



HANDBOOK ON THE RACIAL EQUALITY DIRECTIVE

WITH A SPECIAL FOCUS ON ITALY,
ROMANIA AND SWEDEN

**INDEPENDENT REPORT
SEPTEMBER 2020**

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This publication is part of the project MINDSET co-financed by DG JUST. The concept has been developed due to the gap between EU legislation in the field of non-discrimination based on ethnic origin and the implementation on the ground at national level. Indeed, a lack of awareness of rights, bodies and redress mechanisms; unclear understanding of what discrimination really means and insufficient media coverage are a reality in our societies. Particular focus will be given to Romania, Italy and Sweden, allowing for an interesting geographical representation and the possibility to highlight differences in national implementation of non-discrimination law.

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Foreword

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Racial Equality Directive
[Photo: Shutterstock]

The present Handbook on the Racial Equality Directive provides an easy to use tool for activists, victims and non-lawyers in general, interested in reporting about racial discrimination and promoting racial equality in the European Union. The text is written in an accessible and non-legalistic language, omitting references to legal norms wherever possible and including practical examples that can guide readers in matching abstract legal concepts with real life scenarios.

Journalists working alone or in collaboration with non-governmental organisations (NGO) play a key role in ensuring access to justice in general and to racial equality in particular. They are often the first to report racist incidents, explain the context and basic facts of racial discrimination to both the general public and minority groups, and hold law enforcement officials, decision makers and politicians accountable

when they fail to properly counter racist manifestations or themselves perpetrate racist acts. Given these functions, journalists and NGO activists engage in the dissemination of information, foster social dialogue, and breathe life into European norms prohibiting racial discrimination.

The European Union's so called Racial Equality Directive is the focus of the Handbook but context is provided both in relation to other relevant international norms on racial equality and on European law concerning other protected groups in the Introduction and Section 1. The following section explains the personal and material scope of the directive, while subsequent sections (4-9) describe the different forms of discrimination. Section 10 delves into questions relating to establishing discrimination with a special focus on statistical evidence, situation testing, the reversal of the burden of proof and the representation of

victims. Section 11 discusses remedial routes, highlighting the role of bodies established for the promotion of racial equality and the importance of making wise choices about legal proceedings. Section 12 provides a short overview of sanctions against racial discrimination and Section 13 underlines the importance of reporting about racial discrimination at the EU level.

The Handbook's size allows for the discussion of the key issues. For more detail on these and less central issues concerning legal opportunities introduced by the European Union to tackle racial discrimination, ample on-line resources can be consulted, particularly those provided by [the European Commission](#), [the European Union's Fundamental Rights Agency](#), [Charterpedia](#), [European Network of Legal Experts in Gender Equality and Non-Discrimination](#) and [the Migration Policy Group](#).

1.

Introduction

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Prior to July 2000, when the Racial Equality Directive was adopted, the European Union (previously the European Communities) dealt with discrimination to promote market integration. Discrimination based on nationality was prohibited first to facilitate the free movement of workers, goods, services and capital, while later sex-based unequal pay and discrimination in employment was also targeted by legislation. Article 45 of the Treaty on the Functioning of the European Union (TFEU) prohibits discrimination on grounds of nationality to ensure the free movement of workers, while Article 157 TFEU guarantees equal pay between men and women. Secondary law in the form of directives also prohibits discrimination based on nationality and gender.¹

The perspective changed in 1997, when a treaty provision (now Article 19 TFEU) was adopted to broaden the EU's powers to prohibit discrimination and transform the approach from market integration to the protection of fundamental rights. In this new climate, the European Council passed

two non-discrimination directives in 2000, obliging Member States to introduce measures to eliminate discrimination on a broader scale.² The present Handbook deals with the so-called Racial Equality Directive³.

The Charter of Fundamental Rights of the EU, adopted in December 2000 prohibits racial and other types of discrimination.⁴ Pursuant to Article 21(1), 'Any discrimination based on any ground such as race, colour, ethnic or social origin, language, religion or belief, membership of a national minority ... shall be prohibited.' Under Article 22, the 'Union shall respect cultural, religious and linguistic diversity.'

There are now 27 Member States of the European Union following the United Kingdom's withdrawal in 2019 (BREXIT). The EU has four principal institutions that carry out its tasks. The Council of the EU passed the Racial Equality Directive. The European Parliament is also engaged in legislating against discrimination. The European Commission's main

task is to propose new legislation as well as to enforce existing European law and implement related policies. The Court of Justice of the European Union (CJEU) interprets EU law.

European law prohibits unequal treatment on the grounds of racial or ethnic origin, religion or belief, disability, age, sexual orientation, sex and nationality (limited to EU citizens).⁵ Italy, Romania and Sweden have incorporated the first six protected grounds in their national anti-discrimination legislation, while nationality discrimination may be regulated in separate laws. As most member states, they have chosen not to define the grounds in their implementing legislation. In addition to expanding the list of prohibited grounds of discrimination, various countries have made the list non-exhaustive by adding a phrase such as 'or any other circumstance'. This is the case in Romania, for instance.

Legal regimes governing racial equality in the Member States



The law plays a crucial role in European integration. EU laws take precedence over domestic law and this 'supremacy' entails that national courts must disapply inconsistent domestic measures or interpret them in a way that is compatible with EU law. The EU legal system is characterised as 'supranational' meaning that unlike for instance the European Convention on Human Rights or the various United Nations treaties that prohibit discrimination, EU non-discrimination law applies as part and parcel of domestic legal disputes.

National courts are the primary enforcers of EU law thus individuals can claim rights provided by European law in domestic courts under diverse conditions depending on the form of EU norms (treaty, regulation, directive, decision, guidance, etc.).

The deadline for the transposition into national law of the Racial Equality Directive was 19 July 2003. Member States have fully or in part implemented the directive, but inconsistent national provisions may remain. The European Commission is monitoring the directive's

transposition with the help of the Network of legal experts in gender equality and non-discrimination.⁶ The Member States bear the duty to report on measures they have taken to give the directive effect in national laws while citizens, journalists and non-governmental organizations are free to indicate inconsistencies to the European Commission so that the latter can take action against Member States to ensure compliance.

2.

Legal regimes governing racial equality in EU Member States

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The most common example is where an employee complains about unequal treatment, and the employer responds by dismissing or failing to promote the employee. [Photo: Shutterstock]

European equality norms derive from multiple sources, including international organisations such as the United Nations, Council of Europe and European Union's treaties and directives, as well as countless other legal measures that seek to guide governmental action. National legislation and domestic courts have to apply the various legal sources in a consistent manner. Bodies monitoring the international treaties ratified by member states require compliance on a par with the EU, even if their means ensuring compliance are weaker. All member states ratified the core international treaties but many do not permit the filing of individual

complaints to the treaty bodies.⁷ The only exception is the European Convention on human rights and fundamental freedoms (ECHR) with which individuals can file applications from any member state.⁸

A. UNITED NATIONS

The first international organisation prohibiting racial discrimination was the United Nations. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1965 and in force since 1969 is ratified by all the Member States.⁹ ICERD prohibits both direct and indirect racial

discrimination.¹⁰ ICERD has served as a reference text in European courts, but only as far as the definition of racial discrimination (Article 1) is concerned, thus its application to disputes concerning racial or ethnic discrimination remains to be seen. The Committee on the Elimination of All Forms of Racial Discrimination (CERD) monitors states' compliance with the Convention. It has issued general recommendations on the personal scope of the treaty, including discrimination based on nationality, discrimination against persons of African descent and the Roma.

The International Covenant on Civil and Political Rights ensures the principle of equal treatment and guarantees the rights of ethnic (national, linguistic and religious) minorities, who naturally fall under the scope of the Racial Equality Directive as well.¹¹ For instance, in its general recommendations on specific minority groups, the CERD Committee explicitly calls on states to ensure that mother tongue and bilingual education are guaranteed.¹² The International Covenant on Economic, Social and Cultural Rights prohibits discrimination on the basis of racial or ethnic origin (Article 2(2)) with few member states permitting individual complaints under the optional protocol.¹³

B. COUNCIL OF EUROPE

The Council of Europe has prohibited racial discrimination since 1950, when the European Convention (ECHR) was adopted.¹⁴ Under Article 14, the enjoyment of the rights and freedoms set forth in the Convention must be secured without discrimination on any ground such as race, colour, language, religion, national or social origin, association with a national minority, property or other status. This provision safeguards the principle of equal treatment that the European Court of Human Rights has applied to both direct and indirect racial or ethnic discrimination in an identical manner.¹⁵

Protocol 12 of the ECHR guarantees

the right to equal treatment in all walks of life and explicitly covers direct and indirect discrimination.¹⁶ It is important to note that while the Convention has been signed and ratified by all Member States, Protocol 12 has been signed and ratified by only 10 EU Member States, which greatly diminishes its usefulness.¹⁷

The level of ratification by EU Member States of the European Social Charter¹⁸ is low, particularly as concerns the right of non-governmental organisations to raise collective complaints against states before the European Committee of Social Rights.¹⁹ The majority of collective complaints concerning racial or ethnic discrimination pertain to housing, but the opinions of the Committee leave one in no doubt that equality planning, as well as effective sanctions are required to stem racial discrimination.²⁰

The European Commission against Racism and Intolerance (ECRI) has issued several recommendations relevant or specific to discrimination against various racial or racialised minorities.²¹ ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial intolerance is an important document within the Council of Europe.²² It defines direct and indirect discrimination on the grounds of racial or ethnic origin, building on the Racial Equality Directive and broadens the concept of racial discrimination to less favourable treatment based on nationality, language and religion,

influencing the Strasbourg Court's interpretation.²³

C. RACE-RELEVANT EU LAW

The Racial Equality Directive is the key instrument through which racism is tackled in EU law, but it is not the only race-relevant legal measure. Core human rights treaties, particularly the European Convention (ECHR) play an important role in EU Member States and the Union itself. They are invoked in the preamble of the Racial Equality Directive²⁴ and provide minimum standards of protection as stipulated under the Charter of Fundamental Rights of the EU (Article 52 and 53). The Charter "is addressed to the institutions and bodies of the Union" (Article 51.1.) and provides a legal basis for the European Commission to act when EU law applies or when national measures are taken in application of EU law,²⁵ including measures taken under EU financial mechanisms.²⁶

Hate crime and hate speech is addressed by measures facilitating judicial cooperation, such as the 2008 Framework Decision on combating racism by means of criminal law.²⁷ The European Commission has issued guidelines on the application of this decision, as well as a code of conduct concerning on-line hate speech.²⁸ The rights of victims of hate crimes – and hate speech in countries where such conduct constitutes a criminal offence – are governed by the so-called Victims' Rights Directive.²⁹

3.

The Racial Equality Directive

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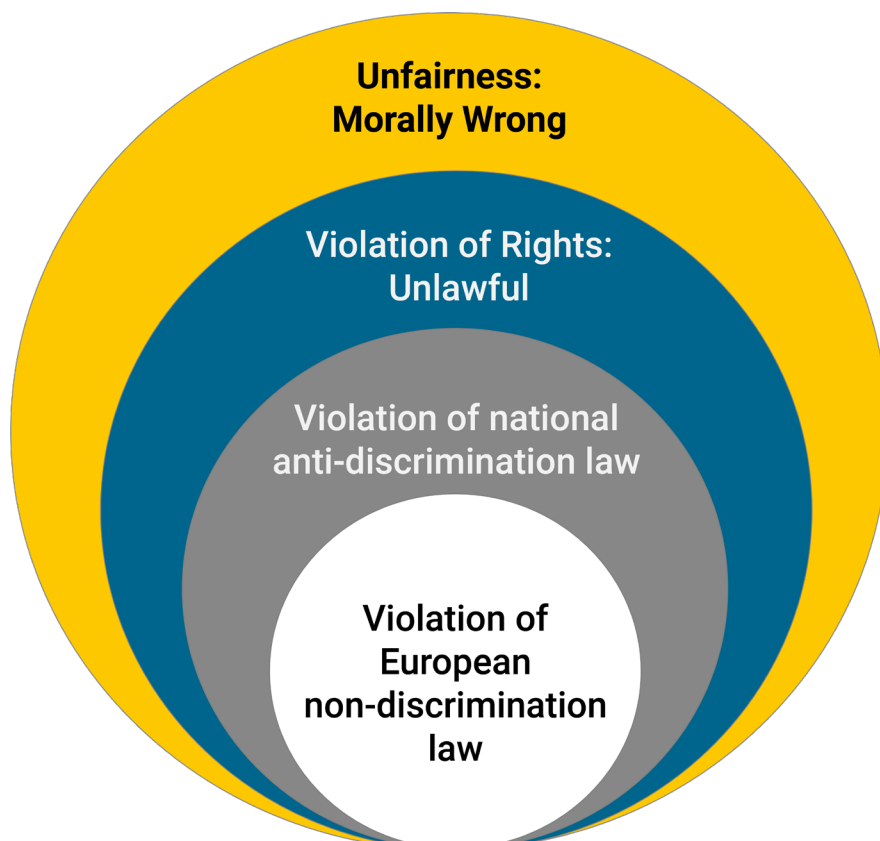
The purpose of the Racial Equality Directive is “to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment” (Article 1).³⁰ Discrimination may arise from conduct that has the purpose or intent to discriminate (refusing to employ non-white job applicants), but proving discriminatory intent is only required under criminal law in the EU. Practice may also have discriminatory effect (when public employees, including cleaning and catering staff are required

to have perfect language skills, which has a detrimental effect on certain racial and ethnic minorities). Unlike many national rules, European law does not specifically define the types of prohibited conduct, therefore actions and omissions are equally covered. Discrimination does not only occur at the individual level. It is often directed against groups or communities and flows also from unequal societal structures.

Discrimination takes on a narrower meaning under European law as compared to the everyday use

of the word. Discrimination does not equal any injustice, (human) rights violation or unlawful act and protection from racial discrimination is only due to those who belong to a racial or ethnic minority or are treated as such. The law may provide rules under which seemingly unfair, unjust or unequal treatment is justifiable. In other words, a discriminatory act may be lawful, even if seemingly unfair or morally wrong but not every unfair treatment amounts to discrimination as shown below.

Circles of injustice



A. WHO IS PROTECTED?

The Racial Equality Directive applies to 'all persons, as regards both the public and private sectors, including public bodies' (Article 3(1)). The directive does not cover differences of treatment based on nationality and statelessness and does not address matters of immigration law (Article 4). Still, protection against discrimination is not conditional on nationality, citizenship, or residence status. In the majority of states, both natural and legal persons are protected against discrimination.³¹ There is more variation in national rules on who is to be held responsible for

discrimination, particularly when it occurs in the workplace.

Racial or ethnic origin are composite and transversal personal characteristics that exist as much as a result of self-identification as of social construction, in other words as bias and prejudices held by racial majorities. Rather than engaging in fruitless disputes about whether race exists and if so, how it should be defined, it seems more useful to focus on racism against which the Racial Equality Directive provides protection. This approach can shift the focus from the negative connotations associated with the term race in

Europe to processes of race making/racialisation and the responsibility of those who engage in such processes by negatively labelling others using race as a label.

Racism can take the form of xenophobia, anti-Semitism, Afrophobia, Romaphobia and Islamophobia, but in Europe it also often emerges as a result of nationalism. Nationals of third countries are not protected on the ground of their nationality under EU law, but may be protected on the ground of their racial or ethnic origin, which is often closely linked to their nationality, especially in the context of xenophobia, the hatred of foreigners.

The company Firma Feryn specialising in the sale and installation of doors advertised for jobs. Its director stated in a radio interview that the company was only seeking to recruit fitters of a native origin, because its customers were reluctant to grant access to foreign fitters to their homes for the work to be carried out. The national equality body established to assist victims of discrimination took legal action against the company, arguing that the public statement on its racially selective recruitment process amounted to direct discrimination. To questions posed by the national court in the so called preliminary referral procedure, the Court of Justice of the EU confirmed that the Racial Equality Directive applies to the racially discriminatory job advertisement. It also stated that sanctions need to be applied even if there is no identifiable victim.

Racial and ethnic origin is not defined in European law. Ethnic minorities are identified both by themselves and by others as people with a shared history, culture and traditions, who often speak a minority language and adhere to a minority religion. The term racial discrimination is defined in ICERD Article 1.1 as "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin" and the Court of Justice of the EU has invoked this definition when dealing with a case concerning discrimination against a non-Roma person 'together with the Roma'.³³

In national laws there may be overlaps between race and ethnic origin on the one hand and nationality, language, religion and belief on the other hand.

In Italy, judges apply the Immigration Decree 286/1998 and Legislative Decree 215/2003 transposing the Racial Equality Directive to every case of racial or nationality discrimination. Therefore, cases of discrimination on the ground of nationality qualify as direct rather than indirect racial discrimination.

In many cases the racial or ethnic ground of discrimination is clear: 'we do not serve Travellers' or 'no Moroccans need to apply for the job'. Often, assumptions are made about a person's racial or ethnic origin and discrimination based on an assumed ground is equally prohibited under European law. If a customer is falsely assumed to be of foreign origin and discriminated on this ground, he can seek protection

under the Racial Equality Directive. In Sweden, a case concerning a landlord asking higher rent from refugees turned on the scope of protection. The trial court found that discriminating against refugees/immigrants fell outside the protection of the law as they could be of different ethnicities or races. However, the appeals court held that the law had to be interpreted broadly and found that the case amounted to ethnic discrimination.³⁴

There are instances when friends, relatives or colleagues also suffer discrimination together or through the victim of racism. For instance, if a mixed-race couple is denied entry to a bar, the ethnic majority spouse suffers discrimination based on associated racial or ethnic origin.

B. PROTECTED FIELDS

Broadly speaking, the Racial Equality Directive prohibits discrimination in the social and economic fields, namely in employment and self-employment, social protection including social security and healthcare, social advantages, education, access to and supply of goods and services which are available to the public, including housing (Article 3(1)). The majority of Member States provide protection from discrimination on grounds protected under European law and beyond, and also on a much broader scale - mainly in relation to public life (civil and political rights, including racial profiling by the police, such as in the infamous Roma registry

kept illegally about thousands of individuals in Sweden)³⁵. This means that claims on these grounds can also be made to national courts and authorities and generally the rules apply as under European law. However, these claims cannot be referred to the CJEU as there is no European law to interpret. As the case of Feryn shows, citizens who are not or are considered not to be native to the land can easily be targeted by this type of racism.

The directive covers contract work, military service and statutory office, employment in both the public and private sectors. Membership and involvement in trades unions and work councils, bar and medical associations is also covered. Services as a field where discrimination is prohibited include services performed

for remuneration and exclude services not available to the general public. The Racial Equality Directive covers all aspects of housing: sale and letting of properties, allocation of tenancies and management of rented accommodation in the public and private sectors, housing loans, and residential care institutions.

Social advantages are benefits of an economic or cultural nature which are granted either by public authorities or private organisations, including concessionary travel on public transport, reduced prices for access to cultural or other events and subsidised meals in schools for children from low-income families



Working against workplace discrimination [Photo: Shutterstock]

4.

Direct discrimination

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Equal treatment means that likes should be treated alike (an ethnic minority and an ethnic majority child should be given equal access to education) and unalikes should be treated unlike (ethnic minority language-speakers should receive special assistance in school). In European law direct discrimination is when one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of his or her protected ground (Article 2(2)a).

Academics have been debating whether the restriction of headgear worn by Muslim women amounts to religious (and sex) discrimination or racial origin also plays a part in these processes. Muslim women have so far litigated denial of employment and dismissal cases on the basis of religious discrimination and the right to religion, partly because in the countries with more restrictive legislation and practices, public sentiment is not conducive to making claims of racism in addition to claims for the accommodation of minority religions. Nonetheless, Islamophobia and prejudices against practicing Muslims virulent in political discourse have been considered as a type of racism by monitoring bodies such as ECRI, leading to a social context where the so-called headscarf cases are used to portray Muslims as an inferior culture and/or race.

The CJEU has identified as direct discrimination cases in which a formally neutral practice in fact affects one group only. This interpretation was offered in *CHEZ*, whereby an electricity company's practices adopted ostensibly to fight criminal behaviour

Direct discrimination is the easiest to spot. Its typical scenarios include:

- Denied access to employment.
- Discriminatory job advertisements.
- Difficulties in enrolling to schools.
- Bars, restaurants or shops deny entry.
- Real estate agencies or owners not renting to minority racial or ethnic tenants.
- Racially segregated social housing and education.
- Pay differences: in certain Member States statistics indicate that minority men earn less than majority men and minority women.

(illegal electricity consumption) solely targeted so called Roma districts, in other words areas predominantly lived in by ethnic Roma in Bulgaria.³⁶

In general, race or ethnicity based direct discrimination is the most difficult to justify. There are two exceptions to the prohibition of direct racial discrimination: a genuine and determining occupational requirement and positive action. The first can be exemplified by the employment of a Black actor to play Othello. As to the second justification, the directive permits the adoption of positive action measures aimed at preventing or compensating for disadvantages linked to racial or ethnic origin (Article 5). Typical positive action measures include extra language classes for minority students. There may be cases, in which it is questionable whether the measures amount to genuine positive action, for instance, if they serve to put an upper limit on the number of ethnic minority employees. If so-called positive action measures *in fact* disadvantage a protected group, then they are discriminatory and cannot qualify as an exception to discrimination.

The definition of direct discrimination rests on identifying a comparator but finding an adequate one may at times be difficult. This was undoubtedly the case in the CJEU's *Jyske Finans* judgment that concerned the less favourable treatment of a Danish citizen of Bosnian origin as compared to his wife, a Danish citizen of Danish ethnic origin.³⁷ While the husband was asked for further identification when requesting a loan for the purchase of a used car, the wife was not, precisely because he was of foreign origin (born outside of Denmark/the EU) while she was a 'native'. Rather than establishing direct racial discrimination against all ethnic non-Danes as compared to ethnic Danes in line with the underlying xenophobic practice, the CJEU found that data on the treatment of the diverse ethnic groups who make up foreigners in Denmark was not available, therefore no discrimination occurred. Critics argue that the CJEU erred when failing to compare ethnic Danes to ethnically diverse non-Danes as one group, because the case turned not on the exact (ethnic) origin but the non-Danish ethnicity of the latter group.

5.

Indirect discrimination

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In European law the general definition of indirect discrimination is: where an apparently neutral provision, criterion, or practice would put persons of a particular racial or ethnic origin at a particular disadvantage compared with other persons (Article 2(2) b). The key to understanding

indirect discrimination is the apparent neutrality of the criterion or the practice, meaning its lack of logical connection to racial or ethnic origin. The fact that racial or ethnic origin is a complex personal characteristic that is often constructed by others rather than the concerned individual may at times complicate the identification

of a criterion as directly racist or apparently neutral. For instance, skin colour would be considered by many as a directly racist criterion, but language and descent may be seen as apparently neutral in terms of racial or ethnic origin, even though they constitute the core element of a person's ethnic identity.

Typical scenarios of indirect discrimination include

- Language requirements that are not in fact necessary.
- Inappropriately high requirements of professional or academic qualifications.
- General ban on a profession or activity that is characteristic of a certain racial or ethnic group (Travelling way of life, fortune telling, collection of scrap metal, street trading).
- Dress codes.

What could be seen as indirect discrimination is often lawful, because European law permits a general exception to this type of treatment. This general exception asks why a certain provision, criterion or practice was needed, what is its aim? It also asks whether the response satisfying this need is necessary and appropriate? Or could the aim be achieved in any other way? This legal formula means that there is a broad range of justifications that may be acceptable under European law, that may render a certain type of indirect discrimination lawful.

BUT it also means that certain principles do limit which justifications are and which are not acceptable:

- ☐ Purely budgetary (financial)

considerations can never serve as objective justifications.

- ☐ The aim of the practice must be unrelated to discrimination and mere generalisations are not sufficient.
- ☐ Proportionality requires that the concrete measure taken in order to achieve the legitimate aim should be suitable for achieving that aim.
- ☐ It also requires the respondent to show that another measure with less or no detrimental effect would not be effective.

The Danish court asking the CJEU to clarify the directive in relation to the Jyske Finans case wondered whether requiring extra identification from individuals born outside of Denmark

could be qualified as direct, rather than indirect discrimination. The case turned on whether place of birth is linked to racial or ethnic origin, so that a measure based on place of birth can have a particularly disadvantageous effect on persons of a particular ethnic origin. The CJEU did not find any type of discrimination in the end, because in its view the evidence presented by the applicant did not convincingly show that ethnically non-Danish groups could be adversely effected as compared to ethnic Danes. Conversely, critics argue that the place of birth signifies a person's descent, which is part and parcel of racial or ethnic origin.

as compared to ethnic Danes. Conversely, critics argue that the place of birth signifies a person's descent, which is part and parcel of racial or ethnic origin.

The legal profession is often divided on whether a certain incident should qualify as direct, indirect or no racial discrimination, particularly when the issue at hand is over-politicised. This was the case in *Biao v Denmark*, another case that concerned particular disadvantage against Danish citizens of non-Danish ethnicity in the context of family reunification. While first the European Court of Human Rights found no racial or

ethnic discrimination, on appeal the Grand Chamber established indirect discrimination. One judge argued that the so-called attachment requirement (a condition that Danish citizens wishing to bring their spouses into the country should reside there for 28 years) amounted to direct discrimination disguised as apparently race-neutral. A handful of other judges disagreed because they did not find the politically highly controversial measure discriminatory in any sense.³⁸ In this case, evidence suggests that an intention to discriminate was disguised by the adoption of a formally

neutral legal provision to conceal direct racial discrimination.

In some Member States employment in the public sector is conditioned on very strict language proficiency, as an effect of which racial and ethnic minorities are vastly underrepresented among public servants not only at higher ranking, executive positions, but also at the lowest ranking positions whose fulfilment does not in general require written skills at all, or only very basic skills. Whether to qualify discrimination arising from language requirements as direct or indirect racial discrimination is also debated.

In Austria, the Viennese Independent Administrative Senate held that a placement company was liable for discrimination, because it placed a job advertisement for an unskilled kitchen assistant and demanded 'excellent proficiency in German' as well as EU citizenship. The Senate found that both requirements were racially discriminatory but it did not specify whether direct or indirect discrimination occurred.³⁹

In Estonia, more than 80 % of ethnic minority people are ethnic Russians. Difference in treatment on the grounds of proficiency in Estonian is widespread and many cases concern the 'linguistic component' of ethnicity. The Commissioner for Gender Equality and Equal Treatment examined the employment contracts of two teachers of Russian ethnicity at a Russian-language kindergarten, cancelled 'for long-term inability to perform duties' due to insufficient proficiency in Estonian.⁴⁰ The commissioner concluded that both teachers were discriminated due to their ethnicity in so far as they had not been offered another position at the kindergarten. The requirement to speak Estonian as a mother tongue discriminated against jobseekers of a minority ethnic origin. The Commissioner explicitly linked ethnic origin, mother tongue and language proficiency in the context of discrimination and clearly stated that a language requirement may discriminate against ethnic minority jobseekers, unless constituting a genuine occupational requirement.

Similar to the questions above, academics debate whether segregation should qualify as direct or indirect discrimination under the directive and the Romanian courts and public bodies have indeed applied either of these

forms of discrimination in cases of school segregation. International law specifically prohibits racial segregation and as explained above, this is binding on Member States.

ICERD prohibits segregation and this treaty provision pertains to the segregation of the Roma in the East and groups 'of migrant origin' in the West.⁴¹

6.

Harassment

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In a recent Romanian case a journalist was held responsible for hate speech against Roma women
[Photo: Shutterstock]

Under European law harassment is: unwanted conduct related to a protected ground with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Even if the purpose is not to harass, establishing a hostile environment that violates a person's dignity (effect) is sufficient for a finding of harassment.

There are uncertainties in national laws relating to the definition of a degrading environment, because it can be subjective or objective, meaning that what is a degrading environment to a certain victim may not appear to be degrading more generally to people not having a protected ground.

Another area where uncertainties exist is determining who is liable for harassment, which is often committed by colleagues at the workplace. Member States provide for the liability of employers in these cases and some even place a special duty

on employers to prevent or redress harassment. Public authorities and institutions, such as hospitals, schools or local councils have a duty to tackle harassment committed by their employees, otherwise they can be held liable under civil law.

Typical scenarios include racist jokes or stories at the workplace, demeaning conduct towards racial or ethnic minority co-workers or subordinates, hate speech, posters, e-mail messages, ordinary mail or graffiti with similar content in general. The Racial Equality Directive protects from harassment in employment and beyond, see the section on material scope above. Hate speech and hate crime related EU law applies to (on-line) hate speech.

In general, harassment can be established without proving intent or making comparison because it is directed at racial or ethnic minority groups or individuals.⁴² Similarly, in Sweden, the discriminator's intent is not the key factor in

establishing harassment because even unintended consequences can have discriminatory effects. However, if the harasser intends to violate a person's dignity but fails to reach the desired effect, no claim for harassment can be successfully made due to the lack of disadvantage.

Racial harassment has been litigated in Romania before the National Council for Combating Discrimination (NCCD) and in Italy before civil courts. Politicians and journalists are often held responsible in hate speech cases in both Member States.⁴³ Both countries provide protection beyond the scope of the directive in their national anti-discrimination laws. In a recent Romanian case a journalist was held responsible for hate speech against Roma women.⁴⁴ In Italy, the Court of Appeal of Brescia convicted a politician of the Lega Nord for discrimination against asylum seekers and NGOs involved in the reception system.⁴⁵

7.

Victimisation

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Victimisation describes any adverse measure taken by an organisation (including employers and public authorities) or by an individual in retaliation for efforts to enforce the right to equal treatment. The most common example is where an employee complains about unequal treatment, and the employer responds by dismissing or failing to promote the employee.

In Italy, a member of a company board who had been dismissed after having protected an employee from discrimination on ground of race and ethnic origin took civil action. The Supreme Court found that, according to the Civil Code, the dismissal is allowed even if unfair and the person is only entitled to compensation. Nevertheless, when the dismissal represents the reaction to an initiative carried out with good faith and fairness by the dismissed person in order to assure the principle of equal treatment irrespective of race and ethnic origin, the dismissed person qualifies as a victim of a discriminatory conduct, and becomes entitled to reinstatement in his/her position according to Legislative Decree 150/2011.⁴⁶

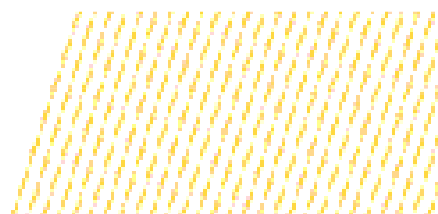


The most common example is where an employee complains about unequal treatment, and the employer responds by dismissing or failing to promote the employee. [Photo: Shutterstock]

The directive defines victimisation as one form of unlawful discrimination: any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with

the principle of equal treatment. Victimisation not linked to a complaint on discrimination is widespread, but it is not protected by the directive. Protection against victimisation is not limited by Romanian law to the

complainant but also extends to the witnesses. Victimisation is prohibited in relation to complaints filed with any public or private body, court, etc.



8.

Instruction to discriminate

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Both non-discrimination directives prohibit instructions to discriminate. This covers for instance proprietors who instruct doormen to deny access on grounds of race or home-owners who instruct real estate agents not to let or sell their property to ethnic minorities. It also

covers instances where employers instruct temping agencies not to refer to them employees of a certain racial or ethnic origin.

National laws diverge when it comes to imposing liability on either the instructor or the actual discriminator, or

both. A key aspect of caselaw is whether vicarious liability (an employer's liability for the deeds of an employee) forms part of a domestic legal system. If so, liability rests with the employer. In contractual relations, what matters is whether the contractor receives orders and is subordinated to the other party.

9.

Establishing discrimination

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Discrimination can be established in several ways.⁴⁷ In civil or labour cases, the general rule is that each party bears the burden of proving facts they allege but in cases of discrimination the burden of proof is reversed as explained below. In administrative and criminal cases, it is usually for the authorities to investigate and establish the facts to different degrees of certainty. The degree of certainty is the highest in criminal cases because once convicted, defendants may be subjected to severe sanctions including imprisonment. In criminal cases a complaint on discrimination must be proven beyond reasonable doubt and the offender's discriminatory intent must be established.

Evidence includes witness statements, documents, or common knowledge. Evidence that can ease the demand on victims of discrimination to support their claim includes statistics,

situation testing, audio or video recording and forensic expert opinions. Information about discriminatory practices can be obtained through freedom of information requests as well. The Romanian Anti-discrimination Law allows the use of audio and video recordings. In practice, during the hearings and before the deliberations, the Steering Board of the Romanian equality body National Council for Combating Discrimination can accept any means of evidence relevant for the case. This is an exception from ordinary civil procedure.

A. STATISTICAL EVIDENCE

Statistics are typically used to support claims on unequal pay, collective redundancy and segregation. However, statistics are not available in many cases and statistical evidence is not a prerequisite of establishing discrimination. Statistics help to shift the focus away from the individual

victim toward underlying structural inequalities. This is helpful if a victim knows that there are many others who share his fate but are unwilling to bring an action against the discriminator.

Even though racial or ethnic origin constitute sensitive data under the General Data Protection Regulation, ethnic data can be collected for the purposes of legal claims and with the informed consent of the individuals concerned. It is important to bear in mind that racial discrimination is often based on the perpetrators' assumptions about the victims' racial or ethnic origin, therefore rather than self-identification, third party identification-based data is needed. This can be obtained from sources other than the victims themselves, such as through testing hiring practices via anonymised CVs, testing rental practices via telephone inquiries or other research into experiences of discrimination.⁴⁸

B. SITUATION TESTING

Situation testing is often used to uncover discriminatory practices such as denial of access to bars, restaurants, accommodation, education or employment. Situation testing aims to recreate situations in which discrimination generally occurs by probing and comparing the treatment of majority and minority individuals.⁴⁹

Across the EU, minority activists, journalists and social scientists use situation testing to uncover and report discriminatory practices. Situation testing has been used in Sweden by minorities and in other Member States also by journalists.

Due to the general procedural rule on the free presentation of relevant evidence, situation testing is allowed to prove violations of the Swedish Discrimination Act. Nevertheless, the sensitive nature of testing was shown in a case that reached the Supreme Court concerning ethnic discrimination by a nightclub. While confirming that discrimination had occurred the Court reduced the compensation awarded due to the systematic nature of the testing.⁵¹

C. REVERSED BURDEN OF PROOF

It is generally very difficult to prove discrimination, in particular as the proof often belongs to the perpetrator (such as employer's internal documents related to hiring practices or statistics on pay in the case of discrimination in employment). Therefore, discrimination law requires that the perpetrator needs to demonstrate that they did not discriminate, rather than requiring that the victim fully proves that they did. This is called the reversal of the burden of proof and applies once a victim has established

A rental applicant with an immigrant background suspected that he was the target of discrimination. Two Swedish friends agreed to apply to the housing company for apartments as well. They were both given a chance to see the apartment while their immigrant friend was denied the same opportunity. Although this test was not decisive, it did help to prove the overall case. The case was decided in favour of the plaintiff and damages were awarded.⁵⁰

facts from which it may be presumed that there has been direct or indirect discrimination. The reversal of the burden of proof does not apply to criminal procedure and Member States can also exclude its application in administrative proceedings.

This does not mean that victims have been freed from convincing the court that they have a case. In order to reverse the burden of proof they must first establish a prima facie case, in other words convince the court of the likeliness or probability that they suffered discrimination. The burden of proof then moves to the respondent to prove that discrimination played no part in the treatment or effect complained of. If the respondent is unable to explain the treatment with objective reasons unrelated to discrimination, he will be liable for a discrimination. The reversal of the burden of proof makes it easier for plaintiffs to show discriminatory motive, but it does not provide access to documents and other proof held by the defendants. Access to evidence held by the other party is generally eased by national procedural law.

In Sweden, the civil courts and the Labour Court seem to have applied the reversed burden of proof differently, which would tend to lead to a lower level of protection before the Labour Court.⁵² Arguably, the Labour Court applies the rule in a more restrictive manner, especially in cases of racial

discrimination.⁵³ A government inquiry, although stating that the legislative text does not seem to be the problem in the few cases brought to the courts, nevertheless proposed an amendment of the legislation to make it even more clear that it was a rule establishing a presumption.⁵⁴ However, no change in the law has yet been proposed.

D. REPRESENTING OR SUPPORTING VICTIMS

In European legal systems, victims can enforce their right to equal treatment on their own or through a legal representative: a lawyer or in many countries an NGO case worker. If discrimination affects a group, then the individual victims can team up and take action together. The Racial Equality Directive makes it a duty of Member States to ensure that associations, foundations, charities or trade unions can engage, either on behalf or in support of the victim, with his or her approval, in any judicial and/or administrative procedure in which equal treatment can be enforced. Still, the lack of funding for legal representation, of qualified lawyers, the scarcity of legal aid and/or the unwillingness of victims, NGOs, and public bodies to take or fund legal action severely hampers access to justice in many cases of discrimination.

Acting on behalf of a victim or supporting her in a procedure are different types of assistance. Acting on behalf of a victim requires that non-governmental organisations or trades unions can represent the victim in proceedings. Italy, Romania and Sweden allow NGOs to engage in proceedings 'on behalf of' victims of discrimination. In Italy, the Department for Equal Opportunities of the Presidency of the Council of Ministers keeps a list of NGOs selected on the basis of 'their purpose and the degree of continuity in their action' which can litigate in support of or on behalf of victims of discrimination or take representative action. Support can be provided through advice prior or during the proceedings, or through interventions in Italy and Romania, but Swedish law does not allow organisations to join or intervene in on-going proceedings. A common form of support is when individual lawyers (working for an organisation) represent a victim. The Swedish government provides support to a number of NGOs known as anti-discrimination bureaus that can represent victims and provide certain types of assistance. Other NGOs are also becoming involved in representing victims. The Italian equality body also provides some

funding for legal representation. Trade unions can represent their members.

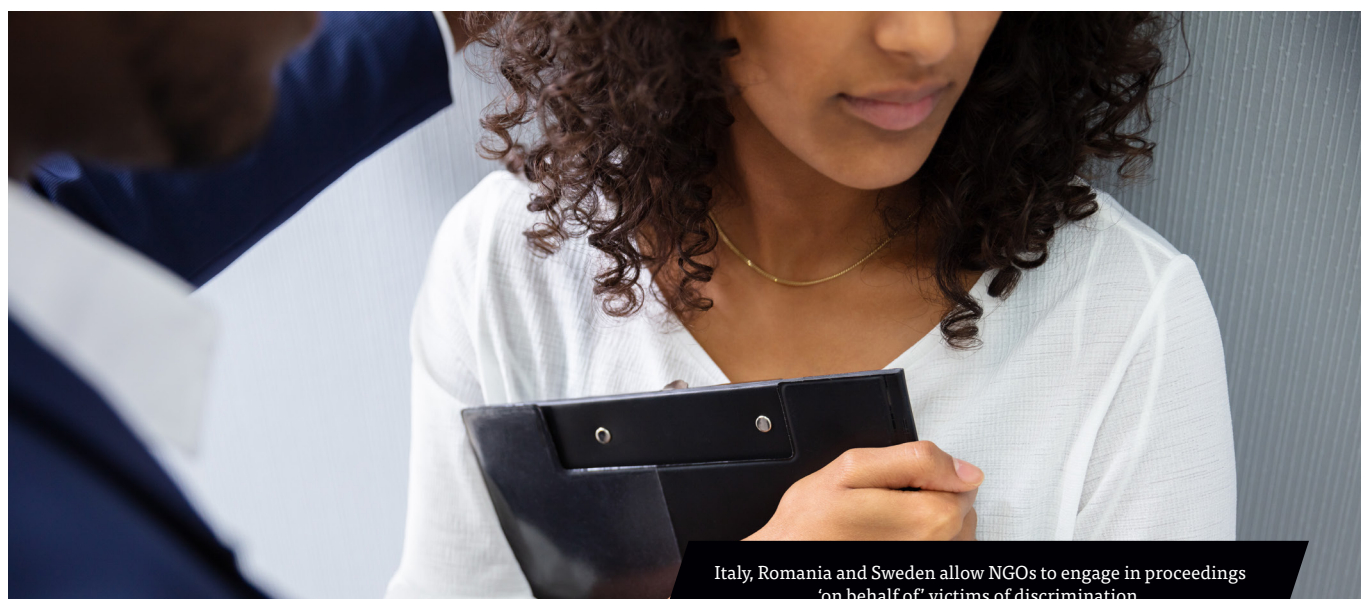
Legal standing signifies the ability of a party to sue, to litigate, to demonstrate to the court sufficient connection to and harm from the law or from the action challenged in order to support her participation in the case. Victims have automatic standing in all legal proceedings.

In Romanian anti-discrimination law for example, when discrimination concerns a community or a group of people, NGOs have legal standing before the NCCD even without the approval of the alleged victims of discrimination, but it is doubtful whether effective remedies are available in so called representative actions in civil courts. In Italy, representative action can be taken by NGOs and trade unions on behalf of unidentified victims in court. As seen in the Feryn case above, certain equality bodies can also have standing in representative cases where victims cannot be identified. This is not the case in Italy, Romania and Sweden, which is problematic because it leaves certain types of racial discrimination unaccounted for. The Romanian NCCD can initiate the investigation of cases based on its own decision (so-called ex

officio procedures).⁵⁵

In most European countries interested third parties – equality bodies, non-governmental organisations or trade unions – can intervene in court procedures to advance the interests of one party. Romanian NGOs may file petitions to intervene in specific cases based on the norms of general civil procedure. The courts will decide if their interest is justified to join the litigation.

So-called 'third parties', i.e. organisations or individuals other than the parties directly involved in a legal case (generally the discriminator and the victim), may sometimes intervene in the case to help either of the parties, through so-called 'friend of the court briefs' (*amicus curiae*). Organisations can thus use the court as a platform to amplify a point of law that might not otherwise be considered within the factual confines of a legal dispute. The third party provides a written brief for the information of the court. Though not explicitly authorised by law, some NGOs in Romania submit friend of court briefs in cases of discrimination, which are accepted by courts. These types of briefs are generally not allowed in Sweden.



Italy, Romania and Sweden allow NGOs to engage in proceedings 'on behalf of' victims of discrimination.
[Photo: Shutterstock]

10.

How to remedy racial discrimination?

Individuals can enforce the directive before courts, administrative authorities or mediatory/conciliatory bodies. There is a duty on States to make available judicial and/or administrative procedures to victims of discrimination. Judicial proceedings follow the type of law: civil, criminal, labour or administrative. Complaints arising in the public sector are often dealt with in administrative courts, while complaints in the private sector go to civil courts.

In Italy, the Immigration Act provides a special procedure for discrimination cases. Representation by a lawyer is not required and the victim can apply directly to the judge at the ordinary civil court to obtain an injunction against the discriminatory activity as well as damages. The hearing takes place 'avoiding all unnecessary formality', with a free choice by the judge of the most suitable method for gathering evidence. In cases of particular urgency, the judge can issue an interim order. Courts can also order the publication of the judgment in a newspaper.

Mediation or conciliation proceedings may be available as a mandatory part of the court proceedings – such as pre-trial mediation in Italy - or as an optional solution, such as in Romania.

Labour inspectorates are generally charged with enforcing the prohibition of discrimination in employment, while education and consumer inspectorates act in their respective fields. They investigate complaints

and deliver binding decisions that can be challenged in court.

The ombudsmen in general examine and review complaints concerning human rights violations including unequal treatment and often attempt to resolve conflicts through conciliation, which if unsuccessful is followed by non-binding recommendations. Often, ombudsmen have the power to initiate administrative or criminal procedures. In Sweden, the Equality Ombudsman can take legal action on behalf of victims of discrimination before civil or labour courts.

A. EQUALITY BODIES

The minimum requirement on Member States is to have a body for the promotion of racial equality which a) provides independent assistance to victims of discrimination in pursuing their complaints about discrimination, b) conducts independent surveys concerning discrimination, and c) publishes independent reports and recommendations on any issue relating to such discrimination.⁵⁶ These so-called equality bodies include the Swedish Equality Ombudsman (DO) and the Romanian National Council for Combating Discrimination (NCCD)⁵⁷ that deal with all the protected grounds. The Italian National Office Against Racial Discrimination (UNAR) has a legal mandate to deal with racial or ethnic origin but in practice it also covers the grounds of sexual orientation, disability, age, and religion.

Equality bodies can follow the ombudsman model – whereby investigations lead to non-binding recommendations – or act as administrative authorities, meaning that they investigate complaints, make a finding of discrimination and order preventive or remedial action, including the payment of fines. The Swedish DO is an example of the ombudsman model, while the Romanian NCCD acts as an administrative authority. The Italian UNAR is a promotional body that does not follow these models. The Romanian NCCD can investigate complaints of discrimination and force compliance with their decisions adopted at the end of the proceedings. In contrast, the Swedish Ombudsman can investigate cases but her final conclusions are not binding. The Italian UNAR lacks these powers.

None of the equality bodies has the power to award compensation to a victim. While ombudsmen's actions may be limited to the public sector, equality bodies in general have the power to also react to complaints arising in the private sector. Equality bodies assist victims of discrimination in a variety of ways. All provide information to victims on their websites and/or in specific publications, and most provide advice with regard to all queries. Most bodies can arrange for conciliation between the parties and most can review and comment on legislative proposals and the reform of existing laws.

Some specialised bodies support legal action – the Italian UNAR provides financial support while the Swedish Ombudsman takes cases herself. In various countries, equality bodies have the power to litigate in their own name if this serves the public interest, and usually if the victims cannot be identified. The Romanian equality body does not have a right to intervene in civil cases, but it will be summoned in all civil cases to provide its expertise.

B. CHOICE OF LEGAL AVENUE

In certain countries, a choice must be made between the different legal avenues to maximise protection from racial discrimination. For instance, in Romania, a victim of discrimination

can choose between filing a complaint with the national equality body and/or filing a civil complaint for civil damages with a court of law unless the act is criminal, in which case the Criminal Code provisions apply. The two legal avenues (national equality body and civil courts) are not mutually exclusive and the plaintiff can choose to use them simultaneously, which in practice creates problems for the parties, the equality body, and the judiciary.

As noted above, in Sweden, civil courts tend to be more amenable to adjudicating claims of (racial) discrimination than labour courts. The two types of courts provide such diverse outcomes that the labour courts' jurisprudence is arguably suspect of non-compliance with the Racial Equality Directive.

In countries, such as Italy and Sweden, where litigation in civil courts is rare or costly, complaining to administrative bodies can provide a viable alternative. Administrative bodies make their own investigation and bring decisions that are subject to judicial challenges. In case they find in favour of the complainant, they will necessarily represent her interests in case their decisions are challenged.

Time limits for filing claims may also differ and the choice of legal avenue is important in this regard as well. The directive does not specify any time limits, but time limits as short as 15 days, a month or even two months may not be appropriate under European law as it can practically hinder access to a procedure for the enforcement of the Racial Equality Directive.



In Sweden, [Photo: Shutterstock]

11.

Sanctions

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Member States have the power to 'lay down the rules on sanctions' as concerns racial discrimination (Article 15 of the directive). 'The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.' In reality, not a single national enforcement system appears to be truly effective, proportionate and dissuasive when viewed from a broader perspective of racial equality because they tend to cater for individual victims seeking a remedy for the discrimination suffered.

Different legal avenues result in different sanctions, but sanctions can only be imposed if discrimination is established. A finding of discrimination is often the most effective, because it recognises the wrongdoing suffered and establishes the defendant's liability. Fines are typical sanctions in criminal and administrative procedures. The Romanian equality body can impose administrative fines and injunctions. While administrative fines may deter, they do not by themselves fulfil the requirement of compensation for the individual.

Civil and labour courts tend to oblige wrongdoers to pay compensation to victims of discrimination, including moral damages that compensate injury to feelings, reputation, etc. The most typical sanction under civil and

labour law is compensation while labour courts generally have the power to order an employee's reinstatement. The amount of compensation tends to be rather low. Few Member States permit civil courts to express public disapproval by imposing damages that go beyond the reparation of the wrongdoing the individual victim had suffered.

Other than fines and compensation, sanctions can take the form of injunctions that either oblige the wrongdoer to perform a particular act or to refrain from action). Sanctions can also include an apology as held by the CJEU in the Feryn judgment discussed above. Apologies, particularly made in public – in newspapers or on the Internet – can also be surprisingly effective and dissuasive. Publicity can take diverse forms, i.e. (a) publicity in the national/local press (b) publicity in the workplace (c) directed publicity to state organs (d) maintenance of a public registry of decisions (e) obligations to declare information in certain circumstances, such as in tender applications.

In Italy, if a company receives benefits from the state or regions or a contractor with public authorities for the execution of public works etc, the judge must transmit his decision to the relevant public authority which will then withdraw the benefit or contract. If the case is particularly

severe a company can be excluded from such contracts for up to two years. Sanctions can also be sought in conciliatory negotiations, usually in the form of compensation and apology.

Although not directly connected to the sanctions under the Swedish Discrimination Act, according to the Regulation on anti-discrimination conditions in public contracts, Sweden's largest government agencies are to include a anti-discrimination condition, subject to sanctions, in their larger contracts for services and building contracts. The purpose of the regulation is to raise awareness of and compliance with the Discrimination Act.⁵⁸

Most Member States provide criminal sanctions against discrimination. These sanctions may range from community service through fines to imprisonment. Criminal sanctions for acts of discrimination other than hate crimes are generally not imposed in Italy, Romania and Sweden. In many countries the effect of a court finding that a criminal offence is racially aggravated is that the sentence is increased to reflect the seriousness of the racial aggravation. The court must specify that the offence was racially aggravated.

Sanctions available against racial discrimination

Procedure/Sanction	Labour	Civil	Criminal	Administrative	Mediation
Finding of discrimination	✓	✓	✓	✓	
Compensation	✓	✓			✓
Apology		✓		✓ (in Romania)	✓
Injunction	Reinstatement	✓		✓	
Aggravated/ punitive damages		✓			
Prohibition to enter public procurement				✓	
Community service			✓		
Fine			✓	✓	
Imprisonment			✓		

12.

Reporting discrimination

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Journalists, citizens, activists and NGOs can play a significant role in reporting incidents. [Photo: Shutterstock]

Member States are under the obligation to communicate to the European Commission every five years (including in 2020) all the information necessary to draw up a report to the European Parliament and the Council on the application of the Racial Equality Directive. The Fundamental Rights Agency of the EU also regularly reports on compliance with the directive and so do European NGOs, such as the European Network

Against Racism (ENAR), whose so called shadow reports provide a valuable insight into the lived realities of Europe's racialised minorities.

Journalists, citizens, activists and NGOs can play a significant role in reporting incidents, trends and patterns of racial discrimination, or instances of non-compliance with the Racial Equality Directive to equality bodies or EU-level stakeholders.

The most up to date information about legislative and policy developments, as well as possible breaches of the directive, comparative data, the analysis of national and European caselaw can be found on the website of the European network of legal experts in gender equality and non-discrimination. The Network publications are useful for journalists who cover racial discrimination both at the EU and national levels.

GLOSSARY

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Amicus curiae brief

Friend of court submission filed by an organisation with no direct interest in a legal dispute, seeking to inform the court's views on the broader implications of a case.

Charter of Fundamental Rights of the European Union (CFR)

The Charter enshrines certain political, social and economic rights for European (EU) citizens and residents into EU law. It was proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission. It has had full legal effect since 1 December 2009. Under the Charter, the European Union must act and legislate consistently with the Charter and the Court of Justice of the EU will strike down legislation adopted by the EU's institutions that contravenes it. The Charter applies to the Institutions of the European Union and its member states when implementing European Union law.

Committee on the Elimination of Racial Discrimination (CERD)

A body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) by its State parties. All States parties are obliged to submit regular reports to the Committee on the implementation of ICERD. The Committee examines each report and issues recommendations in the form of "concluding observations". There are three other mechanisms through which CERD monitors compliance with the Convention: the early warning procedure, the examination of inter-state complaint and the examination of individual complaint. The Committee meets in Geneva and normally hold three sessions per year. It publishes its interpretation of ICERD in general recommendations (or general comments).

Direct discrimination

When one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of his or her protected ground.

European Convention on Human Rights and Fundamental Freedoms (ECHR)

Adopted in 1950 and ratified by 47 Member States, the ECHR prohibits discrimination in relation to the enjoyment of any of the rights protected by the Convention (right to freedom of religion, right to life, etc.). Enforced by the European Court of Human Rights in Strasbourg.

European Commission against Racism and Intolerance

A body established by the Council of Europe in 1994 to monitor racism and related intolerance in the states parties

Equality body

A public body established to promote racial equality.

Fundamental Rights Agency (FRA)

The EU Agency for Fundamental Rights was established in 2007 under Council Regulation (EC) No 168/2007 to provide assistance and expertise relating to fundamental rights to EU institutions, bodies, offices and agencies, and to EU Member States when they implement EU law. The main task of the agency is to collect and publish relevant, objective, reliable and comparable information and data on the situation of fundamental rights in all EU countries within the scope of EU law. The agency also promotes dialogue with civil society in order to raise public awareness of fundamental rights and disseminate its work.

Harassment

Unwanted conduct related to a protected ground with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

ICERD is a United Nations treaty committing states parties to the elimination of racial discrimination and the promotion of good race relations. ICERD requires states parties to outlaw hate speech and criminalize membership in racist organizations. It provides for an individual complaints mechanism against its parties but its jurisprudence is yet quite limited. ICERD was adopted on 21 December 1965, and entered into force on 4 January 1969. As of July 2020, it has 88 signatories and 182 parties.

Indirect discrimination

Where an apparently neutral provision, criterion, or practice would put persons of a particular racial or ethnic origin at a particular disadvantage compared with other persons.

Legal person

An individual, company, or other entity which has legal rights and is subject to obligations.

Preliminary reference procedure

A procedure regulated in an EU treaty that enables national courts to stay/suspend proceedings and ask questions about the interpretation of EU law from the Court of Justice of the EU. National courts against whose judgments no appeal is available are under the obligation to initiate preliminary reference procedures in case the interpretation of EU law is not clear.

Positive action measures

Measures aimed at preventing or compensating for disadvantages linked racial or ethnic origin.

Racial discrimination

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

Racial Equality Directive (RED)

The Racial Equality Directive 2000/43/EC is an Act of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin in economic fields such as employment, social protection including health care, social advantages, education and services available to the public including housing.

Racialisation

Processes that negatively label others using race as a label, race making.

Reversal of the burden of proof

When victims establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

Segregation

Unlawful physical separation.

Situation testing:

Process following a set methodology and yielding evidence establishing discriminatory practices by recreating discriminatory scenarios that yield comparative data about the treatment of racial majority and racial minority individuals.

Victimisation

Any adverse measure taken by an organisation or by an individual in retaliation for efforts to enforce the right to equal treatment.

USEFUL LINKS

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Directorate General for Justice and Consumers: https://ec.europa.eu/info/departments/justice-and-consumers_en

European law: <http://eur-lex.europa.eu/en/index.htm>

Court of Justice of the European Union: http://curia.europa.eu/jcms/jcms/j_6/accueil

European Union's Fundamental Rights Agency: <https://fra.europa.eu/en/about-fra>

Charterpedia: <https://fra.europa.eu/en/eu-charter/title/title-iii-equality>

Italian equality Body, UNAR: www.unar.it

Swedish equality body, DO: www.do.se

Romanian equality body, NCCD: <https://cncd.ro/>

Romanian Anti-discrimination Coalition: <http://www.antidiscriminare.ro/>

European Equality Law Network: <https://www.equalitylaw.eu/>

Migration Policy Group: <https://www.migpolgroup.com/>

A training manual (Manual), including practical information on the basic structure of anti-discrimination law in 24 languages

Strategic Litigation of Race Discrimination in Europe: from principles to practice (Strategic Litigation Manual) ERRC/ Interights/MPG

Proving Discrimination Cases - the Role of Situation Testing

Handbook on European non-discrimination Law, European Union Agency for Fundamental Rights and the European Court of Human Rights (ECtHR): https://www.echr.coe.int/Documents/Handbook_non_discrimination_Law_ENG.pdf

Endnotes

1 EU law on the ground of gender includes 1. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:EN:PDF>, 2. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF>.

On nationality see, further, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Citizens' Rights Directive).

2 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive, RED). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive) was passed in December 2000: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>. The Racial Equality Directive covers a wide range of fields, while the Employment Equality Directive covers discrimination in employment only.

3 In order to approximate the scope of protection beyond the field of employment across the different grounds, the European Commission prepared a draft directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. The Proposal has been pending with the Council since 2008: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:NOT>.

4 Charter of Fundamental Rights of the European Union, Article 21(1) and Article 22.

5 EU law first prohibited discrimination based on nationality covering the citizens of EU Member States only. The Racial Equality Directive does not cover nationality discrimination, unless discrimination based on nationality constitutes indirect racial or ethnic discrimination as explained below.

6 Racial Equality Directive does not cover nationality discrimination, unless discrimination based on nationality constitutes indirect racial or ethnic discrimination as explained below. For details, visit the website at <https://www.equalitylaw.eu/>.

<https://www.ohchr.org/en/hrbodies/tbpetitions/pages/hrtbpetitions.aspx>

For information on making applications, see <https://www.echr.coe.int/Pages/home.aspx?p=applicants/ol&c=>

Information about ICERD and the work of the Committee monitoring its implementation is available at <https://ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

7 <https://www.ohchr.org/en/hrbodies/tbpetitions/pages/hrtbpetitions.aspx>

8 For information on making applications, see <https://www.echr.coe.int/Pages/home.aspx?p=applicants/ol&c=>

9 Information about ICERD and the work of the Committee monitoring its implementation is available at <https://ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

10 Article 1(1): 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

11 Information about the ICCPR and the work of its monitoring body, the Human Rights Committee is available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

12 Henrard, Kristin (2007) *Equal Rights v Special Rights: Minority Protection and the Prohibition of Discrimination*, European Commission, p. 49.

13 Information about the ICESCR and its monitoring mechanism can be found at <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>. Only Belgium, Finland, France, Italy, Luxembourg, Portugal, Slovakia and Spain signed and ratified the optional protocol.

14 https://www.echr.coe.int/Documents/Convention_ENG.pdf

15 <https://www.echr.coe.int/Pages/home.aspx?p=home> Farkas, L. (2007) *Segregation of Roma Children in Education: Addressing structural discrimination through the Race Equality Directive* and Farkas, L. (2014) *Report on Discrimination of Roma Children in Education*, European Commission, October 2014.

16 The leading case is *Sejdic and Finci v. Bosnia and Herzegovina*, in which a Roma and a Jewish citizen challenged the discriminatory impact of election legislation on smaller, non-constituent national minorities.

17 Protocol 12 to the ECHR is ratified by the following EU Member States: Croatia, Cyprus, Finland, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovenia, Spain.

18 <https://www.coe.int/en/web/european-social-charter>

19 Information about the Charter and its monitoring mechanism can be found at <https://www.coe.int/en/web/european-social-charter>. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints ratified by Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Portugal and Sweden.

20 European Union, de Schutter, O. (2016) *The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights*, European Commission.

21 <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/>

22 European Commission against Racism and Intolerance, General Policy Recommendation no. 7 on national legislation to combat racism and racial discrimination, 13 December 2002. General Policy Recommendations can be found at <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/ecri-standards>.

23 It states that: 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification.'

24 Racial Equality Directive, preamble, paragraph 3.

25 In C-617/10 Åkerberg Fransson the CJEU delivered a ruling on the scope of the Charter of Fundamental Rights, clarifying the relationship between national and EU law in general.

26 See, for instance, Decision of the European Ombudsman closing her own-initiative inquiry [OI/8/2014/AN](#) concerning the European Commission on 11 May 2015 in Case OI/8/2014/AN. The inquiry concerned the way in which the European Commission ensures that the fundamental rights enshrined in the Charter are complied with when EU cohesion policy is implemented by Member States.

27 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33178>

28 Guidance Note on the Practical Application of Council Framework Decision 2008/913/JHA of November 2018. Available at: <https://ec.europa.eu/newsroom/just/document.cfm?docid=55607>. European Commission, Code of Conduct on Countering Illegal Hate Speech Online, June 2017, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

29 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=EN>. See, also the European Commission's Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

30 The text of the directive is available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>

31 In Sweden, legal persons are not protected.

32 The Court of Justice of the EU's Feryn judgment, Case C-54/07 is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0054>

33 Judgment of the Court of Justice of the EU of 16 July 2015, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia, C-83/14, available at <http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0083&lang1=fr&type=TEXT&ancre=>

34 Göta Court of Appeal, Case T 1666-09 (judgement 2010-02-25). For further information, see: <https://www.do.se/lag-och-ratt/dis krimineringsarenden/skaret-fastighetsbolag/>.

35 The practice constitutes discrimination according to Svea Court of Appeal, Case T 6161-16, Fred Taikon (and ten more plaintiffs) v. Swedish State through the Chancellor of Justice (judgement 2017-04-28).

36 The Court of Justice of the EU's CHEZ judgment is available at <http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0083&lang1=fr&type=TEXT&ancre=>.

Endnotes continued

37 Case C-668/15, Jyske Finans A/S v. Ligebehandlingsnævnet, acting on behalf of Ismar Huskic, Judgment of the Court of Justice of the EU of 6 April 2017, available at <http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrc=hu&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-668%252F15&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252C%252C%252CR%252C200>

38 European Court of Human Rights, *Biao v Denmark*, Grand Chamber judgment of 24 May 2016, application no. 38590/10, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-163115%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-163115%22]})

Endnotes continued

39 UVS-Wien, judgment 06/42/318/2008 of 11 March 2008

40 Estonia, Opinion of the Commissioner for Gender Equality and Equal Treatment of 22 July 2015 on the dispute of A & B v C.

41 Racial segregation and apartheid (Art. 3), 8/08/95, CERD, General recommendation XIX, 1995. Under Article 3, States parties undertake to prevent, prohibit and eradicate all practices of racial segregation, including 'partial segregation [that] may also arise as an unintended by-product of the actions of private persons', such as residential patterns reflecting group differences in income, race, colour, descent and national or ethnic origin (3).

42 The only case on harassment has been brought before the Court of Justice of the EU in relation to disability by a mother of a disabled child bullied at work on account of her caring duties for her son. Case, C-303/06, *Coleman*.

43 Regrettably, in Romania, over time the NCCD developed a strict test for harassment cases that is arguably not compliant with the Racial Equality Directive and in practice leads to an impunity of politicians for (Romaphobic) hate speech. The scope of protection is limited with reference to justifications invoking the freedom of expression and the alleged requirement that intent must be proven as concerns humiliation.

44 <https://www.equalitylaw.eu/downloads/4544-romania-first-case-of-multiple-discrimination-against-romani-women-sanctioned-by-the-romanian-national-equality-body-pdf44-kb>

45 Court of Appeal of Brescia, Judgment of 18 January 2019, *F.P.E. v. ASGI and others*. Available at <https://www.asgi.it/wp-content/uploads/2019/01/Corte-dAppello-di-Brescia-sentenza-del-18.01.2019-est.-Pianta-xxx-avv.ti-Monguzzi-Forni-De-Vecchi-c.-K-pax-Ass.-Puerto-Escondido-e-ASGI-avv.ti-Guariso-e-Lavanna.pdf>.

46 Italy, Supreme Court, judgment No. 31660 of 4 December 2019, *Extrabanca SPA v. B.O.*

47 For details on bringing discrimination claims, sanctions and other procedural features of EU anti-discrimination law see, Lilla Farkas, *How to present a discrimination claim: Handbook on seeking remedies under the EU non-discrimination Directives*, European Commission, Brussels, 2011.

48 For further details see the Report on Data Collection in the Field of Ethnicity, European Commission, Brussels, 2017, available at <https://www.humanconsultancy.com/downloads/691-specific-report-on-equality-data-based-on-racial-and-ethnic-origin-pdf-1-49-mb>

49 For further details, see, *Proving Discrimination: The Role of Situation Testing* by Isabelle Rorive, Brussels, 2009, available at https://www.migpolgroup.com/old/public/docs/153_ProvingDiscriminationCases_theroleofSituationTesting_EN_03.09.pdf

50 District Court of Gothenburg, judgment delivered on 2007-11-06 (case No. T13077-05).

51 NJA 2008 p. 915. The Court seemed very concerned about the potential unjust enrichment of those carrying out the testing, and less concerned about the systematic nature of the discrimination that was seemingly exposed through the testing.

52 Fransson-Stüber (2015), *Diskrimineringslagen: en kommentar (The Discrimination Act: A Commentary)*, 2d ed., Chap 6 Sec 3. Also, see Sandesjö, H. (2010), p. 14. In cases where the rule on the burden of proof has been decisive, the success rate in the general court system was 90 % against 19 % in the Labour Court.

53 One possible explanation is that clear-cut cases of discrimination may be settled before going to the Labour Court. Criticism has also been voiced, however that judges appointed by trade unions and employer organisations may not be neutral if important parts of the collective bargaining system are affected by the outcome. See Sandesjö, H. (2010), p. 18.

54 White Paper SOU 2016:87, pp. 462-463.

55 The body lacks a set of criteria for launching such proceedings, which may lead to suspicions of arbitrary or politicized action.

56 For a detailed description of equality bodies and their competences, see country reports at <https://www.equalitylaw.eu/>

57 www.cncd.ro

58

For more information, see https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2006260-om_sfs-2006-260.

Moving the Ideas of Non-Discrimination: Supporting an Equality Transformation

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This publication is part of the project MINDSET co-financed by DG JUST. The concept has been developed due to the gap between EU legislation in the field of non-discrimination based on ethnic origin and the implementation on the ground at national level. Indeed, a lack of awareness of rights, bodies and redress mechanisms; unclear understanding of what discrimination really means and insufficient media coverage are a reality in our societies. Particular focus will be given to Romania, Italy and Sweden, allowing for an interesting geographical representation and the possibility to highlight differences in national implementation of non-discrimination law.

THE OBJECTIVES

Media will play a vital role in raising awareness of these issues. Thanks to the complementarity of the consortium members, the objectives which will be reached throughout the project lifecycle are:

- Contribute to the clarification and understanding of the specific terminology related to the non-discrimination field and promote its accurate treatment by the media sector thanks to experts in that area;
- Raise awareness on non-discrimination legislation and its application at national level also by showing best practices of implementation of EU and national law;
- Promote the role and efforts of Equality Bodies in the three focused Member States (Italy, Romania and Sweden), enhance cooperation among them, as well as the involvement of civil societies in the fight against discrimination; and
- Provide easily accessible information for and train young people outside the legal sector.

THE CONSORTIUM

The consortium is composed of the EURACTIV Media Network, via its Brussels, Berlin and Paris offices; EURACTIV Romania; and les Jeunes Européens Fédéralistes. In addition, the Migration Policy Group will support the implementation of the project by providing legal expertise.



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