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

SYNTHESIS REPORT: CONCLUSIONS AND RECOMMENDATIONS ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES IN 2004

15 April 2005

Reference: CFR-CDF.Conclusions.2004.en

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

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

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EXPLANATORY NOTE

The EU Network of Independent Experts on Fundamental Rights has examined the reports prepared by the individual members of the Network on the situation of fundamental rights in the 25 Member States of the Union and on the activities of the institutions of the Union. These reports offer an evaluation of the situation of fundamental rights in the Member States and in the Union in 2004, on the basis of the EU Charter of Fundamental Rights. The Network has decided to highlight certain issues of particular concern, and to select a limited number of good practices in the implementation of fundamental rights, on the basis of a comparative reading of these reports.

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

In accordance with the communication which the Commission presented to the Council and the European Parliament on Article 7 EU, "Respect for and promotion of the values on which the Union is based"[1], certain recommendations are made to the institutions of the Union, either where the Network of Independent Experts arrives at the conclusion that certain violations of fundamental rights or risks of such violation by Member States are serious enough to justify that the attention of the European Parliament be drawn upon them, as they could imperil the mutual trust on which Union policies are founded, where it is found that certain initiatives taken by the EU in the limits of its attributed powers could truly add value to the protection of fundamental rights in the Union, or where the violations which are found to have occured in 2004 have their source in the law of the European Union, requiring that this situation be remedied.

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

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

[1] COM (2003) 606 final, of 15.10.2003.

construed as meaning that similar problems do not occur in other jurisdictions : indeed, as the conclusions focus, as the reports do, on the year 2004 (1st December 2003 – 1st December 2004), problems which have not developed or emerged during that period but may have been continuing since a longer period of time, will not be highlighted.

The interpretation of the EU Charter of Fundamental Rights is based on the explanations provided by the Presidium of the Convention entrusted with the elaboration of the Charter of Fundamental Rights[2], as updated under the responsibility of the Praesidium of the European Convention[3], which the Network considers as a valuable tool of interpretation intended to clarify the provisions of the Charter.

Moreover, in accordance with Article 52(3) of the EU Charter of Fundamental Rights, the Network reads the provisions of the Charter which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms as having the same meaning and the same scope of those rights, as interpreted by the European Court of Human Rights ; in certain cases, the provisions of the Charter however are recognized a broader scope, as confirmed by the second sentence of Article 52(3) of the Charter. The Network also takes into account the fact that other provisions of the Charter have to be read in accordance with the rights guaranteed in instruments adopted in the field of human rights in the framework of the United Nations, the International Labour Organisation or the Council of Europe. Where this is the case, these provisions of the Charter are interpreted by taking into account those instruments and the interpretation given to them in the international legal order. Finally, certain international instruments adopted in the field of human rights develop guarantees equivalent to those of the Charter, widening the scope of the protection of the rights of the individual or developing the procedural guarantees which are attached to these rights. The signature and ratification by the Member States of the Union of these instruments would ensure a minimal level of protection of the rights guaranteed in the EU Charter of Fundamental Rights throughout the Union[4]. Therefore the Network encourages the States to make such ratifications or, if they have considered such ratification but rejected it, to explain their reasons for doing so and examine whether these explanations are still valid.

These conclusions do not seek to be exhaustive on the domains covered by the individual reports. On the contrary, the conclusions select particular topics, which are felt to be of particular importance in the evaluation of the situation of fundamental rights in the Union in 2004. Moreover, even on the issues they do cover, these conclusions do not repeat all the findings and descriptions found in the individual reports, where they are detailed.

Certain provisions of the Charter have not led to the adoption of conclusions by the Network. This is either because no significant developments occured during the year 2004 which is the period under scrutiny, or because the reports on the Member States and the European Union presented a too fragmentary or unequal information. Indeed, where sufficient comparability could not be ensured, the Network took the view that it would be more advisable to refrain from formulating conclusions, which otherwise – especially if they mention certain countries in particular – would run the risk of being selective. Even where no conclusions have been adopted, however, the reports which served as the background to these conclusions may contain information to which the reader is referred.

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

[2] CHARTE 4473/00, CONVENT 49, 11 October 2000 (revised French version : CHARTE 4473/1/00 CONVENT 49 REV 1 of 19 October 2000).
[3] Déclaration n°12 of the Declarations concerning Provisions of the Constitution, OJ C 310 of 16.12.2004, p. 424.
[4] The information concerning the state of ratifications is based on the situation on 15.1.2005.

CHAPTER I : DIGNITY

Article 1. Human dignity

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

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

Article 2. Right to life

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

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

Euthanasia

The Network is concerned by the development in **France** of euthanasia practices outside any legislative framework. The development of practices of indirect euthanasia, as well as of direct euthanasia according to the first report of the Inspectorate General of Social Affairs of May 2002, underlines the urgency of taking legislative and regulatory measures to clarify the options that are open to patients and the limitations imposed on medical staff. On 28 August 2004, the government announced the formulation of a law to redefine the counselling of terminally ill patients but without decriminalizing euthanasia. Eventually, the draft became a bill (Bill on patients' rights and on the end of life no. 1882 of 26 October 2004). The final adoption after voting by the Senate is planned for early 2005. Even if the bill rules out the idea of decriminalizing euthanasia or allowing assisted suicide and does not alter the Penal Code, it does amend the Public Health Code by explicitly asserting the refusal of "unreasonable therapeutic obstinacy", the duty of the physician to "respect the patient's wishes", and by establishing procedures for "discontinuing treatment".

Rules regarding the engagement of security forces (use of firearms)

Positive aspects

In **Austria,** the Human Rights Advisory Board presented reports respectively on the "Application of coercive police measures – Minimising the risks in problematic situations" (Bericht des MRB zum „*Einsatz polizeilicher Zwangsgewalt – Risikominimierung in Problemsituationen*" of April 2004,

available at http://www.menschenrechtsbeirat.at (23.12.2004)) and on the "Reaction to the alleged human rights violations", following the death of Cheibani Wague who suffocated in consequence of the police trying to fix him on the ground in a face-down position. The Network emphasizes that guidelines on the conduct of law enforcement officers must be brought to the attention of the police officers and impact in the long run on the way police officers act in practice. Law enforcement officers must be made sensitive to situations that run the risk of escalating and be adequately trained to handle difficult situations without violating human rights.

Reasons for concern

The Network notes the request for information made to **Germany** by the Human Rights Committee, in its Concluding Observations of 30 May 2004 on the fifth report submitted by Germany to the Committee under Article 40 of the International Covenant on Civil and Political Rights, about the applicability of the Covenant to persons subject to its jurisdiction in situations where its troops or police forces operate abroad, in particular in the context of peace missions (§ 11). The Network encourages Germany – and indeed all EU Member States – to confirm that the Covenant is applicable in such circumstances, and to ensure that their military forces and law enforcement officers are fully informed thereof.

Having examined the report on the situation of fundamental rights in **Greece,** the Network recalls with concern the observation made by the European Court of Human Rights (Grand Chamber) in its judgment of 20 December 2004 in the case of *Makaratzis v. Greece* (application no. 50385/99), where the Greek authorities have failed in their obligation to put in place an adequate legislative and administrative framework and have not done everything that may reasonably be expected of them to offer their citizens the level of protection required by Article 2 of the European Convention on Human Rights, which guarantees the right to life. It also notes that the Committee against Torture, in its conclusions and recommendations of 26 November 2004 issued after its examination of the fourth periodical report on Greece (CAT/C/CR/33/2, 26 November 2004), points out that the allegations of excessive use of firearms against Albanians or members of other vulnerable groups have persisted, despite the adoption of the new law on the use of firearms by police officers (Act no. 3169/2003), which had pleased the Network of Independent Experts in its preceding conclusions. The Network will keep close track of how Greece will respond to those observations by the adoption of appropriate measures.

Other relevant developments

Positive aspects

The Network welcomes the judgment of the Constitutional Court of the **Czech Republic** adopted on 20 August 2004 (Constitutional Court, case No. III. US 459/03, judgment of 20 August 2004), which stressed the priority of the protection of the life of child over the rights of parents who refused, due to their religious conviction, to give their consent to life-saving medical treatment in the context of a proposed blood transfusion and in the absence of effective alternative treatment. It considers that the finding of the Constitutional Court in favour of a limitation of parental rights, justified as a measure necessary in a democratic society for the protection of health and life of minor child, complies with the requirements of proportionality, especially considering the irreversible consequences which would have followed another decision.

As to the **United Kingdom** the Network welcomes the fact that the grant of permission to challenge the refusal of the Ministry of Defence not to hold an inquiry into the alleged torture and death of Baha Mousa in Iraq was granted in *R (Al-Skeini) v Secretary of State for Defence*, *The Times*, 14 December, on the basis that the Human Rights Act 1998 was applicable into a British military prison, operating in Iraq with the consent of the Iraqi authorities.

Article 3. Right to the integrity of the person

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

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

Forced sterilisations

Reasons for concern

Allegations that Roma women had been sterilized in the **Slovak Republic** without their free and informed consent have been surfacing since a number of years. In 2003 the *Podpredseda vlády Slovenskej republiky pre európske záležitosti, ľudské práva a menšiny* [Deputy Prime Minister for European Affairs, Human Rights and Minorities] informed the public that the investigation of reputedly illegal sterilizations of Roma women had been closed because of insufficient evidence, and neither the court nor the investigators drew conclusions that illegal sterilizations have occurred in Slovakia. However, during the period under scrutiny several non-governmental organizations expressed their doubts as regards the accuracy of investigation, and required the reopening of investigations as regards suspicions of illegal sterilizations of Roma women. For instance, pursuant to the Amnesty International Report 2004 concerning the Slovak Republic, the investigation of illegal sterilizations of Roma women in Eastern Slovakia did not correspond with international standards: the investigators, for example, did not verify whether the Roma women had freely requested sterilization, received appropriate instruction about its risks and irreversibility, understood the information provided, or were given appropriate time to consider the information. Amnesty International also found that Roma women had been interrogated without previous notification and during questioning they had been threatened with a three-year prison sentence for false accusations if their complaint proved untrue.

In its Concluding Observations concerning the **Slovak Republic**, the United Nations Committee on the Elimination of Racial Discrimination expressed its concern about reports of cases of sterilization of Roma women without their full and informed consent (Concluding Observations of the Committee on the Elimination of Racial Discrimination: Slovakia, 10 December 2004 (Sixty-fifth session: 2 – 20 August 2004), CERD/C/65/CO/7, point 12). The Network therefore welcomes the adoption by the Slovak Republic of the new Health Care Act (*Zákon č. 576/2004 Z. z. o zdravotnej starostlivosti, službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov* [Act no. 576/2004 Coll. on health care, services relating to provision of health care and on amendments and modifications of certain other laws]), which states, *inter alia,* that sterilization may be performed only on the condition of a written application and written informed consent, and that sterilization operations may be performed not sooner than 30 days after the informed consent has been given. It notes that the new Health Care Act also amends the *Trestný zákon* [Criminal Code] with the Section 246b defining the crime entitled “unlawful sterilization” and providing effective and proportionate penalties for this crime.

Cases of forced sterilisations of Roma women in the **Czech Republic** were reported by national and international NGOs. The Ministry of Health does not have any evidence in support of allegations. The cases are now being investigated by the NGOs and the Public Protector of Rights (Czech Ombudsman).

The Network will follow with interest the fate of the bill tabled in **Belgium** concerning contraceptive and therapeutic sterilization (Bill of 12 December 2003 on contraceptive and therapeutic sterilization, Senate, ordinary session, 2003-2004, *Doc. Parl*., 3-419/1). This Bill provides in particular that any technique intended solely for contraceptive and/or therapeutic purposes can only be practised if the adult person concerned has expressed in writing his or her free and well-reasoned consent after having been clearly and fully informed about the consequences of his or her decision (Article 3) and that, save for urgent medical reasons, the sterilization operation may only be carried out after a reflection period of at least one month after the medical consultation (Article 5). Contraceptive and therapeutic sterilization can only be carried out on a person under guardianship or under temporary administration if there are medical contraindications for the other contraceptive methods or if it proves impossible to implement them efficaciously; in this case, the operation remains subject to a decision of the Justice of the Peace (Articles 7 et seq.).

Rights of the patients

Good practices

Having read the report on the situation of fundamental rights in **Belgium** in 2004, the Network notes with interest that, since September 2004, a declaration of admission to hospital allows the patient, before being admitted, to learn in a document containing information that is as accurate as possible which costs he will be charged. The Network also welcomes the adoption, in **France,** of the Bioethics Act of 6 August 2004 updating the bioethics laws of 1994 (Act no. 2004-801 of 6 August 2004 on the protection of natural persons with respect to the processing of personal data, published in the JORF of 7 August 2004, p. 14063), which sets out to reinforce and clarify the matter of patient information and consent. In connection with the testing of the genetic characteristics of persons, the new Act amends Article 16-10 of the Civil Code by requiring that the express consent of the person must be "obtained in writing, prior to the test, after the person has been duly informed about the nature and purpose of the test". The amended Article 16-11(3) on identification for the purposes of legal proceedings, adopts the same principle in the context of tests for medical or scientific purposes.

Reasons for concern

The **Czech Republic** should immediately improve the situation of patients at the *Opava Psychiatric Hospital* and the *Ostravice Social Welfare Home*, in accordance with the recommendations of the Committee for the Prevention of Torture (Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf (2004)4, Strasbourg, 12 March 2004, par. 123, 125 and 128). All residents at Ostravice should be provided adequate psychological and occupational therapeutic activities, according to their mental capacity and physical mobility. Guidelines should be adopted stipulating that resort to physical restraint (straps, straight jackets, etc.) should remain exceptional and be either expressly ordered by a doctor or immediately brought to the attention of a doctor, and should be monitored carefully be being adequately reported in specific registers. The Network welcomes the fact that, following upon the recommendations of the CPT, the Ministry of Health and the Ministry of Labour and Social Affairs have adopted measures in order to ensure that the medical and social welfare institutions under their respective control withdraw cage-beds from service and restrict the use of net-beds.

The Network is also concerned that, in **Latvia**, both the legislative framework providing for the rights of patients, their physical and mental integrity, and the enforcement of the existing legislation remain insufficient. It notes that, in **Denmark**, the Act on deprivation of liberty and use for force in

psychiatric treatment has been amended in 2004, in order to meet concerns expressed by the Committee for the Prevention of Torture about the use of forced fixation of patients in psychiatric hospitals. The Network regrets however that the amendment does not contain any safety measures or procedures against fixation over a longer period of time, and that, accordingly, the current legal framework remains insufficiently protective of psychiatric patients against inhuman or degrading treatment. The Network is also concerned by the fact that in **France,** several reports indicate an increase by more than 86% in ten years in the number of patients being confined to a mental hospital without their consent.

Protection of persons in medical research

Positive aspects

The Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research, has been adopted on 25 January 2005. This instrument constitutes a useful tool for the interpretation of Article 3 of the Charter of Fundamental Rights. Moreover, in the view of the Network, restrictions to Article 13 of the Charter of Fundamental Rights should be considered as justified, to the extent that they seek to ensure that the guarantees of this Additional Protocol to the Convention on Human Rights and Biomedicine are fully respected. The Network therefore calls upon all the Member States either to sign and ratify this Additional Protocol, or, if they are not parties to the Convention on Human Rights and Biomedicine, to implement the principles of the Protocol in their national law, by ensuring that research on human beings shall only be undertaken if there is no alternative of comparable effectiveness, if it does not involve risks and burdens to the human being disproportionate to its potential benefits, and only after approval by the competent body after independent examination of its scientific merit, including assessment of the importance of the aim of research, and multidisciplinary review of its ethical acceptability. The Member States should moreover set up ethics committees in order to ensure that every research project be subject to an independent examination of its ethical acceptability. Any person being asked to participate in a research project should be given adequate information in a comprehensible form, including an information about the rights and safeguards prescribed by law for their protection, and specifically of their right to refuse consent or to withdraw consent at any time without being subject to any form of discrimination, in particular regarding the right to medical care.

Under Article 29 of the Additional Protocol, “Sponsors or researchers within the jurisdiction of a Party to this Protocol that plan to undertake or direct a research project in a State not party to this Protocol shall ensure that, without prejudice to the provisions applicable in that State, the research project complies with the principles on which the provisions of this Protocol are based. Where necessary, the Party shall take appropriate measures to that end”. This provision was intended as an answer to the concerns which have been expressed “about the possibility of research that might be widely viewed as ethically unacceptable being carried out in another State where systems for the protection of research participants are less well established” (para. 137 of the Explanatory Report). In the context of the European Community where freedom of establishment is guaranteed, making it *de facto* possible in many cases for researchers or research institutions to establish themselves in the Member State offering the most favourable conditions, it is essential that all the EU Member States, even with respect to which the Convention on Human Rights and Biomedicine is not in force, implement the principles of the Additional Protocol concerning Biomedical Research, to the extent it has a wider scope of application than Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use (OJ L 121 , 01/05/2001, p. 34). The Network also calls upon the European Community to refuse to fund research which would not comply with the requirements of the Additional Protocol, in order not to create an incentive for States not to ratify this Protocol or not to implement its principles. Of course, this should not constitute an obstacle to otherwise ethical biomedical research being performed in States where it is less expensive, insofar at least as monetary

inducements to participate in such research do not violate the requirement that the consent of the individual participant must be free and informed.

The new Health Care Act adopted by the **Slovak Republic** regulates the conditions of performing biomedical research and the conditions of participation in biomedical research, imposing in particular a requirement of written informed consent based on prior instruction for participation in biomedical research. This is a welcome development. The Network also welcomes in the **United Kingdom** the increased regulation of the storage and use of human organs and tissues effected by the Human Tissue Act 2004, with consent being the fundamental principle applicable.

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

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

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

Police misconduct

Reasons for concern

The Committee against Torture expressed certain concerns upon consideration of the third periodic report of the **Czech Republic** (CAT/C/60/Add.1) at its 594th and 597th meetings, held on 4 and 5 May 2004 (CAT/C/SR.594 and 597 ; conclusions and recommendations : CAT/C/CR/32/2). The CAT expressed its regret at the absence of an effective, reliable and independent complaint system to undertake prompt and impartial investigations into all allegations of ill-treatment or torture by the police or other public officials, including allegations of racially motivated violence by non-State actors, in particular any that have resulted in deaths, and to punish the offenders; the persistent occurrence of acts of violence against the Roma and the alleged reluctance on the part of the police to provide adequate protection and to investigate such crimes, despite efforts made by the State party to counter such acts; the lack of explicit legal guarantees of the rights of all persons deprived of liberty to have access to a lawyer, and to notify their next of kin from the very outset of their custody; the amendments to the law on the right to asylum which extended the grounds for rejecting asylum requests and now allows for the detention of persons in the process of being removed to be held in aliens' detention centres for a period of up to 180 days, in a carceral-like environment; the fact that remand prisoners and those serving life sentences cannot work and are left idle without adequate activities.

The Committee against Torture recommended that **Slovenia** establish an "effective, reliable and independent complaints system to undertake prompt and impartial investigations into allegations of ill-treatment or torture by police and other public officials and to punish the offenders" (CAT/C/30/4). It also urged Slovenia to introduce a broad definition of torture as required under the Convention against

Torture, an outstanding obligation since May 2000 when the Committee examined Slovenia's initial report. Although it considers that the introduction of a new Regulation on the Investigation of Complaints Against the Police (Pravilnik o pritožbah zoper policijo, Regulation on the Investigation of Complaints Against the Police, *Official Gazette* 2004, nr. 21), under Article 28 of the amended Police Act, constitutes a step in the good direction, the Network still considers this to be unsatisfactory. The new regulation still allows for the police to continue playing a major role in investigating complaints of police misconduct amounting to human rights violations, as it authorizes the Ministry of the Interior to choose a police officer as rapporteur. The Network also shares the concern of Amnesty International about the limited powers and the independence of the three-member committee which decides whether the complaint is founded on the basis of the report is receives. This committee is chaired by a police officer and it has no authority to issue recommendations on disciplinary sanctions against police personnel or on compensation to victims of police misconduct. Any decision on disciplinary measures against Slovenian police officers is left to the relevant regional police directorate. What is required, as a matter of urgency in the view of the Network, is an independent body having the power to investigate fully allegations of police misconduct, if necessary ex officio, and to issue recommendations on disciplinary measures against members of the police as well as on compensation to the victims.

The Network regrets that in **Sweden**, there still exists no properly independent monitoring body to investigate police misconduct. The Network notes, however, that the Commissioner for Human Rights within the Council of Europe was informed by the State Secretary during his visit to Sweden in April 2004 that a Committee of Inquiry is about to be set up to provide a proposal for a separate and independent authority (CommDH(2004)13, p. 7). The Network shall closely monitor the implementation of this proposal.

Conditions of detention and external supervision of the places of detention

Penal institutions

Positive aspects

The Network welcomes the adoption in **Belgium** of the Framework Law on the administration of penitentiary institutions and the legal status of detainees (M.B., 1.2.2005), which defines the legal status of prisoners, clarifies the disciplinary regime in prison and guarantees the right of prisoners to file a complaint and to seek an effective remedy against disciplinary sanctions that are taken against them before an independent and swiftly accessible body. Belgium thus finally responds to the concern expressed by the European Committee for the Prevention of Torture and the Human Rights Committee, including in the last concluding observations of the latter issued in July 2004 (Human Rights Committee of the United Nations, Eighty-first session, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Concluding Observations, Belgium, CCPR/CQ/81/BEL (point 20)).

The Network welcomes the announcement by the Ministry of Justice that, as a response to the recent criticisms by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) [CPT/Inf(2003)] on the situation of the penitentiary in **Cyprus**, a number of measures will be adopted. These measures are: (a) the creation of a prison officers' college to improve professional standards among prison wardens; (b) introduction of training programmes for prisoners; (c) creation of separate places of confinement for young offenders and for persons sentenced to long terms of imprisonment; (d) establishment of a prisoners psychiatric treatment centre. It also welcomes that as of the 1 January 2005 implementation of the L. 571/92 will take place according to which convicted drug addicts will be placed at special rehabilitation centres and not in prison.

Recalling that the European Court of Human Rights has found **Italy** in violation of Article 8 of the European Convention on Human Rights because of the lack of sufficient legal guarantees

recognized to detainees in respect to whom Article 41bis of the Penitentiary Law (Law n° 354 of 26 July 1975), as modified in its content by Law n° 356 of 7 August 1992, is applied (see Eur. Ct. HR (1st sect.), *Ospino Vargas v. Italy* (Appl. N° 40750/98) judgment of 14 October 2004 ; and Eur. Ct. HR (4th sect.), *Musumeci v. Italy* (Appl. N° 33695/96) judgment of 11 January 2005), Article 41b of the Act on the administration of penitentiary establishments (Act no. 354 of 26 July 1975), amended in its content by Act no. 356 of 7 August 1992 – a provision which it will be recalled gives the Minister of Justice the power to fully or partially suspend the application of the ordinary prison regime, as provided for by Act no. 354 of 1975, by an order that is well-reasoned and verifiable by the judiciary authority, for reasons of public order and security, where the ordinary prison regime would be contrary to the latter requirements –, the Network welcomes the adoption of Law n. 95 of 8 April 2004 (Legge 8 aprile 2004, n. 95, *Nuove disposizioni in materia di visto di controllo sulla corrispondenza dei detenuti*), that reinforces the guarantees benefiting detainees considered to fall into this category by the insertion of Article 18ter in the Penitentiary Law relating to the control of the correspondence of the detainees. The Network notes at the same time that there remain outstanding issues concerning certain categories of detainees in Italy, especially with regard to the right of access to a court against the security measures which can be imposed on them, as illustrated recently by the *Musumeci v. Italy* (Appl. N° 33695/96) judgment delivered on 11 January 2005 by the European Court of Human Rights.

The Network welcomes the fact that, in **Hungary**, as noted by the European Commission on Racism and Intolerance, public prosecutors regularly visit prisons to check the living conditions of the detainees, and that during such visits, detainees have the opportunity to complain to the public prosecutor about any abuse committed by a member of the staff (Third report on Hungary of the European Commission against Racism and Intolerance. Strasbourg, 8 June 2004. Article 87).

Good practices

Compliance with the requirements of international and European human rights requires that the applicable standards are made explicit and that both the authorities and the detainees are made aware of them. In that respect, the Network shall follow with interest the follow-up which shall be given in **Austria** to the preparation by the Human Rights Advisory Board, in the context of the elaboration of a new Regulation on Police Detention (*Anhalteordnung*), of a catalogue of guidelines providing minimum standards for the detention of persons that closely rely on the standards recommended by the European Committee for the Prevention of Torture; it shall be permanently kept up to date. The catalogue should benefit the work of the commissions visiting places of police detention, but is, of course, also addressed to the law enforcement authorities so that they can remedy deficiencies where they arise. The set of guidelines are careful to distinguish, as they should, the different legal basis and duration of the detention, which may lead to appreciate differently the conditions of detention which should be guaranteed to those who are deprived of their liberty.

In **France,** there are some encouraging developments to be noted following the public debate that has been going on for some years now about the need to improve the conditions of prisoners. Instructions issued by the Minister of the Interior on 11 March 2003 on guaranteeing the dignity of persons held in police custody recommend following the standards adopted in this respect by the Committee for the Prevention of Torture. This is an interesting initiative, that could profitably inspire the transposition of the Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (COM(2004) 328 final) once this has been adopted. The Network also welcomes the fact that on 20 September 2004 the Minister of Justice and the National Ombudsman expressed in the press their wish to develop a form of mediation between prisoners and the prison administration, in order that "outside persons have a right of inspection". The aim is also to "avoid as much as possible a jurisdictionalization" of conflicts that may arise daily in prison. An experiment of which the features have yet to be specified is to be set up in a dozen establishments that should result in "permanent mediation" in the prisons.

Reasons for concern

The Network is concerned about the conditions of detention in the central prison in Nicosia, **Cyprus**, which according to converging reports, including one following an official visit of Members of the Parliamentary Committee of Human Rights on 12 November 2003, is characterized by overcrowding, by the holding together of convicted prisoners and detainees on remand, as well as of aliens facing deportation and juvenile offenders. In one instance, it has been reported that a 15-year-old British national was arrested in connection of the alleged rape of another 15 year old, and because the bail was set at £10,000, a sum which the family could not afford to pay, the 15 year old suspect was detained in the central prison pending his trial scheduled three months later, where he was in daily contact with convicted criminals in the absence of a separate wing for minors. According to the Prison Regulations, a prisoner can be held incommunicado (in seclusion) when he proceeds to a hunger strike. The Cypriot authorities should be encouraged to act speedily in order to put an end to this situation.

The Network is also concerned that no information was made available by the authorities of the **Czech Republic** about the modalities of the so-called "special regime" for detainees considered exceptionally dangerous detainees – a regime which, according to certain reports, was abolished in 2004 –, despite allegations that such a regime would be applied only to foreigners. The Network considers that this regime, consisting in the regular transfer of the persons concerned making it impossible for detainees under such a regime to work or to benefit from individual programs of treatment raises serious concerns. It would welcome a clarification from the Czech authorities about the content of this regime, and a confirmation that it is not anymore in application.

The Network notes with concern the comments made by Mr Alvaro Gil-Robles, the Council of Europe Commissioner for Human Rights, on conditions in prisons and detention facilities in his report on **Estonia**, published on 12 February 2004. It notes in particular that in the police detention centre in Rakvere, which at the time of the visit of the Commissioner for Human Rights hosted 19 detainees, there was no space for activities indoors or outdoors, so the detainees had to stay in their cells 24 hours a day, and could only leave their cells once a week to take a shower. One cell of approximately 20 m² accommodated eight men, who had to sleep next to each other on thin mattresses on a wooden platform on the floor. Most of the detainees stood in this centre for a period of one or two weeks, but some stood significantly longer, up to a few months waiting for their trial. The Network shares the conclusion of the Commission for Human Rights that it is imperative to afford resources for a total refurbishing of this establishment and for the provision of proper medical care, and that a regime of activities should be offered to all detainees, including at least one hour of outdoor activities daily. The conditions at the detention centre in Rakvere, it should be added, are not exceptional in Estonia. These conditions have been highlighted in 2003 by the Concluding Observations of the Human Rights Committee, and again denounced in 2004 by Amnesty International. Urgent action is required from the Estonian authorities. The current reform process of the prison system, with the aim of having 1500-2000 new prison places by the year 2006 and closing down some of the oldest prisons in the country, are first steps towards overall improvement, but much more needs to be done. Moreover, expanding the capacity of the prisons is not enough, and may even have counterproductive effects in a country which has a very high level of prisoners per capita (340 prisoners per 100.000 inhabitants). The Estonian authorities are strongly encouraged to favour the development and use of alternative penalties. This should be seen as complementary to prison reform and a condition of its success.

The Human Rights Committee expressed concerns in its Concluding Observations on **Finland** of November 2004 (CCPR/CO/82/FIN/Rev.1) over the situation of persons being held in pre-trial detention at police stations and noted the lack of clarity as regards a detainee's right to a lawyer during custody and the involvement and role of a medical doctor during time of detention. The Committee underlined that practical difficulties such as the shortage of personnel and space indicated by the Finnish delegation are not justified reasons for any kind of infringement of article 10 para. 2 (a) of the International Covenant on Civil and Political Rights, which guarantees that remand prisoners shall be separated from convicts. The Network urges Finland to take administrative and budgetary steps to

remedy these problems highlighted in the recent Concluding Observations of the Human Rights Committee.

In its report of 31 March 2004 (CPT/Inf (2004) 6) on **France**, following a visit carried out from 11 to 17 June 2003 at three French penitentiary establishments, the European Committee for the Prevention of Torture notes the existence of inhuman and degrading treatment on account of overpopulation, deplorable material conditions of detention, hygiene conditions that pose a health risk and the paucity of activity programmes. The Committee takes note of the wish of the French government to increase the accommodation capacity of prisons but underlines that an increase in the number of places should be aimed at improving the conditions of detention.

The Network notes that, as the Committee against Torture concludes, prison overpopulation remains a serious problem in **Greece,** which makes it difficult to improve conditions for detainees (Conclusions and recommendations of the Committee against Torture, CAT/C/CR/33/2, adopted on 26 November 2004). As regards the external supervision of penitentiary establishments, the Committee expresses its concern over the fact that access for independent bodies empowered to visit places of detention is not easily assured. The Network notes that the efforts of the Greek authorities to address the problem of prison overpopulation, more particularly by building new prisons, should be coupled with more urgent measures, such as the transfer of detainees to prison farms (currently under investigation), cooperation with neighbouring countries, decriminalization of certain offences, and more frequent use of alternative sentences to imprisonment. As far as external supervision is concerned, the Network encourages the authorities to intensify their dialogue with national human rights protection agencies and relevant non-governmental organizations in order to allow them to help further open up the penitentiary establishments to external monitoring systems.

Referring to the report of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) following its visit to **Hungary** from 30 May to 4 June 2003, which was published in June 2004, the Network recalls that the situation of remand prisoners held in police stations is still unsatisfactory. Remand prisoners, it is recalled, should be provided with some form of activities as well as at least one hour of outdoor exercise every day (Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). CPT/Inf (2004) 18, point 12-19). The Hungarian authorities moreover are encouraged to pursue their efforts to address the problem of overcrowding in prisons, which although it went down from 157 % to 145 %, still remains at an unacceptable high level, and calls for more systematic use of alternative penalties as well as for a more limited resort to pre-trial detention. It appears moreover that the treatment of prisoners with HIV still remains unsatisfactory. Although, since January 2003, HIV testing in Hungarian prisons is performed on a voluntary basis (in addition to anonymous screening along community lines), it would appear that the segregation policy already criticised in the previous report of the CPT following its 1999 visit (cf. paragraph 121 of CPT/Inf (2001) 2) has been continuing since (CPT/Inf (2004) 18, point 47). The Network of independent experts cannot but find that Article 18 of the 19/1995. (XII. 13.) Decree of the Minister of Interior on the regulation of police detention establishments (19/1995. (XII. 13.) BM rendelet a rendőrségi fogdák rendjéről), Article 39 of 6/1996. (VII. 12.) Decree of the Minister of Justice on the execution of imprisonment and pre-trial detention (6/1996. (VII. 12.) IM rendelet a szabadságvesztés és az előzetes letartóztatás végrehajtásának szabályairól), and Article 38 of 7/2000. (III. 29.) Joint Decree of the Minister of Interior and the Minister of Justice on the detailed rules for detention and detention substituted for a fine (7/2000. (III. 29.) IM-BM együttes rendelet az elzárás, illetőleg a pénzbírságot helyettesítő elzárás végrehajtásának részletes szabályairól) prescribing the segregation of HIV positive convicts still do not comply with the aforesaid recommendation. The segregation of prisoners with HIV from other detainees cannot be justified, as less restrictive measures are available to avoid any risk of transmission. The Hungarian authorities are urged to remedy this situation in line with the recommendations of the CPT.

In the 2004 Concluding Observations of the Human Rights Committee on **Lithuania** (CCPR/CO/80/LTU), the concern is expressed that there exist no independent monitoring mechanism

for the investigation of complaints against criminal conduct by members of the police, and that this could contribute to the impunity of police officers involved in human rights violations. The Committee moreover expressed concern on the fact that according to Lithuanian legislation, adults may be detained together with minors in "exceptional cases". While noting that the separation of minors and adults was the rule, the Committee observed that the law did not contain any criteria determining these "exceptional cases".

In its Concluding Observations of 3 April 2003 on **Luxemburg**, the Human Rights Committee of the United Nations expressed its concern over the maximum length of time detainees may be held in solitary confinement and the lack of information on the conditions in which such treatment is applied. Such a measure may be ordered against certain persons either because they are dangerous or as a disciplinary sanction for the most serious offences by the Attorney General (in accordance with Articles 3 and 197 of the Grand-Ducal Regulation of 24 March 1989 on the administration and internal regime of penitentiary establishments). The term of solitary confinement as a disciplinary sanction is limited to six months, but may be extended to twelve months in case of reoffence. The application of the heaviest disciplinary measure remains restricted to the most serious disciplinary offences. Furthermore, since Luxembourg has only one prison, solitary confinement is a necessary tool, an indispensable disciplinary sanction to be able to maintain order and security. Finally, the administrative courts ruled in favour of the compatibility of this regime with Article 3 of the European Convention on Human Rights. Nevertheless, so far there is no law that enumerates or defines the offences that are liable to be punished by solitary confinement, which remains a problem, even bearing in mind that the most recent figures on solitary confinement show a significant downward trend.

The Network shares the concerns expressed by the UN Human Rights Committee (HRC) that many prisoners in **Poland** occupy cells, thus not fulfilling the criteria established in the UN Standard Minimum Rules on the Treatment of Prisoners, and that judges do not use the alternative types of punishment which are available under the law, despite the continued overcrowding in Polish prisons (Concluding Observations of HRC: Poland, of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1, para. 12).

The Network remains concerned about the lack of progress in relation to prisons legislation in **Ireland**, already noted in previous reports. It regrets that the Prisons Bill has yet to be enacted into law, and that both the Office of Prisons Inspector and the Parole Board continue to exist on a non-statutory basis. It also is concerned that the move of the Mountjoy Prison to a new site removed from the city centre will impact negatively on the exercise of their visitation rights by the prisoners' families, and asks that mitigation measures be adopted.

In **Italy**, apart from the chronic overcrowding of penal institutions (56.500 convicted people in a prison system designed to hold 42.100), the Network finds that there is a lack of staff members and a serious lack of health assistance. The Network is concerned that, according to a research led by the National Health Institute, only in less of the half of penal institutions there is a 24 hours health service, that the health services which exist are poorly equipped and the information of detainees on health matters insufficient.

The Network regrets that at the Penitentiary Centre of **Luxembourg** foreign nationals in administrative detention and minors are held alongside sentenced prisoners and persons on remand. Specific structures and supervision ought to become available for these different categories of detainees, and sufficient personnel should be recruited for this purpose, including by recruiting prison officers among persons who do not have Luxembourg nationality, as is recommended by the Human Rights Commissioner of the Council of Europe on 8 July 2004 following his visit on 3 and 4 February 2004. Although the Network welcomes the undertaking given by the government to open a new penitentiary establishment in order to address the problem of overpopulation at the Penitentiary Centre of Luxembourg, it insists – for Luxembourg as well as for other States – that this be coupled with an increased use of alternative sentences to imprisonment. The introduction of electronic tagging for offenders on parole may also be a solution, provided however that this does not lead to an extension of

the penal net by giving prison sentences to persons who at present would be entitled to a suspended sentence or a stay of execution. It requests that if such a system is introduced, it should be strictly evaluated.

The Network again wishes to express its concern about the newly introduced practice in the **Netherlands** to place several detainees in one cell. In making multi-person cells the rule, and single cells the exception, the Dutch Government departs from Article 14 of the European Prison Rules which provides that detainees "shall normally be lodged during the night in individual cells except where it is considered that there are advantages in sharing accommodation with other prisoners". Although the Network acknowledges that this situation is not uncommon in other Member States, it regrets that, in the Netherlands, the situation is degrading rather than being improved. At the very least, the prison authorities should carefully select the detainees who are to share accommodation and keep a close eye on the situation in the cells. In this connection it is worrying to note that minors are also made to share cells ; that, due to a structural lack of capacity in custodial clinics, TBS patients (subject to a non-punitive measure comprising confinement in a custodial clinic) and 'Article 37 patients' (psychiatric patients who have committed criminal offences but who are in a state of diminished responsibility) have to stay in regular prisons and remand centres because of a lack of capacity elsewhere, a situation which the European Court of Human Rights has found to be in violation of Article 5 ECHR ; and that, as the Netherlands Ombudsman has noted, the Ministry of Justice apparently does not, or did not, keep track of all 'Article 37 patients'.

The Network wishes to express its deep regret that cage beds still are in use within healthcare facilities in the **Slovak Republic**. According to the information provided by the Ministry of Health in January 2004, there are about 250 cage beds from about 4700 existing beds within all psychiatric facilities. The authorities of the Slovak Republic are urged to immediately put an end to this situation, which amounts to the infliction of a form of degrading treatment, and to ensure that psychiatric patients benefit, instead, from the presence of a sufficiently numerous and qualified personnel. The Network is concerned by the considerable problem in the **United Kingdom** of deaths in custody highlighted by both Her Majesty's Prison Inspectorate (Annual Report 2003-2004) and the parliamentary Joint Committee on Human Rights (*Deaths in Custody*, HL 15-I/HC 137-I). It is also concerned by the inability to invoke the Human Rights Act 1998 to secure an investigation consistent with the requirements of Article 2 ECHR for deaths occurring before the Act's entry into force, as well as by the apparent shortcomings of arrangements to investigate deaths occurring in hospitals in Northern Ireland.

The Network is also concerned that in **Portugal**, as the statistics of the General Directorate for Penitentiary Services (*Direcção-Geral dos Serviços Prisionais*) revealed on the 15th November 2003, the rate of occupancy of the Portuguese prisons is well above their capacity (121%). As shown by the report issued by the Commission for the research and debate on the Reform of the Penitentiary System (*Comissão de Estudo e Debate da Reforma do Sistema Prisional)* the penal institutions in Portugal are overcrowded; several buildings are in serious state of degradation and without minimum or suitable hygienic and sanitary conditions; some other institutions, either because of their location, structure or dimension, are not adequate for penitentiary treatment. According to the Commission, the reasons for the overcrowding are the following: the excessively long duration of the permanence of the detainees in penitentiary institutions; the insufficiency and inefficacy of public investment, over the last 20 years. Therefore, government's attention should focus on this.

Centres for the detention of juvenile offenders

Reasons for concern

The country reports prepared within the Network of independent experts on fundamental rights show that, in many Member States, juvenile offenders are detained with adult convicted criminals. This is the case, for instance, in **Luxemburg**, in the **Netherlands** and in **Cyprus**, which does not even have a special ward for juvenile offenders in operation. In **Denmark**, young people between 15 and 17 years

may be placed in detention together with adult prisoners on remand. In **Ireland**, the closure of the juvenile detention centre (for over 16 year olds) at Spike Island (Fort Mitchel Place of Detention) risks making it more difficult, in the future, to accommodate the specific needs of juvenile offenders by placing them in specialized education centers. These situations are unacceptable and deserved to be remedied, as a matter of priority, by the national authorities concerned. Article 10(3) of the International Covenant on Civil and Political Rights states that "Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status". The lack of sufficient budgetary resources cannot constitute an excuse for not complying with this requirement, especially where the lack of space in specialized centres for juvenile offenders is not due to an exceptional, temporary, and unexpected rise in the number of juvenile offenders concerned, but is a structural phenomenon developing over a number of years.

Centres for the detention of foreigners

Reasons for concern

Article 5(1)(f) of the European Convention on Human Rights provides for the possibility of depriving a person of his/her liberty in order to prevent his/her effectuating an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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

With regard to the detention of foreigners with a view to effectuating their removal from the territory, the Network recalls that, according to the Committee for the Prevention of Torture, "in those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel" (7th General Report (CPT/Inf(97)10, para. 29). Persons detained pending their removal should in principle not be placed with ordinary prisoners, either convicted or on remand, as recalled by the Parliamentary Assembly of the Council of Europe (see Parliamentary Assembly Recommendation 1547(2002)1 on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, para. 13, v, b and c) and by the Committee of Ministers of the Council of Europe (Recommendation Rec (2003) 5, para. 10). National authorities should moreover ensure that the persons detained in these facilities have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations. Finally, children should only be detained

in exceptional circumstances in centres set up for adults facing deportation, where this is required by the need to preserve the unity of the family. Article 37(b) of the Convention on the Rights of the Child provides that "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time" (Art. 37(b)). According to para. 38 of the United Nations Rules for the protection of juveniles deprived of their liberty, adopted by General Assembly resolution 45/113 of 14 December 1990, "Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education".

In certain States, the conditions of detention of foreigners upon their arrival on the territory or pending their removal are satisfactory. After his April 2004 visit to **Denmark** for instance, the Council of Europe Commissioner for Human Rights noted that the conditions observed in Sandholm Refugee Centre were commendable (para. 25). The Network notes, however, that in a number of Member States, the guarantees listed above still are lacking. In **Austria**, the detention of foreigners pending their deportation to the country of origin or to a safe third state is still effected in regular police detention centres together with persons suspected of having committed a criminal offence. The overcrowded and inappropriate police detention centres moreover contribute to a tense climate promoting aggressive behaviour towards others and, in certain cases, desperate acts of auto-aggression. The Network calls upon the Austrian authorities to consider the Human Rights Advisory Board (HRAB)'s proposal to made in October 2004 to further promote the concept of "open stations" and areas of "enforcement with open cells" for foreigners awaiting deportation (*Empfehlung des MRB zur Schaffung einer Sezialeinrichtung für den Vollzug der Schubhaft und Anhalteformen in den Polizeianhaltezentren*). The detention of minors pending deportation is a source of particular concern in Austria, not only because it is resorted to too often, but also because minors are not infrequently put in solitary confinement. The Network insists that under no circumstances should the police lock minors in solitary cells only to comply with the requirement of separate detention from adults laid down in section 4(3) of the Police Detention Regulations (*Anhalteordnung*) and thereby expose them to disadvantages for reasons of lacking capacities and structural deficiencies of the buildings. After its visit to the **Czech Republic**, the CPT expressed serious concerns about the situation in the Bálková Detention Centre for Foreign Nationals, in particular with respect to the imposition of a « strict » regime of detention to many foreign nationals held in that institution, in practice systematically applied to single men, although it implies that detainees are locked up in their cells 23 hours a day and have no programme of activities. In **Finland**, the CPT delegation found evidence in a number of cases all related to Tampere police station district of stays up till 44 days in police detention pursuant to the Aliens Act. The delegation received information from various sources that foreign nationals had been put under pressure by the police during detention to withdraw their asylum applications, in particular, at the Tampere District Police station. In **Greece,** while acknowledging that the authorities at both the national and local levels have made considerable efforts to improve living conditions at reception centres for registered asylum-seekers, the United Nations High Commissioner for Refugees regretted that the capacity of those centres is limited. There are in fact eight reception centres with room to accommodate 1,200 people, whereas the number of asylum-seekers according to the UNHCR was 8,000 in 2003 and 4,000 in the period from January to October 2004. The UNHCR advises the government and the NGOs to increase the accommodation capacity and to improve living conditions at those centres, in particular for vulnerable persons such as victims of torture, unaccompanied minors, pregnant women and handicapped persons. In its conclusions of June 2004 (CRC/C/15/Add.240 and CRC/C/65/Add.26), the International Committee on the Rights of the Child voiced its concern over the situation of foreign unaccompanied minors in **France.** The Committee is particularly concerned that unaccompanied children arriving at the airport may be returned to their country of origin without judicial intervention and without an evaluation of their family situation. Furthermore, it recommends

that France pursue its efforts to guarantee access to basic services, in particular education, health and legal assistance, and introduce methods of age determination that have proved more accurate than bone examination. In **Ireland**, the Cloverhill Remand Centre continues to be used for the detention of non-Irish nationals pending deportation sometimes for periods amounting to weeks prior to deportation (Prisons Service Annual Report). Foreigners awaiting removal are placed with other categories of detainees in Cloverhill, which moreover is overcrowded. **Luxembourg** has no special facility to accommodate foreigners awaiting deportation. Moreover, family members are only allowed to visit deportees four days after the start of their detention at the special section of the Penitentiary Centre of Luxembourg, while non-governmental organizations have to wait ten days before they can meet persons who are being detained. In **Malta**, the efforts made by the authorities to improve the conditions in which foreigners are detained pending removal remain insufficient to remedy the serious problems which this form of detention raises in this country, as highlighted in the report published by the Council of Europe Commissioner for Human Rights following his visit to Malta in October 2003, where he expresses his concern about the automatic detention of all people entering Malta irregularly, regardless of whether or not they have applied for refugee status, highly inadequate living conditions in some detention centres for aliens, the excessive length of refugee determination proceedings and inadequate access to education for detained migrant children. In his report following his visit to **Sweden** in April 2004, the Commissioner for Human Rights of the Council of Europe noted that one person was detained on remand in the restriction section of the Kronoberg's remand and detention centre solely for entering Sweden with false identity documents (CommDH(2004)13, p. 6) and that, generally, the use of detention of asylum-seekers has increased during recent years. Indeed, the UNHCR has on several occasions expressed its concern about the detention of asylum seekers and the lack of maximum time of detention for asylum seekers. Moreover, asylum seekers in Sweden have occasionally been detained in the same facilities, i.e. regular jails, together with criminal offenders. In the **United Kingdom** her Majesty's Prison Inspectorate has reported that most immigration removal centres recorded a high-level of detainee insecurity, in spite of relatively positive relationships between staff and detainees. It noted in particular that the detention of children continues, with numbers rising, that an inability to work left detainees with not enough to do, that cleaning and catering services were often below standard and that there was no independent welfare advice (*Annual Report 2003-2004*). The Committee against Torture has moreover expressed concern about "allegations and complaints against immigration staff, including excessive use of force in the removal of denied asylum seekers" (CAT/C/CR/33/3, 25 November 2004, para 4(i)). An analysis of medical data by the Medical Foundation for the Care of Victims of Torture has disclosed patterns of apparent abuse in the course of attempts to deport immigration detainees from the United Kingdom, involving in particular misuse of restraint or force methods. Although the sample was small, the repetitive data pointed to systemic problems in the company or companies carrying out the removals. The persons affected also reported the use of verbal abuse of a racial nature (*Harm on Removal: Excessive Force against Failed Asylum Seekers*). The Home Office subsequently announced that closed circuit television cameras would be installed in the vans carrying failed asylum-seekers to and from airports.

Like persons detained for other reasons enumerated in Article 5(1) of the European Convention on Human Rights, foreigners being detained in order to prevent them from illegally entering the territory or with a view to their deportation or extradition are entitled to appropriate conditions of detention that are in keeping with the objective justifying their detention. In its concluding observations addressed to **Belgium** in July 2004, the Human Rights Committee, while welcoming the establishment of an Individual Complaints Board to look into complaints from foreigners about the conditions under which they are held and the rules to which they are subject, is concerned about the fact that complaints have to be lodged within 5 days and do not have the effect of suspending expulsion measures (Articles 2 and 10 of the International Covenant on Civil and Political Rights). The Committee considers that the Belgian State should extend the deadline for lodging complaints and give complaints a suspensive effect on expulsion measures (Human Rights Committee of the United Nations, 81st session, Consideration of the reports submitted by the States parties under Article 40 of the Covenant, Concluding Observations, Belgium, CCPR/CQ/81/BEL (point 21)). The Committee is also disturbed that the rules governing the operation of INAD centres (for passengers refused entry to the country) and the rights of the foreigners held there do not appear to be clearly established in law. In the

Committee's view, Belgium should clarify the situation and ensure that the foreigners held in such centres are informed of their rights, including their rights to appeal and to lodge complaints (idem, point 22).

Domestic violence (especially as exercised against women)

In the report he released on 12 February 2004 after his visit to **Cyprus** on 25-29 June 2003, the Council of Europe Commissioner for Human Rights noted in relation to domestic violence that the authorities have sought to tackle the problem of violence within families by adopting the 1994 *Act on the Prevention of Violence in the Family and the Protection of Victims,* which was revised in July 2002. The Commissioner for Human Rights commended the authorities for implementing this legislation, which contains provisions « authorising the recording of the victim's declarations by electronic audiovisual means and the production thereof in court, together with witness statements taken electronically so as to avoid confrontation with the accused; guaranteeing celerity of procedure and protection of witnesses from any harassment or intimidation; admissibility of the testimony of a medical practitioner who, during a consultation with a child patient, has heard disclosures of ill-treatment committed by any person, and the obligation for the spouse of the accused to testify (waiving the usual rules of criminal procedure); [and] the creation and operation of shelters of victims », and the full implementation of which is monitored by an advisory committee on domestic violence reporting annually to the Council of Ministers (paragraph 39).

It is clear that measures of a criminal nature, while necessary, must be complemented by more positive measures in order to effectively combat domestic violence. Thus, in his report following his visit to **Denmark** on 13-16 April 2004, the Council of Europe Commissioner for Human Rights recommended the adoption of « a more flexible approach to the granting of residence permit to foreign women ceasing to co-habit with violent partners » (Recommendations No. 10, Report CommDH(2004)12). Commenting on the same problem in examining that country's periodical report submitted under the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights recommended that effective measures are taken to ensure that victims of domestic violence receive appropriate rehabilitational care and support and that appropriate mechanisms are enforced so that victims are not prevented from seeking assistance through fear of deportation or expulsion from Denmark (Concluding Observations of the Committee on Economic, Social and Cultural Rights on Denmark. E/C.12/1/Add.102, 26 November 2004).

The Network wishes to renew its concern, in that regard, that Article 16(1), b), of Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3/10/2003, p. 12), which provides that Member States may refuse to renew the residence permit of the spouse or of other family members who have been admitted for the purpose of family reunification where it is found that the sponsor and his/her family member(s) no longer live in a real marital or family relationship (Article 16 § 1, b)), may put the spouse (or the person with whom the sponsor is living in a *de facto* long-term relationship which the Member State considers to grant a right to family reunification), most often the woman, in a particularly vulnerable position, since he finds himself at the mercy of a cessation of marital life, the maintenance of which constitutes a condition for his continued residence. The Directive ought to have provided that the right to family reunification does not cease if the break-up of the relationship is the fault of the sponsor only. Member States which claim to rely on this exception should avoid interpreting it in a way that would amount to creating a right to repudiation.

More generally, in the absence of measures for the protection of victims of domestic violence, the phenomenon will continue to be underreported, as women victims of this form of violence will remain hesitant to file a complaint against the abuse by their partner or husband. Where the criminal law does not provide for effective sanctions (as in **Estonia**, as confirmed recently by the report of the Council of Europe Commissioner for Human Rights (CommDH(2004)5, p. 18) ; in **Greece**, as noted by both the Committee against Torture and the Committee on Economic, Social and Cultural Rights in their Concluding Observations (Concluding Observations of the Committee against Torture, 10 December 2004, CAT/C/CR/33/2, para. 5 (k) ; Concluding Observations of the Committee on Economic, Social

and Cultural Rights, 14 May 2004, E/C.12/1/Add.97, para. 37) ; in **Latvia**, as confirmed by the Concluding Comments of the CEDAW Committee (CEDAW/C/2004/II/CRP.3/Add.5/Rev.1, 26 July 2004); in **Lithuania,** as confirmed by both the 2004 Concluding Observations of the Human Rights Committee (CCPR/CO/80/LTU) and of the Committee on Economic, Social and Cultural Rights (E/C.12/1/Add.96); or as in **Malta**, according to the findings presented by the National Council of Women of Malta during the period under scrutiny), such sanctions should be introduced to effectively combat domestic violence, and to reinforce the understanding that domestic violence is a crime deserving punishment, especially within the police and the judiciary, but also in the eyes of the potential perpetrators and their victims. In accordance with the case-law of the European Court of Human Rights (judgment *S.W. v. the* ***United Kingdom*** (Appl. N° 20166/92) of 22 November 1995, § 44), such a legislation should include a provision specifically aimed at marital rape, where this it not already included in the interpretation given to the incrimination of rape in general criminal law. The approach focused on criminal law however does not exclude, but instead requires to be complemented by, the adoption of provisions on the protection of victims and the prevention on future violations. Such measures of protection may include sheltered homes for women victims of domestic violence, which should be in sufficient numbers throughout the country in order to ensure that all women may effectively have access to such structures (Concluding Observations of the HRC on **Poland**, 5 November 2004, No. CCPR/CO/82/POL/Rev. 1, para. 11).

The same considerations apply to situations where child abuse occurs within families. The Network refers in that regard to the Concluding Observations of the Committee on the Rights of the Child upon its examination of report submitted for consideration at its 35th session by **Slovenia** (CRC/C/15/Add.230). While welcoming the information that the Police Act (Zakon o policiji, Police Act, *Official Gazette* 2004, nr. 102) has been amended in order to allow the police to remove an alleged perpetrator of child abuse or other forms of family violence from home for up to 10 days (a period which the courts may extend for up to 30 days) and noting that an Act on Prevention of Violence in the Family is under preparation, the Committee was concerned that the existing preventive and protective measures taken to address the problem are not sufficient. The Committee recommended not only expediting the drafting and approval of the Act on Prevention of Violence in the Family and related changes in the family law, legislative measures which should provide for effective procedures and mechanisms to receive, monitor and investigate complaints, including intervention where necessary, but also, *inter alia*, providing facilities for the care, recovery and reintegration of victims. It also urged Slovenia to consider introducing an explicit prohibition of corporal punishment of children in the family, both in the draft amendments to the Marriage and Family Relations Act or the special act on preventing violence in the family.

Positive aspects

The Network of independent experts commends **Cyprus** for the 2004 amendment to the *Domestic Violence Law*, which marks a significant development to the protection of victims of domestic violence. It also welcomes the announcement that by the end of 2004 a centre will be established in Nicosia, which will deal with cases of domestic violence and be used as a shelter for victims of domestic violence. Having examined the report on the **Czech Republic**, it welcomes the governmental initiatives concerning the fight against domestic violence have been started since the launching of the governmental plan of action to combat violence against women in March 2002. The Network also notes the contribution of the activities of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth to combating violence against women in **Germany**. It welcomes the fact that, in **Ireland**, the last two social partnership agreements, *Partnership for Prosperity & Fairness* and *Sustaining Progress*, contain specific objectives in relation to tackling violence against women in intimate relationships and rape and sexual assault, and that the funding provided by the Department of Health & Children for services to female victims of violence has significantly been increased over the last five years. It also notes with interest the campaign by the Irish Section of Amnesty International on violence against women in partnership with numerous women's rights groups, which the Network hopes will lead to similar initiatives being launched in other jurisdictions. It also welcomes the 2005-2006 Action plan financed by the Government of **Lithuania,** which major strategic guidelines are the

prevention of violence against women, the assistance to the victims of violence, the measures oriented to violent men, the assistance to the victims of family violence and the means seeking to educate and inform the society and amend the patriarchal stereotypes. It also welcomes the adoption in the **United Kingdom** of the Children Act 2004, which has removed the defence of reasonable chastisement in any proceedings for an offence of assault occasioning actual bodily harm, unlawfully inflicting grievous bodily harm, causing grievous bodily harm with intent, or cruelty to a child and which also prevents the defence being relied upon in any civil proceedings where the harm caused amounted to actual bodily harm but the defence remains available in proceedings before the Magistrates' Court for common assault on a child.

Having examined the report on fundamental rights in **France**, the Network welcomes the adoption of a comprehensive plan to combat violence against women and the fact that domestic violence is taken into consideration in the law reforming divorce (Act no. 2004-439 on divorce of 26 May 2004, published in the JORF of 27 May 2004, p. 9319). It welcomes in particular Article 22 of this Act amending Article 220-1(3) of the Civil Code, which allows the courts, where domestic violence threatens the spouse and/or children, before any petition for divorce, to organize separate residences, to allow the injured spouse the use of the marital home and to rule on the contribution towards the marital expenses as well as on parental authority. The injured spouse has four months in which to sue for a divorce, failing which the ordered measures will be null and void. The Network also welcomes the adoption of the Act of 2 January 2004 on the care and protection of children, which establishes a national Observatory for Children at Risk and which allows medical personnel to report cases of ill-treatment without exposing themselves to disciplinary sanctions (Act no. 2004-1 of 2 January 2004 on the care and protection of children, published in the Official Journal of 3 January 2004, p. 184). Similarly the Network welcomes the adoption by **Luxembourg**, of the Act of 8 September 2003 on domestic violence, which allows the violent partner to be expelled from the home for a period of up to 3 months, and thus saves the victims of violence from having to leave their home in order to escape from a violent partner. It is also pleased to observe that the first evaluations made of the Act just a few months after its entry into force on 1 November 2003, more particularly in the report of February 2004 of the Commission for Equality of Opportunity between Men and Women and the Promotion of Women, already show its effectiveness and usefulness. It points out that this effectiveness may be attributed in particular to the support which the victim receives from the "Agency for support to victims of domestic violence" which was set up under the new law, as well as to the fact that the decision to expel the violent partner does not have to be taken by the victim, since it is the public prosecutor's office that orders the expulsion, irrespective of any request on the part of the victim, and despite the difficulties in enforcing the law on this point as was highlighted by the Luxembourg section of Amnesty International. The Network also welcomes the announcement in the **Netherlands** that the deputy public prosecutor will soon be empowered to adopt a temporary prohibition to enter one's home (*huisverbod*). It notes with interest that the Dutch authorities took inspiration from the practices in Austria and Germany, where similar instruments were introduced in 1997 (*Bundesgesetz zum Schutz vor Gewalt in der Familie)* and 2002 respectively. The power thus recognized to the public prosecutor contributes to an improved protection of the victims of domestic violence, and should therefore be considered as a positive development.

Good practices

Having examined the report on the situation of fundamental rights in **Spain,** the Network notes with interest that the Complementary Budget Act for 2004 contained budgetary incentives for businesses hiring women who are victims of domestic violence. The new system of aid that was put in place allowed a total of 217 women to be taken on during the first half of 2004. Victims of domestic violence have also been given greater opportunities for access to free legal aid, even in emergency situations. The Community of Madrid, imitated in this respect by the 'Xunta' of Galicia [Government of the Autonomous Community], has also empowered the courts to grant, along with a restraining order, an electronic service designed to allow victims of domestic violence to monitor the movements of the person responsible for the violence by using a cell phone equipped with GPS technology

enabling the victim to send an alarm signal to the police or the nearest aid service, who are thus instantly notified of the perpetrator's geographical position.

Although domestic violence remains an issue of serious concern in **Portugal**, some action has been taken within the accomplishment of the II National Plan against Domestic Violence (*II Plano Nacional de Luta contra a Violência doméstica- 2003/2006*); a relevant example thereof was the conclusion of a Protocol between the Portuguese Bar Association and the Commission for Equality and Women's Rights (*CIDM: Comissão para a Igualdade e para os Direitos das Mulheres*) – which is the institution responsible for the implementation of the Plan - aimed at assuring immediate legal consultation and providing quick access to legal support regarding judicial action (*apoio judiciário*) to victims of domestic violence. Nonetheless, this plan is not satisfactory, since it does not foresee deadlines for the conclusion of the tasks, nor budgets nor sanctions in case of disregard.

Reasons for concern

The Network notes that, in **Cyprus,** Section 9 of the *Law on Domestic Violence (Prevention and Protection of Victims) of 2000 and 2004* provides that the testimony of the victim of domestic violence should be taken by a police official of the same sex as the victim. In the opinion of the Network, this may prove problematic, as the majority of police officials currently dealing with such instances are men.

The Network regrets that, despite the adoption in **Luxembourg** of the Act of 8 September 2003 on domestic violence, the structures for receiving and accommodating persons who have been expelled from the home remain inadequate, whereas the existence of such a specialized structure and the presence of specially trained staff would constitute a means to reassure the victim, since once the police have left, the aggressor would not remain in the vicinity of the home. Similarly, there is a lack of centres specializing in the treatment of aggressors to which perpetrators of violence would be systematically referred, and which would help them become aware of the seriousness of their actions and could prevent a repetition of acts of violence, especially when they return to their homes.

The Network is concerned that the implementation of the recommendations contained in the *Report of the Task Force on Violence Against Women* (1996) in relation to domestic violence, rape and sexual assault in **Ireland** does not contain targets, timeframes, budgets and measurable and quantifiable indicators of progress by Government Departments, thus undermining the capacity to monitor Government performance and hold the state accountable for implementation of the Report. It also notes with concern that while the Department of Justice, Equality & Law Reform allocated additional funding to tackle violence against women with remarkable progress between 1998 and 2002, this has decreased in the last two years, and that the Department of Health & Children's budget has been in decline in actual figures in comparison to 2003. In **Spain**, despite the important efforts which have been pursued by the authorities in recent years to combat domestic violence, the figures remain high. The *Memoria del Fiscal General del Estado* [Report of the Attorney General] on the year 2003 (published in September 2004) reports a 58.6% increase in the total number of admissible complaints, 88% of the victims being women. In 2004, 72 women died as a result of this type of violence. In **Sweden**, civil society organisations have criticized the implementation of the provisions combating violence against women (the so-called *kvinnofridslagen*, *i.e*. the Penal Code (BrB 4:4a, 2st.)) as well as the shortage of measures to fight violence against women. Converging reports show that domestic violence remains underreported because of social attitudes and the lack of confidence of women in law enforcement services (*The National Council for Crime Prevention*, (BRÅ), Pressmeddelande från Brottsförebyggande rådet, Våldsbrotten ökar, stöldbrotten minskar, in Advokaten, Nr. 1/2004, p. 8; *C. Reimegård*, Antalet anmälningar om kvinnovåld ökar, SvD 20-04-04, p. 8; Amnesty International, Mäns våld mot kvinnor i nära relationer, En sammanställning om situationen i Sverige, Stockholm, April 2004, www.2.amnesty.se). Despite the fact that according to the law (*Socialtjänstelagen* (SFS 2001:453, Chapter 5, § 11)), the responsibility for services, help and protection of women who have been exposed to violence is invested in the local municipalities, the emergency centres open of victims of violence remain insufficient and the majority of the local authorities appear to rely on the work

done by the voluntary organisations such as women's emergency centres and their contribution to the economy of the centres varies greatly (Amnesty, « Har ej prioriterat frågan », En undersökning om svenska kommuners arbete för att bekämpa mäns våld mot kvinnor, Stockholm, November 2004, www2.amnesty.se). Finally, criticism has been voiced with respect to the poor application of the Act that restricts visiting rights for perpetrators of acts of violence against women (*Lagen om besöksförbjud*, (SFS 2003:484)).

In **Portugal**, the Portuguese Association for the Victim's Support (APAV – *Associação Portuguesa de Apoio à Vítima*) registered an average of 40 cases of domestic violence every day, in a total amount of 10.239. The "Alternative and Reply" Women's Union (UMAR- *União de Mulheres Alternativa e Resposta*) also conducted a survey and revealed that, by November 2004, a record of 50 women were murdered by their husbands, boyfriends or partners. It is also worth noting that some delegations of APAV were, during 2004, at risk of closing, as the government wasn't accomplishing the financial support to those institutions, though the insistent attempts for the renegotiation of the State's support. This is of particular significance, as the surveys reveal that victims tend to appeal to these institutions and not to police authorities.

Other relevant developments

Reasons for concern

As regards the **United Kingdom**, the Committee against Torture has expressed concern about "the incomplete factual and legal grounds advanced … [to it] justifying the derogation's from … international human rights obligations and requiring the emergency powers set out in Part IV of the Anti-terrorism, Crime and Security Act 2001" and the "resort to potentially indefinite detention under the Anti-terrorism, Crime and Security Act 2001 of foreign nationals suspected of involvement in international terrorism and the strict regime in Belmarsh prison", as well as, with respect to Northern Ireland, about "the absence of precise information on the necessity for the continued emergency provisions for that jurisdiction contained in the Terrorism Act 2000" (CAT/C/CR/33/3, 25 November 2004, para 4(c) and (e)). It has recommended a re-examination of "review processes, with a view to strengthening independent periodic assessment of the ongoing justification for emergency provisions of both … [Acts], in view of the length of time the relevant emergency provisions have been operating, the factual realities on the ground and the relevant criteria necessary to declare a state of emergency" and that there should be a review "as a matter of urgency" of the alternatives available to indefinite detention under the 2001 Act (para 5(g) and (h)).These concerns have been reiterated by a number of domestic institutions, both official and non-governmental, notably in a report by 11 psychiatrists and a psychologist on the mental health of the Belmarsh prisoners detained under the Anti-terrorism, Crime and Security Act 2001, which concluded that there was "serious damage to the health of all the detainees they have examined has occurred and is inevitable under a regime which consists of indefinite detention. These conclusions are based on a series of reports originally commissioned for legal purposes from the doctors over the past two and a half years by the prisoners' solicitors. Progressive deterioration in the mental health of all these detainees and their families was observed" (*Damage to the mental health of Belmarsh prisoners detained under the 2001 Anti-Terrorism legislation (Britain's so-called "Guantanamo Bay")*).

The Network is also highly concerned by the fact that in dismissing appeals against detention under the Anti-terrorism, Crime and Security Act 2001, the Court of Appeal has held by a majority in *A v Secretary of State for the Home Department* [2004] EWCA Civ 1123 that evidence obtained by torture would not be deemed admissible when directly procured by **United Kingdom** agents or in whose procurement such agents have connived but evidence obtained by the agents of foreign states would be admissible.

Article 5. Prohibition of slavery and forced labour

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

In accordance with Article 52(3) of the Charter of Fundamental Rights, paragraphs 1 and 2 of this provision of the Charter correspond to Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). It must be read in accordance with the requirements formulated by Article 8 of the International Covenant on Civil and Political Rights (1966), by the Slavery Convention (1926), by the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956), by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), by Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (1979), by Articles 32, 34 and 35 of the Convention on the Rights of the Child (1989), by the Convention against Transnational Organised Crime supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (Smuggling Protocol) (2000), by Article 9 of the Convention on Cybercrime (2001), by ILO Convention (n° 29) concerning Forced or Compulsory Labour (1930), by ILO Convention (n° 105) concerning the Abolition of Forced Labour (1957) and by ILO Convention (n° 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour (1999). The protection of the rights listed in this provision of the Charter of Fundamental Rights has recently been improved at the international level by the adoption of by the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000). Finally, the Network takes into account in its reading of this provision of the Charter Article 7(10) of the European Social Charter, unmodified in the Revised European Social Charter, under which the States parties undertake to ensure special protection against physical and moral dangers to which children and your persons are exposed, particularly against those resulting directly or indirectly from their work.

Fight against the prostitution of others

Forced prostitution constitutes a serious violation of human rights, and must be combated as such by all appropriate means, including proportionate and dissuasive criminal sanctions. The person forced into prostitution should be seen as a victim in need of protection, rather than as a criminal, and this should be seen as a condition for the effective fight against coerced prostitution and the trafficking of human beings for sexual exploitation : as noted by the Committee on the Elimination of Discrimination against Women in its Concluding Observations on **Latvia** (CEDAW/C/2004/II/CRP.3/Add.5/Rev.1, points 30 – 31), only if the victims of forced prostitution benefit from adequate rehabilitation and integration services, shall they be encouraged to denounce their exploiters and to cooperate with the authorities. Moreover, as provided by the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), the exploitation of the prostitution of others, even voluntarily entered into, should be made a criminal offence. The Network regrets that, in countries such as **Denmark**, the exploitation of the prostitution of others still is not considered a criminal offence, and that in certain countries where it is, the existing legislation may be underenforced.

Where prostitution is freely entered into, in the States which have not to make it a criminal offence, it should be regulated and closely monitored, in order both to ensure that in no circumstance shall a person be coerced to resort to prostitution because of the absence of any other alternative or structures from which to seek assistance, and to ensure that the prostitute may work in conditions which respect his or her health, safety and dignity.

Trafficking in human beings

Areas of concern

Trafficking in human beings is a serious violation of human rights. During the period under scrutiny, a number of Member States have adopted criminal provisions in order to implement the Framework Decision 2002/629/JHA of the Council of 19 July 2002 on combating trafficking in human beings (OJ L 20 of 1.8.2002, p. 1), which provides that, by 1 August 2004, the Member States should have rendered punishable certain acts connected with trafficking in human beings. This however is also an area which calls for positive measures directed towards the protection of the victims, which the Member States of the Union should develop by seeking inspiration from one another. The Network notes that, in his Report following his visit to **Estonia**, the Council of Europe Commissioner for Human Rights expressed his regret at the fact that, according to the information provided by the Ministry of the Interior, the local authorities were often unwilling to terminate licences of businesses operating hidden brothels under the cover of a bar, despite requests from the Ministry to do so ; the Commissioner for Human Rights also strongly encouraged the State authorities to adopt a comprehensive plan of action on this question, which should address the different stages of trafficking, including prevention, protection, assistance, and reintegration of the victims (CommDH(2004)5). With regard to **Denmark**, the Commissioner for Human Rights recommended to "increase the access of victims of human trafficking to residence permits, particularly for witnesses testifying in criminal cases." (Recommendations No. 11, Report CommDH(2004)12), a recommendation he also addressed to **Sweden** (Report CommDH(2004)13). The concern about trafficking in persons in **Denmark**, especially women and children, as well as commercial sexual exploitation, was also expressed in the Concluding Observations of the Committee on Economic, Social and Cultural Rights on Denmark (E/C.12/1/Add.102, 26 November 2004, adopted by CSECR at its thirty-third session of 8 -26 November 2004), although the Network notes that Denmark has not remained inactive during the this period, as demonstrated by the introduction of a provision Section 262a on human trafficking in the Danish Criminal Code and by the adoption of an action plan against trafficking in women and awareness raising within the police and border officials of the crime of trafficking. During the period under scrutiny, the Committee on Economic, Social and Cultural Rights voiced a similar concern with respect to **Spain** (Concluding Observations, 7 June 2004, E/C.12/1/Add.99) and with respect to **Greece** (Concluding Observations, 12 May 2004, E/C.12/1/Add.97, para. 18), particularly in view of the high number of women and children in the latter country who are victims of human trafficking and are subjected to forced labour and sexual exploitation; very often they are expeditiously expelled to their country of origin without the benefit of the necessary procedural guarantees. In the Concluding Observations it adopted during the period under scrutiny on **Germany** (CCPR/CO/80/DEU) and on **Finland** (CCPR/CO/82/FIN/Rev.1), the Human Rights Committee encouraged these States in their fight against the trafficking in human beings, to which the Committee considers that the adoption of extra-territorial criminal legislation, as in accordance with chapter 1, section 7 of the Penal Code on international offences, allowing any Finnish citizen to be prosecuted under Finnish law for trafficking abroad whatever law may be applicable where the offence has been committed. In its Concluding Observations of July 2004, formulated with regard to **Belgium**, the United Nations Human Rights Committee (CCPR/CQ/81/BEL (point 15)) welcomes that country's efforts to combat people-smuggling and trafficking in human beings, although it is concerned at the fact that residence permits are not granted to victims of trafficking unless they collaborate with the judicial authorities, and that they are given financial assistance in the event of violence only subject to restrictive conditions. It observes that there are still problems in coping with large groups of intercepted migrants.

Other bodies have expressed their concern at this phenomenon during the period under scrutiny. In its third report on **Greece** published on 8 June 2004 (ECRI (2004) 24, adopted on 5 December 2003 and published on 8 June 2004), the European Commission against Racism and Intolerance (ECRI) notes that Greece is a country of destination and of transit for the traffic in human beings. Women and children coming from neighbouring countries such as Albania, but also from more distant countries, are especially affected. ECRI recommends that additional measures be taken to counter the problem of trafficking in women and children, particularly by carrying out preventive and awareness-raising

measures about this serious problem that aim at all segments of the population concerned. It points out that the situation remains disturbing as regards trafficking, in women for prostitution, but also in children - Albanian nationals who are subjected to forced labour. Children over 12 that are arrested by the police are considered as illegal immigrants in an irregular situation that must be deported, rather than as victims of the traffic in human beings. Children under 12 are placed in reception centres until their families can be located. The Network shares ECRI's concern over allegations that several hundred Albanian children placed in state-run reception centres disappeared from the centres in 2002. It may be that some of them have once again fallen into the hands of the traffickers who brought them into Greece. ECRI encourages the Greek authorities to persist in their new approach of protecting the victims of trafficking in human beings and effectively penalising the traffickers. The Committee on Economic, Social and Cultural Rights also expressed its concern over the high number of women and children who are victims of human trafficking in Greece (Concluding Observations of the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.97, of 7 June 2004, adopted on 14 May 2004), and recommended that Greece continue its efforts to protect the victims and launch an initiative for close cooperation with the neighbouring states to combat trafficking. This same concern is expressed with regard to **Latvia** by the Committee for the Elimination of Discrimination against Women (CEDAW/C/2004/II/CRP.3/Add.5/Rev.1, points 28 – 29). Although the CEDAW Committee noted the 2002 *National Action Plan to Combat Trafficking in Persons* and the special police unit established to deal with the problem, it expressed concerns about the increase in trafficking in women and girls in Latvia, and recommended introducing "measures aimed at improving the economic situation of women", taking education initiatives and providing social support. The Network wishes to express its satisfaction in this regard that the Office of the Prosecutor-General has paid attention to the cases of trafficking in human beings as reflected in cases being brought in front of the courts in 2004. In the 2004 Concluding Observations of the Committee on Economic, Social and Cultural Rights, the Committee noted with concern that trafficking in women and children continued to be a problem in **Lithuania**, which is a country of origin and transit, in spite of the existence of the "Programme on control and prevention of prostitution and commercial trade in people for 2002-2004" and that the new Criminal Code provided for criminal liability for a number of trafficking-related crimes. The Committee also expressed its concern about the high number of persons who were reported missing in Lithuania. Similarly in its 2004 Concluding Observations, the Human Rights Committee (CCPR/CO/80/LTU) expressed its concern with regard to the trafficking in persons in Lithuania, in particular the low number of criminal proceedings against documented cases of trafficking. The Committee on the Rights of the Child encouraged **Slovenia** to further strengthen its efforts on this field, which in this country has been demonstrated to be a serious problem (Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia), CRC/C/15/Add.230). In **Luxembourg**, the National Council of Luxembourg Women (CNFL) demands that the fight against procuring and trafficking in women be stepped up by recommending in a report of 28 June 2004 the setting up of a reception facility and a programme of effective protection for victims and any other persons able to testify in connection with procuring and trafficking in women.

At the international level, the adoption of the United Nations Convention against Transnational Organized Crime and its two supplementing protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and the Protocol against the Smuggling of Migrants by Land, Air and Sea, should contribute to combating trafficking in human beings. The Network recalls that the Council has called upon the Member States to ratify the Trafficking Protocol in a Resolution of 20 October 2003 (OJ C 260 of 29.10.2003, p. 4). It welcomes the ratification by **Sweden** on 1 July 2004 of this Protocol.

Good practices

The Network observes a convergence of views of national and international bodies that are concerned with the issue of combating trafficking in human beings for the purposes of sexual or economic exploitation in particular and which acknowledge that police and judicial measures must be

accompanied by counselling and support measures for victims, on which depends the very effectiveness of the repressive approach. A number of countries have already developed practices favouring this approach. In **Greece,** the Ministry of Justice in May 2004 set up an Interministerial Committee to coordinate the implementation of anti-trafficking legislation. The Action Plan that has been worked out encompasses the establishment and running of shelters, the granting of legal aid and support in social integration and on the labour market, cooperation with NGOs to offer relief to victims as well as medical and psychological counselling, and the setting up of a helpline for victims. With respect to victims having foreign nationality, the main measures already adopted or planned include the granting of a residence and work permit to the victims (Article 34(7) of Act no. 3274/2004 on the organization and operation of first and second-level local authorities [Νόμος 3274/2004 «Οργάνωση και λειτουργία των Οργανισμών Τοπικής Αυτοδιοίκησης πρώτου και δεύτερου βαθμού»]) until completion of the legal proceedings against the traffickers, aid to voluntary return of the victims to their country of origin and their social reintegration in collaboration with the diplomatic representatives of the countries concerned and the NGOs, the conclusion of bilateral treaties with the countries of origin or transit of the victims concerning the protection and reception of minors, and funding for appropriate initiatives in the community. Similarly, in **Slovenia**, the domestic NGO Ključ, in cooperation with the EU and several ministries, established the first shelter devoted to trafficking victims in September 2004. Ključ signed a memorandum of understanding with the Ministry of Interior that provided victims' immunity from prosecution and temporary legal status, including work permits and access to social services. Ključ also worked to raise public awareness of the trafficking problem, provide legal assistance, counselling, and other services to trafficked women, and improve cooperation among NGOs in the region. In **Sweden**, as of 1st of October 2004 victims of trafficking may apply for a temporary residence permit (SOU 2004 :71, p. 108), and from that date on the Government is responsible for the compensation to the local municipalities for their expenses in connection with their taking care of the victims of trafficking.

In **Cyprus**, where an action plan to fight prostitution and trafficking in women was expected to be presented before the Ministerial Council in January 2005, the Minister of Interior has stated that a shelter for women victims of trafficking will be in operation in the city of Limassol as from the beginning of 2005, and a provision for the operation of a "centre for the protection of victims of trafficking", expected to operate within the second semester of 2005, is included within the annual budget of 2005. One interesting practice which has been reported is the distribution by a non-governmental organisation, the Cyprus Observatory for Equality, of an information sheet in Greek and other languages in order to inform all the women from third countries coming to work as artists in cabarets in Cyprus about their rights and obligations. This information should be launched in February 2005. A similar practice is expected to be undertaken by the relevant authorities. The Network shall seek to evaluate this experience in its next report, in order to examine under which conditions it can contribute usefully to protecting the victims of forced prostitution, whether or not they are also victims of trafficking in human beings.

Since it is convinced that the full cooperation of the victims is essential to the effectiveness of the fight against trafficking in human beings, the Network welcomes the fact that during the period under scrutiny Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities was formally adopted (OJ L 261 of 6.08.2004, p. 19). The purpose of the Directive is to allow non-Community nationals who are victims of trafficking in human beings or – if the Member State concerned chooses to make this extension – who have been the subject of an action to facilitate illegal immigration to be granted a short-term residence permit in return for their cooperation in combating those activities by testifying against the traffickers. This Directive marks an important step forward in the protection of fundamental rights through Community law. All the Member States of the Union, except for the three Member States that requested a derogation, are witnessing the general implementation of a type of protection that had been to a large extent unknown in most of the national legislations, and which makes a welcome contribution to the realization of Article 5 of the Charter of Fundamental Rights.

The Network underlines that, in the implementation of this Directive, Member States are obliged to respect fundamental rights. Moreover, the Directive does not prevent Member States from adopting or maintaining more favourable provisions for the persons covered by the Directive (Article 4). This means that, where other international obligations are binding on a Member State, this State cannot rely upon the Directive to depart from those obligations. In this connection, the Network points out that, while the initial proposal submitted by the Commission contained a provision (Article 4 of the proposal) stipulating that the Directive "shall be without prejudice to the protection extended to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments", this safeguard clause has disappeared from the text adopted by the Council. This cannot be interpreted as releasing the Member States from the obligations imposed on them by the Geneva Convention of 28 July 1951 relating to the status of refugees and the other international instruments on the protection of human rights. It should also be emphasized that the Protocol to prevent, suppress and punish trafficking in persons, especially women and children appended to the 2000 Convention against transnational organised crime, includes a saving clause stating that its provisions are without prejudice to the obligations of States under International law, including the 1951 Geneva Convention and the 1967 Protocol relating to the status of refugees and the principle of non-refoulment contained therein. Although the European Community is not a Party to the Geneva Convention, it is bound by its content in particular through Article 63 point 1 EC.

The Network recommends that the evaluation report on the application of the Directive which the Commission has to prepare in 2008 on the basis of the information supplied by the Member States should devote a chapter to the question of compliance by the Member States with those international obligations in the transposition of the Directive and in the application of national implementation measures. If this evaluation reveals shortcomings in the fulfilment of those international obligations, a review of the Directive may have to be proposed in order to explicitly incorporate those requirements.

Protection of children

The European Committee of Social Rights considers that in order to comply with Article 7(10) of the European Social Charter, unmodified in the Revised European Social Charter, under which the States parties undertake to ensure special protection against physical and moral dangers to which children and young persons are exposed, particularly against those resulting directly or indirectly from their work, "Parties must take specific measures to prohibit and combat all forms of sexual exploitation of children, in particular their involvement in the sex industry. This prohibition shall be accompanied with an adequate supervisory mechanism and sanctions. An effective policy against commercial sexual exploitation of children shall cover the following three primary and interrelated forms: child prostitution, child pornography and trafficking in children. To implement such a Policy, Parties shall adopt legislation, which criminalise all acts of sexual exploitation, and a national action plan combating the three forms of exploitation mentioned above" (Conclusions 2004 on **Cyprus**). Article 9 of the Council of Europe Convention on Cybercrime opened for signature in Budapest on 23 November 2001 (ECTS n° 185) also imposes on the States parties to that instrument an obligation to make producing child pornography for the purpose of its distribution through a computer system, offering or making available child pornography through a computer system, distributing or transmitting child pornography through a computer system, procuring child pornography through a computer system for oneself or for another, possessing child pornography in a computer system or on a computer-data storage medium, a criminal offence.

The adoption of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13, 20.1.2004, p. 44) should be seen as an important contribution to the protection of the child. This Framework Decision complements Joint Action 97/154/JHA of the Council of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children (OJ L 63, 4.3.1997, p. 2), which it abolishes, and Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the Internet (OJ L 138, 9.6.2000, p. 1), by defining the sexual exploitation of children, including coercing or recruiting a

child into prostitution, and child pornography as serious criminal offences the constituent elements of which in the criminal law of all Member States shall be harmonized through the Framework Decision, which shall also oblige States to provide for effective, proportionate and dissuasive sanctions.

The Member States should be encouraged to implement fully this Framework Decision at the earliest possible time. Although it is aware that the Framework Decision makes it possible for each State not to establish its jurisdiction over the offences of sexual exploitation of children and child pornography, including the instigation of, or aiding or abetting of these offences, where the offence has not been committed on its territory, even if it is committed by one of its nationals or for the benefit of a legal person established in the territory of that Member State (Article 8(2)), the Network encourages the adoption of extra-territorial legislation by all Member States. It regrets that **Sweden** has announced that it shall not make the listed offences subject to extra-territorial jurisdiction. Indeed, the Network notes that, according to the Committee on the Rights of the Child, the States parties to the 1989 Convention on the Rights of the Child should make their citizens liable to criminal prosecution for child abuse committed abroad (Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: **Slovenia**), CRC/C/15/Add.230).

The Network believes that, with respect to the dissemination of child pornography through a computer system, the effectiveness of the national measures implementing the Framework Decision 2004/68/JHA shall be enhanced by an adequate implementation of Article 19 of Title 4 of the Cybercrime Convention, which relates to the search and seizure of stored computer data. The Member States are therefore strongly encouraged to ratify this Convention and to take it into account in the implementation of the Framework Decision.

The Network encourages the Member States, which should adopt the implementation measures of this Framework Decision before 20 January 2006, to consider adopting a national action plan targeting the sexual exploitation of children, including coercing or recruiting a child into prostitution, and child pornography, which the European Committee of Social Rights has considered to derive from the undertakings of the States which have accepted to be bound by Article 7(10) of the European Social Charter or the Revised European Social Charter. Such a national action plan could facilitate addressing issues such as, for instance, the means service providers have at their disposal in order to control the material they host, the identification of the circumstances which lead to child prostitution in order to combat the phenomenon at its roots, or the cultural attitude towards the availability of child pornography on the internet.

Good practices

In **France,** the organization ECPAT - France ("End Child Prostitution Pornography And Trafficking in Children for Sexual Purposes") launched a new campaign against the sexual exploitation of children in tourism. This campaign contains a reminder of the prosecution and penalties to which tourists are liable if they engage in such practices. The campaign is disseminated as widely as possible among travellers throughout their journey (preparations, purchases, flight, etc). Numerous professionals have already agreed to help disseminate the campaign by distributing leaflets and putting up the poster in their agencies. In addition, the commercial is broadcast on all long-distance flights of Air France, Corsair and Star Airlines.

CHAPTER II: FREEDOMS

Article 6. Right to liberty and security

Everyone has the right to liberty and security of person.

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

A deprivation of liberty may only be decided for one of the reasons enumerated in Article 5(1) ECHR. It is alarming that, as reported by the Council of Europe Commissioner for Human Rights in his report on **Cyprus** released on 12 February 2004 (paras.13-15), imprisonment for debts still occurs in that country, in violation of Article 1 of Protocol n° 4 to the ECHR, despite the fact that, as noted by the Commissioner for Human Rights, the law does not consider such detention as a penalty, but only as a measure of enforcement of obligations (private ones included), and that imprisonment can be ordered only as a last resort by a court after a hearing and only if a judge is convinced that the person concerned is solvent but refuses to pay. The repeal of Section 91 of the Civil Procedure Law does not solve all the problems in this regard, as alternative procedures are likely to be used having the same effect, such as the procedure of contempt of court for not complying with the Court order for payment of the relevant instalments or the procedure of Section 91 B of the Civil Procedure Law in regards to defrauding on the part of a judgement debtor punishable by imprisonment of 12 months or a fine of £1000 CY or both.

Equally problematic under Article 5(1) ECHR are, in the **Czech Republic**, the provisions in the Law No 283/1991 Coll., on the Police Force (Zákon č. 283/1991 Sb. o Policii České republiky [Law No. 283/1991 Coll., on the Police Force of the Czech Republic]) that allow policemen to apprehend a person for up to 24 hours without any review by a state attorney or a judge, insofar as the reasons listed in Sec. 14 of the Act for such deprivation of liberty are too vaguely formulated and go beyond the reasons listed under Article 5(1) ECHR.

Pre-trial detention

Two major reasons of concern emerge during the period under scrutiny. The first area of concern is that of procedural rights of suspects in criminal proceedings, which the Framework Decision proposed by the European Commission seeks to improve throughout the Union. The second area is an excessive use of pre-trial detention, where circumstances would not seem to make it necessary, and where it is prolonged beyond the delays acceptable under Article 5(3) ECHR.

Procedural rights of suspects

During the period under scrutiny, the European Commission proposed to the Council the adoption of a framework decision on certain procedural rights in criminal proceedings throughout the European Union (COM(2004) 328 final of 28.4.2004). The Network of experts welcomes this proposal, the adoption of which will strengthen the mutual confidence between Member States, thus facilitating the implementation of the principle of mutual recognition of judgments and judicial decisions, and will encourage citizens of the Union as well as third-country nationals to exercise the right to freedom of movement that is granted to them in European Union law. It should be noted that an initiative of this

kind, based on Article 31 EU, is only justified from the viewpoint of the principles of subsidiarity and proportionality governing European Union action in areas where the Union does not have exclusive competence insofar as the instrument proposed goes beyond the minimum guarantees provided by the European Convention on Human Rights, and in particular Articles 5 and 6 of the Convention as regards the rights covered by the proposed framework decision. The establishment of minimum standards common to all Member States of the European Union is only significant insofar as it is aimed at imposing a high level of protection of fundamental rights throughout all Member States of the Union and at contributing to the institution and proper functioning of the area of freedom, security and justice. The Preamble of the proposal of the Commission justifies this in particular by the consideration that "the ECHR is implemented to very differing standards in the Member States and that there are many violations of the ECHR" (par. 22). The proposal goes further than simply reasserting the standards of the European Convention on Human Rights by defining the common understanding of those standards which should foster mutual trust between the legal systems of the Member States. This same reasoning – according to which European Union action to guarantee fundamental rights should aim for a high level of protection of fundamental rights, going beyond the existing international obligations of the Member States but at least guaranteeing those rights at the level defined by those existing international instruments – should also guide the choice of the level of protection of fundamental rights in the areas of asylum or fundamental social rights, even though the reference instruments (in particular the Convention on the Status of Refugees or the European Social Charter) may differ.

One of the innovations put forward in the proposed framework decision is the issuing to any person suspected of having committed an offence of a "Letter of Rights" listing the procedural rights that are immediately relevant to him, so as to ensure that those rights, having been brought to the notice of the suspect, are actually exercised. The proposed framework decision provides that "Member States shall ensure that a standard translation exists of the written notification into all the official Community languages" (Article 14(2)). However, it should be noted that, according to the Preamble of the proposed framework decision, the scope of the framework decision "includes all persons suspected in respect of a criminal offence in any proceedings to establish the guilt or innocence of a person suspected of having committed a criminal offence, or to decide on the outcome following a guilty in plea in respect of a criminal charge or to rule on any appeal from these proceedings. There is no differentiation between EU national and third country nationals since to offer one group better protection could lead to criticisms of discrimination that would defeat the aim of enhancing trust between the Member States in each other's criminal justice system" (par. 53). It would not be too much to ask Member States to provide that this "letter" of rights is kept available not only in the languages of the European Union, but also in any other languages which crime suspects might use. The regular evaluation of the implementation of the rights granted by the framework decision (Articles 15 and 16), especially if it contains an obligation for Member States to collect data on certain aspects of this implementation (Article 16), would help identify the need to provide for a version of the Letter of Rights in other languages than the official languages of the European Union. This would be in keeping with the requirement, for Member States that are parties to that instrument, ensuing from Article 10(3) of the Framework Convention of the Council of Europe for the Protection of National Minorities (see for example the Advisory Committee of the Framework Convention for the Protection of National Minorities, Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, par. 57). Moreover, the solution chosen in the proposal to prove that the Letter of Rights has been delivered to the suspect is not satisfactory: although it must be proposed to the suspect to sign that letter, this signature certifying that he has indeed taken cognizance of it, there is no specific measure coupled with a refusal to sign, except that this fact is noted in the records. It could for instance be provided that if the suspect refuses to sign the Letter of Rights, the questioning can only take place in the presence of the suspect's lawyer, except in duly reasoned exceptional circumstances such as emergencies (see *Report on the situation of fundamental rights in the European Union in 2003,* p. 160). The European Committee for the Prevention of Torture considers that "from the start of his detention, the accused must be handed a statement of his rights in a language that is available and in a language he understands, and he must sign a document attesting that this statement of rights has been given to him. It may also be provided that in case of a refusal to sign the statement, questioning can

only take place in the presence of a lawyer, whose presence may compensate for any possible ignorance on the part of the person concerned of his rights" (CPT/Inf (2002) 15, par. 23).

Events during the past year further illustrate the importance of this proposed framework decision on certain procedural rights in criminal proceedings throughout the European Union. In its Concluding Observations concerning **Belgium,** the United Nations Human Rights Committee repeated its concerns over the rights of individuals in custody, bearing in mind the requirements of articles 7, 9 and 14 of the International Covenant on Civil and Political Rights, and recommends guaranteeing the rights of individuals in detention to notify their immediate families that they have been detained and to have access to a lawyer and a doctor within the first few hours of detention (United Nations Human Rights Committee, Eighty-first session, Consideration of the reports submitted by the State Parties under Article 40 of the Covenant, Concluding Observations, Belgium, CCPR/CQ/81/BEL (point 16)). The Human Rights Committee also expressed its concern in its Concluding Observations on **Finland** on November 2004 (CCPR/CO/82/FIN/Rev.1) over the situation of persons being held in pre-trial detention at police stations, noting the lack of clarity as regards a detainee's right to a lawyer during custody and the involvement and role of a medical doctor during time of detention. The Committee invited Finland to clarify and assure that the legislation and practice meets the requirements under articles 7 and 9 of the ICCPR. When it examined the report submitted by **Latvia** under the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has criticised conditions of detention in police stations, lack of provision in the Criminal Procedure Code of the rights of a detainee to contact family members and that access to a doctor of one's choice must be approved by the authorities. It expressed further concern of allegations about denial and delays in access to a lawyer and the practice that defendants have to pay back legal aid in cases where their case is lost (CAT/C/CR/31/35). In **Ireland**, although detainees are entitled to have access to a lawyer they are not entitled to have a lawyer present during questioning.

Excessive use of pre-trial detention

A number of judgments of the European Court of Human Rights decided during the period under scrutiny illustrate the tendency to resort to pre-trial detention in situations where it may not be justified, or to maintain suspects in detention pending trial for unreasonably long periods, in violation of Article 5(3) ECHR (Eur. Ct. H.R. (3rd sect.), *Cevizovic v.* ***Germany*** (Appl. no. 49746/00) judgment of 29 July 2004 (final); Eur. Ct. H.R., *Imre v.* ***Hungary*** (Appl. no. 53129/99) judgment of 2 December 2003; Eur. Ct. H.R., *Maglódi v.* ***Hungary*** (Appl. no 30103/02) judgment of 9 November 2004; Eur.Ct. H.R. *D.P. v.* ***Poland*** (Appl. No. 34221/96) of 20 January 2004; Eur.Ct. H.R. *G.K. v* ***Poland*** (Appl. No. 38816/97) of 20 January 2004; Eur.Ct. H.R. *J.G. v.* ***Poland*** (Appl. No. 36258/97) of 6 April 2004; Eur.Ct. H.R., *M.B. v.* ***Poland*** (Appl. No. 34091/96) of 27 April 2004; Eur. Ct. H.R., *Wesolowski v.* ***Poland*** (Appl. No. 29687/96) of 22 June 2004; Eur.Ct. H.R. *Paszkowski v.* ***Poland*** (Appl. No. 42643/98) of 28 October 2004; Eur. Ct. H. R. (4th sect.), *Pavletic v.* ***Slovakia*** (Application no. 39359/98) judgment of 22 June 2004 (final)). This has also been a concern of the Human Rights Committee, under Article 9 of the International Covenant on Civil and Political Rights (see, e.g., the Concluding Observations on the 2nd periodic report of **Latvia**, considered at the 79th session of the Human Rights Committee, 28/10/2003, 29/10/2003, 05/11/2003. CCPR/CO/79/LVA § 10; Concluding Observations of the Human Rights Committee on **Poland**, considered at the 82nd session of the Human Rights Committee, 5 November 2004, CCPR/CO/82/POL/Rev. 1, § 13 (where, although welcoming the changes brought to the legislation in Poland in 1997 designed to reduce pre-trial detention, the Human Rights Committee expressed its concerns about the fact that the number of individuals in pre-trial detention remains high)). When it examined the situation in **Latvia**, the Working Group on Arbitrary Detention of the UN Human Rights Commission found the widespread use of pre-trial detention, especially with regard to juvenile offenders, to be a source of serious concern. Finally, non-government organisations, such as the Hungarian Helsinki Committee with respect to **Hungary**, have also insisted on this question (press communiqué of the Hungarian Helsinki Committee, Budapest, 18 November 2004). Similar complaints against the abuse of pre-trial detention are moreover very frequent in **Portugal**, where the number of detainees awaiting trial is very high.

Although the judgments of the European Court of Human Rights cited above may relate to situations whose legal environment has been modified since the material facts occurred, especially with respect to new Member States such as **Poland** which have been undergoing rapid legal reform since a few years, the situation of pre-trial detention remains overall a matter of serious concern. Indeed, the abuse of pre-trial detention, and the insufficient use of alternative means of avoiding the flight of persons suspect of having committed certain offences, constitutes the single most significant obstacle to the establishment of mutual confidence between the authorities of the Member States in the area of freedom, security and justice, especially for the effective execution by the Member States of the European arrest warrants delivered by the judicial authorities of other Member States, as provided by the Framework Decision of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA, OJ L 190 of 18.7.2002).

Detention following a criminal conviction

One specific concern raised by the situation in **Cyprus** is the fact that life sentence is interpreted in that State as meaning imprisonment for the rest of the convicted persons' life, i.e., until death by natural causes. As noted in the Ombudsman's Report in relation to the detention conditions at the Central prisons of Nicosia of 26 May 2004 (Γραφείο Επιτρόπου Διοικήσεως, Αυτεπάγγελτη Έρευνα Επιτρόπου Διοικήσεως για το Σωφρονιστικό Σύστημα της Κύπρου και τις Συνθήκες Κράτησης Στις Κεντρικές Φυλακές, 26 May 2004), this is in contrast with other Council of Europe Member States where life imprisonment does not have this implication, but instead leads to release after a number of years (paragraph 69). In the view of the Network, which refers in that respect to the case-law of the European Court of Human Rights (Eur. Ct. HR, *Weeks v. the **United Kingdom*** judgment of 2 March 1987, Series A no. 114; Eur. Ct. HR, *Nivette v. **France*** (dec.), no. 44190/98, 14 December 2000; Eur. Ct. HR, *Sawoniuk v. the **United Kingdom*** (dec.), no. 63716/00, 29 May 2001; Eur. Ct. HR, *S. Einhorn v. **France***, dec. of 16 October 2001 (Appl. No. 71555/01), § 27) as well as to Recommendation Rec(2003)2 of the Committee of Ministers of the Council of Europe to the member states on the management by prison administrations of life sentence and other long-term prisoners, this situation may be in violation of Article 3 ECHR and therefore constitute an obstacle to the surrender of persons against whom Cyprus delivers a European arrest warrant. It can be inferred from Article 1 § 3 of the Framework Decision of 13 June 2002 on the European arrest warrant, as well as from Recitals 12 and 13 of the Preamble, that the surrender of a person cannot take place if this person runs a serious and proven risk of being subjected to inhuman or degrading treatment or punishment in the issuing State. This prohibition can at any rate be inferred from Article 3 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, and from Article 19 § 2 of the Charter of Fundamental Rights of the European Union, where the term "extradition" should be interpreted as "surrender" for the purposes of the operation of the mechanism of the European arrest warrant.

Deprivation of liberty of persons with a mental disability

In the Concluding Observations which it addressed to **Belgium** in July 2004, the United Nations Human Rights Committee voiced its concern over the fact that the Belgian state has not ended its practice of keeping mentally ill people in prisons and in psychiatric wings of prisons for several months before transferring them to social protection establishments, despite the recommendations which had already been formulated in 1998. The Committee reminds Belgium that this practice is inconsistent with Articles 7 and 9 of the International Covenant on Civil and Political Rights, and asks the Belgian authorities to end this practice as quickly as possible. As to **Lithuania**, the Human Rights Committee (CCPR/CO/80/LTU, 4 May 2004) expressed concern with regard to the use of various forms of administrative detention by the authorities, and especially involuntary psychiatric care.

The **Netherlands** face a similar problem. On 11 May 2004 the European Court of Human Rights found a violation of Article 5 ECHR in two cases which concerned a delayed admission to a custodial clinic, due to structural lack of capacity, of two persons convicted of serious offences but whose sentence was combined with a *TBS order* (a non-punitive measure comprising confinement in a custodial clinic). When the applicants had served their prison sentences, no place was available in the

custodial clinics for which they had been selected. They were therefore held in pre-placement detention in an ordinary *Huis van bewaring* [remand centre]. On the basis of domestic legislation they could be kept there for six months, and thereafter, for successive periods of three months on decision of the Minister of Justice. As noted by the European Court of Human Rights, where there exists a structural lack of capacity in custodial clinics and where, therefore, the authorities are not faced with an exceptional or unforeseen situation, a delay of fourteen and fifteen months in admission to a custodial clinic is not acceptable (Eur.Ct.H.R., *Morsink v. the Netherlands* (Appl. no. 48865/99) judgment of 11 May 2004; and *Brand v. the Netherlands* (Appl. no. 49902/99) judgment of 11 May 2004).

The lack of procedural guarantees surrounding the deprivation of liberty of persons with a mental disability also is a source of concern in certain EU Member States, as illustrated for instance by the judgment of the European Court of Human Rights in the case of *Tám v.* ***Slovakia*** (Eur. Ct. H. R. (4th sect.), *Tám v. Slovakia* (Appl. no. 50213/99) judgement of 22 June 2004 (final)) or in the case *H L v* ***United Kingdom*** (Eur.Ct.H.R. (4th sect.), *H L v United Kingdom* (Appl n° 45508/99) judgment of 5 October 2004 (final)). Thus, the Council of Europe Commissioner for Human Rights noted in his 12 February 2004 Report on **Estonia** that the period of 14 days foreseen in the 1997 Mental Health Act (Riigi Teataja I 1997, 16, 260) without any court involvement is excessive, moreover putting persons who are admitted in a psychiatric establishment at a disadvantage compared with people detained on criminal charges, whose detention exceeding 48 hours is to be authorised by a court ; and that the decisions authorising involuntary placement and involuntary treatment should be taken separately, even if they are adopted simultaneously (CommDH (2004)5, p. 16).

Deprivation of liberty of foreigners

The detention of foreigners in order to ensure their removal from the national territory should be limited to certain specific circumstances, where there are objective reasons to believe that he/she will not comply with the order to leave the territory, for instance if the time limit for departing from the territory has expired and the alien has changed his/her place of residence without notifying the authorities of a change of address, if he/she has not complied with the measures adopted to ensure that he/she will not abscond, or if he/she has in the past evaded removal. It should not be used as a means to encourage the participation of asylum-seekers in their own removal, although this would appear to be the underlying motivation of long periods of detention potentially imposed on rejected asylum-seekers in **Denmark**. Detention should only be resorted to where other measures have failed or if there are reasons to believe that they will not suffice. These measures may include the surrendering of the passport or other identity documents to the authorities, an obligation to reside in a particular place or to remain within a certain district, an obligation to report at regular intervals to the authorities, bail or sureties. As these measures constitute restrictions to the right to move freely and to choose one's residence or to the right to respect for private life, they will have to respect the conditions defined in Article 2(4) of Protocol No. 4 to the ECHR and Article 8(2) ECHR.

In its third report on **Belgium,** the European Commission against Racism and Intolerance (ECRI) is concerned about the continuing widespread use of detention of asylum-seekers in Belgium, in particular in respect of (unaccompanied) minors; it asks the Belgian authorities to ensure that this solution is only used as a last resort. ECRI also recommends increased transparency as concerns data on detention with a view to deportation (European Commission against Racism and Intolerance (ECRI), Third Report on Belgium, adopted on 27 June 2003, 27 January 2004, CRI (2004), pp. 12-14). Similarly, in its report on **Hungary,** the European Commission against Racism and Intolerance (ECRI) notes that although the maximum detention period has been reduced, persons of certain nationalities are allegedly automatically placed in detention for the maximum period on the sole grounds of their nationality, irrespective of any other criteria that should normally be taken into account in such decisions. Therefore, ECRI recommended that the Hungarian authorities closely monitor the use of detention with respect to non-citizens and take steps to ensure that it is used as a last resort (Third report on Hungary of the European Commission against Racism and Intolerance. Strasbourg, 8 June 2004, points 41 and 48). Indeed, it should be recalled that neither the illegal entry

into the territory of a State of which one is not a national, nor illegal residence in that State, should be considered a criminal offence. Thus, in his Report on **Cyprus** of 12 February 2004, the Council of Europe Commissioner for Human Rights encouraged the government to "consider rapidly the possibility of classifying foreigners' illegal entry to and residence in Cyprus as an infringement of regulations rather than as a criminal offence, […] particularly where they are willing to return home." (paragraph 28) ; he further noted that asylum seekers whose applications have been rejected, should not be kept at the Central Prisons since they are not criminals. In **Lithuania,** the new Law on Foreigners Legal Status (2004 04 29 LR įstatymas "Dėl užsieniečių teisinės padėties" Nr. IX-2206 [29 April 2004 Law on Foreigners Legal Status Nr. IX-2206] // Valstybės žinios, 2004, Nr. 73-2539) has worsened the situation of asylum seekers. Prior to the adoption of this law, the detention of asylum seekers was possible only in exceptional circumstances. The Network is concerned by the fact that the new Law notably expands the grounds for detention, weakens the alternative to detention measures and leaves significant space for detention of undocumented asylum seekers. In addition, even though the Law stipulates that legal representation of foreigner is mandatory during court hearings, concerns are raised with regard to the fact that the Supreme Administrative Court (*Vyriausias administracinis teismas*) in its decision of 7 June 2004 (2004 06 07 Lietuvos Vyriausiojo administracinio teismo sprendimas Nr. N12-968/2004) has stated that it is sufficient to provide legal assistance only before the court of appeal. Such situation which would leave the foreigner without any legal assistance before the court of first instance might constitute a violation of Article 5 ECHR.

A person may be deprived of his/her liberty with a view either to prohibit an unauthorized entry on the territory or to ensure that a removal order will be executed only in accordance with a procedure prescribed by law (see Eur. Ct. HR (3d sect.), *Shamsa v. Poland* judgment of 27 November 2003 (Appl. No. 45355/99 and no. 45357/99), para. 48-60). In **Austria**, the Human Rights Advisory Board (HRAB) considered such an interference with the fundamental right to personal liberty requires an empowerment of the executive by law that is in conformity with Article 5 ECHR and the Constitutional Law on the Protection of Personal Liberty (*BVG über den Schutz der persönlichen Freiheit*), and concluded that sections 53 and 54 of the Aliens Act (*Fremdengesetz*) do not provide a sufficient legal basis. It considered that, in accordance with both the jurisprudence of the European Court of Human Rights and the Constitutional Court, an interference with the right to liberty of persons by restricting their free movement in order to prevent their unauthorised entry on the Austrian territory is only permitted if they can leave the country any time and are also given the possibility to organise their leave (Empfehlung des MRB zum Dringlichkeitsbericht der zuständigen Kommission des Menschenrechtsbeirats zur *Zurückweisungszone am Flughafen Schwechat* of September 2004, 23 December 2004). In **Latvia**, although the Constitutional Court established in 2002 that the fundamental rights of individuals may only be restricted by law and despite the fact that detention of illegal immigrants is stipulated by law, detention in the Olaine Detention Centre is only governed by an Order issued by the State Border Guards, which appears to be in contradiction to the ruling of the Constitutional Court (Latvian Centre for Human Rights and Ethnic Studies, *Human Rights in Latvia in 2003*, p. 20). In **Poland**, the regulations on the placing and stay of aliens in a guarded centre and deportation detention facilities are routinely disregarded because of the lack of adequate facilities for the detention of aliens. Article 102, item 2 of the Act on Aliens and Article 41 of the Act on Granting Protection to Aliens on the territory of Poland provide that in principle an alien should be placed in a guarded centre, which offers more favourable conditions than deportation detention facilities. The arrest for the purpose of expulsion can only be used in the cases precisely defined in the Act. However, as there is only one guarded centre for about 200 aliens in Poland, and the number of detained aliens is much higher, the courts routinely place aliens in deportation detention facilities, thus violating the above-mentioned provisions (Comments of the Helsinki Foundation for Human Rights to the Fifth periodical report of the Republic of Poland on the realization of international Covenant on Civil and Political Rights for the period of 1 January 1995 to 1 October 2003, Sept. 2004).

One of the guarantees to be given to foreigners being detained with a view to their removal from the territory is the right to take legal action against the deprivation of their liberty. In its Concluding Observations addressed to **Belgium** in July 2004, the Human Rights Committee is concerned that foreigners held in closed facilities pending expulsion and then released by judicial decision have been

held in the transit area of the national airport under questionable sanitary and social conditions. In the Committee's view, which in this respect concurs with the conclusions which the Committee against Torture arrived at in 2003 on the same point (United Nations Committee against Torture, 30th session, 14 May 2003, CAT/C/CR/30/6), such practices are akin to arbitrary detention and can lead to inhuman and degrading treatment (Articles 7 and 9 of the International Covenant on Civil and Political Rights) (United Nations Human Rights Committee, 81st session, Consideration of the Reports submitted by the States Parties under Article 40 of the Covenant, Concluding Observations, Belgium, CCPR/CQ/81/BEL (point 21)). In **Italy**, the new regulations regarding jurisdictional control on orders of deportation, detainment and escort to the border of expelled foreigners or foreigners refused entry into Italy, introduced by Law Decree no. 241 of 15 September 2004, amended into Law 271 on 12 November 2004, are questionable insofar as they devolve jurisdiction over deportation orders from the ordinary court system to the justice of the peace, although the former would be more appropriately equipped to deal with such cases.

In **Malta**, the Refugees Act (Cap. 420 of the Laws of Malta) has been amended in order to make it possible for foreigners detained because of their illegal stay in Malta to apply for their release pending the determination of their status or their removal from the territory. The same amendment to the Refugees Act has also introduced an amendment to the Immigration Act making it possible to the Immigration Appeals Board to order the temporary release from custody of persons awaiting the determination of their asylum or refugee application (Sec. 25A(9) of Cap. 217 of the Laws of Malta). The Board shall only grant release from custody under subsection (9) of section 25A where in its opinion the continued detention of such person is taking into account all the circumstances of the case, unreasonable as regards duration or because there is no reasonable prospect of deportation within a reasonable time. The law however still does not impose a maximum period of detention pending status determination or removal from the territory.

In any case, it is clear that the justified detention of foreigners in accordance with Article 5(1) of the European Convention on Human Rights with a view to their removal from the territory should not prevent access to the asylum procedure or the exercise of legal remedies against the deprivation of liberty or an expulsion decision taken against them. In line with the concerns voiced in an opinion delivered on 6 June 2002 by the National Human Rights Commission (NHRC), the office of the High Commissioner for Refugees in Athens expressed its concern that in **Greece** it is not made easy for NGOs and lawyers to access detention or reception centres where foreigners are confined pending expulsion ("UNHCR Position on Important Aspects of Refugee Protection in Greece", November 2004).

Other relevant developments

Deprivation of liberty of alcoholics - The adoption by **Poland**, on 4 February 2004, of a regulation of the Minister of Health on the procedure of bringing, admitting and releasing intoxicated people and the organisation of sobering up chambers and institutions established or appointed by local government units (Official Journal of 2004, No. 20, item 192) constitutes a welcome development. The regulation concerns the procedure of escorting and admitting to sobering up chambers, police units and other institutions created for this purpose. It introduces an obligation to inform, in writing, the individuals being released of the possibility to file a complaint against the factual grounds and lawfulness of the detention. The regulation also defines the conditions at sobering up chambers and the cost of residing in the facilities.

Article 7. Respect for private and family life

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

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

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

It is obvious that an adequate protection of the right to respect for private life in the context of the exercise of their investigatory and surveillance powers by law enforcement authorities requires, as a preliminary condition, that the constitutional and/or legislative framework protecting the right to privacy be sufficiently clear and accessible, ensuring that every citizen may know in which circumstances and under which conditions his/her privacy rights may be interfered with, and that such a framework ensures the compatibility of surveillance measures with the rule of law, implying a measure of legal protection in domestic law against arbitrary interferences by public authorities with the right to respect for private life. Where a power of the executive is exercised in secret and where, as a consequence, the risks of arbitrariness are most evident, as the implementation of such a power by definition is not open to scrutiny by the individuals concerned or the public at large, the legal discretion granted to the executive may not be expressed in terms of an unfettered power. The law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see Eur. Ct. HR, *Malone v. the United Kingdom* judgment of 2 August 1984, Series A no. 82, p. 32, § 67; Eur. Ct. HR (GC), *Amann v. Switzerland*, Appl. N° 27798/95, § 56, ECHR 2000-II).

In the light of these requirements, the Network expresses its astonishment at the fact that, although this lacuna has already been identified by the Law Reform Commission Report on Privacy in 1998, **Ireland** still has not defined with the required precision the contours of the right to privacy, the legal protection of whom in the context of the exercise by the Executive of its powers remains therefore insufficient.

The Network notes with concern that developments in the **Czech Republic, Denmark, Estonia**, **Lithuania,** the **Slovak Republic,** and **Sweden**, confirm a general trend towards the expansion of proactive surveillance powers being attributed to the police or to intelligence services, making it possible for the police to interfere with the right to respect for private life, for instance by monitoring communications or by effectuating searches, even before any criminal offence is committed, on the basis of the suspicion that certain targeted individuals may commit an offence of a defined level of seriousness. Often, the introduction of these measures or the expansion of the investigative powers of the police are justified by the need to counter terrorism or organized crimes. This constitutes the continuation of a trend already identified during the year 2003.

In this context, the Network urges the Member States to improve the monitoring of the use by the police of such powers, in particular in order to avoid that these powers be exercised in a discriminatory fashion, for instance on the basis of the religion, nationality, or country of origin of the persons subjected to such surveillance measures. In this regard a Home Office report has indicated that in the **United Kingdom** black people are much more frequently subjected to the exercise of stop and search powers by the police. Thus under general powers the *per capita* rate had risen from 14 per 1,000 in 2001-02 to 16 per 1,000 in 2002-03 in the case of white people, while the increases for Asians in the same periods were from 20 to 27 and for blacks from 67 to 92. Moreover in the case of powers under the Terrorism Act 2000, there was an overall increase in usage of 151% but in the case of blacks and Asians the increases were 229% and 285%

respectively, with an increase of 344% in the case of persons whose ethnicity was not recorded. Moreover less than 2% of those stopped were arrested (*Statistics on Race and Criminal Justice – 2003*).

The monitoring of the use by the police of special or particular methods of inquiry or research should involve either independent monitoring bodies, or parliamentary committees in which the opposition parties are represented, as in the model of the *Parlamentarisches Kontrollgremium* created in **Germany** under the Act regarding Article 10 of the Basic Law. Welcoming in this regard judgment n°202/2004 delivered on 21 December 2004 by the Belgian Court of Arbitration partially annulling the Law of 6 January 2003 on particular research methods, described in the report on **Belgium**, the Network recalls that where certain secret surveillance measures are adopted, which create an interference with the right to respect for private life, they should be placed under judicial control, for example under the control of the investigatory judge, rather than left to the initiative of the police or the prosecuting authorities, and that the competent judicial authority should ensure that the collection of evidence will not lead to a violation of the right to respect for private life. Such a judicial control should examine requests by the police or prosecuting authorities to resort to special investigative measures, which are invasive of privacy, by applying to such requests the appropriate level of scrutiny. The Network notes, for instance, that in **Finland**, courts seem to defer to the judgment of the police as to the necessity to monitor communications, thus diminishing the effectiveness of the judicial control exercised on these interceptions. The Network also considers that, in order to remove any incentive of the law enforcement authorities to ignore the restrictions imposed by the right to respect for private life, the evidence collected in violation of the right to respect for private should be considered inadmissible in criminal trials.

Moreover, where certain surveillance measures may be resorted to in order to prevent the commission of "terrorist" acts, such acts must be defined at the adequate level of precision in order to avoid an arbitrary, and potentially discriminatory, use of these powers. The Network recalls in this regard that the replication, in national law, of the definition of terrorism provided by the Council Framework Decision of 13 June 2002 on combating terrorism (OJ L 164 of 22.6.2002, p. 3), may not comply with the principle of legality, as found also by the Human Rights Committee (Concluding Observations on Estonia, 15.4.2003, CCPR/CO/77/EST; see also the Thematic Comment n°1 of the EU Network of independent experts on fundamental rights, at pp. 7, 11 and 16). Instead, referring to the wording chosen by the UN Security Council Resolution 1566(2004) of 8 October 2004 and by the High-level Panel on Threats, Challenges and Change mandated by the Secretary General of the United Nations in para. 164 of its report « A more secure world: our shared responsibility » (UN Doc. A/59/565, 2 December 2004), the Network considers that, where required, terrorism may be defined as any criminal action that is intended to cause death or serious bodily harm to civilians or non-combatants, or the taking of hostages, when the purpose of such an act, by its nature or context, is to intimidate a population by provoking a state of terror in the general public or in a group of persons or particular persons, or to compel a Government or an international organization to do or to abstain from doing any act. Whether this or an alternative, more precise wording is adopted, matters less in the view of the Network than that efforts continue to define terrorism with the required precision, if it is to be relied upon in national criminal law and procedure.

Controls imposed on potential candidates in employment
(in particular security checks with regard to applicants for "sensitive positions")

On 27 July 2004 the European Court of Human Rights delivered its decision in the case *Sidabras and Džiautas v.* ***Lithuania*** (Eur. Ct. H. R., *Sidabras and Džiautas v. Lithuania* (Appl. nos. 55480/00 and 59330/00), judgment of 27 July 2004.) In this judgment, the Court declared that the treatment of the two officers under the Law on the Evaluation of the USSR State Security Committee and the Present Activities of Permanent Employees of the Organisation (Dėl SSRS valstybės saugumo komiteto (NKVD, NKGB, MGB, KGB) vertinimo ir šios organizacijos kadrinių darbuotojų dabartinės veiklos

įstatymas, Valstybės žinios, 1998, Nr.65-1877) was in violation with Article 8 ECHR taken in conjunction with Article 14 of the Convention. Observing that by specifying private *sector* activities from which the former KGB officers were to be excluded the law contained no definition of the specific jobs, functions or tasks which the applicants were barred from holding, the Court found the legislative scheme to be lacking the necessary safeguards for avoiding discrimination and for guaranteeing an adequate and appropriate judicial control over the imposition of such restrictions. Moreover the ban had affected the applicants' ability to develop relationships with the outside world to a very significant degree, and had created serious difficulties as regards the possibility to earn their living, with obvious repercussions on their enjoyment of their private life. The retention of traffic data

On 28 April 2004, **France**, **Ireland**, **Sweden** and the **United Kingdom** have submitted a proposal for a Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism. Although it will not repeat here the analysis of this proposal which is detailed in the Report on the situation of fundamental rights in the Union in 2004, the Network wishes to express its concern at the potential consequences of this proposal, if it is adopted. The Data Protection Working Party « Article 29 » notes in this regard in its Opinion n°9/2004 of 9 November 2004 (11885/04/EN, WP 99):

The routine, comprehensive storage of all traffic data, user and participant data proposed in the draft decision would make surveillance that is authorised in exceptional circumstances the rule. This would clearly be disproportionate. The draft framework would apply, not only to some people who would be monitored in application with specific laws, but to all natural persons who use electronic communications. Additionally all the communications sent or received would be covered. Not everything that might prove to be useful for law enforcement is desirable or can be considered as a necessary measure in a democratic society, particularly if this leads to the systematic recording of all electronic communications. The framework decision has not provided any persuasive arguments that retention of traffic data to such a large-scale extent is the only feasible option for combating crime or protecting national security. The requirement for operators to retain traffic data which they don't need for their own purposes would constitute a derogation without precedent to the finality/purpose principle.

The Network also notes that the Convention on cybercrime opened to signature in the framework of the Council of Europe in 2001 does not provide for the possibility of a generalized retention of data. Article 20 of that convention provides for the possibility of real-time collection of traffic data, which only concerns the collection and recording of traffic data, in real-time, « associated with *specified* communications in its territory transmitted by means of a computer system » (emphasis added). Indeed, the Explanatory Report to this convention states that under this article, « the traffic data concerned must be associated with specified communications in the territory of the Party. (…) The communications in respect of which the traffic data may be collected or recorded, however, must be specified. Thus, the Convention does not require or authorise the general or indiscriminate surveillance and collection of large amounts of traffic data. It does not authorise the situation of 'fishing expeditions' where criminal activities are hopefully sought to be discovered, as opposed to specific instances of criminality being investigated. The judicial or other order authorising the collection must specify the communications to which the collection of traffic data relates » (para. 219).

The Network finds surprising that the need for a systematic and generalized system of retention of traffic data has appeared now, before any insufficiencies of the Convention on Cybercrime have been identified and in the absence of any study on the need to expand the possibilities the law enforcement authorities already have at their disposal with the current periods during which the concerned data are preserved.

Voluntary termination of pregnancy

While acknowledging that there is at yet no settled case-law in international or European human rights law concerning where the adequate balance must be struck between the right of the women to interrupt her pregnancy on the one hand, as a particular manifestation of the general right to the autonomy of the person underlying the right to respect for private life, and the protection of the potentiality of human life on the other hand, the Network nevertheless expresses its concern at a number of situations which, in the view of the independent experts, are questionable in the present state of the international law of human rights.

A woman seeking abortion should not be obliged to travel abroad to obtain it, because of the lack of available services in her home country even where it would be legal for her to seek abortion, or because, although legal when performed abroad, abortion in identical circumstances is prohibited in the country of residence. This may be the source of discrimination between women who may travel abroad and those who, because of a disability, their state of health, the lack of resources, their administrative situation, or even the lack of adequate information (as noted for **Ireland** by the Crisis Pregnancy Agency (CPA)), may not do so. A women should not be seeking abortion because of the insufficiency of support services, for example for young mothers, because of lack of information about support which would be available, or because of the fear that this might lead to the loss of employment : this requires, at the very least, a close monitoring of the pattern of abortions performed in the jurisdictions where abortion is legal, in order to identify the needs of the persons resorting to abortion and the circumstances which ought to be created in order to better respond to these needs. In the view of the Network, Ireland should immediately reform the work permits system, which presently allows for an employer not to renew the work permit of a non-national woman if she becomes pregnant. Referring to the Concluding Observations adopted on 5 November 2004 by the Human Rights Committee upon the examination of the report submitted by **Poland** under the International Covenant on Civil and Political Rights (CCPR/CO/82/POL/Rev. 1, para. 8), the Network notes that a prohibition on non-therapeutic abortion or the practical unavailability of abortion may in fact have the effect of raising the number of clandestine abortions which are practised, as the women concerned may be tempted to resort to clandestine abortion in the absence of adequate counselling services who may inform them about the different alternatives opened to them. According to the report of Directorate general (*Direcção-geral de Saúde*), in **Portugal** in 2003, 1019 women entered the hospitals due to complications caused by abortions "out of the legal framework". Therefore, the Parliament has issued a Resolution containing several recommendations for government to legislate on the prevention of the voluntary interruption of pregnancy, in domains like education, motherhood support, pregnancy planning and health (*Resolução da Assembleia da República nº 28/2004, de 19 de Março*). During 2004, the media focused a lot on the abortion, due not only to the several judgements of women, doctors and nurses on the grounds of illegal abortion, but also because the Portuguese government impeded "Borndiep boat" of the Dutch Association "Women on Waves" to enter in Portuguese territorial waters. This decision was taken on grounds of "public security and to avoid the violation of Portuguese norms", and was attacked as a gross violation of the freedom of movement and expression of the EU citizens, and therefore of the Community Law. Surprisingly, the Administrative Court of Coimbra (*Tribunal Admnistrativo de Círculo de Coimbra*) gave reason to Portuguese government, rejecting the petition of the promoting organizations. The associations appealed to the court of second instance (*Tribunal Central Administrativo Norte*), which confirmed the first instance decision. They are still waiting for the pronunciation of the Supreme Administrative Court (*Supremo Tribunal Adminstrativo*), who will decide in last instance. Nonetheless, at least one of the aims was accomplished, as it launched the debate on abortion at public opinion. It is expected that is a near future the issue of the decriminalisation of abortion might come to the political agenda, probably through a referendum.

Where a State does choose to prohibit abortion, it should at least closely monitor the impact of this prohibition on the practice of abortion, and provide this information in order to feed into an

informed public debate. Finally, in the circumstances where abortion is legal, women should have effective access to abortion services without any discrimination.

Family reunification

Reasons for concern

Certain aspects of the rules on family reunification in **Denmark** are a source of concern to the Network. In particular, the administration of the 24 year age requirement combined with the aggregate ties requirement, both prescribed in the 2002 Aliens Act, although it may be justified by the need to combat forced marriages for the purposes of family reunification, may constitute a disproportionate means of seeking to attain that objective, and therefore results in a violation of the right to family life according to Article 8 of the European Convention on Human Rights; it may also be in violation of the obligation of Denmark to ensure that the right to family life is protected without discrimination, under Articles 10 and 2(2) of the International Covenant on Economic, Social and Cultural Rights, as noted by the UN Committee on Economic, Social and Cultural Rights (Concluding Observations of the Committee on Economic, Social and Cultural Rights on Denmark E/C.12/1/Add.102 26 November 2004, adopted by CSECR at the Thirty-third session 8 -26 November 2004). Moreover, the administrative practice of not considering the relation to children, other than separate children, with whom the resident practices a normal right of access, violates the right to family life guaranteed under Article 8 ECHR and Article 3 of the UN Convention on the Rights of the Child. The national report on the situation of fundamental rights in Denmark in 2004 identifies other difficulties with the rules relating to family reunification in that country. It is important that these concerns are addressed.

Still upon examination of the situation of the right to family reunification in **Denmark**, the Network acknowledges that the introduction in the Act (2004:427), amending the Aliens Act and the Integration Act, of a deferred period in connection with reunification with a spouse, where the person within a period of 10 years from the time of the application for family reunification has been convicted of a violent crime against a former spouse or cohabiter, may contribute to protect foreign women against domestic violence in Denmark. The same Act however reduces the age limit for minor children's right to family reunification from 18 years to 15 years. The Network recalls that, under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3.10.2003, p. 12), the Member States should authorize the entry and residence on their territory, for the purposes of family reunification, of the family members of the third country national residing lawfully on their territory, including the minor children of the sponsor and/or the spouse "must be below the age of majority set by the law of the Member State concerned and must not be married" (Article 4(1), al. 2). In its previous set of conclusions and recommendations concerning the year 2003, the Network of independent experts, recalling that, when implementing EC Law, the Member States are bound to respect the Charter of Fundamental Rights and the other fundamental rights which belong to the general principles of Union law, invited the Commission to monitor closely the implementation measures adopted by the Member States (Synthesis Report: Conclusions and Recommendations, at pp. 28-29). Indeed, the Network arrived at the conclusion that Directive 2003/86/EC contained a number of important exceptions to the principle of family reunification, as it failed to recognize the distinction between family reunification as a right protected under Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights and family reunification as a humanitarian measure granted by the State concerned, and that in a number of situations, the use of those exceptions by the Member States could be in conflict with their obligation to comply with fundamental rights.

In the view of the Network, the provision in the Act (2004:427) amending the Aliens Act and the Integration Act reducing the age limit for minor children's right to family reunification from 18 years to 15 years, although not necessarily a violation of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification as such, may lead to violations both of the right to respect for family life as guaranteed under Article 8 of the European Convention on Human Rights, and of Article 9 of the Convention on the Rights of the Child, Article 1 of which defines a child to be "every human

being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". Such violations would result from a situation where a child above 15 years old would be prohibited from joining his father and/or mother in **Denmark**, where the family life could not be pursued elsewhere. The Network is aware that, according to the explanatory note of the Bill, a residence permit will have to be issued to children between 15 and 18 years in exceptional cases where refusal would be contrary to Article 3 of the Convention on the Rights of the Child or Article 8 of the European Convention on Human Rights, for instance where a refugee who has left his children in the country of origin is granted asylum and applies for reunification with a child older than 15 years. It regrets however that this is not stipulated in the Aliens Act itself, and that the risk that a violation of the right to family life will result from the application of this lowered age limit therefore remains present.

The European Committee on Social Rights (Conclusions XVII-1) concluded that the situation with regard to family reunion in the **United Kingdom** was not in conformity with Article 19(6) of the Charter in that the government had failed to show that applications for family reunion in respect of migrant workers' children aged between 18 and 21 are granted in practice and applications for family reunion are systematically refused if this could entail an increase in social benefit financed from public funds paid to the migrant worker. In addition it confirmed its finding that the United Kingdom was not in conformity with Article 19(8) of the Charter in that family members of a migrant worker who are nationals of Contracting Parties that are not members of the EEA or EU, as well as children of a migrant worker who are nationals of EU member states or parties to the EEA but are aged under 17 years of age, are liable to expulsion following a migrant worker's deportation.

Under Article 4(5) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, the Member States are authorised, by way of derogation, to request "that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive [3 October 2005]". The adoption the provision in the Act (2004:427) amending the Aliens Act and the Integration Act reducing the age limit for minor children's right to family reunification from 18 years to 15 years therefore may have been encouraged by the Directive on the right to family reunification, offering a regrettable example of a Community legislation which has encouraged a race to the bottom by the Member States seeking to rely upon the derogations it allows for. In the view of the Network, this illustrates clearly the need for a more thorough examination of the impact on fundamental rights of Union legislation before such legislation is adopted, as such a consequence could have been easily anticipated, and indeed, must have been intended by the Member States, who should have been made attentive to the implications on fundamental rights of such choices.

The Network reiterates that, where a European legislative instrument is adopted in a field which concerns the exercise of a fundamental rights, it should at a minimum define the obligations of the Member States at a level which ensures that they respect the obligations imposed on all States by the international and European law of human rights, as well as the requirements of the Charter of Fundamental Rights. The Network is aware that the Directive on the right to family reunification does not affect the possibility for the Member States to adopt or maintain more favourable provisions (Article 3(5)), and that, as implied by Article 6(1) EU, the Member States are obliged to adopt or maintain more favourable provisions where this is required by the fundamental rights protected in the Union legal order. However a preventive and proactive approach is to be preferred to a reactive approach, whereby the implementation measures adopted by the Member States are controlled, post hoc, for their compliance with the requirements of fundamental rights, either by the exercise, by the alleged victims of such violations, of judicial remedies, or in exceptional cases by infringement proceedings against the State concerned.

The Network notes, for instance, that under Article 6 of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, the Member States may reject an application for entry and residence of family members on grounds of public policy, public security or public health, and that they may withdraw or refuse to renew a family member's residence permit on grounds of

public policy or public security or public health. The reference to public health, however, should not lead to disproportionate restrictions being imposed to the right to family reunification as recognized in the Directive. In its interpretation of Article 19(6) of the Revised European Social Charter, under which the Parties undertake to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory, the European Committee of Social Rights considers that "refusal to family reunion for health reasons is possible in case of specific illnesses requiring quarantine stipulated in the World Health Organisation's International Health Regulations of 1969 (which replaced the International Sanitary Regulation No. 2 of 25 May 1951). These diseases are, as mentioned in the Health Regulations, cholera, including cholera due to the eltor vibrio, plague and yellow fever. Refusal for health reasons is also possible in case of serious contagious or infectious diseases such as tuberculosis or syphilis. If, on a case by case basis, it is established that very serious drug addiction or mental illness poses a threat to public order or security, then this could justify refusal of family reunion". On that basis, it found that the situation in **Cyprus** was not in conformity with this provision of the Revised European Social Charter, on the grounds that diseases, other than those mentioned in the WHO Regulations are posed as an obstacle to family reunion.

Article 3(4), b) of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification states that it is "without prejudice to more favourable provisions of the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 (read: 1996)". Article 19(6) of the Revised European Social Charter should however be taken into account also by the Member States who have not accepted this provision of the European Social Charter or of the Revised European Social Charter, insofar as it is simply a particular manifestation of the general right to respect for family life protected under Article 7 of the Charter of Fundamental Rights. For instance, although **Denmark** has not accepted to be bound by Article 19(6) of the European Social Charter to which it is a Party, it should take into account that, in its interpretation of this provision, the European Committee of Social Rights considers that denying the right to family reunification to children between 18 and 21 years of age in a country where the majority is set at 21 years old, is not in compliance with the Charter (Conclusions XVII-1 (Spain) 2004).

The Network would emphasize that, although it has serious concerns about the approach followed by **Denmark** with respect to the right to family reunification, other Member States too have followed a path which could potentially lead to violations of the right to respect for family life. For instance, with respect to the **Netherlands**, the Network shall examine what the combined effect will be of the compulsory *inburgeringsexamen*, the cost of which is a source of concern to the Network, and the new requirements that are imposed on *gezinsvorming* (a higher minimum age for foreign spouses and a higher income on the part of the residing spouse). In individual cases this may lead to a situation that is incompatible with the effective enjoyment of the right to respect for family life. Moreover the new rules which have been adopted in the field of family reunification do not apply to all foreigners, and they may have a disparate impact on women. As a number of reforms of the rules on family reunification will occur in 2005, the Network urges the Member States, in their implementation of Council Directive 2003/86/EC, to take into account their international obligations and the fundamental rights protected within the Union legal order.

The Network is concerned by the fact that in **Lithuania** the new Law on Foreigners Legal Status (2004 04 29 LR įstatymas "Dėl užsieniečių teisinės padėties" Nr. IX-2206 [29 April 2004 Law on Foreigners Legal Status Nr. IX-2206] // Valstybės žinios, 2004, Nr. 73-2539) limits the right to family reunification to Convention refugees. Moreover although Council Directive 2003/86/EC on the right to family reunification explicitly exempts the Convention refugees from the two years residence requirement term, the new Law requires Convention refugees – along side with other third country nationals – to reside for at least two years in Lithuania in order to have their right to family reunification recognised. The Network is also concerned by the fact that the new Law on Foreigners Legal Status does not provide for the possibility of issuing, in Lithuania, a residence permit to an alien being married to a Lithuanian national but illegally residing on the territory. The alien has to leave the country – or is deported – and has to apply for the Lithuanian residence permit from abroad. Similarly the fact that, in **Poland**, the legislation does not provide for the possibility of issuing a residence

permit to an alien being in a relationship with a Polish citizen with whom he/she did not enter into marriage, is a source of concern. These aliens, staying in Poland illegally, receive an expulsion decision. Such practices raise serious doubts as to their compatibility with Article 8 ECHR.

Personal identity

Positive aspects

The Network welcomes the adoption in the **United Kingdom** of the Gender Recognition Act 2004, which seeks to provide transsexual people with legal recognition in their acquired gender. Such recognition will follow from the issue of a gender recognition certificate by a Gender Recognition Panel which must be satisfied that the applicant has, or has had, gender dysphoria, has lived in the acquired gender throughout the preceding two years and intends to continue to live in the acquired gender until death. On the issue of a gender recognition certificate the person concerned will be entitled to a new birth certificate reflecting the acquired gender (provided a United Kingdom birth register entry already exists for that person) and will be able to marry someone of the opposite gender to his or her acquired gender. Although a person is regarded of being of the acquired gender, he or she will retain their original status as either father or mother of a child. The recognition of the acquired gender will only affect the distribution of property under a will or other instrument made after the Act enters into force and persons whose expectations are affected thereby can ask a court to make such order as it considers just. Bodies responsible for regulating participation in competitive sporting events may prohibit or restrict the participation in such events of a person who is recognised in an acquired gender and is seeking to compete in it if this is necessary to secure fair competition or the safety of other competitors. The Act has no effect on the descent of any peerage, dignity or title. It is an offence to disclose information obtained in an official capacity about a person's application for a gender recognition certificate or about the gender history of a successful applicant. A Gender Recognition register will also be established which will not be open to public inspection or search.

Article 8. Protection of personal data

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

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

According to the explanations provided by the Presidium of the Convention entrusted with the elaboration of the Charter of Fundamental Rights, as updated under the responsibility of the Praesidium of the European Convention, Article 8 of the Charter of Fundamental Rights has been based, inter alia, on Article 286 of the Treaty establishing the European Community, which will replaced by Article I-51 of the Constitution if and when the Constitution enters into force. In turn, this provision states that European laws or framework laws shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies,

offices land agencies, and by the Member States when carrying out activities which fall within the scope of Union law. The Network notes however that, in laying down these rules, the European legislator remains bound by those principles, as defined in particular by the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, of 28 January 1981, the rules of which should be understood as applying to all types of processing, whether automatic or not. Moreover, it follows from Article 53 of the Charter (Article II-113 of the Constitution: Level of protection) that, although Article 8 of the European Convention on Human Rights is not identified as corresponding to Article 8 of the Charter of Fundamental Rights in the sense of Article 52(3) of the Charter (Article II-112(3) of the Constitution), the interpretation of Article 8 of the Charter of Fundamental Rights must take into account the relevant case-law of the European Court of Human Rights, which considers that the processing of personal data constitutes an interference with the right to respect for private life guaranteed in Article 8 of the European Convention on Human Rights.

The protection of personal data of workers

Noting with interest the adoption, by the **Czech Republic**, of Law No. 435/2004 Coll., on Employment (Zákon č. 435/2004 Sb., o zaměstnanosti), one of the objectives of which is to clarify the legal framework protecting the private life of workers or prospective workers, as well as the improved legal protection of the right to private life of the employee in **Finland**, the Network welcomes the announcement, made by the European Commission in its Communication on the Social Agenda (COM(2005)) of 9 February 2005, that it will propose an initiative in 2005 on the protection of personal data of workers. Also, in **Portugal**, the Parliament issued an Act (*Lei nº 35/2004, de 29 de Julho – Lei Regulamentar do Código do Trabalho*) that regulates the Labour Code containing some rules on worker's data protection; the general use of video surveillance is forbidden, and can only be permitted, when worker's safety ought to be protected.

The Network considers that the adoption of a sectorial directive would be most desirable in the area of employment relations, especially in view of the specific features of this field in relation to the general approach adopted by Directive 95/46/EC of 24 October 1995. There is a proliferation in the technical mechanisms to help the employer take decisions in the management of persons who are applying for a job or who, once the employment contract has been concluded, are under his control or direction. These include personality and intelligence tests that are used in the recruitment process and that are generated by special software, the recording of recruitment interviews in order to allow evaluation by other persons than the interviewer or to notice more precisely the reactions of the interviewee, the systems for monitoring workers in the workplace – for example through the use of video surveillance or counting or measuring the work by computer -, the use of security badges allowing the identification of staff as well as their location on the company premises at any time. It is important that a Community initiative is taken soon in order to harmonize the way in which the Member States regulate those practices. A harmonized legislative framework will facilitate the deployment of the activities of multinational companies operating in several Member States, in particular in the management of their human resources. Above all, the general framework of Directive 95/46/EC does not seem entirely adequate in the context of employment relations, which are characterized by an imbalance between worker and employer, as has already been pointed out by the "Article 29" Data Protection Working Party, set up under Article 29 of Directive 95/46/EC (Opinion no. 8/2001 on the processing of personal data in the employment context, WP 48, 5062/01, 13 September 2001), and may call for certain additional guarantees for the benefit of the former, while respecting the prerogatives of the latter, in particular his authority to organize the work in the workplace.

In the Network's view, the contribution of a specific directive on the processing of personal data in the context of employment relations should have the advantage of clarifying the rules applicable to the processing of personal data as part of the implementation of positive action plans in the company with a view to fostering the integration of certain underrepresented categories in certain sectors or at certain levels of the professional hierarchy. Such an approach involves the processing of "sensitive" data relating more particularly to "racial" or ethnic origin, religious beliefs, health or sexual orientation,

which may only be processed subject to certain specific guarantees (Guideline 5 of the Guidelines for the regulation of computerized personal data files, adopted by the United Nations General Assembly in its Resolution 45/95 of 14 December 1990; Article 6 of Convention no. 108 of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data; Article 8 of Directive 95/46/EC above). Principle 10.1 of Recommendation no. R(89)2 addressed on 18 January 1989 by the Committee of Ministers to the Member States of the Council of Europe on the protection of personal data used for employment purposes provides that sensitive data "should only be collected and stored in particular cases within the limits laid down by domestic law and in accordance with appropriate safeguards provided therein. In the absence of such safeguards, such data should only be collected and stored with the express and informed consent of the employees".

Without prejudice to the conditions under which positive action should be considered consistent with the principle of equal treatment, the Network believes that the collection and storage of sensitive data with a view to giving preferential treatment to persons belonging to a particular ethnic or religious minority, to persons with a disability or to persons with a particular sexual orientation can only be allowed if, on the one hand, the person concerned has given his express consent to such processing and, on the other hand, the national law offers adequate safeguards. Those safeguards should include not only the safeguards imposed by the principles governing the protection of personal data in general, but also the following safeguards:
- The processing of personal data for the purpose of conducting a policy of positive action is only justified insofar as such a policy exists and is effectively implemented;
- The employees must be adequately informed about this policy, the connection between that policy and the processing of personal data, and the safeguards surrounding this processing;
- In accordance with the principle of joint discussion, the implementation of a policy of positive action involving the processing of personal data must be discussed with the employees or their representatives.

The directive on the processing of personal data in the context of employment relations should also make a clear distinction between, on the one hand, the safeguards that should surround the processing of personal data for the purpose of conducting a policy of positive action for the benefit of particular persons belonging to a disadvantaged or underrepresented group, and on the other hand the safeguards that should surround the processing of personal data for the purpose of a self-assessment by the employer of his practices in the area of diversity. When the objective pursued is not to offer advantages to specific individuals, but to identify the obstacles to sufficient diversity within the workforce, the data collected among the workers should be made anonymous immediately, and preference should in any case be given to techniques that do not involve any processing of personal data, for example by means of surveys conducted among the staff of the company on an anonymous basis. When setting forth the guarantees applicable to this form of monitoring, the directive should take into consideration, mutatis mutandis, the principles stated in Recommendation no. R(97)18 of the Committee of Ministers of the Council of Europe to Member States concerning the protection of personal data collected and processed for statistical purposes, adopted on 30 September 1997.

The Network also notes that the directive on the protection of privacy with regard to the processing of personal data in the context of employment relations should specify that the consent of the employee concerned, or of the job applicant, does not constitute a sufficient justification for the processing, unlike what is currently provided under Article 7(a) of Directive 95/46/EC. Bearing in mind the conditions surrounding the respective negotiating positions of worker and employer, although the processing of personal data may be made subject to the worker's consent, such consent does not suffice in itself to justify the processing.

The Network also points out that a special place should be reserved for the social partners in the implementation of a system of personal data processing in the company. According to the above-mentioned Recommendation no. R(89)2, "employers should, in advance, fully inform or consult their employees or the representatives of the latter about the introduction or adaptation of automated systems for the collection and use of personal data of employees. This principle also applies to the

introduction or adaptation of technical devices designed to monitor the movements or productivity of employees" (Principle 3.1). The joint discussion should be aimed at minimizing interference in the privacy of employees which may result from the introduction in the company of new monitoring systems, and at looking through joint consultation for alternative solutions that are capable of yielding the same result while involving less interference in the privacy of workers.

Finally, the Network observes that according to Article 15 of Directive 95/46/EC, every person has the right "not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc", but that an automated individual decision is acceptable if it is taken "in the course of the entering into or performance of a contract, provided the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or that there are suitable measures to safeguard his legitimate interests" (Article 15(2)). Also taking into account Recommendation no. 1/2001 on employee evaluation data, adopted by the "Article 29" Data Protection Working Party on 22 March 2001 (WP 42, 5008/01), the Network considers that it would be advisable for the directive to confirm that the exception under Article 15(2) cannot justify an automated processing of nominative data for recruitment purposes, not only because the consent given by a worker to the processing of personal data in the context of a recruitment procedure cannot be considered to have been given freely, but also because, in accordance with the very wording of Article 15(2), during the recruitment phase the request for the entering into the contract has not yet been satisfied, but on the contrary will depend on the outcome of the selection made by the employer.

Protection of private life in the context of insurance contracts

The Network notes that, while the disparities which exist between the Member States in the protection of the private life of employees vis-à-vis the processing of personal data may justify an initiative of the Community in that field, implementing the principles of Directive 95/46/EC while taking into account the specific characteristics of the employment relationships, similar disparities exist in the practices of insurance companies in the Union, and in the legal frameworks adopted by the Member States. During the period under scrutiny for instance, the **Czech Republic** adopted the new Act on the Insurance Contract (Zákon č. 37/2004 Sb., o pojistné smlouvě a změně souvisejících zákonů (zákon o pojistné smlouvě) [Law No. 37/2004 Coll., on the Insurance Contract and on Amendment of Related Acts (Act on the Insurance Contract)]), which came in force on 1 January 2005 and § 50 of which introduces specific rules regarding obtaining of information concerning health condition or cause of death of the insured person. In **Cyprus**, the Medical Association has criticised insurance companies for insisting on having access to confidential medical reports before compensating their clients, after having required clients or prospective clients to fill out a questionnaire which included a section on "actual diagnosis". In **Portugal**, several cases were brought to the National Commission for Data Protection (CNDP – *Comissão Nacional para a Protecção de Dados*, an independent public body) by insurance companies seeking permission to have access to personal data of a deceased person kept by health institutions, but the general case-law of the CNPD is to deny access to those data, based on the particular purpose of the data processing: data is stored only for personal health related issues, and not for the use by insurance companies. Nevertheless this protective measure may have a negative impact on a person's life, as, in most cases, insurance companies refuse to pay anything until the information concerning the health of the insured person is available.

The Network would welcome an initiative of the European Commission clarifying the principles of Directive 95/46/EC in the field of insurance, while taking into account the specific characteristics of the processing of personal data for insurance purposes. Such an initiative should seek to achieve a high level of protection of the insurance takers, and should take Recommendation Rec(2002)9 of the Committee of Ministers of the Council of Europe to member states on the protection of personal data collected and processed for insurance purposes, adopted by the Committee of Ministers on 18 September 2002, as defining the minimum requirements applicable to this field. Specific attention

should be brought to the processing of data relating to health for the conclusion of a life insurance contract.

Video-surveillance

The Network welcomes the Opinion adopted by the Working Party on Data Protection created under Article 29 of Directive 95/46/EC on the processing of personal data by means of video surveillance (Opinion n° 4/2004 of 11 February 2004, 11750/02/EN - WP 89). Indeed, it finds that, in a number of Member States during the year 2004, the development of monitoring by video surveillance has led to serious concerns that the legal framework applicable to this form of monitoring is insufficiently clear, especially where private actors choose to rely on video surveillance. This was observed for example in **Spain** in the *Informe anual 2003 del Defensor del Pueblo* [Annual Report 2003 of the Spanish Ombudsman, published in 2004], which points to the risk resulting from an arbitrary use of video surveillance in monitoring street demonstrations, or by the *Síndic de Greuges de Catalunya* [Catalan Ombudsman], who deplored the legislative deficiency in the area of video surveillance in private enterprises in his *Report to Parliament 2004*. Moreover, even where the national legislation applicable defines clear rules with respect the conditions of this form of monitoring – as is the case in the **Slovak Republic**, where according to Section 10 paragraph 7 of the Personal Data Protection Act, an area open to public may be monitored with video-recording or audio-recording purely for the purposes of public order and security, detection of crime or violation of state security and in principle only when the area is clearly marked as the monitored area –, there appears to be a generally poor monitoring of the compliance with that legislation. Some progress has been made during the year 2004, for instance by a clarification of the video surveillance of employees in **Finland** or by the *Garante*, the Independent Data Protection Authority in **Italy**, which delivered an opinion on this question on 29 April 2004; however it is important in the light of the need for a uniform application of Directive 95/46/EC that the same clarification be made at the level of the Union. In **Portugal,** the Data Protection Act (*Lei nº 67/98, de 26 de Outubro*) expressly states that its general provisions apply to video surveillance. Image – and sound – is considered personal data, as long as it allows the identification of the person. The Act also applies to video surveillance for public security purposes. During 2004, Parliament has approved a new Act on the use of video surveillance in public fora by the police forces, still to be published (*Projecto-lei 44/IX/2*), that permits the use of video surveillance for the security of public buildings, national security facilities, also for the protection of people and goods and for crime prevention. The Act considers the use of permanent and non permanent cameras. The use of permanent cameras must be authorised by the Minister of Home Affairs, with previous favourable opinion of the CNPD, and a public register of video surveillance used in public *fora* must be kept.

Part of the problem created by the development of monitoring by video surveillance results from an indiscriminate use of this form of monitoring, in circumstances where other, less intrusive surveillance mechanisms would be as efficient. In order to limit the risks associated with an overbroad reliance on video-surveillance, the concerned parties should be made aware of the impact of video-surveillance on the respect for private life. The initiatives taken in **Denmark** by the trade organisation for security companies producing surveillance equipment and offering security services (SikkerhedsBranchen), which hosted seminars and initiated discussions among politicians and in the media on the societal impact of increased video surveillance in the public sphere, and which developed a code of conduct for its members on the setting up of surveillance equipment in order to avoid unnecessary and excessive use of such equipment, should be noted in this regard.

Intelligence and security services

As regards the **United Kingdom** the parliamentary Joint Committee on Human Rights has endorsed the view of the Newton Committee in 2003 that police powers conferred by Part 10 of the Anti-terrorism, Crime and Security Act 2001 to identify people and to retain fingerprints indefinitely ought not to have been included in emergency legislation and should be limited to cases where a person has been charged with an offence or is authoritatively certified as of ongoing importance in a terrorist

investigation and that the power to remove and confiscate disguises should be limited to situations where a senior police officer believes that the measure is necessary in response to a specific terrorist threat. It also endorsed the conclusions of the Newton Committee that: retention of and access to communications data should be based on a coherent statutory framework which should be part of mainstream rather than terrorism legislation; retention should be limited to one year; and the whole retention and access regime should be subject to unified oversight by the Information Commissioner (*Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4*, HL38/HC381).

Article 9. Right to marry and to found a family

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

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

General assessment

Positive aspects

In Belgium, a circular of 23 January 2004 (Circular of 23 January 2004 replacing the Circular of 8 May 2003 concerning the Act of 13 February [2003] opening marriage to persons of the same sex and amending certain provisions of the Civil Code, *M.B.*, 27 January 2004) presently sets forth that, if a provision of the national law of one or both of the spouses prohibits persons of the same sex from marrying, the application of this provision should henceforth be ruled out in favour of Belgian law which authorizes marriage between persons of the same sex insofar as one of the spouses is Belgian or habitually resides in Belgium. The argument given in the Circular is that the prohibition of marriage between persons of the same sex is in fact considered discriminatory and contrary to Belgian international public order. The choice made by **Belgium** to open up marriage between persons of the same sex to persons habitually residing in Belgium marks a step forward in the right to equal treatment of persons of homosexual orientation in the access to the institution of marriage. The Network also encourages municipalities in **Italy** to continue to set up 'registri delle unioni civili' (civil unions registers) giving same-sex couples certain rights to the public administration, such as the right to have council houses, and to follow the examples in that respect of municipalities such as Pisa, Firenze and Bologna. The Network welcomes the adoption in **Luxembourg** of the Act of 9 July 2004 on the legal effects of certain forms of partnership (Mém. A, n° 143 of 6 August 2004, p. 2020), which became effective on 1 October 2004, and which ensures the legal recognition of same-sex unions, even though this Act only addresses the rights and obligations of the partners, the effects of the partnership in the area of succession and social protection, without considering the possible consequences of such partnerships in the area of filiation and adoption. It also welcomes the adoption in the **United Kingdom** of both the Civil Partnerships Act 2004 – which enables same-sex couples to obtain legal recognition of their relationship by forming a civil partnership – and the recognition of the right to marry for transsexuals, which is an automatic consequence of the enactment of the Gender Recognition Act 2004 and which has been recognised by the European Court of Human Rights in the case of *Goodwin v. the United Kingdom*. The parliamentary Joint Committee on Human Rights has noted however that the extension of benefits and protections to unmarried same-sex couples who

register as civil partners gives rise to the need for justification of less favourable treatment of unmarried heterosexual couples on grounds of marital status (*Civil Partnership Bill*, HL 136/HC 855).

Reasons for concern

The Network points out that in **Belgium** the case law of the Council of State seems to suggest that the latter considers that the infringement of the right to respect for family life, within the meaning of Article 8 of the European Convention on Human Rights, represented by the expulsion of a person whose marriage in Belgium, granting him a right of residence, is annulled on the grounds of its bogus nature, even though this expulsion separates him from the child that is born from this marriage, is justified since the person concerned knew or should have known that his relationship with the child was tenuous. In the Network's opinion, this case law takes no account whatsoever of the right of the child not to be separated from his parents, nor of the fact that the existence of a family life should not be assessed solely on the basis of legal criteria, but on the basis of facts.

The Network notes that in **Cyprus**, although the provisions of Law 104 (I) of 2003 provide the possibility for the conclusion of a valid religious Muslim wedding for members of the Turkish Cypriot community or other Muslim persons resident in the territory of the Republic, no marriage officer capable of conducting a Muslim religious wedding is currently registered with the Ministry of Interior and that, as a result, religious marriage is still unavailable to the members of the Muslim community, where it is available to the members of the Greek Orthodox Church or of the other religious dogmas. This situation may potentially constitute a discrimination in the exercise of the right to marry, even though this is not a legal problem but a reflection of the fact that none has actually applied at the Ministry of Interior.

The Network considers the present state of the law in **Ireland** to be incompatible with the right to marry of transsexual persons, as under current Irish Law there is no provision allowing for the official recognition of transsexual people in the gender with which they identify, which results in an impossibility for transsexual people to marry in their reassigned gender and to have their birth certificates revised. The right to marry of transsexuals under Article 12 ECHR has been confirmed by the European Court of Human Rights in the case of *Goodwin v. the United Kingdom*. The Network also regrets that in **Luxembourg** the right of transsexuals to marry remains at present subject to the actual recognition of their new civil status, and that, as the law stands now, they can only marry a person of the opposite sex, that is to say, of their original sex.

While acknowledging the improvements brought to the rules on impediments to marriage in the Marriage Code in **Sweden**, the Network notes that that the Penal Code (Brottsbalken (BrB)) must also be adapted in order to combat more effectively the practice of forced marriages of children, when children, including children who are Swedish citizens, have been brought abroad by their relatives in order to arrange a marriage. The Network notes that, in the current state of the legislation, Swedish authorities are not empowered to interfere in such situations.

The European Committee on Social Rights concluded that the **United Kingdom** was not in conformity with Article 16 of the European Social Charter because full equality between spouses as regards matrimonial property continues not to be guaranteed in Northern Ireland (Conclusions XVII-1).

Article 10. Freedom of thought, conscience and religion

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

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

Reasonable accommodation for the exercise of freedom of religion

During the period under scrutiny, the European Court of Human Rights delivered a judgment in which it acknowledged the broad margin of appreciation which the States Parties to the Convention have with respect to facilitating the exercise of religious freedom by allowing derogations from regulations of general application. In the case of *Vergos v. Greece (Application no. 65501/01)* that gave rise to its judgment of 24 June 2004, the applicant claimed that the refusal of the government authorities to alter the land use plan of his town so as to grant him planning permission for the construction of a place of worship constituted an infringement of his freedom of religion, and requested a derogation from the established rules governing the land use plan of his town. The European Court of Human Rights considered, however, that the criterion adopted by the Council of State of **Greece** to balance the freedom of the applicant to practise his religion against the public interest in a rational town planning was not arbitrary: the public interest in question cannot, according to the Court, make way for the worshipping needs of one single member of the religious community of the "True Orthodox Christians" [followers of the Julian calendar for the religious festivals ("paleoimerologites")] while in a neighbouring town there is a place of worship that meets the needs of the religious community in the area. Bearing in mind the margin of appreciation of the contracting States in the area of town and country planning, the Court considered that the challenged measure was justified in its principle and that it was in proportion to the intended objective. It therefore concluded that there had been no violation of Article 9 of the Convention.

It remains desirable that the specific needs of the followers of non-dominant religious faiths are taken into account, if necessary, by introducing the possibility of exemptions from generally applicable and apparently neutral laws. In **Cyprus** for instance, where the Greek Orthodox Religion is dominant, the Central Prison of Nicosia not only has a mosque and includes religious texts in its library, but also has special dietary provisions for Muslim individuals. By way of contrast, in **Denmark**, a proposal for a parliamentary resolution was put forward by the Danish People's Party (Dansk Folkeparti) prohibiting public employees from wearing culture related headgear. The Network welcomes the defeat of this proposal, which could have constituted an interference with the freedom of religion protected under Article 9 ECHR and Article 18 ICCPR, and could have violated the prohibition against discrimination, since, according to the explanatory notes, it appeared to be strictly aimed at non-Christians and non-Jews. Furthermore, the prohibition would have established a barrier to a significant part of the labour market, since many, especially Muslim women, would have been denied access to employment at a workplace. In **Portugal** a new Concordat with the Catholic Church was ratified, replacing the Concordat of 1940. The representatives of other churches and the secular organizations have accused the new instrument of keeping some of the privileges of the Catholic Church; both the Catholic Church and the Government denied the accusation. The same reservations were aimed at the composition of the newly established Commission on the Freedom of Religion *(Comissão da Liberdade Religiosa)*, set up within the framework of the Lei da Liberdade Religiosa (Act on Freedom of Religion), Lei nº 16/2001, accusing it of undue overrepresentation of the Catholic Church.

Professional activities of churches and other public or private organizations whose ethos is based on religion or belief

Article 4(2) of 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, p. 16) provides, "Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organizations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organization's ethos." It is important to underline that this exception to the general principle of the prohibition of all discrimination on religious grounds is to be strictly interpreted. It concerns only activities for which, due to their very nature or the context in which they are carried out, the religion or belief constitutes an essential, legitimate and justified occupational requirement having regard to the organization's ethos. It cannot be taken to mean that any occupational activity in churches or other public or private organizations whose ethos is based on religion or belief can be reserved for persons professing a particular religion or adhering to the organization's ethos where this bears no relation to the activity to be carried out.

In **Ireland**, section 37(1) of the Employment Equality Act 1998 provides that: "A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of religious services in an environment which promotes certain religious values shall not be taken to discriminate against a person for the purposes of this [Act] if – it gives more favourable treatment, on the religion ground, to an employee or prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or it takes action which is reasonable necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution." This provision remains unaffected by the changes introduced in the Equality Act 2004. The Network is aware that it is defended on the basis that it provides protection for the manifestation of religious belief in certain employment contexts. It is concerned, however, that this provision may go beyond what is admissible under Article 4(2) of Directive 2000/78/EC, which has been quoted above. Moreover, while there is no doubt that the provision applies equally to majority and minority religious beliefs the exemption from discrimination claims that it provides will clearly have a disproportionate beneficial impact on majority religions that control religious, educational and medical institutions.

Conscientious objection

In **Cyprus**, the Law on the Establishment and Organisation of the National Guard and Related Issues [Νόμος Προνοών περί της Ιδρύσεως και Οργανώσεως της Εθνικής Φρουράς και περί Συναφών Ζητημάτων, N. 320/1964] as amended by Law 43(I)/2003, affords the possibility to a conscientious objector to be exempted from armed military service and are allowed to serve an alternative military service. However, alternative service constitutes either serving 34 months within army precincts (section 5A (1)(b)) or serving 42 months outside army precincts (section 5A (1)(a)), where active military service lasts for 26 months (section 5(1)). The Network considers this difference in treatment with regard to the length of these respective services to be problematic, and welcomes the fact that a Bill is pending before the Parliament in relation to conscientious objectors and their exemption from the obligation to do armed military service. It shares in this respect the concerns expressed by the

Council of Europe Commissioner for Human Rights in paragraph 40 of his Report on Cyprus. The status of conscientious objection in **Finland** is also problematic. In its Concluding Observations on Finland, the Human Rights Committee regretted that the right to conscientious objection is only acknowledged during peace time and that alternative civilian service is punitively long. According to the Human Rights Committee, this right should be guaranteed both in peace and war time. The Committee urged Finland to end discrimination inherent as to the alternative civilian service, and to extend the preferential treatment of Jehovah's witnesses (who are exempted from military service without a duty to perform alternative service) to other groups of conscientious objectors. The European Committee of Social Rights also noted that conscientious objectors are required to perform 395 days alternative service, which is more than double the shortest compulsory military service, the situation in Finland was not in conformity with the requirements of para. 2 of Article 1 of the European Social Charter, as it resulted in a disproportionate restriction on workers' right to earn their living in an occupation freely entered upon (Concl. XVII-1). In its 2004 Concluding observations on **Lithuania, (**CCPR/CO/80/LTU**),** the Human Rights Committee reiterated its concern regarding the conditions of the alternative service available to conscientious objectors. It expressed concern in particular with regard to the eligibility criteria applied by the Special Commission and to the duration of the alternative service as compared with military service. The Committee commended to clarify the grounds and eligibility for performing alternative service in order to ensure that the right to freedom of conscience and religion is respected notably by permitting to perform the alternative service outside the defence forces. Lithuania is also requested to ensure that the duration of the service is not punitive in nature. It shall be noted however that the European Committee of Social Rights in its conclusions on the first Lithuanian report on the implementation of the Revised European Social Charter published in July 2004, considered that the length of 18 months of the alternative service, compared with the 12 months of compulsory military service was not excessive and that the situation was therefore in conformity with Article 1 § 2 of the Charter.

Article 11. Freedom of expression and of information

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

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

Freedom of expression in the context of the employment relationship

In **Cyprus**, the Ombudsman in her Report 1768/2004, 1861/2004 (*Έκθεση Επιτρόπου Διοικήσεως αναφορικά με πειθαρχική έρευνα εναντίον δύο εργατών του Ταμείου Θήρας λόγω δηλώσεων στις οποίες προέβησαν στην εφημερίδα Εργατικό Βήμα,* 18 October 2004) noted that within the context of an employment relationship any limitations imposed on the right to freedom of expression must be justified by the nature of the employment relationship and the ensuing obligations on the part of the employee, and must not impinge upon the substance of the said right. The requirement of a prior permission by the employer before an employee may express his/ hers opinion may well constitute an unjustified interference with the right to freedom of expression if in the event of refusal for such

permission the protection of the said right would become ineffective. Protection of the right to freedom of expression is particularly important in relation to the freedom of expression of members of a Trade Union or other employees commenting on their working conditions. The Ombudsman held that the disciplinary action proceedings brought against two employees for commenting to the local media on the health and safety standards of their employment was unacceptable.

Misleading and political advertising

The *Krone Verlag* case stands out of all the cases decided by the European Court of Human Rights during the period under scrutiny, because of its implications for the implementation of European Community, and specifically of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, as amended by Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 (OJ n° L 290, 23.10.1997, p. 18, corrigendum OJ n° L 194, 10.7.1998, p. 54). An injunction by **Austrian** courts against *Neue Kronenzeitung* prohibiting comparing advertising without disclosing information about differences in reporting style as regards the coverage of foreign and domestic politics, economy, culture, science, health, environmental issues and law, was said by the *European Court of Human Rights* to breach Article 10 ECHR (Eur.Ct.H.R., *Krone Verlag GmbH & Co KG v. Austria* (Application No 39069/97), judgement of 11 December 2003). The Court considered that although States parties to the Convention have a margin of appreciation when assessing the necessity of an interference with Art 10 ECHR, the impugned measure was disproportionate for its impact had made future advertising involving price comparisons nearly impossible for the applicant company. Krone Verlag GmbH & Co KG, the owner of the daily newspaper *Neue Kronenzeitung* with its registered office in Vienna, alleged that the injunction issued against it under the Unfair Competition Act by the Salzburg Regional Court was in breach of its right to freedom of expression, within the meaning of Article 10 of the Convention, in so far as it prohibited the applicant company from comparing the sales prices of the *Neue Kronenzeitung* and *Salzburger Nachrichten* without disclosing the differences in their reporting styles as regards coverage of foreign or domestic politics, economy, culture, science, health, environmental issues and law. Although it stressed the importance of the Contracting Parties' margin of appreciation in the context of unfair competition and advertising, the Court found that the injunction to be "far too broad, impairing the very essence of price comparison" and that, moreover, it would be difficult to implement in practice.

The Network is concerned about the implications of the changes introduced in **Ireland** to Freedom of Information legislation. It notes that the Broadcasting Commission of Ireland, in June 2004, banned advertisements for an anti-war concert on the basis that they contravened the Radio and Television Act 1988 and that, under the Act, political and religious advertising and advertising in relation to a trade union disputes are prohibited. This may amount to a disproportionate interference with freedom of expression, especially as the targeted forms of expression relate to public interest issues.

Freedom of the press

In **Luxembourg,** the Act of 8 June 2004 instituted a Press Council, which is authorized to issue and withdraw press cards (Article 23), and charged with drawing up an Ethical Code (which has been in existence since 1995) and defining the conditions for submitting cases to the Press Cards Commission, set up under Article 27, the procedure to be followed before this Commission and the conditions of appointment of its members. The Network of Independent Experts has some serious reservations about the conditions in which those powers are defined. These attributions of the Press Council enable the profession to regulate itself without any guarantee of fairness for the members of the profession. Furthermore, the Act expressly provides that the Chairman of the Press Council is a member of the Press Cards Commission, and therefore seems to allow membership of both the Council and the Commission concurrently. Consequently, the Act allows one and the same person to hold the powers of inquiry and investigation and subsequently to pass judgment and impose penalties. Similar criticisms may also be voiced with respect to the Complaints Commission, set up under Article 33 and empowered to impose administrative sanctions in the form of a reprimand. Furthermore, the Act of 8 June 2004 refrains from setting forth the essential principles of the procedure to be followed before the

Press Council and before the Press Cards Commission and the Complaints Commission. Thus nothing is said about the right of persons involved in disciplinary proceedings to be assisted or represented, the right to have their case file communicated, to be heard before the sanction is pronounced. Withdrawal of the press card is most certainly an administrative sanction that is liable to jeopardize the practising of the profession of journalist. Finally, the Act of 8 June 2004 says nothing about the remedies that are available against possible reprimands issued by the Complaints Commission. Therefore, although the Act of 8 June 2004 contains certain improvements, it is still far from being entirely satisfactory, and does not suffice to remedy the deficiencies in the existing legislation.

The protection of a journalist's sources is an essential aspect of the freedom of the press. The Network of Independent Experts welcomes the fact that **Belgium** is preparing to introduce better safeguards in the law for the protection of journalists' sources as called for in the case-law of the European Court of Human Rights.

Finally, attention is called to the adoption in **France** by the High Council for the Audiovisual Sector (CSA), the administrative authority charged with supervising the audiovisual media, of a recommendation on the representation of "visible minorities", which has led to changes in the general conditions of the public channels and the agreements binding the private media to the CSA. For example, Article 9 of the agreement concluded between the CSA and the broadcasting company TF1 stipulates, "The company shall in its programmes […] respect the different political, cultural and religious sensitivities of the audience; […] promote the values of integration and solidarity that are those of the Republic; […] take into consideration, in its broadcasts, the diversity of ethnic origins and cultures of the national community". Thematic Comment no. 3 of the Network of Independent Experts contains more complete observations on this issue.

Pluralism of the media

Article 11 § 2 of the Charter of Fundamental Rights of the European Union states that "the freedom and pluralism of the media shall be respected". During the period under scrutiny, the European Parliament (EP Resolution of the 22 April 2004 on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI), A5-0230/2004) and the Parliamentary Assembly of the Council of Europe (Council of Europe Parliamentary Assembly Resolution 1387 (2004) of 24 June 2004, Monopolisation of the Electronic Media and Possible Abuse of Power in Italy (Report by the Council of Europe Committee on Culture, Science and Education (Rapp: Mooney), Doc. 10195, 3 June 2004)) have deplored the concentration of political, commercial and media power in the hands of one person in **Italy**, stressing out the lack of independence of the public television service and evidencing a serious concern on the Italian freedom of expression and information. Other influential international institutions and advocacy groups issued several formal warnings and recommendations for Italy to solve the anomalies of its media system. In **Portugal,** the concentration of various media (newspapers, magazines, radio stations, etc.) within the group Portugal Telecom, the major telecommunications company in the country, which is still under strong influence of the Government, gave rise to insistent demands from the opposition parties and the public opinion for the sell off of the media branch of that company.

In its previous set of conclusions and recommendations, the Network of independent experts had noted that Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ L 298 of 17.10.1989, p. 23), subsequently amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 202 of 30/7/1997, p. 60), could be amended in order to fulfil the requirement of Article 11(2) of the Charter. Indeed, although the Preamble of the directive mentions that "it is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in

television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole", the body of the Directive does not contain any provision aimed precisely at requiring that the Member States take certain measures to guarantee the maintenance of pluralism in television broadcasting, whereas the Directive does contain, for example, detailed provisions on the protection of minors (Article 22) or on the right of reply (Article 23).

This option of ensuring respect for the pluralism of the media at Community level has not been retained by the European Commission in its White Paper of May 2004 on services of general interest (COM(2004)374 final of 12.5.2004, para. 4.6.). However, Council Directive 89/552/EEC shall be subjected to evaluation in 2005. The Network takes the view that in the course of such an evaluation, special consideration should be given to the added value which a specification at Community level of the requirements of pluralism in the media would present, in particular in order to clarify the legal framework applicable to such initiatives adopted by the Member States. The Member States should not be chilled from adopting certain regulations in this regard which could be seen as violating the freedom to provide audio-visual services or the freedom of expression of audio-visual service providers.

Article 12. Freedom of assembly and of association

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

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

Freedom of association

As confirmed by the European Court of Human Rights in the case of of *P. and Others v. Poland* (Eur. Ct. H.R., *P. and Others v. Poland* (Appl. No. 42264/98) of 2 September 2004), concerning the refusal to register the Association of Polish Victims of Bolshevism and Zionism, which was supposed to bring together Poles persecuted by the Jewish minority, this provision of the Charter may not be invoked by individuals or groups whose aim is hostile to fundamental rights or freedoms. In its Concluding Observations delivered in July 2004 with regard to the fulfilment by **Belgium** of its obligations under the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee voiced its concern that political parties urging racial hatred can still benefit from the public financing system (United Nations Human Rights Committee, 81st session, Consideration of the reports submitted by the States parties under Article 40 of the Covenant, Concluding Observations, Belgium, CCPR/CQ/81/BEL (point 27)). This concern was shared by the European Commission against Racism

and Intolerance (ECRI) in its Third Report on Belgium, adopted on 27 June 2003 (European Commission against Racism and Intolerance (ECRI), Third Report on Belgium, adopted on 27 June 2003, 27 January 2004, CRI (2004) 1, pp. 23-24). The Network of Independent Experts welcomes the fact that Belgium is preparing to take the measures called for in those recommendations, by making it possible to implement an amendment made in 1999 to the Act of 4 July 1989 on the limitation and supervision of electoral expenditure incurred for the federal elections, as well as on the funding and open accounting of political parties.

The Network recalls also in that respect that, according to the Committee on the Elimination of Racial Discrimination, as expressed in March 2004 during the review of the periodic rapport submitted by **Sweden** on the implementation of the Convention on the Elimination of Racial Discrimination, all provisions of Article 4 of the Convention are of a mandatory character, "including declaring illegal and prohibiting all organizations promoting and inciting racial discrimination, as well as recognizing participation in such organizations as an offence punishable by law". Referring to its General Recommendation XV, the Committee recommended that Sweden should reconsider its position on this particular subject matter and adopt the necessary legislation in order to ensure full compliance with Article 4(b) of the Convention (Concluding observations of the Committee on the Elimination of Racial Discrimination: Sweden, 10/05/2004, CERD/C/64/CO/8, 10 May 2004, § 10).

The Network notes that in the Conclusions it adopted in 2004 on **Lithuania,** the European Committee on Social Rights considered that the situation in that country is not in conformity with Article 5 of the Revised European Social Charter, on the ground that the requirement of having at least 30 members to establish a trade union (according the Law on Trade Unions) is excessive and undermines the freedom to organize.

As regards the **United Kingdom** the European Committee on Social Rights has concluded that sections 15 and 65 of the Trade Union and Labour Relations (Consolidation) Act 1992, which respectively make it unlawful for a trade union to indemnify an individual member for a penalty imposed for an offence or contempt of court and restrict the grounds on which a trade union might lawfully discipline members, continue to represent unjustified incursions into the autonomy of trade unions and are not in conformity with Article 5 of the European Social Charter (Conclusions XVII-1). The Committee also concluded that the limitations in section 174 of the 1992 Act on the grounds on which a person might be refused admission to or expelled from a trade union were not in conformity with Article 5 as they went beyond what was required to secure the individual right to join a union and were an excessive restriction on the rights of trade unions to determine their conditions for membership.

The Network is particularly concerned by the fact that it was held in *R v Hundal*, *The Times*, 13 February that a person in the **United Kingdom** could commit the offence under section 11(1) of the Terrorism Act 2000 of belonging to a proscribed organisation even if he had joined or taken part in the activities of that organisation in another jurisdiction where the organisation was not banned in any way.

Freedom of peaceful assembly

The review of the practices of the Member States during the period under scrutiny illustrates the importance of avoiding any risk of discrimination or arbitrariness in the regulation of the freedom of peaceful assembly, by adopting a clear legal framework binding upon the Executive authorities and, to the extent this may be reconciled with the organisation of powers within decentralized States, by imposing a uniform understanding of the requirements of freedom of peaceful assembly throughout the national territory. The Network regrets, for instance, that in **Poland**, gay and lesbian organisations have experienced difficulties in exercising their right to a peaceful assembly, which seems to constitute a form of discrimination against these organisations, and that in **Sweden**, different districts have different policies when allowing demonstrations and other kinds of manifestations, leading Nazi demonstrations to concentrate in some districts where a permit can be more easily obtained.

The Network welcomes, on the other hand, the modification in **Hungary** of Article 8.1 of the Act on the right to assembly, which previously entitled the police to ban a demonstration if it "would cause disproportionate disorder to the traffic", and which in its new wording as modified in 2004 only allows police to impose such a ban "if the traffic cannot be ensured on any other route". This, the Network hopes, will limit the risk of an arbitrary, and therefore potentially discriminatory, exercise by the police of its powers under the Act on the right to assembly.

Article 13. Freedom of the arts and sciences

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

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

Biomedical research

The Network welcomes the adoption of the Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research, on 25 January 2005 to the extent that this Protocol has a wider scope of application than Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use (OJ L 121 , 01/05/2001, p. 34). It notes that this instrument constitutes a useful tool for the interpretation of Article 3 of the Charter of Fundamental Rights, under which its implications are described more fully. The Network considers that restrictions to Article 13 of the Charter of Fundamental Rights should be considered as justified, to the extent that they seek to ensure that the guarantees of this Additional Protocol to the Convention on Human Rights and Biomedicine are fully respected.

Article 14. Right to education

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

Paragraphs 1 and 3 of this provision of the Charter must be interpreted in accordance with Article 2 of the First Protocol to the Convention for the protection of Human Rights and Fundamental Freedoms (1952), although they are broader in scope. Moreover, Articles 14(1) and 14(2) of the Charter must be read in accordance with the requirements formulated by Articles 6(2) and 13 of the International Covenant on Economic, Social and Cultural Rights (1966), by Article 28 of the Convention on the Rights of the Child (1989) and by Article 17 of the Revised European Social Charter. The right to vocational training recognized in Article 14(1) of the Charter must be read in accordance with the

requirements formulated by Article 10 of the European Social Charter or Article 10 of the Revised European Social Charter. With respect to children who are members of national minorities, Articles 12(3) and 14(1) and (2) of the Framework Convention for the Protection of National Minorities (1995) should also be taken into account. Finally, Article 13 of the Framework Convention for the Protection of National Minorities should be taken into account in the interpretation of Article 14(3) of the Charter.

The dimensions of the right to education which concern either linguistic diversity in education or the promotion of the right to education of members of minorities are examined in the Thematic Comment accompanying this Synthesis Report, on the rights of minorities within the European Union. However, to the extent it concerns an issue which has led to an important public debate during the period under scrutiny, one comment is in order with respect to the adoption in France of the Law of 15 March 2004 regulating, in implementation of the principle of laicism, the wearing of signs or clothing demonstrating a religious belonging in public primary and secondary educational institutions (Act n°2004-228 of 15 March 2004, JORF of 17 March 2004, p. 5190). By adopting this law, the French legislator wishes to facilitate and accelerate the integration of the Muslim community in particular by combating the political and religious pressures that may be experienced by young Muslim girls not to remove their veils at school. The Act of 15 March 2004 consequently prohibits "the wearing in public primary and secondary educational establishments of signs or clothing demonstrating adherence to a particular religion", but authorizes the wearing of religious signs of whatever kind (keppah, bandana, cross, etc) if they remain discreet. The Act of 15 March 2004 only concerns primary and secondary schools; public institutions of higher education are excluded from its scope of application insofar as they cater to adults. Public sector teachers, like all public officials, are bound by an obligation of strict neutrality. The United Nations Committee on the Rights of the Child (CRC/C/15/Add.240, 30 June 2004) is concerned that the new legislation on wearing religious symbols and clothing in public schools may be counterproductive, by neglecting the principle of the best interests of the child and the right of the child to access to education. It recommends that **France** continue to closely monitor the situation of girls being expelled from schools as a result of the new legislation and ensure they enjoy the right of access to education. The Act of 15 March 2004 has, however, already led to the exclusion of Muslim or Sikh pupils who persistently refuse to remove their veil or turban at the schools where they were being educated. In accordance with the law, those exclusions were the outcome of an unsuccessful process of negotiations between the schools, the pupils and their families. Those pupils have henceforth to be educated at private establishments or follow courses of the national centre for distance learning. It is to be feared that this breaking with education at the public educational establishments will for some mean breaking with school in general, whereas one of the objectives of this law was in fact to combat exclusion and foster integration.

In **Portugal**, Government's Decree Law 67/2004 (Decreto-lei nº 67/2004, de 25 de Março), created a national record for minors, which are illegally living in Portugal, in order to ensure them access to the same rights that law attributes to the minors in regular situation on the domestic territory, in particular health and education facilities.

The only other conclusions adopted under this provision of the Charter concern access to education for children with disabilities. This constitutes a serious difficulty throughout the Union, and has been highlighted during the period under scrutiny, inter alia, by the Ombudsman in **Cyprus** – confirming the continued relevant of the observation made by the *Committee on the Rights of the Child* when it examined the State periodical report on the implementation of the Convention on the Rights of the Child at its 33rd session on 6 June 2003, and expressed its concern about the "broad scope of special schools which are intended for children with physical, mental or emotional needs, which *inter alia* is not conclusive to their integration into mainstream schools" – and by the Ombudsman in **Poland**, who noted the need to limit the number of special education centres for children with disabilities, whose cost is moreover prohibitive, in favour of establishing specialised rehabilitation and revalidation centres providing professional assistance to those children (General Approach to the Minister of National Education and Sport of 4 May 2004, No. RPO/470256/04/XI). Certain positive developments ought nevertheless to be mentioned. In **Belgium,** the Flemish government adopted a set of regulations to support the integration of pupils with a moderate or severe mental handicap in mainstream primary

or secondary education (Order of the Flemish Government concerning the integration of pupils with a moderate or severe mental handicap in mainstream primary or secondary education, *M.B.*, 2 March 2004). In **Italy**, when confronted with the claim that the teaching staff was insufficient to meet the needs of children with disabilities, the courts have ordered the Ministry to provide the adequate hours of assistant teachers for handicapped children (see Order of the Tribunale Ordinario di Roma, Sez. II Civ., 12 February 2004 and Order of the Tribunale Ordinario di Ascoli Piceno, 16 March 2004).

It shall be recalled in this respect that, according to para. 1 of Article 15 of the Revised European Social Charter : « With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular (...) to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private". The European Committee of Social Rights views this provision as "both reflecting and advancing a profound shift of values in all European countries over the past decade away from treating them as objects of pity and towards respecting them as equal citizens – an approach that the Council of Europe contributed to promote, with the adoption by the Committee of Ministers of Recommendation (92) 6 of 1992 on a coherent policy for people with disabilities. The underlying vision of Article 15 is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of "independence, social integration and participation in the life of the community". Securing a right to education for children and others with disabilities plays an obviously important role in advancing these citizenship rights. This explains why education is now specifically mentioned in the revised Article 15 and why such an emphasis is placed on achieving that education 'in the framework of general schemes, wherever possible'" (decision on the merits of the Collective Complaint n°13/2002, *Autisme-Europe v. France*, § 48).

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

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

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

On the basis of its examination of the reports concerning the situation of fundamental rights in the Member States, the Network of Independent Experts on Fundamental Rights wishes to highlight the following specific issues under this provision of the Charter:

- With respect to the right for nationals from other member States to seek an employment, to establish themselves or to provide services, particular attention should be paid to the consequences on the employment of third country nationals of the arrival on the labour market of candidate workers from the new EU Member States. In **Ireland** for instance, the trade union SIPTU has reported an increase in the number of non-EU workers losing their jobs to be replaced by workers from new EU member states. This was partly motivated by the requirement for employers to secure a work permit for the non-EU worker at a cost of EUR 500, while no permit is required for EU workers. This has had the effect of placing non-EU workers in a very vulnerable position where some could face deportation if they cannot secure alternative employment.

• Special efforts should be made in order to improve effective access to employment of persons with disabilities. It is important, but not enough in that respect to ensure that persons with disabilities are not discriminated against, either directly or indirectly, in employment and occupation. Employment cannot be isolated from issues such as education, housing or transportation. Indeed, the National Disability Authority (NDA) Report on transport published in **Ireland** in 2004 criticised the provision of transport services for people with disabilities which it states leads to isolation and an inability to access employment (National Disability Authority, *Towards Best Practice in Provision of Transport Services for People with Disabilities in Ireland,* 2004, www.nda.ie).

• The Network also recalls that, in its conclusions adopted in 2004 on the Report presented by **Cyprus** under the (Revised) European Social Charter, the European Committee of Social Rights noted: "the situation in Cyprus is not in conformity with article 1(2) of the revised Charter on the grounds that nationals of Contracting Parties to the 1961 Charter and of States Parties to the Revised Charter who are lawfully resident in Cyprus can only be employed if no citizen of Cyprus can be recruited for the same post ». Cyprus should be encouraged to immediately put an end to this discrimination based on nationality. In its conclusions of 2004, the European Committee of Social Rights notes that in **France** foreign nationals are still excluded from access to certain categories of employment which do not in principle involve the exercise of public authority. The Committee in fact considers on the one hand that "the nationality condition for access to employment on merchant vessels constitutes discrimination" and, on the other hand, that "the authorisation required by foreign nationals to be placed on the civil aviation professional registers constitutes discrimination, because of the random and temporary nature of such authorisation, which does not apply to nationals". In this respect, the Network welcomes the fact that, by a judgment of 23 June 2004 (Cass. Crim., 23 June 2004, *C,* appeal no. 03-86.661), the criminal division of the French Court of Cassation marked a major U-turn in the case-law in this area. Basing itself on Article 39 EC and on the Charter of Fundamental Rights of the European Union, the Court of Cassation decided that the fact of reserving posts of merchant navy officers for persons having French nationality was contrary to Article 39 EC. To justify its decision, the Court considered that the derogation from the principle of free movement of workers, provided by Article 39(4) EC for public service employment, implies that the prerogatives of public authority granted to their incumbents are indeed habitually exercised by the latter and do not represent a minor part of their activities. This judgment correctly applies the case-law of the Court of Justice of the European Communities (judgment of 30 September 2003, Colegio de Oficiales de la Marina Mercante Española, C-405/01: see the Report on the Situation of Fundamental Rights in the European Union in 2003, pp. 75-76). The Network expresses the wish that this case-law be translated into an amendment of the regulations currently in force.

• Finally, among the good practices that have been identified in the national reports, the Network notes the existence in **Belgium**, on the initiative of the Flemish Community, of a "Job Seeker's Charter", revised in 2004, which sets forth the rights of the job seeker, and in particular the right to equal treatment and non-discrimination, the protection of his privacy and the right to participate free of charge in activities that are part of the integration process, vocational training, employment, recognition of acquired skills and career guidance, the right to free information and the right to be counselled when looking for a job, clearly demonstrates the wish to protect the job seeker against any abuse that might result from his vulnerable position, as well as to encourage the job seeker to exercise the rights that are granted to him in order to find a job.

Having read the report on the situation of fundamental rights through the activities of the institutions of the European Union, the Network of Independent Experts welcomes the adoption of Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261 of 6.08.2004, p. 19). The purpose of the Directive is to allow non-Community nationals who have been the subject of an action to facilitate illegal immigration or victims of trafficking in human beings to be granted a short-term residence permit in return for their cooperation in combating those activities by testifying against the traffickers. To this end, it introduces a residence permit

intended for victims of trafficking in human beings. The Network notes with satisfaction that the provisional residence permit may grant access to the labour market, to education and vocational training, under the conditions defined by national law (Article 11). The Network encourages Member States to positively consider this possibility. The fact of being able to take a job, even on a purely provisional basis, may in actual fact not make it more difficult, but indeed make it easier for the person in question to subsequently return to his country of origin, since he has been able to acquire certain skills and undoubtedly accumulate some funds that will allow him to set himself up again and to justify his return in the eyes of the members of his family and his community whom he had left behind. Evidently, the opportunity for employment given to a person to whom a residence permit has been issued in exchange for his cooperation in prosecuting the traffickers constitutes an additional incentive to denounce them and to cooperate with the authorities. Moreover, access to employment will prevent third-country nationals who are granted this status from becoming a burden on the social services of the host Member State and from being employed in illegal conditions.

The Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status is silent on the question of access to employment of asylum-seekers or persons in search of another form of international protection. This is regrettable, taking into account both the length of the procedures for the determination of the claim to asylum – which often last for several months before a final decision is taken – and because, for the reasons expressed in the preceding paragraph, access to employment of asylum-seekers may in many cases facilitate, rather than discourage, their compliance with a removal order or their effective (enforced) removal, if it is determined that their claim to international protection is ill-founded.

Article 16. Freedom to conduct a business

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

General assessment

Good practices

In **Belgium,** a bill that was tabled on 20 April 2004 is aimed at setting up an ethical register and a prohibition to award public contracts to natural and legal persons who have violated the Act of 30 July 1981 on combating certain acts inspired by racism or xenophobia. This bill is part of a broader trend reflected in the adoption of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134 of 30.4.2004, p. 114). This Directive already provides that economic operators may be excluded from participation in a public contract if they have violated the national rules transposing Directives 2000/78/EC or 76/207/EEC (Article 45(2)(c) and (d)). Where it concerns public contracts at Community level, the bill seems to go further than Directive 2004/18/EC since, inexplicably, the latter Directive does not mention Directive 2000/43/EC among the Community instruments where violation of the national rules for the transposition thereof may lead to the exclusion of economic operators who are guilty of such a violation. In the view of the Network of Independent Experts, this illustrates the need to examine the possibility of extending the rights granted to Member States by Directive 2004/18/EC to use the establishment of rules in the area of public contracts as a tool for ensuring the promotion of human rights in business practices.

Reasons for concern

The period under scrutiny has once again highlighted the deficiencies in the European Union's Code of Conduct on arms exports. Several non-governmental organizations (Amnesty International, Greenpeace and Intermón Oxfam) have revealed that 4 of the 10 countries to which Spain exported arms in 2003 do not meet the requirements of the Code of Conduct of the European Union, and that those exports are not sufficiently transparent. Israel, India, Indonesia, Sudan, Ivory Coast and Venezuela are among the countries that have received Spanish arms. In addition, those NGOs found that a detailed analysis of the Spanish transfers during 2003 show that the real volume of this trade is 50% greater than what is officially declared by the Spanish authorities. Furthermore, no record is made in the official accounts of transfers that are not exports, such as gifts, sales of used arms or sales of surpluses. Thus, for example, Morocco received a substantial consignment of used guns that are not reflected in the official figures.

Article 17. Right to property

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

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

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

Article 18. Right to asylum

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

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

At the centre of the right enshrined in this provision of the Charter is the assurance that must be given to each asylum-seeker that his application for refugee status will be examined carefully and impartially. The application of the rules established between the Member States for determining the member State responsible for examining asylum applications lodged in the European Union, as codified in Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50 of 25.2.2003, p. 1), should

not lead to derogation from this essential requirement. However, the Network's attention was drawn to the fact that in **Greece**, according to the High Commissioner for Refugees (UNHCR), persons returned to Greece in accordance with the Dublin II Regulation are informed, upon arriving at the airport, that the examination of their asylum application has been suspended on the grounds that they had left the address they had given to the police without giving notice. Those persons are subsequently detained and often expelled without having had the chance to have their asylum application thoroughly examined either by Greece or by the country that had sent them. The Network shares UNHCR's concern with regard to this practice, which has also been expressed by the Greek Council for Refugees.

The determination of the status of refugees or of persons qualifying for subsidiary protection

Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted was formally adopted by the Council before the start of the required five-year period following the entry into force of the Treaty of Amsterdam (OJ L 304 of 30.09.2004, p.12). This Directive establishes the minimum standards for persons to qualify for refugee status or for subsidiary international protection.

The Network underlines that, in accordance with Article 63(1)(c) and (2)(a) EC, which constitutes its legal basis, this Directive leaves Member States free to retain or introduce more favourable standards for the persons concerned (Article 3). Recalling that the allocation to the European Union of asylum issues, subsequently established in the EC Treaty, is justified by the concern to avoid an erosion of the right to asylum, given the diversity of asylum procedures in the various Member States, with Member States that are the most generous in granting refugee status running the risk of attracting a greater number of asylum-seekers, the Network is aware that certain Member States will be tempted, following the adoption of Directive 2004/83/EC, to align their national legislation with the minimum levels of protection defined in the Directive. It would be regrettable if the transposition of the Directive were in certain Member States to provide a pretext for reducing the levels of protection already offered in their national legislation to persons claiming refugee status or any other form of international protection. Moreover, it would be unacceptable that, in the adoption of the national measures for the transposition of the Directive, the Member States should not heed the obligations imposed on them by the Geneva Convention of 28 July 1951 on the status of refugees as well as their other international obligations.

In following through the measures for the transposition of the Directive, special attention will have to be given to the compatibility of the national measures for the transposition of Directive 2004/83/EC with the obligations deriving from the Geneva Convention and the other international instruments for the protection of human rights. The option that is left to Member States of adopting more favourable standards than the minimum standards established by the Directive constitutes, by virtue of Union law itself, an obligation since it ensues from the fundamental rights that are recognized in the legal order of the Union, and more particularly the right to asylum that is enshrined in Article 18 of the Charter of Fundamental Rights, as well as, for example, the right to respect for private and family life that is recognized by Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights. The term "family members" used in Article 23 of Directive 2004/83/EC is too restrictive in relation to the concept of "family life" that is protected under Article 8 of the European Convention on Human Rights, in the interpretation given by the European Court of Human Rights. The national measures for the transposition of the Directive should be aligned with the stricter standard of the European Convention on Human Rights and should not be confined to the more restrictive concept of "family" used in the Directive.

Similarly, where Directive 2004/83/EC lends itself to divergent interpretations, the States must adopt the only interpretation that is in keeping with their international obligations. For instance, according to Article 15(c) of Directive 2004/83/EC, serious infringements of human rights justifying the granting of subsidiary protection also include, in the French version, "des menaces graves et individuelles contre

la vie ou la personne d'un civil en raison d'une violence aveugle ou en cas de conflit armé interne ou international" ("serious and individual threats to a civilian's life or person by reason of indiscriminate violence or in situations of international or internal armed conflict" (literal translation)). The English version of the Directive reads, "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". The English version of the Directive is more restrictive, since it appears to restrict the cases where indiscriminate violence may justify the granting of subsidiary protection to situations of international or internal armed conflict. The French version, on the other hand, also allows for other situations of indiscriminate violence, for example in case of ethnic conflicts that do not take the form of an internal armed conflict, but rather of riots or acts of violence committed by one population group against another. In the implementation of this Directive, the latter version should be taken into account, since it is more in keeping with the objective that consists in translating, through the concept of subsidiary protection, the obligations incumbent upon States under Articles 2 and 3 of the European Convention on Human Rights. The case law of the European Court of Human Rights confirms that, under those provisions of the European Convention on Human Rights, subsidiary protection should be granted to persons who fear execution, torture or inhuman or degrading treatment, whether in situations of armed conflict or not (Eur. Ct. HR, *H.L.R. v. France*, judgment of 29 April 1997, §§ 40-41, *ECR* 1997-III). The Network also points out that Recommendation (2001)18 on subsidiary protection addressed by the Committee of Ministers of the Council of Europe to the Member States on 27 November 2001 also mentions "reasons of indiscriminate violence, arising from situations such as armed conflict", but not limited to situations where such a conflict exists.

The obligation for Member States to comply with their international obligations as well as with the general principles of European Union law in the adoption of national measures for the transposition of the Directive also covers the obligation not to discriminate between refugees and beneficiaries of subsidiary protection. For instance, the Network does not see why the conditions for access to employed or self-employed activity should be different according to whether the person in question is a refugee or a beneficiary of subsidiary protection, whereas Article 26 of Directive 2004/83/EC establishes the principle of such a differentiation. In its opinion there is no objective and reasonable justification for such a difference in treatment that might clear it of the criticism of creating discrimination.

Article 63 EC presupposes that the measures adopted by the Council under this clause will comply with the Geneva Convention. The necessary result is that Community law prevents Member States, in implementing those measures, from defaulting on their obligations under this Convention. In the report which it is due to present on 10 April 2008 to the European Parliament and the Council on the application of the Directive (Article 37), the Commission will have to pay special attention to the matter of the compatibility of the transposition measures with the international obligations of Member States, taking into account in this respect the comments of the United Nations High Commissioner for Refugees and, where appropriate, the comments of international supervisory bodies. A separate section of this report will have to be devoted specifically to this dimension. Amendments should be made to the Directive if it should emerge from the examination that the Member States' obligations have been set at an insufficiently high level, encouraging Member States to evade their international obligations.

The Network considers that where recognition rates for refugee status or subsidiary protection are particularly low, we need to investigate the reasons why this is the case, more particularly the geographical position of the Member State concerned, and if no plausible explanation can be given, re-examine the procedures for recognition in order to ascertain that they do not lead to persons who qualify being turned down. An analysis of the figures intended to allow comparisons between Member States and, above all, to alert each Member State to the impact on recognition rates of the procedures that have been put in place should thus accompany the establishment of minimum standards at European Union level for the conditions of recognition. The Network notes that, in its report of November 2004 on the right of asylum in **Greece**, the United Nations High Commissioner for Refugees observes that during the first six months of the past year the Government had granted

refugee status to only 8 out of 2,423 applicants (0.3%), whereas the overall recognition rate, including humanitarian status granted to 18 applicants, was 1.07%. This rate, which is extremely low, is largely accounted for by the fact that all decisions adopted in the first instance by the Minister of Public Order are negative, while the favourable recommendations from the Commission of Appeal are not in all cases followed by the Minister. Moreover, the authorities often refuse – or do not renew – humanitarian status to persons who nevertheless do qualify for subsidiary protection. If these figures are confirmed, they will cast doubt on the adequacy with which Greece implements the obligations imposed by Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. A first measure to be considered to improve this situation, which gives cause for concern, would be for the Minister of Public Order to systematically follow the favourable recommendations issued by the Commission of Appeal, without calling its judgment into question. Although it is particularly worrying, even taking into account its particular geographical position, the situation of Greece does not stand entirely alone. In **Luxembourg** in 2003, 62 out of 1058 asylum-seekers were granted refugee status, which is 5.86%. **Finland**, too, has particularly low recognition rates. In Lithuania, only 1 asylum seeker was granted refugee status in 2002, a number which rose to 3 in 2003 and to 12 in 2004. Despite this increase, the Human Rights Committee expressed its concern in its 2004 concluding observations (CCPR/CO/80/LTU) with regard to the low recognition rate in **Lithuania**.

The procedures for granting and withdrawing refugee status

The Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status could not be formally adopted before 1 May 2004, although a political agreement was reached in the Council on 29 April 2004 on the general principles of the text (Doc 8771/04 ASILE 33), due to disagreement between the Member States on the identification of the third countries recognized as safe countries of origin. The list of those countries will be adopted later by the Council by a qualified majority of Member States, on the proposal of the Commission and after consultation of the European Parliament (Doc 14383/04 ASILE 65, of 9 November 2004). The Network observes that the adoption of this text could lead certain Member States to lower the existing standards, more particularly through the widespread use of so-called “accelerated” procedures for the determination of certain categories of asylum claims, to the detriment of the procedural guarantees that should accompany the examination of those applications and the effectiveness of the remedies available against a decision to refuse refugee status. The Network notes that in **Luxembourg**, Bill no. 5330 of 21 April 2004 on accelerating the asylum procedure establishes an accelerated procedure in certain cases, more particularly for applicants from so-called “safe” third countries. This bill provides for the abolition of certain remedies, the setting of shorter time limits at both the administrative and judicial levels, as well as mechanisms designed to oblige asylum-seekers to take a more active part in the procedure. The bill also introduces important derogations in the area of asylum from the usual rules of procedure before the administrative courts, to the detriment of the asylum-seeker’s rights of defence; it intends to abolish the double degree of jurisdiction, and provides that the automatic right of appeal against a decision to refuse refugee status will no longer suspend the term of the judicial appeal, notwithstanding the principle established in Article 13 of the Act of 21 June 1999 regulating proceedings before the administrative courts, which in fact renders the automatic right of appeal virtually useless to the asylum-seeker. Similarly the Network notes that in **Lithuania,** the new Law on Foreigners Legal Status (2004 04 29 LR įstatymas “Dėl užsieniečių teisinės padėties” Nr. IX-2206 [29 April 2004 Law on Foreigners Legal Status Nr. IX-2206] // Valstybės žinios, 2004, Nr. 73-2539) has introduced accelerated procedures at the border for «manifestly unfounded cases». These cases have now to be examined within 48 hours and the examination might be prolonged up to 7 days. It seems that the Migration Department (*Migracijos departamentas*) quite often uses these procedures, even when asylum seekers come from non-safe countries of origin. The Network is also concerned by the fact that the new Law reduces the effectiveness of the appeal procedure by introducing a very short term (7 days) for appealing against both non-admission decisions and final first instance decisions regarding asylum.

We need to recognize that these are not isolated trends. Whereas the idea was to avoid, by defining minimum standards in the area of asylum, a general lowering of the standards of protection provoked by the fear of each Member State of seeming the most attractive country to asylum-seekers, the overall impact of the Directive could in certain respects be the reverse of the impact intended.

While referring for a full analysis of this text to the *Report on the situation of fundamental rights in the European Union in 2004*, the Network wishes to make several comments on the draft at its present stage (Doc. 14203/04 ASILE 64 of 9 November 2004), on which the European Parliament will be consulted again.

"Safe countries of origin". The proposed Directive includes the principle of "safe countries of origin". The principle of the proposed Directive is that « Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications » (Preamble, Recital 17). Once the Member States will have agreed on a common list of safe countries of origin according to the procedure described in Article 30 of the proposed Directive, and on the basis of the criteria laid down in Annex B to Annex I of the proposed Directive, « Member States should be obliged to consider applications of persons with the nationality of that country, or of stateless persons formerly habitually resident in that country, on the basis of the rebuttable presumption of the safety of that country » (Recital 19). The Network notes that the obligation thus imposed on the Member States goes beyond the definition by the Council of minimum requirements, and create be an obstacle to the full compliance by the Member States with their international obligations.

The presumption established in favour of the so-called "safe" countries of origin could not in any event be an absolute one, because as recognized by the Preamble of the Directive, the designation of a third country as a safe country of origin is necessarily based on an assessment which « can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her » (Recital 21).

The designation as certain countries as safe countries of origin would clearly be unacceptable if it led the Member States to refuse to assess the substance of the applications for asylum from nationals of countries thus identified or from stateless persons who are habitually resident in such countries. Even in the system of the proposed Directive where the presumption is only made at the general level and may be rebutted in individual cases, there is a risk that the definition of a list of safe countries of origin will be discriminatory, in the meaning either of the Geneva Convention of 28 July 1951 – Article 3 of which explicitly excludes any discrimination based on the country of origin of refugees – or of Article 26 of the International Covenant on Civil and Political Rights or Article 14 of the European Convention on Human Rights (to the extent that the rejection of the application for asylum could expose the applicant to a real risk of being executed or of being subjected to torture or to an inhuman or degrading treatment). Considering the seriousness of the potential consequences for the individual applicant for asylum, the strictest scrutiny should be applied to such differences of treatment based on the country of origin. It should be verified, in particular, whether, even if the difference in treatment is based on objective criteria, the measure is proportionate to the aim pursued, which is of administrative convenience and in order to alleviate the burden on asylum-processing systems of the Member States.

In this regard the Network is concerned by the fact that in the **United Kingdom** the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 contains a continuation of the deeming provision that certain countries (those bound by Council Regulation (EC) 343/2003 or the Dublin Convention) are safe for Refugee Convention purposes. The Act also adds a limited human rights deeming provision that prevents challenge on the basis of onward removal from the third country in breach of human rights. In addition not only can certain countries continue to be certified as 'safe' for a given

individual but also it will be possible for human rights claims to be certified as clearly unfounded unless the Secretary of State is satisfied that they are not so clearly unfounded. In these cases a person can be removed from the United Kingdom without substantive consideration of his or her asylum claim and there is little, if any scope, to challenge such action.

Accelerated procedures. The proposed Directive provides for the possibility of accelerated procedures. The extent of these derogations and the vague definition of certain situations where an application for asylum may be processed according to accelerated procedures – with Articles 23(4)(a) ("the applicant in submitting his/her application and presenting the fact, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee...") and (g) ("the applicant has made inconsistent, contradictory, unlikely or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having being the object of persecution") using wording that entails the risk of arbitrariness in the application of these clauses – raises fears that recourse to those derogatory procedures will serve to regulate the flow in the processing of asylum applications that are filed in Member States, to the detriment of the guarantees that should accompany the processing of those applications. Although the very principle of an accelerated processing of certain categories of applications may be justified by considerations of efficiency, as UNHCR himself has acknowledged, the option of making use of such procedures should still be based on objective and pre-established criteria, which should not result in putting the most vulnerable asylum-seekers, whose traumatic experiences could explain the inconsistencies in their initial story, in the most unfavourable situation in terms of the guarantees surrounding the examination of their asylum application. The Network points out in this connection that the European Commission against Racism and Intolerance (ECRI), in its third report on **Belgium,** advises the Belgian authorities to see to it that the use of accelerated procedures does not infringe the right of asylum-seekers to a detailed examination of their application (European Commission against Racism and Intolerance (ECRI), Third report on Belgium adopted on 27 June 2003, 27 January 2004, CRI (2004) 1, pp. 14-15). Similar concerns have been raised concerning accelerated procedures for the determination of asylum claims in **Finland** by the Human Rights Committee in its Concluding Observations of November 2004, as well as by the Committee on the Elimination of Racial Discrimination (CERD) in its concluding observations of 2003 and by the Council of Europe Commissioner for Human Rights Alvaro Gil-Robles in his opinion of 17 October 2003. The Network notes with concern that, in **Finland**, largely due to the use of the notion of "safe country", resulting in the application of accelerated procedures, the approval rate of asylum applications is very low. In 2003, The Directorate of Immigration considered about 1,400 cases under normal, procedure and about 1,900 in an accelerated procedure but it only granted asylum to 7 persons. This amounts to an approval rate of 0.2 percent. The Network is concerned by the significant changes that have been made to the process of handling claims for asylum by the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 in the **United Kingdom**. The Network is in particular concerned by the fact that it is now an offence for a person not to produce an immigration document at a leave or asylum interview in respect of either himself or a child with whom he claims to be living or travelling unless, inter alia, he has a reasonable excuse for not having such a document, he or the child travelled to the United Kingdom without one or he produces a false document with which he or the child so travelled. The burden of proving any defence on the balance of probabilities rests on the defendant and the deliberate destruction of a document cannot be used for this purpose unless it was done for a reasonable cause (which will not include improving chances of admission) or in circumstances beyond his control. In addition the Act sets out various behaviours which a deciding authority is required to take account of as being damaging to credibility when deciding whether to believe a statement made by or on behalf of a person making an asylum or human rights claim.

Determination of refugee status – The Network of Independent Experts wishes to underline that the quality of the procedures for determining refugee status cannot be dissociated from the resources that are made available for those procedures. It is essential that there should be sufficient staff in charge of registering asylum applications, with adequate means at their disposal; that this staff receives training in human rights issues and in specific problems which refugees may encounter, in particular the most vulnerable among asylum-seekers. The Network refers, on all these aspects, to the third report which the European Commission against Racism and Intolerance (ECRI) has delivered on **Greece** during the

period under scrutiny. To illustrate this, it also notes that in **Hungary**, according to the UN High Commissioner for Refugees, there are usually no suitable hearing rooms for interviewing asylum-seekers in detention centres under the custody of Border Guards, although it would be an important procedural guarantee, especially taking into account that the first instance decision is based on the asylum-seekers' statements (HUNBU/MOI/HCR/0148, UNHCR Branch Office in Hungary). In **Cyprus**, according to the Ombudsman's annual report concerning asylum seekers, "Asylum Seekers Unit was not properly staffed, neither were its members adequately trained, while the number of applicants have exceeded the logically expectable number, creating a huge work load" (p. 73). The Network acknowledges, however, the fact that the personnel of the Refugee Authority now has received training by the UN High Commissioner for Refugees, and welcomes this as a positive development. It also notes with satisfaction that in **Sweden**, in order to reduce the extended handling time of the assessment of asylum applications, the Government has provided the Swedish Migration Board with an extra SEK 20 million and the Aliens Appeals Board with an extra SEK 25 million, and that in addition, the public counsels will be provided with SEK 60 million.

Information of the asylum seekers or other persons in search of international protection. In **Poland**, aliens detained while applying for refugee status appear not to be provided the necessary information about their legal situation and possibilities of turning for help to non-governmental organisations; moreover refusal decisions are notified solely in the Polish language, which significantly restricts the possibility of appealing against negative decisions (Rights of aliens placed in arrests for the purpose of expulsion and in a guarded centre, Report of the Helsinki Foundation for Human Rights, Warszawa 2004, pages 93-98). The Network notes in this respect that it is essential that asylum-seekers are fully informed, in a language with they understand, about their rights and obligations during the procedure. It recommends that Member States should issue a "Letter of Rights" similar to that which should be given to suspects in criminal proceedings under the proposal for a framework decision of the European Commission presented during the period under scrutiny, providing asylum-seekers who arrive at the borders of the Member States of the European Union with this information, including details about the non-governmental organizations that may help them, as well as about the ways to contact the United Nations High Commissioner for Refugees. This would go further than the obligations which Article 9(1) of the draft Directive intends to impose on Member States concerning the provision of information to asylum-seekers on their rights and obligations during the procedure. Such a declaration of rights would be especially useful where potential asylum-seekers initially meet the border authorities, the members of which are not necessarily adequately trained to provide information about the procedure for the determination of the claim to asylum or may be tempted to mislead the potential candidates to asylum about their rights. The Network is concerned for instance that in **Cyprus**, according to the Ombudsman's annual report concerning asylum seekers, "there have been instances of unjustified arrests or hasty deportations of foreigners who reported themselves at the police asking for asylum and cases of refusal to accept asylum application [and] cases when the police did not comply either with the provisions of the Refugee Law or with the relevant for this process directions of the director of the Population and Immigration Office" (p. 74).

Unaccompanied minors. Article 15 of the proposed Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status related to unaccompanied minors, providing in particular that the Member States take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application to the status of refugee or to subsidiary protection, and that this representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview.

In implementing this provision, the Member States should take into account their other international obligations, in particular the Convention on the Rights of the Child and the related Concluding Observations of the Committee on the Rights of the Child, as well as the Geneva Convention on the Status of Refugees and the recommendations of the UNHCR. For instance, upon examining the report of **Slovenia**, the Committee on the Rights of the Child insisted on the effective implementation of the Asylum Act (E.g. Zakon o azilu, Asylum Act, *Official Gazette* 1999, nr. 61, 2000, nr. 66, 2000, nr.

113, 2000, nr. 124, 2001, nr. 67, 2003, nr. 98) and the amendments to the Aliens Act (E.g. Zakon o spremembah in dopolnitvah zakona o tujcih, Act on Changes and Amendments of the Aliens Act, *Official Gazette* 2002, nr. 87) concerning asylum claims involving children and the appointment of a guardian to unaccompanied children. According to the Committee, Slovenia should ensure that reception centres have special sections for children and the necessary support, including access to education, is given to children and families throughout the process with the involvement of all concerned authorities with a view to finding durable solutions in the best interest of the child (Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia), CRC/C/15/Add.230). In his report of November 2004 on the situation of the right of asylum in **Greece,** the High Commissioner for Refugees (UNHCR) underlines that in 2003, 325 unaccompanied minors or minors who have been separated from their families were registered as asylum-seekers, but that only a small number of those minors were received and put up at reception centres. Furthermore, several minors who have been separated from their families are not identified as such; they are placed in detention and, once they are released, are not put in protection or care facilities. Moreover, despite what is provided for in 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 (OJ L 31 of 6.2.2003, p. 18), a system of representation of minors through the appointment of a legal guardian still has not been put in place. The Network also shares the concern expressed with respect to **Sweden** by the Council of Europe Commissioner on Human Rights (CommDH(2004)13, p. 10) about the considerable number of unaccompanied children who had disappeared from the special centres where they were accommodated, run by the Migration Board, and about the inadequate reaction to such disappearances (see also the statement made by the Children's Ombudsman, Annika Åhnberg, Barn har det inte bra i Sverige, NU 19/04, p. 6).

In order to ensure a fuller protection of unaccompanied minors against such risks, the Member States should envisage an improved definition of the appointed representative of these minors and an expansion of their powers. The Network thus notes with interest that in **Sweden**, the Government intends to present a Bill before the Parliament before the end of the year 2004 and thereby proposing that the legal custodian should be granted the power to take decisions in all matters concerning the unaccompanied child, including the child's accommodation. This will constitute an improvement from the present situation, where the legal custodian has a very limited competence with respect to matters concerning the personal relations of the child, and where, in particular, he/she cannot decide to restrict the child's movements out of the institution/migrant centres. In this regard, the Network welcomes the fact that in **Lithuania**, the new Law on Foreigners Legal Status (2004 04 29 LR įstatymas "Dėl užsieniečių teisinės padėties" Nr. IX-2206 [29 April 2004 Law on Foreigners Legal Status Nr. IX-2206] // Valstybės žinios, 2004, Nr. 73-2539) has introduced a temporary guardianship for all separated children disregarding their status in the country. The Law also contains special guarantees for separated children (i.e., rights to free accommodation, education, necessary medical assistance, social and legal assistance) as well as an absolute admission into the procedure and only exceptional detention. The Network is however concerned by the fact that the Law on Foreigners Legal Status does not recognise the right for an unaccompanied minor to whom the status of refugee has been recognised, to reunify with his parents in Lithuania, a situation which might raise serious concerns of conformity with Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3.10.2003, p. 12).

Due to their particular vulnerability, unaccompanied minors may be particularly affected by accelerated procedures for the determination of their claims to asylum. It is to be welcomed that in the **Netherlands**, in response to criticism on the accelerated procedure, the Minister for Immigration and Integration promised that asylum requests of children under 12 years old would no longer be reviewed under the accelerated procedure (*Kamerstukken II*, 2003-2004, 19 637, No. 826). The Network considers that this is appropriately exemplifies the requirement of Article 15(6) of the Draft Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, which states that the best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Article.

Of course, unaccompanied minors may not be subject to deportation procedures which would create a serious risk for their lives or security, either in the State of return or in any third State to which they might be deported by the State of return. The Network notes with concern that, according to Save the Children Foundation, minors figured among the foreign citizens setting down in October 2004 on the island of Lampedusa, in **Italy**. Repatriation of the immigrants to Libya took place on the basis of presumed nationality, apparently not certified by any reliable procedures and without verifying the ages of the persons involved. This creates a serious risk that the minors were treated like adults and that unaccompanied minors and/or victims of trade were not identified as such nor were their fundamental rights protected. The fact that Libya has not yet signed the Geneva Convention on the status of refugees is of serious concern, because the individuals deported back to that country could then be transferred to other countries in which their lives would be seriously threatened. Moreover, unaccompanied minors run the risk of being abandoned and subsequently vulnerable to abuse and exploitation. The agreements between Italy and Libya could thus represent a serious violation of the principles sanctioned by Italian and international standards, and in particular the Geneva Convention relating to the status of refugees and Article 22(2) of the Convention on the Rights of the Child.

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

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

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

Collective expulsions

Reasons for concern

Having examined the national report on the situation of fundamental rights in **Italy**, the Network is concerned that the Decree of the Ministry of the Interior on 14 July 2003 as regards limiting illegal immigration by sea may lead to violations not only of Article 4 of Protocol n°4 ECHR, which Italy ratified on 14 April 1982, but also, potentially, of Article 33 of the Geneva Convention on the Status of Refugees and Article 3 ECHR. Article 7 of the Decree would state that if the Italian Navy finds a vessel that is carrying individuals who are attempting to enter Italy illegally, it is authorized to identify the place of registration of the ship and - provided the ship is in good condition - send the vessel back

to its port of departure. This measure is an act of rejection at maritime borders. Such a decision is taken in the absence of any examination of the individual positions of the individuals concerned and their reasons for attempting entry to Italy, and results in preventing these individuals from leaving their own country and seeking entry to apply for asylum, although they may qualify as either refugees or as deserving another form of international protection. This is incompatible with Article 12, paragraph 2 of the ICCPR and raises issues under the non-refoulement obligation of Article 33 of the Geneva Convention on the Status of Refugees, and Article 3 ECHR where the return of the persons concerned would create a risk of inhuman or degrading treatment in the country of return.

Moreover, despite the assurances to the contrary given by the Ministry of the Interior to the UN High Commissioner for Refugees, the escort to the border of approximately one thousand illegal immigrants who arrived in Lampedusa (**Italy**) may be in violation of Article 4 of Protocol n°4 ECHR. The immigrants who arrived in Lampedusa should have been granted the right to an interpreter and individual notification in a language they understand of the orders that were served against them, orders which they should have been able to challenge before a competent national authority. They should also have been given access to the procedure for the determination of their claim to asylum, if they did wish to file such claim, of to another form of international protection. Moreover, as already noted in these conclusions under Article 18 of the Charter, no verifications were made on the age of the immigrants illegally arriving in Lampedusa, which resulted in the fact that any unaccompanied minors among the immigrants expelled were not treated according to the special protection they should be granted. Moreover, these immigrants were deprived of their liberty in order to effectuate their removal from the national territory, without any judicial review. The Network notes also that approximately one thousand immigrants were detained in a temporary centre in Lampedusa designed to hold no more than 194 persons, and that a representative of the UNHCR was denied access to the centre. A further source of concern is that Libya is not a party to the Geneva Convention on the Status of Refugees, and that its record in the field of human rights is far from perfect. In such circumstances, it must be considered that Italy has deliberately taken the risk of exposing the immigrants it returned to Libya to persecution or ill-treatments either in Libya or in a third State, in violation both of Article 33 of the Geneva Convention and of Article 3 ECHR.

Prohibition of removals of foreigners to countries were they face a real and serious risk of being killed or being subjected to torture or to cruel, inhuman and degrading treatments

Positive aspects

In its Concluding Observations on **Finland** adopted in November 2004 (CCPR/CO/82/FIN/Rev.1), the Human Rights Committee welcomed the fact that the Finnish Constitution and laws explicitly extend the requirement of non-refoulement to the risk of death penalty in another country and that these clauses have been interpreted to prohibit even the handing over of information in cases where such information could be used to sentence a person to death.

Following the very critical final views adopted by the Human Rights Committee in the case of Sholam Weiss after his unlawful extradition to the United States, **Austria** amended the Extradition and Legal Assistance Act (*Auslieferungs- und Rechtshilfegesetz*) (Federal Law Gazette (BGBl.) I No 15/2004) in order to ensure an effective remedy in extradition proceedings. The Austrian Federal Chancellery, moreover, informed the expert of the Network that Austria notified the U.S. Department of Justice about the views of the UN Human Rights Committee and asked to be notified about all procedural steps taken by the United States after the extradition of the complainant.

On 4 February 2005, the Grand Chamber of the European Court of Human Rights considered for the first time in a final judgment that a refusal by a State party to the European Convention on Human Rights to comply with an interim measure indicated by a Chamber of the Court or its President on the basis of Article 39 of the Rules of the Court constitutes a violation of Article 34 of the Convention, which imposes an obligation on the Contracting Parties « not to hinder in any way the effective exercise » of the right to individual application (Eur. Ct. HR (GC), judgment of 5 February 2005 in the

case of *Mamatkulov and Askarov v. Turkey*, Appl. N°46827/99 and 46951/99). The Network notes with interest that, although in principle aliens unlawfully present in the **Netherlands** are not entitled to reception facilities, a principle which extends to asylum seekers whose applications have been unsuccessful, the Regional Court of The Hague considered that, as a result of the application of Rule 39, the petitioner could not be said to be under an obligation to leave the country and his stay in the Netherlands was, therefore, lawful. In addition, the denial of reception facilities – which was aimed at encouraging a departure from the Netherlands – might detract from the effectiveness of the interim measure. In these circumstances, the judge granted a provisional measure to the effect that the *Centraal Orgaan Opvang Asielzoekers* [COA, the Central Agency for the Reception of Asylum Seekers] should provide the petitioner with reception facilities (case No. AWB 04/4053 COA, of 28 April 2004). The *Afdeling Bestuursrechtspraak van de Raad van State* [Administrative Litigation Division of the Council of State] also held on 25 May 2004 that, as long as an interim measure pursuant to Rule 39 of the Rules of Court is in place, the stay in the Netherlands of the person concerned is lawful (No. 200400863/1). The confirmation of the obligatory character of interim measures granted by the European Court of Human Rights adds further legitimacy to this case-law. The EU Member States should be encouraged to organise the administrative and humanitarian situation of aliens facing the threat of deportation by taking into account that, as a result of the *Mamatkulov and Askarov v. Turkey* judgment of the European Court of Human Rights, once the Court indicates measures on the basis of Rule 39 of the Rules of the Court, these aliens should be considered as residing lawfully on the territory of the State concerned.

Reasons for concern

Upon examination of the reports submitted by its members on the situation of fundamental rights in the 25 Member States of the Union and on the activities of the institutions of the Union, the Network of Independent Experts concludes that the following situations should be the source of particular concern to the institutions of the Union:

• **Belgium** still has not executed the judgment of the European Court of Human Rights in the case of *Conka v. Belgium*, delivered on 5 February 2002. The Network finds, indeed, that the Law of 15 December 1980 on the access to the territory, stay, establishment and removal of foreigners does not formally impose an obstacle to an alien being removed from the territory while the action for annulment of the expulsion order he or she has lodged with the Conseil d'Etat is still pending before this jurisdiction, even where the action has been accompanied with an urgent request to suspend the execution of the expulsion order. Moreover, a foreigner may be removed from the country even before the committals division of the competent First Instance Court has been given an opportunity to decide on the proceeding filed against the decision to deprive him or her from his or her liberty with a view to ensuring the removal, although the lack of such a safeguard has been found to be incompatible with Article 5(4) of the European Convention on Human Rights. During the period under scrutiny, the Human Rights Committee (Concluding Observations, CCPR/CQ/81/BEL (para. 11)) as well as the European Commission against Racism and Intolerance have expressed their concern about the failure to remedy this situation. We should therefore welcome the news to be found in document CM/Del/OJ/DH(2004)897 Volume I of the Committee of Ministers of the Council of Europe that the Belgian state is preparing a draft Royal Decree amending the procedural rules applicable to disputes relating to decisions concerning access to the territory, residence, establishment and expulsion of foreigners with a view to ensuring the full implementation of the *Conka* judgment. Moreover, the fact that there exists a judgment of the European Court of Human Rights against Belgium, specifying the requirements of the right to an effective remedy in connection with the expulsion of foreigners should not obscure the fact that a similar deficiency is to be encountered in other Member States of the European Union: in the **Netherlands** for instance, although an asylum seeker has the possibility to file a request for interim measures with the *Raad van State* (Council of State), the request will be admissible only if the date of expulsion is known, and in practice asylum seekers are not infrequently expelled during the appeal proceedings, without the lawyer being notified.

• The European Committee of Social Rights has concluded that the situation in **Finland** was not compatible with Article 19(8) of the European Social Charter, a provision which it read as prohibiting the expulsion of family members of a migrant worker who constitutes a threat to national security, if the family members themselves do not pose a threat to national security. Considering that family reunion is not to be enforced upon a family, the Committee also concluded that the situation in Finland is not in conformity with article 19(8), on grounds that a minor to a migrant worker may be expelled when the migrant worker is expelled. The European Committee of Social Rights also considered that the situation in **Germany** was not compatible with Article 19(8) of the European Social Charter, insofar as under German legislation migrant workers who are nationals of Contracting parties may be expelled on grounds that are not authorised by the European Social Charter (Conclusions XVII-1); it arrived at a same finding concerning **Spain**, although it also observes with regard to the same country that its situation is not in conformity with Article 19(10) of the Charter due to the fact that self-employed migrant workers do not enjoy the protection provided for in terms of safeguards against expulsion. **Sweden** also has been found not to be in conformity with this clause, on the grounds that migrant workers who are citizens of States parties to the Charter and against whom an expulsion order has been issued on account of their posing a threat to national security have no right of appeal to an independent body. This aspect of the Swedish legislation, as codified in Chapter 7, Section 11, § 2 of the Aliens Act (*utlänningslagen* (SFS 1989:529)), has also been criticized by the Committee on the Elimination of Racial Discrimination when it examined the Report submitted by Sweden under the UN Convention on the Elimination of All Forms of Racial Discrimination. The Committee invited the Swedish Government to reconsider the 1991 Act on Special Control of Aliens (Lag om särskild utlänningskontroll (SFS 1991:572)), which allows the Government to expel a foreigner if this is deemed necessary to the security of the country or if there are reasons to suspect that he or she will commit or participate in crimes involving violence, threats or coercion for political purposes, without the possibility of appealing against such a decisions (CERD/C/64/CO/8, § 15). **Finland**, **Germany** and **Sweden** should modify their legislation accordingly.

• The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment emphasized in September 2004 in his report to the General Assembly of the United Nations that the reliance on assurances, sought by the sending country from the receiving country, that transferred suspects will not be subjected to torture or cruel, inhuman or degrading treatment or punishment, is increasingly undermining the principle of non-refoulement (UN Doc. A/59/324, 1 September 2004, § 30, p. 9). This is illustrated by the forcible expulsion from **Sweden** on 18 December 2001 of two Egyptian men, Ahmed Hussein Mustafa Kamil Agiza and Mohammed Suleiman Ibrahim Al-Zary, who had claimed persecution in their home country and who had sought asylum upon their arrival in Sweden. The expulsion was decided despite the fact that both men risked facing grave human rights violations on their return and the fact that they had been sentenced in absentia to prison in Egypt on the grounds of terrorism-related offences by a military court. The Swedish decision was based partly on diplomatic assurances of fair treatment from the Egyptian authorities. In late March 2004 however, more than two years after Agiza's return, the Egyptian authorities ordered a retrial before a military tribunal where fair trial standards were not respected. Both men have submitted claims before international human rights bodies. The case of Al-Zary was submitted to the European Court of Human Rights (Appl. No 10786/04), but rejected on formal grounds on 26 October 2004. The case of Agiza was declared admissible by a decision taken by the UN Committee against Torture (CAT) on 1st of June 2004 (communication no. 233/2003). The Human Rights Committee has also requested a follow up report on the above mentioned case from the Government, which was presented in 2003. The Network shares the view of the Council of Europe Commissioner for Human Rights that the case in question illustrates "the inability to contest asylum and expulsion decisions taken directly by the government on grounds of national security without applicants having access to the information on which such decisions are based, nor any possibility to appeal against such a decision" as well as the weakness inherent in the practice of diplomatic assurances (CommDH(2004)13, p. 9).

• In its previous conclusions concerning 2003, the Network of Independent Experts noted that the state of the legislation in the **Slovak Republic** appears to be incompatible with the guarantee

provided by Article 19(2) of the Charter of Fundamental Rights : while the paragraph 2 of Section 47 of the Act on Asylum (*Zákon č. 480/2002 Z. z. o azyle a o zmene a doplnení niektorých zákonov v znení neskorších predpisov*) imposes an absolute prohibition of expulsion where there exists a risk of "torture, cruel, inhuman or degrading treatment or punishment", paragraph 1 of Section 47 of the Act on Asylum allows expelling a person to "the territory of the country where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion", provided that such a person "can be reasonably regarded as a danger to the security of the Slovak Republic or who has been convicted by a final judgement of a particularly serious crime constituting a danger to the society." The Network regrets that there has been no improvement on this point during the period under scrutiny.

- The Committee against Torture has expressed concern about the **United Kingdom**'s « reported use of diplomatic assurances in the refoulement context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees followed, are not wholly clear and thus cannot be assessed for compatibility with article 3 of the Convention » (CAT/C/CR/33/3, 25 November 2004, para 4(d)). It has requested details on « how many cases of extradition or removal subject to the receipt of diplomatic assurances or guarantees have occurred since 11 September 2001, what the State party's minimum contents are for such assurances or guarantees and what measures of subsequent monitoring it has undertaken in such cases » (para 5(i)). In addition it has recommended the application of « articles 2 and/or 3, as appropriate, to transfers of a detainee within a State party's custody to the custody whether de facto or de jure of any other State » and that « the State party should consider offering, as routine practice, medical examinations before all forced removals by air and, in the event that they fail, thereafter » (para 5(e) and (n)). The Network welcomes nevertheless in this regard the fact that the appellate committee of the House of Lords recognised in *R (on the application of Ullah) v Secretary of State for the Home Department* [2004] UKHL 26, [2004] 3 All ER 785 that the possibility of a breach of articles of the ECHR other than Article 3 resulting from the removal of someone from the **United Kingdom** could be raised to resist extradition or expulsion. Articles 2, 4, 5, 6, 7 and 8 were specifically instanced in this regard but it was made clear that successful reliance would demand presentation of a very strong case. Furthermore, while considering it hard to conceive that a person could successfully resist expulsion in reliance on Article 9 without being entitled either to asylum on the ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to resist expulsion in reliance on Article 3, it was accepted that such a possibility in principle could not be ruled out.

- Still as regards the **United Kingdom** the parliamentary Joint Committee on Human Rights has expressed concern about the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2002 which states that it applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention, namely, the exception to the principle that refugees cannot be returned to persecution where, having been convicted of a particularly serious crime, the refugee constitutes a danger to the community to the country of refuge. Section 72 of the 2002 Act creates a presumption that a person has been convicted of a particularly serious crime and constitutes a danger to the community in the United Kingdom if convicted of an offence specified by order of the Secretary of State under the power conferred by section 72(4). The Committee is concerned that the Order is ultra-vires the order-making power as it includes within its scope a number of offences – e.g., theft, entering a building as a trespasser intending to steal, aggravated taking of a vehicle, criminal damage and possession of a controlled drug - which do not amount to 'particularly serious offences' within the meaning of Article 33(2) of the Convention, properly interpreted, as these are a very narrow category. Although ECHR Article 3, if relied upon, may prevent return to persecution in such cases, claimants for asylum still suffer the detriment of being denied refugee status (*The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2002*, HL 190/HC 1212).

CHAPTER III : EQUALITY

Article 20. Equality before the law

> Everyone is equal before the law.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (1966) and by Article 14 the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), with respect to the rights and freedoms guaranteed in that instrument. The Preamble of the European Social Charter (1961), stating that the rights listed in that instrument should be recognised without discrimination, as well as Article E of the Revised European Social Charter, should also be taken into account. The Council of Europe Framework Convention for the Protection of National Minorities (1995) guarantees the members of national minorities a right to equality before the law (Article 4(1)).

The issues relating to non-discrimination are dealt with under the following Article of the Charter. It has not been considered necessary to adopt separate conclusions under Article 20 of the Charter.

Article 21. Non-discrimination

> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
> 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (1966), by Article 2 of the International Covenant on Economic, Social and Cultural Rights (1966), by the International Convention on the Elimination of All Forms of Racial Discrimination (1965), by Article 7 of the International Convention on the Rights of All Migrant Workers and Members of their Families (1990) (with regard to the rights recognised to migrant workers and the members of their families under this instrument), by ILO Convention (n°111) concerning Discrimination in Respect of Employment and Occupation (1958), by Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), by Protocol n° 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2000, not yet in force), by Article 11 of the Convention on Human Rights and Biomedicine (1997) (with regard to discrimination based on genetic features) and by Article 4 of the Framework Convention for the Protection of National Minorities (1995). To the extent Article 21 of the Charter of Fundamental Rights prohibits any discrimination on the ground of membership of a national minority, Article 27 of the International Covenant on Civil and Political Rights (1966) should be taken into account in the interpretation of this provision, as well as provisions from the Framework Convention on the Protection of National Minorities (1995).

Protection against discrimination

Under this heading, the Network of Independent Experts focuses in particular on the developments which concern the implementation of 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 of 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, p. 16). Its comments are not limited to those instruments, however.

Good practices

The transposition of Directives 2000/43/EC and 2000/78/EC, where this chiefly calls for legislative and regulatory measures, should also provide the kind of protection against discrimination on the grounds enumerated in those directives that has the required effectiveness. From this point of view, the fact that in **Belgium** the Brussels Employment Office (ORBEM) and the Centre for Equality of Opportunity and the Fight against Racism (CECLR) set up an "Information Centre on Discrimination in Employment", as well as the activities of the decentralized centres of the Centre for Equality of Opportunity and the Fight against Racism, constitute interesting innovations, since those initiatives are able to provide the main interested parties with the legal tools for protection against discrimination.

Although it is still making its way through the parliamentary process at the time of completion of this report, the Network notes with interest the tabling in **France** on 5 October 2004 of a bill establishing a High Authority for Equality and Combating Discrimination (HALDE), which will become a kind of "one-stop shop" for victims of all forms discrimination prohibited by law or by the international obligations of France. Any victim, as well as regional agencies, may appeal to this High Authority in order to attempt mediation and then, if this fails, to conduct inquiries leading, if necessary, to submission of the case to the public prosecutor.

Still in **France**, following a survey conducted by the Observatory of Discrimination of the University of Paris I on behalf of a temporary employment agency in order to identify the sections of the population that are most liable to discrimination in employment, several measures have been adopted to combat this form of discrimination. The survey by the Observatory of Discrimination involved replying to job advertisements by sending one standard CV (that of a 28-year-old male bearing a French name, residing in Paris, "Caucasian with standard appearance") and 6 CVs with one particular feature changing each time (gender, ethnic origin, place of residence, physical appearance, age, disability), all with the same level of qualification. It emerged that the standard applicant received 32% positive replies inviting him for an interview, the disabled applicant received only 2% positive replies, the applicant of Maghreb origin 5%, the applicant over 50 years of age 8% and the applicant with an "unsightly" physical appearance 13%. The survey also found that 20% of the advertisements examined imposed an age limit, which is an unlawful practice. Following these results, the prefecture of Rhône launched an original formula – it is too soon to speak of "good practice" – which however still encounters certain difficulties of implementation: the anonymous CV or "CV of the first meeting". The purpose of this CV is to prevent certain job applicants from being turned down simply on account of their surname, address or appearance. The authorities have asked the intermediaries (National Employment Agency (ANPE), local employment centres, etc) to draw up CVs containing neither name nor photo or address, so that only the career and experience of the applicant should be taken into consideration. The solution of the anonymous CV is also recommended in a report delivered to the Prime Minister on 22 November 2004 entitled "Enterprises in the Colours of France – Visible Minorities: Taking up the Challenge of Access to Employment and Integration in the Workplace". It is worth noting that in **Belgium** the recruitment of contractual public service officials – which since the end of 2004 must be done exclusively through SELOR (Selection Bureau of the Federal Authorities) – must also take place on the basis of anonymous CVs, coupled with a balanced composition of juries.

Portugal has transposed Directive 2000/43/EC, by Act nº 18/2004 (*Lei nº 18/2004, de 11 de Maio*), which also reinforces the role of the Commission against Racial Discrimination (Comissão Contra a

Discriminação Racial), as national specialized organ on the fight against discrimination. Another remarkable novelty was the introduction of the prohibition of discrimination on the grounds of sexual orientation in the Portuguese Constitution through the sixth constitutional amendment (*Lei Constitucional nº 1/2004, de 14 de Julho*).

Reasons for concern

The process of implementing the abovementioned directives has continued during the period under scrutiny. Within the European Commission, DG Employment and Social Affairs has been particularly active in monitoring this implementation, focusing not only on the legal framework in national laws but also on the effectiveness of the implementation measures, and relying on the work of the Group of Legal Experts on Discrimination which covers the 25 Member States. It would be superfluous here to comment on the infringement proceedings brought against six Member States for failure to implement the Equal Treatment Directives, or to review systematically the measures adopted by each Member State, during the period under scrutiny, in order to ensure this implementation. The Network notes however the following difficulties, emphasizing that this list cannot and should not be seen as exhaustive:

• The contents of the Federal Acts adopted in **Austria** purporting to implement the Equality Directives appear in some respects unsatisfactory. In particular, the Equal Treatment Act provides that the victim of discrimination is under the obligation to establish a prima facie violation of his or her rights under the Act, whereas the alleged perpetrator must then try to refute the charges by merely showing the plausibility that the different treatment was due to another motive than the discriminatory motive claimed by the victim or that a special justification applies (ss. 12 para. 12, 26 para. 12, 35 para. 3, 51. para 9 of the Equal Treatment Act). It is doubtful whether this procedural construction fully shifts the onus on the alleged perpetrator in accordance with the Directives.

• The transposition in **Belgium** of Directives 2000/43/EC and 2000/78/EC is heavily jeopardized by the uncertainty that continues to surround the division of tasks between the federal, regional and community levels. This is reflected in particular by a transposition of these directives that remains incomplete as regards the prohibition of discrimination in vocational training and among the personnel of the Brussels-Capital Region. The difficulties in implementing these directives in the context of the federal organization of the State illustrate that it would be a good idea to organize a more systematic consultation between the different levels of power concerned. The setting up of a national institute for the promotion and protection of human rights, as was projected in the government statement of July 2003 but which has not been implemented yet, will be justified in particular by the need for a better coordination in this area as well as, more generally, in the implementation of the international obligations of Belgium that contribute to a better protection of fundamental rights.

• In **Ireland**, while many of the provisions of the Equality Act 2004 are praiseworthy serious concern has been expressed about the broad exemption for non-Irish nationals under the legislation. It has been suggested that the exemption affords too much discretion to low-level officials and may, in its operation, be unconstitutional or contrary to the EU Race Directive. Moreover, Section 10 of the Equality Act exempts from claims for discrimination any act arising from the Employment Permits Act 2003. Furthermore, while the blanket exemption of those employed in a private household from the scope of protection of the Employment Equality Act 1998 has been removed the definition of 'employee' in the new Equality Act 2004 is such as to exclude prospective employees seeking work in a private household. Thus, for the purpose of discrimination claims concerning terms and conditions of employment those working in private households are covered by the legislation but not for the purpose of a discrimination complaint concerning access to employment. This will give rise to a significant inequality before the law for this category of employee (many of whom are migrant workers) in access cases.

• In its previous set of conclusions covering the year 2003, the Network expressed its concern at the fact that, in **Ireland**, the transfer of discrimination cases against publicans and hoteliers away

from the Equality Tribunal and into the District Courts (section 19 of the Intoxicating Liquor Act 2003) could also result in diminishing the protection of the Traveller Community from discrimination, especially taking account the consistent resistance of the licensed trade to the effective implementation of the Equal Status Act 2000. In the cases that remain to be heard by the Equality Tribunal the level of awards of compensation has been very low and, as expected, the number of discrimination claims taken by members of the Traveller Community against licensed premises has reduced considerably. A further and, perhaps, unintended consequence of transferring cases to the District Court under the Intoxicating Liquor Act 2003 arises from certain omissions in the Appendix to that legislation which does operate so as to reduce the jurisdiction of the Equality Authority to deal with discrimination issues – through a variety of means including information provision, development of codes of practice and the execution of equality reviews and action plans – within the licensed trade. The Equality Act 2004 did nothing to remove the ceilings for compensation in discrimination cases taken on the non-gender grounds. The Act also removes the theoretical possibility of different sets of compensation being awarded when a discrimination claim is taken on multiple grounds.

• Again in **Ireland**, the continuing controversy about whether or not members of the Traveller Community constitute a distinct ethnic minority may further lead to doubts about the scope of the protection afforded to that group. At para. 27-28 of its First Report under the Convention for the Elimination of All Forms of Racial Discrimination, the Government notes: "…some of the bodies representing Travellers claim that members of the Traveller community constitute a distinct ethnic group. (...) The Government's view is that Travellers do not constitute a distinct ethnic group from the population as a whole in terms of race, colour, descent or national or ethnic origin. However, the Government of Ireland accepts the right of Travellers to their cultural identity, regardless of whether the Traveller community may be properly described as an ethnic group. In line with this, the Government is committed to applying all the protections afforded to ethnic minorities by CERD equally to Travellers. As outlined in Ireland's Report under the [ICCPR], Travellers in Ireland have the same civil and political rights as other citizens under the Constitution and there is no restriction on any such group to enjoy their own culture, to profess and practice their own religion or use their own language. The Government is committed to challenging discrimination against Travellers and has defined membership of the Traveller community as a separate ground on which it is unlawful to discriminate under equality legislation. This was not meant to provide a lesser level of protection to Travellers compared to that afforded to members of ethnic minorities. On the contrary, the separate identification o Travellers in equality legislation guarantees that they are explicitly protected. The Government notes that the Durban Declaration and Action Plan recognised the need to develop effective policies and implementation mechanisms for the full achievement of equality for Roma/Gypsies/Sinti/Travellers (...)."

• On 7 December 2004, the Council of State delivered its opinion on the two bills for the transposition in **Luxembourg** of Directives 2000/78/EC establishing a general framework for equal treatment in employment and occupation and 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Some of the criticisms which the opinion formulated are the exclusion of the public sector, the exclusion of self-employment, the absence of an exact definition of the scope of application of the Act for the transposition of Directive 2000/43/EC, the unqualified use of the term "race", a too general formulation of the exception for churches with regard to the essential, legitimate and justified occupational requirement, which could be interpreted as putting a new restriction on religious freedom, the absence of a mechanism for the protection of rights, as well as for the protection against reprisals (except in the area of employed activity), the multiplicity of penal sanctions (consecutively with those of the Penal Code) and the absence of a body for the promotion of equal treatment. The Network also points out that the European Commission has announced that it will institute proceedings against Luxembourg before the Court of Justice of the European Communities for failure to transpose the two Directives.

• The Committee on Economic, Social and Cultural Rights in its 2004 Concluding observations on **Lithuania** (E/C.12/1/Add.96), while noting the ongoing efforts to improve the living situation of the Roma community under the "Programme of integration of the Roma into the Lithuanian society

for 2000-2004" remained concerned that the Roma community continued to suffer from problems of integration and discriminatory practices in the fields of housing, health, employment and education.

• The Network is informed that the **Slovak** Government has recently challenged the compatibility of the provision of the new Anti-discrimination Act concerning the positive action with the Slovak Constitution at the Constitutional Court. The argument put forward by the Minister of Justice is that the provision of positive action (Section 8 paragraph 8 of the Anti-discrimination Act, providing that "With a view to ensuring full equality in practice and adherence of the principle of equal treatment, specific measures for prevention and compensation of disadvantages linked to racial or ethnic origin may be adopted"), constitutes a positive discrimination, which is as such forbidden by Article 12 paragraph 2 of the Slovak Constitution, which states: "Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds." The Network notes, however, that the adoption of positive action measures is not considered in international law a violation of the principle of non-discrimination, as confirmed for instance by Article 4(1) of the Convention for the Elimination of All Forms of Discrimination Against Women or by Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination. Moreover, in its resolution of April 2003, the Slovak government adopted specific measures containing also programs of positive action towards Roma population, thus recognizing that *de facto* discrimination against Roma minority cannot be eliminated or even effectively combated without a reasonable use of positive action.

• As regards the **United Kingdom** the Network notes that immigration officers operating at Prague Airport were held to have discriminated on racial grounds – contrary to the Race Relations Act 1976, s 1(1)(a) - against Roma seeking to travel from that airport to the United Kingdom by treating them more sceptically than non-Roma when determining whether to grant them leave to enter the United Kingdom (in *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, 9 December). The Network welcomes the strategy launched in April 2004 by the Commission for Racial Equality on Gypsies and Travellers, aiming to seek better site provision for them, to improve their education, health and employment, as well as their treatment by the police and the courts, to bring legal challenges against discrimination that impact most on them, to work for better ethnic monitoring (including a census category for them) and to encourage fair reporting on them in the media.

• While it shall expand on this issue in its Thematic Comment n°3 on the rights of minorities in the European Union, the Network wishes to recall the need to ensure that Directives 2000/43/EC and 2000/78/EC are interpreted so as to prohibit segregation, a form of discrimination which may, or may not, be understood under the current definitions of direct and indirect discrimination in the existing directives. Indeed, it may be noted that, according to Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, "The principle of equal treatment in the access to goods and services does not require that facilities should always be provided to men and women on a shared basis, as long as they are not provided more favourably to members of one sex." Unfortunately, a restrictive interpretation of Council Directive 2000/43/EC risks being encouraged by the distinction made between "separate facilities" and "discrimination" in Directive 2004/113/EC. The Network believes that this matter should be addressed urgently. Indeed, the Council of Europe Commissioner for Human Rights, Mr. Alvaro Gil-Robles, expressed concern in the report following his visit to **Denmark** 13th-16th April 2004 about the separation of ethnic Danish pupils and bilingual pupils in special classes and the decision to establish a school just for bilingual pupils in Høje Taatrup. The separation deprives the children from getting acquainted with each other and the possibility to teach them to live aside as equal citizens. In addition to this, the pupils with another ethnic background than Danish risk being marginalised later in life. In respect to the prevention of discrimination the Commissioner criticized the Roma children's difficult access to education e.g. the special classes in the municipality of Helsingør which 30 children at the present attend. The majority of the children never return to

"normal" classes again. In reality, the criteria for placement of the children in these classes are the children's ethnic background and not the individual need. The Commissioner questioned why the Roma children with special educational needs are not placed in traditional special classes with Danish pupils with similar needs. Similarly, in its Third Report on the **Czech Republic**, which was made public on 8 June 2004 (CRI (2004) 22), the European Commission against Racism and Intolerance concluded that: "There have been few detectable improvements in the situation of Roma whose marginalisation from mainstream society continues to take physical form through their ghettoisation into substandard housing complexes on the outskirt of cities. Many Roma children also continue to be sent to special schools for the mentally disabled and a disproportionately high number are removed from their families and placed in state institutions or foster care". In **Latvia**, there have been reports that some municipalities place Roma families to live in the same building, thus in segregated settings (Valsts Cilvēktiesību birojs, Aktuālie cilvēktiesību jautājumi Latvijā 2004.gada 1.ceturksnī, available at www.vcb.lv, p.7).

In its Concluding Observations concerning the **Slovak Republic**, the Committee on the Elimination of Racial Discrimination expressed its concern at the segregation of Roma children in special schools, as well as in housing, respectively under Articles 14 and 34 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/65/CO/7). Indeed, despite the formal guarantee of non-discrimination in education under Articles 12 paragraph 2 and 42 of the Slovak Constitution, and despite also the introduction in the Slovak Republic of programmes focusing on improving the educational opportunities of Roma children such as pre-school grades at elementary schools, the inclusion of Romany language education, the preparation classes in elementary schools and positions of teacher's assistants for Roma pupils, there still is a disproportionately high representation of Roma children in special (mentally disabled) schools; in some schools for the mentally disabled, every single pupil is a Roma. Moreover, segregation persists in housing : many Roma live in extremely substandard, racially segregated slum settlements, and discrimination in the allocation of social and other public housing has been frequently reported in the Slovak Republic.

With respect to **Slovenia**, the European Roma Rights Centre (ERRC) reported that Roma frequently lived in settlements apart from other communities that were characterized by lack of basic utilities such as electricity, running water, sanitation, and access to transportation; it also reported that some local authorities developed segregated substandard housing facilities to which Roma communities were forcibly relocated, and that Roma children frequently attended segregated classes or schools and that, in some instances, Roma children were segregated in schools for children with mental disabilities. In its Concluding Observations on Slovenia of June 2003, the CERD had already expressed concern over the practice of educating some Roma children at vocational centres for adults and others in special classes; the Committee encouraged the Government to promote the integration of Roma children into mainstream schools (see also, recommending the integration of Roma children into mainstream education in Slovenia, Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia), CRC/C/15/Add.230).

The situation of the Roma in **Greece** has been the subject of several critical assessments, more particularly by the European Commission against Racism and Intolerance (ECRI), the Committee on Economic, Social and Cultural Rights of the United Nations and the European Committee of Social Rights. Furthermore, the collective complaint no. 15/2003 brought before the European Committee of Social Rights by the European Roma Rights Centre (ERRC) denounces, with regard to Article 16 of the European Social Charter, which recognizes the "right of the family to social, legal and economic protection", coupled with the Preamble (non-discrimination) of the European Social Charter, the alleged discrimination in law and in fact against Roma in the area of housing. The European Committee of Social Rights transmitted its report containing its decision on the merits of the complaint to the Committee of Ministers on 7 February 2005. The decision will be made public on 8 June 2005. Where a violation of the European Social Charter is observed, this lesson will have to be borne in mind in the interpretation of Directives 2000/43/EC and 2000/78/EC, including insofar as the

decision on the merits should offer an interpretation of the requirements ensuing from the principle of non-discrimination.

Insofar as Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin applies to housing (Art. 3(1), h)), it should further be determined whether it should afford a protection against forced evictions, where these are applied in a discriminatory fashion. With regard to **Greece**, ECRI is concerned about allegations that forcible and collective evictions of Roma families have taken place, without any alternative accommodation being offered. Similarly, the Committee on Economic, Social and Cultural Rights of the United Nations has expressed its concern over the forcible expulsions of Roma by the municipal authorities, in particular as part of the activities in preparation for the Olympic Games of 2004. Thus also, the study on the situation of the Roma in the enlarged European Union commissioned by DG Employment and Social Affairs of the European Commission and published in November 2004 documents that, in **Hungary** in particular, the legislation allowing the notary to order evictions without a court order is primarily affecting Roma families. Although the courts tried to ameliorate the effects of these provisions by introducing a moratorium on forced evictions during the winter, Roma remain disproportionately affected by this measure: in 2003, 55% of the victims of evictions were of Roma origin. Forced evictions of Roma from their camps have also occurred in **Italy**, as again in Padova in August 2004.

The implementation of the Equal Treatment Directives should not be relied upon by the Member States to diminish the level of protection against discrimination they have already achieved in their national legislation (Article 6(2) of Directive 2000/43/EC; Article 8(2) of Directive 2000/78/EC). In that respect, while appreciating that this has not been the consequence of the implementation measures of those Directives, the Network shares the concern expressed by the Committee on the Elimination of Racial Discrimination (CERD) in its Concluding Observations on the fifteenth and sixteenth periodic reports of the **Netherlands** (CERD/C/64/CO/7) about the negative consequences of the expiry of the *Wet Samen* [Employment of Minorities Act] on 31 December 2003. This law was the only legislative instrument on the professional participation of ethnic minorities. It also required employers to register how many persons from ethnic minorities they employed. The CERD recommended that the Netherlands pursue an adequate policy to ensure proper participation of these groups in the labour market.

It was held in Eur.Ct.H.R.(1st sect.), *Connors v* ***United Kingdom*** (Appl 66746/01) judgment of 27 May 2004 (final) that the summary eviction of the applicant, his wife and four children – for alleged misbehaviour and causing considerable nuisance - in the early hours from a local authority caravan site for gypsies, where they had lived, with a short absence, for some 14 or 15 years had not been attended by the requisite procedural safeguards, namely, the requirement to establish proper justification for the serious interference with his rights, and consequently could not be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued so that it was in violation of ECHR Article 8. It was particularly significant that a summary procedure was not possible in respect of evictions from privately-run sites and that gypsies did not benefit from any special regime in that there was a duty on local authorities to ensure that there was sufficient provision for them or in the making of special allowances in the planning criteria applied to applications for permission to station caravans on private sites. The Court considered that the situation in England as it had developed, for which the authorities had to take some responsibility, placed considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decided to take up a more settled lifestyle. However, the Network welcomes the fact – as regards the **United Kingdom –** that the Housing Act 2004 has extended the meaning of 'protected site' in the Caravans Act 1968 to sites owned by county councils providing accommodation to gypsies so that they become subject to provisions governing the minimum length of notice, protection from unlawful eviction and harassment and the suspension of eviction orders. It also removes the exclusion of certain caravan occupants, including most Gypsies and Travellers, from eligibility to receive a disabled facilities grant and requires local housing authorities to review the accommodation needs of Gypsies and Travellers in their district when carrying out reviews of housing needs under the Housing Act 1985.

The Network also wishes to emphasize that, in implementing these directives, the Member States should take into account their other, pre-existing international obligations, and that the adoption of implementation measures which would be in violation of the European Convention on Human Rights (and particularly Article 14 ECHR or Article 1 of Protocol n°12 to the ECHR), the International Covenant on Civil and Political Rights (and particularly Articles 2(1) and 26 thereof), the International Covenant on Economic, Social and Cultural Rights (and particularly Article 2(2) thereof), or the (Revised) European Social Charter, should be considered as inadequate.

In this regard, it notes that 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, p. 16) does not clearly specify whether differences in treatment based on whether or not a person is married may be tolerated or whether, in countries where civil marriage is not open to same-sex partners, such differences in treatment should be considered as a form of discrimination based on sexual orientation. Recital 22 of the Preamble to the Framework Directive mentions that this instrument is « without prejudice to national laws on marital status and the benefits dependent thereon ». It is clear that it is compatible with the Framework Directive to define marriage exclusively as a civil union between a man and a woman, even though the consequence is that individuals with a homosexual sexual orientation will thereby be excluded from that institution and the benefits which are attached to the status of married persons. It remains an open question however, whether, in the Member States where same-sex marriage is not recognized (this includes all the Member States with the exception of **Belgium**, the **Netherlands**, and **Spain**) and where homosexuals are therefore excluded from the institution of marriage, it is compatible with the Framework Directive that they have access to no form of recognition of their union with another person of the same sex (in the form of a registered partnership, a civil union, or legal cohabitation for instance) and remain therefore deprived of the advantages they would be recognized if they had entered into a heterosexual marriage.

Although the failure to extend to same-sex couples advantages recognized to married heterosexual couples where the institution of marriage is reserved to the latter is not, at the present stage of development of the case-law of the European Court of Human Rights, considered a discrimination under the European Convention on Human Rights (Eur. Ct. HR (4th sect.), *Mata Estevez v. Spain* (Appl. N° 56501/00), dec. (inadmissibility) of 10 May 2001, Rep. 2001-VI), matters could have to be considered differently where the advantages reserved to married couples are in fact meant to benefit children. Indeed, children may not be made to suffer the discriminatory consequences based on the civil status of their parents, whether they had the choice to marry or whether that choice was not open to them. This appears clearly from the final views adopted by the Human Rights Committee in the case of *Derksen and Bakker v. the Netherlands* (Communication 976/2001, final views of 15 June 2004*)*, which involved a differentiation between married and unmarried couples in the field of social security, in which the Committee found a violation of Article 26 ICCPR. Under the Dutch General Widows and Orphans Law (*AWW, Algemene Weduwen en Wezen Wet*), only widows recognized as such (i.e., the spouse of the deceased) could receive benefits for half-orphans after the death of the spouse. On 1 July 1996, the Surviving Dependants Act (*ANW, Algemene Nabestaanden Wet*) replaced the AWW, stipulating that unmarried partners are also entitled to a benefit. The Human Rights Committee recalled that it has earlier found that a differentiation between married and unmarried couples does not amount to a violation of article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the cohabitating persons. By enacting the new legislation the **Netherlands** has provided equal treatment to both married and unmarried cohabitants for purposes of surviving dependants' benefits. Taking into account that the past practice of distinguishing between married and unmarried couples did not constitute prohibited discrimination, the Committee was of the opinion that the Netherlands was under no obligation to make the amendment retroactive. It arrived at a different conclusion, however, with respect to the refusal of benefits for the author's daughter. It found that this constituted prohibited discrimination under article 26 of the Covenant. In the circumstances of the case it was presented with, the Committee observed that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to

children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considered that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasised that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them.

The views adopted by the Human Rights Committee in the case of *Derksen and Bakker v. the **Netherlands*** illustrate, first, that under Article 26 ICCPR, although a difference in treatment between married couples and unmarried couples may be considered to be based on reasonable and objective grounds where the choice has been made by the partners concerned whether or not to marry, this may not be the case where they could not make such a choice, as is the case of same-sex partners in States where marriage is an institution reserved to different-sex couples; second, the case illustrates that benefits to children may not be made dependent on the civil status of parents. The Member States should be encouraged to implement their obligations under Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation accordingly.

A regards the case of *Derksen and Bakker v. the **Netherlands***, the Network regrets that the Dutch Government officially stated that it rejected the views of the Committee in this case. This is a potentially damaging step that can easily undermine the authority of the Human Rights Committee. Despite the Dutch Government's reassuring words on the importance of the right of individual petition in general, the Dutch response is particularly regrettable at a time when the respect for the international rule of law and human rights is seriously challenged in Guantánamo Bay, Abu Ghraib etcetera". See the NL report, p. 11, for more details.

Finally, renewed calls to expand the implementation of the principle of equal treatment beyond the current directives adopted on the basis of Article 13 EC have been made during the period under scrutiny. The Network considers that the report published by the European Region of the International Lesbian and Gay Association (ILGA) in April 2004 offering a comparative summary of the national reports written in 10 countries joining the European Union in 2004, deserves close attention from both the EU institutions and the Member States. In its conclusion the report draws attention to the very real threat of violence, harassment in the educational system, in the workplace, in the streets and other public places. As a result of this threat gay, lesbian and bisexual people are isolated and marginalized in many aspects. The organization made recommendations to the EU institutions – as the EU Commission and the Council – to take measures that effectively protect the LGB people from exclusion in their society. The Report recommends that Member States adopt anti-discrimination legislation beyond the spheres of work and employment covered by Council Directive 2000/78/EC, and that they adopt legislation prohibiting homophobic speech and homophobic violence. A culture shift within the law enforcement authorities in particular is identified as a priority, so that the police not only does not discriminate against LGB people, but also cooperates effectively with LGB organisations and effectively protect the victims of hate crimes, including by preserving their anonymity. The educational system also should be targeted in an overall antidiscrimination strategy, in order to protect students from harassment and victimization. These proposals are based on a thorough and systematic examination of the discrimination to which LGB are currently facing in the new Member States; the solutions proposed are answers to problems which are well documented and deserve to be addressed as a matter of priority. Indeed, the Network notes that many of these recommendations are shared by the Human Rights Committee, which for instance, upon examining the report submitted by **Poland** in the framework of the International Covenant on Civil and Political Rights, expressed its concerns that the right of sexual minorities to not to be discriminated against is not fully recognised and that discriminatory acts and attitudes against persons on the grounds of sexual orientation are not adequately investigated and punished. The HRC recommended that Polish authorities should provide appropriate training to the law enforcement officials and judiciary to

sensitise them to the rights of these minorities. According to the HRC, discrimination on the grounds of sexual orientation should be explicitly prohibited in Polish law (Concluding Observations of HRC: Poland of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. para. 18). The HRC also expressed its concerns about the lack of general non-discrimination provisions covering all appropriate grounds and recommended that the Polish authorities extend the scope of non-discrimination law to areas other than employment (Concluding Observations of HRC: Poland of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. para. 16). Other examples illustrate the usefulness an extension of the material scope of application of the protection from discrimination on grounds of sexual orientation would present. In **Austria**, the gay and lesbian association *Homosexuelle Initiative (HOSI)* sought on the occasion of the 25th anniversary of their foundation to have two rapid trains named after their organisation for the duration of one year. The Austrian Railway Company (*ÖBB*), which in principle offers this marketing possibility to everyone, disapproved of this train patronage and simply cancelled the order, although the Ministry of Social Affairs could tag slogans on train wagons like "Family Country – Austria". However, there exists no remedy against this form of discrimination.. In another instance, a dancing school in Innsbruck, Province of Tyrol, did not allow a lesbian couple to participate in one of their dancing courses. As the law stands, the prevailing contractual freedom forces homosexual persons to endure such differential treatment of private persons or companies in the provision of goods and services. In **France,** following a violent act of aggression against a young homosexual, a bill to combat discriminatory sexist or homophobic remarks was tabled by the Government before the National Assembly. This bill, which set out to align this protection with that already existing in the area of racism, provided on the one hand for sanctions against incitement to discrimination, hatred or violence against a person or group of persons on the grounds of their actual or supposed sexual orientation or their gender, and on the other hand for sanctions against homophobic slander and insults. It provided that those offences could be prosecuted by associations for combating homophobic or gender-based discrimination or by associations for combating violence against women. The National Consultative Commission of Human Rights (CNCDH) examined this bill and delivered an opinion requesting that it be withdrawn (Opinion adopted on 18 November 2004, www.commission-droits-homme.fr). In this opinion, the CNCDH, referring to the principle of the indivisibility of human rights and considering that it is more by education and discussion that intolerance should be combated, "expresses reservations about the multiplication of categories of persons in need of special protection". The CNCDH considers that "encouraging occasional laws in this way can eventually only reduce the liberties of all", and that "while it is undeniable that the state must give protection to vulnerable persons in society, this principle does not seem to apply to homophobia (…). It has not been proven that the sexual orientation of a person or group of individuals gives rise to the kind of vulnerability that requires special protection from the state." Following this opinion, the Government decided to withdraw its bill and to address this issue in a wider context. The Network of Independent Experts does not share the view of the CNCDH and naturally cannot endorse the motivations for its opinion.

The Network has also identified the following reasons for concern in fields unrelated to the Equal Treatment Directives:

• The European Committee of Social Rights noted in its most recent conclusions relating to **Finland** (Concl. XVII-1 (2004)) that the Contracts of Employment Act (2001/55) reinforces the anti-discrimination provisions relating to different grounds and forms of discrimination, in particular discrimination against part-time workers and workers on fixed term contracts. However, the Committee noted that the new act does not provide for possible reinstatement of victims of discriminatory dismissal. The new act includes compensation to persons suffering discrimination including discriminatory dismissal in full for pecuniary and non-pecuniary damage suffered up to 24 months' wages for ordinary employees and 30 months' wages for staff representatives. The Committee noted that the penalty for breaching the ban of discrimination must sufficiently compensate workers. The compensation awarded being predefined as to the maximum compensation cannot do so.

• The European Commission against Racism and Intolerance (ECRI) notes the traditional policy of **Greece** which consists in granting special status to non-nationals of Greek origin, more particularly

by giving them a special identity card that entitles them to certain social security benefits. This preferential treatment ensues from Article 108 of the Constitution, and is awarded to non-nationals of Greek origin ("*homogeneis"*), who have been living abroad for some time and who have always maintained close relations with Greece. The ECRI considers that such a differentiation between two categories of non-nationals could however give rise to discrimination based on national origin. It should also be noted that there appears to be an objective and reasonable justification for the differentiation in question, given the special ties that exist between the persons in question and their country of origin from which they had emigrated in previous decades.

• The understanding and the will regarding the need to adopt special measures in order to bring the equality *de facto* for different vulnerable groups is not much present in **Latvia** nor are the laws clear on this matter, except for some measures discussed and carried out in the framework of employment policies. Transposition of Directive 2000/43/EC has been very limited and there is a need for a systematic and comprehensive review of the legislation with an aim to clarify the prohibition of discrimination and equal rights. A substantive work has been done by the Ministry for Integration but it remains opposed in other parts of the government and the *Saeima* or at least it is not considered to be a priority.

• Para. 7 of Article 19 of the Revised European Social Charter provides, for the States parties which have accepted that provision, that these States undertake to "secure for [migrant workers] lawfully residing within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article [concerning the right of migrant workers and their families to protection and assistance]". The situation in **Sweden** was considered not be compatible with this clause, as according to the Swedish Legal Aid Act although all persons *domiciled* in Sweden, whatever their nationality, have the right to legal aid, non-Swedish citizens who are not domiciled in the country may receive legal aid, only when international conventions and bilateral agreements have been concluded to that effect, even if they are *lawfully present* within the Swedish territory. The European Committee of Social Rights considered in its conclusions regarding the Swedish report in 2004 that Article 19 para. 7 (equality regarding legal proceedings) of the Revised European Social Charter "obliges states parties to secure the same treatment for nationals of other states parties as for their own nationals, independently of any international agreement". Sweden should adapt its legislation accordingly.

• In the case *of Aziz v.* ***Cyprus*** (Appl. N° 69949/01, judgment of 22 June 2004, final on 22 September 2004), the European Court of Human Rights found that denying the applicant a right to vote in parliamentary elections because, as a member of the Turkish-Cypriot community, he could not be registered on the Greek-Cypriot electoral roll, constituted a discrimination prohibited by Article 14 ECHR in combination with Article 3 of Protocol n°1 ECHR. **Cyprus** should ensure that this judgment is executed within the best possible delays. It is understood that a Bill to give effect to the ECHR judgment is being prepared.

• Article 12(4) of the Revised European Social Charter imposes on the States having accepted that provision an obligation to take steps to ensure "equal treatment with their own nationals of the nationals of other Parties in respect of social security rights (...)". In **Estonia**, family benefits are granted to residents, whether permanent or temporary, on condition that the family members are residing in Estonia. Benefits are not paid in respect of family members who already receive family benefit from other countries. The European Committee of Social Rights in its 2004 Conclusions on Estonia considered that the fact that child allowances were not paid in respect of children not residing with the claimant parent in Estonia (except where studying abroad was involved) constituted a case of indirect discrimination prohibited by Article 12(4) of the Revised European Social Charter.

• In its previous set of conclusions and recommendations covering the year 2003, the Network of Independent Experts concluded, with respect to the situation of the approximately 11 percent "non-citizens" in **Estonia** who form part of the Russian-speaking minority, that "although including a language test requirement as a naturalization condition cannot be criticized as such, provided that such

a test is organized in conditions which are transparent and non-discriminatory, the Network takes the view that Estonia should send a more clear signal to its non-citizens that citizenship is both worth acquiring and acquirable. Information campaigns for the non-citizens to encourage them getting citizenship are desirable. Estonia should also make further efforts in making the study of Estonian language accessible in all regions of the country. In this respect, the Network encourages the recent campaign that the State gives back the money spent for a language course if the person has succeeded in the citizenship exam".

These conclusions appear to be shared by the Council of Europe Commissioner for Human Rights, when he dealt with this issue in his report on **Estonia** published on 12 February 2004 (CommDH(2004)5). Mr Gil-Robles observed that although various measures have been taken in recent years to improve the access to Estonian citizenship, of the total population of approximately 1.370.000 persons, 80 percent have Estonian citizenship, 7 percent have a citizenship of another country (mainly Russian), and 12 percent still are "persons whose citizenship is undetermined" (they do not have citizenship of any state). The lack of citizenship deprives these persons of a number of rights, and carries an increased risk of social exclusion. The slow pace of naturalisation may be attributed to two factors: it may be explained, first, by the difficulties that some persons continue to experience in passing the examinations required for the acquisition of Estonian citizenship and second, by the relatively limited motivation of some of the non-citizens to seek naturalisation.

In order to avoid a perpetuation of the status of non-citizens, all newborn children of non-citizen parents should acquire a nationality after birth. This possibility is guaranteed by the law on the basis of an application by the parents. However, many parents do not apply for Estonian citizenship for their children or, apparently, for any other citizenship, and leave it up to the child to decide whether to apply for citizenship through naturalisation when he or she turns 15. Mr Gil-Robles recalled in his report that the right to acquire a nationality entails a positive obligation for the State to ensure an effective exercise of this right. He emphasized that a state should not accept a situation where newborn children are rendered stateless on the basis of a mere option available for the parents to apply for another citizenship. In order to ensure the effective enjoyment of the right of the child to acquire a nationality from birth, Mr Gil-Robles proposed during his visit that the interpretation of the Law on Citizenship be modified so that the registration of a new-born child of non-citizens would be automatically considered as an application for Estonian citizenship, unless the parents of the child declare in writing that they have applied for citizenship of another state, under which laws the child is entitled to acquire citizenship of that country. Mr Gil-Robles argued in his report that such a solution would ensure that every child would acquire citizenship at birth, instead of subjecting the child to statelessness at least until she or he turns 15 and becomes eligible for a naturalisation on his or her own right. This interpretation would ensure that a child would acquire one citizenship or another from birth, without the effect of imposing Estonian citizenship on those who apply for another citizenship.

Mr Gil-Robles noted in his report of 12 February 2004 that many of his interlocutors in Estonia noted that the level of language proficiency required for acquiring Estonian citizenship continued to be too high for some persons, particularly for the elderly, and for many those who live in regions predominantly inhabited by Russian-speakers. It was estimated that 20 percent of candidates do not pass the language exam. The Commissioner for Human Rights suggested that successful participation in a language course would be regarded as sufficient proof of the knowledge of the language without having to pass the exam. Mr Gil-Robles also expressed his concern that – although the legislation grants significant exemptions for persons with certain disabilities from compliance with the requirements set forth for the naturalisation – the pace of naturalisation was low among persons with disabilities. Furthermore, Mr Gil-Robles quoted the absence of specific anti-discrimination legislation as an impediment to achieving full equality. He encouraged the enactment of legislation prohibiting discrimination in areas such as access to housing, education and services.

In this context, the Network notes with satisfaction that **Estonia's** entry into the EU has made acquiring the Estonian citizenship more attractive for the part of the Russian-speaking minority that had/has not acquired the citizenship yet. Indeed, the increase of non-citizens applying for citizenship

was very noticeable in 2004: during the first six months of 2003 2229 persons applied for citizenship while during the first six months of 2004 the number of applications was already 3648; altogether, 6500 stateless individuals were naturalized in Estonia in 2004. As of 28 December 2004, there were 153 500 stateless persons ("non-citizens") in Estonia, making up 11 % of the population, a percentage that has diminished considerably since the 1990s. The number of stateless persons as compared to the 2000 population census data has decreased by 18 000 persons. As of 1 May 2004, 4080 under 15-year-old children of stateless persons who were born in Estonia had received citizenship by way of simplified naturalisation.

The Network commends the Estonian authorities for the steps they have taken in order to make the acquisition of citizenship easier for school pupils, especially by ensuring that the Examination and Qualification Centre improves the conditions for pupils to pass the citizenship exam. It also welcomes the approval by the Government on 6 May 2004 of the action plans of sub-programmes of the integration programme for 2004-2007, foreseeing a gradual increase of allocations to cultural societies of national minorities with the aim to create possibilities for stable base funding of umbrella organisations of national minorities from the state budget. It shall follow with interest the results of the debate concerning the amendment to Citizenship Act suggested by the Ministry of Education and Science which would enable the graduates of the Russian-speaking schools to apply for the citizenship upon completing the civic education class at principal school level (even when this subject would be taught in Russian).

The Network notes that similar concerns remain in respect of **Latvia**. In its Comments to the Concluding observations of the Human Rights Committee, the Government of **Latvia** acknowledges that "currently, a large proportion of the population is treated as a specific and distinct category of persons with long-standing and effective ties to Latvia. The Government regards them as potential citizens; …." (CCPR/CO/79/LVA/Add.1, 16 November 2004). The citizenship issue also figures as one of the main ones in the Report by the Council of Europe Commissioner for Human Rights (CommDH(2004)3, 12 February 2004), which states, for instance, that "The vast majority of non-citizens either are Latvian-born or have lived in Latvia for most of their lives, and they must not be held responsible for past aberrations, of which they are themselves victims. For that reason I believe the state should do even more to bring those populations into its fold, as a forthright demonstration to them of their place in Latvian society. All who love the Latvia where they were born, where they have lived most of their lives, where their children have been born and where their family dead are buried, all who have a sense of belonging to the country they regard as their homeland, must be allowed full membership of the national community" (paragraph 35).

• Non-governmental organizations (see Amnesty International, Europe and Central Asia, Concerns in Europe and Central Asia, July – December 2003, AI Index: EUR 01/001/2004) and human rights expert bodies (see Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia), CRC/C/15/Add.230) have expressed their concern at the status of thousands of former Yugoslav citizens who were removed from the Slovenian population registry in 1992 (otherwise known as the "erased"). These individuals were citizens of other former Yugoslav republics who had been living in **Slovenia** but have not filed an application for Slovenian citizenship, after Slovenia became independent. The Slovenian Constitutional Court had recognized that the removal of these persons from the Slovenian population registry constituted a violation of the principle of equality and, in those cases where the individuals concerned had to leave the Slovenian territory, it gave rise to a violation of their rights to a family life and to freedom of movement. As noted in particular by Amnesty International, the removal from population registries may also gave rise to violations of the social and economic rights; in some cases the individuals concerned lost their employment and pension rights. The Slovenian Constitutional Court had established in April 2003 that previous provisions to solve this issue were inadequate to restore the rights of former Yugoslav citizens who were unlawfully removed from Slovenian population registries. The Slovenian Parliament and Executive should adopt all the necessary measures to implement this judgment of the Constitutional Court, and address the situation of the "erased" persons adequately.

Fight against incitement to racial, ethnic, national or religious discrimination

In its previous set of conclusions covering the year 2003, the Network encouraged the Council of the European Union to resume the discussions on the adoption of a Framework Decision on combating racism and xenophobia, as proposed by the Commission (COM(2001)664 final) and as advocated by the European Parliament. It noted in this regard that, in its concluding observations of 10 December 2003 concerning the **United Kingdom**, the Committee for the Elimination of All Forms of Racial Discrimination (CERD) has insisted that the obligations of the States parties under Article 4 of the UN Convention on the Elimination of All Forms of Racial Discrimination should not be read too restrictively, and that these obligations should not be seen as limited by the need to respect freedom of expression, as freedom of expression does not extend to incitement to racial hatred or discrimination. It also noted that the Advisory Committee on the Framework Convention for the Protection of National Minorities insists in its opinions on an effective protection of minorities from ethnically motivated crime (see e.g. concerning **Sweden**, where Chapter 16 Section 8 of the Penal Code (BrB) which tackles racially motivated crimes appears to be lacking effective application, ACFC/INF/OP/I (2003)006, 25th of August 2003, § 23), and that the European Commission on Racism and Intolerance had also clearly advocated this in its General Policy Recommendation n°7 on national legislation to combat racism and racial discrimination (CRI(2003)8, 13 December 2002). The Network therefore invited the European Parliament to address the appropriate recommendations in this regard to the Member States, acting under the powers recognized to it by Article 39(3) EU.

A study of developments during the period under scrutiny further strengthens the case for the adoption of a framework decision to combat racism and xenophobia. In its opinion on **Spain,** the Advisory Committee on the Framework Convention for the Protection of National Minorities called for a stepping up of the fight against racial acts perpetrated against gypsies (ACFC/INF/OP/I(2004)004, of 27 November 2003 [published in 2004]). In **Greece,** the penal laws against hate speeches are still not being enforced, despite the fact that legal action can be taken automatically. In **Hungary**, the fight against incitement to racial hatred through criminal law is made difficult by the case-law of the Hungarian Constitutional Court; with respect to civil actions, the trial courts do not consider that the plaintiffs have standing in personality rights cases where he/she is not mentioned by name or is not identifiable on the basis of the context. In **Ireland**, the Department of Justice, Equality & Law Reform has been carrying out a review of the Prohibition on Incitement to Hatred Act, 1989 since 2000. The review was prompted by concerns that the 1989 Act was not especially useful in the fight against incitement to hatred arising from the very low number of prosecutions brought under the Act, although since the review began in 2000 18 cases have been taken under the 1989 Act resulting in 7 convictions. Upon examining the fifteenth and sixteenth reports submitted by the **Netherlands**, the Committee on the Elimination of Racial Discrimination (CERD), in its concluding observations of 10 May 2004 (CERD/C/64/CO/7), stated its concern about anti-Semitic and "Islamophobic" incidents in the Netherlands and of discriminatory attitudes towards minorities, as well as about the sharp increase in the number of complaints which were submitted to the Dutch Complaints Bureau for Discrimination on the Internet. A fairly general finding across the Member States is the lack of incentives for the prosecuting authorities to effectively address incitement to discrimination or discriminatory behaviour, even in the presence of an adequate legal framework criminalizing such behaviour as required under Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination. Indeed, in certain Member States the police adopt a discriminatory behaviour towards the Roma, and the Roma are often victims of racist attacks, without receiving adequate protection from law enforcement officers. A Framework Decision on this issue would not only facilitate cooperation between the Member States where racism and xenophobia are concerned; it also has a potential to significantly improve the level of protection of victims in each Member State.

The prohibition of discrimination on grounds of nationality in the scope of application of Union law

The European Court of Justice concluded in a judgement of 16 September 2004 that, by excluding EU nationals employed in Austria from standing for election to the Chamber of Labour (*Arbeiterkammer*), **Austria** has violated its obligations under European Community law to grant equal conditions of

employment without discrimination based on nationality to workers who are nationals of other Member States; the same obligation is violated with respect to non-EU nationals for whom special agreements between the Community and non-Member States are applicable (Case C-465/01, *Commission v. Austria*, judgement of 16 September 2004). The decision is thus in one line with its own views already laid down in a preliminary judgement of 8 May 2003 regarding the interpretation of the association agreement with Turkey (Case C-171/01, *Gemeinsam Zajedno et al.*, judgement of 8 May 2004) and findings previously adopted by the UN Human Rights Committee on 4 April 2002 and the ILO Committee of Experts on the Application of Conventions and Recommendations in 2003, respectively, on similar complaints regarding the elections to work councils. By denying workers who are nationals of other Member States of the European Union or the European Economic Area the right to vote and stand as candidate in elections to the Chamber of Labour, the Republic of Austria has failed to ensure equality of treatment in respect of "other conditions of employment" and thereby breached its obligations under Article 39 EC, Article 8 of Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, as amended by Council Regulation 2434/92 of 27 July 1992, and Article 28 of the Agreement on the European Economic Area. Secondly, Austria has failed to fulfil similar provisions contained in agreements between the Community and non-Member States prohibiting discrimination as regards conditions of work against these non-EU-citizens legally employed in a Member State. Austria should amend its national legislation in this respect without further delay.

Article 22. Cultural, religious and linguistic diversity

> The Union shall respect cultural, religious and linguistic diversity.

This provision of the Charter should be interpreted taking into account in particular Article 27 of the International Covenant on Civil and Political Rights (1966), ILO Convention (n°169) concerning Indigenous and Tribal Peoples in Independent Countries, the European Charter for Regional or Minority Languages (1992) and the Framework Convention for the Protection of National Minorities (1995).

The Network refers to its Thematic Comment n°3 on the rights of minorities in the European Union. It therefore has adopted no specific conclusions under this provision of the Charter.

Article 23. Equality between men and women

> Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 2(1), 3 and 26 of the International Covenant on Civil and Political Rights (1966), by Articles 3 and 7, a), i) of the International Covenant on Economic, Social and Cultural Rights (1966), by the Convention on the Elimination of All Forms of Discrimination against Women (1979), by ILO-Convention (n° 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951), by ILO Convention (n° 111) concerning Discrimination in Respect of Employment and Occupation (1958), by Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), by Article 5 of Protocol n° 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1984), by Protocol n° 12

to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2000, in force from 1 April 2005), by Article 8 of the European Social Charter, by Article 1 of the Additional Protocol of the European Social Charter of 1961 (1988), and by Articles 8 and 20 of the Revised European Social Charter. The Convention on the Elimination of All Forms of Discrimination against Women has recently been reinforced by the adoption of an Optional Protocol (2000), which improves the international protection of rights which are equivalent to those of Article 23 of the Charter.

Gender discrimination in work and employment

Reasons for concern

The national reports submitted by the Members of the Network of Independent Experts all illustrate that the gap between men and women, both with respect to their representation in certain sectors or within the professional hierarchy, and with respect to remuneration, still remains important. In **Denmark**, the organization KTO published a statistic report in November 2004 concerning sex related differences in salary between employees in the private and public sector. The report shows that in both sectors the women's salary amount to 83 % of the men's; however, the percentage is higher if other factors such as age and education are taken into consideration. As the Committee on Economic, Social and Cultural Rights of the United Nations has pointed out (Concluding Observations of the Committee on Economic, Social and Cultural Rights: Spain. 07/06/2004. E/C.12/1/Add.99), pay differentials between men and women in **Spain** are growing, despite the legislation on equal pay. The Ministry of Finance observes that, on average, men earned 45% more than women in 2003; furthermore, the disproportion increases with age and professional qualification, with discrimination being particularly marked towards women with the highest qualifications. The average gross salary is still only 71.1% of the average salary of men in Spain. In addition, temporary workers, who are mostly women, earn 40% less than regular workers. In the study entitled "The occupational situation of women in the public service", prepared by the offices of the House of Representatives, it is noted that, although 52% of public service posts are held by women, they are very much underrepresented at the higher echelons: 22% in the public services of the Autonomous Communities and a third in those of the State. In its 2004 Conclusions on **Lithuania**, the European Committee of Social Rights, having considered the first periodic report on the implementation of the Revised European Social Charter in Lithuania, noted with concern that despite the fact that various measures have been adopted in order to improve the situation of women, including the "National programme for equal opportunities for men and women 2003-2004", women are still in a disadvantaged position in the society, as to employment and equal pay for work of equal value and as to their participation in the decision-making process. In **Luxembourg**, the 2004 report of the Commission for Equality of Opportunity between Men and Women and for the Promotion of Women notes that "the number of women assuming household duties has diminished from 76,000 to 58,000, whereas the number of men at home has doubled from 900 to 1800" (Report of 3 March 2004 of the Commission for Equality of Opportunity between Men and Women and for the Promotion of Women, p. 25 (the Commission does not indicate which period this assessment applies to)). Furthermore, the figures that were presented on 31 January 2004 show that on average 377 new requests for parental leave are granted each month by the National Fund for Family Benefits to 301 women and 76 men. However, this report also points out that "even though in Luxembourg the legal framework provides for equal pay, the surveys carried out by CEPS and STATEC show that there is an average hourly pay differential of 28%. Even allowing for the structural differences between male and female employment, that is to say, the types of jobs held, career interruptions, and part-time employment, there still remains a 12% differential accounted for solely by the fact of being a woman" (Report of 3 March 2004 of the Commission for Equality of Opportunity between Men and Women and for the Promotion of Women, p. 17). In **Ireland**, the Central Statistics Office (CSO) published a major report in December 2004 entitled *Women and Men in Ireland 2004* which, comparing the differences in the social and economic lives of men and women in Ireland, noted for instance that in Ireland, the employment rate for women aged 15-64 in 2003 was 55.3% (just above the EU 25 average of 55%), where the employment rate for men in Ireland in the same

year was 74.7% (considerably above the EU 25 average of 70.8%). Indeed, while Ireland already exceeds the Stockholm Council employment rate 2010 target of 50% for men in the 55-64 years age group – it was 64.7% in 2003 –, the 2003 figure for women was 33.4%, considerably below the 50% target. The division of tasks within the family appears to be a major factor in access to employment: the employment rate for women aged 20-44 years varied from 87.2% for women with no children to 52.4% for women whose youngest child was aged 3 or under; men worked almost 10 hours longer per week than women in 2004; less than 1% of persons whose principal economic status was looking after the home an family in 2004 were men. For **Poland**, the report of the World Bank and the Plenipotentiary for the Equal Status of Women and Men entitled "Gender and the economic possibilities in Poland: Did women lose because of the transformation?" (Chancellery of the Prime Minister, Government Press Centre, available on the page http://www.kprm.gov.pl), as well as the latest report of the State Labour Inspection (Państwowa Inspekcja Pracy – PIP) published in 2004 (State Labour Inspection report of 2003, available at the webpage http://pip.bip.ornak.pl/pl/bip/sprawozd_pip_2003), show that women, in spite of legal guarantees, receive lower salaries and pensions. Men in Poland are more than twice as likely to hold higher positions in the public sector. The issue of discrimination is most vivid in the area of remuneration, and the highest discrepancies are in remunerations for senior positions. The Human Rights Committee therefore recommended that the Polish authorities should ensure equal treatment of men and women at all levels of public service and to ensure that women enjoy equal access to the labour market and equal wages for work of equal value (Concluding Observations of HRC: Poland, of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. paras. 5 and 10). Even in a country such as **Sweden**, which is often ranked as the country that has come furthest in terms of achieving equality between men and women – for the last ten years Sweden has had, for example, a gender-balanced government –, there is still a significant wage gap between women and men, both in private and public sectors. The average difference between women's and men's wages has been estimated to 25 per cent (Factsheet-Wage differences, www.jamombud.se); preliminary statistics from the SCB for the year 2004 indicate that the wage span between men and women is on increase. In addition, gender segregation persists in the labour market (see the Swedish Government Official Reports Series, SOU 2004:43, *Den könsuppdelade arbetsmarknaden*; *M.Abrahamsson*, Jämställdhetspolitiken, Ha inte dåligt samvete i onödan, SvD 7-11-04, p. 4).

These data, other data concerning the other Member States, are detailed in the national reports. The overall picture is that the provision of a legal framework to combat discrimination against women does not suffice to ensure effective equality, because of a number of factors: the existence of stereotypes and prejudice concerning women; the inequality between men and women in the fulfilment of household duties and in duties relating to the family; and the interruption of career paths by maternity breaks and for child-rearing purposes. In this context, the introduction of positive action measures should be seen by the Member States as an indispensable tool for the pursuance of the goal of effective equality.

Positive action measures

Article 141(4) EC confirms that the Member States may, without violating the principle of equal treatment between men and women in employment and occupation, adopt positive action measures in order to realize concretely the principle of equal opportunities : "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers". This is further confirmed by Article 2(8) of 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 (OJ 1976, L 39, p. 40), as modified by Directive 2002/73/EC of 23 September 2002, OJ L 269 of 5.10.2002, p. 15).

Indeed, the human rights expert bodies encourage States to adopt such measures. In its Concluding Observations relating to **Denmark** which the Committee on Economic, Social and Cultural Rights adopted on 26 November 2004 (E/C.12/1/Add.102) at its Thirty-third session of 8 -26 November 2004, the Committee called upon Denmark to adopt effective measures to ensure equality between men and women as provided for in articles 2 (2) and 3 of ICESCR, including through implementing the principle of equal pay for work of equal value and ensuring participation of women in decision-making, and it requested Denmark to provide, in its next periodic report, detailed information on the progress made on gender discrimination issues, including through affirmative actions. In its Concluding Observations on **Finland** adopted in November 2004 (CCPR/CO/82/FIN/Rev.1), the Human Rights Committee noted with satisfaction steps that had increased the number of women in senior posts within the administration including directors of several ministries, and urged that this should be followed up in the future in order to allow qualified women greater opportunities to occupy senior decision-making posts. In its Concluding Observations following the presentation by **Germany** of its 5th Periodic Report under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the CEDAW Committee commended Germany for adopting a substantial number of laws and amendments with a view to improving the legal position of women and called upon Germany to intensify its efforts to increase women's de facto equal opportunities in the labour market, including their access to full-time employment. In the Concluding Observations which it adopted with respect to **Greece,** the Committee on Economic, Social and Cultural Rights, while appreciating the measures taken by Greece to establish a legal framework to promote equality between men and women, is concerned that women are still underrepresented at the decision-making level in the political, economic and academic fields, and is concerned about the high level of unemployment, especially affecting women. It therefore encourages Greece to take effective measures to increase the level of representation of women at all decision-making levels. In its Concluding Comments relating to **Latvia**, the CEDAW Committee noted with concern that the State hesitates to use temporary special measures to achieve concrete goals in the field of de facto equality of women (CEDAW/C/2004/II/CRP.3/Add.5/Rev.1, 26 July 2004, points 22 – 23). In its Concluding Observations on **Poland**, the Human Rights Committee welcomed with satisfaction the improvements in the area of women's rights, particularly by the appointment of a Government Plenipotentiary on the Equal Status of Women and Men, but at the same time it reiterated its concern about the low number of women in senior positions and disparities in remuneration between men and women (Concluding Observations of HRC: Poland, of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. paras. 5 and 10).

To the extent that Member States choose to adopt positive action measures as they are authorized to do so under European Community Law, they remain bound by the fundamental rights which are part of the general principles of Union law, which are identified in particular in the international instruments for the protection of human rights to which the Member States have acceded or to which they have cooperated. Among those instruments is the International Covenant on Civil and Political Rights. The Network therefore considers it useful to note that, in the final views it adopted with respect to **Belgium** on 17 August 2004, the United Nations Human Rights Committee rejected Communication no. 943/2000 pointing out that paragraph 3 of Article 259b-1 of the Judicial Code, as amended by the Act of 22 December 1998, violated Articles 2, 3, 25(c) and 26 of the International Covenant on Civil and Political Rights. The author of the communication considered that the obligation instituted by Article 259b-1(3) of the Judicial Code to have at least 4 candidates of each gender among the 11 non-justices appointed to the High Council of Justice constituted an infringement of the Covenant. The Committee rejected those arguments and recalled that the gender requirement had been introduced by the legislator under the terms of the Act of 20 July 1990 on the promotion of a balance between men and women on advisory bodies. It considers that such a requirement does not in this case amount to a disproportionate restriction of candidates' right of access, on general terms of equality, to public office. The Committee expressly points out that "the gender requirement does not make qualifications irrelevant, since it is specified that all non-justice applicants must have at least 10 years' experience" (point 9.5 of its views).

Article 24. The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 24(1) of the Charter must be read in accordance with the requirements formulated by Article 24(1) of the International Covenant on Civil and Political Rights (1966) and by Articles 3(2) and 12 of the Convention on the Rights of the Child (1989). Article 24(2) of the Charter must be read in accordance to Article 3(1) of the Convention on the Rights of the Child. Article 24(3) of the Charter must be read in accordance to Article 9 of the Convention on the Rights of the Child (1989) and to the right to respect for family life recognized in Article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms.

Possibility for the child to be heard, to act and to be represented in judicial proceedings

Good practices

In **Belgium,** the bill instituting lawyers for minors (Bill of 19 December 2003 instituting lawyers for minors, House of Representatives, ordinary session, *Doc. parl.,* 51 0644/001) merits close attention. This bill sets out to recognize the right for every minor to be represented by a "lawyer for minors" in any legal or administrative proceedings concerning or affecting the interests of minors, and to which they are a party, in which they intervene or when they are being heard, as well as to institute the obligation for the president of the Bar or the Legal Aid Bureau (BAJ) to appoint a "lawyer for minors" who has received specialized training in dealing with cases involving young people, in the event that the minor has not chosen a lawyer. Although this initiative has yet to be implemented and needs to be carefully evaluated, it acknowledges the need for specialized legal aid for minors and should contribute to a more widespread use of the International Convention on the Rights of the Child before the Belgian courts.

In the **United Kingdom** in order to ensure a voice for children and young people at the national level, the Children Act 2004 has created the post of Children's Commissioner. The role of the Commissioner will be to promote awareness of the views and interests of children (and certain groups of vulnerable young adults) in England. The Commissioner will also be able to hold inquiries on direction by the Secretary of State or on his own initiative – into cases of individual children with wider policy relevance in England. Both these roles can also be performed by the Commissioner in other parts of the United Kingdom with respect to non-devolved matters. In addition the Act seeks to make arrangements to support better integrated planning, commissioning and delivery of children's services in England and Wales and to provide clearer accountability. It also establishes statutory Local Safeguarding Children Boards to replace the existing non-statutory Child Protection Committees and provides for regulations to require children's services authorities to publish a Children and Young People's Plan which will set our their strategy for services for children and relevant young people. The Act allows for the creation of databases holding information on all children and young people in order to support professionals in working together and in sharing information to identify difficulties and provide appropriate support. There is also a provision requiring local authorities to put in place a director of children's services to be accountable for, as a minimum, the local authority's education and social services functions in so far as they relate to children and to designate a lead member for children's services to mirror the director's responsibilities at a local political level. In order to ensure a shared approach across inspections, provision is made in the Act for the creation of an integrated

inspection framework and for inspectorates to carry out joint reviews of all children's services provided in an area. The Act also creates a new duty for local authorities to promote the educational achievement of looked after children and an associated power to transmit data relating to individual children in monitoring this.

Reasons for concern

In its Concluding Observations relating to **Slovenia**, the Committee on the Rights of the Child recommended, in the light of Article 12 of the Convention, that measures be taken to ensure that children are provided the opportunity to be heard not only in civil law procedures (e.g. related to custody and visitation rights) but in all other legal procedures and decision making processes, including at Social Work Centres. Furthermore, the Committee recommended that the right to be heard should be extended also to children below the age of 10 who are able to understand the significance of the proceeding (Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: **Slovenia**), CRC/C/15/Add.230). In its Concluding Observations relating to **Germany**, the Committee recommended that further efforts be made to ensure the implementation of the principle of respect for the views of the child. In this connection, particular emphasis should be placed on the right of every child to participate in the family, at school, within other institutions and bodies, and in society at large, with special attention to vulnerable groups. This general principle should also be reflected in all policies and programmes relating to children. Awareness-raising among the public at large as well as education and training of professionals on the implementation of this principle should be reinforced (at para. 29).

This guideline however is far from being respected in all the Member States: despite recommendations of the Committee on the Rights of the Child in its last concluding observations on the **Czech Republic** on 18 March 2003 (CRC/C/15/Add.201) a legal regulation guaranteeing the right of a child to be heard in all areas that concern him has not been adopted yet; in **Denmark**, this guideline is not fully complied with, especially outside court proceedings (in various administrative decisions, including with respect to child protection services, custody proceedings and the placement of children in institutions) and with regard to children below the age of 12 years, according to his/her evolving capacities; the Committee on the Rights of the Child is concerned that, in practice, in **France** the interpretation of the law and the definition of the child who is "capable of discernment" leave open the possibility of denying a child this right or of conditioning it to the child's own request, at the risk of creating discrimination, and is also concerned about the practice whereby, as revealed by the special Rapporteur on trading in and prostitution of children and pornography featuring children, the French courts do not hear the children involved in this type of cases; in **Ireland**, the legislative provision for independent advocacy for children by means of a guardian *ad litem*, although contained in the Children Act 1997 which amended the Guardianship of Infants Act 1964, has never been commenced with the effect that children remain inadequately represented in public and private law court proceedings that may affect their interests; in **Sweden**, it has been shown that the youngest children have experienced great difficulties in putting their views on custody, residence and access in proceedings as well as in getting the Swedish courts to respect their views, i.e. taking explicitly the children's views into account in their judgments and decisions (*L.Dahlstrand,* Barns deltagande i familjerättsliga processer, Uppsala 2004, pp. 310-314), and even with respect to older children, it has been common that the required information during the proceedings only has been provided by other people than the child itself ; moreover, both the use in the Swedish Parental Code of the narrow term "will of the child" instead of the more inclusive term "views" of the child as the UN Convention on the Rights of the Child does, and the failure to give the child access to an adult person, who is neutral to a conflict when the parents of the child were in dispute in a custody case, and who can assist the child to express his or her own views, are a source of concern (*Barnombudsmannen (BO),* Observations by the Children's Ombudsman of Sweden with regard to the discussion on the Third Periodic Report by the Government of Sweden to the UN Committee on the Rights of the Child, October 2004, § 18, p. 5); finally, a study that has been undertaken by the Children's Ombudsman shows that only 18 per cent of the County Administrative Court's judgments, i.e. cases dealing with

issues of custody, living arrangements and access, comprised an autonomous and individual assessment of the child's best interest (Save the Children, Sweden's Third Report to the UN Committee on the Rights of the Child, Stockholm 2004, p. 22).

Other relevant developments

Reasons for concern

The Committee on Economic, Social and Cultural Rights in its Concluding Observations of 7 June 2004 on **Lithuania** (E/C.12/1/Add.96) has expressed its concern about the problem of street children in Lithuania. The Committee urged Lithuania to combat the phenomenon of street children as a matter of priority. Lithuania should take effective measures to address the root causes of neglect, abuse and abandonment of children, particularly through increased assistance to families.

On the 9th December 2003,the European Committee of Social Rights has considered admissible the complaint No.20/2003, *World Organisation Against Torture (OMCT) v.* ***Portugal***, based on the fact that "Portuguese law has not effectively prohibited corporal punishment of children, nor has it prohibited other forms of degrading punishment or treatment of children and provided adequate sanctions in penal or civil law".

Article 25. The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

This provision of the Charter must be read in accordance with the requirements formulated by Article 23 of the Revised European Social Charter, or by Article 4 of the Additional Protocol to the European Social Charter of 1961 (1988), which have the same content.

The Network recalls that these provisions guarantee the right of elderly persons to social protection. The European Committee of Social Rights reads this provision as requiring the introduction of non-discrimination legislation protecting elderly persons against discrimination on grounds of age (Concl. 2003, vol. 1 (Italy), p. 314). It also insists on the provision of adequate resources to the elderly, by pensions or other financial assistance where they perceive no salary, or by an adequate level of wages; on the provision of services and facilities, including home help services and day care centres in particular for elderly persons suffering from Alzheimer's disease; on health care programmes and services specifically aimed at the elderly; on the inclusion of the needs of elderly persons in national or local housing policies; on the availability, accessibility and quality of residential institutions for elderly persons; and on the possibility for elderly persons, their families, and social and trade union organisations to make complaints about care and treatment in the institution.

No conclusions have been adopted under this provision.

Article 26. Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 2 and 23 of the Convention on the Rights of the Child (1989), by Articles 2 and 26 of the International Covenant on Civil and Political Rights (1966), by Article 2 of the International Covenant on Economic, Social and Cultural Rights (1966), by Article 1 of ILO-Convention (n°111) concerning Discrimination in Respect of Employment and Occupation (1958), by Articles 3, 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), by the Protocol n° 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000, in force from 1.4.2005) and by Articles 15 and E of the Revised European Social Charter.

Protection against discrimination on the grounds of health or disability

The protection of persons with disabilities from discrimination requires more than the adoption of adoption of legislation which, as prescribed by Directive 2000/78/EC with respect to employment and occupation, prohibits direct and indirect discrimination on the grounds of disability. First, any such legislation should be based on a sufficiently broad definition of disability, in order to include episodic disabilities, people with mental health issues and people who will acquire enduring disabilities without early intervention. The Disability Bill currently proposed for **Ireland** falls short, for instance, in that respect. Second, the implementation of the principle of equal treatment also requires the adoption of measures which ensure the effective integration of persons with disabilities by the removal of barriers to their full participation in the life of the community, i.e., the accommodation of the specific needs of individuals with disabilities where the cost of such measures is not disproportionate. The public authorities not only should provide such reasonable accommodation and encourage private actors to provide such reasonable accommodation (indeed, a failure to provide such accommodation should be considered as a specific form of discrimination against persons disabilities); they also should adopt measures which ensure that the private actors will be compensated to the fullest extent possible for the cost of providing such accommodations, in order to limit the number of situations where the burden of providing them will be judged disproportionate, and therefore, where it will be justified not to make such provision. In the provision of effective accommodation for the persons with disabilities, the public authorities have a duty to adopt the best practices possible, and to set the standards to be followed by others. Therefore, Section 5 of the Disability Bill currently proposed for **Ireland** on resourcing of services should be reviewed, insofar as, in its current formulation, it may undermine the currently legally enforceable rights under the Equal Status Acts 2000-2004 by allowing public service providers to rely on its provisions as a defence to a claim for discrimination and claims for failure to provide reasonable accommodation. Indeed, resources should be ring-fenced to the extent necessary for the effective implementation of the Disability Bill.

Article 15 par. 3 of the Revised European Social Charter concerns the integration and participation of persons with disabilities in the life of the community. According to the European Committee on Social Rights, this provision requires the adoption of positive measures to achieve integration in housing, transport, telecommunications, cultural and leisure facilities. As Article 15 par. 3 of the Revised Charter refers to participation of persons with disabilities, the European Committee on Social Rights also requires that "persons with disabilities and their representative organisations should be consulted in the design, and ongoing review of such positive action measures and that an appropriate forum should exist to enable this to happen"(Concl. 2003-1, p. 168 (France – Article 15 para. 3) ; Concl. 2003-1, p. 507 (Slovenia – Article 15 para. 3)). Moreover, Article 15 par. 3 of the Revised European Social Charter "requires the existence of anti-discrimination (or similar) legislation covering both the public and the private sphere in the fields such as housing, transport, telecommunications, cultural and leisure activities, as well as effective remedies for those who have been unlawfully treated" (Concl. 2003-1, p. 170 (France – Article 15 para. 3) ; Concl. 2003-1, p. 298 (Italy – Article 15 para. 3) ; Concl. 2003-2, p. 508 (Slovenia – Article 15 para. 3) ; Concl. 2003-2, p. 614 (Sweden – Article 15 para. 3)).

Positive aspects - The Network is encouraged by the fact that in **Austria**, the Vienna branch of the Federal Social Office (*Bundessozialamt*) offers assistance at workplace to persons with disabilities and carries the costs, making it possible for 40 disabled employees with a high degree of physical or mental impairment which cannot be compensated by technical means to have personal assistants

accompanying them on the way to work and providing help whenever necessary so that persons with disabilities can exercise their profession. The Network also notes with interest that Section 1 paragraph 3 of the E-Government Act (Federal Law Gazette (BGBl) I No 10/2004) provides that by 1 January 2008 all public internet sites must be adapted in a way that allows persons with (visual) disabilities to access those sites without encountering barriers or complications according to international standards. It notes with satisfaction that in the **Czech Republic**, the Government approved by Resolution No 605 of 16 June 2004 a new Medium-term Strategy for National Policy on People with Disabilities setting tasks and objectives for years 2004-2009, which stresses the principle of non-discrimination in all spheres of life. It looks forward to the implementation of this Strategy which, it hopes, will translate into concrete changes, visible for persons with disabilities. Similarly in the **Netherlands**, the establishment on 2 April 2004 by the Secretary of Health, Welfare and Sports of the High-level Taskforce *Handicap en Samenleving* [Handicap and Society] should actively promote equal treatment in practice by helping people with a handicap strengthen their own position in society; by changing the mentality of society on this topic by publicizing good and bad practices and organizing public debate; and finally, engendering a feeling of responsibility on the topic through dialogue with individuals and relevant organizations. The Network also welcomes the announcement on 28 May 2004 by the Dutch government that in its proposals to lighten the administrative burden of citizens it will pay special attention to the needs of the elderly, the chronically ill and the disabled. The Network welcomes the adoption, in the **Slovak Republic**, of the *zákon o službách zamestnanosti* [Act on employment services] (*Zákon č. 5/2004 Z. z. o službách zamestnanosti a o zmene a doplnení niektorých zákonov v znení neskorších predpisov* [Act no. 5/2004 Coll. on employment services and on amendments and modifications of certain other laws as amended]). This Act regulates, *inter alia*, employment assistance for persons with disabilities, which includes contribution for establishing, maintaining and operating of the protected workshop and protected workplace, contribution for operating or performing self-employment to disabled citizens, and contribution to cover employees' transport costs; it introduces the contribution for activities of the assistant at work, i.e. of an employee who provides the assistance to disabled employee or employees in their execution of employment and personal needs during working time; it also introduces the *Agentúra podporovaného zamestnávania* [Agency for Supported Employing], which may contribute to the promotion of the professional integration of persons with disabilities. In **Denmark**, the establishment of an Internet Job website (http://www.ijobnu.dk), constituting a portal for jobs for persons with disabilities and for companies seeking employees, should serve to fulfil the same objective. The Network also welcomes the fact that in **Latvia** the Labour Law was amended to prohibit direct discrimination of persons with disabilities (Grozijumi Darba likuma, 22.04.2004., Latvijas Vestnesis, nr. 72, 07.05.2004.).

Imposition of quotas – The Committee on Economic, Social and Cultural Rights in its 2004 Concluding observations on **Lithuania** (E/C.12/1/Add.96) has recommended Lithuania to take effective measures under the "National programme for social integration of people with disabilities for 2003-2012" (Nacionalinė žmonių su negalia socialinės integracijos 2003-2012 metų programa. Vyriausybės 2002 06 07 nutarimas Nr.850. Valstybės žinios, 2002, Nr 57-2335) in order to promote the integration of persons with disabilities into the labour market, notably by providing incentives to employers and by strengthening the system of job quotas for persons with disabilities. In **Portugal**, Decree-law nº 38/2004 (*Decreto Lei nº 38/2004, de 18 de Agosto*), defining the legal regime for the prevention, rehabilitation and participation of persons with disabilities, introduced a quota up to 2% of the workers for persons with disabilities in the private sector. Nevertheless this may not be a crucial element for the elimination of the discrimination that persons with disabilities face at work, as it is isolated and not articulated with the necessary complementary measures. Among the measures introduced in the **Slovak Republic** by the Act on Employment, is the obligation imposed on employers to employ disabled citizens in numbers corresponding to 3.2 % of the total number of his/her employees, when he/she employs at least 20 employees, and when there are disabled citizens on file in the Office of Labour, Social Affairs and Family's register of job seekers. The imposition of quotas of employees with disabilities on employers may be part of an overall strategy in favour of the professional integration of persons with disabilities. The Committee of Economic, Social and Cultural Rights has noted with satisfaction that in **Greece,** in accordance with Act no. 2643/1998 on the employment of special categories of persons and Act no. 2956/2001 on the reorganization of the

Employment Agency, the public services, public corporations and local authorities are obliged to reserve 5% of advertised job vacancies for the appointment or employment, as a matter of priority, of disadvantaged persons or parents of large families, as well as persons belonging to other vulnerable groups, without obliging them to go through a procedure of open competition or selection. However, the imposition of quotas should not be seen as being an adequate substitute for the imposition of a duty to provide equal treatment, including an obligation to provide reasonable accommodation, especially where the imposition of quotas is effectively unenforceable, as it appears to be the case in the Disability Bill proposed for **Ireland**, according to the Equality Authority.

Reasons for concern - The Network also has a number of concerns with regard to the way the Member States implement their obligation to ensure the full integration of persons with disabilities. In **Sweden**, municipalities and county councils appear not to implement adequately all decisions concerning their legal obligations to provide support to children with disabilities. There are, for example, several documented cases in which pupils with disabilities have been denied school places because the school premises were not made accessible for them; in general, the Government and the municipalities need to intensify their efforts in order to be able to remove the existing obstacles for the full participation in society that were faced by children with disabilities (*Barnombudsmannen (BO*), Observations, October 2004, op. cit., § 30, p. 7). Moreover, certain decisions of local authorities (a municipality or a county council) still cannot be appealed to the courts, and there is no access to appeal in situations when these authorities refuse to follow a court ruling obliging them to provide support to a child, as for example, technical aid. In the **Slovak Republic**, the non-governmental organisation *Združenie na pomoc ľuďom s mentálnym postihnutím v Slovenskej republike* [Association for assistance to mentally disabled people in the Slovak Republic] has presented in 2004 the *Národná správa o dodržiavaní ľudských práv ľudí s mentálnym postihnutím* [National Report on the Situation of Human Rights of Mentally Disabled People] highlighting the discrimination against mentally disabled people and the deficiencies in the process of termination and limitation of their legal capacity, including the consequences entailed by the delays for the appointments of guardians by courts to mentally disabled people. In **Slovenia**, the Placement of Children with Special Needs Act (e.g. Zakon o usmerjanju otrok s posebnimi potrebami, Placement of Children with Special Needs Act, *Official Gazette* 2000, nr. 54) still has not been implemented; as a consequence, children with disabilities who are not enrolled in special institutions cannot take advantage of programmes provided for in the law. Moreover, the enrolment of female children with disabilities in school remains at an unacceptably low level (Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: **Slovenia**), CRC/C/15/Add.230). In the **United Kingdom** a formal investigation by the Disability Rights Commission has found that most websites (81%) failed to satisfy the most basic Web Accessibility Initiative category and that many had characteristics that made it difficult, if not impossible, for persons with certain impairments, particularly those who are blind, to make use of them.

Referring to Article 15 para. 3 of the Revised European Social Charter and to the relevant case-law of the European Committee of Social Rights, the Network recalls its proposal to expand the reach of the principle of equal treatment beyond the current scope of 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, p. 16). Apart from the fact that it is not possible, neither in theory nor in practice, to effectively ensure the professional integration of persons with disabilities without addressing their needs with respect to transport or communications, Article 26 of the Charter of Fundamental Rights does not address itself only to employment and occupation; and Article 21 of the Charter of Fundamental Rights is not restricted to the professional sphere of activities. Insofar as Article 13 EC provides the European Community with the necessary powers to act in order to fulfil these requirements of the Charter, the institutions should exercise these powers, which moreover would contribute to the objectives of the European Employment Strategy, one pillar of which concerns the integration of disadvantaged groups into the employment market. The Network welcomes in this regard the adoption in **Denmark** of an amendment to the Building Act, requiring the owners of publicly accessible building to make certain improvements to the building's accessibility provided that the costs of the improvements are lower than 9 per cent of the total costs of the planned building

alteration. Nevertheless, norms like those should be followed by adequate inspection and sanctions, since for instance in **Portugal** the deadline for the adaptation of public buildings, collective equipments and public accesses, established by Decree-Law nº 123/97 (*Decreto-Lei nº 123/97, de 22 de Maio*) is overdue and there is no record of the implementation of the necessary measures; therefore almost all public buildings remain inaccessible for persons with disabilities. It also welcomes as regards **Denmark,** the presentation on 1 March 2004 by the Minister of Science of two new It-handicap projects, seeking to improve the access to the Internet society for persons with reduced functions.

CHAPTER IV : SOLIDARITY

Article 27. Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 21 and 29 of the Revised European Social Charter and by Article 2 of the Additional Protocol to the European Social Charter of 1961 (1988).

No conclusions were adopted under this provision of the Charter.

Article 28. Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

This provision of the Charter must be read in accordance with the requirements formulated by Article 8 of the International Covenant on Economic, Social and Cultural Rights (1966), by the ILO Convention (n° 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949), by the ILO Convention (n° 135) concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (1971), by the ILO Convention (n° 154) concerning the Promotion of Collective Bargaining (1981), by Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), by Article 6 of the European Social Charter and by Article 6 of the Revised European Social Charter.

Right of collective bargaining

Article 6 para. 2 of both the European Social Charter and the Revised European Social Charter provides that the Parties having accepted that provision undertake « to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements ». The Network recalls that the Member States should take this provision into

account in particular in the context of the European Employment Strategy and in the preparation of the National Action Plans. Upon examining the conformity of the situation of **Cyprus** under this provision, the European Committee of Social Rights referred to the fact that "discussions were held with the social partners regarding the establishment of a separate tripartite Employment Committee with a view to monitoring the employment situation and to submitting suggestions for the formulation of national employment policy" and that "the cooperation between Government and social partners in the field of employment has been reinforced within the framework of the preparation in the European Employment Strategy. The social partners have been consulted on the preparation of the Joint Assessment of Employment and Labour Market Priorities in Cyprus and they have been invited to submit their comments on the National Action Plan under preparation" (Concl. XVIII).

The previous set of conclusions adopted by the Network under this guarantee of the Charter, covering the year 2003, referred to the conclusion by the European Committee of Social Rights under Article 2 of the European Social Charter in respect of the **Netherlands** (Kingdom in Europe), according to which the provisions of the Working Hours Act on the so-called "flexibility regulations" do not contain sufficient guarantees for collective bargaining in order to protect workers and are thus not in conformity with Article 2 § 1 of the European Social Charter. The Dutch Government considered that this conclusion was probably based on a misunderstanding. Before the Governmental Committee of the European Social Charter, the Dutch delegate explained that the term "flexibility regulations" used in the ECSR's conclusion was misleading. In reality the legal framework for working time provided for two different norms: a standard norm and a consultation norm. Although the latter norm allowed for slightly longer working hours, the limits were still strict both as regards ordinary working time and overtime. Application of the limits laid down in the consultation norm is allowed only with the consent of workers representatives at the sectoral (collective agreement) or enterprise level. The ETUC representative did not consider that the situation raised a problem and called upon the Government to explain the situation more clearly in the next report. The Governmental Committee asked the Government to include all the necessary information in the next report (Governmental Committee of the European Social Charter, 16th Report (II) (*full report*), Strasbourg, 23 January 2004, T-SG (2003) 27, p. 11).

Good practice

The Network welcomes the bill on equal rights and opportunities, participation and citizenship of disabled persons in **France** (NOR: SANX0300217L/B1) which institutes e periodical obligation to negotiate, and sectorial and company level, the conditions of access to employment, vocational training and advancement, as well as the employment and working conditions of disabled persons. Measures for adapting workstation arrangement, timetables, work organization or training schemes will be explicitly mentioned as clauses that must be covered by a collective sectorial agreement to enable extension thereof. At the same time, Article L.136-2 of the Employment Code will be extended to include the measures taken in favour of the right to work for disabled persons among the themes addressed in the annual report drawn up by the National Commission for Collective Bargaining.

Right to collective action

Under Article 6 § 4 of the European Social Charter, which is unchanged in the Revised European Social Charter, the Parties having accepted that provision undertake to recognize "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into". The Network notes that, during the period under scrutiny, the Committee of Social Rights reexamined the conclusions it adopted in 2002 with respect to **Sweden**, which concerned the implementation of Article 6 § 4 of the European Social Charter. In those conclusions, the Swedish practice was then considered not to be in conformity with that provision because strikes could only be called by those entitled to the parties to collective agreements. In its conclusions adopted in 2004 the Committee decided that "the reference to 'workers' in Article 6 § 4 of the Charter relates to those who are entitled to take part in collective action but says nothing about those empowered to call a strike." According to

the latter interpretation of this provision, states were not required to grant any group of workers authority to call a strike. In other words, states have the option of deciding which groups shall have this right and they may thus restrict the right to call strikes to trade unions. The Committee emphasized, however, that "such restrictions are only compatible with Article 6 § 4 if there is complete freedom to form trade unions and the process is not subjected to excessive formalities that would impede the rapid decisions that strike action sometimes requires". According to the Committee these conditions have been observed in Sweden since figures have shown a high rate of trade union membership.

The Network notes, however, that in its 2004 Concluding observations on **Lithuania,** the Committee on Economic, Social and Cultural Rights (E/C.12/1/Add.96) – while noting that the Labour Code of 1st January 2003 had addressed some of the weaknesses of previous legislation regulating the rights to strike (Lietuvos Respublikos darbo kodekso 78 str. Valstybės žinios, 2002, Nr.64-2569.) – expressed its concern about the fact that the definition of "essential services" for which strikes are prohibited was too broad. Moreover in its 2004 Conclusions, the European Committee of Social Rights considered that the situation in **Lithuania** was not in conformity with the Article 6 (4) of the Revised European Social Charter on the grounds that even though the strike ban in electricity, district heating and gas supply enterprises could serve a legitimate purpose – since work stoppages in these enterprises that are essential to the life of the community could create a threat to the lives of others or to public health – simply prohibiting all employees in these enterprises from striking cannot be considered to be proportionate to the requirements of these sectors, and therefore necessary in a democratic society. The Committee also concluded that the situation in **Lithuania** was not in conformity with the said provision for the reason that unions could only initiate collective action if two-thirds of an undertaking's employees vote in favour of a strike (Article 77.1 of the Labour Code). The Committee has considered that such a situation constitutes an undue restriction on trade union's right to collective action. In its Conclusions adopted in 2004 with respect to **Sweden**, the European Committee of Social Rights found the situation in that country not being in conformity with the requirements of Article 6 § 4 of the Revised European Social Charter on the grounds that the National Mediation Office may impose excessive fines (*varselavgift*) for failure by a party to give requisite notice of collective action. In the view of the Committee the amount of the fines that can be imposed were to be considered disproportionate. Moreover, action in violation of a postponement order may entail liability ranging from at least 300 000 SEK (approximately 33 000 Euros) up to a maximum of one million SEK (approximately 108 000 Euros). The fines imposed on the trade unions concerned are decided by a district court at the request of the National Mediation Office. Moreover, the exercise of the rights guaranteed in Article 6 § 4 of the European Social Charter should not be restricted to situations where the exercise of collective action is related to the negotiation of a collective agreement. Thus, the regulation of the right to strike in the **Slovak Republic** may be considered as too restrictive in this regard, as concluded by the European Committee of Social Rights during the period under scrutiny (Conclusions XI-2 [2003]). As regards the **United Kingdom** the European Committee on Social Rights has concluded that that the scope for workers to defend their interests through lawful collective action was excessively circumscribed, entailing a lack of conformity with Article 6(4), in that the Trade Union and Labour Relations (Consolidation) Act 1992, s 244 limits trade disputes to ones between workers and the employer since this means that secondary action is not lawful and since it has also been interpreted as excluding action concerning a future employer and future terms and conditions of employment in the context of a transfer of a part of a business. In the addition the Committee concluded that the requirement to give notice to an employer of a ballot on industrial action is excessive and not in conformity with Article 6 (4), notwithstanding that pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992, s 226A there was no longer an obligation to identify the workers who were being balloted but only the number, categories and place of work of those concerned, since in any case unions must issue a strike notice before taking action. A further lack of conformity with Article 6(4) was concluded to exist in that the protection against dismissal of workers taking industrial action applied only for eight weeks and then only to official action. The Committee also found that the fact that it was not lawful for a trade union to take industrial action on behalf of workers dismissed for unofficial action was a serious restriction on the right to strike. However, the Committee reserved its position as to whether the ability given by section 235A of the

1992 Act to third parties, including individual consumers, to take action to prevent a strike entailed a lack of conformity with Article 6(4) pending the receipt of information as to the conditions to be met and the its possible effect.

The situation of **Belgium** does not always comply with the requirements of Article 6(4) of the European Social Charter, bearing in mind the intervention of the judicial courts in collective labour disputes, which go beyond the restrictions on the right to strike that would be admissible from the viewpoint of Article 31 of the European Social Charter (Article G of the Revised European Social Charter), in particular since (civil) interim injunctions that have been issued were able to prohibit, on pain of penalty, picketing classed as assault and battery, even in the absence of physical violence, threats or intimidation, and were also able to rule on the legitimacy of the strike by prohibiting it on the grounds of its allegedly abusive nature (Concl. XVI-1, p. 74-76). The government announced in a communication of 13 December 2001 its intention to put an end to the infringements of the European Social Charter by giving the labour courts exclusive jurisdiction in collective labour disputes. Nevertheless, the implementation of this reform was in fact postponed by the adoption of a protocol approved between the social partners in April 2002, in which the employers' organizations undertook to advise their members to avoid the institution of legal proceedings for matters connected with the collective dispute, while the trade unions undertook to advise their members to avoid all physical or material violence during collective disputes and to guarantee the protection of plant and tools. However, this does not suffice to rule out once and for all the threat of interim injunction proceedings in collective labour disputes, and therefore does not suffice to bring Belgian law into conformity with the requirements of the European Social Charter. Neither is the situation in the **Netherlands** in conformity with Article 6 § 4 of the Charter, since the Dutch courts may determine whether recourse to a strike is premature, which leads to an impingement on the very substance of the right to strike, the Committee observed, as this allows the judge to exercise one of the trade unions' key prerogatives, that of deciding whether and when a strike is necessary (Concl. XVII-1).

In **Cyprus**, the violation of Article 6 § 4 of the European Social Charter, as found by the European Committee of Social Rights in its recent Conclusions, results from the fact that in accordance with the Trade Unions Laws 1965-1996, the decision to call a strike must be endorsed by the executive committee of a trade union; moreover, the Defence Regulations 79A and 79B, which authorise the requisition of workers and the prohibition of strikes in cases other than those allowed by the Revised Charter, are still in force. In **Denmark**, the situation was considered not to be in conformity with the same provision of the European Social Charter in the absence of any guarantee for the workers who participated in a lawful strike to be re-employed (Concl. XVII-1). In **Estonia**, Section 21 of the Collective Labour Disputes Act (*Kollektiivse töötüli lahendamise seadus*) prohibits strikes in government agencies and other state bodies and local authorities, the defence forces, other national defence organisations, the courts, and fire fighting and rescue services, which – even in the light of Article G of the Revised European Social Charter (Art. 31 of the European Social Charter), which may justify restrictions to the right to strike of civil servants insofar as they perform duties affecting public interest or national security –, because of its general character, cannot be deemed in conformity with Article 6 §4 of the Revised Charter. A similar concern must be expressed with respect to the right to strike of public servants in **Germany** (see Conclusions XVII-1 of the European Committee of Social Rights). The Network has serious doubts about the compatibility with the requirements of Article 28 of the Charter of Fundamental Rights, which must be interpreted in accordance with Article 6 of the Revised European Social Charter, of the regulation of the right to strike in **Latvia**, insofar as the 1998 Law on Strikes (*Streiku likums*, 23.04.1998., *Latvijas Vēstnesis*, no. 130/131, 12.05.1998) provides that a quorum is required to vote on a strike, provides for overly lengthy pre-strike procedures, and prohibits solidarity strikes as well as strikes called to protest at the government's economic and social policies.

Article 29. Right of access to placement services

Everyone has the right of access to a free placement service.

This provision of the Charter must be read in accordance with the requirements formulated by both ILO Convention (n° 168) concerning Employment Promotion and Protection against Unemployment (1988), by Article 1 (3) of the European Social Charter (1961) and by Article 1(3) of the Revised European Social Charter.

The EU Member States should not only set up free employment services for all workers, but also ensure that these services have the personnel and budget required for them to perform their tasks effectively. They also should promote an active placement policy, going beyond ensuring that the demand on the employment market will meet the offer, and seeking to ensure that job-seekers are adequately trained or re-trained in order to meet the needs of the economy. It is essential that all job-seekers have an equal access to these services. The Network notes with some concern, for instance, that in **Ireland** reports have been published which highlight the negative impact recruitment agencies may have on the rights on non-national workers (Migrant Rights Centre Ireland, *Private Homes, A Public Concern, The Experience of Twenty Migrant Women Employed in the Private Home in Ireland,* December 2004), and that FAS schemes are not open to those over 65.

No other conclusions have been adopted under this provision of the Charter.

Article 30. Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 24 and 29 of the Revised European Social Charter. Article 24 of the Revised European Social Charter in particular provides that

« With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body. »

The Network urges **Belgium** to safeguard striking workers against dismissal in accordance with Article 6(4) of the European Social Charter (see Concl. XVI-1 (2003) adopted by the European Committee of Social Rights). While recognizing that Belgium did not wish to accept Article 24 of the Revised European Social Charter in its ratification of this instrument, bearing in mind that under Article 18 of the Act of 3 July 1978 governing employment contracts the employer is not obliged to justify a dismissal, the Network points out that this does not exempt Belgium from complying with the other obligations it has entered into under the European Social Charter, more particularly those ensuing from Article 6(4) of that instrument. Moreover, Article 1(2) of the European Social Charter, which prohibits all discrimination in employment, requires that the compensation offered in case of

discriminatory dismissal is adequate, proportionate and sufficiently dissuasive, which in particular excludes national law setting an upper limit for compensation for wrongful dismissal. The imposition of a lump-sum indemnity for unfair dismissal, as set by Article 63 of the Act of 3 July 1978 governing employment contracts, cannot be in conformity with this requirement, since it should be interpreted as ruling out the allocation of compensation that is in proportion to the prejudice suffered in case of discriminatory dismissal. Moreover, in case of dismissal on discriminatory grounds, it should be possible to order the reinstatement of the worker in the company. The Network regrets that in **Ireland**, the re-employment remedies (of reinstatement and reengagement) provided for under the Unfair Dismissals Acts are availed of too infrequently in preference for the remedy of compensation.

The European Court of Justice, under case C-55/02 *Commission of European Communities vs.* ***Portugal***, "declares that by restricting the concept of collective redundancies to redundancies for structural, technological or cyclical reasons, and by failing to extend that concept to dismissals for any reason not related to the individual workers concerned, the Portuguese Republic has failed to fulfil its obligations under articles 1 and 6 of Council Directive 98/59/EC of 20th July 1998 on the approximation of the laws of the member states relating to collective redundancies". Still according to the Court, the concept of collective redundancy must include "any termination of contract of employment not sought by the worker, and therefore without his/her consent", also "termination of a contract cannot escape the application of the Directive just because it depends on external circumstances not contingent on the employer's will". Although this collective decision of the Court applies to decree law nº 64-A/89 of 27 February, diploma now revoked by the Labour Code (Lei nº99/2003, de 27 de Agosto), the decision is still applicable as the grounds for the collective redundancies remain more or less the same in the new code - "market, structural or collective reasons".

Article 31. Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

This provision of the Charter must be read in accordance with the requirements formulated by Article 7 of the International Covenant on Economic, Social and Cultural Rights (1966), by ILO Convention (n° 105) concerning the Abolition of Forced Labour (1957), by the ILO Convention (n°148) concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration (1977), by the ILO Occupational Health Services Convention (No. 161) (1985), by Articles 2 and 3 of the European Social Charter (1961) and by Articles 2, 3 and 26 of the Revised European Social Charter.

Health and safety at work

Article 2 § 4 of the 1961 European Social Charter provides that the States parties to that instrument who have accepted this provision should provide additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations. The Network takes the view, in conformity with the text of the Revised European Social Charter, that the primary obligations of the States is to eliminate the risks in inherently dangerous or unhealthy occupations, and that the provision of additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations should only be seen as subsidiary.

The Network notes, however, that the adoption of health and safety regulations at work may constitute in certain cases a barrier to the employment or retainment of persons with disabilities. This risk should be particularly a source of concern where the Member States go beyond the minimal requirements

established under European Community law in the field of occupational health and safety. As stated by Article 1(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ L 183, 29.6.1989, p. 1), this directive « shall be without prejudice to existing or future national and Community provisions which are more favourable to protection of the safety and health of workers at work"; and the other, sectorial directives adopted in this area also establish minimal requirements for the Member States. However, referring to the Report « Pre-Employment Inquiries and Medical Examinations as Barriers to the Employment of Persons with Disabilities: Reconciling the Principle of Equal Treatment and Health and Safety Regulations under European Union Law » commissioned by the DG Employment and Social Affairs of the European Commission to the Group of experts on discrimination on grounds of disability, the Network notes the need to clarify the relationship between the possibility for the Member States to ensure a high level of protection of the health and safety at work, and the requirement to ensure equal treatment in employment and occupation to workers with disabilities.

Referring to the conclusions of that Report, the Network notes that a Member State would currently not be in violation of its obligations under Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation if it provided that it can be a valid defence for employers accused of discriminating against persons with disabilities by denying them employment opportunities that they are acting in order to comply with the existing national regulations protecting health and safety at work. This may be derived from Articles 2(5), 7(2) and 2(2)(b) of the Framework Directive. However, the Member States should strictly define the conditions under which this justification may be invoked: as this constitutes an exception to the principle of equal treatment, it should not be read too widely and authorize health and safety regulations to become false excuses for perpetuating discrimination against persons with disabilities in the employment relationship. Specifically, the Report mentioned suggested that under the Framework Directive such a justification should only be considered as admissible where a) it would be not only more difficult or burdensome, but impossible for the employer hiring the person with a disability to comply with the requirements set out in the existing health and safety regulations, even by providing a form of reasonable accommodation to that person; b) this impossibility has been determined following an individualized assessment of the person concerned, of the range of accommodations which could be provided as an alternative to a refusal to hire (or a discontinuation of the employment), and of the incompatibility between the obligations imposed on the employer to guarantee health and safety at work and the recruitment (or the retainment) of the person concerned; it follows from this requirement that any blanket, across-the-board restriction on the employment of persons with certain categories of disabilities, should be presumed in violation of the Framework Directive, even where such a restriction is purportedly justified by the need to comply with health and safety requirements; c) the incompatibility between the obligations imposed on the employer to guarantee health and safety at work and the recruitment (or the retainment) of the person concerned, which the employer alleges, relies on current medical knowledge or on the best available objective evidence, rather made to depend on the subjective appreciation of the employer, even where it is admitted that the employer has acted in good faith and with no discriminatory purpose; and d) the procedure which leads to the conclusion that the employer is justified in refusing to hire a person with a disability (or in not retaining that person) complies with the fundamental rights recognized in EU law, including in particular the right to respect for private life and the protection of personal data. The Report concluded:

> A Member State is not obliged under the Framework Directive to screen out from its health and safety regulations those regulations whose protective pretences may adversely impact upon the access to employment of persons with disabilities. However the Member States could be encouraged and perhaps incentivized to do so, to the extent that they have provided for a level of protection of health and safety at work which goes beyond the minimal levels of requirement set out by EC Directives or required under Article 3(3) of the Revised European Social Charter.

The free movement of services in the internal market and the protection of posted workers

During the period under scrutiny, an important debate followed the presentation by the European Commission of its proposal for a Directive on the services in the internal market (COM(2004) 2 final, of 13.1.2004). One aspect of this debate, of particular importance under Article 31 of the Charter, concerned the relationship between the proposal and the protection of posted workers in the context of a transnational provision of services. While referring for further developments to the Report on the situation of fundamental rights in the Union in 2004, the Network would make the following comments.

In connection with the provision of transnational services involving the posting of workers – taking the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or a private contract - , the Community legislator has already taken action with the adoption of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18 of 21.01.1997, p. 1). Although it is sometimes presented as setting out to promote the transnational provision of services by clarifying the legal framework applicable to the posting of workers and, in particular, the division of tasks between the law of the Member State of destination (where the services are provided) and the Member State of origin (where the service provider is established and where the posted worker is habitually employed), this Directive is in fact intended to prevent a specific form of unfair competition developing in Europe, called "social dumping", where undertakings wrongfully resort to posting of workers under a contract of services between undertakings established in two different Member States in order to escape the consequences of the national law of the Member State of destination and thus to compete with the undertakings established in that State which are obliged to comply with that national law. In order to achieve this objective, Directive 96/71/EC coordinates the legislations of the Member States in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided (see in particular Article 3(1)). All areas dealt with in Directive 96/71/EC are exempt from the country of origin principle (Article 17(5) of the proposal for a Directive on services in the internal market).

However, the application of the country of origin principle to the posting of workers in the context of a transnational provision of services radically modifies the function to be fulfilled by the core provisions for the protection of workers' rights listed under Article 3(1) of Directive 96/71/EC. Article 3(10) of this Directive states explicitly that it « shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of (…) terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 [cited above] in the case of public policy provisions (…) ». The country of origin principle, on the contrary, prohibits this.

Where the Directive concerning the posting of workers in the framework of the provision of services mentioned (in Article 3(10)) that it does not preclude the application by Member States, « in compliance with the Treaty », to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of terms and conditions of employment on matters other than those referred to in Article 3(1), this Directive did not consider that, beyond the minimal protection afforded to the workers by the application of certain imperative provisions of the State of destination, the national rules regulating the employment relationship in that State should be ignored in favor of the law of the State of origin. This however is what the principle of the country of origin in effect leads to. What were *minimal* safeguards for the workers in the system of the Posted Workers Directive now appears to constitute the *maximum* room allowed for the law of the State of destination of the transnational provision of services.

The principle of the country of origin applied to the transnational provision of services amounts to imposing a form of mutual recognition without prior harmonisation, and in particular, without a prior determination of a minimum level of protection of workers' rights. The judgment delivered by the Court on 23 November 1999 in the case of *Arblade and others* appears on the contrary, with specific reference to the building sector, to make the substitution of the protection of the country of origin to the protection offered by the host country, dependent on a sufficient comparability between the protections offered by the two regimes. The Court said in its judgment that

> It must be acknowledged the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules may constitute an overriding requirement justifying the imposition on an employer established in another Member State who provides services in the host Member State of obligations capable of constituting restrictions on freedom to provide services. However, that is not the case where the workers employed by the employer in question are temporarily engaged in carrying out works in the host Member State and enjoy the same protection, or essentially similar protection, by virtue of the obligations to which the employer is already subject in the Member State in which he is established (para. 51).

In conclusion, the Network considers that the fears that have been voiced with respect to the consequences that may result for the protection of the fundamental social rights of workers employed in the services sector from the proposal for a Directive on services in the internal market are not unfounded. A mutual recognition as provided for by the country of origin principle should be contemplated as part of a coherent legislative whole, comprising measures for the harmonization of the fundamental social rights of workers beyond the minimum safeguards currently enshrined in Community law.

Right to limitation of maximum working time

During the period under scrutiny, the Commission has made a proposal (COM(2004) 607 final of 22.9.2004) aiming at the amendment of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, of 18.11.2003, p. 9). With respect to the « opt-out » provision currently in Article 22(1) of the Directive, the Commission has proposed to maintain the principle of the individual opt-out from the 48-hour average weekly limit, but – recognizing that « The experience gained in the application of Article 22(1) shows that the individual final decision not to be bound by Article 6 of the Directive can be problematic in two respects: the protection of workers' health and safety and the freedom of choice of the worker » (Preamble, 9th Recital, of the Proposal) – proposes to reinforce the protection of the worker by introducing a dual system, which the Commission believes combines the advantages of the individual approach with those of collective bargaining. According to this dual system, the individual opt-out will require prior collective agreement or agreement among social partners where such agreements are possible under national legislation and/or practice; in other cases, opt-out on the basis of individual consent alone will remain possible, but reinforced conditions will apply to prevent abuses and to ensure that the choice of the worker is entirely free. Furthermore, the Directive introduces a maximum duration of working time for any one week, unless otherwise provided by collective agreement.

The Network recalls that the flexibility allowed by maintaining the individual opt-out could have an impact on the health and safety of the workers concerned, since fatigue associated with the risk of cardiovascular diseases and with a rise in the number of work accidents is directly proportional to the number of hours worked. It could also discourage women from entering the labour market, since it becomes more difficult to reconcile family and professional life. It may also reinforce the professional segregation between men and women, since the most senior positions in the professional hierarchy require greater availability on the part of the worker. Finally, although the Commission proposal sets out to strengthen the reality of worker consent by preserving the latter's freedom of choice, in particular by guaranteeing that no worker should be disadvantaged by the fact that he is not willing to

agree to work longer than 48 hours a week, the worker finds himself restricted essentially by the fact that he finds himself in a competitive position with other workers of whom the same extension of working time is asked, and that because of his refusal he may end up being given tasks with less responsibility, as well as being denied promotion to positions with greater responsibility.

The Network therefore welcomes the fact that, in the proposal of the Commission, the consent of the individual worker may not, by and in itself, legitimize the opt-out. In this proposal, Article 22(1) provides that the possibility of individual opt-out must be « expressly foreseen by a collective agreement or an agreement between the two sides of industry at national or regional level or, in accordance with national law and/or practice, by means of collective agreements or agreements concluded between the two sides of industry at the appropriate level ». Except for enterprises where there is no collective agreement in force and for which there is no workers' representation that is empowered to conclude a collective agreement or an agreement between the two sides of industry on the issue, this ensures a certain protection of the individual worker, compensating in part his/her vulnerability in the face of pressures which the employer might be tempted to exert. At the same time, it will be recognized that the representatives of workers themselves may be subjected to certain pressures linked to the need for the undertaking concerned to remain competitive in comparison not only with its competitors in other countries of the Union, but also with competitors in third countries in sectors exposed to international competition.

It should be remembered in this respect that, according to the OECD Guidelines for Multinational Enterprises, approved by all governments of the OECD Member States, Member States should encourage multinational enterprises, in the context of collective bargaining negotiations, not to threaten workers with relocating certain parts of their activity in order to secure additional concessions from the workers' representatives and to influence the outcome of those negotiations in a way that those guidelines term "unfair" (Chapter IV, par. 7 of the Guidelines). This principle is cited in paragraph 52 of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977). Bearing in mind that, during the period under scrutiny, certain collective agreements have been secured by the enterprises concerned under the threat of such relocations, the Network considers it appropriate to recall the requirement formulated by those guidelines.

Moreover, the Network recalls that Article 2(1) of the Revised European Social Charter provides that "With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake: (..) to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit." The European Committee of Social Rights considers that the law must require that collective agreements set a daily or weekly limit to working time and that the possibility of reaching collective agreements at the enterprise level must be surrounded by specific guarantees (Decision of 16 November 2001 on the merits of Collective Complaint No. 9/2000, *Confédération francaise de l'Encadrement CFE-CGC against France*).

Since Article 31(2) of the Charter of Fundamental Rights of the European Union is based on Article 2 of the European Social Charter, it should be read in conformity with the latter provision, taking into account the interpretation given thereof by the European Committee of Social Rights. It would be advisable if, in the evaluation report on the application of the Directive which it is to submit to the European Parliament, the Council and the European Economic and Social Committee (Article 24b of the proposed Directive), the Commission would examine the compatibility of the transposition measures adopted by the Member States with the requirements of the European Social Charter. Although it is aware that not all the Member States have accepted to be bound by Article 2(1) of the (Revised) European Social Charter, the Network takes the view that, under Article 31(2) of the Charter of Fundamental Rights, all the Member States are bound by the requirements of Article 2(1) of the (Revised) European Social Charter in the implementation of European Community Law, the uniform application throughout the Union of which, moreover, shall be encouraged through such an interpretation.

Article 32. Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

This provision of the Charter must be read in accordance with the requirements formulated by Article 10(3) of the International Covenant on Economic, Social and Cultural Rights (1966), by Article 32 of the Convention on the Rights of the Child (1989), by ILO Convention (n° 138) concerning Minimum Age for Admission to Employment (1973), by ILO Convention (n° 182) concerning the prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999), and by Article 7 of the European Social Charter (1961) and Article 7 of the Revised European Social Charter.

Protection of minors at work

The Network encourages **Cyprus** to amend the Protection of Young Persons at Work Act 2001 in order to ensure that it is extended to occasional or short term work relating to the provision of domestic service in a private household, as recommended by the European Committee on Social Rights in its conclusions adopted under Article 7 of the European Social Charter. Similarly, in **Estonia**, the Employment Contracts Act (1992) should be made applicable to work done in family enterprises, insofar as the prohibition of exploitation under the Children Protection Act may not offer sufficient protection; moreover, the Working and Rest Time Act 2001 should be made to apply to children working in family enterprises, on family farms or as domestic workers. As far as **France** is concerned, the 2004 Conclusions of the European Committee of Social Rights conclude that French law is not in conformity with Article 7(2) of the Revised European Social Charter, which sets at 18 years the minimum age for admission to certain occupations that are regarded as dangerous and unhealthy, in that the French Labour Code stipulates for certain dangerous types of work a minimum age below 18 years (ranging from 15 to 18 years). Furthermore, the Committee considers that the fact that young persons who have obtained the relevant vocational qualification (CAP) are no longer subject to the age limits stipulated in the Labour Code and may therefore undertake potentially dangerous or unhealthy work with the consent of an occupational physician as being contrary to the Revised Social Charter, which permits no exceptions for those who have completed their vocational training. In **Sweden**, the Ordinance 1996:1, Minors at Work (Arbetarskyddsstyrelsens föreskrifter, Minderåriga (AFS 1996:1)), Section 5(2)b of which authorizes a derogation from the rules prohibiting minors from undertaking work that is considered dangerous and unhealthy, should be reviewed in order to be in conformity with Article 7(2) of the European Social Charter. **Sweden** should moreover ensure that the mandatory rest period during school holidays for children still subjected to compulsory education be extended in conformity with Article 7(3) of the European Social Charter. Finally, the Network deplores that the situation in **Sweden** still is not in conformity with Article 7(9) of the European Social Charter, which imposes that persons under 18 years of age employed in occupation be subjected to regular medical checkups: the performance of such a medical examination should not be made to depend on the decision of the employer or the Labour Inspectorate.

Article 4(1) of the European Social Charter provides that the States parties having accepted that provision undertake to recognize « the right of workers to a remuneration such as will give them and their families a decent standard of living ». The European Committee of Social Rights had found under Article 4 of the European Social Charter in respect of the **Netherlands** (Kingdom in Europe) that, under the Minimum Wage and Minimum Holiday Allowance Act as amended workers under the age of 23 years are entitled only to a percentage of the adult minimum wage ranging from 30 % for 15-year olds increasing to 85 % for 22-year olds, and that this situation

was not in conformity with Article 4(1) of the Charter. The Network notes the response of the Dutch Government in its 17th report of 2004 that "15-year-olds are still subject to compulsory education full-time, and 16 and 17-year-olds part-time. In 2002, 98.8% of 16-year-olds attended school, and 85.4% of 17-year-olds. Since 15-year-olds are subject to compulsory education, it is not meaningful to talk in terms of a fair wage. In the case of 16 and 17-year-olds, the level of the minimum wage is justified in the light of labour market policies for young people (the prevention of youth unemployment) and efforts to reduce early school leaving. (…) the labour market position of young people is particularly vulnerable when there is a cyclical downturn. The most important thing is to prevent young people dropping out of school, since workers without basic qualifications are the unemployed of tomorrow. One crucial way of preventing early school leaving is to ensure a sensible development of youth minimum wages, taking into account the fact that young workers are less productive. High wages would have an adverse effect on the demand for young people in the labour market". While awaiting the views of the European Committee of Social Rights on this question, the Network would suggest that this situation should also be examined under 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, p. 16), insofar as the prohibition of age-based discrimination in employment and occupation concerns not only discrimination against older workers, but also discrimination against young workers.

The European Commissioner for Human Rights, issued a report on the 19th December 2003, upon his visit to **Portugal**, revealing that child labour remains a problem in Portugal and highlighting new forms of urban exploitation, such as begging, prostitution and drug trafficking. He calls the attention for the need to regulate the employment of children in sports and entertainment; during 2004 new provisions were approved, like Law 35/2004 (*Lei Regulamentar do Código do Trabalho*), which regulates the Labour Code and dedicates a chapter to the participation of children and young people in entertainment and other activities. Despite the fact that it does not establish a minimum age to become an actor, singer, dancer, musician or model, it forbids the participation of children under 12 in circus activities. It also establishes maximum hours of working per week but it is predictable that difficulties will arise to inspect that timetable. The participation of the child/young person in the above mentioned activities is subject to an authorization from the Commission of Protection of children and young persons (*Comissão de Protecção de Menores*), which is an innovation; in case it denies, legal representatives can appeal to the Family Court. Schools have the duty to inform the Commission in case the child/youngster shows significant changes of behaviour or of results. Also, the 10th periodic report on the implementation of the European Social Charter, presented in June, reveals that 48 914 children between 6 and 15 are engaged in economic activities (paid and not paid, within the family context), 28 224 are involved in child labour and 14 008 do dangerous work.

Article 33. Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

This provision of the Charter must be read in accordance with the requirements formulated by Article 23 of the International Covenant on Civil and Political Rights (1966), by Article 10 of the International Covenant on Economic, Social and Cultural Rights (1966), by Articles 8, and 16 of the European Social Charter (1961) and Articles 8, 16 and 27 of the Revised European Social Charter (1996).

Parental leaves

The Network welcomes the legal recognition by **Austria** of the right to part-time employment for parents, after a law to that effect was passed in Parliament in June 2004 (Federal Law Gazette (BGBl) I No 64/2004 of 22 June 2004). As an effect of this law, which entered into force on 1 July 2004, parents are entitled to part-time employment until the seventh birthday of the child if they are employed in enterprises with more than 20 employees and their employment lasted for at least three years without interruptions. This is an important contribution to the reconciliation between professional and family life. The Network also welcomes the fact that in **Ireland**, a commitment on the work-life balance was included under the *Sustaining Progress* Agreement, and that as a result, a National Framework Committee for Family-Friendly Policies was established with representatives of the social partners, with the aim of supporting and facilitating the development of family-friendly policies through the development of practical measures. It notes that, under the Sustaining Progress Interim Review, the Government had made a commitment to restore maternity benefit to 80 per cent of earnings from its current level of 70 per cent of earnings, and that this was achieved in the budget in December 2004. In **Latvia**, steps have been taken in an encouraging direction, in particular by the approval on 24 August 2004 by the Cabinet of Ministers of the Concept on the Increase of the Child Benefits in the Families after the Birth of the Child. A number of encouraging developments have also been taking place in **Spain**. In the Balearic Islands, the Government decided that, in 2005, parents taking up their parental leave shall receive benefits set at 150 euros per month for women and at 180 euros on average for men in order to stimulate them to make more use of those instruments. Companies may be given tax incentives for setting up replacement services for persons being granted conciliation measures. Finally, parents of children under 3 years will receive 100 euros extra per month as a supplement for childcare. The Basque Autonomous Community has decided to allocate 2,400 euros per year to women who request three years' leave to look after children under 3 years, and 3,000 euros per year to men who request such leave. It also allows for part-time leave, with a proportional reduction of this benefit. Finally, companies receive support to arrange for the replacement of employees who take such leave.

At the same time, it is important, especially for the improved professional integration of women, that measures are being taken in order to make possible a conciliation between family and professional life, without there being a need to make a choice between either. Thus, the Committee on the Rights of the Child has considered, on the basis of Articles 18 (3) and 25 of the Convention on the Rights of the Child and in light of the recommendations of the Committee on Economic, Social and Cultural Rights (E/C.12/1/Add.68, para. 44), that **Germany** should take measures to establish more childcare services to meet the needs of working parents, and to set up national standards to ensure quality childcare is available to all children.

Article 34. Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (1966), by Articles 26

and 27 of the Convention on the Rights of the Child (1989), by ILO Convention (n° 168) concerning Employment Promotion and Protection against Unemployment (1988), by Article 12, 13 and 17 of the European Social Charter (1961) and by Articles 12, 13, 30 and 31 of the Revised European Social Charter.

Social security and social and medical assistance

Article 12 of the European Social Charter guarantees a right to social security. Under Article 12(1) of the European Social Charter, States parties having accepted that provision undertake to establish or maintain a system of social security. The principle of collective funding is a fundamental feature of a social security system as foreseen by Article 12 of the Charter as it ensures that the burden of risks are spread among the members of the community, including employers, in an equitable and economically appropriate manner and contributes to avoiding discrimination of vulnerable categories of workers, especially workers with a history of medical problems. Therefore making the public sickness insurance scheme subsidiary for the majority of workers may call into question the foundation and spirit of social security, as noted by the European Committee of Social Rights with respect to the **Netherlands** (Conclusions XVII-1). Therefore, any privatization of the social security system should be accompanied with the necessary safeguards to ensure that such discriminatory impacts are avoided or, at least, mitigated.

It is of course an elementary requirement that the provisions organizing social protection do not discriminate between different categories of beneficiaries. Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 adopted in **Ireland** order to allow for measures announced in the budget of 2003 to be implemented is unacceptable in this regard, as the provision restricts the definition of 'spouse' or 'couple' to a married couple and to an opposite-sex cohabiting couple for state welfare schemes, thus creating a direct discrimination based on sexual orientation incompatible with the Equal Status Act 2000.

Under Article 12(4) of the Revised European Social Charter, the States parties to this instrument should take steps in order to ensure equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties ; as well as the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.

According to the European Committee of Social Rights, the situation in **Belgium** is still not in conformity with this provision (Concl. XVII-1), on the grounds that the payment of family benefits is conditional on the claimant's children being resident in Belgium, subject to any international agreements that may be applicable; the payment of guaranteed family benefits is conditional on a five-year residence period; the payment of disability allowances is conditional on beneficiaries having received disabled-child supplementary family benefit before the age of 21; and finally, there is no provision in Belgian legislation for the export of acquired social security rights by nationals of Contracting Parties to the 1961 European Social Charter and the Revised European Social Charter not covered by Community regulations or bilateral or multilateral agreements other than the Charter.

The European Committee of Social Rights also noted that in **Finland**, certain family benefits remained subject to a residence requirement for dependent children and Finnish legislation does not provide for aggregation of the periods of insurance or employment completed by nationals of Contracting Parties to the Charter, not being Member States of the EU or not having entered into a bilateral agreement with Finland. This situation is not in conformity with article 12 (4) of the Charter (Concl. XVII-1). Similarly, the situation in **Cyprus** is not in conformity with article 12(4) of the Revised Charter [on the social security of persons moving between states] insofar as the residence requirement for entitlement to the social pension is excessive and may constitute indirect discrimination against nationals of other States Parties, and as, moreover, Cypriot legislation does not provide for the

aggregation of insurance or employment periods completed by nationals of States Parties which have not concluded bilateral social security agreement with Cyprus. The European Committee of Social Rights (Conclusions XVII-1 (Spain) 2004) also concluded that the situation in **Spain** is not in conformity with Article 12(4) of the Charter regarding the social security of persons moving between states, in so far as payment of family benefit is subject to a residence requirement in respect of the children unless otherwise provided by any bilateral agreement that may apply. The European Committee of Social Rights concluded in its 2004 Conclusions on **Lithuania** that the situation in Lithuania was not in conformity with Article 13(1) of the Revised European Social Charter regarding the adequate assistance for every person in need, on the grounds both that the level of social assistance benefits is manifestly inadequate and that the requirement of a length of residence for the entitlement to social assistance is imposed. Similarly in its 2004 Concluding observations on **Lithuania,** the Committee on Economic, Social and Cultural Rights (E/C.12/1/Add.96) expressed its concern on the unequal distribution of social benefits and social services, which depends on the place of residence of the beneficiaries. The Committee also expressed its concern on the situation in rural areas and on the problem of homelessness in Lithuania. As regards the **United Kingdom** the European Committee on Social Rights concluded that the Habitual Residence Test as a condition of eligibility for housing benefit and access to long-term tenancies in social housing was not in conformity with Article 19(4) of the European Social Charter as it discriminated against migrant workers (Conclusions XVII-1).

A positive remark should be made to the Constitutional Court of **Portugal** which decided that there is violation of the constitutional principle of human dignity in Article 824 of the Civil Procedure Code, which permits the seizure of the workers wages in cases of debt execution, when the debtor does not own any other seizable property or income enough to pay the debt, to the extent that it may deprive the worker from the enjoyment of his/her minimum monthly income, correspondent to the minimum national wage. Decision of the Constitutional Court nº 96/2004 (*Acórdão do Tribunal Constitutional nº 96/2004*).

Article 13 of the European Social Charter guarantees the right to social and medical assistance. Generally, States should ensure that the social assistance they provide to persons without adequate resources and lacking the means to secure such resources must enable recipients to meet basic needs in an adequate manner. It would be manifestly inadequate to set the level of such social assistance benefits or unemployment benefits at a level which falls below the poverty line. **Estonia** should ensure that both the unemployment benefit as defined by the government pursuant to Section 6 para. 2 of the Unemployed Persons Social Protection Act and the social assistance benefits be raised in order to comply with this requirement, which the European Committee of Social Rights derives from Article 13(1) of the European Social Charter. Any discrimination in the granting of social or medical assistance should also be avoided, which would result, for instance, from the imposition of a condition of age or of residency. The European Committee of Social Rights (European Social Charter. European Committee of Social Rights. Conclusions XVII-1 (Spain) 2004) thus considered that the situation in **Spain** is not in conformity with Article 13(1) of the Charter as entitlement to the minimum income is subject to a residence requirement in an Autonomous Community and to a minimum age limit of 25 years in most Autonomous Communities, and as a right to appeal does not exist in all Autonomous Communities. In **Denmark**, foreigners who are legally residing in Denmark or migrant workers are not treated as Danish citizens in regards to continued assistance and, since the 2002 Amendments to the Act on an Active Social Policy and the Act on Integration, there exists a requirement of 7 years of residence in the country in order to receive assistance allowance, which is the source of an indirect discrimination against ethnic minorities, which are overrepresented among newly arrived immigrants. The Network encourages Denmark to remedy a situation which the European Committee of Social Rights has found to be in violation of Article 13(1) of the European Social Charter. The situation in the **Netherlands** has been found by the European Committee of Social Rights (Conclusions XVII-1) not to be in conformity with Article 13(4) of the European Social Charter, insofar as emergency social assistance is not available to all nationals of the Contracting Parties to the Charter and Parties to the Revised Charter other than European Union members and parties to the Agreement on the European Economic Area who are lawfully present but not resident in the Netherlands.

Right to housing assistance

Article 34(3) of the Charter of Fundamental Rights sets forth that the Union recognizes and respects the right to housing assistance. This means, at the very least, that Union law must not prevent Member States from complying with the obligations that are incumbent on them, more particularly under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights and Article 31 of the Revised European Social Charter. In its Concluding Observations on **Denmark** for instance (E/C.12/1/Add.102 26 November 2004, adopted by CSECR at the Thirty-third session 8 -26 November 2004), the Committee on Economic, Social and Cultural Rights encouraged Denmark to consider enacting specific legislation providing for the right to housing. The Committee also recommended, in line with the Committee's General Comment No. 4, the State party to adopt national policies to ensure that all families have adequate housing facilities, and that adequate resources are allocated for social housing, particularly for disadvantaged and marginalised groups such as immigrants. The Committee further encouraged Denmark to take measures to address the problem of homelessness, particularly among the immigrant population.

The guarantee set forth in Article 34(3) of the Charter of Fundamental Rights should influence the Commission's attitude in the application of the provisions of the EC Treaty relating to State aid. The Network considers it desirable that the situation of social housing organizations be clarified, either by applying the criteria defined in the case-law of the Court of Justice of the European Communities (ECJ, 24 July 2003, *Altmark,* C-280/00), or by ceasing to class the subsidies that are paid to them as State aid, or by securing an exemption arrangement for that category of organizations, or by adopting an *a priori* decision that the social housing sector is compatible with Community law. The Network therefore welcomes the Commission's announcement that the funding of public services provided by social housing would be exempt from notification, irrespective of the amounts involved. It also notes with satisfaction that the resolution adopted on 14 January 2004 by the European Parliament (rapporteur Herzog) sets forth that "in accordance with all its previous resolutions, services of general interest provided as essential functions by public authorities, such as education, public health, *public and social housing* and social services of general interest assuming functions of social security and social inclusion, do not fall within the scope of EU competition and internal market law".

The Network also insists on the need for the rules and criteria for the attribution of social housing to be transparent and not subject to discriminatory application. In **Latvia** for example, the National Human Rights Office continued receiving numerous complaints about the refusal of municipalities to include them in the lists of persons in need for social or municipality housing; former convicts in particular continue to experience problems in obtaining housing after the release (Valsts Cilvēktiesību birojs, *Aktuālie cilvēktiesību jautājumi Latvijā 2004.gada 1.ceturksnī*, available at www.vcb.lv, pp. 6 – 8). The Network welcomes in that respect the development, by the Department of the Environment in **Ireland**, of a model scheme, by which people on waiting lists are awarded points depending on their particular circumstances. This improves transparency and should set an example for further initiatives in other States, although regrettably, the circular to the local authorities proposing the scheme does not have legal effect and some local authorities have not at yet implemented its provisions. In **Portugal** Decree-law nº 135/2004 (*Decreto-lei nº 134/2004, de 3 de Junho*), which created PROHABITA – access to housing financing programme (*Programa de Financiamento de Acesso à Habitação*) to solve situations of strong needs of housing for low income families, a programme to be implemented through the celebration of protocols like the one signed between the Government housing Department, the National Housing Institute (*INH – Instituto Nacional de Habitação*) and APFIN - Portuguese Association of Property Management and Investment Funds Companies (*Associação Portuguesa das Sociedades Gestoras de Patrimónios e de Fundos de Investimento*) for the reallocation of families living under precarious conditions, launching for that purpose a set of commitments for the establishment of an operative model for the construction of houses with resources derived from real estate investment funds, whose process shall be supervised by INH.

Article 35. Health care

> Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

This provision of the Charter must be read in accordance with the requirements formulated by Article 12 of the International Covenant on Economic, Social and Cultural Rights (1966), by Article 24 of the Convention on the Rights of the Child (1989). The interpretation of this provision of the Charter must also take into account Articles 11 and 13 of the European Social Charter of 1961 and Articles 11 and 13 of the Revised European Social Charter, regarding the right to protection of health and the right to medical assistance.

Medical assistance

Article 13(1) of the European Social Charter provides that the States parties having accepted that provision undertake "to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition". This provision has been left unmodified in the Revised European Social Charter.

The Network notes that, in its decision on the merits of the collective complaint n° 14/2003 (*FIDH v. France*), the European Committee of Social Rights considered that the right to medical assistance, as guaranteed in Article 13 of the Revised European Social Charter, "is of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being" (§30). Furthermore, considering that "Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights – and health care is a prerequisite for the preservation of human dignity" (§31), the Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter. Moreover, Article 17 of the Revised European Social Charter provides that children and young persons are entitled to appropriate social, legal and economic protection. Observing that in **France,** unlawfully resident minors are only entitled to medical assistance in case of life-threatening situations and children of illegal immigrants are only admitted to the medical assistance scheme after a certain period of residence on the territory, the European Committee of Social Rights considered in this same case that the situation in France was not in conformity with Article 17 of the Charter. This is a welcome development, which ensures that Article 17 of the Revised European Social is interpreted in accordance with the Convention on the Rights of the Child, from which it is directly inspired (see for instance, Committee on the Rights of the Child, 35th session, Concluding observations of the Committee on the Rights of the Child: Slovenia (CRC/C/15/Add.230), where the Committee encourages **Slovenia** to take further measures to ensure that asylum seeking and refugee children are granted equal access to services, including healthcare). In this respect, we should welcome the *DRASS pays de la Loire* judgment of 1 April 2004 of the Court of Cassation which, in plenary session, decided that a foreign national could claim, with retrospective effect to the date of his entry into **France,** family benefits for his children once the procedure of family reunification has been regularized.

These developments are important insofar as they should be taken into account in the interpretation of Article 34(3) of the Charter of Fundamental Rights, and should guide the implementation of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States (OJ L 31 of 6.2.2003, p. 18).

The Network notes in this respect that, in **Austria**, the social situation of asylum seekers not admitted in the Federal care programme is still precarious. Those who cannot find alternative accommodation provided by private aid and refugee organisations are homeless, and without an official address it is impossible to receive financial support from the social security system, as well as to be served the decisions adopted in the course of asylum proceedings. In **Sweden**, the Swedish National Board of Health and Welfare reports that the recent strengthening the right of every child to health and medical care, has not yet been implemented adequately with regard to asylum seeking children, quota refugees as well as children seeking to join relatives in Sweden (Save the Children, Sweden's Third Report to the UN Committee on the Rights of the Child, Stockholm 2004, p. 11). The Children's Ombudsman has also voiced criticism with respect to the existing system for guaranteeing the exercise of the right to health care of children : indeed, the right to health care for the children who have applied for asylum or residence permit or whose parents/relatives have applied on their behalf as well as children in hiding is covered by agreements between the Government and the county councils and not by law, which results in a situation where children, who have not applied for asylum or residence permit, are in practice outside the scope of the guarantees with respect to the right to health care (*Barnombudsmannen (BO*), Observations, October 2004, op. cit, § 34, p. 8).

On the other hand, certain positive developments may be mentioned. **Portuga**l has created a registry for illegal immigrant children, in order to guarantee them access to health assistance in the same conditions as other children. Still in **Portugal** complaints have been reported about preferential treatment of private insurance patients to the detriment of NHS patients following the corporatization of public hospitals; however fortunately the intervention of the newly established *Entidade Reguladora da Saúde* (Health Regulation Authority, an independent public body) was strong enough to prevent violations of the equal access to health care. The Amendment to the Act on Asylum adopted in the **Slovak Republic**, which will come into force on 1 February 2005, provides that the asylum seeker will be granted urgent health care and in the certain cases also with other health care services according to the state of health of the individual asylum seeker. New legal regulation of health care provided to asylum seekers includes appropriate health care to minor asylum seekers in the case when they are victims of malpractices, exploitation, neglect, torture, inhuman and degrading treatment or when suffered of consequences of the armed conflict. In **Spain,** the public authorities grant health care to illegal foreign nationals, foreign pregnant women and, generally, to any foreign national in emergency situations. Cooperation efforts between the Government, the Autonomous Communities and the NGOs are also designed to take care of any person in difficulty (United Nations Committee of Economic, Social and Cultural Rights. *Summary Record of the 13th meeting: Spain 24/05/2004. E/C 12/2004/SR 13*). In **Sweden**, the Government decided on 25 November 2004 to increase the financial compensation to the county councils for their health care expenses in connection with the treatment of asylum-seekers, a decision which will come into force on 1 January 2005.

With regard to the right of access to health care, the Network of independent experts also expresses its concern that in **Estonia**, as noted by the Council of Europe Commissioner for Human Rights in his report published on 12 February 2004, 6% of the population are not covered by medical insurance, and therefore have access only to emergency medical care; moreover, those who are covered by the insurance, face problems due to the fact that a person cannot get treatment outside the place of his or her official residence, which is particularly problematic for those who temporarily work outside his or her place of residence (CommDH(2004)5). In its report of 30 June 2004 on **France,** the Committee on the Rights of the Child (CRC/C/15/Add.240) expressed concerns over certain aspects of the French healthcare system, more particularly the inequalities in patient treatment due to the increased decentralization of the healthcare system, the lack of human and financial resources as well as of healthcare infrastructure in the most disadvantaged areas, the lack of psychiatric services, the lack of an international body to promote and encourage exclusive breastfeeding and the "conditioned" access to health care by undocumented migrants.

Free movement of medical services

The Network notes that the proposed Directive on services in the internal market presented by the European Commission on 13 January 2004 also applies to health care, since, on the basis of the definition of service deriving from the interpretation by the Court of Justice of Articles 49 et seq. of the Treaty of Rome, the Directive means by "service" any economic activity normally provided for consideration, without this service necessarily being paid for by the recipients of the service and irrespective of how the financial consideration is financed. Nevertheless, the application of the Directive to healthcare services pays too little regard to the specific features of this field and could infringe Article 35 of the Charter. It would be advisable to exclude healthcare services from the scope of application of the Directive and to dedicate a specific instrument to healthcare services in the internal market which takes better into account the peculiarities of this sector. For a description of the specific features of medical services, which rule out any consideration of their situation from the viewpoint of the rules of the internal market in the same way as for other services, the Network refers to the report on the situation of fundamental rights in the European Union in 2004.

Article 36. Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

This provision of the Charter must be read in accordance with the requirements formulated by Article 11 of the International Covenant on Economic, Social and Cultural Rights (1966), as developed in the General Comment n°4 (1991) of the UN Committee on economic, social and cultural rights. The interpretation of Article 36 of the EU Charter of Fundamental Rights should also take into account Article 31 of the Revised European Social Charter, which recognizes the right to housing.

The internal market of services and services of general economic interest

Noting that, while adopting essentially the provision on services of general economic interest as proposed by the European Convention in Article III-6 of the Draft Treaty establishing a Constitution for Europe, Article III-122 of the Treaty establishing a Constitution for Europe as adopted by the Intergovernmental Conference emphasizes that the definition of the services of general interest is left to the Member States, the Network is concerned about the impact the proposal for a Directive on services in the internal market (COM(2004) 2 of 13.1.2004), presented by the European Commission on 13 January 2004, may have on the debate relating to the status of services of general interest in the Union and on the adoption of a framework directive on such services.

The conditions in which the country of origin principle applicable in the area of the free movement of services from one Member State to another and the resulting arrangements in Articles 16 to 19 of the proposed Directive on services in the internal market are defined tend, however, to threaten the balance currently established in Community law between the requirements of the internal market on the one hand and the tasks of general interest that have been entrusted to certain operators that to this end have been granted certain special or exclusive rights on the other. In certain situations, the country of origin principle may in fact prevent a Member State from imposing certain obligations on service providers from other Member States according to its interpretation of requirements of general interest. Without imposing an *obligation* on Member States to refrain from organizing certain services of general economic interest, the proposed Directive could have the effect of *making this more difficult*, particularly in terms of the financing of those services, when the activities of certain economic operators are regulated in such a way that public service obligations are imposed on them whereas those same regulations cannot be imposed on operators established in other Member States. The

choice made by the authors of the proposal to give a restrictive enumeration of the services that do not fall within the scope of application of the proposed Directive on services in the internal market or that are covered by a general derogation may thus seem in contradiction with the assertion that it is for Member States, and not Community law, to define the services of general economic interest on their territory.

The Network therefore considers that it would be advisable to complete the list of general derogations from the country of origin principle contained in Article 17 of the proposed Directive on services in the internal market by providing that this principle does not apply to the regulations imposed on undertakings entrusted with the operation of services of general economic interest, in accordance with Article 86(2) EC and the interpretation given of this provision by the Court of Justice.

Article 37. Environmental protection

> A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

The Network has adopted no conclusions under this provision of the Charter.

Article 38. Consumer protection

> Union policies shall ensure a high level of consumer protection.

The Network of Independent Experts cannot fail to point out, under this provision of the Charter, the difficulty resulting from the fact that no systematic analysis has been made of the impact of the proposed Directive on services in the internal market on the rights enshrined in the Charter of Fundamental Rights. One difficulty created by this proposed Directive concerns more specifically consumer contracts. The Convention of Rome on the law applicable to contractual obligations contains special clauses (Article 5) on consumer protection, taking into account the interests of the professional and those of the consumer. In combination with Article 15 of Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12 of 16.1.2001), this provision constitutes a coherent system of consumer protection in international contracts.

Article 17 of the proposed Directive on services in the internal market excludes from the scope of the country of origin principle the law applicable to consumer contracts, insofar as no full harmonization exists yet in this area. Although this exclusion sets out to preserve the system put in place by the Convention of Rome, it does not satisfy the requirements of legal certainty, on the one hand because different issues within the same contract may be governed by different legislations (the Convention of Rome for the areas that are not fully harmonized, and the country of origin principle for the issues that are fully harmonized), and on the other hand because it is not conceivable to expect the consumer, in order to be able to determine the law applicable to different aspects of consumer contracts, to know the

state of progress of the European harmonization, to the extent of being able to determine what the legal problems are for which he is not protected by the Convention of Rome.

CHAPTER V : CITIZEN'S RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

This provision of the Charter must be read in accordance with the requirements formulated by Article 25 of the International Covenant on Civil and Political Rights (1966) and by Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952).

Right to vote and to stand as a candidate at elections to the European Parliament

Positive aspects

The Network welcomes the fact that, in **Cyprus**, Turkish Cypriots are allowed to register to vote for the European Parliament elections according to the *European Parliament Members Election Law*[*Ο περί της Εκλογής των Μελών του Ευρωπαϊκού Κοινοβουλίου Νόμος του 2004*, N. 10(I)/2004], which does not differentiate between Turkish-Cypriots and Greek-Cypriots. It regrets however, that only 503 Turkish Cypriots have been registered to vote and there has been only one Turkish-Cypriot candidate. The adoption in **Italy** of two laws imposing certain incompatibilities to the Members of the European Parliament elected in Italy (*Disposizioni concernenti i membri del Parlamento europeo eletti in Italia, in attuazione delle decisione 2002/772/CE, del Consiglio* (l. 27 marzo 2004, n. 78) [Dispositions concerning the European Parliament members elected in Italy, according to European Council decision 2002/772/CE] (l. 27 March 2004), published on the *Official Journal* 2004, n. 74; and *Norme in materia di elezioni dei membri del Parlamento europeo e altre disposizioni inerenti ad elezioni da svolgersi nell'anno 2004* (l. 8 aprile 2004, n. 90) [Norms about the election of the European Parliament members and other dispositions about elections to take place in the year 2004] (l. 8 April 2004, n. 90), published on the *Official Journal* 2004, n. 84) is to be welcomed, as it aligns Italy with the standards imposed by Council 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 (OJ L 283 of 21.10.2002, p. 1).

The Network also welcomes the fact that in **Latvia**, the *Law on Elections to the European Parliament* adopted on 29 January 2004 (*Eiropas Parlamenta vēlēšanu likums*, 29.01.2004., *Latvijas Vēstnesis*, No. 22, 11.02.2004) does not replicate the exclusions contained in Article 5 of the *Saeima Election Law* with respect to past affiliations of the potential candidates with services of the USSR, with the CPSU (Communist Party) or with other assimilated organisations, although Article 11 of the Law requires that candidates announce whether they have had such affiliations. The Network recalls in this respect that a Chamber of the European Court of Human Rights, in a judgment delivered on 17 June 2004, considered that the prohibition from being a candidate in parliamentary elections due to the applicant's activities with the CPSU, ten years after the facts, constitued a disproportionate restriction both to Article 3 of the First Protocol to the ECHR, and to Article 11 of the European Convention on

Human Rights (Eur. Ct. HR (1st sect.), *Tatjana Ždanoka v. Latvia* (Appl. n° 58278/00), judgment of 17 June 2004). While it is aware that this judgment is not final and that it has been accepted for a referral to the Grand Chamber of the European Court of Human Rights, it should be noted that the applicant in that case could not be said to aim at antidemocratic objectives or at the destruction of the rights and freedoms of the Convention. Thus, any restriction to her right to seek to be elected under Article 3 of Protocol n°1 to the ECHR may only be considered acceptable if it is justified as necessary in a democratic society for the fulfilment of a legitimate aim, and respects the requirement of proportionality. This also should be seen as applying to the elections to the European Parliament, which is to be considered a « legislative body » in the meaning of that provision. As regards the **United Kingdom** a blanket restriction on the right to vote of those prisoners who were convicted of crimes sufficiently serious to warrant an immediate custodial sentence, which applied irrespective of the length of their sentence or of the nature or gravity of their offence, was held in Eur.Ct.H.R.(4th sect.), *Hirst v United Kingdom (No 2)* (Appl 74025/01) judgment of 30 March 2004 (referred to the Grand Chamber of the Eur.Ct.H.R.) to be disproportionate and a violation of Article 3 of ECHR, Protocol 1.

Reasons for concern

While welcoming the adoption in **Latvia** of the abovementioned law on the elections to the European Parliament, the Network is concerned that problems have occurred due to the requirement under Article 2 (1) 2 of the Law according to which a person can vote if "information regarding this person has been entered in the electoral register in Latvia", insofar as the electoral register, being based on the Population Register, contained a number of omissions and was not fully up to date.

Article 40. Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

This provision of the Charter must be read in accordance with the requirements formulated by Article 25 of the International Covenant on Civil and Political Rights (1966), by Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952) and by Article 10 of the European Convention on the Participation of Foreigners in Public Life at Local Level (1992).

Participation of foreigners in public life at local level

The Network encourages all the EU Member States who have not done so yet to ratify without delay the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level (ETS, n° 144), and to adapt their legislation accordingly. It also notes that the participation of foreigners in public life, including especially their participation in local elections, requires active measures of encouragement to such participation. In **Sweden** for instance, non nationals who have resided in Sweden for at least 36 months are entitled to stand for elections in local elections and a special authority, the Election Authority, has been instructed to initiate awareness-raising activities about elections and guaranteeing that citizens entitled to vote receive information about elections in the language they are familiar with (CERD/C/452/Add.4). In **Italy**, the municipalities have taken a number of initiatives towards non-national residents, as requested by the Ministry of the Interior and the Prefects of the Republic, in order to improve their electoral participation. These are good practices which the other Member States could be encouraged to follow. The Network also welcomes the adoption by **Belgium** of the Act of 19 March 2004 granting the right to vote in local elections to foreigners who are not European Union nationals. On the other hand, in **Ireland**, although non-nationals may vote and stand as candidates in local

elections, potential voters appear to encounter serious difficulties in registering to vote as the green card issued to immigrants by the Garda National Immigration Bureau is deemed not acceptable, which does not take into account in particular the situation of asylum seekers who often have neither a driver's licence nor a passport. In the **Slovak Republic**, the multiplicity of election laws for various types of elections appear to be the source of complexities and inconsistencies which should be removed (OSCE/ODIHR Election Assessment Report on the Presidential Election in the Slovak Republic on 3 April 2004 (9 June 2004)). A regards **Latvia**, the Network notes that in his report on Latvia (CommDH(2004)3), the Council of Europe Commissioner for Human Rights recommended that Latvia would consider granting its "non-citizens" the right to vote in local elections (paragraph 5 of the conclusions of the report).

Article 41. Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

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

Article 42. Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

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

Article 43. Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

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

Article 44. Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

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

Article 45. Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

This provision of the Charter must be read in accordance with the requirements formulated by Article 12 of the International Covenant on Civil and Political Rights (1966), by Article 2 of Protocol n° 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms other than those already included in the Convention and in the First Protocol (1963) and by the European Convention on Establishment (1955).

The Network welcomes the adoption, during the period under scrutiny, of the European Parliament and the Council adopted Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (JO L 158 of 30.4.2004, p. 77). It recalls that the Member States are to implement the Directive without discrimination between its beneficiaries, *inter alia*, on grounds of sexual orientation. The notion of « spouse » under Article 2(2) of the Directive therefore may not be restricted to spouses of a different sex, where the marital relationship has been recognized as valid by the national law of the Member State of origin. As recalled by the Network in its Opinion n°1-2003 delivered on 10 April 2003, a Member State would be creating a direct discrimination based on sexual orientation if it refused to recognize as a « spouse » the spouse of the same sex as the citizen of the Union wishing to move to that State, validly married under the laws of the Member State of origin.

The Network observes that, in accordance with Directive 2004/38/EC, where a citizen of the Union has contracted a registered partnership with a third-country national, this registered partnership only entitles the latter to follow his or her partner to another Member State on condition that the latter State recognizes registered partnerships as equivalent to marriage. The possibility that is thus given to the host Member State to rule out that a registered partnership grants the right to family reunification implies that, unless the partners have Belgian or Dutch nationality or permanently reside in one of those two countries, which gives them access to marriage in those countries, the freedom of movement recognized by Article 45 of the Charter of Fundamental Rights – which is inconceivable without the holder of this right being able to be reunited with his family – will in actual fact be less effective for persons of homosexual orientation than for other Union citizens, so that the difference in treatment that is established

between marriage and registered partnership in terms of the impact on the right to family reunification results in discrimination on grounds of sexual orientation.

Article 3(2) of Directive 2004/38/EC provides that, without prejudice to any right to free movement and residence the persons concerned may have in their own right, « the host Member State shall, in accordance with its national legislation, facilitate entry and residence » for , *inter alia*, « the partner with whom the Union citizen has a durable relationship, duly attested », and shall therefore « undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people ». The Member States should be encouraged to take into account the requirements of Article 21 of the Charter of Fundamental Rights when making such an examination. It may be recalled that, according to the European Court of Human Rights, « Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification » (Eur. Ct. HR (1st section), Karner v. Austria (Appl. N° 40016/98), judgment of 24 July 2003, § 37).

Article 46. Diplomatic and consular protection

> Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

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

CHAPTER VI: JUSTICE

Article 47. Right to an effective remedy and to a fair trial

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

In accordance with Article 52(3) of Charter of Fundamental Rights, al. 2 and 3 of this provision of the Charter have the same meaning than Article 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), to which they correspond, although they have a broader scope. Moreover, this provision of the Charter must be read in accordance to the requirements formulated by Articles 2(3) and 4(1) of the International Covenant on Civil and Political Rights (1966) and by Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), to which all Member States are parties.

Right of access to a court

Reasons for concern

The Network shares the concerns expressed by the Human Rights Committee of the United Nations in the Concluding Observations which it delivered in July 2004 with regard to **Belgium** in connection with the impact of the immediate application of the Act of 5 August 2003 on complaints lodged under the Act of 16 June 1993 relating to sanctions for serious violations of international humanitarian law (Articles 2, 5, 16 and 26 of the International Covenant on Civil and Political Rights) (CCPR/CQ/81/BEL (point 9)).

Still with regard to this country, the Network is concerned about the plans to reform access to the Council of State (administrative section), as announced in the Prime Minister's General Policy Statement to the House of Representatives of 12 October 2004 (Section 7: Justice: Continuing the Reforms). These plans provide for measures specific to actions brought by foreigners, which account for 80% of the appeals brought before the Council of State. In clear violation of the obligation which Belgium has under the judgment in the case of *Conka v. **Belgium*** delivered by the European Court of Human Rights on 5 February 2002 and, moreover, in contradiction with the information that had been supplied to the secretariat of the Committee of Ministers of the Council of Europe (see in the present conclusions the reasons for concern expressed under Article 19 of the Charter), there is talk of abolishing the proceedings for suspension in case of extreme emergency and for ordinary suspension against expulsion decisions, with a new section established within the Council of State having sole power of annulment. There is also talk of abolishing the intervention of the public prosecutor and therefore of the preliminary examination of the case by him, the introduction of a "specific and very short procedure (…) where attention will be focused primarily on new cases that are submitted", and a revision of Article 9(3) of the Act of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners, since this clause, which makes it possible to request permission to remain on the territory in the face of exceptional circumstances of a humanitarian nature which prevent the foreign national's return to his country of origin, is sometimes considered to be misused. Other measures being considered apply to all legal actions that come within the jurisdiction of the Council of State, such as a generalization of the appeal to one single court, restrictions on the possibility to submit a statement of reply, and the fact of reserving access to the Council of State for lawyers who have been registered with the Bar for at least 10 years (which means at least 13 years' experience). Although it is sympathetic to the argument that, as the Prime Minister's General Policy Statement of 12 October 2004 recalls, the administrative court faces a substantial backlog (the Council of State has a backlog of two-and-a-half years for actions brought by foreign nationals and nearly five years for all other cases; at the beginning of 2004, some 41,066 cases were still pending), the Network needs to point out that the solutions adopted to cope with this situation must be in keeping with Articles 6 and 13 of the European Convention on Human Rights, and must not introduce distinctions devoid of objective and reasonable justification between lawsuits relating to access to the territory, residence and removal on the one hand and all other cases on the other. The measure that reserves access to the Council of State for lawyers who have been registered with the Bar for 10 years is particularly questionable, since this could cause serious difficulties for those who wish to receive free legal aid, considering that the majority of voluntary lawyers with the Legal Aid Bureau have been registered with the Bar for less than 10 years.

A similar concern with alleviating the workload of courts has led in **Finland** to the amendment of chapter 26, section 2, of the Code of Judicial Procedure, which allows for simplified procedures in clear cases. The conditions of applicability of these simplified procedures should be further clarified in order to ensure legal certainty, and the appeals courts should arrive at a uniform understanding of the cases where this provision may be relied on. Moreover, it is important that the new procedure does not interfere with the right to oral hearings in the appeals court. Where there is reason to doubt the credibility of the oral evidence presented at the court of first instance, this should not be reassessed in a written procedure at the appeals court.

Having taken note of the judgment in the case of *Neroni v. Italy* delivered by the European Court of Human Rights on 22 April 2004 (Appl. No. 7503/02), which has become final, the Network calls upon **Italy** to amend as soon as possible Article 18 of the Bankruptcy Act in order to grant the bankrupt an effective remedy to complain about the extended restriction of his personal and property-related capacities, in accordance with the requirements of Article 13 of the European Convention on Human Rights. Since the European Court of Human Rights concluded in its judgment in the case of *Boulougouras v. Greece* of 27 May 2004 that Article 6(1) of the European Convention on Human Rights had been violated for disproportionate hindrance to the right of access to a court on account of the excessive formalism involved in the access to the Court of Cassation, thus excluding appeals containing material errors for which the appellant cannot be held responsible, **Greece** is called upon to comply with this judgment, which means for the time being that the Court of Cassation shall interpret the conditions of admissibility of appeals in accordance with this case-law, even before any changes are made to the law. **Spain** should also heed the essentially identical lessons from the judgment in the *Saez Maeso* case delivered on 9 November 2004, also with regard to the formal conditions for the admissibility of appeals before the Supreme Court (Eur. Ct. H.R. (4th section), *Saez Maeso v. Spain* (Appl. No. 77837/01) of 9 November 2004). Similarly, all Member States are invited to take into account the teachings of the *Marpa Zeeland B.V. and Metal Welding B.V.* judgment of the European Court of Human Rights (Eur. Ct. H.R., *Marpa Zeeland B.V. and Metal Welding B.V. v. the Netherlands* (application no. 46300/99) judgment of 9 November 2004, final), about the consequences of the undertakings of the prosecuting authorities which lead the defendants in criminal proceedings to withdraw from their appeal.

The Network welcomes the adoption in **Poland**, on 17 June 2004, of the Act on a complaint against infringement on a party's right to have its case examined by a court without undue delay (Official Journal of 2004, No. 179, item 1843), which executes the judgment delivered by the European Court of Human Rights in the case of *Kudła v. Poland* (Eur. Ct. H.R. *Kudła v. Poland* of 26 October 2000, Appl. No. 30210/96, ECHR 510). It is concerned, on the other hand, about the potential impact of Article 45 of the amended Act on court enforcement officers and judicial enforcement (Act amending the Act about court enforcement officers and enforcement and amending the Code of Civil Procedure of 24 September 2004 (Official Journal of 2004, No. 236, item 2356), which makes it mandatory to make a 2% prepayment to court enforcement officers in order for the enforcement to begin. The Network encourages Poland to closely monitor the application of this amendment, and to examine whether this may infringe upon the right to have judicial decisions enforced, as an element of the right of access to a court.

Positive aspects and good practices

While noting that, in **Italy**, the legal system does not provide for the possibility of collective or class actions, which may in particular impede the effective protection of the rights of investors in large financial cases as has occurred in the "Parmalat trial" (*processo Parmalat*), concerning the Network notes with interest the initiative taken by the Procura della Repubblica presso il Tribunale di Milano (office of the prosecutor by the Tribunal of Milan) to make available on the web a form facilitating the exercise by aggrieved individuals of their right to seek compensation in the course of the pending criminal proceedings .

The Network welcomes the adoption in the **Slovak Republic** of the Act on State liability for damage (*Zákon č. 514/2003 Z. z. o zodpovednosti štátu za škodu spôsobenú pri výkone verejnej moci a o zmene niektorých zákonov* [Act no. 514/2003 on liability for damage incurred due to the execution of public authority]). Under the Act, which came into force on 1 July 2004, the State is liable for damages caused by the adoption of unlawful decisions, unlawful arrest, detention or deprivation of personal liberty, decisions on custody and punishment, decisions on protective supervision and maladministration of the public authority bodies as a results of the execution of their public authority.

The right to a defence lawyer and to legal assistance

Reasons for concern

Articles 2 to 5 of the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union which the Commission presented on 28 April 2004 (COM(2004)328 final) are devoted to the right to legal advice in such proceedings. Article 2 guarantees the principle of the right of a suspected person to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it. Article 3 requires that certain suspected persons be offered legal advice so as to safeguard fairness of proceedings. Article 4 obliges Member States to ensure the effectiveness of legal advice, more particularly by setting up a mechanism to provide a replacement lawyer if the legal advice given is found not to be effective. This provision takes into account the *Artico v.* ***Italy*** case-law of the European Court of Human Rights, where the Court had considered that Article 6(3)(c) of the European Convention on Human Rights, which evokes the right to be "assisted" by a lawyer and not merely a right to have a lawyer "nominated" for that purpose : the Court had considered that "mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations" (Eur. Ct. HR, *Artico v. Italy* judgment of 13 May 1980, § 33).
Finally, Article 5 of the proposed Framework Decision guarantees the right to free legal advice by providing that the costs of legal advice shall be borne in whole or in part by the Member States if these costs would cause undue financial hardship to the suspected person or his dependents. Member States may subsequently carry out enquiries to ascertain whether the suspected person's means allow him to contribute towards the costs of the legal advice with a view to recovering all or part of it. In **Portugal**, the new regime on legal aid (*apoio judiciário*), Act nº 34/2004 (*Lei do Apoio Judiciário, Lei nº 34/2004, de 29 de Julho*) has created the Institute for Access to Justice (*Instituto de Acesso à Justiça*) for the legal aid of those with scarce economical resources; nevertheless, this institute is just a legal declaration and has no budgetary nor structural existence and therefore with no practical application.

The developments that have taken place during the period under scrutiny illustrate the usefulness of reinforcing those guarantees beyond what is prescribed by the European Convention on Human Rights, in order to strengthen the mutual confidence in the legal systems of the different Member States. In **Poland**, a report about the access to free legal assistance published by the Helsinki Foundation for Human Rights concludes that the right to legal assistance is not assured properly. About 30% of those interviewed were not represented by a lawyer (72 of the 198 interviewed : Łukasz Bojarski, Report, access to legal aid in Poland, Helsinki Foundation for Human Rights, Warsaw 2003, p. 140); 80% did not try to receive free legal aid (ibid., p. 142). The study also concluded that most people who are served by a lawyer do not know that there is a remedy available in a case when the lawyers do not fulfil their duties properly (ibid., pp. 202-204). This situation may be attributed to the lack of adequate legal framework and improper implementation of the law, but also to the lack of reliable information about the possibility of getting legal aid.

In its Report following upon its visit to **Finland** in September 2003 (Report to the Finnish Government on the visit to Finland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment 7-17 September 2003, CPT/Inf (2004) 20 of 14 June 2004), the European Committee for the Prevention of Torture noted that access to lawyer continues to be granted to persons in police custody only at the beginning of the first formal questioning or occasionally at the first remand hearing. The CPT stressed that steps should be taken to ensure that all persons detained enjoy effectively the right to a lawyer from the very outset of their deprivation of liberty as guaranteed in section 10 of the Pre-Trial Investigation Act. The Network shares the concerns expressed by the CPT about the new instructions on the treatment of apprehended and arrested persons issued by the Ministry of Interior in January 2003 which still authorise police officers to be present during the consultation between the detained and his lawyer when "there is justified cause to suspect misuse", although it acknowledges that, in its response to the Report by the

CPT, the Finnish government insists that this may only happen in exceptional cases (Response of the Finnish Government to the report of the CPT, 8 November 2004. CPT/Inf (2004) 31, p.9). This should be allowed, only in exceptional cases where there are grounds for suspicion and where the lawyer has been chosen by the detainee; and unrestricted access to another independent lawyer must, in all circumstances, be guaranteed including the right to consult the lawyer in person. Although, under chapter 2, section 1, subsection 3, of the Criminal procedure Act, a person is appointed a lawyer *ex officio* when the suspect is incapable of defending him/herself, the suspect is under the age of 18 and has not retained a lawyer unless it is unnecessary, the counsel selected does not meet the qualifications for a public defender or otherwise is unable to defend the suspect or there is some other special reason for the same, the CPT delegation heard some complaints that the police had prevented detained persons from freely choosing their lawyer and being imposed a lawyer *ex officio*.

In the **Czech Republic**, the right to free legal assistance is in principle guaranteed only in court proceedings and therefore does not cover pre-litigation advice. Furthermore, in the absence of specific criteria for granting legal aid, it is left at the discretion of a judge. As a consequence, different criteria are applied by different judges. In **Ireland**, despite the announcement of additional funding for civil legal aid the Free Legal Advice Centres (FLAC) Ltd and other independent law centres have complained of long delays in legal aid centres and of the fact that the legal aid scheme does not cover very important areas of litigation such as employment tribunal proceedings. Moreover, Article 11(2) of the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States (OJ L 190 of 18.7.2002), according to which the requested person arrested for the execution of a European arrest warrant should have the right to be assisted by a legal counsel « in accordance with the national law of the executing Member State », should be read in accordance with Article 47(3) of the Charter of Fundamental Rights, as well as with Article 6(3), c) of the European Convention on Human Rights.
However, under the Irish European Arrest Warrants Act 2004 there is no provision for legal aid. The Network considers that if the practice of providing assistance through the discretionary Attorney General's Scheme – which was used in the past in extradition cases – is used, this will be most unsatisfactory in terms of securing adequate legal defence for those persons the subject of such warrants.

In the **United Kingdom** the House of Commons Select Committee on Constitutional Affairs has concluded that the laudable aim of ensuring that costs were properly audited has resulted in a wasteful and self-defeating system of cost compliance auditing which bears little relation to quality or even shows much accuracy in the assessment of costs. It considered that there was a significant danger that the system will not survive if urgent efforts are not made to enable solicitors' firms to recruit young entrants into legal aid work, there being widespread evidence of serious recruitment and retention problems. It also considered that firms which do legal aid work subsidise the system in a way which is not sufficiently quantified by Government or acknowledged. Furthermore the Committee found that there was evidence of significant unmet need for legal services by many in society – often among those most vulnerable – and that too much has been squeezed out of the Community Legal Service budget as a result of the twin pressures of criminal and asylum work. It recommended that: the civil and criminal legal aid budgets should be ringfenced so that the former is protected and considered quite separately; the cost calculation of policy initiatives should include an impact on the assessment of the legal aid budget and there should be further research on improving electronic means of access to advice, in particular to enable to enable less literate groups to use information technology (Fourth Report, HC 391-1).

Positive aspects and good practices

The Network welcomes the adoption by **Estonia**, on 28 June 2004, of the State Legal Aid Act (Riigi õiguabi seadus, Riigi Teataja I, 15.07.2004, 56, 403), which guarantees to any individual whose economic situation would not allow him/her to obtain legal services a right to State legal aid (§ 6 section 1). It notes with interest that under this Act, an individual can also request State legal aid for civil proceedings in a Court of another EU Member State and even for filing a complaint against

Estonia before the European Court of Human Rights (§ 33 and 37). The Network also welcomes the fact that in **France**, Act no. 2004-204 of 9 March 2004 abolishes proceedings in the absence of the accused, which had been condemned on several occasions by the European Court of Human Rights, and replaces them with proceedings by "criminal default", allowing the accused, even in his or her absence, to appoint a lawyer to defend him. The Network also welcomes the prospect of improving the right to legal assistance in **Italy** before the juvenile courts (disegno di legge 4294/C, Disciplina della difesa d'ufficio nei giudizi civili minorili [Bill in Parliament 4294/C, Norms about court appointed defence in proceedings by youth courts]). In the **Slovak Republic**, the Ministry of Justice adopted an Order on attorney's fees and reimbursements for provision of legal services (vyhláška Ministerstva spravodlivosti Slovenskej republiky o odmenách a náhradách advokátov za poskytovanie právnych služieb č. 655/2004 Z. z.). This order, which came into force on 1 January 2005, inter alia, has introduced new tariff-fees for legal assistance that are basically lower than tariff-fees in former regulation, and therefore, it is expected that this new regulation of attorneys´ fees may improve access of indigent people to legal services provided by counsels.

The Network also welcomes the entry into force in Latvia of the Administrative Procedure Law and the beginning of the work of independent administrative courts. The Network notes that Article 98 (1) provides for the possibility of a "reference" (uzzina) to a responsible authority, who is requested thereby to clarify the rights that a person has in a given legal situation and may not subsequently adopt an administrative act which would be less favourable to the addressee. The Network believes that this procedure may ensure an improved foreseeability and legal certainty for the individual. While considering that this is a welcome development it is to be hoped that reference procedure will be used within the framework of other applicable principles of administrative law.

Independence and impartiality

Reasons for concern

Having examined the reports on the situation of fundamental rights in the Member States of the Union, the Network would express four specific reasons for concern:

The Network notes that, in its Concluding observations on **Finland** of November 2004 (CCPR/CO/82/FIN), the Human Rights Committee expressed its concern about overt attacks made by political authorities, in particular members of the Government and Parliament, on the competence of the judiciary with a view of interfering in certain judicial decisions. The Committee urged Finland to take action at the highest level to maintain and uphold the independence of the judiciary and maintain public trust in the independence of the courts. In **Latvia**, the *Law on the Judiciary* (*Par tiesu varu*, *Ziņotājs*, no. 1, 14.01.1993) should be revised in order to better preserve the independence of the Judiciary. The current situation, where the Minister of Justice may issue regulations determining how judges are recruited and what are the minimal requirements for the recruitment, and where the Minister of Justice has issues such regulations determining how judges are promoted or, e.g., how the chairman of the court is nominated, may be seen as problematic, especially insofar as Article 72 (4) of a more recent *Law on State Structure* provides that internal regulations bind only to those persons who work within the institution by which such regulations were issued. The Network is similarly concerned that in **Austria**, the Ministry of the Interior is now directly responsible for the allocation of financial means and human resources, and that it would constitute the exercise of undue influence on the Independent Federal Asylum Tribunal to blame this body for the long duration of the appeals proceedings, where neither the staff nor the means made available appear to be sufficient.

Noting that, in the period under review a process was commenced in **Ireland** to remove a member of the Circuit Court from judicial office, under Article 35 of the Irish Constitution which provides that the Oireachtas can remove a judge (of the High or Supreme Court) from judicial office for 'stated misbehaviour' or incapacity, the Network is concerned that, in the absence of detailed and explicit provisions for the removal of a judge from judicial office, insufficient regard may be paid to the due process entitlements of a person the subject of such a procedure. Equally, there are concerns that the

absence of such procedures makes it extremely difficult to deal with problems of judicial misconduct with all of the implications that has for judicial authority. In the view of the Network, the need for legislation and/or a constitutional amendment in this area is pressing.

Despite the finding by the Human Rights Committee, in the case of *Perterer v. Austria* (Communication No CCPR/1015/2001, final views of 20 August 2004), that the composition of a disciplinary commission for the employees of municipalities resulted in a lack of impartiality in violation of Article 14 ICCPR, insofar as that persons were sitting as senate members of a disciplinary commission that have either been challenged by the author in previous sets of the proceedings according to a procedural guarantee in domestic law or were in continued employment with the municipality which originally had instituted the proceedings against the author, **Austria** has still not executed this decision. The Network is of the view that this policy of the Austrian Government to ignore decisions of the UN Human Rights Committee constitutes a violation of the obligation of Austria under Article 2(3) of the Covenant obliging States parties to grant victims an effective remedy in cases of alleged human rights violations. Moreover, by ratifying the First Optional Protocol to the International Covenant on Civil and Political Rights, Austria has agreed to recognize the competence of the Human Rights Committee to accept and decide on individual complaints, and it should fulfil its obligations under the Protocol in good faith.

A number of problems in the judicial system in the **Slovak Republic** appear to have its source in the still widespread corruption of the public sector. This affects the length of judicial proceedings (lawyers attempt to speed up their case by proposing bribes), the fairness of the procedures, and the ability to ensure the full execution of judicial decisions.

Good practices

The Network welcomes the adoption in the **Netherlands** by the *Nederlandse Vereniging voor Rechtspraak* (NVvR) [Dutch Association of Magistrates] of a set of guidelines on the impartiality of judges, which the NVvR has drafted together with the presidents of Regional Courts and Courts of Appeal. These guidelines are drafted to support judges in checking their impartiality in a concrete case as well to secure permanent alertness on impartiality of the judiciary (NVvR, 16 March 2004; see www.nvvr.org).

Unreasonable delays in judicial proceedings

A large number of judgments have been delivered by the European Court of Human Rights during the period under scrutiny, which have found the different Member States to be in violation of the requirement of Article 6(1) ECHR to ensure that in the determination of civil rights and obligations or of any criminal charge, everyone shall be entitled to a hearing within a reasonable time. The national reports provide the details of these cases.

Without overlooking the efforts that have been made, for example with the presentation in **Italy** of Bill no. 4578/C authorizing the government to reform civil procedure (disegno di legge 4578/C, *Delega al Governo per la riforma del codice di procedura civile* [Bill in Parliament 4578/C, Enabling act to the Government in order to reform civil procedure]), the Network cannot help expressing its concern over the structural nature of those delays, particularly in **Italy,** before certain courts in **Belgium,** and in **Greece.** It also regrets that, although the judgment in the case of *Kudla v.* ***Poland*** had been delivered more than four years ago (on 26 October 2000), certain countries have still failed to organize, as required by Article 13 of the European Convention on Human Rights, the possibility of an effective remedy against the exceeding of reasonable time limits for judgments in disputes to which Article 6 of the Convention applies (see for **Greece:** Eur. Ct. H.R.., judgments in *Lalousi-Kotsovos v. Greece* of 19 May 2004, *Theodoropoulos and others v. Greece* of 15 July 2004, *Nastos v. Greece* of 15 July 2004, *Karellis v. Greece* of 2 December 2004; for **Ireland:** Eur. Ct. H.R., judgments in *O'Reilly and Others v. Ireland* (Appl. n° 54725/00) and *McMullen v. Ireland (*Appl. no.42297/98) of 29 July 2004; for **Finland**: Eur. Ct. H.R. (4th sect.), *Kangasluoma v. Finland* (Appl. n° 48339/99) judgment of 20

January 2004; for the **Slovak Republic**: Eur. Ct. H. R. (4th sect.), *E.O. and V.P.* (Application no. 56193/00 and 57581/00) judgment of 27 April 2004 (final); Eur. Ct. H. R. (4th sect.), *Zuzčák and Zuzčáková v. Slovakia* (Application no. 48814/99) judgment of 13 July 2004 (not yet final)); as regards the **United Kingdom**: Eur.Ct.H.R.(4th sect.), *Eastaway v United Kingdom* (Appl no 74976/01) judgment of 20 July 2004 (final) in respect of various sets of proceedings brought against him after a group of companies had gone into receivership that had lasted eight years and eleven months. Such a violation was also found in Eur.Ct.H.R.(4th sect.), *Henworth v United Kingdom* (Appl no 515/02) judgment of 2 November 2004 (final) (in respect of criminal proceedings leading to a conviction for murder which had lasted some six years), Eur.Ct.H.R. (4th sect.), *King v United Kingdom* (Appl no 13881/02) judgment of 16 November 2004 (final) (in respect of tax penalty proceedings that had lasted thirteen years, ten months and twelve days) and Eur.Ct.H.R.(4th sect.), *Massey v United Kingdom* (Appl no 14399/02) judgment of 16 November 2004 (final) (in respect of criminal proceedings for indecent assault that had lasted four years, nine months and eleven days). With respect to **Austria**, noting that it has taken on the average 22 months for the Administrative Court to deliver judgments on the submissions it has received, the Network is concerned that Regional Administrative Courts still have not been set up in order to alleviate the burden on the Administrative Court, despite repeated suggestions to do so. The Network also notes that, in several Member States, the accumulated judicial backlog, with the resulting delays in judgments, are due to the lack of budgetary means, since the courts and tribunals do not have enough personnel and means to discharge their duties adequately. This illustrates that if there is sufficient political will to address this urgent matter, which is also decisive for the very concept of the rule of law, the solutions would be easy to identify. Furthermore, bearing in mind the cost which slow proceedings and the resulting legal uncertainty represent for the economic actors, good government calls for substantial investments in the justice budgets of the majority of Member States. This solution is preferable to that which consists in diminishing the rights of defence, the exercise of which is sometimes presented as being the cause of the delays incurred by the courts in settling the cases that are submitted to them.

Bearing in mind the contribution that the system of mediation could make to tackling the judicial backlog and the resulting delays in judgments, it is interesting to note that in the **Slovak Republic**, the Act on mediation (*Zákon č. 420/2004 Z. z. o mediácii a o doplnení niektorých zákonov* [Act no. 420/2004 Coll. on mediation and on modifications of certain other laws]) entered into force on 1 September 2004, providing for the use mediation in civil matters as a form of out of court settlement between parties. The mediator assisting the parties in reaching a solution has to be registered in the Mediator Registry. On 1 January 2004, the Act on probation and mediation officers (*Zákon č. 550/2003 Z. z. o probačných a mediačných úradníkoch* [Act no. 550/2003 Coll. on probation and mediation officers]) entered into force, providing for mediation in criminal proceedings. In **Belgium,** the Mediation Bill was voted on 26 June 2004 in the House of Representatives (Bill of 24 June 2004 amending the Judicial Code with regard to mediation, House of Representatives, ordinary session, 2003-2004, *Doc. Parl*., 51 0327/009) and is pending before the Senate at the time of completion of this report. Mediation, which does not prevent requests for interim and precautionary measures, involves the intervention of a mediator approved by the "Federal Mediation Commission". The mediation procedure is confidential, for the parties as well as for the mediator, who is bound by professional secrecy. The bill distinguishes voluntary or extrajudicial mediation, proposed by one party to the other parties in a lawsuit, and judicial mediation, ordered by the court at the joint request of the parties or on the court's own initiative with the consent of the parties.

Article 48. Presumption of innocence and rights of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

This provision of the Charter corresponds to Article 6 paragraphs 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). It must also be read in accordance to the requirements formulated by Article 14 of the International Covenant on Civil and Political Rights (1966), and by Articles 40 (2) b and 40 (3) of the Convention on the Rights of the Child (1989), to which all the Member States are parties.

Presumption of innocence

Positive aspects

Noting that in **Austria**, compensation for pre-trial detention was previously not afforded in cases where the person indicted was subsequently acquitted under the benefit of doubt, a situation which was incompatible with Article 6(2) ECHR, the Network welcomes the adoption of the Compensation (Criminal Proceedings) Act 2005 (*Strafrechtliches Entschädigungsgesetz*) (Federal Law Gazette (BGBl) I No 125/2004 of 15 November 2004) which brings an end to this situation and ensures the compatibility of Austrian legislation with the ECHR. The Network also welcomes the fact that the procedure for the compensation proceedings has been improved for the applicant: while formerly a decision by the criminal court acknowledging the claim to compensation was necessary, it is now sufficient to submit a simple request to the Federal Litigation Service (Finanzprokuratur) which may allow the claim and transfer the sum, and the applicant can file a lawsuit with the competent civil court if served with a negative decision or if no decision is adopted within three months.

Rights of defence

Reasons for concern

In **Estonia**, concerns have been expressed over the provisions of the new Code of Criminal Procedure, in force since July 2004, relating to the search of advocates' offices and seizure of confidential data in the possession of advocates. Under this Code, a search may be conducted in the advocate's office, inter alia, for the purposes of confiscating a document necessary for the adjudicating of a criminal matter, with the permission of a judge or a court. However, the conditions upon which such a search permit may be granted remain insufficiently precise. Moreover, illegal taping practices by the Defence Police have been reported, in particular by the Bar Association. The Network will pay particular attention to the impact on the rights of defence of the implementation in **France** of Act no. 2004-204 of 9 March 2004 establishing a new procedure called "pleading guilty". This procedure, which was worked out in response to a wish to disencumber the criminal courts, is applicable to adults for *"offences punishable principally by a fine or a prison sentence of five years or less"* (Article 495-7 of the Code of Criminal Procedure). Certain offences are excluded, however, such as those involving minors, press-related offences or those involving a special procedure. It is for the public prosecutor to obtain a confession of guilt from the offender and to suggest a penalty to him. The offender's counsel or a lawyer designated by the president of the Bar must be present when the penalty is suggested. A judge from the bench intervenes in the approval stage to verify the truth of the facts as well as the legal classification thereof, though he can only grant or refuse the request for approval. The approval order is immediately enforceable and is open to appeal by the offender, the public prosecution or the victim. At the end of this procedure, the person being prosecuted may be sentenced to imprisonment for a term that must not exceed half of the sentence incurred within a year.

The Network refers in this respect to the inadmissibility decision adopted on 25 November 2004 by the European Court of Human Rights in the case of *Aalmoes a.o. v. the* ***Netherlands*** (Appl. No. 16269/02), where a number of lawyers, supported by the *Nederlandse Vereniging van Strafrechtadvocaten* [Dutch Association of Criminal Defence Lawyers], had filed an application about the interception of telephone calls between suspects and lawyers. The Court found that the Dutch domestic rules were sufficiently precise and contained sufficient safeguards against abuse; the legal regime as such was therefore compatible with Article 8 ECHR. However the Court only arrived at this conclusion after having found that, under Dutch law, "telecommunications may only be intercepted

and recorded on the basis of a written order, with the authorisation of the investigating judge, for a defined category of offences of a certain gravity, and for a maximum duration of four weeks, which period, subject to the investigating judge's authorisation, may be extended by four weeks each time. Furthermore, (...) an investigating judge may not authorise the tapping of the telecommunications made by a lawyer in his or her professional capacity, unless it is the lawyer who is the suspect of the offence under investigation. Finally, all acts and findings of officials in a criminal investigation must be recorded in writing and (...) recorded information obtained by the interception of telecommunications must be added to the case file. However, (...) information obtained by the tapping of telecommunications may not be added to the case file, must be destroyed and may not be used in evidence, if that information falls within the ambit of the privilege of non-disclosure (...) as enjoyed by, inter alia, lawyers. In case the information obtained by the interception of telecommunications does not fall within that category, but has been conveyed to or by a person enjoying the privilege of non-disclosure, it can only be added to the case file with the authorisation of the investigating judge. Furthermore, if the suspect is a person enjoying the privilege of non-disclosure on account of his or her profession, domestic law prescribes the involvement of a member in authority of the professional group concerned in identifying what information may and may not be added to the case file in the light of the privilege of non-disclosure. In this situation, it is again the investigating judge who eventually authorises what information conveyed to or by the suspect may be included in the case file". The European Court of Human Rights concluded on the basis of these findings that "domestic law provides for various procedural safeguards designed to ensure that the interception of telecommunications is not ordered haphazardly, irregularly or without due and proper consideration. It requires this measure to remain under the permanent supervision of a judge. Moreover, the statutory and other provisions at issue lay down strict rules for the processing, retention and destruction of information obtained by the interception of telecommunications, and that these rules were further tightened and clarified after it had appeared at the domestic level that in practice the rules on the destruction of information not added to the case file were not adequately complied with in all cases ».

In its previous set of conclusions covering the year 2003, the Network has considered that « In the **Slovak Republic**, according to the Code of Criminal Procedure, a person indicted for having committed certain offences may be afforded a time-limit of only three days to file a complaint against that decision, even where the person concerned has just been notified of the criminal proceeding. The Network finds this time-limit for filing complaint against decision issued in criminal proceeding stated in aforesaid provision of the Code of Criminal Procedure unreasonably short ». The Network regrets that this situation has remained unmodified since those conclusions were adopted.

Article 49. Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

Article 49(1) of the Charter (with the exception of the last sentence) and (2) correspond to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). This provision of the Charter must be read in accordance to the requirements formulated by Article 15 of the International Covenant on Civil and Political Rights (1966), and by Article 40 (2)b and 40 (3) of the Convention on the Rights of the Child (1989), to which all Member States are parties.

Legality of criminal offences and penalties

In the present Conclusions, under Article 7 of the Charter of Fundamental Rights, the Network has already noted that the replication, in national law, of the definition of terrorism provided by the Council Framework Decision of 13 June 2002 on combating terrorism (OJ L 164 of 22.6.2002, p. 3), may not comply with the principle of legality. This view, which the Network had adopted since that Framework Decision was first adopted, has been confirmed by the United Nations Human Rights Committee in the Concluding Observations it delivered upon examining the report submitted by **Belgium**. The Human Rights Committee is concerned that the Act of 19 December 2003 on terrorist offences gives a definition of terrorism which, in referring to the degree of severity of offences and the perpetrators' intended purpose, does not entirely satisfy the principle of offences and penalties being established in law as required by Article 15 of the International Covenant on Civil and Political Rights (CCPR/CQ/81/BEL (point 24)).

No other conclusions were adopted under this provision of the Charter.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

> No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

This provision of the Charter has the same meaning as the corresponding Article 4 of Protocol n° 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1984), although its scope is wider. This provision of the Charter must also be read in accordance to the requirements formulated by Article 14 of the International Covenant on Civil and Political Rights (1966), and by Articles 40 (2)b and 40 (3) of the Convention on the Rights of the Child (1989).

No conclusions were adopted under this provision of the Charter.

APPENDIX: TABLES OF RATIFICATION

United Nations' main instruments
(status of ratifications on 13 January 2005)

- International Covenant on Economic, Social and Cultural Rights, 16th December 1966 (CESCR)
- International Covenant on Civil and Political Rights, 16th December 1966 (CCPR)
- Optional Protocol to the International Covenant on Civil and Political Rights, 16th December 1966 (CCPR-P1)
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, 15th December 1989 (CCPR-P2)
- International Convention on the Elimination of All Forms of Racial Discrimination, 21st December 1965 (CERD)
- Convention on the Elimination of All Forms of Discrimination against Women, 18th December 1979 (CEDAW)
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6th October 1999 (CEDAW-P)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10th December 1984 (CAT)
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18th december 2002 (not in force)(CAT-P)
- Convention on the Rigths of the Child, 20th November 1989 (CRC)
- Optional Protocol to the Convention on the Rigths of the Child on the Involvement of Children in Armed Conflict, 25th May 2000 (CRC-P1)
- Optional Protocol to the Convention on the Rigths of the Child on the Sale of Children, Child Prostitution and child pornography, 25th May 2000 (CRC-P2)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18th December 1990 (MWC)
- Rome Statute of the International Criminal Court, 18th July1998 (ICC)
- Convention relating to the Status of Refugees, 28th July 1951 (CSR)
- Protocol relating to the Status of Refugees, 31 January 1967 (CSR-P)
- Convention relating to the Status of Stateless Persons, 28th September 1954 (CSA)
- Convention on consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 10th December 1962 (CCM)
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 21st March 1950 (CRTEH)
- Slavery Convention, 25th September 1926 (CE)
- Protocol amending the Slavery Convention, 7th December 1953 (CE-P)
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, 7th September 1956 (CSAE)
- Convention on the Political Rights of Women, 31st March 1953 (CDPF)

NOTE : The changes that have occurred during the period under scrutiny are highlighted in bold characters.

	CESCR	CCPR	CCPR-P1	CCPR-P2	CERD	CEDAW	CEDAW-P	CAT	CAT-P	CRC	CRC-P1	CRC-P2	MWC
Germany	17/12/73	17/12/73[i]	25/08/93[ii]	18/08/92	16/05/69[iii]	10/07/85[iv]	15/01/02	01/10/90[v]	-	06/03/92[vi]	**13/12/04**	*s. 09/00*	-
Austria	10/09/78	10/09/78[vii]	10/12/87[viii]	02/03/93	09/05/72[ix]	31/03/82[x]	07/09/00	29/07/87[xi]	*s. 09/03*	06/08/92[xii]	01/02/02	**06/05/04**	-
Belgium	21/04/83[xiii]	21/04/83[xiv]	17/05/94	08/12/98	07/08/75[xv]	10/07/85[xvi]	**17/06/04**	25/06/99[xvii]	-	16/12/91[xviii]	06/05/02	*s. 09/00*	-
Denmark	06/01/72[xix]	06/01/72[xx]	06/01/72[xxi]	24/02/94	09/12/71[xxii]	21/04/83	31/05/00	27/05/87[xxiii]	**25/06/04**	19/07/91[xxiv]	28/08/02	24/07/03[xxv]	-
Spain	27/04/77	27/04/77[xxvi]	25/01/85[xxvii]	11/04/91	13/09/68[xxviii]	05/01/84[xxix]	06/07/01	21/10/87[xxx]	-	06/12/90[xxxi]	08/03/02	18/12/01	-
Finland	19/08/75	19/08/75[xxxii]	19/08/75	04/04/91	14/07/70[xxxiii]	04/09/86	29/12/00	30/08/89[xxxiv]	*s. 09/03*	21/06/91	11/04/02	*s. 09/00*	-
France	04/11/80[xxxv]	04/11/80[xxxvi]	17/02/84[xxxvii]	-	28/07/71[xxxviii]	14/12/83[xxxix]	09/06/00	18/02/86[xl]	-	08/08/90[xli]	05/03/03	05/02/03	-
Greece	16/05/85	05/05/97	05/05/97	05/05/97[xlii]	18/06/70	07/06/83	24/01/02	06/10/88[xliii]	-	11/05/93	22/10/03	*s. 09/00*	-
Ireland	08/12/89[xliv]	08/12/89[xlv]	08/12/89[xlvi]	18/06/93	29/12/00[xlvii]	23/12/85[xlviii]	08/09/00	11/04/02	-	28/09/92	18/11/02	*s. 09/00*	-
Italy	15/09/78	15/09/78[xlix]	15/09/78[l]	14/02/95	05/01/76[li]	10/06/85	22/09/00	12/01/89[lii]	*s. 08/03*	05/09/91	10/05/02	10/05/02	-
Luxembg	18/08/83	18/08/83[liii]	18/08/83[liv]	12/02/92	01/05/78[lv]	02/02/89[lvi]	01/10/03	29/09/87[lvii]	**13/01/05**	07/03/94[lviii]	**04/08/04**	*s. 09/00*	-
Netherlands	11/12/78[lix]	11/12/78[lx]	11/12/78	26/03/91	10/12/71[lxi]	23/07/91[lxii]	22/05/02	21/12/88[lxiii]	-	06/02/95[lxiv]	*s. 09/00*	*s. 09/00*	-
Portugal	31/07/78	15/06/78	03/05/83	17/10/90	24/08/82[lxv]	30/07/80	26/04/02	09/02/89[lxvi]	-	21/09/90	19/08/03	16/05/03	-
United King.	20/05/76[lxvii]	20/05/76[lxviii]	-	10/12/99	07/03/69[lxix]	07/04/86[lxx]	**17/12/04**	08/12/88[lxxi]	**10/12/03**	16/12/91[lxxii]	24/07/03	*s. 09/00*	-
Sweden	06/12/71[lxxiii]	06/12/71[lxxiv]	06/12/71[lxxv]	11/05/90	06/12/71[lxxvi]	02/07/80	24/07/03	08/01/86[lxxvii]	*s. 06/03*	29/06/90	20/02/03	*s. 06/00*	-
Cyprus	02/04/69	02/04/69	15/04/92	10/09/99[lxxviii]	21/04/67[lxxix]	23/07/85	26/04/02	18/07/91[lxxx]	***s. 07/04***	07/02/91	-	*s. 02/01*	-
Estonia	21/10/91	21/10/91	21/10/91	**30/01/04**	21/10/91	21/10/91	-	21/10/91	***s. 09/04***	21/10/91	*s. 09/03*	**03/08/04**	-
Hungary	17/01/74[lxxxi]	17/01/74[lxxxii]	07/09/88	24/02/94	01/05/67[lxxxiii]	22/12/80	22/12/00	15/04/87[lxxxiv]	-	08/10/91	**S 03/02**	**S 03/02**	-
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*	-
Lithuania	20/11/91	20/11/91	20/11/91	28/03/02	10/12/98	18/01/94	*s. 09/00*	01/02/96	-	31/01/92	20/03/03	**05/08/04**	-
Malta	13/09/90[lxxxv]	13/09/90[lxxxvi]	13/09/90[lxxxvii]	24/12/94	27/05/71[lxxxviii]	08/03/91[lxxxix]	-	13/09/90[xc]	24/09/03	30/09/90[xci]	10/05/02	*s.09/00*	-
Poland	18/03/77	18/03/77[xcii]	07/11/91[xciii]	*s. 03/00*	05/12/68[xciv]	30/07/80	**22/12/03**	26/07/89[xcv]	***s. 04/04***	07/06/91[xcvi]	*s. 02/02*	*s. 02/02*	-
Czech R.	01/01/93[xcvii]	22/02/93[xcviii]	22/02/93	**15/06/04**	22/02/93[xcix]	22/02/93	27/02/01	01/01/93[c]	***s. 09/04***	22/02/93[ci]	30/11/01[cii]	-	-
Slovakia	28/05/93[ciii]	28/05/93[civ]	28/05/93	22/06/99	28/05/93[cv]	28/05/93	17/11/00	28/05/93[cvi]	-	28/05/93[cvii]	*s. 11/01*	**25/06/04**	-
Slovenia	06/07/92	06/07/92[cviii]	16/07/93[cix]	10/03/94	06/07/92[cx]	06/07/92	**23/09/04**	02/02/94[cxi]	-	06/07/92[cxii]	**23/09/04**	**23/09/04**	-

	ICC	CSR	CSR-P	CSA	CCM	CRTEH	CE	CE-P	CSAE	CDPF
Germany	11/12/00[cxiii]	01/12/53[cxiv]	05/11/69	26/10/76[cxv]	09/07/69	-	12/03/29	29/05/73	14/01/59	04/11/70[cxvi]
Austria	28/12/00[cxvii]	01/11/54[cxviii]	05/09/73	-	01/10/69	-	19/08/27	16/07/54	07/10/63	18/04/69
Belgium	28/06/00[cxix]	22/07/53[cxx]	08/04/69	26/05/60	-	22/06/65	23/09/27	13/12/62	13/12/62	20/05/64
Denmark	21/06/01[cxxi]	04/12/52[cxxii]	29/01/68	17/01/56[cxxiii]	08/09/64[cxxiv]	*s. 02/51*	17/05/27	03/03/54	24/04/58	07/07/54[cxxv]
Spain	24/10/00[cxxvi]	14/08/78[cxxvii]	14/08/78	12/05/97[cxxviii]	15/04/69	18/06/62	12/09/27	10/11/76	21/11/67	14/01/74[cxxix]
Finland	29/12/00[cxxx]	10/10/68[cxxxi]	10/10/68	10/10/68[cxxxii]	18/08/64[cxxxiii]	08/06/72[cxxxiv]	29/09/27	19/03/54	01/04/59	06/10/58[cxxxv]
France	09/06/00[cxxxvi]	23/06/54[cxxxvii]	03/02/71	08/03/60[cxxxviii]	*s. 12/62*	19/11/60[cxxxix]	28/03/31	14/02/63	26/05/64[cxl]	22/04/57
Greece	15/05/02	05/04/60[cxli]	07/08/68	04/11/75	*s. 01/63*	-	04/07/30	12/12/55	13/12/72	29/12/53
Ireland	11/04/02	29/11/56[cxlii]	06/11/68	17/12/62[cxliii]	-	-	18/07/30	31/08/61	18/09/61	14/11/68[cxliv]
Italy	26/07/99	15/11/54[cxlv]	26/01/72	03/12/62[cxlvi]	*s. 12/63*	18/01/80	25/08/28	04/02/54	12/02/58[cxlvii]	06/03/68[cxlviii]
Luxembg	08/09/00	23/07/53[cxlix]	22/04/71[cl]	27/06/60	-	05/10/83	-	-	01/05/67	01/11/76
Netherlands	17/07/01	03/05/56[cli]	29/11/68[clii]	12/04/62[cliii]	02/07/65[cliv]	-	07/01/28	07/07/55[clv]	03/12/57[clvi]	30/07/71
Portugal	05/02/02[clvii]	22/12/60[clviii]	13/07/76[clix]	-	-	30/09/92	04/10/27	-	10/08/59	-
UK	04/10/01[clx]	11/03/54[clxi]	04/09/68[clxii]	16/04/59[clxiii]	09/07/70[clxiv]	-	18/06/27	07/12/53	30/04/57[clxv]	24/02/67[clxvi]
Sweden	28/06/01[clxvii]	26/10/54[clxviii]	04/10/67	02/04/65[clxix]	16/06/64[clxx]	-	17/12/27	17/08/54	28/10/59	31/03/54
Cyprus	07/03/02[clxxi]	16/05/63[clxxii]	09/07/68	-	30/07/02	05/10/83	21/04/86[clxxiii]	-	11/05/62	12/11/68
Estonia	30/01/02[clxxiv]	10/04/97[clxxv]	10/04/97	-	-	-	16/05/29	-	-	-
Hungary	30/11/01[clxxvi]	14/03/89[clxxvii]	14/03/89	21/11/01[clxxviii]	05/11/75[clxxix]	29/09/55	17/02/33	26/02/56	26/02/58	20/01/55
Latvia	28/06/02[clxxx]	31/07/97[clxxxi]	31/07/97[clxxxii]	05/11/99[clxxxiii]	-	14/04/92	09/07/27	-	14/04/92	14/04/92
Lithuania	12/05/03[clxxxiv]	28/04/97[clxxxv]	28/04/97	07/02/00	-	-	-	-	-	-
Malta	29/11/02[clxxxvi]	17/06/71[clxxxvii]	15/09/71[clxxxviii]	-	-	-	03/01/66[clxxxix]	-	03/01/66	09/07/68[cxc]
Poland	12/11/01[cxci]	27/09/91[cxcii]	27/09/91	-	08/01/65	02/06/52	17/09/30	-	10/01/63	11/08/54[cxciii]
Czech R.	*s. 04/99*	11/05/93[cxciv]	11/05/93	**19/07/04**	22/02/93	30/12/93	22/02/93	-	22/02/93	22/02/93
Slovakia	11/04/02[cxcv]	04/02/93[cxcvi]	04/02/93	03/04/00[cxcvii]	28/05/93	28/05/93	28/05/93	-	28/05/93	28/05/93
Slovenia	31/12/01	06/07/92[cxcviii]	06/07/92	06/07/92	-	06/07/92	-	-	06/07/92	06/07/92

International Labor Organization's main Instruments (status of ratifications on 12 January 2005)

- Convention (n°29) concerning Forced or Compulsory Labour, 28th June 1930
- Convention (n°87) concerning Freedom of Association and Protection of the Right to Organise, 9th July 1948
- Convention (n°98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1st July 1949
- Convention (n°100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 29th June 1951
- Convention (n° 105) concerning the Abolition of Forced Labour, 25th June 1957
- Convention (n°111) concerning Discrimination in Respect of Employment and Occupation, 25th June 1958
- Convention (n° 122) concerning Employment Policy, 9th July 1964
- Convention (n°135) concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, 23rd June1971
- Convention (n°138) concerning Minimum Age for Admission to Employment, 26th June1973
- Convention (n°154) concerning the Promotion of Collective Bargaining, 19th June 1981
- Convention (n°168) concerning Employment Promotion and Protection against Unemployment, 21st June 1988
- Convention (n°182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17th June 1999

NOTE : The changes that have occurred during the period under scrutiny are highlighted in bold characters.

	Forced Labor		Freedom of Association				Discrimination		Child Labor			
	C.29	C.105	C.87	C.98	C.135	C.154	C.100	C.111	C.138[excix]	C.182	C.122	C.168
Germany	13/06/56	22/06/59	20/03/57	08/06/56	26/09/73	-	08/06/56	15/06/61	08/04/76	18/04/02	17/06/71	-
Austria	07/06/60	05/03/58	18/10/50	10/11/51	06/08/73	-	29/10/53	10/01/73	18/09/00	04/12/01	27/07/72	-
Belgium	20/01/44	23/01/61	23/10/51	10/12/53	-	29/03/88	23/05/52	22/03/77	19/04/88	08/05/02	08/07/69	-
Denmark	11/02/32	17/01/58	13/06/51	15/08/55	06/06/78	-	22/06/60	22/06/60	13/11/97	14/08/00	17/06/70	-
Spain	29/08/32	06/11/67	20/04/77	20/04/77	21/12/72	11/09/85	06/11/67	06/11/67	16/05/77	02/04/01	28/12/70	-
Finland	13/01/36	27/05/60	20/01/50	22/12/51	13/01/76	09/02/83	14/01/63	23/04/70	13/01/76	17/01/00	23/09/68	19/12/90
France	24/06/37	18/12/69	28/06/51	26/10/51	30/06/72	-	10/03/53	28/05/81	13/07/90	11/09/01	05/08/71	-
Greece	13/06/52	30/03/62	30/03/62	30/03/62	27/06/88	17/09/96	06/06/75	07/05/84	14/03/86	06/11/01	07/05/84	-
Ireland	02/03/31	11/06/58	04/06/55	04/06/55	-	-	18/12/74	22/04/99	22/06/78	20/12/99	20/06/67	-
Italy	18/06/34	15/03/68	13/05/58	13/05/58	23/06/81	-	08/06/56	12/08/63	28/07/81	07/06/00	05/05/71	-
Luxembg	24/07/64	24/07/64	03/03/58	03/03/58	09/10/79	-	23/08/67	21/03/01	24/03/77	21/03/01	-	-
Netherlands	31/03/33	18/02/59	07/03/50	22/12/93	19/11/75	22/12/93	16/06/71	15/03/73	14/09/76	14/02/02	09/01/67	-
Portugal	26/06/56	23/11/59	14/10/77	01/07/64	31/05/76	-	20/02/67	19/11/59	20/05/98	15/06/00	09/01/81	-
United King.	03/06/31	30/12/57	27/06/49	30/06/50	15/03/73	-	15/06/71	08/06/99	07/06/00	22/03/00	27/06/66	-
Sweden	22/12/31	02/06/58	25/11/49	18/07/50	11/08/72	11/08/82	20/06/62	20/06/62	23/04/90	13/06/01	11/06/65	18/12/90
Cyprus	23/09/60	23/09/60	24/05/66	24/05/66	03/01/96	16/01/89	19/11/87	02/02/68	02/10/97	27/11/00	28/07/66	-
Estonia	07/02/96	07/02/96	22/03/94	22/03/94	07/02/96	-	10/05/96	-	-	24/09/01	12/03/03	-
Hungary	08/06/56	04/01/94	06/06/57	06/06/57	11/09/72	01/01/94	08/06/56	20/06/61	28/05/98	20/04/00	18/06/69	-
Latvia	-	27/01/92	27/01/92	27/01/92	27/01/92	25/07/94	27/01/92	27/01/92	-	-	27/01/92	-
Lithuania	26/09/94	26/09/94	26/09/94	26/09/94	26/09/94	26/09/94	26/09/94	26/09/94	22/06/98	29/09/03	**03/03/04**	-
Malta	04/01/65	04/01/65	04/01/65	04/01/65	09/06/88	-	09/06/88	01/07/68	09/06/88	15/06/01	-	-
Poland	30/07/58	30/07/58	25/02/57	25/02/57	09/06/77	-	25/10/54	30/05/61	22/03/78	09/08/02	24/11/66	-
Czech R.	01/01/93	06/08/96	01/01/93	01/01/93	09/10/00	-	01/01/93	01/01/93	-	19/06/01	01/01/93	-
Slovakia	01/01/93	29/09/97	01/01/93	01/01/93	-	-	01/01/93	01/01/93	29/09/97	20/12/99	01/01/93	-
Slovenia	29/05/92	24/06/97	29/05/92	29/05/92	29/5/92	-	29/05/92	29/05/92	29/05/92	08/05/01	29/05/92	-

Council of Europe's main instruments
(status of ratifications on 12 January 2005)

- Convention for the Protection of Human Rights and Fundamental Freedoms, 4th November 1950 (STE005)
- Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20th March 1952 (STE009)
- European Convention on Establishment, 13th December 1955 (STE019)
- European Social Charter, 18th October 1961 (STE035)
- Protocol n°4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the first Protocol thereto, 16th September 1963 (STE046)
- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28th January 1981(STE108)
- Protocol n°6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28th April 1983 (STE114)
- Protocol n° 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22nd November 1984 (STE117)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26th November 1987 (STE126)
- Additional Protocol to the European Social Charter, 5th May 1988 (STE128)
- Protocol amending the European Social Charter, 21st October 1991 (not in force) (STE142)
- European Charter for Regional or Minority Languages, 5th November 1992 (STE148)
- Framework Convention for the Protection of National Minorities, 1st February 1995 (STE157)
- Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9th November 1995 (STE158)
- European Convention on the Exercise of Children's Rights, 25th January 1996 (STE160)
- European Social Charter (revised), 3rd May 1996 (STE163)
- Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine : Convention on Human Rights and Biomedicine, 4th April 1997 (STE164)
- Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, 12th January 1998 (STE168)
- Protocole n° 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4th November 2000 (not in force)(STE177)
- Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personnel Data, regarding supervisory authorities and transborder data flows, 8th Novembre 2001 (not in force) (STE181)
- Convention on Cybercrime, 23rd November 2001 (not in force)(STE185)
- Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, 24th January 2002 (not in force)(STE186)
- Protocol n°13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of th Death Penalty in All Circumstances, 3rd May 2002 (STE187)
- Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 28th January 2003 (not in force) (STE189)

NOTE : The changes that have occurred during the period under scrutiny are highlighted in bold characters.

	STE005	STE009	STE019	STE035	STE046	STE108	STE114	STE117	STE126	STE128	STE142	STE148	STE157
Germany	05/12/52[cc]	13/02/57[cci]	23/02/65[ccii]	27/01/65[cciii]	01/06/68[cciv]	19/06/85[ccv]	05/07/89[ccvi]	*s. 03/85*[ccvii]	21/02/90[ccviii]	*s. 05/88*	-	16/09/98[ccix]	10/09/97[ccx]
Austria	03/09/58[ccxi]	03/09/58[ccxii]	*s. 12/57*	29/10/69[ccxiii]	18/09/69[ccxiv]	30/03/88[ccxv]	05/01/84	14/05/86[ccxvi]	06/01/89	*s. 12/90*	13/07/95[ccxvii]	28/06/01[ccxviii]	31/03/98[ccxix]
Belgium	14/06/55	14/06/55	12/01/62[ccxx]	16/10/90[ccxxi]	21/09/70	28/05/93[ccxxii]	10/12/98	-	23/07/91	23/06/03[ccxxiii]	21/09/00	-	*s. 07/01*[ccxxiv]
Denmark	13/04/53	13/04/53	09/03/61	03/03/65[ccxxv]	30/09/64	23/10/89[ccxxvi]	01/12/83	18/08/88[ccxxvii]	02/05/89	27/08/96[ccxxviii]	-	08/09/00[ccxxix]	22/09/97[ccxxx]
Spain	04/10/79[ccxxxi]	27/11/90[ccxxxii]	-	06/05/80[ccxxxiii]	*s. 02/78*	31/01/84[ccxxxiv]	14/01/85	*s.11/84*	02/05/89	24/01/00	24/01/00	09/04/01[ccxxxv]	01/09/95
Finland	10/05/90[ccxxxvi]	10/05/90	-	29/04/91[ccxxxvii]	10/05/90	02/12/91[ccxxxviii]	10/05/90	10/05/90	20/12/90	29/04/91[ccxxxix]	18/08/94	09/11/94[ccxl]	03/10/97
France	03/05/74[ccxli]	03/05/74[ccxlii]	*s. 12/55*	09/03/73[ccxliii]	03/05/74[ccxliv]	24/03/83[ccxlv]	17/02/86	17/02/86[ccxlvi]	09/01/89	*s. 06/89*[ccxlvii]	24/05/95	*s. 05/99*[ccxlviii]	-
Greece	28/11/74	28/11/74[ccxlix]	02/03/65[ccl]	06/06/84[ccli]	-	11/08/95	08/09/98	29/10/87	02/08/91	18/06/98	12/09/96	-	*s. 09/97*
Ireland	25/02/53[cclii]	25/02/53[ccliii]	01/09/66[ccliv]	07/10/64[cclv]	29/10/68[cclvi]	25/04/90[cclvii]	24/06/94	03/08/01	14/03/88	-	14/05/97	-	07/05/99
Italy	26/10/55	26/10/55	31/10/63	22/10/65[cclviii]	27/05/82[cclix]	29/03/97[cclx]	29/12/88	07/11/91[cclxi]	29/12/88[cclxii]	26/05/94[cclxiii]	27/01/95	*s. 06/00*	03/11/97
Luxembg	03/09/53	03/09/53[cclxiv]	06/03/69[cclxv]	10/10/91[cclxvi]	02/05/68	10/02/88[cclxvii]	19/02/85	19/04/89[cclxviii]	06/09/88	*s. 05/88*	*s. 10/91*	*s. 11/92*	*s. 07/95*[cclxix]
Netherlands	31/08/54[cclxx]	31/08/54[cclxxi]	21/05/69[cclxxii]	22/04/80[cclxxiii]	23/06/82[cclxxiv]	24/08/93[cclxxv]	25/04/86[cclxxvi]	*s. 11/84*[cclxxvii]	12/10/88[cclxxviii]	05/08/92[cclxxix]	01/06/93[cclxxx]	02/05/96[cclxxxi]	*s. 02/95*
Portugal	09/11/78[cclxxxii]	09/11/78[cclxxxiii]	-	30/09/91[cclxxxiv]	09/11/78	02/09/93[cclxxxv]	02/10/86	**20/12/04** [cclxxxvi]	29/03/90	-	08/03/93	-	07/05/02
United King.	08/03/51[cclxxxvii]	03/11/52[cclxxxviii]	14/10/69[cclxxxix]	11/07/62[ccxc]	*s. 09/63*	26/08/87[ccxci]	20/05/99[ccxcii]	-	24/06/88[ccxciii]	-	*s. 10/91*	27/03/01[ccxciv]	15/01/98
Sweden	04/02/52	22/06/53[ccxcv]	24/06/71[ccxcvi]	17/12/62[ccxcvii]	13/06/64	29/09/82[ccxcviii]	09/02/84	08/11/85[ccxcix]	21/06/88	05/05/89	18/03/92	09/02/00[ccc]	09/02/00[ccci]
Cyprus	06/10/62	06/10/62	-	07/03/68[ccciii]	03/10/89[ccciii]	21/02/02[ccciv]	19/01/00	15/09/00	03/04/89	*s. 05/88*	01/06/93	26/08/02[cccv]	04/06/96
Estonia	16/04/96[cccvi]	16/04/96[cccvii]	-	-	16/04/96	14/11/01[cccviii]	17/04/98	16/04/96	06/11/96	-	-	-	06/01/97[cccix]
Hungary	05/11/92	05/11/92	-	08/07/99[cccx]	05/11/92	08/10/97[cccxi]	05/11/92	05/11/92	04/11/93	***s. 10/04***	**04/02/04**	26/04/95[cccxii]	25/09/95
Latvia	27/06/97	27/06/97[cccxiii]	-	31/01/02[cccxiv]	27/06/97	30/05/01[cccxv]	07/05/99	27/06/97	10/02/98	*s. 05/97*	**09/12/03**	-	*s. 05/95*
Lithuania	20/06/95[cccxvi]	24/05/96	-	-	20/06/95	01/06/01[cccxvii]	08/07/99	20/06/95	26/11/98	-	-	-	23/03/00
Malta	23/01/67[cccxviii]	23/01/67[cccxix]	-	04/10/88[ccccx]	05/06/02	28/02/03[ccccxi]	26/03/91	15/01/03	07/03/88	-	16/02/94	*s. 11/92*	10/02/98[ccccxii]
Poland	19/01/93	10/10/94	-	25/06/97[ccccxiii]	10/10/94	23/05/02	30/10/00	04/12/02	10/10/94	-	25/06/97	*s. 05/03*	20/12/00[ccccxiv]
Czech R.	18/03/92[ccccxv]	18/03/92	-	03/11/99[ccccxvi]	18/03/92	09/07/01[ccccxvii]	18/03/92	18/03/92	07/09/95	17/11/99[ccccxviii]	17/11/99	*s.11/00*	18/12/97
Slovakia	18/03/92[ccccxix]	18/03/92	-	22/06/98[cccxxx]	18/03/92	13/09/00[ccccxxi]	18/03/92	18/03/92	11/05/94	22/06/98	22/06/98	05/09/01[ccccxxii]	14/09/95
Slovenia	28/06/94	28/06/94	-	*s. 10/97*	28/06/94	27/05/94[ccccxxiii]	28/06/94	28/06/94	02/02/94	*s. 10/97*	*s. 10/97*	04/10/00[ccccxxiv]	25/03/98[ccccxxv]

	STE158	STE160	STE163	STE164	STE168	STE177	STE181	STE185	STE186	STE187	STE189
Germany	-	10/04/02[cccxxxvi]	-	-	-	*s. 11/00*	12/03/03[cccxxxvii]	*s. 11/01*	-	**11/10/04**	*s. 01/03*
Austria	*s. 05/99*	*s. 07/99*	*s. 05/99*	-	-	*s. 11/00*	*s. 11/01*	*s. 11/01*	-	**12/1/04**	*s. 01/03*
Belgium	23/06/03	-	**02/3/04** [cccxxxviii]	-	-	*s. 11/00*	*s. 04/02*	*s. 11/01*	-	23/06/03	*s. 01/03*
Denmark	*s. 11/95*	-	*s. 05/96*[cccxxxix]	10/08/99[cccxl]	*s. 01/98*	-	*s. 11/01*	*s. 04/03*	-	28/11/02[cccxli]	***s. 02/04***
Spain	-	*s. 12/97*	*s. 10/00*	01/09/99	24/01/00	-	-	*s. 11/01*	-	*s. 05/02*	-
Finland	17/07/98[cccxlii]	*s. 01/96*	21/06/02[cccxliii]	*s. 04/97*	*s. 01/98*	**17/12/04**	*s. 11/01*	*s. 11/01*	-	**29/11/04**	*s. 01/03*
France	07/05/99	*s. 06/96*	07/05/99	*s. 04/97*	*s. 01/98*	-	*s. 11/01*	*s. 11/01*	-	*s. 05/02*	*s. 01/03*
Greece	18/06/98	11/09/97[cccxliv]	*s. 05/96*	06/10/98	22/12/98	*s. 11/00*	*s. 11/01*	*s. 11/01*	*s. 01/02*	*s. 05/02*	*s. 01/03*
Ireland	04/11/00	*s. 01/96*	04/11/00[cccxlv]	-	-	*s. 11/00*	*s. 11/01*	*s. 02/02*	-	*s. 05/02*	-
Italy	03/11/97	04/07/03[cccxlvi]	05/07/99[cccxlvii]	*s. 04/97*	*s. 01/98*	*s. 11/00*	*s. 11/01*	*s. 11/01*	*s. 02/02*	*s. 05/02*	-
Luxembg	-	*s. 01/96*	*s. 02/98*	*s. 04/97*	*s. 01/98*	*s. 11/00*	***s. 02/04***	*s. 28/01*	*s. 01/02*	*s. 05/02*	*s. 01/03*
Netherlands	***s. 01/04***	-	***s.01/04***	*s. 04/97*	*s. 05/98*[cccxlviii]	**28/07/04**[cccxlix]	**08/9/04**[ccel]	*s. 11/01*	*s. 02/02*	*s. 05/02*	*s. 01/03*
Portugal	20/03/98	*s. 03/97*	30/05/02[ccecli]	13/08/01	13/08/01	*s. 11/00*	*s. 11/01*	*s. 11/01*	*s. 02/02*	03/10/03	*s. 03/03*
UK	-	-	*s. 11/97*	-	-	-	*s. 11/01*	*s. 11/01*	-	10/10/03[ccclii]	-
Sweden	29/05/98	*s. 01/96*	29/05/98[ccecliii]	*s. 04/97*	*s. 01/98*	-	08/11/01	*s. 11/01*	-	22/04/03	*s. 01/03*
Cyprus	06/08/96	*s. 09/02*	27/09/00[ccecliv]	20/03/02	20/03/02	30/04/02	**17/03/04**	*s. 11/01*	-	12/03/03	-
Estonia	-	-	11/09/00[ccclv]	08/02/02	08/02/02	*s. 11/00*	-	12/05/03[ccclvi]	17/09/03	**25/02/04**	*s. 01/03*
Hungary	***s. 10/04***	-	***s. 10/04***	09/01/02	09/01/02	*s. 11/00*	***s. 03/04***	04/12/03[ccclvii]	-	16/07/03	-
Latvia	-	30/05/01[ccclviii]	-	*s. 04/97*	*s. 01/98*	*s. 11/00*	-	***s. 05/04***	-	*s. 05/02*	***s.05/04***
Lithuania	-	-	29/06/01[ccclix]	17/10/02	17/10/02	-	**02/03/04**	**18/03/04**[ccclx]	-	**29/1/04**	-
Malta	-	*s. 01/99*	-	-	-	-	-	*s. 01/02*	-	03/05/02	*s. 01/03*
Poland	-	28/11/97[ccclxi]	-	*s. 05/99*	*s. 05/99*	-	*s. 11/02*	*s. 11/01*	-	*s. 05/02*	*s. 07/03*
Czech R.	*s. 02/02*	07/03/01[ccclxii]	*s. 11/00*	22/06/01	22/06/01	*s. 11/00*	24/09/03	-	-	**02/07/04**	-
Slovakia	*s. 11/99*	*s. 06/98*	*s. 11/99*	15/01/98	22/10/98	*s. 11/00*	24/07/02	-	-	*s. 07/02*	-
Slovenia	*s. 10/97*	28/03/00[ccclxiii]	07/05/99[ccclxiv]	05/11/98	05/11/98	*s. 03/01*	-	**08/09/04**	*s. 01/02*	04/12/03	**08/09/04**

[i] Reservations : art. 2(1), 14(3)(d), 14(5), 15(1), 19, 21 and 22 ; Declaration : art. 41
[ii] Reservation : art. 5(2)(a)
[iii] Declaration : art. 14
[iv] Reservations : §11 of the Preamble, art. 7(b)
[v] Reservations : art. 3, 21 and 22
[vi] Reservations : art. 18(1), 38(2), 40(2)(b)(ii) and (v)
[vii] Reservations : art. 9, 10(3), 12(4), 14, 19, 21, 22 and 26 ; Declaration : art. 41
[viii] Reservation : art. 5(2)
[ix] Reservations : art. 4(a), 4(b) and 4(c)
[x] Reservation : art. 11
[xi] Reservations : art. 5(1)(c) and 15 ; Declarations : art. 21 and 22
[xii] Reservations : art. 13, 15,17, 38(2), 38(3)
[xiii] Reservations : art. 2(2) and (3)
[xiv] Reservations : art. 10(2)(a), 10(3), 14(1), 14(5), 19, 20, 21, 22 and 23(2) ; Declaration : art. 41
[xv] Reservation: art. 4 ; Declaration : art. 14
[xvi] Reservations : art.15(2) and (3)
[xvii] Reservations : art. 21 and 22
[xviii] Reservations : art. 2(1), 13, 14(1), 15 and 40(2)(b)(v)
[xix] Reservation : art. 7(d)
[xx] Reservations : art. 10(3), 14(1), 14(5), 14(7) and 20(1) ; Declaration : art. 41
[xxi] Reservation : art. 5(2)(a)
[xxii] Declaration : art. 14
[xxiii] Declarations : art. 21 and 22
[xxiv] Reservation : art. 40(2)(b)(v)
[xxv] Declaration
[xxvi] Declaration : art. 41
[xxvii] Reservation : art. 5(2)
[xxviii] Declaration : art. 14
[xxix] General Declaration
[xxx] Declarations : art. 21 and 22
[xxxi] Reservations : art. 21(d), 38(2) and 38(3)
[xxxii] Reservations : art. 10(2)(b), 10(3), 14(7) and 20(1) ; Declaration : art. 41
[xxxiii] Declaration : art. 14
[xxxiv] Declarations : art. 21 and 22
[xxxv] Reservations : art. 6, 8, 9, 11, 13
[xxxvi] Reservations : art. 4(1), 9, 13, 14, 20(1), 21, 22 and 27
[xxxvii] Reservations : art. 1, 5(2)(a) and 7
[xxxviii] Reservations : art. 4, 6 and 15 ; Declaration : art. 14
[xxxix] Reservations : §11 of the Preamble, art. 5(b), 9, 14(2)(c), 14(2)(h), 16(1)(d), 16(1)(g) and 29(1)
[xl] Reservation : art. 30(2) ; Declarations : art. 21 and 22
[xli] Reservations : art. 6, 30 and 40(2)(b)(v)
[xlii] Reservation : art. 2
[xliii] Declarations : 21 and 22
[xliv] Reservations : art. 2(2) and 13(2)(a)
[xlv] Reservations : art. 10(2), 14, 14(7), 19(2) and 20(1) ; Declaration : art. 41
[xlvi] Reservation : art. 5(2)
[xlvii] Reservations : art. 4(a), (b), (c) ; Declaration : art. 14
[xlviii] Reservations : art. 13(b), 13(c), 16(1)(d) and 16(1)(f)
[xlix] Reservations : art. 9(5), 12(4), 14(3), 14(5), 15(1) and 19(3) ; Declaration : art. 41
[l] Reservation : art. 5(2)
[li] Reservations : art. 4(a), 4(b) and 6 ; Declaration : art. 14
[lii] Declarations : art. 21 and 22
[liii] Reservations : art. 10(3), 14(3), 14(5), 19(2) and 20 ; Declaration : art. 41
[liv] Reservation : art. 5(2)
[lv] Declaration : art. 14
[lvi] Reservation : art. 7 and 16(1)(g)
[lvii] Reservation : art. 1(1) ; Declarations : art. 21 and 22
[lviii] Reservation : art. 3, 6, 7 and 15
[lix] Reservation : art. 8(1)(d)
[lx] 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
[lxi] Declaration : art. 14
[lxii] Reservations : § 10 and 11 of the Preamble
[lxiii] Reservation : art. 1(1) ; Declarations : art. 21 and 22
[lxiv] Reservations : art. 14, 22, 26, 37, 38, 40
[lxv] Declaration : art. 14
[lxvi] Declarations : art. 21 and 22
[lxvii] Reservations : art. 1, 2(3), 6, 7(a)(i), 9, 10(2), 13(2)(a) and 14
[lxviii] 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
[lxix] Reservations : art. 1(1), 4(a)(b) and (c), 6, 15 and 20
[lxx] Reservations : art. 2, 4(1), 9, 11(2), 15(3) and 15(4), 16(1)(f) ; General Declaration
[lxxi] General Declaration ; Declaration : art. 21
[lxxii] Reservations : art. 22 and 37(c) ; General Declaration
[lxxiii] Reservation : art. 7(d)
[lxxiv] Reservations : art. 10(3), 14(7) and 20(1) ; Declaration : art. 41
[lxxv] Reservation : art. 5(2)
[lxxvi] Declaration : art. 14
[lxxvii] Declarations : art. 21 and 22
[lxxviii] Reservation : art. 2(1)
[lxxix] Declaration : art. 14
[lxxx] Declarations : art. 21 and 22
[lxxxi] Reservations : art. 26(1) and 26(3)
[lxxxii] Reservations : art. 48(1) and 48(3) ; Declaration : art.41
[lxxxiii] Reservations : art. 17(1) and 18(1) ; Declaration :art. 14
[lxxxiv] Declarations : art. 21 and 22
[lxxxv] Reservation : art. 13
[lxxxvi] Reservations : art. 13, 14(2), 14(6), 19, 20 and 22 ; Declaration : art. 41
[lxxxvii] Reservations : art. 1 and 5(2)
[lxxxviii] Reservations : art. 4 and 6
[lxxxix] Reservations : art. 11, 13, 15 and 16
[xc] Declarations : art. 21 and 22
[xci] Reservations : art. 26
[xcii] Declaration : art. 41
[xciii] Reservation : art. 5(2)(a)
[xciv] Reservations : art. 17(1) and 18(1) ; Declaration : art. 14
[xcv] Reservations : art. 20 and 30(1) ; Declaration : art. 21 and 22
[xcvi] Reservations : art. 7, 12 à 16, 24(2)(f) and 38
[xcvii] Reservation : art. 26
[xcviii] Reservation : art. 48 ; Declaration : art. 41
[xcix] Reservation : art. 17 ; Declaration : art. 14
[c] Declarations : art. 21 and 22
[ci] Reservation : art. 7(1)
[cii] Reservation : art. 3(2)
[ciii] Reservation : art. 26
[civ] Reservation : art. 48 ; Declaration : art. 41
[cv] Reservation : art. 17 ; Declaration : art. 14
[cvi] Declarations : art. 21 and 22
[cvii] Reservation : art. 7(1)
[cviii] Declaration : art. 41
[cix] Reservations : art. 1 and 5(2)(a)
[cx] Declaration : art. 14
[cxi] Declarations : art. 21 and 22
[cxii] Reservation : art. 9(1)
[cxiii] Reservation : art. 87
[cxiv] Reservation : art. 1B
[cxv] Reservations : art. 23 and 27
[cxvi] Reservation : art. III
[cxvii] Reservation : art. 87(2)
[cxviii] Reservations : 1B, 17 , 22, 23 and 25
[cxix] Reservations : art. 31(1)(e), 21(1)(b)(c), 87
[cxx] General declaration; Reservations : art. 1B and 15
[cxxi] Reservation : art. 87

[cxxii] Reservations : art. 1B and 17(1)
[cxxiii] Reservations : art. 24 and 31
[cxxiv] Reservation : art. 1(2)
[cxxv] Reservation : art. 3
[cxxvi] Reservations : art. 87 and 103
[cxxvii] General declaration; Reservations : art. 1B, 8, 12 and 26
[cxxviii] Reservation : art. 29(1)
[cxxix] Reservations : art. I, II and III
[cxxx] Reservation : art. 87
[cxxxi] Reservations : general, art. 1B, 7(2), 8, 12(1), 24, 25 and 28(1)
[cxxxii] Reservations : general, art. 7(2), 8, 24(1)(b), 24(3), 25 and 28
[cxxxiii] Reservation : art. 1(2)
[cxxxiv] Reservation : art. 9
[cxxxv] Reservations : art. III
[cxxxvi] Reservations : art. 8, 87 and 124 ; General Declaration
[cxxxvii] Declaration : art. 29(2) and 17 ; Reservation : art. 1B
[cxxxviii] Reservation : art. 10(2)
[cxxxix] General declaration
[cxl] General declaration
[cxli] Reservations : art. 1B and 26
[cxlii] Declaration : art. 32 ; Reservations : art. 1B, 17, 25 and 29(1)
[cxliii] Declarations : art. 31, general ; Reservation : art. 29(1)
[cxliv] Reservation : art. III
[cxlv] Reservation : art. 1B
[cxlvi] Reservations : art. 17 and 18
[cxlvii] General declaration
[cxlviii] Declaration : art. III
[cxlix] Réservations : art. 1B, general
[cl] General Reservation
[cli] Reservation : art. IB
[clii] Declaration : art. VII
[cliii] Reservations : art. 8 and 26, general
[cliv] General declaration
[clv] General declaration
[clvi] General declaration
[clvii] Declaration : art. 5(1)
[clviii] Reservation : art. 1B
[clix] General declaration
[clx] Reservations : art. 8 and 87
[clxi] Reservation : art. 1B
[clxii] Declaration : art. VII(4)
[clxiii] Declarations : art. 36, 38 and general ; Reservations : art. 8, 9, 24(1)(b) and 25(1) and(2)
[clxiv] Declarations : art. 1 and general
[clxv] Declaration general
[clxvi] Reservations : art. III, general
[clxvii] Reservation : art. 8 and 87
[clxviii] Reservation : art. 1B
[clxix] Reservations : art. 8, 12(1), 24(1)(b), 24(3) and 25(2)
[clxx] Reservation : art. 1(2)
[clxxi] Reservation : art. 87
[clxxii] General Declaration ; Reservation : art. 1B
[clxxiii] Ratification of the Convention as amended by the Protocol
[clxxiv] Reservation : art. 87
[clxxv] Reservations : art. 1B, 23, 24, 25 and 28(1)
[clxxvi] Reservation : art. 87
[clxxvii] Reservation : art. 1B
[clxxviii] Reservations : art. 23, 24 and 28
[clxxix] Reservation : art. 1(2)
[clxxx] Reservation : art. 87
[clxxxi] Reservations : art. 1B, 8, 17, 24, 26 , 34 and general
[clxxxii] Declaration : art. VII(2)
[clxxxiii] Reservations : art. 24(1)(b) and 27
[clxxxiv] Declaration : art. 103(1) ; Reservation : art. 87
[clxxxv] Reservation : art. 1B
[clxxxvi] Declaration : art. 20(3) ; Reservation : art. 87
[clxxxvii] Reservation : art. 1B
[clxxxviii] Declaration : art. VII(2)
[clxxxix] Ratification of the Convention as amended by the Protocol
[cxc] Reservation : art. III
[cxci] Reservation : art. 87(2)
[cxcii] Reservation : art. 1B
[cxciii] Reservation : art. VII
[cxciv] Reservation : art. 1B
[cxcv] Declaration : art. 103(1)
[cxcvi] Reservation : art. 1B
[cxcvii] Declaration : art. 27
[cxcviii] Reservation art. 1B
[cxcix][cxcix] 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.
[cc] Reservation : art. 7 ; Declaration : art. 56
[cci] Declarations : art. 1, 2 and 4
[ccii] Réserve : art 4 ; Declaration : art. 30
[cciii] Declarations : art. 6, 20 and 34
[cciv] Declaration : art. 5
[ccv] Declarations : art. 8, 12, 13, 24
[ccvi] General Declarations
[ccvii] Declarations : art. 2, 3, 4
[ccviii] Declaration : art. 20
[ccix] Declarations : art. 2, 3, 7, 8, 9, 10, 11, 12, 13, 14
[ccx] Declaration
[ccxi] Reservations : art. 5 and 6
[ccxii] Reservation : art. 1
[ccxiii] Declaration : art. 20
[ccxiv] Reservation : art. 3
[ccxv] Declarations : art. 2, 3, 5, 9 and 13
[ccxvi] Declarations : art. 2, 3, 4
[ccxvii] Declaration : art. 4
[ccxviii] Declarations : art. 2 and 3
[ccxix] Declaration
[ccxx] Declaration : art. 12
[ccxxi] Declaration : art. 20
[ccxxii] Declarations : art. 3, 13 and 14
[ccxxiii] Declaration : art. 5
[ccxxiv] Reservation
[ccxxv] Declarations : art. 20 and 34
[ccxxvi] Declarations : art. 13 and 24
[ccxxvii] Reservation : art. 2 ; Declarations : art. 2 and 6
[ccxxviii] Declaration : art. 9
[ccxxix] Declarations : art. 2, 3, 4 and 15
[ccxxx] Declaration
[ccxxxi] Reservation : art. 17 ; Declarations : art. 5, 6, 10 and 15
[ccxxxii] Reservation : art. 1
[ccxxxiii] Declaration : art. 31 and 37
[ccxxxiv] Declaration : art. 13
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[ccxl] Declarations : art. 2, 3, 7, 8, 9, 10, 11, 13, 14
[ccxli] Reservations : art. 5, 6 and 15 ; Declarations : art. 10 and 56
[ccxlii] Declarations : art. 1 and 4
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