

The Race Equality Directive: a Shadow Report

Lessons learnt from the implementation in nine EU member states

Costanza Hermanin and Eefje de Kroon

July 2013

CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS 3

INTRODUCTION 7

COMPARATIVE ANALYSIS OF MEMBER STATES 9

1. Lack of disaggregated data.....9
2. Categorizing and proving racial or ethnic origin13
3. How effective is domestic antidiscrimination legislation in providing judicial redress?.....18
4. How effectively are equality bodies working?.....25

ANNEX I: COUNTRY SUMMARIES

1. Bulgaria
2. Czech republic
3. France
4. Germany
5. Greece
6. Hungary
7. Italy
8. The Netherlands
9. Spain

ANNEX II: EXCERPTS FROM INTERNATIONAL HUMAN RIGHTS MONITORING BODIES

1. Bulgaria
2. Czech republic
3. France
4. Germany
5. Greece
6. Hungary
7. Italy
8. The Netherlands
9. Spain

ANNEX III: EXPERT QUESTIONNAIRE

EXECUTIVE SUMMARY AND RECOMMENDATIONS

The Open Society Foundations (OSF) have produced this report on the implementation of the Race Equality Directive (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment in between persons irrespective of racial or ethnic origin, hereinafter: RED) to assist the European Commission with its review of this legislation. The report identifies trends in the challenges facing the countries examined, examples of successful or problematic implementation, and recommendations for improving effective implementation. Specific challenges to implementation are grouped under four headings: the lack of disaggregated data needed to implement parts of this legislation and evaluate its effectiveness; the unclear identification of proxy categories that can be used to detect discrimination on the ground of racial and ethnic origin; problems that impede effective access to and use of judicial (individual or collective) redress against discrimination; and hindrances to alternative forms of individual (or collective) redress, through the equality bodies (EBs). Part of the recommendations listed below may be applied, *mutatis mutandis*, to the implementation of the Framework Employment Directive 2000/78/EC.

Lack of disaggregated data

This report shows that it is extremely difficult to properly monitor the effectiveness of antidiscrimination policies in the nine member states, primarily because data indicating access to goods and services and participation in the employment market is rarely disaggregated according to race or ethnicity.

The principal international human rights monitoring bodies drawn upon for this report have systematically recommended that state authorities collect such data. While expressing a clear preference for self-identification, such bodies have not ruled out the possibility for states to resort, in certain circumstances, to classification criteria other than self-declared identity. Disaggregated data is also essential for the enforcement of antidiscrimination law in legal proceedings, especially with regard to indirect discrimination.

The European Commission should:

1. Join the main human rights bodies monitoring racial discrimination in Europe in requesting that member states explicitly address the lack of disaggregated data on groups at risk of discrimination.
2. Reiterate to national authorities that the collection of sensitive data such as race and ethnic origin, or their proxies, is not prohibited by EU data protection law if performed with due regard to confidentiality, informed consent, and anonymity, and if data are only used for the purposes for which they are collected.

3. Firmly request that those countries that cannot ensure confidentiality, voluntary consent, anonymity or the exclusive use of data for equality policies, swiftly bring their policies on collecting and processing ethnic and racial data in line with EU equality and data protection law.
4. Highlight the limits of current practices related to data collection, and in particular, show how categorizations based solely on country of birth or nationality of (grand)parents or uninformed self-identification lead to underreporting.

Categorizing and proving racial or ethnic origin

Neither the RED nor most equality legislation within EU member states contains a definition of racial or ethnic origin. To support antidiscrimination efforts, however, racial and ethnic categories should be identified to reflect the groups that are most exposed to discrimination. Under this view, the most useful categories are those that reflect the characteristics, which are perceived as racial or ethnic, of the victims of discrimination. In the EU, common victims include Roma, Jews, Muslims, third country nationals as well as EU citizens who have a migration background.

The European Commission should:

5. Clarify that the identification of those racial and ethnic categories that are relevant under the RED has to be derived from the social reality of the discrimination experienced in every national and local context. Such categories may be based on geographical origin of groups, colour, ascendance, native language, religious or ethnic identity.
6. Clarify that categories such as "nomads", "Travellers", "gens du voyage", and "Gypsies" are to be interpreted as proxies for racial categories in order to apply antidiscrimination law correctly.
7. Request that member states implement Article 14 of the RED and review national law or jurisprudence to verify whether authorised differential treatment towards third country nationals or EU immigrants, despite its use as an apparently neutral criterion, amounts to either direct or indirect discrimination on the ground of racial or ethnic origin.
8. Stress that the intersectional character of racial and other forms of discrimination and the frequency of cases of multiple discrimination require antidiscrimination law to provide the same level of protection for all the suspect grounds of discrimination listed under Article 19 TFEU. As a consequence, the review of the implementation of the RED should be used to revitalise negotiations on the 2008 proposal for a horizontal antidiscrimination directive (Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426, 02.07.2008).

Making judicial redress for discrimination effective

Although all member states have transposed antidiscrimination provisions in their domestic legal systems, the effective level of protection offered by national provisions differs from country to country. The lack of comprehensive judicial statistics concerning the numbers of cases lodged, judgments issued, and damages or other remedies awarded under the RED is a major barrier to understanding the degree to which the RED is being enforced in practice. The other main impediments to effective judicial enforcement in the member states include a) public awareness of and access to legislation, b) legal standing in judicial proceedings, c) the interpretation given to the shift in the burden of proof by national jurisprudence, d) ineffective sanctions and remedies, and e) the lack of enforcement of the prohibition of indirect discrimination.

The European Commission should:

9. Request that member states maintain a detailed record of complaints and national jurisprudence derived from the transposition and implementation of the RED.
10. Request that member states have an antidiscrimination statute that is clear, comprehensive, contained in one legislative instrument, and easily accessible.
11. Recommend that member states facilitate access to legal and administrative standing for associations, organisations or other legal entities, which have a legitimate interest in ensuring that the provisions of the RED are implemented and enforced. The European Commission should present the possibility of collective antidiscrimination actions (i.e. actions that do not refer to a specific victim) as a best practice to be taken up by member states.
12. Recommend that wherever equality bodies do not have the competence to assess and adjudicate complaints as quasi-judicial bodies, they should be endowed with legal standing before the courts, either in support of a claimant, or autonomously, or as *amici curiae*.
13. Urge member states to follow good practice examples on the interpretation of the sharing of the burden of proof applicable in antidiscrimination proceedings.
14. Request that member states provide for effective, proportionate and dissuasive sanctions in antidiscrimination proceedings, especially by implementing moral (non-pecuniary) damages for victims of discrimination. The Commission should indicate standards for pecuniary damages in antidiscrimination cases by providing a grid referring to the average national wage, the wealth of the perpetrator, or the amount of the benefit denied.
15. Request that member states provide concrete examples concerning the prohibition of indirect discrimination on the ground of racial or ethnic origin in their national jurisprudence.

Making equality bodies effective

In the nine countries assessed, the equality bodies (EBs) differ in mandate, areas of competence, powers, financial and staff resources. The lack of clear guidelines regarding powers and resources make it impossible to comparatively assess the effectiveness of these bodies in providing alternatives for redress. In addition, easily accessible and systematically classified information about the complaints treated by the EBs is sometimes difficult to access. Under-reporting, especially of data broken down by ground of discrimination, is of concern. EBs established in compliance with the RED tend to be unitary institutions, frequently based in a member state capital, which can pose difficulties of access for those groups that are most likely to be segregated in geographically peripheral areas.

The European Commission should:

- 16.** Based on its review of the implementation of the RED in the member states of the EU, elaborate a set of minimum criteria to assess the capacity of national equality bodies (EBs) to provide independent assistance to victims of discrimination, conduct independent surveys concerning discrimination, publish independent reports and make recommendations on any issue relating to such discrimination. Such criteria should specifically aim to develop guidelines on what operating independently means in terms of a) financial and b) human resources, and c) legal status of the EBs. Financial autonomy should be of particular concern given the current economic context, characterised by sharp budget reviews.
- 17.** Encourage equality bodies to disclose detailed and comparable information concerning their organizational resources, the complaints they process, and the survey or research that they support. Such information should be broken down according to the different grounds of discrimination that they cover.
- 18.** Encourage equality bodies to explicitly address the lack of disaggregated data on groups at risk of discrimination, and suggest that, to wholly fulfil their mandate, EBs should encourage targeted research or surveys on such groups.
- 19.** In order to increase the effectiveness of the EBs, encourage the member states to endow their EBs with powers to either a) assist victims of discrimination in judicial proceedings, and/or b) conduct independent investigations, and/or c) impose effective sanctions wherever they have quasi-judicial powers.

INTRODUCTION

The Open Society Foundations (OSF) have produced this comparative report on the RED to assist the European Commission with its review of the implementation of this legislation within the member states. The report is based on data gathered on nine EU member states: Bulgaria, the Czech Republic, France, Germany, Greece, Hungary, Italy, the Netherlands and Spain. OSF selected these countries because they represent both implementation challenges and the EU's geographic diversity. In addition, OSF engages in activities to promote racial equality in these member states, enabling it to provide accurate and up-to-date information. OSF's work in these countries includes support for local civil society projects, as well as advocacy and strategic litigation aimed at countering racial discrimination and ensuring the full implementation of EU Law and European Human Rights Law. Summaries of developments in each of these member states are contained in Annex I.

The report identifies trends in the challenges facing the countries examined, examples of successful or problematic implementation, and recommendations for improving the effectiveness of implementation. Analysis is based on two sources of data. The first source is data from specialized international monitoring bodies, namely, country reports by the Council of Europe's Commissioner for Human Rights, the European Commission against Racism and Intolerance, the United Nations Committee on the Elimination of Racial Discrimination, and the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. These excerpts, divided by the relevant areas covered under the RED (employment, education, healthcare, housing, access to other goods and services, equality data, positive action, equality bodies) are contained in Annex II. This information was supplemented, verified and updated, by data generated by independent experts and OSF staff. Experts were asked to verify the background information gathered and respond to a short questionnaire. A copy of the questionnaire is contained in Annex III.

The comparative report is structured around three questions:

- **How to define, categorize and prove racial or ethnic origin?** Given that race or ethnicity are socially constructed categories and are often impossible to dissociate from migration background, geographical origin, or religion as a personal characteristic, this report also includes information about religious discrimination and discrimination against EU migrants and third country nationals.
- **How effective is domestic legislation in ensuring access to judicial redress?** Self-contained, consolidated discrimination legislation is easier to implement than provisions scattered over different legislative codes and acts. In addition, wherever procedural rights and substantive rights granted under the RED are easily accessible, redress through judicial enforcement is more likely.

- How effective are the equality bodies and what challenges do they face in terms of adequacy of their powers, responsibilities and independence?

While specific challenges to implementation are identified under each question, broader obstacles may also exist. The principal barrier is that disaggregated data on the racial and/or ethnic background of the population in the nine member states is generally unavailable or inaccurate. This shortcoming makes it extremely difficult to monitor the extent to which implementation of the RED is advancing the fight against racial discrimination in the EU. OSF encourages the European Commission, in accordance with the repeated recommendations of EU, Council of Europe and UN bodies, to take a bolder approach towards fostering data collection, and to make the requirement to collect "equality data" a cornerstone of its review of the implementation of all the EU's Equality Directives.

Part of the analysis provided below may be applied, *mutatis mutandis*, to implementations issues relative to the Framework Employment Directive 2000/78/EC.

COMPARATIVE ANALYSIS OF MEMBER STATES

This section outlines the overarching trends, challenges and lessons learnt from the country information examined, and provides a set of recommendations for the upcoming implementation report on the Equality Directives of 2000 by the European Commission. Four cross-cutting challenges are identified: the lack of disaggregated data, the definition of race and ethnicity, the effectiveness of domestic legislation in providing judicial remedies for cases of discrimination, and the effectiveness of equality bodies.

1. Lack of disaggregated data

Information collected in this report shows that it is extremely difficult to properly monitor the effectiveness of antidiscrimination policies in the nine member states. This is mainly due to the fact that data indicating the degree of access to goods and services and participation in the employment market is rarely disaggregated on the basis of race or ethnicity. This information, which would help policy makers to develop, implement, and adapt antidiscrimination policies, should emerge from data broken down according to categories based on the suspect grounds of discrimination, namely, racial or ethnic origin, as well as relevant proxy categories such as colour, national origin, or religion. A review of data collection practices in the nine countries shows that, in practice, equality monitoring based only on limited categories (e.g. place of birth, nationality of parents and grandparents) is inadequate in the current European migration context. This is because most racial and ethnic minorities have been settled within the EU for several generations.

The lack of reliable data on discrimination significantly impedes monitoring and improving equality policies. Such information could be made available through a system of data collection based on voluntary self-identification or third party identification, which ensures the anonymity of the data subject and makes the information publicly accessible for the purposes of monitoring and research. Currently, most of the nine countries examined do not have any such mechanism in place. The absence of such data is particularly acute in the healthcare sector, where the secondary sources used for this report show that data on access to health services for minorities are almost completely unavailable.

The principal international human rights monitoring bodies drawn upon for this report have systematically recommended that state authorities collect such data. For almost all the nine countries analysed, the CERD, ECRI, the UN Rapporteur on contemporary forms of racism and the Human Rights Commissioner of the Council of Europe have recommended the collection of disaggregated data in accordance with the principles of confidentiality, informed consent and individuals' voluntary self-identification as members of a particular group. This call for the collection of disaggregated data has also been supported by specialised demographers,

lawyers and NGOs working in the field of racial equality¹ as well as the European Union Agency for Fundamental Rights (FRA). More specifically, the FRA developed, in 2008, a survey covering 23,500 persons with migrant or minority background across all EU countries to track rates of discrimination (the EU-MIDIS survey)² and, in 2012, a survey of Roma respondents in 11 member states conducted in collaboration with UNDP.³ In a report on the implementation of the RED published in January 2012, FRA also highlighted the importance of collecting ethnic data to use as evidence in court cases concerning discrimination, among other purposes.⁴ In a recent opinion on the new draft Data Protection Regulation, the FRA encouraged the EU's institutions to specify in the new Regulation that sensitive data can be collected for the purpose of combating discrimination based on the grounds as listed in Article 21 of the European Union Charter of Fundamental Rights.⁵

Disaggregated data is essential for the enforcement of antidiscrimination law in legal proceedings, especially with regard to indirect discrimination. For instance, in France the absence

Self-Identification and Third Party Identification

While expressing a clear preference for self-identification, the UN CERD, the Advisory Committee on the Framework Convention on the Protection of National Minorities, ECRI and the European Court of Human Rights (see, in particular ECHR (Fourth Section), 2010. *Ciubotaru v. Moldova*, Application No. 27138/04, 27 April) have not ruled out the possibility for states to resort in certain circumstances to classification criteria other than self-declared identity. As noted by Julie Ringelheim: 'Whereas in national census practices, self-identification is now the method most commonly used for racial or ethnic categorisations, experience indicates that when data are collected for the purpose of designing and evaluating antidiscrimination policies, the self-identification approach may in some contexts cause difficulties. **One major problem arises from the fact that when data are processed with a view to supporting antidiscrimination efforts, what is searched for is not how people see their ethnic identity, but whether they are part of a group exposed to discrimination... As self-identification depends on voluntary identification by the persons concerned, it may lead in some contexts to under-reporting (or, conversely, to over-reporting).**' This phenomenon is well known with reference to figures about Roma in Central and Eastern Europe, and in the Balkans. In both the Northern Ireland and Dutch cases, religious, or ethnic classification rests on criteria other than self-declaration, but efforts are made to ensure that individuals have a say in the categorisation process (in Northern Ireland, employees are entitled to ask the employer to modify the category selected by the employers in the monitoring return form that they are due to fill in the framework of their equality monitoring duty; the Dutch data protection legislation allows individuals to refuse to provide information on their origins, if they do so in writing). 'These examples demonstrate that **when ethnic classification is based on a different approach than self-identification, it is nevertheless possible to guarantee individuals a certain degree of control over the way they are ranged into ethnic categories**'. (Ringelheim, J., 2011. 'Ethnic Categorisations and European Human Rights Law', *Ethnic and Racial Studies*, Vol. 34, N. 10, 1682-1696, p. 1688-9, emphasis added).

of data on racial or ethnic origin makes it difficult for claimants to prove the existence of indirect discrimination, which often requires statistical information.⁶ As an OSF expert affirms: "So far,

comparative 'panels' have only been established based on the family names of potential claimants or their place of birth. Although this method proved useful in some lawsuits, its applicability is limited to individuals with a recent immigration background" (2013, France, OSF expert). Comparative panels are statistical analyses where family names or countries of origin are used to display the relative disadvantage of certain employees of a specific origin as compared to their French/white colleagues with the same qualifications/seniority in the advancement of their careers. The only other alternative to prove discrimination is through situation testing. Situation testing is a method in which pairs (such as applicants for accommodation or a job vacancy or clients of a restaurant) are established to demonstrate that differential treatment was based solely on the single characteristic reflecting the discriminatory ground (gender, ethnicity, age, disability, religion or belief, sexual orientation) under scrutiny. If the member of the pair with the protected characteristic faces less favourable treatment, this distinction can be taken as proof of discrimination.⁷ However, situation testing is not accepted in all jurisdictions as a means of proof.

The 'lessons learnt' section below provides a range of different national practices relating to data collection. While some authorities may be willing to collect disaggregated data, such information is sometimes misused or collected with inadequate safeguards for the data subject. In contrast, other member states refuse to collect disaggregated data on data protection grounds or due to historical factors.

Lessons learnt

Czech Republic. The 2011 population census gave respondents the opportunity to answer open-ended, optional questions, including on ethnic origin. For instance, it did offer the possibility to identify as Roma. OSF research indicates that only slightly more than 5,000 out of an estimated 200,000 Roma in the Czech Republic did so in 2011. One reason put forward for this is that Roma themselves are unwilling to disclose their Romani ethnicity (OSF Expert, 2013. Czech Republic).

Hungary. In its report, ECRI states: 'The main reason given by the authorities for the lack of data disaggregated by ethnic origin is the high level of protection of personal data afforded by Hungarian legislation; the experience of the Second World War in particular is cited as underpinning the desire to ensure that individuals are not identifiable on the basis of their ethnicity. However, as described repeatedly ... – in the fields of education, employment, racist violence, administration of justice, to name a few – the absence of such data makes it particularly difficult for the authorities to monitor the effectiveness of the many measures they have taken in order to improve the situation of certain groups, and to adapt the measures accordingly if needed. ... Provided that certain key requirements are met – that is, that any data collected is anonymous, confidential, used only for the purposes for which it is collected, and is collected on

a voluntary basis – the collection and publication of data broken down according to ethnicity can act as a key element in effectively fighting discrimination.’ (ECRI, 2009. Hungary, §189-190).

France. As late as December 2007, the *Conseil Constitutionnel* reaffirmed, in the margins of a ruling, that race and ethnic origin are not grounds on which any form of differentiation or grouping ought to be drawn, given that race and ethnic origin are ‘not objective categories.’ (*Conseil Constitutionnel*, CC 2007-557 DC, 15.11.2007). However, a 2010 report by a special task force entrusted by the government with a study on how to collect data to fight discrimination (*Comité pour la mesure et l'évaluation de la diversité et des discriminations*, (COMMED)) recommended that the French census form be amended to include data on the nationality and place of birth of parents, and that special surveys and research be conducted every five years also relying on self-identification with reference to ethno-racial proxy categories. Among NGOs, the *Conseil Représentatif des Associations Noires de France* and the *Collectif Contre l'Islamophobie* have also called for the collection of disaggregated data (especially on police stops) (OSF expert, 2013. France). In 2010 the CERD once again reiterated its view that ‘the purpose of gathering statistical data is to make it possible for States parties 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 made.’ (CERD, 2010. France, §12).

Italy. ECRI, the Human Rights Commissioner of the Council of Europe (CoE) and CERD have all strongly condemned the census carried out to implement the 2008 ‘Nomad Emergency Decree’ (ECRI, 2012. Italy, §84 and CERD, 2012. Italy §11). ‘Although the authorities have stated that these measures were not based on an ethnic criterion and that, in July 2008, they had adopted guidelines providing that the operations entrusted to the Commissioners “shall not concern specific groups, individuals or ethnic groups, but all people living in illegal and legal campsites, regardless of their nationality and religion. The Commissioners shall avoid any action that might be, directly or indirectly, considered discriminatory,” civil society organisations have noted that all the censuses were performed in campsites that were virtually solely inhabited by Roma. Moreover, there were reports of cases in which persons concerned by these censuses were misinformed as to their purpose, children were fingerprinted or searches of dwellings were conducted without the police officers having shown the residents a court order’ (ECRI, 2012. Italy, §84). Therefore, ECRI concludes that ‘the data apparently have not always been gathered in accordance with the principles of confidentiality, informed consent and individuals’ voluntary self-identification as members of a particular group’ (ECRI, 2012. Italy, §185).

The Netherlands. The Dutch authorities do not collect information broken down according to categories such as race, colour or language but do make official distinction between ‘allochtony’ and ‘autochtony’ persons (‘allochtony persons’ have at least one parent born outside the Netherlands). ECRI questions whether this information is used to improve the situation of the concerned minorities. Instead, it says, ‘it has been stressed that such information is rather used to

target security measures at particular minority groups.’ Furthermore, ECRI notes that, as the number of citizens who are third generation descendants of persons born outside the Netherlands increases, the classification on the basis of ‘allochthony’ appears less and less apt to monitoring patterns of racial discrimination’, (ECRI, 2008. The Netherlands, §114).

Recommendations

The European Commission should:

1. Join the main human rights bodies monitoring racial discrimination in Europe in requesting that member states explicitly address the lack of disaggregated data on groups at risk of discrimination.
2. Reiterate to national authorities that the collection of sensitive data such as race and ethnic origin, or their proxies, is not prohibited by EU data protection law if performed with due regard to confidentiality, informed consent, and anonymity, and if data are only used for the purposes for which they are collected.
3. Firmly request that those countries that cannot ensure confidentiality, voluntary consent, anonymity or the exclusive use of data for equality policies, swiftly bring their policies on collecting and processing ethnic and racial data in line with EU equality and data protection law.
4. Highlight the limits of current practices related to data collection, and in particular, show how categorizations based solely on country of birth or nationality of (grand)parents or uninformed self-identification lead to underreporting.

2. Categorizing and proving racial or ethnic origin

Neither the Race Equality Directive nor most of the equality legislation currently in force within EU member states contain a definition of racial or ethnic origin. The sole indications provided within the RED on race and ethnicity concern, on the one hand, the fact that the EU rejects theories which attempt to determine the existence of separate human races, and that the use of the term "racial origin" in the RED does not imply an acceptance of such theories. On the other hand, the RED makes an explicit exception for differences of treatment based on nationality, and more precisely for direct discrimination grounded upon citizenship or immigration status.

As mentioned in Section 1, with a view to supporting antidiscrimination efforts, racial and ethnic categories should be identified to reflect the groups that are most exposed to discrimination. Such a critical, or socially constructivist, definition of racial or ethnic origin is the one that can best encompass all the various forms of discrimination that are present in Europe. Under this view, the most useful categories are those that reflect the characteristics, which are perceived as racial or ethnic, of the victims of discrimination. Such characteristics may vary from

country to country, and may be as different as to include characteristics based on the perceived colour, the alleged ascendance, or the geographical origin of persons. In its 2009 EU-MIDIS survey on minorities and discrimination, the FRA embraced this approach, selecting different respondents in every EU country, based on the groups that are most likely to be victims of discrimination. The selection of groups produced a multi-faceted definition of racial and ethnic groups, including, for example, Turkish and Former Yugoslavs for Germany, North Africans and Sub-Saharan Africans for France, North-Africans, South-Americans and Romanians for Spain.⁸

As a consequence, racial and ethnic categories that are relevant under the RED should be based on the reality of the discrimination experienced in a given geographical context.

Roma⁹

Across the countries examined in this report, Roma are generally reported to experience the most serious discrimination on the ground of racial or ethnic origin. Prejudices and stereotypes about Roma are deeply rooted in societies and embedded in state institutions as well as public attitudes and behaviour. There is a clear connection between the observed problems which Roma encounter in accessing the labour market, the education system, the health care system, the housing sector and access to other goods and services. A vicious cycle becomes evident from the reports: segregation and inequality in a certain sectors of life (such as housing) leads to segregation and inequality in the other sectors (such as employment, education, healthcare and access to other goods and services).

Terms used to refer to Roma in the media or as part of legal and administrative measures should be considered to be racial categories whenever they are used to establish a difference of treatment that is detrimental for the group as such. Thus, categories such as “nomads”, “Travellers”, “*gens du voyage*”, and “Gypsies” should be interpreted as proxies for racial categories for antidiscrimination law to be correctly enforced.

Black people

Due to the heritage of the colonial system, black people as a group have historically faced discrimination in Europe. Afrophobia and discrimination targeted at black people in Europe has been increasingly disguised since biological, pseudo-scientific forms of racism were denounced in the aftermaths of World War Two. Nowadays, this discrimination mainly affects the descendants of Antilleans, Afro-Caribbeans and Sub-Saharan Africans.¹⁰ With the exception of a handful of cases identified through situation testing, this report shows that cases where a finding of discrimination is made against black people remain extremely rare in the nine countries, which raises questions about the effectiveness of the remedies provided by domestic antidiscrimination laws.

Religious minorities, including Jews and Muslims

The fact that European Jews have historically faced racial discrimination and racial hatred is undisputed. The information collected in Annex 2 and 3 shows that, more recently, Muslims residing in Europe (including North Africans, Turks, Pomaks, and the Muslim minority in Western Thrace) have encountered higher levels of discrimination. In Europe, this group is sometimes discriminated against purely on the basis of religious considerations. Frequently, however, the generally lower socio-economic status of European Muslims is maintained by racially discriminatory practices, or the lack of positive measures to correct historical inequalities. Muslims fall within the scope of the RED because, as in the case of Jews, the widespread discrimination suffered by this group has undeniable racial interconnections. As affirmed by J.A. Lindgren Alves (a member of the CERD): "The postulation – which is indeed founded on international Human Rights Law – that "race is not a question of choice: you are born with it and you cannot move out. Religion, on the other hand, according to international human rights law, is supposed to be freely chosen and therefore discrimination on the basis of religion cannot be considered racial discrimination, has been invalidated by several sources such as the FRA, ECtHR and the CERD".¹¹ Academic research also supports this view, with Nasar Meer recently pointing out that: "the category of race was co-constituted with religion, and our resurrection of this genealogy implicates the formation of race in the racialization of religious subjects."¹²

Religious Minorities and Racial Discrimination

The 2012 Annual report by the Fundamental Right Agency of the European Union (FRA) affirms: 'it is often difficult to distinguish between ethnic and religious discrimination. For example, the European Union Minorities and Discrimination Survey – EU-MIDIS – interviewed 23,500 people from various ethnic minority and immigrant groups across the 27 member states. About 40 % of all the respondents self-identified as Muslim. The survey shows that many of the members of the minority groups that were surveyed said they suffered discrimination, with almost half of Muslim respondents not being able to tell whether they felt they were discriminated against on the grounds of their 'religion or beliefs' or on the grounds of their 'ethnic or immigrant background' (FRA, 2012. Annual report, p. 157).

Migrants and nationality

Article 3.2 of the RED states that the Directive "does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned."

Nonetheless, the Directive applies to those cases in which nationality or immigrant status are used as an apparently neutral, but in practice discriminatory, criterion, amounting to either direct or indirect discrimination on the ground of racial or ethnic origin. The Court of Justice of

the EU has stated that differential treatment that is facially based on nationality or migration status may, in fact, amount to racial or ethnic discrimination and fall under the scope of the RED. Common examples of such discrimination involve third country nationals (such as Asians, North Africans or individuals from the Balkans) as well EU citizens, typically from Western or Southern Europe.

The FRA concisely connects nationality and ethnicity in this way: "Nationality can be understood as a constitutive element of ethnicity."¹³

Migratory Background and Racial or Ethnic Origin

The interpretation of the RED by Court of Justice of the European Union (CJEU) confirms the inherent connection between discrimination against immigrants and racial or ethnic discrimination. In its 2008 decision *Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn* the CJEU affirms:

'[T]he Centrum voor gelijkheid van kansen en voor racismebestrijding is acting on the basis of the public statements of the director of Feryn to the effect that his undertaking was looking to recruit fitters, but that it could not employ 'immigrants' the CJEU found that 'public statements concerning the possibilities of recruitment for "immigrants" or "non-indigenous" fitters established a difference of treatment relating to a certain racial or ethnic origin'...

The fact that an employer states publicly that it will not recruit employees of a certain racial or ethnic origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2 (2)(a) of Council Directive 2000/43/EC.'

CJEU: 2008, C-54/07 [ECR I-5187] (para. 16 and 28).

Lessons learnt

France. In 2012 the Constitutional Council ruled unconstitutional the process whereby Travellers of French nationality without a regular income needed their travel permits to be stamped by the administrative authorities every three months, while non-Travellers need this done every other year. The Constitutional Council also found unconstitutional the rule that Travellers are not entitled to vote until they have been registered at a municipality for at least three years, whereas other French citizens only need to be registered for six months (*Conseil Constitutionnel*, CC 2012-279 QPC, 5.10.2012). Unfortunately, however, the Constitutional Council has not clarified the compatibility with antidiscrimination law of 'circulation documents' for Travellers. Neither did it rule clearly that regulations limiting the number of Travellers registered in a municipality to no more than 3 per cent of a municipality's population constituted discrimination in access to housing. The fact that Travellers may only vote in the municipality where they are registered combined with this 3 per cent ceiling on residence may not only discriminate against Travellers

with respect to housing, but also hinder them from electing a representative to protect their interests (OSF expert, 2013. France).

Italy. Italian courts have rarely found racial discrimination against Roma, mainly because they have refused to equate the administrative terminology “nomad” with the racial category “Roma”. The most blatant example is the decision by the Tribunale di Milano of 12 March 2011 (Application No. 2008/59283): “The ethnic character of the census in question, alleged by the complainants, is in reality excluded by the wording of the measures and the purposes therein set forth, since the recipients of the measures are described as all the individuals present in the authorised camps as well as in the non-authorised squatter settlements where there are nomadic communities and therefore all those who, whatever their nationality, are present in these settlements”. With reference to the same measures, the Council of Europe’s Committee of Social Rights held that “[T]he contested ‘security measures’ represent a discriminatory legal framework which targets Roma and Sinti, especially by putting them in a difficult situation of non-access to identification documents in order to legalise their residence status and, therefore, allowing even the expulsion of Italian and other EU citizens (for example, Roma from Romania, Czech Republic, Bulgaria or Slovakia)” (ECSR, *Centre on Housing Rights and Evictions v. Italy*, Complaint No. 58/2009, 25.06.2010).

Greece. In its recent Concluding Observations on Greece, the CERD expressly recognised the overlap between race and religion, stating that: “Bearing in mind the intersectionality between ethnicity and religion, the Committee is concerned about information on certain specific difficulties encountered by Muslims belonging to different ethnic groups to practice their religion. The Committee recalls the State party’s obligation to ensure that all persons enjoy their right to freedom of thought, conscience and religion, without any discrimination based on race, colour, descent or national or ethnic origin” (CERD, 2009. Greece, § 14).

Recommendations

The European Commission should

- Clarify that the identification of those racial and ethnic categories relevant under the RED has to be derived from the social reality of the discrimination experienced in every national and local context. Such categories may be based on the geographical origin of groups, colour, ascendance, native language, religious or ethnic identity.
- Clarify that categories such as “nomads”, “Travellers”, “gens du voyage”, “Gypsies” should be interpreted as proxies for racial categories in order to apply antidiscrimination law correctly.
- Request that member states implement Article 14 of the RED and review national law or national jurisprudence to verify whether authorised differential treatment towards third country nationals or EU immigrants, despite being used as an apparently neutral criterion, amounts to either direct or indirect discrimination on the ground of racial or ethnic origin.

- Stress that the intersectional character of racial and other forms of discrimination and the frequency of cases of multiple discrimination require antidiscrimination law to provide the same level of protection for all the suspect grounds of discrimination listed under Article 19 TFEU. As a consequence, the review of the implementation of the RED should be used to revitalise negotiations on the 2008 proposal for a horizontal antidiscrimination directive (Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426, 2 July 2008).

3. How effective is domestic antidiscrimination legislation in providing judicial redress?

Although all member states have transposed antidiscrimination provisions in their domestic legal systems, the effective level of protection offered by national provisions differs from country to country. This section offers an overview of the elements that support more effective enforcement of racial antidiscrimination law. In order to have effective domestic enforcement, all the procedural (the shared burden of proof, legal standing, and effective, proportionate and dissuasive remedies) and substantive rights (protection from direct and indirect discrimination, harassment, instruction to discriminate and victimization) granted under the RED need to be enforceable in practice.

Lack of data on antidiscrimination litigation

Although specialised collections of antidiscrimination jurisprudence do exist (such as those managed by the FRA and the Network of Legal Experts in the Field of Non Discrimination), these do not indicate how the RED is enforced through the national courts. The lack of judicial statistics concerning the numbers of cases lodged, judgments issued, and damages or other remedies awarded under the RED prevents understanding the degree to which the RED is enforced in practice. In some member states this results from a general lack of judicial statistics and digital databases of jurisprudence. In others, lack of precise data is due to the fact that civil antidiscrimination proceedings are not given as a separate category, meaning that figures for these cases can only be found through a textual analysis of case law databases.

The RED guarantees judicial redress as the principal means of enforcement by individuals at national level. Prior to the adoption of the RED, most EU member states had either no antidiscrimination legislation or lower levels of protection than subsequently required by the RED. At the same time successive Eurobarometers surveys (Eurobarometer 57.0 (2003), 65.4 Special Eurobarometer 263 (2007), Special Eurobarometer 317 (2009), and Special Eurobarometer 393 (2012)) suggest that racial discrimination has been more widespread than any other type of discrimination in Europe over the last 15 years. Considering these factors it would be sensible to expect that proper implementation of the RED would lead to increased levels of litigation. However, the unavailability of data on judicial complaints makes difficult to use litigation levels as an indicator of successful implementation of the RED. Nevertheless, the little data that is available

does not show increased litigation. This is reflected by the fact that the Court of Justice of the European Union has, so far, only adjudicated three cases concerning the RED (Feryn (C-C54/07), Galina Meister (C-415/10), Belov (C-394/11), compared to dozens of cases in the areas of gender and age equality.

Other impediments to enforcement through the courts

The main challenges to effective domestic judicial enforcement relate to a) public awareness of and access to legislation, b) legal standing in judicial proceedings, c) the interpretation given to the shared burden of proof by national jurisprudence, d) ineffective sanctions and remedies, and e) the lack of enforcement of the prohibition of indirect discrimination.

Victims are often unaware that they are protected by antidiscrimination legislation, or do not know how to access remedies for violations. The FRA's EU MIDIS survey shows that 55% of migrant and minority respondents believe that racial discrimination is widespread in their country, and that 37% of them, in particular individuals of Roma ethnicity and North African ancestry, also claim to have themselves been personally subjected to racial discrimination during the year preceding the interview. However, 80% of those who claim they were victims of racial discrimination did not report the incident to anyone, some declaring that they were unaware of the existence of redress mechanisms and others that a complaint would not have yielded any concrete results.¹⁴ One factor resulting in lower levels of awareness among victims and legal practitioners is the diffusion of antidiscrimination provisions across various codes and acts, adopted at different times. This makes the legislation more difficult to access and enforce.

A second important aspect regarding enforcement is the issue of legal standing to bring civil cases to court. The RED states that associations, organisations or other legal entities, which have a legitimate interest in ensuring that the provisions of the RED are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement. This provision has left member states with a large margin of discretion to regulate the conditions under which associations and legal entities can complain before the courts. Some member states give legal standing only to organizations and entities acting "in support" of claimants, thus providing no opportunity for collective antidiscrimination complaints pursued by NGOs only, or on behalf of a victim. Others, such as Germany and Italy, have established stringent requirements on legal standing for NGOs. This directly affects the ease with which the RED can be enforced, since litigation is easier to pursue wherever NGOs have facilitated access to the courts. In practice, their support is crucial to raise awareness of discrimination among victims, convince them to seek redress, or bring cases that reveal instances of large scale or systematic discrimination. By taking part directly in court proceedings, NGOs can claim moral damages that, if awarded, can be used to pursue further claims in the future.

Collective Antidiscrimination Actions and Acting on Behalf of a Victim

ECRI notes in relation to Greece: 'Although Law 3304/2005 provides that legal entities which have a legitimate interest in ensuring that the principle of equal treatment is applied can represent the victim before the courts or administrative authorities, they are required to obtain the latter's written consent. As a result, NGOs cannot bring cases to court if they do not represent a specific victim. Few cases have been brought to court or before the Greek Ombudsman under this law by the victims themselves, as the overwhelming majority have been filed on their behalf by civil society actors. Therefore, in order to ensure their [*sic.*] full enjoyment of the protection afforded by Law 3304/2005, victims should be able to invoke this piece of legislation without facing unnecessary legal hurdles. In this regard, ECRI wishes to bring to the Greek authorities' attention, paragraph 25 of its **General Policy Recommendation No. 7** in which it recommends that member states' antidiscrimination law provide that organizations such as associations, trade unions and other legal entities which have, according to the criteria laid down by the national law, a legitimate interest in combating racism and racial discrimination, are entitled to bring civil cases, intervene in administrative cases or make criminal complaints, even if a specific victim is not referred to.' (ECRI, 2009. Greece §22)

Like civil society organisations, equality bodies could play an important role as autonomous initiators of a complaint, in support of a victim, or as *amici curiae*. Wherever equality bodies do not have the power to settle complaints as quasi-judicial bodies, giving them the right to directly access the judicial system would greatly reinforce their work of providing independent assistance to victims of discrimination. In many of the member states assessed here, equality bodies do not have this right and have more limited powers to conduct or supervise mediation or issue non-enforceable recommendations.

Judicial Interventions by Equality Bodies

The French equality body is competent to handle claims of discrimination lodged by victims or associations fighting discrimination; it can also deal *ex officio* with cases of discrimination and has various investigative powers. In 2006, it gained powers to perform plea bargaining (*transaction pénale*) and to independently act in civil and criminal suits in 2006. The equality body's data show that in 80% of the cases, its court briefings were followed up by the relevant jurisdictions.

This type of intervention (across all grounds of discrimination) numbered between 48 and 212 cases a year (2006 to 2010), of which, according to the general trends presented by the EB, about a third pertain to race discrimination cases (HALDE, 2011. Rapport annuel) (OSF expert, 2013. France) .

A third aspect affecting effective judicial enforcement concerns the interpretation given to the shared burden of proof by national courts. Although the European Commission pursued infringement proceedings aimed at harmonizing the definition of the facts from which direct or indirect discrimination may be presumed in national legislation, an analysis of jurisprudence shows that different standards are actually applied. *Prima facie* evidence to prove direct and

indirect discrimination especially in the process of accessing employment or goods and services seems particularly difficult to establish, as demonstrated by a recent case referred to the CJEU (Galina Meister C-415/10). As mentioned in section 1, the unavailability of disaggregated statistical data on racial and ethnic origin constitutes a further impediment to proving discrimination in the courts.

National Standards on the Shared Burden of Proof

In two German cases, the Labour Appeal Court of Hamburg and that of Schleswig-Holstein established that membership in intersectional groups at risk of discrimination — an elderly non-German woman, in the first case, and a disabled black man, in the second — was not sufficient to create an assumption of discrimination in the job recruitment process that the employers would have to rebut (*LArbG* (Regional Employment Appeal Court) Hamburg, H3 Sa 102/07, 9.11.07 and *LArbG* Schleswig-Holstein, 1Sa129/08, 26.06.2008) (OSF expert, 2013. Germany).

Until 2008, in France, most civil antidiscrimination complaints filed within labour courts were dismissed on the grounds that the plaintiffs did not bring sufficient evidence to shift to the defendant the burden of proving that no consideration of race or ethnic criteria was involved in their employment-related decisions. The situation has gradually evolved partly due to the involvement of trade unions and specialized NGOs in major strategic cases on career progression against large companies, such as the French company Renault and the multinational company Bosch ((Bosch) *CPH Lyon* (Labour Court), F071/01754, 20.06.2008, and (Renault), *CA Versailles*, 2.04.2008). These cases helped to develop a quasi-statistical method for proving discrimination *prima facie*, which the judiciary considered as sufficient to create an assumption of discrimination that the employer would then have to rebut. This method, called *méthode des panels* (comparable panels method), consists of establishing a comparison within sets of employees with similar functions and qualifications but different career paths, and showing that surnames or places of birth suggesting a foreign origin are the only characteristics distinguishing the two sets (OSF expert, 2013. France).

A fourth aspect directly impeding enforcement of the RED through the courts is related to sanctions. The RED requires member states to lay down rules providing for effective, proportionate and dissuasive sanctions. However, cases where national courts have ordered dissuasive or even proportionate sanctions for findings of racial discrimination are extremely rare. Rather, moral (non-pecuniary) damages are seldom awarded, and when they are, the sums specified are extremely low, meaning that the amount is unlikely to have any dissuasive effect.

A final barrier to RED enforcement is that national courts rarely find indirect discrimination, even though the concept is correctly defined in the legislation of most of the member states under review. One explanation for this phenomenon is the lack of awareness of the concept among potential plaintiffs. Another is that this notion is mainly known to civil society organizations that frequently lack legal standing. However, it also appears that where claimants do raise cases of indirect discrimination, national courts may not apply the concept correctly, as exemplified by the Italian case detailed below.

Indirect Racial Discrimination in Domestic Jurisprudence

In its ruling in the case *Ministry of the Interior and others v. ERRC and others*, No 6050, 16.11.2011), the Council of State, Italy's highest administrative court, completely ignored the notion of indirect discrimination in its assessment of the discrimination complaint brought by the European Roma Right Centre against the Nomad Emergency Decree. The Italian court focused entirely on the notions of the intention behind and objectives of the administrative action:

"It is certainly a fact of common knowledge that the vast majority of individuals present in the concerned camps concretely has a precise ethnic background, insofar as they have Roma origins. However, in the opinion of this Section, even though these elements are perhaps apt to reveal a discriminatory intent by some of the institutional subjects involved, they do not allow to conclude that the entire administrative action has been uniquely and principally finalized at establishing a racial discrimination of the Roma community.... Naturally, this does not exclude at all the fact that single measures or provisions have had concrete illegitimate and discriminatory effects ... but this is not sufficient to declare that the acts are illegitimate under this profile." (Council of State, *Ministry of the Interior and others v. ERRC and others*, cit., p. 19) (OSF Expert, 2013. Italy).

Lessons learnt

Czech Republic. In its Concluding Observations on the Czech Republic, the CERD stated: "while welcoming the enactment of the Antidiscrimination Act of 2009, the Committee is concerned that legal provisions against discrimination are scattered across the principal acts of public law (the Constitution), private law (the Civil Code, the Labour Code) and administrative law (the Code of Administrative Offences, the Antidiscrimination Act) and their respective procedural codes." The CERD also found that the Antidiscrimination Act does not provide for sufficient means of protection for victims and recommends enacting comprehensive antidiscrimination legislation to ensure practical remedies (CERD, 2011. Czech Republic, §7). The Czech Helsinki Committee conducted a survey among district courts on discrimination in early 2012 and found that out of 86 courts, 16 had registered complaints relating to equal treatment and discrimination, but no judgments had been passed. Most of the cases concern employment, housing, health care and education. The lack of case law can be ascribed to the fact that the Antidiscrimination Act is not well known among practitioners, it is only applicable to cases that occurred after its adoption, and elements of evidence frequently are not considered by the court as sufficient to shift the burden of proof (OSF Expert, 2013. Czech Republic).

France. Judicial statistics available on the number of civil cases of discrimination adjudicated by French courts are incomplete. Whereas Decree No. 2008-522 of 2 June 2008 created the database JURICA for appeal jurisdictions, this database is not accessible to researchers outside of specific conventions (Independent expert, 2013. France). Legifrance and LexisNexis Jurisclasseur mainly collect decisions by courts of second and third instance (OSF expert, 2013. France).

Nonetheless, after 2008, complaints in French labour courts show an increased percentage of success over prior years, as well as the adoption of a range of different remedies including: the allocation of damages, including moral damages (up to several thousand euros), the loser pays principle, the publication of the ruling, and orders for specific actions such as reappointment or promotion of the claimant. Damages awarded range from up to 250,000 Euros in the 2008 case involving Renault, with an award of 3,000 Euros for the legal fees of each of the supporting NGOs and trade unions (Renault, CA Versailles, 02.04.2008), but were in general closer to an average of a few thousand euros (OSF expert, 2013. France).

Germany. Until July 2010, court decisions on discrimination on racial and ethnic origin grounds under the Equal Treatment Act were extremely rare (only 14). Most cases related to employment and concerned requirements in terms of language proficiency. It was claimed that this apparently neutral criterion in fact amounted to indirect discrimination on the ground of ethnic origin. All these 14 complaints were presented as individual complaints, with no formal intervention by antidiscrimination NGOs, trade unions, or equality bodies. In fact, the German Equal Treatment Act places a heavy bureaucratic burden on civil society organizations wishing to formally stand in court. As a consequence, most NGOs had to act informally whenever they wished to support a plaintiff.

With respect to damages, moral damages ordered for denial of access to a service were halved in the case of the Oldenburg nightclub where situation testing was used as proof (500 Euros) (*AG* (Civil Court) Oldenburg, E2C2126/07, 23.07.2008). 2,500 Euros were awarded in damages for a case of discrimination in access to housing (OLG Köln, 24U51/09, 19.01.2010). In the two cases in which courts found discrimination in access to employment and in a case of discriminatory dismissal, all based on language proficiency, the pecuniary compensation ordered ranged between 3,900 and 5,400 Euros plus interest (*LArbG* (Regional Employment Appeal Court) Bremen, 1 SA 29/10, 29.06.2010, and *ArbG* (Employment Court) Berlin, 55 Ca 16952/08, 11.02.2009)) (OSF expert, 2013 Germany).

Hungary. Since the beginning of the 2000s, a maximum of five or six racial discrimination judicial decisions per year have been issued. From 2004, this number may have increased somewhat due to the entry into force of the Act on Equal Treatment. However, the number of decisions published still does not exceed ten to fifteen cases per year. As only some of the judgments have been published to date, the exact number cannot be ascertained. In the last few years, the number of published decisions improved slightly, but there has not yet been any specific effort to study the details of this case law. Most cases emerged in the field of labour law, especially access to employment, with a few in the field of education. Courts are becoming increasingly aware of the Act on Equal Treatment. Nevertheless, they continue to apply the rules under civil law that require the claimant to bear the burden of proof alone.

The Act on Equal Treatment included an important innovation in Hungarian law, allowing non-governmental organisations to act as plaintiffs in cases where they consider a provision to be discriminatory even though no individual has yet suffered any harm. However, as a result of an amendment to this legislation in 2012, the right to representation for civil organisations became more difficult. Currently, it is possible to do so only if an NGO's founding statute mentions the protection of the interests and rights of the given group. As a result, this has excluded many organisations from representing potential victims. Concerning remedies, the Constitutional Court established that discrimination constitutes a serious violation of human dignity, which in itself should give rise to the award of compensation. In general practice, this sum for serious violations of human dignity is 600,000 HUF (1,990 EUR). The usual amount of compensation for antidiscrimination cases, however, is usually between 100,000 and 150,000 HUF (330 to 495 EUR), which is inconsistent with the finding by the Constitutional Court (Independent expert, 2013. Hungary).

Italy. The RED was transposed without amending existing domestic law, creating uncertainty over which legal standards (the RED transposition decree or the 1998 Immigration Act) are applicable, especially with respect to legal standing for civil society organizations. The paucity of civil court decisions on racial or ethnic discrimination in Italy have meant that some procedural findings developed elsewhere have yet to be addressed in the Italian context, leading to a limited implementation of the RED's provisions. Most litigation has concerned local statutes or regulations explicitly excluding third country nationals or short term residents from accessing public services or employment, which was found to constitute a form of indirect racial discrimination. Most litigation sought the repeal of explicit, directly discriminatory legislation or administrative acts. As a consequence, there has not yet been any jurisprudence showing whether the shift of the burden of proof is correctly implemented, or that statistical evidence and situation testing are allowed in proceedings.

Civil society organisations (associations and other entities) are allowed to support victims in courts if they are registered on a list established by the Ministry of Equal Opportunities and updated by ministerial decree on an annual basis. In order to register, the associations and the other entities have to respect certain criteria concerning the official scope of the association, the timing of its establishment, and other formal requirements concerning the statute of its associates and chair (Legislative Decree No 215 of 2003, Article 5.1). Associations and agencies that are thus registered can act both on behalf of and in support of a victim, and even autonomously if there are no victims of discrimination that are directly and immediately identifiable. In practice, legal standing for antidiscrimination NGOs was generally granted in cases involving legal or administrative requirements in terms of nationality, whereas it was often denied in cases of racial discrimination. The Italian jurisprudence did not develop any specific criteria about remedies and applying to antidiscrimination lawsuits. When courts find discrimination by the state, the remedy ordered is frequently the repeal of the law/act/ordinance and/or the payment of the social benefit that had been denied. Occasionally, judges have also ordered the publication of rulings in

the local media, so as to make the remedy more effective. However, there have been no damages awarded as a result of a finding of discrimination by a state body, and symbolic damages (100 to 2000 EUR per complainant) have been awarded in the few cases of race discrimination in access to private services (OSF expert, 2013. Italy).

Recommendations

The European Commission should:

- Request that member states maintain a detailed record of complaints and national jurisprudence derived from the transposition and implementation of the RED.
- Request that member states have an antidiscrimination statute that is clear, comprehensive, contained in one legislative instrument, and easily accessible.
- Recommend that member states facilitate access to legal and administrative standing for associations, organisations or other legal entities, which have a legitimate interest in ensuring that the RED is implemented and enforced. The European Commission should propose collective antidiscrimination actions (i.e. actions that do not refer to a specific victim) as a best practice for member states to adopt.
- Recommend that wherever equality bodies cannot assess and adjudicate complaints as quasi-judicial bodies, they should be endowed with legal standing before the courts, either in support of a claimant, or autonomously, or as amici curiae.
- Urge member states to follow good practice examples on the interpretation of the sharing of the burden of proof applicable in antidiscrimination proceedings.
- Request that member states provide for effective, proportionate and dissuasive sanctions in antidiscrimination proceedings, especially by implementing moral damages for victims. The Commission should indicate standards for pecuniary damages in antidiscrimination cases by providing a grid referring to the average national wage, the wealth of the perpetrator, or the amount of the benefit denied.
- Request that member states provide concrete examples to member states concerning the prohibition of indirect discrimination on the ground of racial or ethnic origin in their national jurisprudence.

4. How effectively are equality bodies working?

In the nine countries assessed, the EBs differ in mandate, areas of competence, powers, financial and staff resources. The degree of public awareness of their existence and trust in them by civil society organisations also varies to a large degree. Recently, some of the equality bodies have gone through a transformation process and have developed into multi-ground bodies and even national human rights institutions, such as in the UK, France, and the Netherlands. In many cases, these transformations have led to an extension of the EBs' competencies, for instance, through the merger of formerly distinct bodies. However, the human and financial resources of these

bodies have not been expanded to match their increased duties, and in some cases have actually been reduced. These new institutions should be allocated sufficient focus and resources to fight racial discrimination by providing independent assistance to victims of discrimination, conducting independent surveys concerning discrimination, publishing independent reports and making recommendations on issues relating to such discrimination.

Access to Equality Bodies

The number of complaints addressed to EBs is generally expanding. This trend signals a positive development, improved outreach and profiles for EBs. In fact, increasing recourse to proceedings before EBs in a context where surveys show that racial discrimination is constantly perceived as the most serious form of discrimination in the EU, may indicate that victims are gaining increased access to redress mechanisms. Nonetheless, expanding caseloads may also be a signal of a backlog caused by shrinking resources or ineffectiveness. Therefore, it is essential that EBs clearly disclose information about their resources and the activities they perform.

It remains difficult to draw comparative conclusions regarding the effectiveness of EBs due to the lack of easily accessible and systematically disaggregated information about complaints. Under-reporting, especially of data broken down by ground of discrimination, remains of concern.

Finally, EBs established in compliance with the RED tend to be unitary institutions, frequently based in a member state capital, which can pose difficulties of access for groups most likely to be segregated in geographically peripheral areas. Information collected over the nine countries shows that only some equality bodies have organised decentralised services.

Lessons learnt

Hungary. The Special Rapporteur on Racism is concerned about the lack of effective independence of the Equal Treatment Authority, which operates under the direction of the Minister of Public Administration and Justice. The lack of adequate resources was also reported (Special Rapporteur on Racism, 2012. Hungary §23).

Italy. International human rights bodies such as CERD have recommended that Italy take all necessary measures to guarantee the independence of the Italian equality body, UNAR (*Ufficio Nazionale Antidiscriminazioni Razziali*). ECRI affirms that: “[I]n terms of structure, it should be noted that UNAR still comes under the Department for Equal Opportunities of the Presidency of the Council of Ministers. For many involved in the fight against racial discrimination, this direct institutional link is a source of concern as it runs counter to the kind of independence that is necessary for the effective operation of such a body” (ECRI, 2012. Italy, §41). UNAR’s powers should be extended to cover not only ethnic origin and race, but also colour, language, religion, nationality and national origin. The Commissioner for Human Rights has expressed concern that

UNAR will lose 9 of its 14 staff members due to the 2012 spending review (Commissioner for Human Rights of the CoE, 2012. Italy, §72).

The Netherlands. The *Commissie Gelijke Behandeling* (CGB) – now merged into the Netherlands Institute for Human Rights (NIHR) – used to be well known and generally trusted. Data from its successor institutions are still too recent to assess the NIHR. The CGB was reported to be delivering effective decisions (on average 70 per cent of the CGB's decisions were implemented), although the latter are not legally binding. The CGB's annual reports used to give a clear and accessible overview of the complaints dealt with by that body. The Netherlands is also an interesting example for its local antidiscrimination bodies, which cover specific geographical regions. In addition to the national equality body, in 2009, the Municipal Antidiscrimination Services Act (*ADV Wet*) entered into force and created a mechanism to enforce antidiscrimination law at the local level. Local Antidiscrimination bureaux are responsible for providing help and advice to individuals upon request and providing municipalities with annual figures on reports of discrimination at the local level. Municipalities can formulate local antidiscrimination policy in cooperation with the Public Prosecution Service, the ADVs and the police (OSF expert, 2013. The Netherlands).

Spain. With reference to the establishment, in 2009, of the Council for the Promotion of Equal Treatment of All Persons without Discrimination on Grounds of Racial or Ethnic Origin to combat discrimination, the CERD expressed concern “about reports that the Council lacks the necessary autonomy and independence to carry out its work efficiently, that it does not have an adequate budget and that it is barely known to the general population (art. 2). The Committee recommends that the State party take the necessary measures to ensure that the Council for the Promotion of Equal Treatment of All Persons without Discrimination on Grounds of Racial or Ethnic Origin has the required independence as set out in the European Commission against Racism and Intolerance (ECRI) general policy recommendations Nos. 2 and 7 for this type of body. It also recommends that the State party undertake campaigns to increase public awareness of the existence of the Council” (CERD, 2011. Spain, §9). In 2012, resources for the Council were further cut due to a spending review enacted by the Spanish government, raising concerns among civil society organisations (OSF expert, 2013. Spain).

Recommendations

The European Commission should:

- Based on its review of the implementation of the RED in the member states of the EU, elaborate a set of minimum criteria to assess the capacity of national EBs to provide independent assistance to victims of discrimination, conduct independent surveys concerning discrimination, publish independent reports and make recommendations on any issue relating to such discrimination. Such criteria should specifically aim to develop a definition of what operating

independently means in terms of a) financial and b) human resources, and c) legal status of the EBs. Financial autonomy should be of particular concern given the current economic context, characterised by sharp budget reviews.

- Encourage equality bodies to disclose detailed and comparable information concerning their organizational resources, the complaints they process, and the survey or research that they support. Such information should be broken down according to the different grounds of discrimination that they cover.
- Encourage equality bodies to explicitly address the lack of disaggregated data on groups at risk of discrimination, and suggest that, to wholly fulfil their mandate, EBs should encourage targeted research or surveys on such groups.
- In order to increase the effectiveness of the EBs, encourage member states to endow their EBs with powers to either a) assist victims of discrimination in judicial proceedings, and/or b) conduct independent investigations, and/or c) impose effective sanctions wherever they have quasi-judicial powers.

¹ On France see: Sabbagh, D. & Peer, S., 2008. French Color-Blindness in Perspective: The Controversy over "Statistiques Ethniques". *French Politics, Culture, and Society*, 26); On Hungary: Krizsan, A., 2012. 'Group self-determination, individual rights, or social inclusion? Competing frames for ethnic counting in Hungary.' *Ethnic and Racial Studies* 35, no. 8 (2012): 1392-1408.

² Fundamental Rights Agency (2009) European Union Minorities and Discrimination Survey, http://fra.europa.eu/fraWebsite/eu-midis/index_en.htm

³ Fundamental Rights Agency, UNDP (2012) The Situation of Roma in 11 EU member states, http://fra.europa.eu/fraWebsite/attachments/FRA-2012-Roma-at-a-glance_EN.pdf

⁴ Fundamental Rights Agency, 2012. The Racial Equality Directive: application and challenges, p.13 http://fra.europa.eu/fraWebsite/attachments/FRA-RED-synthesis-report_EN.pdf

⁵ Fundamental Rights Agency, 2012. Opinion of the European Union Agency for Fundamental Rights on the proposed data protection reform package, para. 31 and ff. <http://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>

⁶ Fundamental Rights Agency, (2012). *Handbook on European Antidiscrimination Law*, p. 30.

⁷ Migration Policy Group, Situation testing, available at http://www.migpolgroup.com/projects_detail.php?id=25

⁸ Fundamental Rights Agency, 2009. EU MIDIS Main Results Report, p. 23.

⁹ In this report this term is used to cover also groups referred to as Sinti and Camminanti, nomads, and Travellers.

¹⁰ ENAR, 2012. Black Europeans and People of African Descent in Europe. Available at http://cms.horus.be/files/99935/MediaArchive/publications/FS%20People%20of%20African%20Descent_final.pdf

¹¹ Lindgren Alves, J.A., 2008. 'Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination', *University of San Francisco Law Review*, Vol. 42, 941-982, p.974.

¹² Meer, N., 2013. 'Racialization and religion: race, culture and difference in the study of antisemitism and Islamophobia', *Ethnic and Racial Studies*, 36:3, 385-398).

¹³ Fundamental Rights Agency, 2010. *Handbook on European Antidiscrimination Law*, pp. 104-106.

¹⁴ Fundamental Right Agency, 2009. EU MIDIS survey Main Results Report.

Contact on Equality, Justice, and Home Affairs at the
Open Society European Policy Institute:
Dr. Costanza Hermanin, Senior Policy Officer
Costanza.Hermanin@opensocietyfoundations.org



The Open Society European Policy Institute (OSEPI) is the EU policy arm of the Open Society Foundations. We work to influence and inform EU policies, funding and external action to ensure that open society values are at the heart of what the European Union does, both inside and outside its borders.

OSEPI brings into EU policy debates evidence, argument and recommendations drawn from the work of the Open Society Foundations in more than 100 countries. The foundations' priorities include human rights, justice and accountability pursued through a wide range of policy areas including education, health, media, information, arts and culture.

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies.

Our staff is based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo, and Washington, D.C.