



# The **Racial Equality Directive:** application and challenges

The report addresses matters related to the principle of non-discrimination (Article 21) falling under Title III 'Equality' of the Charter of Fundamental Rights of the European Union.

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# The **Racial Equality Directive:** application and challenges



## Foreword

According to the Treaty on European Union and the Treaty on the Functioning of the European Union, the EU is founded on the value of equality and non-discrimination and through its policies should combat discrimination based on racial or ethnic origin. The Racial Equality Directive represents a key measure in this regard as a framework for combating discrimination and giving effect to the principle of equal treatment. The directive, adopted a decade ago, has brought about the introduction of new or the strengthening of existing equality regimes in the EU Member States. Although significant progress has been made towards the realisation of racial and ethnic equality, several challenges remain to be overcome.

Article 17 of the Racial Equality Directive requires the European Commission to report to the European Parliament and the Council on its application and, in doing so, to take into account the views of the European Union Agency for Fundamental Rights (FRA). The present report constitutes one of a number of publications of the Agency contributing to this exercise. It discusses the application of the Racial Equality Directive and challenges to the realisation of its goals, and is built on the research of the Agency and the former European Monitoring Centre on Racism and Xenophobia since its establishment in 1997.

The analysis is informed by a discussion of legislation and practices in the EU Member States, the actual experiences of members of racial and ethnic minorities, and the views of the social partners. While it is clear that there has been an evolution in legislation and practice over the past 10 years in this area, it is not possible to present a concrete trends analysis because the development of indicators to gauge the precise shape and effect of these measures remains ongoing and at an early stage.

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# Contents

<b>FOREWORD</b> .....	<b>3</b>
<b>INTRODUCTION</b> .....	<b>7</b>
<b>1. THE APPLICATION OF THE RACIAL EQUALITY DIRECTIVE</b> .....	<b>9</b>
1.1. The effect of the Racial Equality Directive on practices and perceptions .....	9
1.2. Equality bodies .....	10
1.3. Access to a remedy and dispute settlement .....	12
1.4. Social dialogue .....	15
1.5. Promotional measures .....	16
<b>2. CHALLENGES TO REALISING THE AIMS OF THE RACIAL EQUALITY DIRECTIVE</b> .....	<b>19</b>
2.1. Awareness of equality legislation .....	19
2.2. Failure to recognise and reluctance to report discrimination .....	20
2.3. Legal costs .....	21
2.4. Limits of dispute settlement as a means of achieving equality .....	21
2.5. Complementary means: data collection and preventive/promotional measures .....	22
<b>CONCLUSIONS</b> .....	<b>25</b>
<b>BIBLIOGRAPHY</b> .....	<b>27</b>



## Introduction

The problem of discrimination on the basis of racial or ethnic origin attracted increasing attention from the Community institutions in the 1990s resulting in several measures recognising the need to combat racism and xenophobia. To allow the Community and the Member States to better address this issue, the European Monitoring Centre on Racism and Xenophobia (EUMC) was established in 1997 with the task of collecting and analysing objective, reliable and comparable data.<sup>1</sup> In 2007, the FRA succeeded the EUMC, with a broader mandate and range of tasks covering human rights more generally.<sup>2</sup> Since the adoption of the Racial Equality Directive, the EUMC and FRA research and analysis on racism and xenophobia has included reporting on measures and practices adopted by the Member States in pursuance of their obligations under this instrument.

The present report discusses the application of the Racial Equality Directive through the laws and practices in the 27 EU Member States. In doing so it explores the challenges to the effective realisation of the directive's goals and in conclusion discusses how such obstacles might be overcome. To the extent possible, the report outlines how legislation and practices have evolved over time. However, there is often an absence of data at Member State level and, where data is collected, divergent end-purposes and methodologies impede direct and precise comparisons. Indicators capable of facilitating more standardised measurements of progress in the realisation of fundamental rights are in a state of ongoing development. In this sense the FRA own work on indicators on the rights of the child constitutes a valuable tool for gauging implementation that highlights the need for further research of this nature.<sup>3</sup>

According to Article 17 of the Racial Equality Directive, the five-yearly report of the European Commission on the application of the directive 'shall take into account' the views of the FRA. This report constitutes one among a range of publications contributing towards this exercise.

Through a body of qualitative, quantitative and legal research and analysis in the area of discrimination spanning over 10 years, the EUMC and FRA have built up a significant range of studies covering various population groups across a range of contexts. This report draws on the wealth of these sources to offer an accessible and rounded analysis. Given the specific role accorded to the social partners under Article 11 of the directive, particular reference is made to their views collected and published by the FRA in *The impact of the Racial Equality Directive: Views of trade unions and employers in the European Union*.<sup>4</sup> More broadly, the report is based on contributions by FRALEX, the FRA network of legal experts and other relevant EUMC and FRA reports, including: EUMC, *Migrants, minorities and education: Documenting discrimination and integration in 15 Member States of the European Union*;<sup>5</sup> *Migrants, minorities and employment: Exclusion discrimination and anti-discrimination in the 15 Member States of the European Union*;<sup>6</sup> *Migrants, minorities and housing: Exclusion, discrimination and anti-discrimination in the 15 Member States of the European Union*;<sup>7</sup> *Roma and Travellers in public education: An overview of the situation in the EU Member States*;<sup>8</sup> *Access to justice in Europe: an overview of challenges and opportunities*;<sup>9</sup> *European Union Minorities and Discrimination survey (EU-MIDIS), Data in focus 3: Rights awareness and equality bodies*;<sup>10</sup> *EU-MIDIS, Main results report*;<sup>11</sup> *EU-MIDIS at a glance: Introduction to the FRA's EU-wide discrimination survey*;<sup>12</sup> *Migrants, minorities and employment: Exclusion and discrimination in the 27 Member States of the European Union, Update 2003-2008*;<sup>13</sup> *The impact of the Racial Equality Directive: Views of trade unions and employers in the European Union*;<sup>14</sup> *Trends and Developments 1997-2005: Combating ethnic and racial discrimination and promoting equality in the European Union*;<sup>15</sup> *Housing Conditions of Roma and Travellers in the European Union: Comparative report*;<sup>16</sup> as well as FRA Annual Reports.

1 FRA (2007), pp. 9-16, 47-50.

2 Regulation 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia. (O.J. L 151, 10 June 1997, p. 1); Regulation 168/2007 establishing a European Union Agency for Fundamental Rights (O.J. L 53, 22 February 2007, p. 1).

3 FRA (2010b). The UN's Office of the High Commissioner for Human Rights has been particularly active in the area of developing indicators on human rights implementation for use by the UN treaty bodies in gauging the degree of realisation of the rights contained in UN human rights instruments. See [www2.ohchr.org/english/issues/](http://www2.ohchr.org/english/issues/)

4 FRA (2010e).

5 EUMC (2004).

6 EUMC (2003b).

7 EUMC (2005).

8 EUMC (May 2006).

9 FRA (2011).

10 FRA (2010c).

11 FRA (2009i).

12 FRA (2009h).

13 FRA (2010d).

14 FRA (2010e).

15 FRA (2007).

16 FRA (2009j).



# 1. The application of the Racial Equality Directive

The aim of the Racial Equality Directive is to establish a framework for combating discrimination and give effect to the principle of equal treatment in the EU Member States. It operates alongside the Employment Equality Directive, which prohibits discrimination on the basis of religion or belief, disability, age or sexual orientation, and the Gender Equality Directive and Gender Equality Directive on Goods and Services which prohibit discrimination on the basis of sex.<sup>17</sup> Together these directives contribute significantly towards the realisation of the EU's aim of combating discrimination. Discrimination on the grounds of racial and ethnic origin and sex are prohibited in the context of employment, access to goods and services and in accessing the welfare and social security system ('social protection' and 'social advantages'), while discrimination on the basis of religion or belief, disability, age or sexual orientation are prohibited in the context of employment only. This creates what is often referred to as a 'hierarchy of grounds', where protection against discrimination is applied unevenly. This uneven protection is addressed by the European Commission proposal for a 'horizontal' directive. The latter would introduce legislation offering protection against discrimination on the basis of religion or belief, disability, age or sexual orientation in those contexts covered by the Racial Equality Directive.<sup>18</sup>

Under the Racial Equality Directive, EU Member States are required to prohibit discrimination on the grounds of racial or ethnic origin and authorised to adopt specific measures to prevent or compensate for disadvantages linked to these grounds ('positive action'). In order to give effect to these aims, Member States are required to adopt a range of measures and a particular architecture: judicial and/or administrative procedures, which may include conciliation, must be available for individuals to pursue their rights. In the course of such procedures the burden of proof should be shared between the claimant and the respondent, and effective, proportionate and dissuasive sanctions should be available. Several measures are

required in order to assist and support victims pursuing claims. One or more equality bodies should be assigned to offer assistance to victims pursuing complaints. EU Member States must also authorise civil society organisations to engage on behalf of or in support of a claimant in judicial or administrative proceedings, which may include NGOs, trade unions or the equality bodies themselves. Equality bodies are also to be empowered to undertake a range of promotional activities, namely: the publication of reports and recommendations and the conduct of independent surveys. Member States are also to take steps to ensure that provisions adopted pursuant to the directive are disseminated. Finally, Member States are to promote dialogue between the social partners (employers and employees) with a view to the elaboration of policies to promote equality, as well as dialogue with NGOs.

A range of measures have been taken at Member State level in order to give effect to the directive, by both public and private entities. There are encouraging examples of practices that go beyond the directive's minimum requirements, as well as some areas where it is not clear whether the directive's standards have been met.

## 1.1. The effect of the Racial Equality Directive on practices and perceptions

The Racial Equality Directive obliges EU Member States to implement a series of measures to maintain a legal and procedural framework for the promotion of equality for racial and ethnic minorities. For some Member States this has meant the introduction, for the first time, of a detailed non-discrimination regime covering the grounds of racial and ethnic origin. These include Bulgaria, Cyprus, Estonia, Lithuania, Hungary, Poland, Romania, the Slovak Republic, Slovenia, and Spain. For others, which had pre-existing non-discrimination frameworks, the application of the directive has required more modest changes, such as Denmark, Ireland, the Netherlands, Sweden and the UK.<sup>19</sup> Nevertheless, the directive has required the adoption of various specific measures which were not universally present across the Member States before its adoption, including: the creation of civil and/or administrative procedures to enforce the prohibition on discrimination; the creation of an equality body; allowing civil society organisations to engage in judicial and/or administrative procedures to enforce the obligations under the directive; promoting dialogue with the social partners and with

17 Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (O.J. L 180, 19 July 2000, p. 22); Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (O.J. L 303, 2 December 2000, p. 16); Council Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (O.J. L 373, 21 December 2004, p. 37); Council Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (O.J. L 204, 26 July 2006, p. 23).

18 European Commission, *Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM(2008) 426 final, 2 July 2008.

19 FRA (2007), p. 17.

non-governmental organisations; and the introduction of a 'shared' burden of proof in legal proceedings (see Section 1.3.2).

It is difficult to gauge the effect of the directive in measurable terms. The FRA research established that among the social partners interviewed there are mixed views over the extent of the effect of the Racial Equality Directive on the national regulatory framework. There was a tendency among the social partners (interviewed by the FRA<sup>20</sup>) from those Member States with pre-existing non-discrimination regimes (predominantly the 15 Member States that formed the EU prior to enlargements in 2004 and 2007) to question the practical contribution of the directive, given that national law was already in place. Among respondents from Member States with less detailed regimes (principally the 12 Member States joining the EU from 2004 and 2007, but also some southern EU Member States) there was a tendency to question the necessity of the directive because it was considered that discrimination was not actually a significant problem. This failure to recognise discrimination is discussed further below.<sup>21</sup>

The social partners tended to view the effect of the directive in more indirect or symbolic terms.<sup>22</sup> The 'symbolic' contribution of the directive was to provide a firm and unambiguous message that discrimination on the basis of racial or ethnic origin was unacceptable. This sentiment, which was echoed among respondents from several Member States, is captured by a trade union representative who stated 'The directives have helped to implement the diversity policies and provided strong arguments to legitimate them.'<sup>23</sup> In the opinion of most, but not all, social partner interviewees, the adoption and transposition of the directive itself served to stimulate awareness of the problem of discrimination and conferred greater legitimacy on already existing equality initiatives. In this sense it is possible to note the introduction of initiatives by employers that were designed to promote racial and ethnic equality including codes of conduct, training programmes, diversity audits, efforts to integrate foreign workers and adjustments in recruitment policies, which emerged during the transposition period. There is also evidence among trade unions of measures to promote the participation of minorities within the unions, measures to monitor differences of treatment in wages and working conditions, and the establishment of support mechanisms within trade unions for victims of racial or ethnic discrimination.<sup>24</sup>

It was also pointed out among the social partners that the adoption of the directive in 2000 came at a time

when economic growth had produced labour market shortages that were met by the use of foreign workers, which in turn required the introduction of measures to combat discrimination in order to preserve the cohesion of the work force. Furthermore, there was a realisation that to maximise performance it was necessary to recruit those with the best skills and qualifications, regardless of race or ethnicity. In addition, it was also recognised that a diverse work force was more appealing to a diverse consumer base.<sup>25</sup>

Apart from these perceptions it is clear that the directive brought about the introduction of specific legislative and institutional measures, as noted above, that were not present across the Member States. It should also be kept in mind that changes in employer and trade union practices coincided with the period leading to the deadline for transposition of the directive. The perception that their introduction was not owed to the directive as such may be based more on the fact that by the time the impetus for such initiatives had filtered down from public authorities and high-level employer and employee organisations to the point of implementation, the connection with the directive was no longer apparent. Furthermore, the perceptions of the social partners may have been coloured by the view expressed in those Member States with no detailed pre-existing non-discrimination legislative framework that the directive constituted an imposition of 'exotic' and 'unnecessary' rules by the EU.<sup>26</sup> In part, this may be due to the tendency among the social partners in some Member States towards the view that discrimination simply did not occur (discussed below).

## 1.2. Equality bodies

Article 13 of the Racial Equality Directive requires Member States to establish a body or bodies responsible for the promotion of equal treatment. Such bodies are to be assigned three tasks to be carried out on an independent basis. Firstly, to offer assistance to victims in pursuing their complaints; secondly to conduct surveys on discrimination; thirdly to publish reports and make recommendations on discrimination. All Member States have designated either one or more equality bodies to deal with racial or ethnic discrimination; with the exception of Poland where, although no entities have been specifically 'designated' the three tasks currently lie within the remit of a range of existing bodies. In a number of Member States, bodies dealing with ethnic and racial discrimination already existed prior to the introduction of the directive (Belgium, Ireland, the Netherlands, Sweden and the UK). In others either a new body was established (for example, France, Germany, Italy and Spain), or the

20 FRA (2010e).

21 FRA (2010e), pp. 56-60.

22 FRA (2010e), pp. 47-50.

23 FRA (2010e), pp. 75, 49-50.

24 FRA (2010e), pp. 62-70, 74-77, 86-88.

25 FRA (2010e), pp. 9, 19, 52-53, 66-67.

26 FRA (2010e), pp. 10, 56-59.

mandate of an existing body or bodies was expanded to deal with racial or ethnic discrimination across the areas required by the directive (for example, Cyprus and Latvia). In some cases the extent of activity of the equality bodies may be more difficult to gauge because they became operational relatively recently (e.g. Luxembourg in 2008, Spain in 2009, Czech Republic in 2010), or because the three tasks are divided over several different bodies (for example, Austria, Finland, Ireland and Poland<sup>27</sup>). In the majority of Member States the designated equality body or bodies cover not only racial and ethnic discrimination, but also grounds of discrimination covered by the other non-discrimination directives, noted above. This practice contributes towards ensuring equal protection against discrimination on all grounds in a manner consistent with the European Commission proposal for a 'horizontal' directive.

### 1.2.1. Assistance to victims

The requirement to provide assistance to victims includes offering information on how to pursue a claim as well as legal advice. This function appears to be performed by almost all the designated equality bodies. In Lithuania there is no express mention of this function among the powers of the equality body, while in Spain the legislation does not specify the form that 'assistance to victims' will take. However, a number of EU Member States have gone beyond the minimum requirements of the directive.

Firstly, in a small number of Member States equality bodies may ensure the representation of private individuals pursuing remedies in the courts, for example Hungary and the UK. In around one third of Member States, equality bodies may themselves initiate court proceedings either in the victim's and/or their own name (though sometimes the consent of the victim is required). In Belgium, Hungary and Ireland the equality bodies may bring claims addressing potentially widespread discrimination such as where there is no identifiable victim, in relation to patterns of discrimination, or as a public interest action (*actio popularis*). This allows action to be taken where there is no identifiable victim, where there are numerous victims, or where the victim is reluctant to single themselves out. A number of equality bodies may also intervene in legal proceedings between private parties in disputes relevant to their mandate.

Secondly, some Member States have gone beyond the directive by endowing equality bodies with a quasi-judicial role, allowing them to issue decisions on individual complaints. These states include Austria, Denmark, Hungary and the Netherlands.

Thirdly, a number of Member States have endowed equality bodies with powers to investigate cases of discrimination (for example, France and Sweden) and in some cases to impose sanctions. For some bodies this power can only be exercised in response to an actual complaint, but others are authorised to investigate cases on their own initiative. This mechanism is not quasi-judicial in the sense that the body does not hear a dispute between two parties, but more regulatory in nature. In some Member States, the power to investigate may extend to monitoring the impact of legislation. The frequency with which this latter function is exercised depends firstly on whether a body may act on its own initiative or only in response to a complaint, and secondly, on whether it has sufficient resources. In many Member States, no systematic monitoring has occurred of the impact that legislation has over a period of time.

These measures constitute an important means of enhancing the effectiveness of protection mechanisms. This is particularly true of those bodies that may undertake action on their own initiative since, as will be discussed below, there is a lack of knowledge among ethnic minorities of their rights or available procedures, as well as a reluctance to report incidences of discrimination. The facility of a quasi-judicial function also allows for faster, cheaper and, potentially, more simple access to a remedy than proceeding through the regular courts. The ability of equality bodies to initiate legal action, provide legal representation, or process claims themselves under a quasi-judicial procedure requires adequate financial and staffing capacity. For instance, resource constraints among some equality bodies (Bulgaria and Ireland) have led to delays in issuing decisions and the accumulation of a backlog of cases.

### 1.2.2. Surveys, reports and recommendations

The equality bodies in different Member States exercise a range of functions under their powers to conduct surveys and publish reports and recommendations. This may include issuing advice both to public bodies and private actors in their capacity as employers or providers of goods and services. Such advice may take the form of codes of practice, or the creation or review of equality action plans.

Some equality bodies also carry out other functions, such as offering advice to law-makers during the legislative process and engaging in awareness-raising. This activity may contribute to implementation of the obligation on Member States under Article 10 of the Racial Equality Directive to disseminate information about the directive. However, although most equality bodies engage in awareness-raising through publications, training and seminars, the range and intensity of this activity will inevitably be affected by factors such as the availability

<sup>27</sup> Although the relevant bodies in Poland have not been formally 'designated' as such, they are competent to perform the tasks required by the directive.

of resources and geographical accessibility. For instance, trade union representatives felt that equality bodies in Germany and Denmark were difficult to access because there was only one central office in these Member States.<sup>28</sup> The ability to raise awareness is, of course, dependent on the resources available to equality bodies. Where financial or staffing capacity is insufficient it has a significant impact on the ability of these bodies to advertise their services or improve public knowledge of the relevant legislation and procedures.

Some questions have also been raised regarding the independence of equality bodies from central government. This is owed to the relationship that an equality body may have with government ministries. This may be physical (where an equality body shares its premises with a ministry), financial (where a ministry determines the level of funding), organisational (where equality body's director is appointed by a minister or attached to a ministry). One or more of these concerns were expressed in relation to Italy, Malta, Hungary, Slovenia and Spain. While these issues may not affect the independence of the equality bodies in practice, they may give rise to unfavourable perceptions, affecting the confidence of victims to approach them.

The range of activities outside the sphere of dispute resolution constitute an important function of equality bodies because of the potential to provide long-term solutions to the promotion of equality by addressing potentially systematic and structural issues, as well as more broadly contributing to public awareness. This is particularly useful in pre-empting litigation by provoking the review of potentially discriminatory policies and practices before they give rise to a dispute. The contribution that these functions can make to realising equality will depend on the mandates of the equality bodies, the degree to which equality bodies have the resources to engage with different actors and the openness of public and private bodies to the advice offered.

### 1.3. Access to a remedy and dispute settlement

#### 1.3.1. Access to judicial and/or administrative procedures

The EU Member States are obliged, under Article 7 of the Racial Equality Directive, to ensure that judicial and/or administrative procedures are available to victims to enforce their right to equal treatment. All Member States offer remedies through judicial and/or quasi-judicial

mechanisms. Some Member States also apply penal procedures for certain forms of discrimination prohibited by the directive. Such complaints procedures can be referred to collectively as dispute settlement mechanisms.

Few Member States collect or publish data regarding the number of cases on racial or ethnic discrimination that are brought before a court. Where data on cases involving discrimination law is collected, the results are sometimes not disaggregated according to the ground of discrimination. Where information is available it suggests that the number of cases relating to racial or ethnic discrimination that go through the courts remain low for most Member States. For instance, in the UK in 2007, 2,511 cases of racial discrimination were referred to the Complaints Service of the former equality body, and of these 459 went on to the courts. However, in the overwhelming majority of other Member States where information was available it was more likely to see the number of (non-criminal) cases to date figuring between zero and 15. The picture is different if one takes into account the level of complaints received by the equality bodies. Again, some Member States have registered very few complaints. For instance, fewer than 20 were lodged with equality bodies in Estonia, Luxembourg, Malta, Portugal, Romania, the Slovak Republic, and Slovenia during 2008. At the other end of the scale the French equality body registered over 3,009 cases in 2009. Other equality bodies receiving more than a few hundred complaints in 2008 or 2009 include Belgium, Ireland and Sweden.<sup>29</sup> The low number of formally registered cases or complaints may be affected by the extent to which disputes are settled through informal mediation, where an agreement is reached at a very early stage upon initial contact from an equality body encouraging voluntary compliance. Depending upon the point at which equality bodies consider these cases as 'formally' registered, such claims might not be included in complaints statistics.

Article 7 also allows Member States to provide for enforcement of obligations under the directive through conciliation or mediation procedures. Mediation has the advantage of avoiding the legal costs and delays associated with judicial proceedings as well as the conflict and polarisation that may arise during dispute settlement mechanisms in general. However, it is also essential that the settlements achieved reflect the outcomes available through regular dispute settlement channels and that the interests of the victim are adequately protected. In some Member States, it is obligatory to attempt mediation before proceeding to other dispute settlement mechanisms. The involvement of equality bodies may range from directly offering mediation services, to simply referring cases to a third party mediator. Where equality bodies are directly involved in mediation, or where settlements reached must be approved by the equality

28 See FRA (2010e), p. 99.

29 The preceding figures are taken from FRA (2010a), pp. 33-34.

body, this may serve to ensure that the victims' interests are adequately protected. However, it is not possible to have an overview of whether mediation allows for effective, proportionate and dissuasive sanctions across the EU since, for the most part, the results of cases are not made public.

### 1.3.2. Proof of discrimination

Article 8 of the directive requires Member States to allow for the burden of proof to be shared between the claimant and the respondent in cases of discrimination, except in Member States where it is for the court or competent body to investigate the facts. Accordingly, where the claimant establishes facts from which it may be presumed that discrimination has occurred, it is for the respondent to prove that the principle of equal treatment has not been breached. This provision articulates a principle already established in the case law of the Court of Justice of the European Union (CJEU) concerning discrimination on the ground of sex.<sup>30</sup> It is considered as particularly valuable in assisting claimants in discrimination cases where most of the evidence needed to prove discriminatory treatment rests with the perpetrator. Nevertheless, this constituted a new development in the law of several Member States. A small number of Member States appear not to have explicitly incorporated this principle into their rules of civil procedure, or have not applied it during court proceedings.

A further development relates to the breadth of the concept of discrimination, which may make it easier to prove. In this sense the CJEU has accepted that discrimination against an individual 'on the ground of a protected characteristic need not relate directly to a characteristic held by the actual victim. Thus in the *Coleman* case the CJEU accepted that the claimant had been discriminated against 'on the ground of' disability because she received unfavourable treatment as a result of her child's disability.<sup>31</sup> This approach has been recognised in the legislation of Bulgaria, Ireland and, to a lesser extent, Austria. Application of the prohibition on discrimination in this manner allows for more effective realisation of the directive's goal to promote equality.

In order to be able to substantiate a claim of discrimination the claimant must prove that they have received less favourable treatment than other individuals in a comparable situation. However, this information may sometimes be difficult to obtain. For instance in

order to prove a claim of direct discrimination in the context of pay a claimant will need access to evidence that they are receiving less pay than colleagues in similar posts with similar levels of experience or qualifications. However, this information is not always readily available. In order to prove indirect discrimination it is necessary to show that a uniform (that is, apparently 'neutral') rule or practice has a disproportionately negative impact on a particular group of persons characterised by, for instance, their racial or ethnic origin. In certain situations this requires the production of statistical data. For instance, it may be shown that a service provider, who refuses to offer a service in a particular neighbourhood, is in fact committing indirect discrimination on production of evidence that this area is populated predominantly by members of an ethnic minority. Statistical data has been accepted as evidence capable of giving rise to a presumption of discrimination by the CJEU and the European Court of Human Rights and its use is well established in the UK and the Netherlands.<sup>32</sup> However, this practice remains uncommon in many Member States, since data which might be of assistance is not actually collected – the reasons for which are discussed below.

More than a third of Member States allowed for 'situation testing' to be used in order to prove the existence of discrimination, subject to certain criteria (Belgium, Bulgaria, the Czech Republic, Finland, France, Hungary, Latvia, the Netherlands, Sweden and the UK).<sup>33</sup> 'Situation testing' has been conducted by some equality bodies and NGOs and involves using both members of the majority population and minority groups who may try to access a particular service, such as entry to a restaurant or bar. Similarly, it may involve sending out job applications from candidates with identical qualifications and employment histories but with names identified both with the majority population and ethnic minorities. Where evidence is collected that members of the minority group are systematically treated less favourably without objective justification this has been accepted as proof of discriminatory treatment by the courts. Situation testing is particularly useful for proving incidents of direct discrimination, though its application for indirect discrimination may be more limited given the need to show that apparently neutral rules or practices have an impact on group sharing a particular characteristic as a whole.

While the Member States are not obliged under the Racial Equality Directive to collect statistical data or introduce the device of 'situation testing' they both constitute valuable measures in promoting equality. Particularly with regard to data collection, enforcing the prohibition

30 For example, *Enderby v. Frenchay Health Authority and Secretary of State for Health*, [1993] ECR I-5535, paragraph 14.

31 It should be noted that this case related to discrimination on the basis of disability rather than race. However, does not seem unreasonable to expect the concept of discrimination by association to be applied more generally.

32 For example, CJEU, Joined Cases C-4/02 and C-5/02, *Hilde Schönheit v Stadt Frankfurt am Main* and *Silvia Becker v Land Hessen*, [2003] ECR I-12575; European Court of Human Rights (ECtHR), *D.H. and Others v The Czech Republic*, [GC] No. 57325/00, 13 November 2007.

33 I. Rorive (2009), p. 56.

on indirect discrimination is greatly facilitated by the existence of statistics disaggregated by ethnicity and other personal characteristics such as age.

### 1.3.3. Assistance from civil society organisations

Article 7 of the Racial Equality Directive obliges EU Member States to ensure, in accordance with national law, that associations, organisations or other legal entities may engage in judicial or administrative proceedings on behalf of or in support of victims, with the victim's permission. The CJEU clarified in the *Feryn* case that Member States may also adopt more generous rules of legal standing, allowing claims to be brought without the permission of the victim, or even where no identifiable victim exists.<sup>34</sup> The role of such civil society organisations, which may include NGOs, trade unions or equality bodies<sup>35</sup> themselves, is particularly valuable in facilitating the enforcement of discrimination law for several reasons. Firstly, their participation may help to reduce the financial and personal burden on individual victims, giving them greater access to justice. Secondly, particularly where the permission of the victim is not required, the ability to enforce the directive is enhanced since, as noted below, members of ethnic minorities are often unaware of their rights or available procedures or unwilling to pursue claims. Thirdly, if claims can be brought even in the absence of an identifiable victim, it allows cases to be chosen on a strategic basis in order to address those practices that result in discrimination against large numbers of individuals.

In Denmark, Finland, Sweden and the UK no special rules appear to regulate associations in discrimination procedures.<sup>36</sup> However, individual lawyers working for associations such as NGOs or trade unions may represent a victim with their permission. In other Member States more specific rules existed. In many Member States NGOs were able to provide legal representation or initiate court proceedings either in the name of the victim or on their own behalf. NGOs were able to bring cases to court without the consent of the victim in certain circumstances (such as for 'class actions'), for example in Bulgaria, Hungary, Italy and the Slovak Republic. In other Member States the consent of the victim is required, for example in Latvia, Lithuania, and Spain (though in the latter only in cases outside the sphere of employment). In other Member States it appears that the standing of NGOs is more limited, either to appearing before particular bodies or a right of third party intervention.

In more than half of the Member States victims are entitled to be represented by trade unions in at least some dispute settlement fora: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Germany, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain and the UK. Trade unions in some Member States also provide financial assistance to cover the legal costs of those involved in disputes. They were also able to initiate legal proceedings upon satisfaction of certain criteria in the following Member States: Belgium, Bulgaria, Denmark, France, Italy, Malta, the Netherlands, Poland, Romania, Spain and Sweden. In Cyprus, Hungary and Italy trade unions were entitled to bring claims of a 'collective' nature (that is, where a large group of individuals are affected, or there is no identifiable victim).

The ability of civil society organisations to provide assistance or engage in litigation is dependent upon expertise and resources. For instance, in the Netherlands a national network of professionally-run anti-discrimination agencies is funded by local municipalities. Although these bodies do not engage in litigation themselves they are able to resolve many disputes informally. Similarly, in Sweden and the UK, NGO advice centres receive funding or other forms of support from equality bodies. Although civil society organisations appear to play an important role in referring cases to equality bodies and participating in litigation, a lack of human and financial resources constitutes a significant limitation on their capacities, and public funding is mostly sparse or unavailable.

### 1.3.4. Effective, proportionate and dissuasive sanctions

Article 15 of the Racial Equality Directive requires Member States to ensure the application of effective, proportionate and dissuasive sanctions for breaches of the rules contained in the directive. Such sanctions may consist in the payment of compensation. This reflects case law developed by the CJEU requiring that remedies in national law for breaches of rights deriving from EU law be effective, including that compensation be proportionate to the damage suffered and that it be sufficient to have a deterrent effect on the offender.<sup>37</sup> In some Member States remedies for breaches of the directive are provided for in administrative or criminal law, and although the relevant dispute settlement bodies may impose fines, they do not generally have the power to issue compensation. Where remedies for discrimination are only available under administrative or criminal, and not civil procedures, this may preclude compensation

34 CJEU, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn VN*, [2008] ECR I-5187.

35 Where equality bodies may bring claims or assist claimants this is noted above in section 1.2.1.

36 European Network of Legal Experts in the non-discrimination field (2009), p. 63.

37 For example, Case C-14/83, *Von Colson and Kamman v Land Nordrhein-Westfalen*, [1984] ECR 1891; Case C-271/91, *Marshall v Southampton and South West Hampshire Area Health Authority II*, [1993] ECR I-4367.

for victims. While these remedies may be effective and dissuasive the lack of compensation may act as a disincentive to bring claims.

In addition, the decisions of some quasi-judicial bodies are not legally binding, which could call into question their effectiveness and their dissuasiveness. For instance, in Austria, Latvia and the Netherlands the equality bodies may only issue non-binding recommendations. This also undermines their ability to act as viable alternatives to judicial proceedings, which is important given the financial burdens associated with the regular courts.<sup>38</sup> Furthermore, equality bodies may not always have sufficient resources to engage in effective follow-up activities to verify implementation of their decisions.

Where actions are pursued through the civil courts a range of remedies tend to be available. Article 14 of the directive obliges Member States to ensure that contractual provisions contrary to the principle of equal treatment 'are or may be declared, null and void', which would suggest that this should be available as a remedy through the courts. The FRA research indicates that 19 EU Member States offer remedies in addition to financial compensation, including: an injunction to cease a discriminatory act, an order to publish or display a finding of discrimination on the perpetrator's premises, an order of reinstatement or reengagement, nullification of discriminatory contractual provisions, and a range of other orders to take specific courses of action. Most Member States allow for compensation to be calculated both on the basis of the victim's economic losses (pecuniary damages) and for distress and inconvenience (non-pecuniary damages), although it seems that some states either do not provide for or rarely award compensation based on the latter (for instance, Malta, the Netherlands and Poland). Two Member States (Cyprus and the UK) allow for the award of punitive (or 'exemplary') damages where the normal rate of compensation is not considered sufficient deterrent in itself.<sup>39</sup>

Few Member States collect or publish data regarding the level of sanctions or compensation issued, making it difficult to comment on the overall picture of remedies. Neither does there appear to be data available to suggest how levels of compensation for cases of discrimination on the basis of racial or ethnic origin compare to those on other grounds across the Member States. In the UK, where this data is available, awards of damages for racial discrimination were on average higher than awards in cases of all other types of discrimination, save for disability. The level of financial compensation appears to vary considerably among the Member States. In

2007-2008, in the UK the average award of damages for cases of racial discrimination was around £17,000. In Finland, in 2006, in the nine cases where discrimination was found to have occurred the compensation awarded varied between €50 and €500. In Austria and Lithuania, in the only reported court cases (one in each Member State) of discrimination sums in the region of €800 were awarded. In Germany, compensation for discrimination in the recruitment process this is capped at three months' salary. In Hungary, in cases of discriminatory dismissal compensation is capped at 12 months' salary. In Belgium, a claimant may request damages to be calculated according to a flat-rate of €1,300. In the context of labour relationships, compensation levels in Belgium are set at six months' salary. In both cases the level of compensation can be halved if the employer can prove that the same course of treatment would have been adopted even in the absence of discrimination.

It is difficult to determine whether the Member States are applying effective, proportionate and dissuasive sanctions without further research being conducted into how they compare to the cost of living and other factors related to the provision of social security in particular Member States. However, it would not appear that the differences in levels of compensation noted above can be explained purely by reference to factors such as cost of living or average income. That is, it could be expected that Member States with similar living costs would apply similar levels of compensation. Although only limited data is available, this does not seem to be the case.<sup>40</sup> At the same time it should be noted that trade union respondents in the FRA study, *The impact of the Racial Equality Directive: Views of trade unions and employers in the European Union* often referred to the sanctions applied in discrimination cases as being too low to act as a deterrent to employers, who were easily able to absorb the costs.<sup>41</sup> What is clear is that there is considerable variation in: the amounts awarded; the availability of non-pecuniary or punitive damages; and the frequency with which these are awarded.

## 1.4. Social dialogue

Article 11 of the Racial Equality Directive requires Member States to promote equality through social dialogue between the social partners – that is employers and employees, usually represented through employers' organisations and trade unions. The directive recognises the key position social partner organisations have in dealing with employment issues and their potential to play an important role in promotion of diversity and

38 European Network of Legal Experts in the non-discrimination field (2009), pp. 58-59.

39 See: FRA (2011); European Network of Legal Experts in the non-discrimination field (2009), pp. 69-73.

40 See Eurostat, 'GDP per capita in Purchasing Power Standards' on: [epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&code=tsieb010](http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&code=tsieb010).

41 FRA (2010e), p. 110. Similar concerns are raised in European Network of Legal Experts in the non-discrimination field (2009), pp. 69-72.

tolerance. This may include the conclusion of agreements giving effect to the prohibition of discrimination as laid down in the directive.

Interviews conducted by the FRA with the social partners found evidence of collective agreements dealing with discrimination across the EU Member States. These occurred at the national, regional, branch, but also company level, depending on the country's model of industrial relations. Several agreements created internal complaints procedures for cases of alleged discrimination. Examples of fruitful collaboration are not confined to particular Member States. However, there was evidence that agreement on the issue of racial discrimination had proved more difficult to reach as part of collective agreements than sex discrimination, which was considered to be a longer-established and better understood issue.<sup>42</sup>

Several respondents reported successful social dialogue initiatives that were supported by the EQUAL programme of the European Commission. A variety of initiatives were reported such as promotion of collective agreements on discrimination, awareness-raising, supporting the creation of networks of trade unions and employers to facilitate case-by-case consultation, and supporting dialogue between the social partners and NGOs in developing anti-discrimination policies and practices. One concern raised among social partners interviewed was that the impact of the programmes was not always sustained once EU funding had been exhausted.<sup>43</sup>

## 1.5. Promotional measures

The Racial Equality Directive contemplates combating discrimination through measures that actively promote equality. This can be given effect in two ways: firstly, through 'positive action'; secondly through adopting a preventive approach to indirect discrimination.

Firstly, Article 7 expressly authorises the EU Member States to take 'positive action', 'maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin'.<sup>44</sup> The permissibility of such measures is also recognised under United Nations human rights treaties to which all the

Member States are party, which refer to these applying the term, among others, 'temporary special measures'.<sup>45</sup>

This could include, for instance, taking broad measures to promote social inclusion, such as undertaking housing projects integrated with vocational or other training programmes,<sup>46</sup> or more specific programmes, such as targeting persons belonging to minorities in recruitment drives.

In some situations the adoption of 'positive action' or 'temporary special measures' may result in members of the majority population receiving less favourable treatment than the targeted minority. This could occur, for instance, if policies of preferential treatment for members of minority groups were applied in the context of employment. Where this is the case the UN treaty bodies and the CJEU have underlined the need to ensure that such measures do not extend in scope beyond what is strictly necessary to achieve the goal of eliminating inequalities.<sup>47</sup> In concrete terms the CJEU has maintained that in the context of employment consideration should be given on a case-by-case basis without applying an automatic and unconditional priority for minority candidates.<sup>48</sup>

Secondly, the prohibition of indirect discrimination contained in Article 2 could be approached preventively rather than in reaction to specific disputes. Direct discrimination can be remedied simply by abolishing rules that accord less favourable treatment on the basis of a protected characteristic. However, indirect discrimination requires a more 'positive' approach in that rules and practices must be adapted to take into account the differences that flow from a protected characteristic. This could include, for instance, making allowances for variations in rest days, dress codes, dietary requirements

45 For example, the UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination UN Doc. CERD/C/GC/32, 24 September 2009. See also (reprinted in UN Doc. HRI/GEN/1/Rev.9, Vol. II, 27 May 2008): UN Committee on Economic Social and Cultural Rights, General Comment 13: The Right to Education; the UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures); UN Human Rights Committee, General Comment No. 18: Non-Discrimination; UN Committee on the Elimination of Racial Discrimination, General Recommendation 30 on Discrimination against Non-Citizens.

46 For an example of this multifaceted approach see FRA (2009f). See also FRA (2009j).

47 UN Committee on the Elimination of Racial Discrimination, General Recommendation 32 (above, note 45), paragraphs 21-26. UN Committee on the Elimination of Discrimination Against Women, General Comment No. 25 (above, note 45), paragraph 22.

48 UN Committee on the Elimination of Racial Discrimination, General Recommendation 32 (above, note 45), paragraphs 21-26. Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, [1995] ECR I-3051; Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, [1997] ECR I-6363; Case C-407/98, *Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, [2000] ECR I-5539.

42 FRA (2010e), pp. 101-105.

43 FRA (2010e), pp. 105-106.

44 See in greater detail FRA and ECtHR (2011).

or working hours to reflect the different ethnic backgrounds of workers. Indirect discrimination can be addressed in a preventive manner by reviewing existing practices and laws to ensure that apparently neutral rules do not create less favourable results for minorities. This in turn may pre-empt resort to complaints mechanisms. Similarly, the principle of racial and ethnic equality could be mainstreamed into policy-making to ensure that new rules and practices are adjusted as appropriate to take into account differences that may result from racial or ethnic origin.

In the context of employment, such preventive or promotional measures can be found across several Member States both among government policies and practices, but also among employers and trade unions. In the UK, Finland, Belgium, Hungary and Sweden there is a legal obligation to take a variety of measures – which may apply to public or private entities – such as assessing and monitoring the impact of policies on racial equality, adjusting practices that prevent the realisation of equality, the creation of equality plans, the introduction of measures to reflect ethnic diversity proportionately in workforces, or the introduction of training or education to facilitate the participation of persons belonging to minorities. Similarly the social partners reported several initiatives, such as offering extra training or language tuition to ethnic minority employees, targeted recruitment drives, reviewing the ethnic make-up of workforces, adjusting criteria for posts to focus on generic skills rather than formal qualifications, diversity training and codes of conduct for employers, and awarding prizes for best equality practices.<sup>49</sup>

In the context of housing some Member States have developed generalised policies of anti-segregation, such as Hungary, which conditions access to funding for urban development by local authorities on the elaboration of an 'Integrated Development Strategy', including an 'Anti Segregation Plan'.<sup>50</sup> Research has also shown the existence of good practices across several Member States that integrate improvements in housing conditions with measures to improve the qualifications, accessibility to public services and assistance in entering the job market.<sup>51</sup> In this respect it should be noted that the European Commission has highlighted the possibility of using the European Social Fund and European Regional Development Funds to improve housing conditions, particularly for Roma.<sup>52</sup>

In the context of education, examples of promotional measures can be found in several Member States, including free mother-tongue education, intercultural teacher training, training of Roma as teaching assistants, and desegregation projects.<sup>53</sup> As in relation to housing, the European Commission has indicated that Structural Funds may be used to assist with the integration of Roma children in the education system.<sup>54</sup> It should also be noted that funds were directed at supporting improvements in education for Roma through the EU PHARE programme, assisting those Member States that joined the EU since 2004.<sup>55</sup>

49 FRA (2010e), pp. 62-68.

50 FRA (2009j), p. 46.

51 EUMC (2005), pp. 114-115; FRA (2009j), Chapter 4. See also detailed discussion of good practice case studies by the FRA: in the UK (2009a), Hungary (2009b), Spain (2009c), the Czech Republic (2009d), Slovakia (2009e) and Ireland (2009f).

52 European Commission, *The Roma in the European Social Fund 2007-2013*, available at: [ec.europa.eu/employment\\_social/esf/docs/roma\\_en.pdf](http://ec.europa.eu/employment_social/esf/docs/roma_en.pdf)

53 EUMC (2004), Chapter 7; EUMC (2006), Chapter 4; FRA (2010), pp. 71-73.

54 European Commission, (see above, note 52).

55 EUMC (2006), p. 98.



## 2. Challenges to realising the aims of the Racial Equality Directive

Chapter 2 discusses existing challenges to attaining the goals of the directive. These obstacles cluster principally around the means through which the directive is given effect, in particular factors affecting the extent to which equality can be created by reliance on complaints procedures. The potential for dispute settlement as an effective mechanism to enforce the rights contained in the directive is limited by several factors: legal costs, a lack of rights awareness, a reluctance to report incidences, and a tendency towards denial of discrimination as a problem. At the same time the social partners have raised objections to the emphasis placed on dispute settlement as the means for achieving equality. This is not to say that enforcement through the courts and other complaints mechanisms is not crucial in ensuring the effectiveness of the prohibition on discrimination. But in addition to the difficulties noted, dispute settlement procedures are geared towards individualised remedies and are therefore not ideal for addressing broader disadvantage experienced by entire population groups or prevalent in entire social settings. Reliance on dispute settlement, which reacts to specific breaches (where they are reported), should be complemented by policies to promote equality, which prevents breaches. As noted, this has occurred across several Member States, but the extent to which such policies can be developed is in turn hindered by the lack of statistical data. Without such data the degree to which particular groups may be disadvantaged and the areas of life in which they are affected become difficult to identify. Neither can progress towards the realisation of equality be accurately measured.

### 2.1. Awareness of equality legislation

Article 10 of the Racial Equality Directive requires Member States to disseminate information about provisions in place to give effect to the directive. Awareness of equality legislation and complaints procedures is important among potential victims so that they are able to enforce their right to equal treatment. It is also important among potential perpetrators in order to act as a deterrent. Awareness-raising activities can be found among many of the Member States, including central government publications, educational initiatives, training, roundtables and public events, including activities funded under the European Year of Equal Opportunities for All in 2007.<sup>56</sup>

The FRA *EU-MIDIS* survey undertook interviews with 23,500 immigrants and members of ethnic minorities across the 27 EU Member States.<sup>57</sup> Individuals were asked about their experiences of discrimination across different contexts covered by the directive (such as accessing certain goods and services and employment), including their awareness of legislation and complaints procedures of which they could avail themselves. It should be noted that there was great variation between results for different Member States as well as variation between different minority groups within the same Member State. For the most part, however, the average figure across the EU will be referred to.<sup>58</sup>

It was found that on average 82 per cent of those who had experienced discrimination in the 12 months preceding the interview did not report the most recent incident to a competent authority. Among the reasons for non-reporting is linked with a lack of awareness (although other considerations also appear to play a role, as discussed below). Around one third of those who had experienced discrimination without reporting it stated that they did not report the incident because they did not know how or where to do so.

Overall, only 16 per cent of those coming from immigrant or ethnic minority backgrounds indicated that they were aware of any organisation that supports victims of discrimination (such as an NGO or an equality body). Sixty-three per cent of respondents indicated that they had not heard of the designated equality bodies in their country of residence. Fifty-seven per cent were unaware or unsure about the existence of legislation prohibiting discrimination on grounds of racial or ethnic origin when applying for a job, when entering or while in a shop, restaurant or club, or when buying or renting accommodation.

The fact that awareness-levels are low is also borne out by research in the context of housing. FRA research indicates that between 2000 and 2009 approximately 550 housing related discrimination complaints were filed with national equality bodies or Ombudsperson offices across the Member States.<sup>59</sup> It does not seem plausible to interpret this low figure to suggest that discrimination in this area is negligible, particularly in light of well-documented discriminatory practices against the Roma and Travellers.<sup>60</sup> Further, 376 of the 550 complaints were accounted for by

56 See further: European Network of Legal Experts in the non-discrimination field (2009), pp. 82-84.

57 The following figures are taken from: FRA (2009b), p. 13; FRA (2010c), p. 3.

58 For a detailed breakdown of figures see FRA (2009i).

59 FRA (2009j), pp. 22-25.

60 EUMC (2005); FRA (2009j).

only two Member States (Ireland and Finland).<sup>61</sup> The low numbers coupled with uneven distribution suggests that a lack of awareness, as well as other factors affecting reporting of incidents (discussed below), constitutes a significant problem.

In the context of employment, interviews with the social partners revealed that, in most Member States, trade unions were markedly more likely to be aware of equality law and the existence of an equality body than employers. Even so, awareness levels were not always high among the social partners in general.<sup>62</sup> Several factors were put forward among the social partners to explain a lack of awareness among employers and employees.

Firstly, it was noted that small and medium sized enterprises were less likely to be aware of the legislation than larger employers because such information would usually be collected and disseminated through human resources managers, which are less likely to be found among smaller firms.<sup>63</sup> Secondly, awareness was said to be lower among Member States where a detailed legislative framework for combating racial or ethnic discrimination had not been in place before the introduction of the directive.<sup>64</sup> Thirdly, employees were said to be less aware of legislation where they worked either in seasonal employment, or where they worked in the informal economy, both of which sectors may be more likely to affect workers from minority backgrounds. Seasonal workers were said to be more likely to be acquainted with immigration laws, while those working in the informal economy were, as a consequence, subject to employers who were less to comply with legislation and were unregulated in practice. Such workers were also less likely to belong to trade unions, which might otherwise have provided information on their rights.<sup>65</sup>

## 2.2. Failure to recognise and reluctance to report discrimination

The prevailing attitude among the social partners from some Member States, particularly the 12 Member States joining the EU after 2004, but also some southern EU Member States, was that discrimination simply did not exist. This can be illustrated most starkly in relation to attitudes expressed in relation to the Roma. For instance, one trade union respondent stated: 'We don't see a lot of discrimination here in Lithuania at all [...]. As regards Gypsies, our employers do not like to have workers who are Gypsies.'<sup>66</sup> Similar responses were gathered

during the course of the FRA research in several Member States. Previous research of the EUMC suggested that discrimination was more likely to be perceived as a 'new' phenomenon among Member States where the extent of immigration has historically been low.<sup>67</sup> The prevalence, among the social partners from Member States joining the EU more recently, of the view that discrimination was not a problem may go some way to explaining why many of the EU-12 did not have a detailed non-discrimination regime before the Racial Equality Directive. Put otherwise, where there is a lack of awareness or recognition that discrimination is a problem, a society may be less likely to generate a demand for regulation in this area.

It seems that the view among some social partners that discrimination did not exist in their Member States, could be exacerbated by the fact that minorities were simply resigned to unfavourable treatment as a normal part of life. As such they were simply satisfied with being in employment and felt that complaining about unfavourable treatment could result in dismissal. This would appear to be supported by information presented in the *EU-MIDIS* results. Although lack of awareness was one factor resulting in non-reporting of incidents of discrimination, there were other reasons given by respondents:

- 63 per cent stated that nothing would happen or change;
- 40 per cent stated that they considered the incident to be too trivial or 'normal' in that it happened with great frequency;
- 26 per cent were concerned about negative consequences;
- 14 per cent feared intimidation from the perpetrators.<sup>68</sup>

These responses were supported by the views of employers and trade unions gathered by the FRA. The social partners tended to agree that a lower number of complaints against racial or ethnic discrimination existed than would otherwise be expected because: many workers did not wish to risk losing their jobs; they were not convinced that penalties would make a difference; and most minority workers were so thankful to have a job that they simply tolerated or did not recognise that they were subject to discrimination.<sup>69</sup>

A further factor acting as an obstacle to bringing a claim appears to be the burdens that may be involved. In this sense the *EU-MIDIS* study found that overall 21 per cent of respondents who had been discriminated against stated that their reason for not reporting the incident was

61 FRA (2009j), pp. 22-25.

62 FRA (2010e), pp. 38-42.

63 FRA (2010e), p. 41.

64 FRA (2010e), pp. 57-59.

65 FRA (2010e), pp. 58-59, 78-79.

66 FRA (2010e), pp. 85, 41, 59-61.

67 EUMC (2003b), pp. 84-85.

68 FRA (2009h), p. 9.

69 FRA (2010e), pp. 95-98.

due, at least in part, to the fact that procedures were too cumbersome or time consuming.<sup>70</sup> This issue also appears to apply even in the context of accessing complaints procedures within trade unions themselves.<sup>71</sup>

### 2.3. Legal costs

In some Member States the potential cost of judicial proceedings (such as court and lawyers' fees, or principle that the 'loser pays' the costs of both sides) was put forward as having a significant deterrent effect on victims. The 'loser pays' principle is applied in 22 Member States, though in some Member States there is discretion not to apply this rule in light of the parties' financial or personal situation. Some Member States also allow for the waiver of court fees (e.g. Poland and Latvia) or the non-applicability of the 'loser pays' principle (e.g. Germany, the UK) for cases of discrimination in the context of employment. The FRA study *Access to justice in Europe* notes that members of the FRA network of legal experts (FRALEX) in almost one third of the Member States stated that, in their professional opinion, legal costs were so high as to represent a significant obstacle to obtaining access to justice. Although all Member States offer some form of legal aid, rules on the determination of eligibility vary.

Three factors may help to offset the problem of high legal costs. Firstly, mediation services may prove faster and cheaper than other dispute settlement mechanisms. However, as noted above, it is important to ensure that where settlements are reached these adequately reflect victims' rights. This role of verification is played by some equality bodies. Secondly, quasi-judicial dispute settlement mechanisms available through the equality bodies may be faster and available at no or at a lower cost than judicial proceedings. However, this is not available across all the Member States. Thirdly, the ability of civil society organisations to support victims or take cases on their behalf can reduce the financial and personal burden of legal action on the individual claimant. However, there are two limitations. As noted above, limitations on human and financial resources among civil society organisations will dictate the number of cases that they may undertake. Further, the criteria imposed under national law that such organisations need to satisfy in order to be eligible to exercise this function limits the number of organisations available to victims. For instance, in Germany an association wishing to act as counsel for a victim must operate on a non-profit and non-temporary basis, have at least 75 members, or be comprised of at least seven associations acting together. In Italy, associations must first register with public authorities, but this process can be a lengthy process. In France and Luxembourg, such

associations must have already been in existence for at least five years.

Some issues specific to trade unions affecting their ability or inclination to support victims of discrimination were noted in interviews with the social partners.<sup>72</sup> Firstly, during periods of economic difficulty the need to ensure racial equality had to be balanced against protectionist tendencies to preserve employment among majority-population members. This situation threatens to reverse gains made in promoting equality in the past. Secondly, some respondents reported that priorities lay more in ensuring that trade union activists in general were not discriminated against by employers, rather than protecting persons belonging to minorities. Thirdly, while measures to combat racial discrimination might be welcomed among the hierarchy of some trade unions, it was stated that there were difficulties in ensuring that these were actually applied on the ground (in part because of protectionist attitudes among the workforce). Fourthly, some respondents among the social partners stated that the support offered by trade unions to individuals, such as legal advice, was either insufficient or gave rise to an overly bureaucratic and cumbersome procedure.

These factors may well act as a barrier to trade unions constituting a channel or vehicle for pursuing complaints of discrimination. Respondents from Belgium were of the opinion that the number of complaints dealt with by the equality body that had been referred by trade unions was disproportionately low (15 per cent).<sup>73</sup> Perhaps as a consequence of these difficulties, it was also reported by trade unions that individuals often resorted to NGOs to pursue claims. Trade unions themselves, however, viewed this as potentially undermining of their traditionally collective approach to resolving issues with employers.<sup>74</sup>

### 2.4. Limits of dispute settlement as a means of achieving equality

Several difficulties raised by the social partners appear to relate to the means through which the directive is given effect. That is, there was a perception that the directive addresses discrimination through the imposition of a prohibition that is then enforced through dispute settlement, when other promotional and preventive means of creating equality may be more appropriate.

Firstly, some employers stated that the directive imposed a heavy burden on them. In practical terms it placed them under an obligation to supervise workers to ensure that no discrimination occurred between employees.

70 FRA (2009h), p. 9.

71 FRA (2010e), p. 77.

72 FRA (2010e), pp. 71-74, 79, 83, 89.

73 FRA (2010e), p. 77.

74 FRA (2010e), pp. 93-94.

In addition, the shared burden of proof created additional administrative tasks in ensuring appropriate documentation was available in the event of a challenge. The shared burden of proof was also seen as open to abuse by individuals who may threaten employers with false claims and obtain compensation because employers feel they would be unable to rebut a presumption of discrimination.<sup>75</sup>

Secondly, the directive was seen by trade unions as potentially undermining of their role. Many representatives felt that it encouraged individuals to pursue individual remedies, often beyond the trade union structure, which itself conflicted with the process of collective bargaining.<sup>76</sup>

Thirdly, the directive was seen as unsuitable for achieving equality.<sup>77</sup> On the one hand this was because it was attempting to regulate prejudicial attitudes by punishing discriminatory behaviour. It was felt that it was more effective to take measures to challenge these attitudes through measures other than the application of sanctions, such as awareness-raising, dialogue or education. In part this was because, as noted above, sanctions were seen as affordable to employers and therefore not a sufficient disincentive to discriminate and in part because such attitudes could be concealed behind other motives. On the other hand the directive was not seen as suitable because while it could be used to punish individual incidents it could not redress discrimination against entire groups (discussed below).

## 2.5. Complementary means: data collection and preventive/promotional measures

It is important that measures to prevent discrimination and promote equality operate in conjunction with dispute settlement procedures. Dispute settlement mechanisms are essentially reactive, in that they are put in motion in order to address specific incidents, and the remedies awarded are often confined in their impact to the participants in the particular case. While they may provoke broader changes in legislation or practice, dispute settlement mechanisms are not adapted to this purpose. Where the difficulties faced by particular minorities relate to a number of interlocking social and economic factors, litigation alone may not provide an adequate solution. This sentiment was captured well by one trade union respondent: 'Any measures that depend on being taken up on the initiative of individuals cannot

have a sustainable impact on the generally discriminatory situation of whole population groups.'<sup>78</sup>

In the context of employment, minorities tend to have lower rates of participation in the employment market, higher rates of unemployment, be underrepresented among entrepreneurs, be highly concentrated in lower-skills areas such as agriculture, industry and the service sector and have lower incomes by comparison to the majority population.<sup>79</sup> In the context of housing, EUMC and FRA studies reveal that members of certain minority groups appear more likely to experience *de facto* segregation, a generally lower quality of housing (in some cases informal housing), accompanied by a lack of security of tenure, often located in sites with inadequate infrastructure linking them to health and education services or employment markets, as well as poorer sanitation facilities.<sup>80</sup> In the area of education, FRA research indicates that minority groups tend to enrol in schools with lower academic demands, have higher drop-out rates, and be over-represented in vocationally-oriented training and special education. Classroom segregation and placement in special schools was noted as a particular problem affecting Roma children in certain Member States.<sup>81</sup> There are, of course, variations within and between minority groups with some enjoying equality in the spheres of employment, education and housing.<sup>82</sup>

At the same time, the disadvantaged position of minorities across these areas does not always stem from instances of direct discrimination. For instance, some employers interviewed during FRA research cited the lack of adequate (formally certified) qualifications in order to prefer candidates from the majority population over Roma candidates.<sup>83</sup> A requirement to possess appropriate qualifications may constitute a legitimate reason to differentiate between candidates. Thus, while this may not constitute direct discrimination, it may result in a situation where particular minority groups with inadequate access to education become effectively excluded from entry into certain categories of employment. Similarly, in the context of housing, while minorities tend to enjoy less favourable living conditions, *EU-MIDIS* results suggest that experiences of incidents of direct discrimination among minorities were relatively low, as compared to other areas, such as employment.<sup>84</sup>

This shows that the disadvantages experienced by minorities cannot be dealt with simply by prohibiting discrimination. In this, as previous EUMC and FRA studies

75 FRA (2010e), pp. 9, 47, 52, 55-56.

76 FRA (2010e), pp. 93-94.

77 FRA (2010e), pp. 53-55.

78 See for example, discussion in: FRA (2010e), p. 81.

79 FRA (2010d), Chapter 2.

80 EUMC (2005), Chapters 4 and 6.3; FRA (2009j), Chapter 4.

81 EUMC (2006), p. 8; FRA, (2010a) pp. 69-70.

82 EUMC (2004), Chapters 4 and 5. FRA (2010c), Chapter 2.

83 FRA (2010e), pp. 59, 82-83.

84 FRA (2009i), 43-44.

have indicated, a lack of access to education, housing or healthcare, may give rise to built-in or structural disadvantages that prevent an individual from acquiring suitable qualifications, level of health, or stable housing that in turn has an impact in other areas such as the ability to access employment.<sup>85</sup> This in turn may give rise to differences in wages, the accessibility of certain professions and areas of the employment market, and levels of employment more generally.<sup>86</sup> The interlocking nature of discrimination in the area of health, education, housing and employment reveals the need for holistic policies to improve the socio-economic position facing many members of minorities.

While examples of good practice can be found, such as the adoption of holistic approaches to social exclusion by combining measures to increase access to housing, training, employment and public services for disadvantaged minorities, these tend to be project-driven. In this sense they do not typify a generalised and state-wide approach.<sup>87</sup> Similarly in the sphere of education, although good practices can be found their impact is limited by several factors. For instance, most of the initiatives mentioned in the previous chapter were not available in all Member States, were of a voluntary nature, were offered mainly only in primary schools, or were not applied throughout the state.<sup>88</sup>

One major obstacle to developing proactive policies of social inclusion is the absence of ethnically disaggregated data, which would allow Member States to begin the process of assessing the extent of inequality in different sectors. Although the directive does not explicitly require the collection of such information, Member States are obliged to take steps in this regard under the International Convention on the Elimination of All Forms of Racial Discrimination, to which all the EU Member States are party.<sup>89</sup> Currently, this appears only to be collected in the UK, Ireland, the Netherlands and Finland.<sup>90</sup> Some Member States which formerly collected data in particular areas appear to have abandoned such practices (such as Lithuania and the Slovak Republic).<sup>91</sup> In others the collection of ethnically disaggregated data is actually illegal. In this regard the UN Committee on the Elimination of Racial Discrimination, under the state

reporting procedure has urged, for instance, France Germany and Portugal, whose law does not appear to permit the collection of racially disaggregated data, to include ethnic and racial data in their census on 'anonymous and purely voluntary ethnic and racial self-identification by individuals' to allow them 'to identify and obtain a better understanding of the ethnic groups in their territory and the kind of discrimination they are or may be subject to, to find appropriate responses and solutions to the forms of discrimination identified, and to measure progress'.<sup>92</sup> The absence of a practice of collecting ethnically disaggregated data may be partly due to fears among some Member States of breaching rules relating to data protection. However, it should be noted that as long as certain safeguards are in place (such as anonymising the data provider), this is actually permissible.<sup>93</sup>

It should also be noted that respondents to the EU-MIDIS survey were asked: 'Would you be in favour of or opposed to providing, on an anonymous basis, information about your ethnic origin, as part of a census, if that could help to combat discrimination in [COUNTRY]?' Overall, 65 per cent of respondents from minorities in the *EU-MIDIS* study indicated that they would not be opposed to disclosing their ethnic origin in a census on an anonymous basis.<sup>94</sup> By way of further illustration, the break-down of responses for France, Germany and Portugal indicating a willingness to provide this information was as follows:<sup>95</sup>

- In France, 58 per cent of respondents of North African origin and 61 per cent of respondents of Sub-Saharan African origin were in favour.
- In Germany, 88 per cent of respondents of Turkish origin and 90 per cent of respondents of ex-Yugoslavian origin were in favour.
- In Portugal, 53 per cent of respondents of Brazilian origin and 62 per cent of respondents of Sub-Saharan origin were in favour.

Successive EUMC and FRA studies have repeated the need for adequate data collection, including data

85 EUMC (2003b), pp. 51-52; FRA (2009j), pp. 87-88. FRA, (2010d), Chapters 2-3.

86 EUMC (2003b), pp. 51-52.

87 EUMC (2003b), pp. 114-115; FRA, (2009j).

88 EUMC (2004), Chapter 7; EUMC (2006), Chapter 4; FRA (2010a), p. 73.

89 See successive General Recommendations of the UN Committee on the Elimination of Racial Discrimination: No. 4 concerning reporting by States parties (Article 1 of the Convention); No. 24 concerning Article 1 of the Convention; No. 25 on gender-related dimensions of racial discrimination; No. 27 on discrimination against Roma; No. 29 on Article 1, paragraph 1, of the Convention (Descent); No. 30 on discrimination against non-citizens. Reprinted in: UN Doc. HRI/GEN/1/Rev.9, Vol. II, 27 May 2008.

90 European Commission (2008), p. 69.

91 FRA (2007), p. 23.

92 Committee on the Elimination of Racial Discrimination, Concluding observations on France, paragraph 12, UN Doc. CERD/C/FRA/CO.17-19, 23 September 2010. Similarly, Concluding observations on Germany, paragraph 14, UN Doc. CERD/C/DEU/CO/18, 22 September 2008; Concluding observations on Portugal, paragraph 8, UN Doc. CERD/C/65/CO/6, 10 December 2004.

93 Council Directive 1995/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, (O.J. L 218, 23 November 1995, p. 31). Preamble, paragraph 26 and Article 2(a). European Commission, *Communication on the application of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, COM(2006) 643 final, 30 October 2006, p. 9.

94 FRA (2010f), p. 25.

95 FRA, *EU-MIDIS*, 2008 (data file). Information available on request.

disaggregated according to grounds including racial and ethnic origin, while ensuring data protection safeguards.<sup>96</sup>

As discussed above, the use of 'positive action' measures and application of the concept of 'indirect discrimination' in a preventive, rather than reactive, way can already be noted across the Member States and could have several advantages. Firstly, it has the potential to address those issues giving rise to disadvantages experienced by minority groups as a whole such as a lack of formally certified qualifications resulting from difficulties in accessing the education system, or poor health resulting from the quality and location of housing. Secondly, it may obviate the need to have recourse to dispute settlement mechanisms by eliminating discrimination, and pre-empting the need to engage in complaints procedures. However, these initiatives require long-term commitment for their results to have an impact on the ground.

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96 EUMC (2000), p. 96; EUMC (2003a), pp. 9, 34-38; EUMC (2003b), pp. 88-89; FRA (2007), p. 46; FRA (2009j), pp. 99-100; FRA (2010f), p. 25.

## Conclusions

Ten years since its adoption, the Racial Equality Directive has led to the introduction of new or strengthening of existing frameworks to combat discrimination on the grounds of racial and ethnic origin and promote equality in the EU Member States. Many positive examples of the directive's application have been noted, but several challenges remain if full effect is to be given to its goals.

Awareness of the national legislative and procedural framework giving effect to the prohibition on discrimination appears to be low among racial minorities as well as the social partners in some EU Member States more generally. This, in turn, affects the degree to which victims pursue their rights. In itself this may reduce the frequency with which the prohibition of discrimination is enforced and remedies are obtained. This will also then have an impact on the overall deterrent affect of the equality regime.

Continuation and intensification of awareness-raising activities by national and local authorities, including among bodies that can help to disseminate information such as equality bodies, NGOs, trade unions and employers, can help to address this issue. Targeting persons belonging to those groups that appear to be most at risk of discrimination, as well as those in a position to commit breaches, such as employers and service providers, may allow for more effective use of resources. Support from EU institutions has been and will continue to be valuable in this regard.

Access to a remedy through judicial or quasi-judicial procedures or mediation, constitutes an essential ingredient in ensuring implementation of the prohibition on discrimination. The effectiveness of such procedures is undermined where victims are reluctant to use them. Several factors have been noted that act as a disincentive to using complaints procedures: legal costs; fear of negative consequences; a perception that the situation would not alter; a tolerance of or failure to recognise discrimination.

Consideration could be given to taking measures that widen access to complaints mechanisms, including: broadening the mandate of equality bodies that are not currently competent to act in a quasi-judicial capacity; relaxing the rules on legal standing for NGOs and other civil society organisations; increasing funding for voluntary organisations in a position to assist victims. In light of the fact that victims are often reluctant to bring claims, allowing civil society organisations, including equality bodies, to act of their own motion in bringing claims to court or conducting investigations, without

the consent of a victim, or without an identifiable victim, could constitute an important step towards facilitating enforcement.

The degree to which complaints procedures fulfil their role of repairing damage done and acting as a deterrent for perpetrators depends on whether dispute settlement bodies are able to issue effective, proportionate and dissuasive sanctions. Opinions expressed by trade unions to the effect that, in the context of employment, sanctions are at such a level as to be easily absorbed by perpetrators, raise questions as to the adequacy of available remedies. Further research could be conducted into this issue with a view to identifying where concrete improvements can be made.

The creation of equality relies not only on the enforcement of rules through complaints procedures, but also on the existence of preventive and promotional measures. This is particularly so where persons belonging to minority groups as a whole experience disadvantages across a number of areas.

A preventive, rather than reactive, approach to indirect discrimination and the adoption of positive action measures can be noted across the Member States. This not only allows complicated socio-economic problems to be addressed but also pre-empts breaches of non-discrimination law. Measures that reflect the interlocking nature of disadvantage suffered by minority groups across areas such as employment, housing and education should be encouraged and broadened so that they are applied systematically across policy areas and throughout the Member States, rather than on a more limited *ad hoc* or project-driven basis.

As repeatedly underlined by the EUMC and FRA, without collection of ethnically disaggregated data it is difficult to develop policies to prevent discrimination and promote equality. This renders it difficult to identify where problems exist, and also to measure the success or otherwise of measures to combat the latter. In this sense, the realisation of the EU obligation under Article 10 TFEU to combat discrimination when 'defining and implementing its policies and activities' would be greatly facilitated by the systematic collection of data at Member State level, as well as the establishment of common EU-wide indicators. Such data is often also needed in order to prove claims of indirect discrimination. Parties to the International Convention on the Elimination of All Forms of Racial Discrimination should be mindful of their obligations in this regard.

The existence of prejudicial attitudes towards minorities lies at the root of incidences of discrimination. Although this can be partially addressed by introducing sanctions to deter discriminatory behaviour, of itself it may not transform ways of thinking. The above measures may contribute to changes in this regard by removing barriers to accessing employment, for instance, in order to create role models and dispel negative attitudes. However, other measures could also be contemplated such as in the context of education, or providing fora for balanced and informed debate and dialogue among those in a position to influence public opinion, such as political leaders, the media, and community institutions.

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The Racial Equality Directive (2000/43/EC) is the key piece of EU legislation for combating discrimination on the grounds of racial or ethnic origin and for giving effect to the principle of equal treatment.

The directive, adopted a decade ago, has brought about the introduction of new or the strengthening of existing legal frameworks. Although significant progress has been made towards the realisation of racial and ethnic equality, several challenges remain to be overcome. The present report discusses the application of the Racial Equality Directive through the laws and practices in the 27 EU Member States. In doing so, it explores the challenges to the effective realisation of the directive's goals and in conclusion discusses how such obstacles might be overcome.

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