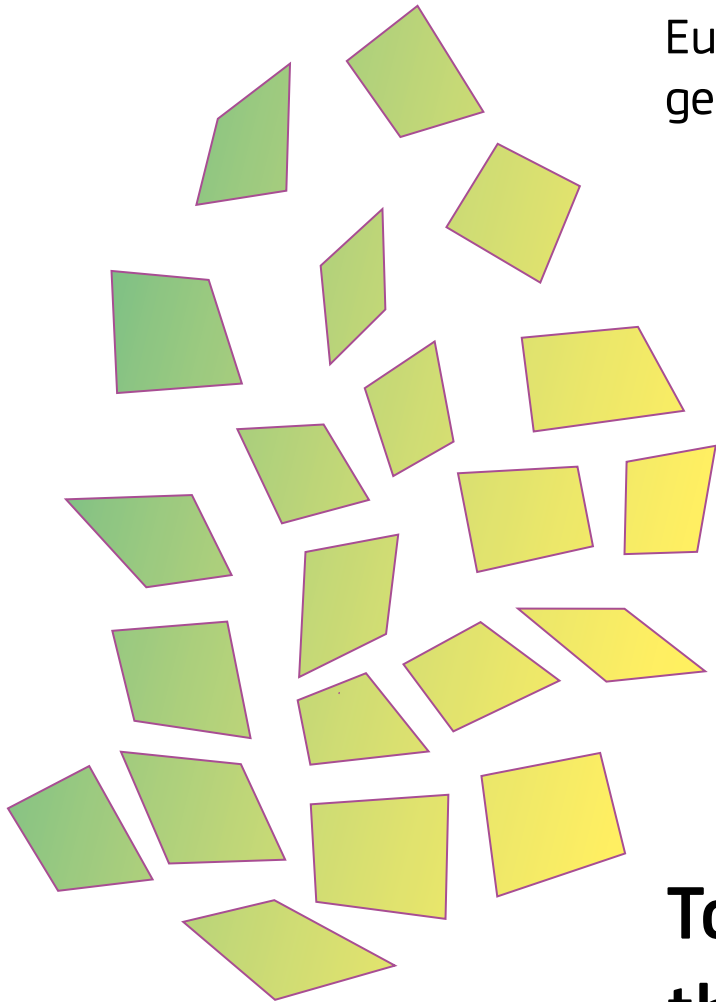




European
Commission

European network of legal experts in
gender equality and non-discrimination



**To name and address
the underlying problem:
Structural discrimination
on the ground of racial
or ethnic origin**

Including summaries in
English, French and German

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality and Union citizenship
Unit D.1 Non-discrimination and Roma coordination
Unit D.2 Gender Equality

European Commission
B-1049 Brussels

**To name and address
the underlying problem:
Structural discrimination
on the ground of
racial or ethnic origin**

Author

Niall Crowley

2022

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(*)The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

LEGAL NOTICE

This document has been prepared for the European Commission; however, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2022

ISBN 978-92-76-59372-0

doi:10.2838/324057

Catalogue number DS-03-22-205-EN-N

© European Union, 2022

Contents

EXECUTIVE SUMMARY	6
RÉSUMÉ	16
ZUSAMMENFASSUNG	28
1 INTRODUCTION	40
1.1 Understanding structural discrimination	40
1.2 Appreciating the intersectional dimension	42
1.3 This thematic report	43
2 EUROPEAN UNION AND INTERNATIONAL CONTEXT	44
2.1 EU legislative and policy framework	44
2.2 International standards	49
2.3 Review	51
3 STRANDS OF NATIONAL INITIATIVE	52
3.1 Equal treatment law	52
3.1.1 Introduction	52
3.1.2 Legal provisions on structural discrimination	52
3.1.3 Statutory equality duties	53
3.1.4 Review	59
3.2 National policy strategies addressing racism	59
3.2.1 Introduction	59
3.2.2 Focus on structural discrimination in policy strategies	60
3.2.3 Focus on positive action in policy strategies	67
3.2.4 Focus on intersectionality in policy strategies	68
3.2.5 Review	69
4 KEY DRIVERS FOR ACTION	74
4.1 Institutional infrastructure at national level	74
4.1.1 Introduction	74
4.1.2 Governmental bodies	74
4.1.3 Equality bodies	79
4.1.4 Civil society platforms	81
4.1.5 Review	87
5 CASE LAW	90
5.1 Introduction	90
5.2 Case law on structural discrimination	90
5.3 Complaint processes and remedies/sanctions	97
5.4 Review	98
6 CONCLUSIONS AND PROPOSALS	100
BIBLIOGRAPHY	109

Members of the European network of legal experts in gender equality and non-discrimination

Management team

General coordinator	Jos Kösters	Human European Consultancy
Specialist coordinator gender equality law	Linda Senden	Utrecht University
Content coordinator gender equality law	Alexandra Timmer	Utrecht University
Specialist coordinator non-discrimination law	Isabelle Chopin	Migration Policy Group
Project manager	Magdalena Maier	Human European Consultancy
Content managers gender equality law	Franka van Hoof Birte Böök	Utrecht University
Content manager non-discrimination law	Catharina Germaine	Migration Policy Group

Senior experts

Senior expert on gender equality law	Susanne Burri
Senior expert on age	Elaine Dewhurst
Senior expert on sexual orientation/trans/intersex people	Peter Dunne
Senior expert on racial or ethnic origin	Lilla Farkas
Senior expert on EU and human rights law	Christopher McCrudden
Senior expert on social security	Frans Pennings
Senior expert on religion or belief	Isabelle Rorive
Senior expert on EU law, CJEU case law, sex, gender identity and gender expression in relation to trans and intersex people	Christa Tobler
Senior expert on disability	Lisa Waddington

National experts

	Non-discrimination	Gender
Albania	Irma Baraku	Entela Baci
Austria	Dieter Schindlauer	Marion Guerrero
Belgium	Sébastien Van Drooghenbroeck	Nathalie Wuiame
Bulgaria	Margarita S. Ilieva	Genoveva Tisheva
Croatia	Ines Bojić	Adrijana Martinović
Cyprus	Corina Demetriou	Vera Pavlou
Czechia	Jakub Tomšej	Kristina Koldinská
Denmark	Pia Justesen	Natalie Videbaek Munkholm
Estonia	Mari-Liis Sepper	Anu Laas
Finland	Rainer Hiltunen	Kevät Nousiainen
France	Sophie Latraverse	Marie Mercat-Bruns
Germany	Matthias Mahlmann	Jule Mulder
Greece	Athanasios Theodoridis	Panagiota Petroglou
Hungary	András Kádár	Lídia Hermina Balogh
Iceland	Gudrun D. Gudmundsdottir	Herdís Thorgeirsdóttir
Ireland	Judy Walsh	Frances Meenan
Italy	Chiara Favilli	Simonetta Renga
Latvia	Anhelita Kamenska	Kristīne Dupate
Liechtenstein	Patricia Hornich	Nicole Mathé
Lithuania	Gediminas Andriukaitis and Monika Guliakaitė	Tomas Davulis
Luxembourg	Tania Hoffmann	Nicole Kerschen
Malta	Tonio Ellul	Romina Bartolo
Montenegro	Maja Kostić-Mandić	Vesna Simovic-Zvicer
Netherlands	Karin de Vries	Marlies Vegter
North Macedonia	Biljana Kotevska	Biljana Kotevska
Norway	Lene Løvdal	Marte Bauge
Poland	Łukasz Bojarski	Anna Cybulko
Portugal	Dulce Lopes and Joana Vicente	Maria do Rosário Palma Ramalho
Romania	Romanița Iordache	Iustina Ionescu
Serbia	Ivana Krstić Davinic	Ivana Krstić Davinic
Slovakia	Vanda Durbáková	Zuzana Magurová
Slovenia	Neža Kogovšek Šalamon	Tanja Koderman Sever
Spain	Fernando Camas Roda	Dolores Morondo Taramundi
Sweden	Paul Lappalainen	Jenny Julén Votinius
Türkiye	Ulaş Karan	Kadriye Bakirci
United Kingdom	Lucy Vickers	Rachel Horton

Executive summary

Starting points

Structural racism, specifically, is best understood as composing three different elements:

- Historical: the untold or inadequately analysed history of slavery, colonialism and exploitation, with its ongoing consequences unrecognised and unaddressed; the justificatory and inaccurate ideology that the single human race could be understood as being made up of separate races defined in biological terms that are then given false significance; and the manner in which this history, uncorrected or hidden, has shaped an oppressive common sense in relation to Black and minority ethnic groups, including Roma and Travellers.
- Societal: the culture, values, norms and discourse dominant at societal level that are imbued with notions of superiority and inferiority and characterised by hostility to the detriment of Black and minority ethnic groups, including Roma and Travellers.
- Institutional: the policies, procedures, practices and perceptions within organisations that serve, often inadvertently, to exclude, hamper or disadvantage Black and minority ethnic groups, including Roma and Travellers.

Discrimination occurs at different levels, in particular at the individual level and at the structural level. Discrimination on the ground of racial or ethnic origin which is structural manifests in relation to these three elements (historical, societal and institutional), generating unequal outcomes of social, economic, cultural and political disadvantage for Black and minority ethnic groups, including Roma and Travellers.

This structural level of discrimination is where the sustained inter-generational momentum for racism can be found. It is less visible, only becoming apparent in these unequal outcomes of disadvantage for Black and minority ethnic groups, including Roma and Travellers. These outcomes of disadvantage become apparent in inequalities in relation to:

- Situation: access to and distribution of key resources including income and employment, and social goods such as education, health and housing.
- Experience: access to relationships of solidarity, care and respect when participating in society and community, and when engaging with institutions, employers and service providers.
- Voice: access to influence, having a say in decisions that impact on one, and participating in the governance of society and its institutions.
- Identity: access to recognition for culture and identity and to the flexibility and resources required to address the practical implications of cultural difference and how different groups choose to live out their identity.

This thematic report addresses the issue of structural discrimination on the ground of racial or ethnic origin. It explores the national legal, policy and institutional initiatives, as well as case law, across the 27 Member States, that contribute to addressing such discrimination. It does so to analyse the state of play in responding to this issue and to identify learning to inform and enable more consistent and coherent action on the issue.

The report has been prepared through the European network of legal experts in gender equality and non-discrimination. The network's non-discrimination experts in each Member State researched and completed a questionnaire, and prepared a country fiche on the issue of structural discrimination and the legal, policy and institutional responses in their Member State.

Context

The European Commission identifies structural racism as the ‘underlying problem’ in its EU Anti-Racism Action Plan.¹ In doing so, the European Commission has put down a marker for action on the issue of structural racism and has presented a key challenge to be addressed if racism is to be effectively combated.

The definition of structural racism is broadly drawn in the Action Plan, capturing the historical, societal and institutional elements. However, despite some further detail in the Common Guiding Principles published by the European Commission to support the development of national action plans against racism,² the definition lacks specific detail that might be important in a context where the concept of structural discrimination on the ground of racial or ethnic origin is not widely understood or addressed.

A narrow range of action on the issue of structural racism, focused on equality data and on stereotyping, is noted in the Action Plan. However, this is supplemented by other actions encouraged in the Action Plan including: implementing statutory equality duties; adopting positive action programmes; and addressing the discriminatory potential of artificial intelligence. Member States are encouraged to adopt national action plans against racism by the end of 2022. This is to be done in close cooperation with civil society and equality bodies. Valuably, one of the eight Common Guiding Principles for such national action plans, is to ‘Identify and tackle potential manifestations of structural racism and their impact’.³

The European Commission makes reference to structural discrimination in the understanding of ‘antigypsyism’ set out in the EU Roma Strategic Framework.⁴ This encompasses its historical, societal and institutional elements. Member States are invited to prepare national Roma strategic frameworks, which should include the fight against discrimination and ‘antigypsyism’ as a key objective and crosscutting priority. This focus is further strengthened through a 2021 Council Recommendation on Roma equality, inclusion and participation, which emphasises the institutional element in recommending Member States to take measures to fight multiple and structural discrimination against Roma.⁵

The European Commission has recognised the imperative for good equality data in rendering structural discrimination visible and formulating effective strategies to address it, through the work of the High-level group on non-discrimination, equality and diversity and its subgroup on equality data. This has included a publication on data on racial or ethnic origin, setting out guiding principles for the collection of such data.⁶

In terms of legislation, Directive 2000/43/EC addresses discrimination on the ground of racial or ethnic origin across a broad, though not fully comprehensive, range of fields.⁷ It does not make specific reference to or contain any specific provision on structural discrimination. The Directive is focused on the individual level rather than the structural level, being based on individual rights and an individual complaints system. However, the provisions made, in particular in relation to indirect discrimination but also in relation to direct discrimination, hold potential to address discrimination at the structural level. This is evident in

-
- 1 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘[A Union of Equality: EU anti-racism action plan 2020-2025](#)’, Brussels, 18.9.2020, COM(2020) 565 final.
 - 2 European Commission (2021), [Common guiding principles for national action plans against racism](#), European Commission Subgroup on the National Implementation of the EU Anti-Racism Action Plan 2020-2025, DG Justice and Consumers.
 - 3 European Commission (2021), [Common guiding principles for national action plans against racism](#), European Commission Subgroup on the National Implementation of the EU Anti-Racism Action Plan 2020-2025, DG Justice and Consumers.
 - 4 European Commission (2020), Communication from the Commission to the European Parliament and the Council, ‘[A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion and Participation](#)’, Brussels, COM(2020) 620 final.
 - 5 Council of the European Union (2021), [Council Recommendation of 12 March 2021 on Roma equality, inclusion and participation](#), (2021/C 93/01).
 - 6 European Commission (2021), [Guidance note on the collection and use of equality data based on racial or ethnic origin](#), High-level group on equality, non-discrimination and diversity, subgroup on equality data, DG Justice and Consumers.
 - 7 [Council Directive 2000/43/EC](#) of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

the casework that has emerged on structural discrimination. Yet this casework is limited and has, further, been found difficult to progress at Member State level.

The European Commission has recognised the potential for algorithmic discrimination that is structural in nature in the development and use of artificial intelligence (AI) systems. It has proposed a regulation that aims to 'minimise the risk of algorithmic discrimination, in particular in relation to the design and the quality of data sets used for the development of AI systems complemented with obligations for testing, risk management, documentation and human oversight throughout the AI systems' lifecycle'.⁸

There is also an emerging explicit engagement with structural discrimination on the ground of racial or ethnic origin, and its historical, societal and institutional elements, at a wider European and international level.

In the Council of Europe, the European Commission against Racism and Intolerance, emphasising the institutional element, has identified that the mandate of equality bodies should include a focus on structural discrimination and that they should have powers to conduct inquiries and bring cases that address such discrimination, including in their own name.⁹ The Intercultural Cities Programme has developed a programme of initiatives to support local level action on the issue of systemic discrimination, also emphasising the institutional element.¹⁰

The key United Nations standard in relation to racism is the International Convention on the Elimination of all Forms of Racial Discrimination, which does not specifically name or define structural discrimination.¹¹ It does, however, have a broad definition of racial discrimination that encompasses this issue. A recent report of the United Nations Office of the High Commissioner on Human Rights, on the experience of Africans and people of African descent of excessive use of force and other human rights violations by law enforcement officers, has explicitly addressed 'systemic' racism.¹² It emphasises the obligation on states, under human rights law and as a result of political commitments, to eliminate all forms of racial discrimination, including systemic discrimination, and to take an intersectional approach to achieving this.

This context, while promising, remains somewhat tentative given the lack of clarity in defining structural discrimination on the ground of racial or ethnic origin, setting out the agreed elements contained within the concept, and establishing the manner in which structural racism and its component elements can be dismantled.

National level: legislation

There are no provisions in national legislation reported by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination that could be identified as specifically addressing structural discrimination on the ground of racial or ethnic origin, in any Member State. There are, however, provisions identified in equal treatment legislation at Member State level that could be and are deployed to play a role in addressing such discrimination.

8 European Commission (2021), [Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence systems \(Artificial Intelligence Act\) and amending certain Union legislative acts](#), COM(2021) 206 final.

9 ECRI (2017), [ECRI General Policy Recommendation No. 2: Equality bodies to combat racism and intolerance at national level](#), adopted on 7 December 2017.

10 Council of Europe (2020), [Identifying and preventing discrimination at the local level: Policy study](#), Intercultural Cities Programme.

11 [International Convention on the Elimination of all forms of Racial Discrimination](#), General Assembly Resolution 2106, United Nations, 1965.

12 United Nations High Commissioner for Human Rights (2021), [Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers](#), Report of the United Nations High Commissioner for Human Rights, Human Rights Council Forty-seventh session, 21 June-9 July 2021.

These, in common with and drawing on the provisions of the EU Directives, include provisions on: indirect discrimination; positive action; equality body competences to undertake surveys, prepare reports and issue recommendations pertaining to discrimination, and to undertake reviews or inquiries, with the necessary investigative powers; various forms of *actio popularis*, including own initiative cases taken by equality bodies without an individual named complainant; and equality bodies' competence to make orders for action by respondents found to have discriminated, where they have a decision-making function.

In some instances, the equal treatment legislation defines direct discrimination so broadly that it can be interpreted to include structural discrimination, although without naming it. There is also further potential noted to address structural discrimination on a less explicit basis, by progressing a critical mass of individual cases on an issue. Equality bodies have a role to play in realising such an approach, although they can be hampered in this because of a lack of resources.

Statutory equality duties have a potential to counter structural discrimination, in particular – as they are currently designed – its institutional element. Such duties can require the introduction of equality-focused systems within public and private sector organisations that would serve to dismantle or disarm those internal systems that might currently reflect this form of structural discrimination.

Statutory equality duties can encompass: preventive duties on organisations to take measures to prevent discrimination, harassment or sexual harassment in employment or in providing goods and services; institutional duties on organisations to take specified steps to promote equality for employees or people accessing their services; and mainstreaming duties on public authorities to promote equality and eliminate discrimination in carrying out their functions.¹³

There is limited and uneven provision across the Member States in providing for statutory equality duties. No such duty is evident in 16 Member States.¹⁴ A further five Member States only evidence a preventive type duty,¹⁵ which is not deemed to hold the same potential to address structural discrimination as the institutional and mainstreaming duties. Only four Member States evidence a mainstreaming duty,¹⁶ with one of these being more of a permissive nature. Another Member State has such a duty at the regional level only.¹⁷ Two Member States have an institutional duty,¹⁸ which has some capacity to address structural discrimination.

There are issues noted in relation to the implementation of these duties in a way that would impact on structural discrimination. In seven instances, a lack of enforcement mechanisms to secure implementation is noted. In seven instances, issues of quality of implementation arise due to a lack of awareness of the duty, lack of understanding of the issues including that of structural discrimination, and lack of follow-up to ensure quality of implementation. In five instances, a lack of detail on the steps to be taken under the duty are noted as an impediment to implementation.

National level: policy

Structural discrimination on the ground of racial or ethnic origin is only beginning to appear on the policy agenda at Member State level. At the point of survey by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination, six current national action

13 Crowley, N. (2016), *Making Europe more equal: A legal duty?*, Equinet, Brussels.

14 Austria, Belgium, Croatia, Cyprus, Denmark, France, Germany, Greece, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal and Romania.

15 Czechia, Estonia, Slovenia, Slovakia and Spain.

16 Finland, Hungary, Ireland and Lithuania.

17 Belgium.

18 Bulgaria and Sweden.

plans against racism were noted across the Member States by the national experts.¹⁹ This reflects the fact that the deadline for submission is the end of 2022.

There is specific reference to structural discrimination in five of these action plans.²⁰ In another Member State, an interim report indicates that the forthcoming national action plan against racism will include a focus on structural racism.²¹ In a further Member State, while there is no national action plan against racism, a regional action plan does reference structural discrimination.²² This situation should improve as further Member States respond to the encouragement of the European Commission.

However, there is no coherence evident in the understanding of structural discrimination on the ground of racial or ethnic origin across the different plans or in the framework of action that is engaged within these plans to address the issue. The various definitions used in the plans tend to focus on the institutional element. In only one plan do the societal and historical elements secure some focus. The framework for action on the issue is limited, and there is no evident strategy underpinning this.

A diverse range of actions on structural discrimination are proposed in the action plans that do reference the issue. These include: equality planning; equality-related training; equality reviews undertaken by an equality body; investigative projects regarding the memory of slavery, colonialism and the historical presence of discriminated groups; recruitment strategies to increase diversity; addressing artificial intelligence systems; development of education resources; and enabling association building and political participation.

The focus on artificial intelligence systems, an emerging area of concern in relation to structural discrimination, is limited. This reflects the findings in a report on the issue by Allen and Masters, that 'at present, there is only an embryonic debate across Europe concerning the equality implications of AI systems'.²³ Their report emphasises the need for action at national level on this issue.

In the other relevant policy strategies reported on, structural discrimination was only referenced in a number of national Roma strategic frameworks, which respond to the EU Roma strategic framework. This was the case in only six of the nineteen Member States where such policy strategies are noted.²⁴ This reference to structural discrimination experienced by Roma is accompanied by action to address it in only two of these six cases.²⁵ In two further instances, beyond these six cases, while reference is not made to structural discrimination, there were actions noted that would contribute to addressing this issue.²⁶ This reflects a very limited engagement with the issue of structural discrimination.

Positive action is needed to address the unequal outcomes that are the marker of structural discrimination, and to reverse these in progressing the achievement of full equality in practice. Positive action is not an antidote to structural discrimination as it addresses the impact rather than the causes, but it is a necessary part of any strategy seeking to eliminate structural discrimination. There is evidence of positive action measures across some of the strategies identified, principally targeting Roma, as set out in some of the national Roma strategic frameworks.

These measures tend to focus on the fields of employment, training and education, with a strong labour market and employability emphasis. In some instances, positive action is evident in the fields of healthcare, social inclusion and housing, and for political participation. There is no systematic approach

19 Finland, Germany, Greece, Malta, Portugal and Sweden.

20 Finland, Germany, Malta, Portugal and Sweden.

21 Ireland.

22 Belgium.

23 Allen, R., & Masters, D. (2020), *Regulation for an equal AI: A new role for equality bodies, Meeting the new challenges to equality and non-discrimination posed from increasing digitisation and the use of artificial intelligence*, Equinet, p. 30.

24 Croatia, Czechia, Germany, Hungary, Slovakia and Spain.

25 Croatia and Germany.

26 Portugal and Sweden.

evident in seeking to ensure coverage of all dimensions of situation, experience, voice and identity, and the emphasis is on addressing disadvantage rather than achieving equality.

There is reference to intersectionality in some of these policy strategies, most specifically in the national Roma strategic frameworks. An intersectional focus, addressing diversity within the groups exposed to structural discrimination, is necessary for an effective and comprehensive response. Overall, the focus on intersectionality is underdeveloped: it is low on the policy agenda and the manner in which it is addressed is limited.

Implementation issues noted in relation to these policy strategies include:

- the predominance of an understanding of discrimination as an issue at the individual level – action in response is principally, therefore, guided by the need to overcome stereotypes and/or unconscious bias held by the individual, or to address the individual acts that exclude or disadvantage;
- barriers such as a lack of dedicated budget, absence of political will, inadequate administrative capacity, and lack of disaggregated data, noted in many instances;
- language or terminology is used in the plan, such as ‘structural barriers’, but it is not underpinned by any adequate understanding of the term, nor is it accompanied by any conscious attention or will to address the issue, noted in some instances;
- the focus on overt forms of structural discrimination took precedence over investment in addressing more hidden forms that might be more controversial, noted in one instance; and
- the federal nature of some Member States.

These implementation issues focus attention on the model to examine policy implementation developed by Matland.²⁷ In his analysis of policies that invoke ‘highly salient symbols’, such as structural racism, he notes risks of policy implementation failure. Such policies face challenges of lack of clarity (policy ambiguity) and lack of agreement on policy framing and means of implementation (policy conflict). Such a context pertains in relation to structural racism, with the absence of a clear definition to shape action, and with the lack of agreement on how best to make progress and on what is required to address the issue.

National level: institutional infrastructure

There is no clear standard for the national institutional infrastructure that is required in this field of combating racism, including tackling structural discrimination on the ground of racial or ethnic origin. This is reflected in the diversity and limited nature of such infrastructure, as reported by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination. The infrastructure needs to start from governmental institutions that give leadership for and have responsibility for this policy focus. In its design, it needs to involve coordination of relevant policy fields and to be cross-sectoral in engaging with other sectors, in particular civil society. Key actors, in a cross-sectoral approach, include equality bodies and civil society platforms. The private sector can usefully be included, in particular through social partnership structures.

While underdeveloped in terms of its spread across the Member States and structure within Member States, there are exemplars for the governmental part of the national institutional infrastructure on addressing racism, including structural discrimination on the ground of racial or ethnic origin. However, even these exemplars have yet to be mobilised adequately to address the issue of structural discrimination on the ground of racial or ethnic origin, given the lack of focus on this issue in policy strategies.

²⁷ Matland, R. E. (1995), ‘Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation’, *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174.

Influence is one important measure of the effectiveness of the governmental institutional infrastructure, the capacity of the responsibility holder to give leadership to other parts of government. Issues of influence are evident in the choice whether to have a ministry responsible for equality, or for the issue to be part of a ministry with other and wider responsibilities. Issues of influence further arise, in the latter context, in the choices made as to the scale, location and seniority of the leadership of the department that is given responsibility for this issue in the ministry.

At its best, in terms of institutional location, these structures take the form of a dedicated ministry with policy responsibility for this issue, which is noted in eight Member States.²⁸ Another model, where equality and/or non-discrimination forms part of a ministerial brief, is found in 11 Member States.²⁹ Two Member States have dedicated offices or structures linked to Government that play a role in policy development in this field.³⁰

The governmental institutional infrastructure identified has a broad and multi-ground responsibility in relation to equality and/or non-discrimination. This would require further examination to establish whether it is managed in a manner that ensures adequate visibility of and attention to the ground of racial or ethnic origin.

Coordination across different parts of government is an important element of, and function required for, this governmental infrastructure. Coordination responds to the need for a coherent approach in combating racism, addressing structural discrimination on the ground of racial or ethnic origin, and progressing equality on these same grounds, across the full range of policy fields. There are positive exemplars of a governmental institutional infrastructure for coordination across Government ministries and agencies, but these are noted in only eight Member States.³¹

Cross-sectoral collaboration has a contribution to make in combating racism, by bringing different sectors together behind common goals and agendas. Cross-sectoral collaboration with civil society organisations in particular has a capacity to bring forward the perspective of those exposed to racism and to enable an engagement with structural discrimination on the ground of racial or ethnic origin by policy makers. An institutional infrastructure for such collaboration is evident in only 13 Member States.³² In four Member States this infrastructure is broad and includes labour market organisations.³³ In three instances, the infrastructure is narrow in focus, being limited to a specific group exposed to racism.³⁴

Equality bodies are well placed to play a role in driving action to dismantle structural discrimination on the ground of racial or ethnic origin, in particular its institutional elements. There are instances of substantive intervention on the issue: taking and supporting cases and issuing casework decisions; undertaking research and publishing reports; offering policy advice and making policy recommendations to Government; and providing reports to international human rights monitoring bodies. It is noted, however, that the scale of endeavour can in some cases be too limited to achieve significant impact, primarily due to limited resources made available to equality bodies.

There is an uneven engagement by equality bodies with structural discrimination. While many equality bodies have been able to take some action on the issue, 13 equality bodies have little or no engagement in this area.³⁵ A key impediment to taking action, and to doing so on the scale necessary, is the shortage of adequate resources, but barriers due to a lack of appropriate powers and competences and limitations

28 Belgium, France, Germany, Ireland, Italy, Malta, Portugal and Spain.

29 Denmark, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Netherlands, Slovakia, Spain and Sweden.

30 Croatia and Poland.

31 France, Germany, Hungary, Italy, Lithuania, Malta, Netherlands and Portugal.

32 Bulgaria, Czechia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Malta, Netherlands, Slovakia and Spain.

33 Finland, France, Latvia and Malta.

34 Czechia, Hungary and Spain.

35 In: Austria, Bulgaria, Cyprus, Czechia, Estonia, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal and Romania.

in leadership are also noted. Equality bodies face particular challenges in gearing up to and engaging with issues of equality and non-discrimination in relation to artificial intelligence systems.

Civil society platforms play an important role in empowering representative organisations and breaking down fragmentation in the sector. Such platforms, in this instance, involve organisations that represent those who are exposed to racism in creating shared spaces for deliberation and action on common issues. This is important to bring forward the perspective of those exposed to racism, and enabling its articulation with some influence.

There is limited evidence of such civil society platforms being in place to address issues related to racism, with only eight exemplars noted.³⁶ Some of these are active on the issue of structural discrimination on the ground of racial or ethnic origin. However, they are more notable for being active in promoting discussion on racism more broadly. A lack of meaningful engagement by the national authorities with such civil society platforms is noted as an issue affecting their potential and impact. Limited access to adequate resources to form and operate an effective platform is a barrier to their formation and functioning.

These issues of national institutional infrastructure are of concern, given the work of Matland,³⁷ and the imperative he finds of building coalitions and enabling coalitional strength at the level of policy implementation if policy outcomes are to be achieved, for policies that invoke 'highly salient symbols', such as this area of structural racism.

National level: case law

There is no case law identified by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination that explicitly addresses the issue of structural discrimination on the ground of racial or ethnic origin, besides two limited exceptions, in France and the Netherlands. This situation flows directly from the lack of specific provisions in legislation to define and prohibit this issue. A judiciary that can be reluctant to acknowledge that discrimination may not only be at the level of the individual act can also be at issue.

Case law of relevance to structural discrimination on the ground of racial or ethnic origin, without explicitly addressing the concept, is found. This is reported in only 11 Member States.³⁸ It is limited in extent and could not be considered a body of case law that is adequate to build an effective response to structural discrimination.

Such case law is most prevalent in relation to the more visible forms of structural discrimination, in particular issues of Roma and Traveller segregation and of ethnic profiling by the police. More broadly, such case law is concentrated on the institutional element of structural discrimination, which is more easily captured under current provisions in equal treatment legislation on indirect and, in some instances, direct discrimination. The societal element emerges to a lesser extent, most specifically in the focus on stereotypes in some of these cases.

Housing issues for Roma and Travellers are evident to some significant extent in this case law. The workplace emerges as another significant focus. Some of this case law touches on the less visible forms of structural discrimination and, in some instances, brings the fore a focus on stereotypes.

36 In: Belgium, Estonia, Greece, Hungary, Ireland, Netherlands, Romania and Slovenia.

37 Matland, R. E. (1995), 'Synthesizing the Implementation Literature: The Ambiguity-Conflict Model of Policy Implementation', *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174.

38 Belgium, Croatia, Finland, France, Greece, Hungary, Ireland, Netherlands, Portugal, Slovakia and Sweden.

Despite such case law of relevance to structural discrimination, the overall context is one in which sanctions and remedies are not designed for dealing with such a phenomenon. There are few complaints processes identified with remedies or sanctions with the capacity to address the issue of structural discrimination effectively. Where such a capacity to respond effectively is found, it has tended to rest in the powers accorded to the national equality body to issue remedial orders as a result of a finding of discrimination. In only one instance – Hungary – is a positive development in the jurisprudence noted in the prescribing of sanctions capable of having a systemic impact in cases of systemic discrimination.

Proposals

The European Commission could usefully:

- ▶ Generate deliberations and facilitate good practice exchange on structural discrimination on the ground of racial or ethnic origin and the responses required to address this within the High-level group on combating racism, xenophobia and other forms of intolerance and the High-level group on non-discrimination, equality and diversity, with a view to building shared understanding, generating policy learning and creating agreement on:
 - a definition for the various elements of this concept of structural discrimination on the ground of racial or ethnic origin; and
 - a framework of the types of responses required to effectively address structural discrimination on the ground of racial or ethnic origin.
- ▶ Support and enable legislative change at the national level and/or advance legislative change at the European level with regard to the explicit naming, defining and prohibition of structural discrimination on the ground of racial or ethnic origin under equal treatment legislation, alongside provision for appropriate remedies and sanctions where such discrimination is found.
- ▶ Support and enable legislative change at the national level and/or advance legislative change at the European level with regard to provision for statutory equality duties on the ground of racial or ethnic origin, of an institutional and a mainstreaming type, with a capacity to drive the institutional change required to dismantle the elements of structural discrimination on the ground of racial or ethnic origin, and to drive the necessary action to rectify the long-term consequences of such discrimination.
- ▶ Ensure a focus on the adequacy and appropriateness of the responses implemented to structural discrimination on the ground of racial or ethnic origin, including a concern for positive action and an intersectional approach in the monitoring and tracking of national action plans against racism at a European level, with a view to strengthening these responses over time and extracting the policy learning from the experience of the design and implementation of these national action plans.
- ▶ Stimulate and support the development of the national institutional infrastructure for the issue of racism, including structural discrimination on the ground of racial or ethnic origin, within Member States, including by:
 - devising models, and subsequently securing agreement on standards and indicators, for such a national institutional infrastructure;
 - supporting Member-State-level coalition building to enable and drive policy implementation in relation to structural discrimination on the ground of racial or ethnic origin at this level;
 - providing stimuli in the form of resources and support for the further evolution of this national institutional infrastructure through the appropriate funding mechanisms available; and
 - providing stimuli, in the form of resources and support, through the appropriate funding mechanisms available, for civil society platforms at Member State level addressing the issue of racism, and with

a contribution to make to rendering visible and tackling structural discrimination on the ground of racial or ethnic origin.

- ▶ Ensure the place and contribution of equality bodies within the national institutional infrastructure for the issue of racism, including structural discrimination on the ground of racial or ethnic origin, within Member States, by progressing the current commitment to and work on standards for equality bodies, in a manner that includes a particular focus on: adequate resourcing of equality bodies; the adequacy of their mandate, competences and powers to address structural discrimination on the ground of racial or ethnic origin; securing the role of equality bodies in supporting and enforcing statutory equality duties; and ensuring they are adequately and appropriately resourced and empowered to address new challenges posed by artificial intelligence systems.

At national level, Member States could usefully:

- ▶ Make provisions, under equal treatment legislation, to explicitly name, define and prohibit structural discrimination on the ground of racial or ethnic origin, alongside provision for appropriate remedies and sanctions where such discrimination is found.
- ▶ Support and enable a focus on the issue of structural discrimination on the ground of racial or ethnic origin, the provisions of equal treatment legislation governing this issue, and the case law in this field, within judicial training mechanisms.
- ▶ Make provision, under equal treatment legislation, for statutory equality duties of an institutional and a mainstreaming type, with adequate detail as to the steps required to be taken by the duty bearer, alongside provision for sanctions where these steps are not adequately implemented; and ensure adequate and appropriate support for and enforcement of their implementation.
- ▶ Set out an understanding of structural discrimination on the ground of racial or ethnic origin and its different elements, and include and invest in adequate and appropriate steps towards its elimination in the national action plan against racism, along with positive action measures to address current outcomes of disadvantage for Black and minority ethnic groups, including Roma and Travellers, across the spectrum of situation, experience, voice and identity, and to do so in an intersectional manner.
- ▶ Review and strengthen the governmental institutional infrastructure concerned with racism, including structural discrimination on the ground of racial or ethnic origin, to ensure: a governmental institutional infrastructure with a capacity to give leadership within government on the issue; to secure coordination across the different parts of government in this area; and to develop collaboration on it across different sectors.
- ▶ Establish and respond to the challenges posed by artificial intelligence systems in relation to structural discrimination on the ground of racial or ethnic origin, including by identifying how best to regulate artificial intelligence systems from an equality and non-discrimination perspective, and developing the necessary legislative and administrative reforms found necessary to this end.
- ▶ Enable and empower equality bodies by affording them the mandate, competences, powers and resources to fully realise their potential in combating structural discrimination on the ground of racial or ethnic origin, including in litigating on and/or enforcing a critical mass of casework on this issue; in providing support and guidance on, setting standards for and enforcing implementation of statutory equality duties; and in addressing the challenges posed in this area by artificial intelligence systems.
- ▶ Build collaboration with civil society behind shared goals and agendas of combating structural discrimination on the ground of racial or ethnic origin and invest resources to enable civil society to engage in platform building on this issue.

Résumé

Points de départ

Le racisme structurel est à considérer, de manière spécifique, comme s'articulant en trois éléments distincts:

- la composante historique: l'histoire non racontée ou mal analysée de l'esclavage, du colonialisme et de l'exploitation, et ses effets persistants non reconnus et non gérés; l'idéologie justificative et inexacte selon laquelle la race humaine unique pourrait être envisagée comme constituée de races distinctes définies en termes biologiques auxquels de fausses significations sont ensuite attribuées; et la manière dont cette histoire, non corrigée ou occultée, a façonné un sens commun oppressant vis-à-vis des groupes de Noirs et des groupes de minorités ethniques, y compris les Roms et les gens du voyage;
- la composante sociétale: la culture, les valeurs, les normes et le discours dominant au plan sociétal qui sont imprégnés de notions de supériorité et d'infériorité, et qui se caractérisent par une hostilité au préjudice des groupes de Noirs et des groupes de minorités ethniques, y compris les Roms et les gens du voyage;
- la composante institutionnelle: les politiques, procédures, pratiques et perceptions qui, au sein des organisations, contribuent, involontairement souvent, à exclure, à entraver ou à défavoriser des groupes de Noirs et des groupes de minorités ethniques, y compris les Roms et les gens du voyage.

La discrimination se produit à différents niveaux, et plus particulièrement aux niveaux individuel et structurel. La discrimination à caractère structurel fondée sur la race ou l'origine ethnique se manifeste en lien avec ces trois éléments (historique, sociétal et institutionnel) par une inégalité d'effets sur le plan social, économique, culturel et politique à la défaveur des groupes de Noirs et des groupes de minorités ethniques, y compris les Roms et les gens du voyage.

C'est au niveau structurel de la discrimination qu'est ancrée la persistance de la dynamique intergénérationnelle du racisme. Le racisme structurel est moins visible car il n'apparaît qu'au travers de cette inégalité d'effets qui défavorise les groupes de Noirs et les groupes de minorités ethniques, y compris les Roms et les gens du voyage. Ces effets du désavantage se manifestent par des inégalités en rapport avec les dimensions suivantes:

- la situation, à savoir l'inégalité d'accès et de répartition de ressources essentielles comprenant le revenu et l'emploi ainsi que des biens sociaux tels que l'éducation, la santé et le logement;
- l'expérience, à savoir l'inégalité d'accès aux liens de solidarité, d'attention et de respect lors de la participation à la société et la communauté, et lors d'interactions avec des institutions, des employeurs et des prestataires de services;
- la voix, à savoir l'inégalité d'accès pour les personnes concernées à la possibilité d'exercer une influence, d'avoir leur mot à dire dans les décisions qui les affectent, et de participer à la gouvernance de la société et de ses institutions;
- l'identité, à savoir l'inégalité d'accès à une reconnaissance en matière de culture et d'identité ainsi qu'à la flexibilité et aux ressources nécessaires pour gérer les conséquences pratiques d'une différence culturelle et de la manière dont certains groupes choisissent de vivre leur propre identité.

Le présent rapport thématique est consacré à la problématique de la discrimination structurelle fondée sur la race ou l'origine ethnique. Il examine un ensemble d'initiatives juridiques, politiques et institutionnelles ainsi que la jurisprudence qui, adoptées au plan national dans les 27 États membres, contribuent à lutter

contre le racisme structurel. Son but est de dresser l'état des lieux des réponses élaborées à cette fin, et de tirer des enseignements susceptibles d'informer et d'étayer une action davantage systématique et cohérente face au phénomène.

Ce rapport a été préparé dans le cadre du Réseau européen d'experts juridiques en matière d'égalité des genres et de non-discrimination. Dans chacun des États membres, les experts nationaux affiliés à ce réseau ont procédé à des recherches, complété un questionnaire et rédigé une fiche par pays sur la question de la discrimination structurelle et des réponses juridiques, politiques et institutionnelles apportées dans leur État membre.

Contexte

Dans son plan d'action contre le racisme,¹ la Commission européenne aborde le racisme structurel en termes de «problème sous-jacent». Elle a posé ainsi un jalon dans l'approche de ce phénomène et un défi à relever pour qu'il soit effectivement combattu.

Le plan d'action fournit une définition assez générale du racisme structurel: elle en saisit les éléments historique, sociétal et institutionnel. Cependant, en dépit des précisions figurant dans les principes directeurs communs² publiés par la Commission européenne à l'appui de l'élaboration de plans d'action nationaux contre le racisme, cette définition omet certains détails plus spécifiques susceptibles d'être importants dans un contexte où la discrimination structurelle fondée sur la race ou l'origine ethnique ne serait pas largement comprise ou traitée.

Si le plan d'action présente un éventail limité d'actions en matière de racisme structurel, mettant essentiellement l'accent sur les données sur l'égalité et sur les stéréotypes, il encourage toutefois des actions complémentaires telles que la mise en œuvre des obligations légales en matière d'égalité; l'adoption de programmes d'action positive; et la prise en compte du potentiel discriminatoire de l'intelligence artificielle. Les États membres sont encouragés à adopter des plans d'action nationaux contre le racisme d'ici à la fin de 2022, et à agir dans ce cadre en étroite collaboration avec la société civile et les organismes de promotion de l'égalité. Il convient d'apprécier à cet égard que le huitième principe régissant l'élaboration de ces plans nationaux recommande d'identifier et de lutter contre les manifestations éventuelles du racisme structurel et leur impact.³

La Commission européenne fait également référence à la discrimination structurelle dans l'approche de «l'antitsiganisme» adoptée dans le cadre stratégique de l'UE relatif aux Roms.⁴ Elle en englobe les éléments historique, sociétal et institutionnel. Les États membres sont invités à élaborer des cadres stratégiques nationaux pour les Roms faisant de la lutte contre la discrimination et «l'antitsiganisme» un objectif essentiel et une priorité transversale. Cette focalisation a été renforcée en 2021 par une recommandation du Conseil sur l'égalité, l'inclusion et la participation des Roms, qui insiste sur l'élément institutionnel en recommandant aux États membres de prendre des mesures destinées à lutter contre la discrimination multiple et structurelle à l'égard des Roms.⁵

- 1 Commission européenne (2020), Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social et au Comité des régions, Une Union de l'égalité: plan d'action de l'UE contre le racisme 2020-2025, Bruxelles, 18.9.2020, COM(2020) 565 final.
- 2 Commission européenne (2021), Principes directeurs communs relatifs aux plans d'action nationaux contre le racisme et la discrimination raciale, Commission européenne, sous-groupe sur la mise en œuvre nationale du plan d'action de l'UE contre le racisme 2020-2025, DG Justice et Consommateurs.
- 3 Commission européenne (2021), Principes directeurs communs relatifs aux plans d'action nationaux contre le racisme et la discrimination raciale, Commission européenne, sous-groupe sur la mise en œuvre nationale du plan d'action de l'UE contre le racisme 2020-2025, DG Justice et Consommateurs.
- 4 Commission européenne (2020), Communication de la Commission au Parlement européen et au Conseil, Une Union de l'égalité: cadre stratégique de l'UE pour l'égalité, l'inclusion et la participation des Roms, Bruxelles, COM(2020) 620 final.
- 5 Conseil de l'Union européenne (2021), Recommandation du Conseil du 12 mars 2021 sur l'égalité, l'inclusion et la participation des Roms, (2021/C 93/01).

La Commission européenne a reconnu, sur la base des travaux du Groupe de haut niveau sur la non-discrimination, l'égalité et la diversité et de son sous-groupe sur les données relatives à l'égalité, la nécessité impérative de disposer de données de bonne qualité pour rendre la discrimination structurelle plus visible et pour formuler des stratégies efficaces en vue de la combattre. Ces travaux ont notamment donné lieu à une publication consacrée aux données relatives à la race ou l'origine ethnique, qui propose des principes directeurs pour la collecte de ce type de données.⁶

Sur le plan législatif, la directive 2000/43/CE aborde la discrimination fondée sur la race ou l'origine ethnique dans une gamme étendue, bien qu'incomplète, de domaines.⁷ Elle ne comporte ni référence ni disposition spécifique concernant la discrimination structurelle. La directive est axée sur le niveau individuel plutôt que structurel, se fondant sur des droits individuels et un système de plaintes personnelles. Les dispositions adoptées – en rapport avec la discrimination indirecte plus particulièrement mais également avec la discrimination directe – offrent cependant certaines possibilités d'aborder la discrimination au niveau structurel. Preuve en est l'émergence de dossiers portant sur une discrimination structurelle, même si leur nombre reste peu élevé et si les progrès à cet égard semblent, en outre, lents au niveau des États membres.

La Commission a reconnu le risque d'une discrimination algorithmique, structurelle par nature, liée au développement et à l'utilisation de systèmes d'intelligence artificielle (IA). Elle a proposé une réglementation visant à «réduire au maximum le risque de discrimination algorithmique, en particulier s'agissant de la conception et de la qualité des jeux de données utilisés pour le développement de systèmes d'IA, assorties d'obligations en ce qui concerne les essais, la gestion des risques, la documentation et le contrôle humain tout au long du cycle de vie des systèmes d'IA».⁸

On assiste par ailleurs, sur un plan européen et international plus large, à une prise de conscience explicite vis-à-vis de la discrimination structurelle fondée sur la race ou l'origine ethnique, et de ses éléments historique, sociétal et institutionnel.

Au Conseil de l'Europe, la Commission européenne contre le racisme et l'intolérance (ECRI), soulignant l'élément institutionnel, a établi que le mandat des organismes de promotion de l'égalité devrait insister également sur la discrimination structurelle et que ces organismes devraient être habilités à mener des enquêtes et à porter cette forme de discrimination devant les instances juridictionnelles, y compris en leur propre nom.⁹ Le programme «Cités interculturelles» a développé pour sa part une série d'initiatives à l'appui d'actions locales axées sur la discrimination systémique; l'accent y est également mis sur l'élément institutionnel.¹⁰

La référence principale des Nations unies concernant le racisme est la convention internationale sur l'élimination de toutes les formes de discrimination raciale, qui ne cite ni ne définit pas spécifiquement la discrimination structurelle.¹¹ Elle contient en revanche une large définition de la discrimination raciale qui comprend cette problématique. Un récent rapport de la Haute-Commissaire des Nations unies aux droits de l'homme, consacré à l'expérience des Africains et des personnes d'ascendance africaine face au

6 Commission européenne (2021), Note d'orientation sur la collecte et l'utilisation de données relatives à l'égalité fondées sur la race ou l'origine ethnique, Sous-groupe sur les données relatives à l'égalité, Groupe de haut niveau sur la non-discrimination, l'égalité et la diversité, DG Justice et consommateurs.

7 Directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique.

8 Commission européenne (2021), Proposition de Règlement du Parlement européen et du Conseil établissant des règles harmonisées concernant l'intelligence artificielle (Législation sur l'intelligence artificielle) et modifiant certains actes législatifs de l'Union, COM(2021) 206 final.

9 Recommandation de politique générale n° 2 de l'ECRI: Les organismes de promotion de l'égalité chargés de lutter contre le racisme et l'intolérance au niveau national, adoptée le 7 décembre 2017.

10 Conseil de l'Europe (2020), Identifying and Preventing Discrimination at the Local Level: Policy Study, Programme «Cités interculturelles».

11 Nations unies (1965), Convention internationale sur l'élimination de toutes les formes de discrimination raciale, Résolution de l'Assemblée générale 2106.

recours excessif à la force et aux autres violations des droits de l'homme dont se rendent coupables des membres des forces de l'ordre, a explicitement évoqué le racisme «systémique».¹² Il insiste sur l'obligation des états, en vertu du droit relatif aux droits de l'homme et en conséquence d'engagements politiques, d'éliminer toutes les formes de discrimination raciale, y compris la discrimination systémique, et d'adopter une approche intersectionnelle pour y parvenir.

Bien que prometteur, ce contexte demeure quelque peu inachevé étant donné son manque de clarté pour ce qui concerne la définition de la discrimination structurelle fondée sur la race ou l'origine ethnique, l'établissement des éléments convenus qui en sous-tendent le concept, et la formulation de manières de supprimer le racisme structurel et ses composantes.

Niveau national: la législation

Selon les experts en non-discrimination du réseau européen des experts juridiques en matière d'égalité des genres et de non-discrimination, on ne trouve de disposition susceptible d'être considérée comme portant spécifiquement sur la discrimination structurelle fondée sur la race ou l'origine ethnique dans la législation nationale d'aucun État membre. Il existe cependant au niveau national, dans la législation relative à l'égalité de traitement, des dispositions qui pourraient servir – et servent d'ailleurs – à lutter contre cette forme de discrimination.

Il s'agit, comme dans le cas des dispositions des directives de l'UE dont elles s'inspirent, de dispositions visant la discrimination indirecte; l'action positive; l'habilitation des organismes pour l'égalité à mener des enquêtes, à préparer des rapports et à formuler des recommandations en matière de discrimination, et à procéder à des études ou des investigations en étant dotés des pouvoirs d'enquête requis; diverses formes d'*actio popularis*, en ce compris des cas pris en charge de leur propre initiative par des organismes de promotion de l'égalité sans désignation d'un plaignant individuel; et l'habilitation de ces organismes, lorsqu'ils ont une fonction décisionnelle, d'ordonner une action de la part de défenseurs dont les faits discriminatoires ont été établis.

Dans certains cas, la législation relative à l'égalité de traitement donne une définition tellement large de la discrimination directe qu'elle pourrait être interprétée comme incluant la discrimination structurelle, sans la nommer pour autant. On relève également la possibilité éventuelle de combattre la discrimination structurelle sur une base moins explicite en réalisant des avancées en termes de constitution d'une masse critique de cas individuels portant sur une problématique donnée. Les organismes de promotion de l'égalité ont un rôle à jouer dans la concrétisation de cette approche, bien qu'ils puissent s'en trouver empêchés faute de ressources suffisantes.

Les obligations légales en matière d'égalité peuvent potentiellement contribuer à combattre la discrimination structurelle, au travers plus particulièrement – dans leur conception actuelle – de leur composante institutionnelle. Ces obligations peuvent exiger l'introduction, au sein d'organisations du secteur public et du secteur privé, de systèmes focalisés sur l'égalité destinés à démanteler ou à désarmer les régimes internes pouvant actuellement présenter cette forme de discrimination.

Les obligations légales en matière d'égalité peuvent englober des obligations préventives exigeant des organisations qu'elles prennent des mesures pour prévenir la discrimination, le harcèlement ou le harcèlement sexuel dans le domaine de l'emploi ou de la fourniture de biens et de services; des obligations institutionnelles exigeant des organisations qu'elles prennent des mesures déterminées pour

12 Haut-Commissariat des Nations unies aux droits de l'homme (2021), Promotion et protection des droits de l'homme et des libertés fondamentales des Africains et des personnes d'ascendance africaine face au recours excessif à la force et aux autres violations des droits de l'homme dont se rendent coupables des membres des forces de l'ordre, Rapport du Haut-Commissariat des Nations unies aux droits de l'homme, quarante-septième session du Conseil des droits de l'homme, 21 juin-9 juillet 2021.

promouvoir l'égalité au niveau de leurs salariés ou des personnes accédant à leurs services; et des obligations de transversalité politique exigeant des autorités publiques qu'elles veillent à promouvoir l'égalité et à éliminer la discrimination dans l'exercice de leurs fonctions.¹³

L'instauration d'obligations légales en matière d'égalité reste limitée et peu homogène parmi les États membres. Aucune obligation de ce type n'est signalée dans seize d'entre eux.¹⁴ On observe uniquement, dans cinq autres, une obligation de type préventif,¹⁵ considérée comme n'offrant pas le même potentiel que les obligations institutionnelles et d'intégration politique pour lutter contre la discrimination structurelle. Seuls quatre États membres affichent une obligation de transversalité politique,¹⁶ l'obligation en question ayant un libellé plus permissif dans l'un des cas. Un autre État membre ne prévoit ce type d'obligation qu'au niveau régional.¹⁷ Deux États membres se sont dotés d'une obligation institutionnelle¹⁸ ayant une certaine capacité de combattre la discrimination structurelle.

Certaines difficultés sont notées quant à la manière dont s'exercent ces obligations en termes d'impact éventuel sur la discrimination structurelle. Dans sept cas, une absence de mécanismes de respect des obligations pour en garantir la mise en œuvre est constatée. Dans sept cas, des problèmes de qualité de mise en œuvre surviennent en raison d'une méconnaissance de l'obligation, d'une compréhension insuffisante des enjeux, y compris celui de la discrimination structurelle, et d'un manque de suivi pour garantir une mise en œuvre de qualité. Dans cinq cas, une absence de description suffisamment précise des mesures à prendre pour respecter l'obligation est signalée en tant qu'obstacle à sa mise en œuvre.

Niveau national: la politique

La discrimination structurelle fondée sur la race ou l'origine ethnique commence à peine à figurer à l'agenda politique des États membres. A l'heure de rédiger leurs rapports, les experts en non-discrimination du réseau européen des experts juridiques en matière de non-discrimination n'ont recensé que six plans nationaux d'action contre le racisme pour l'ensemble des États membres.¹⁹ Cette situation traduit le fait que la date limite de leur présentation est fixée à fin 2022.

Cinq de ces plans d'action font spécifiquement référence à la discrimination structurelle.²⁰ Dans un autre État membre, un rapport intermédiaire indique que le plan national d'action attendu portera une attention particulière au racisme structurel.²¹ Dans un autre État membre encore, alors qu'aucun plan national d'action contre le racisme n'a été adopté, un plan régional d'action fait référence à la discrimination structurelle.²² Cette situation devrait s'améliorer au fur et à mesure que les États membres donnent suite aux encouragements prodigués par la Commission européenne.

On ne note cependant aucune cohérence dans l'approche de la discrimination structurelle fondée sur la race ou l'origine ethnique, que ce soit entre les différents plans ou dans le cadre des actions qu'ils prévoient pour combattre le phénomène. Les diverses définitions utilisées dans les plans tendent à se concentrer sur l'élément institutionnel. Une certaine attention n'est réservée aux éléments sociétal et historique que dans un seul plan. Le cadre d'action en la matière est restreint et on ne discerne aucune stratégie claire destinée à l'étayer.

13 Crowley, N. (2016), *Making Europe More Equal: A Legal Duty?*, Equinet, Bruxelles.

14 Allemagne, Autriche, Belgique, Croatie, Chypre, Danemark, France, Grèce, Italie, Lettonie, Luxembourg, Malte, Pays-Bas, Pologne, Portugal et Roumanie.

15 Espagne, Estonie, République tchèque, Slovaquie et Slovaquie.

16 Finlande, Hongrie, Irlande et Lituanie.

17 Belgique.

18 Bulgarie et Suède.

19 Allemagne, Finlande, Grèce, Malte, Portugal et Suède.

20 Allemagne, Finlande, Malte, Portugal et Suède.

21 Irlande.

22 Belgique.

Les plans d'action qui font référence à la discrimination structurelle présentent une large gamme d'actions pour y remédier. On peut citer à cet égard la planification de mesures en faveur de l'égalité; des formations en rapport avec l'égalité; des bilans d'égalité réalisés par un organisme de promotion de l'égalité; des projets d'enquête concernant l'esclavage, le colonialisme et la présence historique de groupes discriminés; des stratégies de recrutement visant à accroître la diversité; la prise en compte des systèmes d'intelligence artificielle; le développement de ressources éducatives; et une facilitation de la constitution d'association et de la participation politique.

L'attention spécifiquement accordée aux systèmes d'intelligence artificielle – domaine neuf suscitant certaines préoccupations en matière de discrimination structurelle – reste limitée, comme en atteste un rapport consacré à cette problématique par Allen & Masters, qui concluent qu'il n'existe en Europe, à l'heure actuelle, qu'un embryon de débat concernant les répercussions des systèmes d'intelligence artificielle sur l'égalité.²³ Leur rapport insiste sur la nécessité d'agir à l'échelon national face à ce problème.

En ce qui concerne les autres stratégies pertinentes signalées, la discrimination structurelle n'est mentionnée que dans un certain nombre de cadres stratégiques nationaux en faveur des Roms s'inscrivant dans le cadre stratégique de l'UE dans ce domaine. Tel est le cas dans six seulement des dix-neuf États membres où des stratégies de ce type sont rapportées.²⁴ Le signalement d'une discrimination structurelle vécue par des Roms mais s'accompagnant d'une action en vue d'y remédier n'a été notée que dans deux de ces six cas.²⁵ Dans deux autres États membres, alors que la discrimination structurelle n'est pas mentionnée, on note des actions susceptibles de contribuer à son élimination.²⁶ Ce bilan atteste d'un engagement très limité vis-à-vis du problème de la discrimination structurelle.

L'action positive s'impose pour remédier à l'inégalité d'effets qui atteste d'une discrimination structurelle, et pour inverser cette situation en réalisant des avancées sur la voie de la pleine égalité en pratique. L'action positive n'est pas une antidote de la discrimination structurelle dans la mesure où elle porte sur l'effet plutôt que les causes; mais elle fait nécessairement partie de toute stratégie visant à éliminer la discrimination structurelle. Des mesures d'action positive sont signalées dans plusieurs stratégies recensées, principalement axées sur les Roms, et notamment dans plusieurs cadres stratégiques nationaux en faveur de ces derniers.

Ces mesures tendent à se concentrer sur les domaines de l'emploi, de la formation et de l'éducation avec un accent particulier sur le marché du travail et l'employabilité. On relève, dans certains cas, une action positive dans les domaines des soins de santé, de l'inclusion sociale et du logement, ainsi qu'en faveur de la participation politique. On n'observe aucune approche systématique en vue d'assurer une couverture englobant l'ensemble des dimensions, à savoir la situation, l'expérience, la voix et l'identité, et l'accent est mis sur l'élimination du désavantage plutôt que sur la réalisation de l'égalité.

Référence est faite à l'intersectionnalité dans plusieurs de ces stratégies, et en particulier dans des cadres stratégiques nationaux en faveur des Roms. L'approche intersectionnelle, prenant en compte la diversité au sein des groupes exposés à une discrimination structurelle, s'avère nécessaire pour y apporter une réponse efficace et complète. De façon générale, l'intersectionnalité ne reçoit guère l'attention requise, au vu à la fois de la place insuffisante qui lui est réservée à l'agenda politique et de la manière limitée dont elle est abordée.

23 Allen, R. & Masters, D. (2020), *Regulation for an Equal AI: A New Role for Equality Bodies, Meeting the new challenges to equality and non-discrimination posed from increasing digitisation and the use of Artificial Intelligence*, Equinet, p. 30.

24 Allemagne, Croatie, Espagne, Hongrie, République tchèque et Slovaquie.

25 Allemagne et Croatie.

26 Portugal et Suède.

Les problèmes de mise en œuvre signalés à propos de ces stratégies concernent:

- la prédominance d'une approche de la discrimination en tant que problème au niveau individuel – l'action à son encontre est dès lors essentiellement dictée par la nécessité d'éradiquer les stéréotypes et/ou les préjugés inconscients véhiculés au niveau individuel, ou de lutter contre des actes individuels qui engendrent l'exclusion ou le désavantage;
- les entraves telles que l'absence de budget dédié, l'absence de volonté politique, l'insuffisance de capacités administratives et le manque de données ventilées – situations signalées dans de nombreux cas;
- le langage ou la terminologie, et notamment l'expression «obstacles structurels», qui sont utilisés dans le plan sans être étayées par une compréhension adéquate du terme et sans bénéficier d'une attention consciente ou d'une réelle volonté de remédier au phénomène – situations signalées dans de nombreux cas;
- la focalisation sur des formes explicites de discrimination structurelle, qui a pris le pas sur l'investissement dans la lutte contre ses formes davantage cachées – et potentiellement beaucoup plus controversées – situation signalée dans un cas; et
- la nature fédérale de certains États membres.

Ces problèmes de mise en œuvre polarisent l'attention sur le modèle développé par Matland²⁷ pour l'étude de l'implémentation des politiques. Dans son analyse de celles qui invoquent des symboles forts (*highly salient symbols*), tel le racisme structurel, il constate des risques d'échec du fait que ces politiques peuvent se heurter à un manque de clarté (ambiguïté) et à un manque de consensus quant au cadrage de la politique et aux moyens de la mettre en œuvre (conflit). Un tel contexte s'applique au racisme structurel en raison d'une absence de définition claire pour orienter les actions et d'une absence de consensus quant à la meilleure façon d'avancer et quant à ce qui est nécessaire pour éradiquer le phénomène.

Niveau national: l'infrastructure institutionnelle

Il n'existe pas, en matière de lutte contre le racisme, en ce compris la lutte contre la discrimination structurelle fondée sur la race ou l'origine ethnique, de norme claire applicable aux infrastructures institutionnelles nationales – ce qui se reflète dans leur diversité et dans leur nature restreinte, comme le rapportent les experts en non-discrimination du réseau européen des experts juridiques en matière d'égalité des genres et de non-discrimination. Ces infrastructures doivent émaner d'institutions gouvernementales qui confèrent à la fois un leadership et une responsabilité à cet égard. Leur conception même doit prévoir une coordination entre domaines d'action concernés ainsi qu'une approche intersectorielle impliquant notamment la société civile – les organismes de promotion de l'égalité et les plateformes de la société civiles étant des acteurs clés de ce type d'approche. Une inclusion du secteur privé peut également s'avérer utile, notamment via des structures de partenariat social.

Bien que les exemples restent peu développés à l'échelon de l'ensemble des États membres et des infrastructures au sein de ceux-ci, on observe un élément gouvernemental dans un certain nombre d'infrastructures institutionnelles nationales pour ce qui concerne la lutte contre le racisme, y compris la discrimination structurelle fondée sur la race ou l'origine ethnique. Encore faudra-t-il que ces exemples eux-mêmes soient mobilisés de façon adéquate pour combattre cette forme de discrimination, étant donné le relatif manque d'intérêt réservé à cette problématique par les stratégies politiques.

L'influence exercée est une mesure importante de l'efficacité de l'infrastructure institutionnelle gouvernementale, de la capacité du titulaire de la responsabilité de conférer un leadership à d'autres départements. Des questions d'influence interviennent dans la décision de désigner un ministère en charge

27 Matland, R. E. (1995), 'Synthesizing the Implementation Literature: The Ambiguity-Conflict Model of Policy Implementation', *Journal of Public Administration Research and Theory*, J-PART, vol.5, n° 2 (1995), p. 145-174.

de l'égalité ou de confier plutôt cette compétence à un ministère ayant d'autres responsabilités, plus larges. Elles surviennent également, dans ce dernier contexte, au moment d'opérer des choix concernant l'envergure et la localisation du département ministériel qui se voit confier les questions d'égalité, de même qu'à propos de l'ancienneté de ses responsables.

En termes de localisation institutionnelle, ces structures prennent, dans le meilleur des cas, la forme d'un ministère dédié ayant la responsabilité de la problématique: les experts signalent que ce choix a été fait par huit États membres.²⁸ Un autre modèle dans lequel l'égalité et/ou la non-discrimination font partie d'un mandat ministériel est observé dans onze États membres.²⁹ Deux États membres se sont dotés de bureaux ou de structures qui, rattachés au gouvernement, interviennent dans l'élaboration des politiques dans ce domaine.³⁰

Les infrastructures gouvernementales nationales recensées ont, en matière d'égalité et de non-discrimination, de larges compétences couvrant plusieurs motifs. Ce point mériterait un examen plus approfondi en vue de déterminer si le motif de la race ou de l'origine ethnique est traité dans ce cadre de manière à lui garantir suffisamment de visibilité et d'attention.

La coordination entre les différents départements gouvernementaux est à la fois un élément majeur et une fonction essentielle de cette infrastructure gouvernementale. Elle constitue une réponse à la nécessité d'une approche cohérente pour combattre le racisme, éliminer la discrimination structurelle fondée sur la race et l'origine ethnique, et faire progresser l'égalité fondée sur la race ou l'origine ethnique dans l'éventail complet des domaines de l'action politique. Il existe, au niveau des structures institutionnelles gouvernementales, des exemples positifs de coordination entre les différents ministères et agences, mais ils sont signalés dans huit États membres seulement.³¹

La collaboration intersectorielle peut contribuer à combattre le racisme en rassemblant différents secteurs autour d'objectifs et d'agendas communs. Une collaboration intersectorielle avec des organisations de la société civile permet plus spécialement de mettre en lumière le point de vue des personnes exposées au racisme et de veiller à ce que la discrimination structurelle fondée sur la race ou l'origine ethnique soit prise en compte par les décideurs. Une infrastructure institutionnelle prévoyant ce type de collaboration est signalée dans treize États membres seulement.³² Dans quatre pays, elles sont de grande envergure et incluent des organisations syndicales.³³ Dans trois cas, ces infrastructures ont un champ de collaboration plus restreint puisqu'il se limite à un groupe spécifique exposé au racisme.³⁴

Les organismes de promotion de l'égalité sont bien placés pour impulser des actions d'éradication de la discrimination structurelle fondée sur la race ou l'origine ethnique, et de ses composantes institutionnelles en particulier. Il existe plusieurs exemples d'intervention substantielle dans ce sens – laquelle consiste à prendre en charge ou soutenir des dossiers et à formuler des décisions dans ce cadre; à procéder à des travaux de recherche et publier des rapports; à offrir des conseils et formuler des recommandations à l'intention du gouvernement; et à fournir des rapports aux organismes internationaux de suivi des droits de l'homme. Il est signalé toutefois que l'ampleur des efforts déployés reste trop limitée dans certains cas pour avoir un effet significatif – une situation qui s'explique principalement par l'insuffisance des ressources mises à la disposition des organismes de promotion de l'égalité.

28 Allemagne, Belgique, Espagne, France, Irlande, Italie, Malte et Portugal.

29 Danemark, Espagne, Estonie, Finlande, Grèce, Hongrie, Lettonie, Lituanie, Pays-Bas, Slovaquie et Suède.

30 Croatie et Pologne.

31 Allemagne, France, Hongrie, Italie, Lituanie, Malte, Pays-Bas et Portugal.

32 Allemagne, Bulgarie, Espagne, Finlande, France, Grèce, Hongrie, Lettonie, Lituanie, Malte, Pays-Bas, République tchèque et Slovaquie.

33 Finlande, France, Lettonie et Malte.

34 Espagne, Hongrie et République tchèque.

L'engagement de ces organismes vis-à-vis de la discrimination structurelle est inégal. Si beaucoup d'entre eux ont pu agir à cet égard, l'engagement est faible, voire totalement absent, dans treize cas.³⁵ Le manque de ressources suffisantes constitue ici l'obstacle principal à l'action, mais d'autres entraves sont également notées, telles une absence de pouvoirs et de compétences appropriés, ou une certaine réticence des responsables de l'organisme de promotion de l'égalité à traiter de cette question. Se préparer et aborder les problèmes d'égalité et de non-discrimination en rapport avec les systèmes d'intelligence artificielle constitue désormais des défis particuliers pour les organismes de promotion de l'égalité.

Des plateformes de la société civile jouent un rôle important dans l'habilitation d'organisations représentatives et dans l'élimination de la fragmentation du secteur. En l'occurrence, ces plateformes impliquent des organisations qui représentent des personnes exposées au racisme en créant des espaces partagés de réflexion et d'action face à des enjeux communs. La démarche est importante pour mettre en lumière le point de vue de ceux qui sont exposés au racisme, et pour le formuler de manière à exercer une influence.

On note peu d'exemples de telles plateformes en place dans la société civile – huit seulement – qui traitent de questions liées au racisme.³⁶ Certaines d'entre elles agissent sur la problématique de la discrimination structurelle fondée sur la race ou l'origine ethnique, mais elles sont davantage marquantes en tant qu'organismes favorisant le débat sur le racisme de façon plus générale. Le manque d'engagement réel de la part des autorités nationales vis-à-vis de ces plateformes de la société civile est décrit comme un problème qui affecte leur potentiel et leur impact. La création et le fonctionnement de ces plateformes se trouvent par ailleurs entravés par leur accès limité à des ressources suffisantes pour leur permettre de se constituer et d'exercer leur action de façon efficace.

Les questions suscitées par les infrastructures institutionnelles nationales sont préoccupantes à la lumière des travaux de Matland,³⁷ et de la nécessité impérieuse qu'il constate de bâtir des coalitions et d'en exercer le poids au niveau de la mise en œuvre des politiques invoquant des symboles forts, tel le domaine du racisme structurel, afin que celles-ci puissent atteindre leur but.

Niveau national: la jurisprudence

Les experts du réseau européen des experts juridiques en matière de non-discrimination n'ont recensé aucune jurisprudence portant spécifiquement sur la question de la discrimination structurelle fondée sur la race ou l'origine ethnique, hormis deux exceptions limitées en France et aux Pays-Bas. Cette situation est la conséquence directe de l'absence de dispositions spécifiques visant à définir et à interdire cette forme de discrimination. Elle peut également résulter du fait qu'un système judiciaire se montre réticent à reconnaître que la discrimination peut se situer à un autre niveau que celui de l'acte individuel.

Une jurisprudence peut être pertinente pour la discrimination structurelle fondée sur la race ou l'origine ethnique sans viser explicitement ce concept. Ce constat a été fait dans onze États membres seulement,³⁸ mais la portée d'une telle jurisprudence est limitée et elle ne peut être considérée comme suffisante pour l'édification d'une réponse efficace à la discrimination structurelle.

Ce type de jurisprudence porte le plus souvent sur les formes les plus visibles de discrimination structurelle, et notamment sur la question de la ségrégation à l'égard des Roms et des gens du voyage ainsi que sur la question du profilage ethnique. Elle se concentre, de façon plus générale, sur la composante

35 En Autriche, en Bulgarie, à Chypre, en Estonie, en Grèce, en Hongrie, en Italie, en Lettonie, au Luxembourg, à Malte, au Portugal, en République tchèque et en Roumanie.

36 En Belgique, en Estonie, en Grèce, en Hongrie, en Irlande, aux Pays-Bas, en Roumanie et en Slovaquie.

37 Matland, R. E. (1995), 'Synthesizing the Implementation Literature: The Ambiguity-Conflict Model of Policy Implementation', *Journal of Public Administration Research and Theory*, J-PART, vol. 5, n° 2 (1995), p. 145-174.

38 Belgique, Croatie, Finlande, France, Grèce, Hongrie, Irlande, Pays-Bas, Portugal, Slovaquie et Suède.

institutionnelle de la discrimination structurelle, plus facile à saisir en vertu des dispositions actuelles de la législation relative à l'égalité de traitement qui visent la discrimination indirecte et, parfois, la discrimination directe. La composante sociétale est moins fréquente, et apparaît plus spécifiquement dans des cas qui se focalisent sur les stéréotypes.

Les problèmes de logement rencontrés par les Roms et les gens du voyage occupent une place assez importante dans cette jurisprudence, de même que des questions liées au lieu de travail. Une partie des arrêts prononcés concernent des formes moins visibles de discrimination structurelle et met en évidence, dans certains cas, une focalisation sur les stéréotypes.

En dépit de l'existence de cette jurisprudence pertinente pour la discrimination structurelle, le cadre général reste un contexte dans lequel les sanctions et mesures correctives ne sont pas conçues pour traiter ce type de phénomène. Rares sont les procédures de plainte dans lesquelles les sanctions et mesures correctives permettent de gérer efficacement la problématique de la discrimination structurelle. Lorsque cette capacité de réponse efficace existe, elle relève généralement des compétences conférées à l'organisme national de promotion de l'égalité d'ordonner des mesures de réparation lorsqu'une discrimination a été établie. On observe dans un cas seulement, en l'occurrence en Hongrie, une évolution positive au niveau de la jurisprudence, laquelle prescrit des sanctions capables d'avoir un effet systémique lorsqu'il s'agit de discrimination systémique.

Propositions

La Commission européenne pourrait utilement:

- ▶ Susciter, au sein du Groupe de haut niveau sur la lutte contre le racisme, la xénophobie et d'autres formes d'intolérance et du Groupe de haut niveau sur la non-discrimination, l'égalité et la diversité, une réflexion et une facilitation des échanges de bonnes pratiques concernant la discrimination structurelle fondée sur la race ou l'origine ethnique, et les actions requises pour la combattre, en vue de forger une vision partagée, de générer un apprentissage au niveau des politiques et de trouver un consensus sur:
 - une définition des différents éléments du concept de discrimination structurelle fondée sur la race ou l'origine ethnique; et
 - un cadre des différents types de réponses requises pour lutter efficacement contre la discrimination structurelle fondée sur la race ou l'origine ethnique.
- ▶ Soutenir et permettre un changement législatif au niveau national et/ou promouvoir ce changement au niveau européen pour ce qui concerne la désignation, la définition et l'interdiction explicite de la discrimination structurelle fondée sur la race ou l'origine ethnique en vertu de la législation relative à l'égalité de traitement, ainsi qu'une disposition prévoyant des réparations et sanctions adéquates lorsqu'une discrimination de ce type est établie.
- ▶ Soutenir et permettre un changement législatif au niveau national et/ou promouvoir ce changement au niveau européen pour ce qui concerne l'instauration, en matière d'égalité en rapport avec la race et l'origine ethnique, d'obligations légales de type institutionnel ou de transversalité politique, capables d'impulser, d'une part, le changement institutionnel nécessaire pour éradiquer les éléments de la discrimination structurelle fondée sur la race ou l'origine ethnique, et, d'autre part, l'action indispensable pour remédier aux conséquences à long terme de ce type de discrimination.
- ▶ Veiller à un accent particulier sur le caractère adéquat et approprié des réponses mises en œuvre face à la discrimination structurelle fondée sur la race ou l'origine ethnique, y compris une volonté d'action positive et d'approche intersectorielle, dans le cadre du contrôle et du suivi des plans d'action nationaux de lutte contre le racisme au niveau européen, afin d'intensifier ces réponses au fil du temps

et de tirer des enseignements de l'expérience que constitue la conception et l'implémentation de ces plans d'action nationaux.

► Encourager et soutenir, au sein des États membres, l'évolution des infrastructures institutionnelles nationales par rapport à la problématique du racisme, y compris la discrimination structurelle fondée sur la race ou l'origine ethnique, notamment:

- en formulant des modèles de normes et d'indicateurs à appliquer à ce type d'infrastructure institutionnelle nationale, et en veillant ensuite à ce qu'ils soient agréés;
- en soutenant la formation de coalitions au niveau des États membres afin de permettre et d'impulser à ce niveau la mise en œuvre des politiques relatives à la discrimination structurelle fondée sur la race ou l'origine ethnique;
- en mettant en place, au moyen des mécanismes de financement adéquats et disponibles, des stimulants sous la forme de ressources et de soutien en faveur de la poursuite de l'évolution de cette infrastructure institutionnelle nationale; et
- en mettant en place, au moyen des mécanismes de financement adéquats et disponibles, des stimulants sous la forme de ressources et de soutien à des plateformes de la société civile qui agissent au niveau de l'État membre sur la question du racisme, et contribuent à conférer davantage de visibilité à la discrimination structurelle fondée sur la race ou l'origine ethnique et à combattre ce phénomène.

► Assurer au niveau des États membres la place et la contribution des organismes de promotion de l'égalité au sein des infrastructures institutionnelles nationales concernant la problématique du racisme, y compris la discrimination structurelle fondée sur la race ou l'origine ethnique, en faisant progresser l'engagement et les travaux actuels en matière de normes applicables à ces organismes avec un accent plus particulier sur le niveau suffisant de leurs ressources et l'adéquation de leur mandat, de leurs compétences et de leurs pouvoirs en matière de lutte contre la discrimination structurelle fondée sur la race ou l'origine ethnique; en veillant au rôle des organismes de promotion de l'égalité en termes d'appui et d'implémentation des obligations légales en matière d'égalité; et en s'assurant qu'ils disposent de ressources adéquates et suffisantes pour relever les nouveaux défis posés par les systèmes d'intelligence artificielle.

Au niveau national, les États membres pourraient utilement:

► Prévoir, dans le cadre de la législation relative à l'égalité de traitement, des dispositions visant à désigner, définir et interdire explicitement la discrimination structurelle fondée sur la race ou l'origine ethnique, et à fixer des réparations et sanctions adéquates lorsque qu'une discrimination de ce type est établie.

► Soutenir et permettre davantage de focalisation des mécanismes de formation judiciaire sur la problématique de la discrimination structurelle fondée sur la race ou l'origine ethnique, sur les dispositions de la législation relative à l'égalité de traitement qui régissent cette matière, et sur la jurisprudence dans ce domaine.

► Prévoir, dans le cadre de la législation relative à l'égalité de traitement, des obligations de type institutionnel ou de transversalité politique suffisamment précises pour ce qui concerne les mesures requises de la part du détenteur d'obligations, ainsi que des sanctions lorsque lesdites mesures ne sont pas mises en œuvre de façon adéquate; et garantir le soutien adéquat et approprié de leur mise en application.

► Exposer une bonne compréhension de la discrimination structurelle fondée sur la race ou l'origine ethnique et de ses différents éléments, et prévoir et investir, dans le cadre des plans d'action nationaux contre le racisme, dans des mesures adéquates et appropriées en vue de son élimination, ainsi que

dans des mesures d'action positive destinées, selon une approche intersectionnelle, à remédier aux effets du désavantage envers des groupes de Noirs et des groupes de minorités ethniques, y compris les Roms et les gens du voyage, à la fois en termes de situation, d'expérience, de voix et d'identité.

- ▶ Réexaminer et renforcer les infrastructures institutionnelles gouvernementales concernées par la question du racisme, y compris la discrimination structurelle fondée sur la race et l'origine ethnique, afin de garantir une infrastructure institutionnelle gouvernementale qui soit capable en la matière d'assurer un leadership au sein du gouvernement, de veiller à une coordination entre les différents départements ministériels et d'instaurer une collaboration entre différents secteurs.
- ▶ Définir et répondre aux défis posés par les systèmes d'intelligence artificielle en termes de discrimination structurelle fondée sur la race ou l'origine ethnique, notamment en déterminant la meilleure manière de réglementer ces systèmes dans une perspective d'égalité et de non-discrimination, et en élaborant les réformes législatives et administratives jugées nécessaires à cette fin.
- ▶ Habilitier les organismes de promotion de l'égalité de traitement en les dotant d'un mandat, de compétences et de ressources qui leur permettent de réaliser pleinement leur potentiel dans la lutte contre la discrimination structurelle fondée sur la race ou l'origine ethnique, y compris en intentant des poursuites et/ou en veillant à une masse critique de dossiers axés sur cette problématique; en apportant un soutien et des orientations et en fixant des normes quant aux obligations légales en matière d'égalité, et en les faisant appliquer; et en relevant les défis posés dans ce domaine par les systèmes d'intelligence artificielle.
- ▶ Bâtir avec la société civile une collaboration basée sur des objectifs et des agendas communs pour ce qui concerne la lutte contre la discrimination structurelle fondée sur la race ou l'origine ethnique, et investir les ressources qui permettront à la société civile de constituer des plateformes axées sur cette problématique.

Zusammenfassung

Ausgangspunkte

Struktureller Rassismus lässt sich am besten als Verbindung von drei verschiedenen Elementen verstehen:

- Historisch: die nicht erzählte oder unzureichend analysierte Geschichte der Sklaverei, des Kolonialismus und der Ausbeutung, deren anhaltende Folgen weder erkannt noch aufgearbeitet wurden; die rechtfertigende und unzutreffende Ideologie, wonach die menschliche Gattung als aus verschiedenen „Rassen“ zusammengesetzt verstanden werden konnte, die nach biologischen Kriterien definiert waren, denen sodann eine falsche Bedeutung beigemessen wird; die Art und Weise, in der diese Geschichte, die nicht korrigiert wurde bzw. verborgen blieb, einen unterdrückerischen *common sense* in Bezug auf Schwarze und ethnische Minderheiten, einschließlich Roma und Traveller, geprägt hat.
- Gesellschaftlich: die Kultur, die Werte, die Normen und der Diskurs, die auf gesellschaftlicher Ebene vorherrschen und die von Vorstellungen von Überlegenheit und Unterlegenheit durchdrungen und von Feindseligkeit gegenüber Schwarzen und ethnischen Minderheiten, einschließlich Roma und Travellern, gekennzeichnet sind.
- Institutionell: die Politiken, Verfahren, Praktiken und Sichtweisen innerhalb von Organisationen, die – oftmals unbeabsichtigt – dazu führen, dass Schwarze und ethnische Minderheiten, einschließlich Roma und Traveller, ausgeschlossen, behindert oder benachteiligt werden.

Diskriminierung findet auf unterschiedlichen Ebenen, insbesondere auf der Ebene des Individuums und auf der strukturellen Ebene statt. Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft, die struktureller Natur ist, manifestiert sich in Bezug auf die genannten drei Elemente – historisch, gesellschaftlich und institutionell –, indem sie Ungleichheiten schafft, die Schwarze und ethnische Minderheiten, einschließlich Roma und Traveller, in sozialer, wirtschaftlicher, kultureller und politischer Hinsicht benachteiligen.

Auf dieser strukturellen Ebene von Diskriminierung ist es, wo der nachhaltige, generationenübergreifende Impuls für Rassismus angesiedelt ist. Er ist weniger sichtbar und zeigt sich nur in den für Schwarze und ethnische Minderheiten, einschließlich Roma und Travellern, benachteiligenden Ungleichheiten. Diese Benachteiligungen manifestieren sich in Ungleichheiten in Bezug auf:

- Position: Zugang zu und Verteilung von Schlüsselressourcen, einschließlich Einkommen und Beschäftigung, und sozialen Gütern wie Bildung, Gesundheit und Wohnraum;
- Erfahrungen: Zugang zu solidarischen, fürsorglichen und respektvollen Beziehungen bei der Teilhabe an Gesellschaft und Gemeinschaft wie auch bei der Zusammenarbeit mit Institutionen, Arbeitgebern und Dienstleistern;
- Mitsprache: Zugang zu Möglichkeiten der Einflussnahme, also der Mitsprache bei Entscheidungen, die einen selbst betreffen, und der Beteiligung an der Gestaltung des Gemeinwesens und seiner Institutionen;
- Identität: Zugang zu Anerkennung von Kultur und Identität und zu der Flexibilität und den Ressourcen, die erforderlich sind, um mit den praktischen Auswirkungen kultureller Unterschiede und der Art und Weise, wie unterschiedliche Gruppen ihre Identität leben, umzugehen.

Der vorliegende Themenbericht befasst sich mit der Frage struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft. Er untersucht die nationalen, rechtlichen, politischen und institutionellen Initiativen sowie die Rechtsprechung, die in den 27 Mitgliedstaaten dazu beitragen,

diese Art von Diskriminierung zu bekämpfen. Ziel ist es, den aktuellen Stand beim Umgang mit dieser Problematik zu analysieren und Erkenntnisse zu gewinnen, die ein konsequenteres und kohärenteres Vorgehen ermöglichen.

Der Bericht wurde vom Europäischen Netzwerk von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Geschlechtergleichstellung und Nichtdiskriminierung erarbeitet. Die Nichtdiskriminierungsexpertinnen und -experten des Netzwerks in den verschiedenen Mitgliedstaaten haben auf der Grundlage eines Fragebogens Recherchen über strukturelle Diskriminierung und zu den rechtlichen, politischen und institutionellen Maßnahmen in ihrem jeweiligen Land angestellt, den Fragebogen ausgefüllt und für jedes Land ein Datenblatt erstellt.

Kontext

In ihrem Aktionsplan gegen Rassismus¹ bezeichnet die Europäische Kommission strukturellen Rassismus als das „zugrunde liegende Problem“. Damit hat sie ein Zeichen für die Bekämpfung von strukturellem Rassismus gesetzt und eine zentrale Herausforderung benannt, die es zu bewältigen gilt, wenn Rassismus wirksam bekämpft werden soll.

Die Definition des Begriffs „struktureller Rassismus“ in dem Aktionsplan ist weit gefasst und beinhaltet die historischen, gesellschaftlichen und institutionellen Elemente dieses Phänomens. Trotz einiger Erläuterungen in den von der Europäischen Kommission veröffentlichten Gemeinsamen Leitprinzipien,² mit denen die Entwicklung nationaler Aktionspläne gegen Rassismus unterstützt werden soll, mangelt es der Definition an konkreten Details, die in einem Kontext, in dem der Begriff der strukturellen Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft weithin nicht verstanden oder aufgegriffen wird, von Bedeutung sein können.

Der Aktionsplan enthält eine begrenzte Anzahl von Maßnahmen in Bezug auf strukturellen Rassismus, die sich schwerpunktmäßig auf Gleichstellungsdaten und Stereotypisierung richten. Ergänzend dazu werden in dem Aktionsplan jedoch weitere Maßnahmen angeregt, darunter folgende: Implementierung gesetzlicher Gleichstellungspflichten, Verabschiedung von Förderprogrammen und Auseinandersetzung mit dem Diskriminierungspotenzial von künstlicher Intelligenz. Die Mitgliedstaaten werden angehalten, bis Ende 2022 nationale Aktionspläne gegen Rassismus zu verabschieden. Dies soll in enger Zusammenarbeit mit der Zivilgesellschaft und den Gleichstellungsstellen erfolgen. Eines der acht gemeinsamen Leitprinzipien für diese nationalen Aktionspläne ist es, potenzielle Erscheinungsformen von strukturellem Rassismus und deren Auswirkungen zu ermitteln und zu bekämpfen.³

Die Europäische Kommission bezieht sich auf strukturelle Diskriminierung in dem im Strategischen Rahmen der EU für die Roma⁴ dargelegten Verständnis von „Antiziganismus“. Dies umfasst seine historischen, gesellschaftlichen und institutionellen Elemente. Die Mitgliedstaaten werden aufgefordert, nationale strategische Rahmen für die Roma auszuarbeiten, die als zentrales Ziel und Querschnittspriorität die Bekämpfung von Diskriminierung und „Antiziganismus“ enthalten sollen. Weiter gestärkt wird dieser Fokus durch eine Empfehlung des Rates von 2021 zur Gleichstellung, Inklusion und Teilhabe der Roma,

1 Europäische Kommission (2020), Mitteilung der Kommission an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, [Eine Union der Gleichheit: EU-Aktionsplan gegen Rassismus 2020-2025](#), Brüssel, 18.9.2020 COM(2020) 565 final.

2 Europäische Kommission (2021), [Common guiding principles for national action plans against racism and racial discrimination](#), Untergruppe der Europäischen Kommission für die nationale Umsetzung des EU-Aktionsplans gegen Rassismus 2020-2025, GD Justiz und Verbraucher.

3 Europäische Kommission (2021), [Common guiding principles for national action plans against racism and racial discrimination](#), Untergruppe der Europäischen Kommission für die nationale Umsetzung des EU-Aktionsplans gegen Rassismus 2020-2025, GD Justiz und Verbraucher.

4 Europäische Kommission (2020), Mitteilung der Kommission an das Europäische Parlament und den Rat, [Eine Union der Gleichheit: Strategischer Rahmen der EU zur Gleichstellung, Inklusion und Teilhabe der Roma](#), COM(2020) 620 final.

die das institutionelle Element unterstreicht, indem sie den Mitgliedstaaten empfiehlt, Maßnahmen zur Bekämpfung der mehrfachen und strukturellen Diskriminierung der Roma zu ergreifen.⁵

Durch die Arbeit der Hocharangigen Gruppe für Nichtdiskriminierung, Gleichstellung und Vielfalt und deren Untergruppe für Gleichstellungsdaten hat die Europäische Kommission anerkannt, dass gute Gleichstellungsdaten unerlässlich sind, um strukturelle Diskriminierung sichtbar zu machen und wirksame Strategien zu ihrer Bekämpfung zu entwickeln. Dazu gehört auch eine Veröffentlichung über Daten zu „rassischer“ bzw. ethnischer Herkunft, in der Leitprinzipien für die Erhebung solcher Daten festgelegt sind.⁶

Was die Gesetzgebung betrifft, so befasst sich die Richtlinie 2000/43/EG mit Diskriminierungen aus rassistischen Gründen oder wegen der ethnischen Herkunft in einem breiten, wenn auch nicht völlig umfassenden Spektrum von Bereichen.⁷ Sie bezieht sich nicht speziell auf strukturelle Diskriminierung und enthält auch keine spezifischen Bestimmungen dazu. Schwerpunkt der Richtlinie ist nicht die strukturelle, sondern die individuelle Ebene, weshalb sie auf individuellen Rechten und einem individuellen Beschwerdesystem basiert. Die Bestimmungen – insbesondere die zu mittelbarer Diskriminierung, aber auch die zu unmittelbarer Diskriminierung – sind potenziell jedoch in der Lage, Diskriminierung auf struktureller Ebene anzugehen. Dies zeigt sich in der Fallarbeit, die zu struktureller Diskriminierung entstanden ist. Diese Fallarbeit ist jedoch begrenzt; ihre Weiterentwicklung auf der Ebene der Mitgliedstaaten wird außerdem als schwierig angesehen.

Die Europäische Kommission hat erkannt, dass bei der Entwicklung und Nutzung von Systemen der künstlichen Intelligenz (KI) das Risiko einer Diskriminierung durch Algorithmen besteht, die struktureller Art ist. Sie hat eine Verordnung vorgeschlagen, die geltendes Unionsrecht ergänzt, „indem konkrete Anforderungen zur Minimierung des Risikos der Diskriminierung durch Algorithmen, vor allem in Bezug auf Entwurf und Qualität von für die Entwicklung von KI-Systemen verwendeten Datensätzen, aufgenommen wurden und Tests, Risikomanagement, Dokumentation und menschliche Aufsicht über die gesamte Lebensdauer von KI-Systemen hinweg verbindlich vorgeschrieben werden“.⁸

Auf breiterer europäischer und internationaler Ebene zeichnet sich ebenfalls eine explizite Auseinandersetzung mit struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft und deren historischen, gesellschaftlichen und institutionellen Elementen ab.

Im Europarat hat die Europäische Kommission gegen Rassismus und Intoleranz (ECRI) den Akzent auf das institutionelle Element gelegt, indem sie feststellte, dass das Mandat der Gleichstellungsstellen einen Schwerpunkt „strukturelle Diskriminierung“ beinhalten sollte und dass diese Stellen befugt sein sollten, Untersuchungen durchzuführen und Fälle, die derartige Diskriminierungen betreffen, vor Gericht zu bringen – auch in ihrem eigenen Namen.⁹ Das Programm „Interkulturelle Städte“ hat eine Reihe von Initiativen entwickelt, um auf lokaler Ebene Maßnahmen gegen systemische Diskriminierung zu unterstützen, und betont damit ebenfalls das institutionelle Element.¹⁰

Die wichtigste Norm der Vereinten Nationen in Bezug auf Rassismus ist das Internationale Übereinkommen zur Beseitigung jeder Form von rassistischer Diskriminierung, in dem strukturelle Diskriminierung nicht

5 Rat der Europäischen Union (2021), Empfehlung des Rates vom 12. März 2021 zur Gleichstellung, Inklusion und Teilhabe der Roma, (2021/C 93/01).

6 Europäische Kommission (2021), Guidance note on the collection and use of equality data based on racial or ethnic origin, Hocharangige Gruppe für Nichtdiskriminierung, Gleichstellung und Vielfalt, Untergruppe für Gleichstellungsdaten, GD Justiz und Verbraucher.

7 Richtlinie 2000/43/EG des Rates vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft.

8 Europäische Kommission (2021), Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates zur Festlegung harmonisierter Vorschriften für künstliche Intelligenz (Gesetz über künstliche Intelligenz) und zur Änderung bestimmter Rechtsakte der Union, COM/2021/206 final.

9 ECRI General Policy Recommendations No. 2: Equality Bodies to Combat Racism and Intolerance at National Level, angenommen am 7. Dezember 2017.

10 Europarat (2020), Identifying and Preventing Discrimination at the Local Level: Policy Study, Programm „Interkulturelle Städte“.

ausdrücklich erwähnt oder definiert wird.¹¹ Das Übereinkommen enthält jedoch eine weit gefasste Definition von rassistischer Diskriminierung, die diesen Aspekt mit einschließt. In einem kürzlich veröffentlichten Bericht des Büros des Hohen Kommissars der Vereinten Nationen für Menschenrechte über die Erfahrungen von Afrikanerinnen und Afrikanern sowie Menschen afrikanischer Abstammung mit exzessiver Gewaltanwendung und anderen Menschenrechtsverletzungen durch Ordnungskräfte wird ausdrücklich „systemischer“ Rassismus angesprochen.¹² Es wird betont, dass die Staaten aufgrund von Menschenrechtsnormen und politischen Zusagen verpflichtet sind, alle Formen rassistischer Diskriminierung, einschließlich systemischer Diskriminierung, zu beseitigen und im Hinblick darauf einen intersektionalen Ansatz zu verfolgen.

Dieser Kontext ist zwar vielversprechend, bleibt aber ziemlich unverbindlich, da es der Definition von struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft, der Festlegung der in dem Begriff enthaltenen Elemente sowie der Festlegung der Modalitäten zur Eliminierung von strukturellem Rassismus und seinen verschiedenen Bestandteilen an Klarheit mangelt.

Nationale Ebene: Gesetzgebung

In keinem Mitgliedstaat konnten die Nichtdiskriminierungsexpertinnen und -experten des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Geschlechtergleichstellung und Nichtdiskriminierung innerstaatliche Rechtsvorschriften finden, die sich speziell mit struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft befassen. In den Gleichbehandlungsgesetzen der Mitgliedstaaten gibt es jedoch Bestimmungen, die bei der Bekämpfung dieser Art von Diskriminierung eine Rolle spielen könnten und dies auch tun.

Dazu gehören – in Anlehnung an die Bestimmungen der EU-Richtlinien – Bestimmungen über: mittelbare Diskriminierung; positive Maßnahmen; Befugnisse von Gleichstellungsstellen zur Durchführung von Erhebungen, Erstellung von Berichten und Abgabe von Empfehlungen in Sachen Diskriminierung sowie zur Durchführung von Überprüfungen oder Untersuchungen mit den erforderlichen Ermittlungsbefugnissen; verschiedene Formen von Popularklagen, einschließlich Rechtssachen, die von Gleichstellungsstellen aus eigener Initiative, ohne eine namentlich genannte beschwerdeführende Person, übernommen werden; Befugnis der Gleichstellungsstellen, beschwerdegegnerischen Parteien, die einer Diskriminierung für schuldig befunden werden, Maßnahmen aufzuerlegen, sofern sie Entscheidungsfunktionen haben.

In einigen Fällen ist die Definition von unmittelbarer Diskriminierung in den Gleichbehandlungsvorschriften derart weit gefasst, dass sie dahingehend ausgelegt werden kann, dass sie strukturelle Diskriminierung mit einschließt, auch ohne diese zu erwähnen. Weiteres Potenzial, um weniger direkt gegen strukturelle Diskriminierung vorzugehen, besteht darin, eine kritische Masse von Einzelfällen zu einem Thema voranzutreiben. Den Gleichstellungsstellen kommt bei der Verwirklichung eines solchen Ansatzes eine wichtige Rolle zu; ein Mangel an Ressourcen kann sie dabei jedoch behindern.

Gesetzliche Gleichstellungspflichten haben das Potenzial, strukturelle Diskriminierung zu bekämpfen, insbesondere – so wie sie derzeit konzipiert sind – deren institutionelles Element. Solche Pflichten können die Einführung gleichstellungsorientierter Systeme in Organisationen des öffentlichen und des privaten Sektors erfordern, mit dem Ziel, interne Systeme, in denen strukturelle Diskriminierung möglicherweise zum Ausdruck kommt, abzubauen oder zu entschärfen.

11 [International Convention on the Elimination of all forms of Racial Discrimination](#), Resolution 2106 der Generalversammlung, Vereinte Nationen, 1965.

12 Hoher Kommissar der Vereinten Nationen für Menschenrechte (2021), [Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers](#), Bericht des Hohen Kommissars der Vereinten Nationen für Menschenrechte, Siebenundvierzigste Sitzung des Menschenrechtsrats, 21. Juni bis 9. Juli 2021.

Gesetzliche Gleichstellungspflichten können Folgendes umfassen: Präventionspflichten für Organisationen, die darin bestehen, Maßnahmen zu ergreifen, um Diskriminierung, Belästigung oder sexuelle Belästigung am Arbeitsplatz oder bei der Versorgung mit Gütern und Dienstleistungen zu verhindern; institutionelle Pflichten für Organisationen, die darin bestehen, bestimmte Maßnahmen zu ergreifen, um die Gleichstellung von Beschäftigten oder Dienstleistungsnehmern zu fördern; Pflicht staatlicher Stellen, durchgängig dafür zu sorgen, dass in der Ausübung ihrer Funktionen Gleichstellung gefördert und Diskriminierung beseitigt wird (Mainstreaming-Pflicht).¹³

Die Vorschriften zur Regelung gesetzlicher Gleichstellungspflichten in den Mitgliedstaaten sind begrenzt und uneinheitlich. In sechzehn Mitgliedstaaten existieren keine derartigen Pflichten.¹⁴ In weiteren fünf Mitgliedstaaten existiert lediglich eine Präventionspflicht,¹⁵ der nicht das gleiche Potenzial zur Bekämpfung struktureller Diskriminierung zugeschrieben wird wie den institutionellen und den Mainstreaming-Pflichten. Nur vier Mitgliedstaaten verfügen über eine Mainstreaming-Pflicht,¹⁶ wobei eine davon eher permissiven Charakter hat. In einem weiteren Mitgliedstaat existiert eine solche Pflicht nur auf regionaler Ebene.¹⁷ Zwei Mitgliedstaaten verfügen über eine institutionelle Pflicht,¹⁸ die in gewissem Maße in der Lage ist, gegen strukturelle Diskriminierung vorzugehen.

Es wurden Probleme festgestellt, diese Pflichten so umzusetzen, dass sie Auswirkungen auf strukturelle Diskriminierung haben. In sieben Fällen mangelt es an Durchsetzungsmechanismen zur Sicherstellung der Umsetzung. Ebenfalls in sieben Fällen gibt es Probleme mit der Umsetzungsqualität, die auf mangelndes Bewusstsein für die Gleichstellungspflicht, mangelndes Verständnis der Problematik, einschließlich des Problems der strukturellen Diskriminierung, und mangelndes Follow-up zur Sicherstellung der Umsetzungsqualität zurückzuführen sind. In fünf Fällen wird die Umsetzung dadurch behindert, dass genauere Angaben zu den im Rahmen der Pflicht erforderlichen Schritten fehlen.

Nationale Ebene: Politik

Strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft taucht erst allmählich auf der politischen Agenda der Mitgliedstaaten auf. Bei der Erhebung durch die Nichtdiskriminierungsexpertinnen und experten des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Geschlechtergleichstellung und Nichtdiskriminierung wurden in den Mitgliedstaaten sechs laufende nationale Aktionspläne gegen Rassismus ermittelt.¹⁹ Dabei ist zu beachten, dass die Einreichungsfrist bis Ende 2022 läuft.

In fünf dieser Aktionspläne wird strukturelle Diskriminierung ausdrücklich erwähnt.²⁰ Ein anderer Mitgliedstaat weist in einem Zwischenbericht darauf hin, dass der zukünftige nationale Aktionsplan gegen Rassismus einen Schwerpunkt auf strukturellen Rassismus legen wird.²¹ In einem weiteren Mitgliedstaat gibt es zwar keinen nationalen Aktionsplan gegen Rassismus, dafür aber einen regionalen Aktionsplan, der auf strukturelle Diskriminierung Bezug nimmt.²² Diese Situation dürfte sich in dem Maße verbessern, in dem weitere Mitgliedstaaten der Aufforderung der Europäischen Kommission folgen.

Was das Verständnis von struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft betrifft, so ist weder in den verschiedenen Plänen noch in dem Aktionsrahmen,

13 Crowley N. (2016), *Making European More Equal: A Legal Duty?*, Equinet, Brüssel.

14 Belgien, Dänemark, Deutschland, Frankreich, Griechenland, Italien, Kroatien, Lettland, Luxemburg, Malta, Niederlande, Österreich, Polen, Portugal, Rumänien und Zypern.

15 Estland, Slowakei, Slowenien, Spanien und Tschechien.

16 Finnland, Irland, Litauen und Ungarn.

17 Belgien.

18 Bulgarien und Schweden.

19 Deutschland Finnland, Griechenland, Malta, Portugal und Schweden.

20 Deutschland, Finnland, Malta, Portugal und Schweden.

21 Irland.

22 Belgien.

den diese Pläne zur Bewältigung des Problems vorsehen, Kohärenz zu erkennen. Die unterschiedlichen Definitionen, die in den Plänen verwendet werden, konzentrieren sich in der Regel auf das institutionelle Element. Nur in einem Plan wird dem gesellschaftlichen und dem historischen Element ein gewisser Stellenwert eingeräumt. Der Aktionsrahmen in dieser Frage ist begrenzt, und es gibt keine klare Strategie, die diesen untermauert.

In den Aktionsplänen, die auf strukturelle Diskriminierung Bezug nehmen, wird eine Vielzahl von Maßnahmen zu deren Bekämpfung vorgeschlagen. Dazu gehören: Gleichstellungsplanung; gleichstellungsbezogene Schulungen; von Gleichstellungsstellen durchgeführte Gleichstellungsprüfungen; Investigativprojekte zur Geschichte der Sklaverei, zum Kolonialismus und zur historischen Präsenz diskriminierter Gruppen; Einstellungsstrategien zur Steigerung der Diversität; Auseinandersetzung mit Systemen der künstlichen Intelligenz; Entwicklung von Bildungsressourcen; Unterstützung der politischen Beteiligung und der Bildung von Vereinigungen.

Systemen der künstlichen Intelligenz – ein Thema, das im Zusammenhang mit struktureller Diskriminierung zunehmend Sorge bereitet – wird nur begrenzte Aufmerksamkeit gewidmet. Dies spiegelt sich in den Ergebnissen eines Berichts von Allen und Masters wider, wonach in Europa derzeit nur Ansätze einer Debatte über die Auswirkungen von KI-Systemen auf Gleichstellung existieren.²³ Der Bericht unterstreicht die Notwendigkeit, auf nationaler Ebene Maßnahmen in diesem Bereich zu ergreifen.

In den anderen relevanten Politikstrategien, über die berichtet wird, wurde strukturelle Diskriminierung lediglich in einer Reihe von nationalen Roma-Strategierahmen erwähnt, die eine Reaktion auf den Roma-Strategierahmen der EU sind. Dies war nur in sechs der neunzehn Mitgliedstaaten, in denen solche Politikstrategien verzeichnet wurden, der Fall.²⁴ Nur in zwei dieser sechs Fälle geht der Hinweis auf die strukturelle Diskriminierung der Roma mit Maßnahmen zu deren Bekämpfung einher.²⁵ Abgesehen von diesen sechs Fällen wird in zwei weiteren Fällen strukturelle Diskriminierung zwar nicht erwähnt, es werden aber Maßnahmen genannt, die zur Bewältigung des Problems beitragen würden.²⁶ Dies spiegelt eine sehr begrenzte Auseinandersetzung mit dem Thema strukturelle Diskriminierung wider.

Positive Maßnahmen sind erforderlich, um gegen ungleiche Ergebnisse, die Kennzeichen struktureller Diskriminierung sind, vorzugehen und diese umzukehren, um die Verwirklichung vollumfänglicher Gleichstellung in der Praxis voranzutreiben. Positive Maßnahmen sind kein Gegenmittel gegen strukturelle Diskriminierung, da sie eher die Auswirkungen als die Ursachen bekämpfen, aber sie sind notwendiger Bestandteil jeglicher Strategie, deren Ziel es ist, strukturelle Diskriminierung zu beseitigen. In einigen der ermittelten Strategien wurden positive Maßnahmen gefunden, die, wie in manchen nationalen Roma-Strategierahmen festgelegt, vor allem auf Roma abzielen.

Diese Maßnahmen konzentrieren sich in der Regel auf die Bereiche Beschäftigung, Ausbildung und Bildung, wobei der Schwerpunkt auf dem Arbeitsmarkt und der Beschäftigungsfähigkeit liegt. In manchen Fällen existieren positive Maßnahmen in den Bereichen Gesundheitsfürsorge, soziale Eingliederung und Wohnen sowie für politische Teilhabe. Ein systematischer Ansatz, dessen Ziel es wäre, alle Dimensionen – Position, Erfahrung, Mitsprache und Identität – abzudecken, ist nicht erkennbar; der Schwerpunkt liegt eher auf der Beseitigung von Benachteiligungen als auf der Verwirklichung von Gleichstellung.

In einigen dieser Politikstrategien, insbesondere in den nationalen Roma-Strategierahmen, wird auf Intersektionalität verwiesen. Ein intersektionaler Fokus, der Diversität innerhalb der von struktureller Diskriminierung betroffenen Gruppen thematisiert, ist für ein wirksames, umfassendes Vorgehen

23 Allen, R., u. Masters, D. (2020), *Regulation for an Equal AI: A New Role for Equality Bodies, Meeting the new challenges to equality and non-discrimination posed from increasing digitisation and the use of Artificial Intelligence*, Equinet, S. 30.

24 Deutschland, Kroatien, Slowakei, Spanien, Tschechien und Ungarn.

25 Deutschland und Kroatien.

26 Portugal und Schweden.

erforderlich. Insgesamt ist der Fokus auf Intersektionalität unterentwickelt: Das Thema steht auf der politischen Agenda weit unten, und die Art und Weise, wie es angegangen wird, ist beschränkt.

In Zusammenhang mit den erwähnten Politikstrategien wurden u.a. folgende Umsetzungsprobleme festgestellt:

- Diskriminierung wird weitgehend als ein Problem auf individueller Ebene betrachtet – Abhilfemaßnahmen sind daher in erster Linie von der Notwendigkeit geleitet, Stereotype und/oder unbewusste Vorurteile des oder der Einzelnen zu überwinden und gegen individuelle Handlungen vorzugehen, die ausgrenzen oder benachteiligen;
- häufig existieren Hindernisse wie fehlende Haushaltsmittel, fehlender politischer Wille, unzureichende Verwaltungskapazitäten oder Mangel an aufgeschlüsselten Daten;
- in manchen Plänen wird eine Sprache oder Terminologie, z.B. der Begriff „strukturelle Barrieren“, verwendet, die jedoch weder durch ein angemessenes Verständnis des entsprechenden Begriffs untermauert ist, noch mit einer bewussten Aufmerksamkeit oder einem bewussten Willen einhergeht, sich mit dem Thema zu beschäftigen;
- in einem Fall hatte der Fokus auf offene Formen struktureller Diskriminierung Vorrang vor Investitionen in die Bekämpfung versteckterer Formen, die vielleicht kontroverser sind;
- der föderale Charakter einiger Mitgliedstaaten.

Diese Umsetzungsprobleme lenken die Aufmerksamkeit auf das von Matland entwickelte Modell zur Untersuchung von Politikumsetzung.²⁷ In seiner Analyse von Politiken, die sich auf „bedeutende Symbole“ (*highly salient symbols*) wie z. B. strukturellen Rassismus berufen, konstatiert er die Gefahr eines Scheiterns der Politikumsetzung. Derartige Politiken haben mit mangelnder Klarheit (politische Ambiguität) und mangelnder Einigkeit über die Gestaltung der Politik und die zu ihrer Umsetzung erforderlichen Mittel (Politikkonflikt) zu kämpfen. Ein solcher Kontext trifft in Bezug auf strukturellen Rassismus zu: Fehlen einer klaren Definition, um Maßnahmen zu entwickeln, und mangelnde Einigkeit darüber, wie Fortschritte am besten erzielt werden können und was zur Lösung des Problems erforderlich ist.

Nationale Ebene: Institutionelle Infrastruktur

Es gibt keinen klaren Standard für die nationale institutionelle Infrastruktur, die auf diesem Gebiet der Rassismusbekämpfung, einschließlich der Bekämpfung struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft, erforderlich ist. Wie die Nichtdiskriminierungsexpertinnen und experten des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Geschlechtergleichstellung und Nichtdiskriminierung berichten, spiegelt sich dies in der Verschiedenartigkeit und dem begrenzten Umfang dieser Infrastruktur wider. Die Infrastruktur muss von staatlichen Einrichtungen ausgehen, die eine führende Rolle in Bezug auf und Verantwortung für diesen Politikschwerpunkt übernehmen. In ihrer Konzeption muss sie die Koordination der einschlägigen Politikbereiche einbeziehen und sektorenübergreifend sein, indem sie mit anderen Sektoren, insbesondere der Zivilgesellschaft, zusammenarbeitet. Zu den Hauptakteuren eines sektorenübergreifenden Ansatzes gehören Gleichstellungsstellen und Plattformen der Zivilgesellschaft. Der Privatsektor kann sinnvollerweise einbezogen werden, insbesondere durch Strukturen der Sozialpartnerschaft.

Der Teil der nationalen institutionellen Infrastruktur zur Bekämpfung von Rassismus, einschließlich struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft, der der Regierung untersteht, ist, was seine Verbreitung in den Mitgliedstaaten und seine Struktur innerhalb der Mitgliedstaaten betrifft, zwar unterentwickelt, ein paar Beispiele gibt es jedoch. Angesichts der mangelnden Ausrichtung der politischen Strategien auf das Thema strukturelle Diskriminierung aus rassistischen

27 Matland, R. E. (1995), „Synthesizing the Implementation Literature: The Ambiguity-Conflict Model of Policy Implementation“, *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174.

Gründen oder wegen der ethnischen Herkunft müssen selbst diese Stellen aber entsprechend mobilisiert werden, um das Problem anzugehen.

Einfluss ist ein wichtiger Maßstab für die Leistungsfähigkeit der institutionellen Infrastruktur der Regierung, für die Fähigkeit der Verantwortungsträger, gegenüber anderen Teilen der Regierung eine Führungsrolle zu übernehmen. Der Einfluss hängt wesentlich davon ab, ob es ein Ministerium gibt, das für Gleichstellung zuständig ist, oder ob das Thema Teil eines Ministeriums mit anderen, umfassenderen Aufgaben ist. In letzterem Fall hängt der Einfluss auch von den Entscheidungen bezüglich Umfang, Standort und fachlicher Qualifikation der Leitung der Abteilung ab, der innerhalb des Ministeriums die Zuständigkeit für dieses Thema übertragen wird.

Was die institutionelle Verortung betrifft, so haben diese Strukturen im besten Fall die Form eines eigenen Ministeriums mit politischer Verantwortung für dieses Thema, was in acht Mitgliedstaaten der Fall ist.²⁸ Ein anderes Modell, bei dem Gleichstellung und/oder Nichtdiskriminierung Teil eines ministeriellen Mandats ist, findet sich in elf Mitgliedstaaten.²⁹ In zwei Mitgliedstaaten gibt es spezielle Fachstellen oder Strukturen, die der Regierung angeschlossen sind und bei der Politikgestaltung in diesem Bereich eine Rolle spielen.³⁰

Die auf Regierungsebene ermittelte institutionelle Infrastruktur trägt in Bezug auf Gleichstellung und/oder Nichtdiskriminierung umfassende und vielschichtige Verantwortung. Um herauszufinden, ob diese in einer Weise ausgeübt wird, die eine angemessene Sichtbarkeit und Aufmerksamkeit für den Diskriminierungsgrund Rassismus bzw. ethnische Herkunft gewährleistet, wären weitere Untersuchungen erforderlich.

Koordinierung zwischen den verschiedenen Teilen der Regierung ist ein wichtiges Element und eine notwendige Funktion dieser staatlichen Infrastruktur. Koordinierung trägt der Notwendigkeit eines kohärenten Ansatzes bei der Bekämpfung von Rassismus, der Beseitigung struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft und der Förderung von Gleichstellung ohne Benachteiligungen aus rassistischen Gründen oder wegen der ethnischen Herkunft in sämtlichen Politikbereichen Rechnung. Es gibt positive Beispiele für eine institutionelle Infrastruktur der Regierung zur Koordinierung von Ministerien und Behörden, diese sind jedoch nur in acht Mitgliedstaaten zu finden.³¹

Sektorenübergreifende Zusammenarbeit kann einen Beitrag zur Bekämpfung von Rassismus leisten, indem sie verschiedene Sektoren hinter gemeinsamen Zielen und Agenden zusammenbringt. Sektorenübergreifende Zusammenarbeit speziell mit zivilgesellschaftlichen Organisationen ist in der Lage, die Perspektive derjenigen, die von Rassismus betroffen sind, einzubringen und eine Auseinandersetzung politischer Entscheidungsträger mit struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft zu ermöglichen. Eine institutionelle Infrastruktur für eine solche Zusammenarbeit ist nur in 13 Mitgliedstaaten vorhanden.³² In vier Mitgliedstaaten ist diese Infrastruktur breit angelegt und umfasst auch Organisationen des Arbeitsmarktes.³³ In drei Fällen ist sie eng gefasst und auf eine bestimmte von Rassismus betroffene Gruppe beschränkt.³⁴

Gleichstellungsstellen sind in einer guten Position, um Maßnahmen zum Abbau von struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft, insbesondere deren institutionellen Elementen, voranzutreiben. Es gibt Beispiele für substanzielle Interventionen in diesem Bereich: Übernahme und Unterstützung von Rechtsstreiten sowie Erlass von Fallentscheidungen;

28 Belgien, Deutschland, Frankreich, Irland, Italien, Malta, Portugal und Spanien.

29 Dänemark, Estland, Finnland, Griechenland, Lettland, Litauen, Niederlande, Schweden, Slowakei, Spanien und Ungarn.

30 Kroatien und Polen.

31 Deutschland, Frankreich, Italien, Litauen, Malta, Niederlande, Portugal und Ungarn.

32 Bulgarien, Deutschland, Finnland, Frankreich, Griechenland, Lettland, Litauen, Malta, Niederlande, Slowakei, Spanien, Tschechien und Ungarn.

33 Finnland, Frankreich, Lettland und Malta.

34 Spanien, Tschechien und Ungarn.

Durchführung von Forschungsarbeiten und Veröffentlichung von Berichten; politische Beratung und Abgabe von politischen Empfehlungen an die Regierung; Erstellen von Berichten für internationale Menschenrechtsüberwachungsgremien. Es ist jedoch festzustellen, dass die Bemühungen in einigen Fällen vielleicht nicht ausreichen, um eine signifikante Wirkung zu entfalten, was in erster Linie auf die begrenzten Ressourcen zurückzuführen ist, die den Gleichstellungsstellen zur Verfügung stehen.

Das Engagement der Gleichstellungsstellen im Bereich strukturelle Diskriminierung ist uneinheitlich. Während viele Gleichstellungsstellen in der Lage sind, Maßnahmen in diesem Bereich zu ergreifen, engagieren sich 13 Gleichstellungsstellen diesbezüglich kaum oder gar nicht.³⁵ Ein Haupthindernis dafür, Maßnahmen umzusetzen – und zwar im erforderlichen Umfang –, ist der Mangel an ausreichenden Ressourcen; Gründe sind aber auch das Fehlen angemessener Zuständigkeiten und Befugnisse sowie Einschränkungen auf der Führungsebene. Gleichstellungsstellen stehen vor besonderen Herausforderungen, wenn es darum geht, sich auf Fragen der Gleichstellung und Nichtdiskriminierung im Zusammenhang mit Systemen der künstlichen Intelligenz einzustellen und sich mit diesen zu befassen.

Zivilgesellschaftliche Plattformen spielen eine wichtige Rolle, wenn es darum geht, Vertretungsorganisationen zu stärken und die Fragmentierung in diesem Bereich zu überwinden. Derartige Plattformen beziehen in diesem Fall Organisationen mit ein, die diejenigen vertreten, die von Rassismus betroffen sind, indem sie gemeinschaftliche Räume für Aussprachen und Aktionen zu gemeinsamen Themen schaffen. Dies ist wichtig, um die Sichtweise derjenigen, die von Rassismus betroffen sind, einzubringen und zu ermöglichen, dass der Vortrag dieser Sichtweise eine gewisse Wirkung entfaltet.

Es gibt nur wenig Belege dafür, dass sich solche zivilgesellschaftlichen Plattformen mit Fragen des Rassismus befassen; nur acht Beispiele sind bekannt.³⁶ Einige dieser Plattformen befassen sich mit dem Thema strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft. Sie zeichnen sich jedoch eher dadurch aus, dass sie die Diskussion über Rassismus im weiteren Sinne aktiv fördern. Das Fehlen einer konstruktiven Zusammenarbeit der nationalen Behörden mit solchen zivilgesellschaftlichen Plattformen wird als ein Problem angesehen, das diese in ihrem Potenzial und ihrer Wirkung beeinträchtigt. Der begrenzte Zugang zu angemessenen Ressourcen für den Aufbau und den Betrieb leistungsfähiger Plattformen ist ein Hindernis für deren Entstehen und Funktionieren.

Angesichts der Arbeit von Matland³⁷ und der von ihm konstatierten Notwendigkeit für Politiken, die sich auf „bedeutende Symbole“ berufen, wie z.B. diesen Bereich des strukturellen Rassismus, auf der Ebene der Politikumsetzung Koalitionen aufzubauen und koalitionäre Stärke zu ermöglichen, wenn politische Ergebnisse erzielt werden sollen, sind diese Aspekte der nationalen institutionellen Infrastruktur von Bedeutung.

Nationale Ebene: Rechtsprechung

Die Nichtdiskriminierungsexpertinnen und -experten des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Geschlechtergleichstellung und Nichtdiskriminierung haben keine Rechtsprechung gefunden, die sich ausdrücklich mit dem Thema strukturelle Diskriminierung aus rassistischen Gründen oder wegen der Herkunft befasst, abgesehen von zwei begrenzten Ausnahmen in Frankreich und den Niederlanden. Diese Situation ist unmittelbare Folge des Fehlens spezifischer gesetzlicher Bestimmungen, die dieses Phänomen definieren und verbieten. Ein weiteres Problem liegt möglicherweise darin, dass es der Justiz mitunter schwerfällt anzuerkennen, dass Diskriminierung sich nicht nur auf der Ebene individueller Handlungen äußern kann.

35 In: Bulgarien, Estland, Griechenland, Italien, Lettland, Luxemburg, Malta, Österreich, Portugal, Rumänien, Tschechien, Ungarn und Zypern.

36 In: Belgien, Estland, Griechenland, Irland, Niederlande, Rumänien, Slowenien und Ungarn.

37 Matland, R. E. (1995), „*Synthesizing the Implementation Literature: The Ambiguity-Conflict Model of Policy Implementation*“, *Journal of Public Administration Research and Theory*. J-PART, 5(1995):2:145-174.

Es existiert Rechtsprechung, die für strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft relevant ist, den Begriff jedoch nicht ausdrücklich erwähnt. Derartige Rechtsprechung wird lediglich aus elf Mitgliedstaaten berichtet.³⁸ Sie ist von begrenztem Umfang und kann nicht als ein Rechtsprechungskorpus gelten, der geeignet wäre, eine wirksame Antwort auf strukturelle Diskriminierung zu entwickeln.

Am häufigsten findet sich diese Art von Rechtsprechung im Zusammenhang mit den sichtbareren Formen struktureller Diskriminierung, insbesondere im Zusammenhang mit der Segregation von Roma und Travellern und der Erstellung von ethnischen Profilen seitens der Polizei. Generell konzentriert sich diese Rechtsprechung auf das institutionelle Element der strukturellen Diskriminierung, das mit den derzeitigen Bestimmungen der Gleichbehandlungsgesetze zu mittelbarer, und in manchen Fällen auch unmittelbarer, Diskriminierung leichter zu erfassen ist. Das gesellschaftliche Element kommt in geringerem Maße zum Tragen, vor allem im Fokus auf Stereotype in einigen dieser Fälle.

Wohnraumprobleme von Roma und Travellern spielen in dieser Rechtsprechung eine wichtige Rolle. Ein weiterer wichtiger Schwerpunkt ist der Arbeitsplatz. In einigen Fällen berührt diese Rechtsprechung die weniger sichtbaren Formen struktureller Diskriminierung und richtet manchmal einen Fokus auf Stereotype.

Auch wenn diese Rechtsprechung für strukturelle Diskriminierung relevant ist, steht sie doch in einem Gesamtkontext, in dem Sanktionen und Abhilfemaßnahmen nicht für den Umgang mit diesem Phänomen ausgelegt sind. Es wurden nur wenige Beschwerdeverfahren mit Abhilfemaßnahmen oder Sanktionen gefunden, die in der Lage sind, das Problem der strukturellen Diskriminierung wirksam anzugehen. Wo eine solche Kapazität zu wirksamem Vorgehen gefunden wurde, liegt diese in der Regel in der Befugnis der nationalen Gleichstellungsstelle, bei Feststellung einer Diskriminierung Abhilfemaßnahmen anzuordnen. Nur in einem Fall – Ungarn – ist eine positive Entwicklung in der Rechtsprechung festzustellen, und zwar in der Verhängung von Sanktionen, die in Fällen von systemischer Diskriminierung eine systemische Wirkung entfalten können.

Vorschläge

Es wäre zweckmäßig, dass die Europäische Kommission

- ▶ in der Hochrangigen Gruppe zur Bekämpfung von Rassismus, Fremdenfeindlichkeit und anderen Formen von Intoleranz und in der Hochrangigen Gruppe für Nichtdiskriminierung, Gleichstellung und Vielfalt Beratungen über strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft und die erforderlichen Maßnahmen zu ihrer Bekämpfung anregt und einen Austausch bewährter Praktiken über dieses Thema unterstützt, mit Blick auf die Schaffung eines gemeinsamen Verständnisses, das Erzeugen politischer Lernprozesse und das Erzielen einer Einigung über:
 - eine Definition der verschiedenen Elemente des Konzepts der strukturellen Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft und
 - einen Rahmen für die verschiedenen Arten von Maßnahmen, die erforderlich sind, um strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft wirksam zu bekämpfen;
- ▶ Gesetzesänderungen auf nationaler Ebene unterstützt und ermöglicht und/oder Gesetzesänderungen auf europäischer Ebene vorantreibt mit dem Ziel, strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft im Rahmen der Gleichbehandlungsgesetzgebung ausdrücklich zu

38 Belgien, Finnland, Frankreich, Griechenland, Irland, Kroatien, Niederlande, Portugal, Schweden, Slowakei und Ungarn.

benennen, zu definieren und zu verbieten sowie geeignete Abhilfemaßnahmen und Sanktionen für Fälle zu verankern, in denen solche Diskriminierungen festgestellt werden;

► Gesetzesänderungen auf nationaler Ebene unterstützt und ermöglicht und/oder Gesetzesänderungen auf europäischer Ebene vorantreibt mit dem Ziel, gesetzliche Gleichstellungspflichten – sowohl institutionelle als auch Mainstreaming-Pflichten – für den Diskriminierungsgrund Rassismus oder ethnische Herkunft zu verankern, die in der Lage sind, den institutionellen Wandel zu fördern, der nötig ist, um die Elemente struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft zu beseitigen und die erforderlichen Maßnahmen zur Behebung der langfristigen Folgen dieser Art von Diskriminierung voranzutreiben;

► sicherstellt, dass bei der Überwachung und Zielverfolgung der nationalen Aktionspläne gegen Rassismus auf europäischer Ebene ein Schwerpunkt auf die Angemessenheit und Zweckmäßigkeit der Maßnahmen gelegt wird, die zur Bekämpfung struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft ergriffen werden – einschließlich der Berücksichtigung positiver Maßnahmen und eines intersektionellen Ansatzes –, um diese Maßnahmen im Laufe der Zeit zu stärken und aus den Erfahrungen mit der Konzeption und Umsetzung der nationalen Aktionspläne politische Lehren zu ziehen;

► die Entwicklung der nationalen institutionellen Infrastruktur zum Thema Rassismus, einschließlich struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft, in den Mitgliedstaaten fördert und unterstützt, unter anderem durch:

- Entwicklung von Modellen und in der Folge Treffen von Vereinbarungen über Standards und Indikatoren für eine solche nationale institutionelle Infrastruktur;
- Unterstützung des Aufbaus von Bündnissen auf der Ebene der Mitgliedstaaten, um die Umsetzung politischer Maßnahmen in Bezug auf strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft auf dieser Ebene zu ermöglichen und voranzutreiben;
- Schaffung von Anreizen in Form von Ressourcen und Unterstützung für die Weiterentwicklung dieser nationalen institutionellen Infrastruktur durch die entsprechenden verfügbaren Finanzierungsmechanismen;
- Schaffung von Anreizen in Form von Ressourcen und Unterstützung durch die entsprechenden verfügbaren Finanzierungsmechanismen für zivilgesellschaftliche Plattformen auf der Ebene der Mitgliedstaaten, die sich mit dem Thema Rassismus befassen und dazu beitragen, strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft sichtbar zu machen und zu bekämpfen;

► die Position und den Beitrag der Gleichstellungsstellen innerhalb der nationalen institutionellen Infrastruktur zum Thema Rassismus, einschließlich struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft, in den Mitgliedstaaten sicherstellt, indem sie das derzeitige Engagement für und die Arbeit an Standards für Gleichstellungsstellen vorantreibt und dabei einen besonderen Schwerpunkt auf folgende Aspekte legt: angemessene Mittelausstattung der Gleichstellungsstellen; Angemessenheit ihres Mandats, ihrer Zuständigkeiten und Befugnisse, um gegen strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft vorzugehen; Gewährleistung der Rolle der Gleichstellungsstellen bei der Förderung und Durchsetzung gesetzlicher Gleichstellungspflichten; Sicherstellung ihrer Ausstattung mit angemessenen und ausreichenden Mitteln und Befugnissen, um neue Herausforderungen durch Systeme künstlicher Intelligenz zu bewältigen.

Auf nationaler Ebene wäre es zweckmäßig, dass die Mitgliedstaaten

► im Rahmen der Gleichbehandlungsgesetzgebung Bestimmungen einführen, die strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft ausdrücklich benennen,

definieren und verbieten, sowie geeignete Abhilfemaßnahmen und Sanktionen für Fälle vorsehen, in denen solche Diskriminierungen festgestellt werden;

► im Rahmen der richterlichen Aus- und Fortbildungsmechanismen eine Fokussierung auf das Thema strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft, die entsprechenden Bestimmungen der Gleichbehandlungsgesetze und die Rechtsprechung in diesem Bereich unterstützen und ermöglichen;

► im Rahmen der Gleichbehandlungsgesetzgebung gesetzliche Gleichstellungspflichten, sowohl institutionelle als auch Mainstreaming-Pflichten, mit hinreichend detaillierter Beschreibung der vom Pflichtenträger zu ergreifenden Maßnahmen festschreiben sowie Sanktionen für den Fall vorsehen, dass diese Maßnahmen nicht angemessen umgesetzt werden, und darüber hinaus gewährleisten, dass die Umsetzung der Maßnahmen sachgerecht und angemessen unterstützt und durchgesetzt wird;

► ein Verständnis von struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft und deren verschiedenen Elementen sowie angemessene und sachgerechte Schritte zur Beseitigung dieser Art von Diskriminierung in ihrem jeweiligen nationalen Aktionsplan gegen Rassismus darlegen und in diese Schritte investieren sowie Fördermaßnahmen ergreifen, um gegen bestehende Benachteiligungen von Schwarzen und ethnischen Minderheiten, einschließlich Roma und Travellern, im gesamten Spektrum benachteiligender Ungleichheiten (Position, Erfahrungen, Mitsprache und Identität) vorzugehen, und zwar auf intersektionelle Weise;

► die institutionelle Infrastruktur der Regierung, die mit Rassismus einschließlich struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft befasst ist, überprüfen und stärken, um sicherzustellen, dass diese in der Lage ist, innerhalb der Regierung eine Führungsrolle in dieser Frage zu übernehmen, die Koordinierung der verschiedenen Teile der Regierung in dieser Frage zu gewährleisten und eine sektorenübergreifende Zusammenarbeit in dieser Frage zu entwickeln;

► die Herausforderungen, die sich durch Systeme der künstlichen Intelligenz in Bezug auf strukturelle Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft ergeben, ermitteln und auf diese reagieren, auch indem sie bestimmen, wie Systeme der künstlichen Intelligenz unter dem Gesichtspunkt der Gleichstellung und Nichtdiskriminierung am besten reguliert werden können, und die zu diesem Zweck für notwendig erachteten legislativen und administrativen Reformen entwickeln;

► Gleichstellungsstellen durch Ausstattung mit den erforderlichen Mandaten, Zuständigkeiten, Befugnissen und Ressourcen in die Lage versetzen und ermächtigen, ihr Potenzial zur Bekämpfung struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft voll auszuschöpfen, auch indem sie eine kritische Masse von Fällen zu diesem Thema im Prozesswege verfolgen und/oder durchsetzen, die Implementierung gesetzlicher Gleichstellungspflichten durch Festlegung entsprechender Standards unterstützen, anleiten und durchsetzen sowie den Herausforderungen begegnen, die sich in diesem Bereich durch Systeme der künstlichen Intelligenz ergeben;

► auf der Grundlage gemeinsamer Ziele und Agenden zur Bekämpfung struktureller Diskriminierung aus rassistischen Gründen oder wegen der ethnischen Herkunft eine Zusammenarbeit mit der Zivilgesellschaft aufbauen und Mittel investieren, um die Zivilgesellschaft in die Lage zu versetzen, Plattformen zu diesem Thema aufzubauen.

1 Introduction

1.1 Understanding structural discrimination

Structural racism, specifically, is best understood as composing three different elements:

- Historical: the untold or inadequately analysed history of slavery, colonialism and exploitation, with its ongoing consequences unrecognised and unaddressed; the justificatory and inaccurate ideology that the single human race could be understood as being made up of separate races defined in biological terms that are then given false significance; and the manner in which this history, uncorrected or hidden, has shaped an oppressive common sense in relation to Black and minority ethnic groups, including Roma and Travellers.
 - By way of example, this historical element emerges in: the curricula of educational establishments that fail to address the history of slavery and colonialism appropriately or adequately; and the demand for reparations for the historic crimes of colonialism and their present day consequences for people of African descent.
- Societal: the culture, values, norms and discourse dominant at societal level that are imbued with notions of superiority and inferiority and characterised by hostility to the detriment of Black and minority ethnic groups, including Roma and Travellers.
 - By way of example, this societal element emerges in: the prevalence of stereotypes and false assumptions about Black and minority ethnic people in public and political discourse; and the widespread nature of hate speech and hate crime.
- Institutional: the policies, procedures, practices and perceptions within organisations or key systems that serve, often inadvertently, to exclude, hamper or disadvantage Black and minority ethnic groups, including Roma and Travellers.
 - By way of example, this institutional element emerges in: the ethnic profiling of Black and minority ethnic people by the police, security services and anti-fraud measures; the failure to take account of the practical implications of cultural difference in psychometric testing regimes for employment; and racial bias in artificial intelligence systems.

Discrimination occurs at different levels, in particular at the individual level and at the structural level. Discrimination on the ground of racial or ethnic origin which is structural manifests in relation to these three elements (historical, societal and institutional), generating unequal outcomes of social, economic, cultural and political disadvantage for Black and minority ethnic groups, including Roma and Travellers.¹

These outcomes of disadvantage for Black and minority ethnic groups, including Roma and Travellers, become apparent in inequality for these groups in:

- Situation: access to and distribution of key resources including income and employment, and social goods such as education, health and housing.
- Experience: access to relationships of solidarity, care and respect when participating in society and community, and when engaging with institutions, employers and service providers.

¹ When laid out in this manner, it is clear that while structural discrimination on the ground of racial or ethnic origin per se is not directly and specifically addressed in European or Member State anti-discrimination legislation, there are core components of some of the three elements of structural discrimination that can be addressed through current definitions of discrimination in such legislation. This has enabled the casework set out in Section 6, for example.

- Voice: access to influence, having a say in decisions that impact on one, and participating in the governance of society and its institutions.
- Identity: access to recognition for culture and identity and to the flexibility and resources required to address the practical implications of cultural difference and how different groups choose to live out their identity.

It is important to address both the structural and the individual levels of discrimination on the ground of racial or ethnic origin, if the long-term effect of the inter-generational nature of these issues is to be cut short.

There is clarity in relation to the individual level, involving action by an individual and impact on another individual. This has the more immediate visibility, the more direct impact, and the greater likelihood of intentionality. The individual level has been the dominant focus for legal and policy responses to discrimination on the ground of racial or ethnic origin.

However, it is at the structural level of discrimination on the ground of racial or ethnic origin where the sustained inter-generational momentum for inequality can be found. Discrimination at the structural level is less visible, only becoming apparent in unequal outcomes of disadvantage for Black and minority ethnic groups, including Roma and Travellers. Intent is less likely to be at issue, which can often mean that there is a defensive reaction when a concern about addressing structural discrimination on the ground of racial or ethnic origin is raised.

Structural discrimination is not yet widely understood, recognised or taken seriously as an issue, including on the ground of racial or ethnic origin. It is often denied or rendered invisible. The discourse on structural discrimination lacks clarity, deploying a range of different but interlinked terms. There is a particular challenge in establishing and understanding the intersectional dimensions of structural discrimination and in imagining and pursuing intersectional responses. There is limited tracking of how this phenomenon is evolving, in particular in how it takes on new forms, such as through the growth of artificial intelligence.

Allen and Masters of AI Law Consultancy in Cloisters Chambers UK, in a report for Equinet, the European network of equality bodies, on the issue of artificial intelligence and the challenges posed to equality and non-discrimination, note that while artificial intelligence systems have potential to further the public good, 'if badly designed or incorrectly used, [they] lead to profound breaches of fundamental rights including the principle of non-discrimination'. It is of concern that a key finding of their report is that 'at present, there is only an embryonic debate across Europe concerning the equality implications of AI systems'.²

In a context where there is lack of clarity and understanding in relation to structural discrimination on the ground of racial or ethnic origin, and where there has been limited action to address this issue, the naming and recognition of structural racism in the EU Anti-Racism Action Plan by the European Commission³ holds important symbolic functions.

Matland in his work on policy implementation has noted the importance of what he refers to as 'symbolic policy making'.⁴ Such policies introduce and confirm new goals, reaffirm commitment to old goals in need of reinforcement, or emphasise core and important values and principles. However, Matland warns that policies that invoke 'highly salient symbols' can pose particular implementation challenges in that they can hold high levels of ambiguity, or lack of clarity, and can provoke high levels of conflict, understood in

2 Allen, R., Masters, D. (2020), *Regulation for an equal AI: A new role for equality bodies, Meeting the new challenges to equality and non-discrimination posed from increasing digitisation and the use of artificial intelligence*, Equinet, pp. 29-30.

3 European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, 'A Union of Equality: EU anti-racism action plan 2020-2025', Brussels, 18.9.2020, COM(2020) 565 final, p. 13.

4 Matland, R. E. (1995), 'Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation', *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174; p. 168.

terms not just of opposition and clashing interests, but also of disagreements on policy framing or means of policy implementation.⁵

1.2 Appreciating the intersectional dimension

The EU Anti-Racism Action Plan identifies the need for an ‘intersectional approach’ in responding to structural racism.⁶ The Action Plan notes the European Institute for Gender Equality (EIGE) definition of intersectionality as an ‘analytical tool for studying, understanding and responding to the ways in which sex and gender intersect with other personal characteristics/identities, and how these intersections contribute to unique experiences of discrimination’.⁷ It notes that such discrimination applies equally to the ground of racial or ethnic origin and to any form of discrimination.

Crenshaw captures the concept of intersectionality and its relevance for addressing issues of discrimination, including structural discrimination, with the image: ‘Discrimination, like traffic through an intersection, may flow in one direction and it may flow in another. If an accident happens at an intersection, it can be caused by cars travelling from any number of directions, and, sometimes, from all of them’.⁸

Fredman, in her work for the European network of legal experts in gender equality and non-discrimination, distinguishes intersectionality in suggesting multiple discrimination can manifest itself in three ways:

- Sequential multiple discrimination: when a person suffers discrimination on different grounds on separate occasions.
- Additive multiple discrimination: when a person is discriminated against on the same occasion but in two different ways.
- Intersectional discrimination: when discrimination does not simply consist in the addition of two sources of discrimination and the result is qualitatively different, or as Crenshaw terms it, synergistic.⁹

Fredman, notes that ‘it is increasingly recognised that discrimination can occur on the basis of more than one ground. A person who is discriminated against on grounds of her race might also suffer discrimination on grounds of her gender, her sexual orientation, her religion or belief, her age or her disability’, and points to the imperative of taking an intersectional perspective, because ‘such discrimination can create cumulative disadvantage’.¹⁰

The EU Anti-Racism Action Plan argues that an ‘intersectional perspective deepens understanding of structural racism, and makes responses more effective’. In its reasoning it notes that ‘in addition to religion or belief, racism can also be combined with discrimination and hatred on other grounds, including gender, sexual orientation, age, and disability or against migrants’.¹¹

Equinet, the European network of equality bodies, emphasises the value in an intersectional approach in that it ‘offers a window into the real lives and experiences of people, offers a better understanding of

5 Matland (1995), ‘Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation’, *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174, p. 168.

6 European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘A Union of Equality: EU anti-racism action plan 2020-2025’, Brussels, 18.9.2020, COM(2020) 565 final, p. 2.

7 See the glossary on EIGE’s website.

8 Crenshaw, K. (1989), ‘Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics’, in *University of Chicago Legal Forum*, p. 149.

9 Fredman, S. (2016), ‘Intersectional discrimination in EU gender equality and non-discrimination Law’, European network of legal experts in gender equality and non-discrimination, European Commission, pp. 27-28.

10 Fredman, S. (2016), ‘Intersectional discrimination in EU gender equality and non-discrimination Law’, European network of legal experts in gender equality and non-discrimination, European Commission, p. 7.

11 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘A Union of Equality: EU anti-racism action plan 2020-2025’, Brussels, 18.9.2020, COM(2020) 565 final, p. 13 and p. 2.

issues, and translates into better support for people that are exposed to discrimination’ and ‘enables a focus on structural discrimination and gives a better understanding of hidden and complex realities’.¹²

The synergistic nature of intersectional discrimination, at both the structural and individual levels, points to the imperative of addressing structural discrimination on the ground of racial or ethnic origin in a manner that takes account of the situation, experience and voice of the diversity within Black and minority ethnic groups, including Roma and Travellers, and responds appropriately to the specific needs of those groups at the intersections of the ground of racial or ethnic origin and other grounds such as gender, age, disability, religion or belief, and sexual orientation.

1.3 This thematic report

This thematic report addresses the issue of structural discrimination on the ground of racial or ethnic origin. It has been inspired by the engagement of the European Commission with the issue in its EU Anti-Racism Action Plan, where it addresses structural racism as the ‘underlying problem’.¹³ In doing so, the European Commission has put down an important marker for future action on the issue of racism and presents a key challenge to be addressed if racism is to be effectively combated and eliminated.

The report seeks to inform this new focus on structural racism put forward by the European Commission. It does so by exploring the legal, policy and institutional initiatives, as well as case law, across the 27 Member States, which contribute to addressing structural discrimination on the ground of racial or ethnic origin. Its intention is to establish the state of play in current responses to this issue, and to identify learning to enable more consistent and coherent action.

This thematic report has been prepared through the European network of legal experts in gender equality and non-discrimination. The network’s non-discrimination experts in each Member State researched and completed a questionnaire and prepared a country fiche on the issue of structural discrimination and the legal, policy and institutional responses in their Member State. The questionnaire forms are in the appendix to the report. This material served as the baseline for the content and analysis of this report.

The report first addresses the European Union and international context to establish key legislative and policy initiatives taken that frame and give form to action on the issue at national and other levels of governance (section 2). It then proceeds to explore national legislative and policy initiatives of relevance across the Member States (section 3), and the institutional infrastructure in place to drive action on this issue at Member State level (section 4). It goes on to identify and present case law of relevance on the topic (section 5). Finally, it draws some conclusions from the material presented and makes some proposals for further action on the issue at the European and Member State levels (section 6).

12 Crowley, N. (2016), *Innovating at the intersections: Equality bodies tackling intersectional discrimination*, Equinet, Brussels, p. 41.

13 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, [A Union of Equality: EU anti-racism action plan 2020-2025](#), Brussels, 18.9.2020, COM(2020) 565 final, p. 13.

2 European Union and international context

2.1 EU legislative and policy framework

In terms of **legislation**, Directive 2000/43/EC addresses discrimination on the ground of racial or ethnic origin across a broad, though not fully comprehensive, range of fields.¹⁴ The Directive has offered some scope to raise structural discrimination on the ground of racial or ethnic origin in casework, establishing the key architecture for the exercise of rights in this area, with provisions in relation to both direct and indirect discrimination; processes for the vindication of rights; and sanctions.

However, the Directive does not make specific reference to or provision on structural discrimination. It primarily addresses the individual level rather than the structural level, being based on individual rights and an individual complaints system. This limits any tailoring of the provisions to the very specific elements involved in discrimination at this structural level. This omission discourages reporting, especially in a context of high levels of under-reporting, in particular in relation to structural discrimination. Nonetheless, the Directive includes important provisions in regard to this issue, in particular those on indirect discrimination, positive action and equality bodies.

While in some instances provisions on direct discrimination have been used in casework on structural discrimination, the provisions in relation to indirect discrimination (Article 2(2)), though bounded by an exemption, offer the most significant potential in regard to addressing structural discrimination.¹⁵ Indirect discrimination is defined in terms of discrimination by effect, with an objective justification exemption:

‘Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.¹⁶

However, casework on indirect discrimination is limited and has been found difficult to progress at Member State level. Mulder, in her study on the issue, which focuses on the ground of sex in employment, notes the potential in the concept to progress structural, systemic and institutional change. However, she identifies that ‘few cases on indirect sex discrimination law are actually considered by the courts and even fewer are successful’.¹⁷ She notes that ‘the concept is often poorly understood or ignored in the Member States’.¹⁸ She further highlights that ‘indirect sex discrimination law faces significant challenges to stay relevant within the ever-changing labour markets and current legal discourses on equality’.¹⁹

While the preamble to the Directive identifies that indirect discrimination could be established by any means including on the basis of statistical evidence, Mulder notes that ‘most case law within the Member States and CJEU focuses on statistical evidence’.²⁰ This presents particular issues for the ground of racial or ethnic origin given the inadequate collection of data on this ground. The subgroup on equality data of the European Commission’s High-level group on equality, non-discrimination and diversity has noted that

14 Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

15 Of further interest in this regard will be the forthcoming thematic report on indirect discrimination of the European network of legal experts in gender equality and non-discrimination, authored by Christa Tobler.

16 Directive 2000/43/EC, Article 2(2).

17 Mulder, J. (2020), *Indirect sex-discrimination in employment*, European network of legal experts in gender equality and non-discrimination and DG Justice and Consumers European Commission, p. 123.

18 Mulder, J. (2020), *Indirect sex-discrimination in employment*, European network of legal experts in gender equality and non-discrimination and DG Justice and Consumers European Commission, p. 123.

19 Mulder, J. (2020), *Indirect sex-discrimination in employment*, European network of legal experts in gender equality and non-discrimination and DG Justice and Consumers European Commission, p. 131.

20 Mulder, J. (2020), *Indirect sex-discrimination in employment*, European network of legal experts in gender equality and non-discrimination and DG Justice and Consumers European Commission, p. 127.

'To date, few countries operate comprehensive systems or have a coordinated approach to collecting and using equality data that would uncover inequalities based on racial or ethnic origin'.²¹

This analysis is reflected in the European Commission's 2021 report on the implementation of Directive 2000/43/EC.²² This notes that 'some stakeholders point to a limited awareness and application of indirect discrimination in domestic judicial practice'²³ and that 'there are some situations in which it is especially difficult to establish prima facie evidence, e.g. for claims of indirect discrimination'.²⁴

The Directive, further, allows for positive action (Article 5), whereby specific measures to prevent or compensate for disadvantage are allowed 'with a view to ensuring full equality in practice'.²⁵ Such positive action, while not specifically addressing structural discrimination, is a corrective for the impact of structural discrimination in terms of its outcomes of disadvantage and inequality on the ground of racial or ethnic origin, across the dimensions of situation, experience, voice and identity.

Finally, the Directive provides for the establishment or designation of equality bodies (Article 13) with functions to: provide assistance to victims of discrimination; undertake surveys concerning discrimination; and publish reports and make recommendations in relation to discrimination.²⁶ Although it is not expressly indicated in the Directive, such equality bodies have the potential to address structural discrimination and have worked to realise this potential.

The European Commission has recognised the potential for algorithmic discrimination that is structural in nature in the development and use of artificial intelligence systems. It has proposed a regulation that aims to 'minimise the risk of algorithmic discrimination, in particular in relation to the design and the quality of data sets used for the development of AI systems complemented with obligations for testing, risk management, documentation and human oversight throughout the AI systems' lifecycle'.²⁷

The proposed Regulation notes that 'aside from the many beneficial uses of artificial intelligence, that technology can also be misused and provide novel and powerful tools for manipulative, exploitative and social control practices'. It points to the potential for algorithmic discrimination in a wide range of fields: education or vocational training; employment; access to financial resources or essential services such as housing, electricity, and telecommunication services in terms of credit score or creditworthiness; and in migration, asylum and border control management.

In terms of **policy**, the policy field at European level has more directly opened up a focus on structural discrimination on the ground of racial or ethnic origin. The European Commission has responded to this challenge in placing an emphasis, in the EU Anti-Racism Action Plan 2020-2025, on the need to tackle structural racism, noting the need to take an intersectional approach.²⁸

-
- 21 European Commission (2021), Guidance Note on the Collective and Use of Equality Data based on Racial or Ethnic Origin, High-level group on equality, non-discrimination and diversity, Subgroup on equality data, DG Justice and Consumers, p. 10.
- 22 European Commission (2021), Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), COM(2021) 139 final.
- 23 European Commission (2021), Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), COM(2021) 139 final, p. 4.
- 24 European Commission (2021), Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), COM(2021) 139 final, p. 8.
- 25 Directive 2000/43/EC, Article 5.
- 26 Directive 2000/43/EC, Article 13.
- 27 European Commission (2021), Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence systems (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final.
- 28 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, 'A Union of Equality: EU anti-racism action plan 2020-2025', Brussels, 18.9.2020, COM(2020) 565 final, p. 13.

The EU Action Plan defines structural racism, in a dedicated section on the issue, in these terms:

'Racism is often deeply embedded in our societies' history, intertwined with its cultural roots and norms. It can be reflected in the way society functions, how power is distributed and how citizens interact with the state and public services. It can be unconscious and is often felt through a failure to reflect the interests of the people affected by racism, even if not necessarily a direct attempt to exclude'.²⁹

This definition of structural racism is broadly drawn, capturing the historical, societal and institutional elements. However, it lacks specific detail that might be important in a context where the concept of structural discrimination on the ground of racial or ethnic origin is not widely understood or addressed. The concept of structural racism is captured in more specific terms in the introduction:

'Racist and discriminatory behaviours can be embedded in social, financial and political institutions, impacting on the levers of power and on policy-making. This structural racism perpetuates the barriers placed in the way of citizens solely due to their racial or ethnic origin. Every day, people affected by racism can feel its impact on their access to jobs, healthcare, housing, financing or education, as well as cases of violence'.³⁰

This more specific definition emphasises the institutional element to structural racism. It usefully identifies that its impact becomes visible principally in the outcomes for people affected by structural racism in a range of key fields.

The EU Action Plan valuably notes that 'as the impact of structural racism can be as profound and harmful as individual racism, its existence needs to be acknowledged and it must be addressed through proactive policies'.³¹ However, in the section dedicated to structural racism, the EU Action Plan limits itself to commitments in relation to actively addressing racial and ethnic stereotypes, and to improving the collection of data disaggregated by racial or ethnic origin. Both are important, in that the focus on stereotypes responds in part to the societal element of structural discrimination, and the focus on data can assist in addressing the institutional element. However, alone they do not adequately capture what is required to address the historical, societal and institutional elements of structural discrimination on the ground of racial or ethnic origin.

In the wider framework advanced for responding to racism, the EU Action Plan does, however, emphasise further actions with potential to address structural discrimination on the ground of racial or ethnic origin, including:

- Statutory equality duties: Member States are encouraged to 'identify ways to promote duties to integrate equality considerations into the day-to-day work of public authorities', which further responds to the institutional element to structural discrimination.³²

29 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, [A Union of Equality: EU anti-racism action plan 2020-2025](#), Brussels, 18.9.2020, COM(2020) 565 final, p. 13.

30 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, [A Union of Equality: EU anti-racism action plan 2020-2025](#), Brussels, 18.9.2020, COM(2020) 565 final, pp. 1-2.

31 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, [A Union of Equality: EU anti-racism action plan 2020-2025](#), Brussels, 18.9.2020, COM(2020) 565 final, p. 13.

32 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, [A Union of Equality: EU anti-racism action plan 2020-2025](#), Brussels, 18.9.2020, COM(2020) 565 final, p. 23.

- Positive action programmes: Member States are encouraged to ‘adopt specific measures to avoid, or compensate for, disadvantages linked to discrimination on grounds of racial or ethnic origin where there is provision for protection’, which serves to address the impact of structural discrimination.³³
- Artificial intelligence: The Commission will ‘ensure that the legislative framework on AI will specifically address the risk of bias and discrimination built into AI systems’, which further responds to the institutional element of structural discrimination and the new forms this is taking.³⁴

More broadly, there is further potential to address the impact of structural discrimination in relation to the situation, experience, voice and identity of Black and minority ethnic groups, including Roma and Travellers, and possibly to directly address the issue of structural discrimination itself, in the commitment in the EU Action Plan that the Commission will ‘use policy measures and funding programmes to combat racism and discrimination in access to employment, education and training, healthcare, social protection and housing’.³⁵

There is an important focus on the preparation of national action plans against racism, which would hold potential for action on structural discrimination on the ground of racial or ethnic origin. Member States are encouraged to ‘adopt national action plans against racism by the end of 2022’.³⁶ The Common Guiding Principles published to inform the preparation of such plans make valuable reference of relevance to structural discrimination on the ground of racial or ethnic origin, with ‘Identify and tackle potential manifestations of structural racism and their impact’ established as one of eight such principles.³⁷

This guiding principle gives further depth to the understanding of structural racism, which encompasses the institutional, societal and historical elements. It emphasises the need to ‘identify potential racial bias – conscious or unconscious – and patterns of discrimination in “rules, norms, routines, algorithms, attitudes and behaviour in institutions and other societal structures”’, and to ‘Combat stereotypes and prejudices by raising awareness on the historical roots of racism’. It references the need to ‘include targeted measures’ and ‘apply an intersectional approach’.³⁸ Nonetheless, further clarity of definition and shared understanding of the issue and responses required is still needed.

The European Commission makes further reference of relevance to structural discrimination on the ground of racial or ethnic origin, in its policy work on Roma, specifically in the understanding of ‘antigypsyism’ that it establishes. This encompasses the historical, societal and institutional elements of structural discrimination. In the EU Roma strategic framework for equality, inclusion and participation for 2020–2030, the Commission defined the term as:

‘Antigypsyism (a form of racism against Roma) is a historically rooted structural phenomenon that appears at institutional, social and interpersonal levels. It has its origins in how the majority views

33 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘[A Union of Equality: EU anti-racism action plan 2020-2025](#)’, Brussels, 18.9.2020, COM(2020) 565 final, p. 23.

34 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘[A Union of Equality: EU anti-racism action plan 2020-2025](#)’, Brussels, 18.9.2020, COM(2020) 565 final, p. 13.

35 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘[A Union of Equality: EU anti-racism action plan 2020-2025](#)’, Brussels, 18.9.2020, COM(2020) 565 final, p. 13.

36 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘[A Union of Equality: EU anti-racism action plan 2020-2025](#)’, Brussels, 18.9.2020, COM(2020) 565 final, p. 21.

37 European Commission (2021), [Common guiding principles for national action plans against racism and racial discrimination](#), European Commission Subgroup on the National Implementation of the EU Anti-Racism Action Plan 2020-2025, DG Justice and Consumers.

38 European Commission (2021), [Common guiding principles for national action plans against racism and racial discrimination](#), European Commission Subgroup on the National Implementation of the EU Anti-Racism Action Plan 2020-2025, DG Justice and Consumers, p. 7.

and treats those considered ‘gypsies’. It is rooted in a process of ‘othering’ that builds on negative as well as positive, exoticising stereotypes’.³⁹

Member States are invited to prepare national Roma strategic frameworks which should include the fight against discrimination and antigypsyism as a key objective and crosscutting priority in each policy area,⁴⁰ and to present a plan or set of measures for preventing and fighting antigypsyism and discrimination, segregation in education and housing, and antiRoma prejudices and stereotypes (including online).⁴¹ This holds the potential to drive action at national level on structural discrimination experienced by Roma and Traveller communities, across all three historical, societal and institutional elements.

The Commission, in the EU Roma strategic framework, positions itself to create a context for such national action on structural discrimination, and to provide necessary supports. It commits to: mobilising EU funds for Roma and combating antigypsyism;⁴² monitoring and enforcing the application of the Racial Equality Directive, by investigating systematic discrimination and launching infringement proceedings, if necessary, to prompt changes in national legislation and policy;⁴³ and supporting activities promoting positive narratives and Roma role models, combating negative stereotypes, raising awareness on Roma history and culture, and promoting truth and reconciliation under the citizens, equality, rights and values programme.⁴⁴ Annex 1 to the EU Roma strategic framework emphasises the need to subject key mainstream policy measures to screening/audit to assess their impact on Roma equality and inclusion.⁴⁵

This focus on structural discrimination against Roma is further strengthened by means of a 2021 Council Recommendation on Roma equality, inclusion and participation.⁴⁶ This recommends that Member States take measures to fight multiple and structural discrimination against Roma, referencing the institutional element of this issue, and that Member States should enable equality bodies and rely on their advice in, among other areas, their efforts to dismantle such discrimination.

In terms of **data**, the European Commission has recognised the imperative for good equality data in rendering structural discrimination visible and formulating effective policies and strategies to address it, though the work of the High-level group on non-discrimination, equality, and diversity and its subgroup on equality data. This has included a specific publication on data on racial or ethnic origin.⁴⁷ The publication sets out eight guiding principles for collecting such data alongside a rationale for, guidance on, and good practice examples for each of them. The eight principles are to:

1. map existing data sources that provide information on racial or ethnic origin (including the categories applied and their underlying definitions);
2. carry out a needs assessment of (potential) users of data disaggregated by racial or ethnic origin;
3. align definitions, classifications and categorisations related to racial or ethnic origin and mainstream data on racial or ethnic origin into EU and national surveys;

39 European Commission (2020), Communication from the Commission to the European Parliament and the Council, [A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion, and Participation](#), Brussels, COM(2020) 620 final, p. 1.

40 European Commission (2020), Communication from the Commission to the European Parliament and the Council, [A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion, and Participation](#), Brussels, COM(2020) 620 final, p. 7.

41 European Commission (2020), Communication from the Commission to the European Parliament and the Council, [A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion, and Participation](#), Brussels, COM(2020) 620 final, p. 9.

42 European Commission (2020), Communication from the Commission to the European Parliament and the Council, [A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion, and Participation](#), Brussels, COM(2020) 620 final, p. 6.

43 European Commission (2020), Communication from the Commission to the European Parliament and the Council, [A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion, and Participation](#), Brussels, COM(2020) 620 final, p. 11.

44 European Commission (2020), Communication from the Commission to the European Parliament and the Council, [A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion, and Participation](#), Brussels, COM(2020) 620 final, p. 15.

45 European Commission (2020), Communication from the Commission to the European Parliament and the Council, [A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion, and Participation](#), Brussels, COM(2020) 620 final, Annex 1, p. 5.

46 Council of the European Union (2021), [Council Recommendation of 12 March 2021 on Roma equality, inclusion and participation](#), (2021/C 93/01).

47 European Commission (2021), ‘Guidance Note on the Collective and Use of Equality Data based on Racial or Ethnic Origin’.

4. collect and use equality data in full compliance with EU General Data Protection Regulation and national data protection rules;
5. collect information, based on self-identification, on 'racial or ethnic origin';
6. use proxy information when collecting data on racial or ethnic origin (when self-identification is not possible);
7. collect data on experience of discrimination based on ethnic/racial origin in key areas of life; and
8. provide sufficient budget for regular surveys collecting equality data on racial/ethnic origin, particularly when administrative data collection is not possible.

2.2 International standards

Structural discrimination on the ground of racial or ethnic origin has been a focus for standard setting and initiative at the Council of Europe level and the United Nations Level. These standards and initiatives are clearly coherent with the approach developed by the European Commission. They offer complementarity and some further detail.

The work of the European Commission against Racism and Intolerance (ECRI) of the *Council of Europe*, has included an ongoing focus on the issue of structural discrimination. It has defined structural discrimination as referring to 'rules, norms, routines, patterns of attitudes and behaviour in institutions and other societal structures that, consciously or unconsciously, present obstacles to groups or individuals in accessing the same rights and opportunities as others and that contribute to less favourable outcomes for them than for the majority of the population'.⁴⁸ This emphasises and gives some detail to the institutional element of structural discrimination noted above. ECRI identifies that the mandate of equality bodies should include a focus on structural discrimination and emphasises that equality bodies should have powers to conduct inquiries and bring cases that address both individual and structural discrimination, including in their own name.⁴⁹

The Intercultural Cities Programme of the *Council of Europe* has developed a series of initiatives on the issue of systemic discrimination. It defines systemic discrimination, in terms akin to the institutional element noted above for structural discrimination, as occurring 'where the procedures, routines and organisational culture of any organisation contribute to unequal outcomes for minority groups compared to the general population'.⁵⁰ It suggests that this can be 'rooted in the way organisations go about their day-to-day business as policymakers, employers, or service providers, and can also feature in automated decision making'.⁵¹

The Intercultural Cities Programme has developed guidance for the city level on responding effectively to systemic discrimination. This framework for action encompasses four strands of initiative:

1. Gear up: This strand of activity is about creating the conditions within an organisation to tackle systemic discrimination. It involves securing leadership and creating drivers for action, as well as setting standards in relation to the issue within the organisation.
2. Identify: This strand of activity is about uncovering and rendering systemic discrimination visible. It involves gathering evidence, engaging in dialogue with those affected by the issue, and monitoring incidents and patterns of discrimination.

48 ECRI (2017), *ECRI General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level*, adopted on 7 December 2017, p. 13.

49 ECRI (2017), *ECRI General Policy Recommendation No. 2*, pp. 4, 5 and 6.

50 Council of Europe (2020), *Identifying and Preventing Systemic Discrimination at the Local Level*, policy brief, Intercultural Cities Programme, p. 1.

51 Council of Europe (2020), *Identifying and Preventing Systemic Discrimination at the Local Level*, policy brief, Intercultural Cities Programme, p. 1.

3. Prevent: This strand of activity is about developing systemic remedies to what is a systemic problem. It involves redesigning the systems that create disadvantage, and implementing new systems required to advance equality.
4. Shared practice: This strand of activity is about enabling a coherent response to systemic discrimination across all sectors. It involves the city, the wider public sector, and the private sector engaging together with a view to achieving such a coherence of response.⁵²

The key *United Nations* standard in relation to racism is the International Convention on the Elimination of all Forms of Racial Discrimination, which does not specifically name or define structural discrimination or its historical, societal or institutional elements.⁵³ It does have a broad definition of racial discrimination that does encompass this issue. This is set out as ‘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’.⁵⁴

A number of its commitments evidently address the issue of structural discrimination. For example, the commitment of State Parties to ‘take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination’⁵⁵ and to take measures ‘particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups’.⁵⁶

A recent and seminal report of the *United Nations Office of the High Commissioner on Human Rights*, on the experience of Africans and people of African descent of excessive use of force and other human rights violations by law enforcement officers, has addressed this definitional gap. It defines ‘systemic’ racism, on the basis of consultation with experts, as including structural and institutional racism, and involving ‘the operation of a complex, interrelated system of laws, policies, practices and attitudes in State institutions, the private sector and societal structures that, combined, result in direct or indirect, intentional or unintentional, de jure or de facto discrimination, distinction, exclusion, restriction or preference on the basis of race, colour, descent or national or ethnic origin’.⁵⁷

The UN Office of the High Commissioner on Human Rights report emphasises the obligation on states, under human rights law and their political commitments, to eliminate all forms of racial discrimination, including systemic discrimination, and to take an intersectional approach in doing so. It notes that ‘systemic racism needs a systemic response’. In this regard, it recommends and emphasises the need for:

- ‘effective legal, policy and institutional measures that address racism beyond a summation of individualised acts’;
- ‘whole-of-government and whole-of-society responses that are contained in comprehensive and adequately resourced national and regional action plans and that include, where necessary, special measures to secure for disadvantaged groups’; and

52 Council of Europe (2020), *Identifying and Preventing Systemic Discrimination at the Local Level*, policy brief, Intercultural Cities Programme, p. 8.

53 *International Convention on the Elimination of all forms of Racial Discrimination*, General Assembly Resolution 2106, United Nations, 1965.

54 ICERD, Article 1, p. 2.

55 ICERD, Article 2, p. 2.

56 ICERD, Article 7, p. 4.

57 United Nations High Commissioner for Human Rights (2021), *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, Report of the United Nations High Commissioner for Human Rights, Human Rights Council Forty-seventh session, 21 June–9 July 2021, p. 5.

- states to ‘collect and make publicly available comprehensive data disaggregated by race or ethnic origin, as well as by sex and other factors, with strict safeguards and in accordance with international human rights law’.⁵⁸

2.3 Review

There is an emerging explicit engagement with structural discrimination on the ground of racial or ethnic origin, and its historical, societal and institutional elements, at European and international levels. This builds on a strong body of work over years to address discrimination at the individual level on the ground of racial or ethnic origin in legislation and policy.

Significant European and international markers have been put down in relation to the issue of structural discrimination on the ground of racial or ethnic origin over the past two years, in particular with: the European Commission’s EU Anti-Racism Action Plan and Roma Strategic Framework for Equality, Inclusion, and Participation in 2020; the report of the United Nation High Commissioner for Human Rights on the ‘Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers’ in 2020; and the work of the Intercultural Cities Programme of the Council of Europe on systemic discrimination at the level of the city in 2020.

This emerging context is promising but remains somewhat tentative because of the lack of clarity in defining structural discrimination on the ground of racial or ethnic origin and setting out the agreed elements contained within the concept. A clarity of means, the manner in which such discrimination and its component elements can be dismantled, and the practical steps required to achieve this goal, also requires detailing.

The European Network Against Racism, in early work on national action plans against racism (NAPAR), which predates the EU Anti-Racism Action Plan, had emphasised the need for a sophisticated definition of racism that recognises structural discrimination. It noted that ‘Although the situation of racism and discrimination might vary across different EU member states, there is merit in grounding a NAPAR in a common definition of racism, which is comprehensive and sophisticated’.⁵⁹ In its response to the Common Guiding Principles published by the European Commission for national action plans against racism, the European Network Against Racism has reiterated the need for these plans to be based on a comprehensive and sophisticated definition of racism, encompassing ‘individual, historical, structural and institutional dimensions’.⁶⁰

Realising the promise in this European and international context will require action that is focused on ensuring implementation at national, regional and local levels. The naming of structural racism, particularly in the EU Anti-Racism Action Plan and in the Common Guiding Principles for national action plans, is a vital starting point in setting out a ‘highly salient symbol’⁶¹ for attention and action. Attention now needs to be given to the establishment of the necessary drivers for policy implementation, the devising of effective strategies for policy implementation, and action on the present and emerging barriers to such implementation.

58 United Nations High Commissioner for Human Rights (2021), *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, Report of the United Nations High Commissioner for Human Rights, Human Rights Council Forty-seventh session, 21 June–9 July 2021, p. 8.

59 European Network Against Racism (2019), *Lessons for effective anti-racism policies: National Action Plans Against Racism*.

60 European Network Against Racism (2021), *Comments by the European Network Against Racism on Common Guiding Principles for national action plans against racism*.

61 Matland (1995), ‘Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation’, *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174, p. 168.

3 Strands of national initiative

3.1 Equal treatment law

3.1.1 Introduction

Legislation is a key starting point in addressing structural discrimination on the ground of racial or ethnic origin. As noted in Section 2.1 above and further explored in Section 5.2 below, current legislation does provide important but limited opportunities to challenge and seek redress for this form of discrimination. There is, however, a lack of specific provisions addressing structural discrimination in the European Union equal treatment directives. This has the potential to undermine the recognition of the issue of structural discrimination that is needed at national, regional and local level for this issue to be effectively addressed. There is a failure to set the normative standards on this issue that could be provided by such provision.

Legislation, in the form of statutory equality duties, can play a further role in replacing those systems and processes that generate inequality, with systems and processes that advance the achievement of equality on the ground of racial or ethnic origin. There is a new generation of equal treatment legislation that encompasses such positive duties on public bodies, in particular, but also on private sector organisations, to be proactive in the pursuit of equality and non-discrimination. These positive duties are important for their capacity to bring a focus on structural discrimination into mainstream decision-making. They usefully require a systemic response to structural discrimination, as a systemic problem.

3.1.2 Legal provisions on structural discrimination

There are no provisions in national legislation reported by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination that could be identified as specifically addressing structural discrimination on the ground of racial or ethnic origin, in any Member State. This suggests a difficult point of departure for new action on structural discrimination, in the absence of a normative standard set out in law.

There are, however, provisions identified in equal treatment legislation at Member State level that could be and are deployed to address structural discrimination on the ground of racial or ethnic origin. These include provisions in relation to:

- indirect discrimination, with a capacity to address the systemic and institutional elements of structural discrimination in casework;
- positive action, with a capacity to remedy some of the impacts of structural discrimination;
- equality bodies, empowered with competences to
 - undertake surveys, prepare reports, and issue recommendations pertaining to discrimination which enable them to give visibility to structural discrimination and
 - undertake reviews or inquiries, with necessary investigative competences, that enable them to report on and make recommendations that could include a focus on structural discrimination;
- various forms of *actio popularis*, including own initiative cases taken by equality bodies without an individual named complainant, which enable a focus on structural discrimination with their concern beyond an individual claimant and their focus on the wider public interest;
- equality bodies with decision-making functions, empowered with the competence to make orders for action by respondents found to have discriminated, that can be used to address causal factors of the discrimination, including structural discrimination, so as to ensure no future discrimination.

In some instances, the equal treatment legislation defines direct discrimination so broadly that it could be interpreted to include structural discrimination, though no mention is made of the specific issue. In Slovenia, by way of example, the definition of discrimination under the Protection Against Discrimination

Act 2016 involves 'any undue actual or legal unequal treatment, differentiation, exclusion, limitation or failure to act' (Article 4), and a further article introduces 'mass discrimination' whereby several people are discriminated against simultaneously (Article 12).

There is further potential to address structural discrimination on a less explicit basis. This potential lies in progressing a critical mass of individual cases on an issue, often in a manner linked to strategic litigation. Equality bodies have a key role to play in realising such an approach. In this regard, the European Commission against Racism and Intolerance (ECRI) of the Council of Europe, in its standards for equality bodies, usefully defines the aim of strategic litigation as including ensuring a critical mass of casework on the different grounds covered and to develop case law on issues of structural discrimination.⁶²

However, strategic litigation by equality bodies has been significantly hampered by the lack of resources made available to them, or due to limitations in their strategy. A 2018 report noted that 14 out of 43 equality bodies reviewed had not deployed their litigation powers to any significant extent.⁶³ This situation would preclude the emergence of a critical mass of such casework on any wide scale. The same report noted that a 'lack of, or limited, competences in relation to having legal standing to take cases of discrimination or to act as *amicus curiae* before the courts is evident for 17 equality bodies'.⁶⁴

3.1.3 Statutory equality duties

The European Commission, in its EU Anti-Racism Action Plan usefully encourages Member States to introduce statutory equality duties, specifically 'duties to integrate equality considerations into the day-to-day work of public authorities'.⁶⁵ Statutory equality duties, with their focus on and requirements in relation to institutional systems and procedures, have a potential to counteract and address structural discrimination, in particular the institutional element of this issue.

Equinet, in its study of statutory equality duties across the EU and the role of equality bodies in their implementation, identifies a typology of such duties:⁶⁶

- Preventive duties on organisations to take measures to prevent discrimination, harassment or sexual harassment in employment or in the provision of goods and services. Such duties are limited in their focus on ensuring non-discrimination and compliance with equal treatment legislation.
- Institutional duties on organisations to promote equality for employees or for people accessing their services. Such duties are ambitious in their concern for equality and their focus on institutional action to advance such goals.
- Mainstreaming duties on public authorities to have due regard to the need to promote equality in carrying out their functions. Such duties are ambitious in their concern for equality and their capacity to draw an equality perspective into the mainstream of planning and policy-making by policy authorities, thus enhancing the potential for equality outcomes.

The Equinet study notes the potential for statutory equality duties to contribute to change, in 'advancing equality and new outcomes for the diversity of policy beneficiaries, employees and service users'.⁶⁷ There are challenges in relation to such duties noted in the report including: an uneven development of statutory

62 ECRI (2017), *ECRI General Policy Recommendation No. 2: Equality bodies to combat racism and intolerance at national level*, adopted on 7 December 2017, p. 21.

63 Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination and DG Justice and Consumers, Brussels, p. 107.

64 Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination and DG Justice and Consumers, Brussels, p. 105.

65 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, 'A Union of Equality: EU anti-racism action plan 2020-2025', Brussels, 18.9.2020, COM(2020) 565 final, p. 23.

66 Crowley, N. (2016), *Making Europe more equal: A legal duty?*, Equinet, Brussels, p. 9.

67 Crowley, N. (2016), *Making Europe more equal: A legal duty?*, Equinet, Brussels, p. 71.

equality duties across the EU; the need for legal provision to provide more detail on what is required of duty bearers by the statutory equality duties; and the need for new traditions in implementing proactive approaches to equality to be built in order to secure effective implementation of the statutory equality duties.

In subsequent work, Equinet has emphasised a further potential in statutory equality duties in that 'statutory equality duties play an important role in introducing equality focused systems within public sector and private sector organisations that can replace or counter organisational systems that drive institutional racism'.⁶⁸

The institutional duties and the mainstreaming duties noted by Equinet hold particular potential for the elimination of structural discrimination, particularly its institutional element. These duties introduce systems within public and private sector organisations that direct attention and effort towards the achievement of equality and hold the potential to dismantle or make redundant those systems that were reflective of structural discrimination. The mainstreaming duties with their focus on policy making by public bodies have a wider reach in this regard, beyond the policy-making institution and into society where that policy makes its impact.

Four different approaches to the implementation of such mainstreaming duties have been identified by Equinet.⁶⁹

- Equality impact assessment approach: involving a formal assessment at final draft stage of the potential impact of the plan, policy or strategy on the grounds covered, including racial or ethnic origin.
- Equality planning approach: involving analysis of situations and experiences of discrimination and inequality and defining objectives, targets and measures to address these.
- Coordination approach: involving coordination between Government departments to enable direction, coherence and mutual support in pursuing and realising agreed equality objectives.
- Process approach: involving specified steps to build a focus on addressing equality and non-discrimination issues into the strategic planning processes of public bodies.

The situation in relation to statutory equality duties, the nature of the provision made for these in equal treatment legislation, and issues pertaining to these duties, as identified by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination in January 2022, is set out in Table 1, below.

No such duty is evident in the case of 16 Member States. A further five Member States only evidence a preventative type duty, which does not hold the same level of potential to address structural discrimination as the institutional and mainstreaming duties. Only four Member States evidence a mainstreaming duty, with one of these appearing to be more of a permissive than an obligatory nature. Another Member State has such a duty at the regional level only. A further two Member States have an institutional duty, which also has the capacity to address structural discrimination.

68 Crowley, N. (2021), *Tackling institutional racism: Realising the potential of equality bodies*, Equinet, p. 22.

69 Crowley, N. (2016), *Making Europe more equal: A legal duty?*, Equinet, Brussels, p. 30.

Table 1: Statutory equality duties across the Member States that address the ground of racial or ethnic origin reported⁷⁰

Member State	Statutory Equality Duty	Preventative	Institutional	Mainstreaming	Issues Identified
Austria	No	N/A	N/A	N/A	
Belgium	Not at Federal Level. Brussels Capital Region, under Ordinance of 4 September 2008 & Framework Ordinance of 25 April 2019. Flemish Region, under Decree of 8 May 2002 on Proportional Representation on the Labour Market, and Decree of 10 July 2008 on Equal Opportunities and Equal Treatment.		Public sector employers to prepare diversity plans – regional civil service & local civil service (Brussels Capital). Public sector employers to prepare an annual action plan for proportional participation in the labour market, and private sector employers to be stimulated to do so (Flemish 2002).	Requirement on government to set strategic goals and develop a horizontal plan to achieve them (Flemish 2008).	Limited scope of Flemish 2002 Decree, to: vocational training, vocational guidance, integration of persons with disabilities in the labour market, and access to employment within the public authorities. Lack of obligation for positive action in Flemish Decree 2008.
Bulgaria	Yes Protection Against Discrimination Act 2004.	Public authorities required to take measures to attain goals of the Act.	Measures required of employers (provide for equal opportunities in training and promotion) and educators (addressing stereotypes).		Lack of enforcement mechanisms.
Croatia	No	N/A	N/A	N/A	
Cyprus	No	N/A	N/A	N/A	
Czechia	Yes Anti-Discrimination Act 2009.	Employers must take measures necessary for effective protection against discrimination.			Lack of detail on requirements. Lack of clarity on enforcement.
Denmark	No	N/A	N/A	N/A	

70 This table is based on information provided by the non-discrimination experts in each Member State from the European network of legal experts in gender equality and non-discrimination in January 2022.

Member State	Statutory Equality Duty	Preventative	Institutional	Mainstreaming	Issues Identified
Estonia	Yes Equal Treatment Act 2008.	Employers must take appropriate measures to protect employees from discrimination and to inform employees of their rights under the Act. Educational and research institutions and other training providers must take account of the need to promote equal treatment. Ministries must monitor compliance with the Act and cooperate with others in promotion of the principle of equal treatment.			Lack of detail on requirements. Lack of awareness of requirements. Lack of enforcement mechanisms.
Finland	Yes Non-Discrimination Act 2014.		Education providers, and employers must evaluate the realisation of equality in their activities and take necessary measures to promote the realisation of equality, preparing an equality plan (in the case of employers, only those employing over 30 must prepare a plan).	Public authorities must evaluate the realisation of equality in their activities and take necessary measures to promote the realisation of equality, preparing an equality plan.	Quality of equality plans varies.
France	No	N/A	N/A	N/A	
Germany	No	N/A	N/A	N/A	
Greece	No	N/A	N/A	N/A	
Hungary	Yes Law on Equal Treatment and Promotion of Equal Opportunities 2003.		Budgetary organisations with more than 50 employees required to prepare an equal opportunities plan.	There is provision that Municipal governments may devise a local equal opportunities programme.	No detail is provided on requirement. There is a further duty, but of a declaratory nature, in the Fundamental Law in relation to taking special measures to promote the realisation of equal opportunities.

Member State	Statutory Equality Duty	Preventative	Institutional	Mainstreaming	Issues Identified
Ireland	Yes Irish Human Rights and Equality Commission Act 2014.			Public bodies to have regard, across all their functions, to the need to eliminate discrimination, promote equality of opportunity, and protect human rights of service users, staff, and members.	Limited enforcement powers. Limited evidence of implementation. Limited understanding in public bodies of structural discrimination.
Italy	No	N/A	N/A	N/A	
Latvia	No	N/A	N/A	N/A	
Lithuania	Yes Law on Equal Treatment 2003. Labour Code 2016.		Public and private bodies with more than 50 employees to adopt measures to promote and implement workplace equality policies (Labour Code).	Public bodies to ensure equal treatment in all legislative acts and draft measures to ensure equal opportunities in all strategic planning documents (Law on Equal Treatment 2003).	Implementation at issue for limited understanding of the issues and for lack of control mechanisms under the Law on Equal Treatment, though there is administrative liability for violations of the Labour Code.
Luxembourg	No	N/A	N/A	N/A	
Malta	No	N/A	N/A	N/A	
Netherlands	No	N/A	N/A	N/A	
Poland	No	N/A	N/A	N/A	
Portugal	No	N/A	N/A	N/A	
Romania	No	N/A	N/A	N/A	
Slovenia	Yes Protection Against Discrimination Act 2016.	Duty on public bodies to take measures to provide conditions for equal treatment.			Lack of leadership or political will for implementation. Lack of detail or any binding element.
Slovakia	Yes Act on Equal Treatment in Certain Areas and Prohibition of Discrimination 2004.	Duty to adopt measures for the protection against discrimination.			Lack of detail on what steps are required and low level of implementation

TO NAME AND ADDRESS THE UNDERLYING PROBLEM: STRUCTURAL DISCRIMINATION ON THE GROUND OF RACIAL OR ETHNIC ORIGIN

Member State	Statutory Equality Duty	Preventative	Institutional	Mainstreaming	Issues Identified
Spain	Yes Organic Law 2/2006 on Education modified by Organic Law 3/2020.	Requirement to address equal treatment and discrimination at the different stages of basic education.			
Sweden	Yes Discrimination Act 2009.		Duty on employers and education providers to undertake active measures for equality, in a goal-oriented approach. Requirement on larger public agencies to include an anti-discrimination condition in their larger public contracts for services or construction.		Limited enforcement Lack of follow-up to ensure standard of implementation

3.1.4 Review

There is no explicit reference to structural discrimination on the ground of racial or ethnic origin identified in equal treatment legislation across the Member States. The absence of such a norm established in this legislation is a significant gap in seeking to make progress on this issue. The lack of specific reference presents an impediment to effective casework on the issue.

However, there are provisions noted that have enabled the emergence of case law on structural discrimination under equal treatment legislation, most specifically provisions in relation to indirect discrimination and provisions enabling various forms of *actio popularis*.

Further provisions have enabled action on structural discrimination, in particular by equality bodies with competences in relation to surveys, reports and recommendations, reviews and inquiries, and in making orders for action by a respondent in a case where the equality body has a decision-making function. Provisions in relation to positive action enable initiatives to redress the impact of structural discrimination on Black and minority ethnic groups, including Roma and Travellers.

There is only limited and uneven development across the Member States in making provision for statutory equality duties under their equal treatment legislation. These do include practices of interest in relation to the mainstreaming duties in Finland and in Ireland. The requirements on public and private sector organisations in relation to equality planning in Finland and the planned and systematic approach to equality and human rights required of public bodies in Ireland hold particular potential to unravel the institutional element to structural discrimination on the ground of racial or ethnic origin and to replace this with systems directed at advancing equality on this ground.

There are issues noted in relation to the implementation of these duties in a manner to ensure their impact on structural discrimination. In seven instances, a lack of enforcement mechanisms to secure implementation is noted. In seven instances issues of quality of implementation arise as a result of lack of awareness of the duty, lack of understanding of the issues including that of structural discrimination, and lack of follow-up to ensure quality of implementation. In five instances, a lack of detail on the steps to be taken under the duty are noted as an impediment to implementation.

The lack of equality data noted in Section 2.1 above, and specifically data disaggregated on the ground of racial or ethnic origin, also presents impediments to the effective implementation of statutory equality duties in a manner capable of making an impact on structural discrimination.

3.2 National policy strategies addressing racism

3.2.1 Introduction

There is a useful tradition across many Member States of developing national policy strategies on the issue of racism or broader national policy strategies on non-discrimination. This tradition will be reinforced and further expanded with the EU Anti-Racism Action Plan, given its encouragement to prepare national action plans against racism. This tradition is important for its potential and capacity to target attention and resources on the issue of racism, and specifically on structural discrimination on the ground of racial or ethnic origin, at national, regional and local levels. National action plans against racism should provide a key framework for implementation of the commitments made in relation to structural racism at the European level.

There is a wider range of national policy strategies that further complement, or if necessary point out the direction required of, national action plans against racism in addressing structural discrimination on the ground of racial or ethnic origin. These include national Roma strategic frameworks, encouraged by

the European Commission under the EU Roma strategic framework, as well as national policy strategies targeting other groups subjected to structural and individual discrimination on the ground of racial or ethnic origin, or national policy strategies taking a multi-ground approach in seeking to tackle structural and individual discrimination.

At their most basic, these national policy strategies serve to advance programmes of action to address the inequality of outcome and the inter-generational disadvantage attendant on structural discrimination. This involves positive action targeting groups experiencing racism. At their most effective, these national policy strategies name and define structural discrimination and advance initiatives with a capacity to dismantle and replace the systems that underpin and drive structural discrimination. This latter approach involves a dual strategy of targeting, through specific measures, and mainstreaming, using measures to adapt and evolve policy making, service provision, and employment design and delivery mechanisms.

3.2.2 Focus on structural discrimination in policy strategies

At the point of survey by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination, there are six current **national action plans against racism** in place and operational across the Member States. This will change during 2022 with the deadline in the EU Anti-Racism Action Plan for Member States to prepare such action plans being the end of 2022. Where such action plans are in place, most, but not all, reference structural discrimination. A diverse range of actions are proposed on structural discrimination on the ground of racial or ethnic origin across those national action plans against racism that do reference this issue.

The Finnish Government Action Plan for Combating Racism and Promoting Good Relations between Population Groups 2021-2023,⁷¹ has a chapter on structural racism, which is defined:

‘Structural racism is a matter of social institutions, their operating methods, and the opportunities that people from different backgrounds have to operate in these institutions and use their services. Structural racism may occur in the activities of the authorities, employment, education, and other services – for example, seemingly neutral practices and structures will exclude some people in practice’.

The key lines of action identified to tackle structural racism include: equality planning; increasing the diversity of employees in the administration; and improving the officials’ abilities regarding non-discrimination and minority issues.

In Germany, the National Action Plan Against Racism was adopted by the federal Government in 2017 as an overarching framework for action in this field. In a section on ‘Forms of racism and ideologies of inequality’, it includes reference to institutional discrimination in terms of ‘the problem of intentional, unintentional, direct and indirect discrimination in public and private institutions’. It notes this includes ‘possible racist stereotypes/attitudes and racist behaviour of employees in Government institutions which have a direct or indirect discriminatory influence on work routines and rules of procedure’.⁷²

It commits that, if evidence of such discriminatory institutional processes emerges, the Federal Government will assume its responsibility and take care of the problem, which appears somewhat reactive. It further commits to preventive strategies and vocational basic and advanced training that ‘focus on conscious and subconscious prejudices and discriminatory attitudes held and displayed by individuals in their interactions in their social and institutional environment’, which appears to focus on the individual rather

71 See: Finnish Ministry of Justice (2022), *An equal Finland. Government action plan for combating racism and promoting good relations between population groups*, pp. 21-24.

72 See: German Federal Government (2017), *National Action Plan Against Racism*, p. 9.

than the institution.⁷³ A more proactive approach is evident in the commitment to an inter-ministerial working group to examine ‘whether racist practices (work routines, rules of procedure, workflows, etc.) can be found in institutions and what can be done to counter them’.⁷⁴

The Irish anti-racism strategy is still in preparation, however there are valid expectations that it will explicitly address structural discrimination. An interim report published by the committee charged with its preparation adopts a definition of racism that encompasses its structural elements: ‘We understand racism to mean the power dynamics present in those structural and institutional arrangements, practices, policies and cultural norms, which have the effect of excluding or discriminating against individuals or groups, based on their identity’.⁷⁵ The committee’s interim report further notes: ‘Racism is embedded in structures, reflected and reproduced by institutions and experienced individually. This interplay between structure and institutions in the reproduction of racism, is referred to as “systemic racism”’.

The Maltese Anti-Racism Strategy sets out one of its two aims as being to confront racism in all its forms, individual, systemic and societal.⁷⁶ A number of strands of activity of relevance to the issue of structural discrimination are identified.

- Under the objective to tackle all forms of discrimination experienced by minority groups: the equality body will be supported to conduct equality reviews of current policy making, employment, and service provision systems with a view to identifying and preventing systemic discrimination; and public authorities will be proactive in putting in place equality systems, to a model developed by the equality body, to enable policy and provision to reflect the principles of equality, diversity, interaction, and participation.
- Under the objective to achieve planned and systematic approaches to confronting racism and advancing intercultural inclusion: each ministry will design an intra-ministerial anti-racism action plan addressing the policy making, employment and service provision functions of the ministry and their contribution to confronting racism and achieving intercultural inclusion.

In Portugal, the National plan to combat racism and discrimination 2021-2025 – Portugal Against Racism, acknowledges that despite the existing legal framework on non-discrimination, there are element of racism and discrimination rooted in Portuguese society that perpetuate structural discrimination:⁷⁷

The Government recognises that, despite the existing legal framework, racism and discrimination phenomena that violate fundamental rights enshrined in the Constitution of the Portuguese Republic continue to occur, based on stereotypes based on ideas, myths and theories founded on the alleged superiority of a race or a group of people of a certain ethnic origin or nationality, which generate direct and indirect discrimination, including from an intersectional perspective, and which reflect the historical processes that gave rise to them, such as slavery and colonialism, and which perpetuated models of structural discrimination.

A wide range of actions are identified with some capacity to contribute to addressing structural discrimination and its various elements, including:

- anti-discrimination training for public bodies, politicians at a local level, professionals, and front-office employees in public services;
- launch of an inquiry into the conditions, origins and trajectories of the population resident in Portugal;

73 German Federal Government (2017), *National Action Plan Against Racism*, p. 9.

74 German Federal Government (2017), *National Action Plan Against Racism*, p. 41.

75 See: Government of Ireland, Anti-Racism Committee (2022), *Interim report to the Minister for Children, Equality, Disability, Integration and Youth*, pp. 5-6.

76 See: Government of Malta (2021), *Anti-racism strategy 2021-2023*.

77 See: High Commissioner for Migration (2021), *National plan to combat racism and discrimination 2021-2025 – Portugal Against Racism*.

- random checks on agricultural facilities to ascertain whether there are phenomena of social exclusion and multiple discrimination;
- inclusion of actions to combat racism in municipal plans;
- identification and organisation of education resources that include content on diversity and non-discrimination;
- launch of special calls for investigative projects regarding the memory of slavery, colonialism and the historical presence of discriminated groups;
- raising awareness and knowledge of good practices in recruiting with more diversity;
- promotion of association building, and civic and political participation of discriminated groups; and
- support for the development of artificial intelligence systems to minimise risks of discrimination.

The Swedish national plan, *A comprehensive approach to combat racism and hate crime: National plan to combat racism, similar forms of hostility and hate crime*, published in 2017, includes some focus on structural racism.⁷⁸ This is posed in terms of the potential for racist actions to be unconscious, rather than always being based on an individual's political convictions. This plan further suggests that racism exists as part of the structures of society, which limits people's access to rights and opportunities, power and influence, and to point to the need to look beyond isolated incidents of racism to a broader context. An intersectional perspective is included in this understanding.

The plan identifies five strategic areas for action that should include a focus on this dimension: knowledge, education and research; coordination and monitoring; support for and more in-depth dialogue with civil society; strengthening preventive measures online; and a more active legal system. However, issues of implementation are pointed to in terms of the priority given to addressing the perpetrators of hate and to developing more knowledge, education and research on hate (or extreme ideologies). Action taken appears to be guided by a focus on those areas without a substantial risk of backlash.

Despite repeated commitments dating from 2002, some preparatory actions, and national and international prompting, there is no national action plan against racism at inter-federal level in Belgium. However, in 2022 the Brussels Capital Region adopted a set of recommendations that were the product of a series of conferences on combating racism that involved civil society associations, public and private stakeholders, and experts. There is some reference to addressing structural discrimination on the ground of racial or ethnic origin among the recommendations, including:

- To conduct a debate to clarify themes and concepts and in particular institutional racism, structural racism, on the notion of diversity, current antisemitism, on the association between race, culture and religion and the scope of universalism and differentialism; and
- Care must be taken in interpreting racism within a company, a sector or an area of life in society, taking into account its structural nature.

There are a range of plans, noted as relevant to this topic, that address discrimination more broadly or that address specific groups subject to racism. In particular, **policy strategies in relation to Roma** are evident across the Member States, which are current and respond to the invitation in the EU Roma strategic framework to prepare such policy strategies. In two Member States the current policy strategy in relation to Roma is reported as being at draft stage. Only six of the nineteen policy strategies reported that are targeted at Roma include reference to structural discrimination, and they include limited actions reflecting this focus.

The Croatian National Roma Inclusion Plan 2021-2027 identifies combating anti-Roma racism and discrimination as a specific objective, making reference to structural discrimination. It defines structural discrimination as: 'Systemic or structural discrimination is a form of discrimination that manifests itself

78 Government Offices of Sweden (2017), *A comprehensive approach to combat racism and hate crime: National plan to combat racism, similar forms of hostility, and hate crime*.

through inequalities arising from legislation, policy, and practice, not intentionally but as a result of a number of institutional factors in the preparation, implementation and revision of legislation, policy and practice'.⁷⁹ It includes a broad commitment to take action to combat multiple and structural discrimination against Roma, in particular Roma women and children, LGBTI+ Roma, Roma with disabilities, older Roma, stateless Roma or those moving to the EU, and to analyse and recognise the phenomenon of antigypsyism, raising awareness of its existence, the forms it can take and its harmful consequences.

The Czech Strategy of equality, integration and participation of Roma 2021-2030 uses terms such as 'structural disadvantages' or 'structural' antigypsyism, however, it does not elaborate on or define these terms, and does not bring forward any recommendations or actions to address such issues.

The German national Roma strategy 'Tackling Antigypsyism, Ensuring Participation', published in 2022, makes no explicit substantial reference to structural discrimination, but does acknowledge the possible existence of institutional procedures or policies that lead to the segregation of Sinti and Roma communities, as a contemporary manifestation of antigypsyism and references the proposal of the Federal Antidiscrimination Agency to commission a study of possible forms of institutional discrimination (e.g. in regard to housing or health).

The Hungarian National Strategy for Social Inclusion 2030 is noted as making reference to structural discrimination but, without defining it and principally in quoting different studies and stakeholder statements. It is a feature in the analysis but does not translate into the section on actions.

The Slovak Strategy for equality, inclusion and participation of Roma to 2030, published in 2021, includes the fight against anti-Roma racism as one priority area, and makes specific reference to structural discrimination. This is defined as disadvantage for a particular group that results from rules, regulations, procedures and behaviours in institutions and other social structures, pointing to the role played by established practices, procedures and standards in precluding access for the group. The strategy does not, however, include specific actions to address this, as this requires action plans for the particular fields covered by the strategy. There is a concern noted, however, as to policy implementation failure in relation to such strategies and any measures with potential to address structural discrimination, due to lack of political will and failure to allocate sufficient funding and secure the systemic approach required for implementation. Nonetheless, the Government adopted the related action plans for the strategy in 2022, that set out a wide range of measures to implement the strategy.

The Spanish National Strategy for Roma Equality, Inclusion, and Participation 2021-2030 includes a strand on equal opportunities and non-discrimination, with action lines on antigypsyism. The strategy notes the need to recognise antigypsyism as a structural phenomenon and to tackle this through proactive, positive action or special policies. The strategy identifies that the state should establish effective mechanisms and actions to combat the multiple and structural discrimination experienced by the Roma population, from an intersectional approach. However, the specific actions proposed do not appear to look beyond the application of existing regulatory frameworks and public policies on racist discrimination, which largely have an individual-level focus.

While the Portuguese National Roma Communities Integration Strategy 2013-2020 (amended to apply until 2022) does not reference structural discrimination, it does refer to the need for 'structural changes' and some actions could be seen as contributing to addressing structural discrimination, including: raising awareness on the deconstruction of stereotypes and combating discrimination; developing training on capacities of communities, interculturalism and non-discrimination; valorisation of intercultural mediation; and promotion of associativism and civic and political participation.

79 See: Government of Croatia (2021), *National Roma Inclusion Plan 2021-2027*, p. 45.

Likewise, the Swedish Coordinated and long-term strategy for Roma inclusion 2012-2032, adopted in 2012, while not referencing structural discrimination, emphasises a need to deal with structures that hinder or prevent access by Roma to their human rights, in particular the rights to education and work, and the need to deal with these structures. The strategy contains goals and measures related to education, employment, housing, health, social care and security, culture and language, and organisation of civil society.⁸⁰

Beyond these, Finland's National Roma Policy (ROMPO) 2018-2022 does not reference structural discrimination, but does refer to equality planning as required under the Non-Discrimination Act, with a commitment to promoting equality planning that takes into account the needs of Roma.⁸¹

Further **policy strategies of relevance that are targeted on particular groups** are noted. These include: policy strategies to address antisemitism (Austria), to address national minorities (Croatia), to address a range of groups, on the grounds of nationality, ethnic origin and racial origin, including Roma (Estonia), and addressing several groups in a National Policy on Social Integration and Reduction of Poverty (Greece). There is no reference to structural discrimination identified in these strategies.

More **general anti-discrimination strategies** are noted in a number of Member States. These include Croatia (the most recent plan covers 2017-2022, with a new one for 2021-2027 awaiting adoption); Estonia (covering 2016-2023); the Netherlands (published as an umbrella strategy in 2016); Poland (the most recent plan was concluded in 2016); and Slovakia (covering 2016-2019). There is an Action Plan for Promoting Non-discrimination in Lithuania but it has been criticised for not including specific measures to address discrimination on the ground of racial or ethnic origin, not being allocated adequate funding, and not being adequately monitored.

These general policy strategies are not found to reference structural discrimination. In some instances, despite not being referenced specifically, it is suggested that some of the measures in these plans do hold some potential to address structural discrimination. These include measures with a capacity to make visible and/or correct systems that discriminate against particular groups including: the use of situation testing; the use of anonymous job applications; curricular revision in the education sector; and research.

The situation in relation to policy strategies (on racism, on Roma, on a particular group, and of a broad anti-discrimination nature) and their coverage of structural discrimination on the ground of racial or ethnic origin, as identified by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination in January 2022, is set out in Table 2, below.

80 See: Swedish Government (2012), *Coordinated and long-term strategy for Roma inclusion 2012-2032*, Government communication 2011/12:56.

81 See: Finland, Ministry of Social Affairs and Health (2019), *National Roma Policy (ROMPO) 2018-2022*, p. 38.

Table 2: Relevant policy strategies and reference to structural discrimination reported⁸²

Country	Policy strategy on Racism	Reference to structural discrimination	Roma Policy Strategy	Reference to Structural Discrimination	Policy strategy targeting relevant group	Reference to Structural Discrimination	Broad anti-discrimination policy strategy	Reference to Structural Discrimination
Austria	No	N/A	Yes	No	Yes Antisemitism	No	No	N/A
Bulgaria	No	N/A	Yes	No	No	N/A	No	N/A
Belgium	No	N/A	No	N/A	No	N/A	No	N/A
Croatia	No	N/A	Yes	Yes	Yes National minorities	No	Yes	No
Cyprus	No	N/A	No	N/A	No	N/A	No	N/A
Czechia	No	N/A	Yes	Yes	No	N/A	No	N/A
Denmark	No	N/A	Yes	No	No	N/A	No	N/A
Estonia	No		No		Yes Several groups including Roma	No	Yes	No
Finland	Yes	Yes	Yes	No	No	N/A	No	N/A
France	No (being finalised)	No	Yes	No	No	N/A	No	N/A
Germany	Yes	Yes	Yes	Yes	No	N/A	No	N/A
Greece	Yes	No, though one axis addresses discrimination, stereotypes, and prejudice.	Yes	No	Yes (covers several groups)	No, though one axis addresses xenophobia and discrimination.	No	N/A
Hungary	No	N/A	Yes	Yes	No	N/A	No	N/A
Ireland	No (being finalised, interim report published)	Yes (interim report)	Yes	No	Yes Migrant Integration Strategy.	No	No	N/A
Italy	No	N/A	No	N/A	No	N/A	No	N/A

82 This table is based on information provided by the non-discrimination experts in each Member State from the European network of legal experts in gender equality and non-discrimination in January 2022.

TO NAME AND ADDRESS THE UNDERLYING PROBLEM: STRUCTURAL DISCRIMINATION ON THE GROUND OF RACIAL OR ETHNIC ORIGIN

Country	Policy strategy on Racism	Reference to structural discrimination	Roma Policy Strategy	Reference to Structural Discrimination	Policy strategy targeting relevant group	Reference to Structural Discrimination	Broad anti-discrimination policy strategy	Reference to Structural Discrimination
Latvia	No	N/A	No (in draft)	No (in draft)	No	N/A	No	N/A
Lithuania	No	N/A	No (in draft)	No (in draft)	Yes Action plan for Integration of Foreigners into Society 2018-2021, new plan in preparation.	No	Yes	No, but some actions relevant to structural discrimination but ground of racial or ethnic origin not addressed.
Luxembourg	No	N/A	No	N/A	No	N/A	No	N/A
Malta	Yes	Yes	No	N/A	No	N/A	No	N/A
Netherlands	No	N/A	Yes	No	No	N/A	Yes	No
Poland	No	N/A	Yes	No	No	N/A	No	N/A
Portugal	Yes	Yes	Yes	Not directly	No	N/A	No	N/A
Romania	No	N/A	Yes	No	Yes Antisemitism, xenophobia, radicalisation and hate speech	No	No	N/A
Slovakia	No	N/A	Yes	Yes	Yes National minorities & ethnic groups	No	No	N/A
Slovenia	No	N/A	Yes	No	No	N/A	No	N/A
Spain	No	N/A	Yes	Yes	No	N/A	No	N/A
Sweden	Yes	Yes	Yes	Not directly	No	N/A	No	N/A

3.2.3 Focus on positive action in policy strategies

Positive action has a key role to play in responding to and redressing the past impact of structural discrimination. It is required to address the unequal outcomes that are the marker of structural discrimination, and to reverse these in progressing the achievement of full equality in practice. Positive action is not an antidote to structural discrimination as it addresses the impact rather than the causes, but it is a necessary part of any strategy seeking to eliminate structural discrimination on the ground of racial or ethnic origin.

Equinet, in its work on positive action, notes that positive action ‘is a fundamental tool to fight against structural discrimination’, but stresses that ‘positive action does not solve problems and must therefore always be accompanied by solutions that remove the structural barriers to, for example, the labour market. It is crucial to work on both tracks, otherwise there will not be any impact’.⁸³

The EU Anti-Racism Action Plan notes the importance of positive action in this regard, in that it ‘can play an important role in redressing the lack of substantive equality in societies: formal equality alone may not address the specific needs of certain groups of people. Action can be taken to offset the disadvantages to which people with a minority racial or ethnic background are exposed’.⁸⁴ It encourages Member States to ‘adopt specific measures to avoid, or compensate for, disadvantages linked to discrimination on grounds of racial or ethnic origin where there is provision for protection’.⁸⁵

There is evidence of positive action measures across some of the strategies identified by the non-discrimination experts of the European network of legal experts in gender equality and non-discrimination. These measures are principally evident in measures targeted at Roma set out in national Roma strategic frameworks, though not noted in all of these.

These measures tend to focus on the fields of employment, training and education with a strong labour market and employability emphasis. In some instances, positive action is evident in the fields of healthcare, social inclusion and housing, and in relation to political participation. There is no systematic approach evident in seeking to ensure coverage of all dimensions of the unequal outcomes of situation, experience, voice and identity. The emphasis is, further, on addressing disadvantage rather than achieving equality.

Finland’s National Roma Policy is valuable in overtly making the link between positive action and the goal of substantive equality. One of the principles identified as underpinning the strategy is:

‘Specific measures and positive action targeted at Roma are needed in situations where Roma are disadvantaged compared with the rest of the population. Positive action means temporary measures targeted at persons or groups whose status is unequal. The aim of these measures is to achieve de facto equality or to prevent or remove disadvantages attributable to discrimination. The aim must be to achieve permanent improvements’.⁸⁶

In France, public policy faces a particular difficulty when it comes to positive action, as the concepts of race and ethnic origin are not recognised by French law, and cannot generate the construction of legal categories as the basis for public policy. In such a context, proxies have to be identified and made use of as possible.

83 Equinet (2021), *Exploring positive action as a means to fight structural discrimination in Europe*, Equality Law in Practice Working Group, pp. 8 and 81.

84 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘[A Union of Equality: EU anti-racism action plan 2020-2025](#)’, Brussels, 18.9.2020, COM(2020) 565 final, p. 21.

85 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘[A Union of Equality: EU anti-racism action plan 2020-2025](#)’, Brussels, 18.9.2020, COM(2020) 565 final, p. 23.

86 Finland, Ministry of Social Affairs and Health (2019), *National Roma Policy (ROMPO) 2018-2022*, p. 19.

3.2.4 Focus on intersectionality in policy strategies

There is some limited focus on intersectionality in these national strategies, mostly in the national Roma strategic frameworks. An intersectional focus, addressing diversity within the groups exposed to structural discrimination on the ground of racial or ethnic origin, is necessary for an effective and comprehensive elimination of such structural discrimination. Equinet notes a further gain in the innovation provoked by such an approach: 'The issue of intersecting grounds is a relatively recent focus for anti-discrimination and equality work. Yet, it holds a potential to challenge norms and stimulate innovation in the field of equality'.⁸⁷

The EU Anti-Racism Action Plan emphasises, in particular, that an 'intersectional perspective deepens understanding of structural racism, and makes responses more effective'.⁸⁸ It points to the importance of a focus on intersectional data in its commitments to new approaches on data collection.

The EU Roma strategic framework proposes that, in national Roma strategic frameworks

'Member States should ensure that their strategic frameworks cover all Roma on their territory and reflect the needs of diverse groups through an intersectional approach. They should bear in mind how different aspects of identity can combine to exacerbate discrimination. They should set quantitative and/or qualitative targets to ensure that diversity in terms of age, gender, sexual orientation, mobility and other personal characteristics is reflected'.⁸⁹

The Croatian National Roma Inclusion Plan 2021-2027 identifies that activities which help to combat multiple and structural discrimination against Roma will be undertaken, especially in relation to women and children in the Roma community, LGBTI+ Roma, Roma with disabilities, older Roma and stateless Roma, in achieving the objective of combating anti-Roma racism and discrimination.

Finland's National Roma Policy (ROMPO) 2018-2022 makes reference to multiple discrimination being taken into account as a cross-cutting action, and notes as an underpinning principle that 'the life situations of Roma women, men, various age groups as well as minorities involve special characteristics that need to be identified when planning measures promoting equality and inclusion'.⁹⁰

The Anti-Racism Strategy 2021-2023 of Malta commits to 'an intersectional approach, acknowledging the diversity within minority groups. Particular importance will be given to identifying and addressing intersectional discrimination and responding to the particular needs of groups at these intersections'.⁹¹ Intersectional discrimination is mentioned in the measure on underreporting.

The Spanish Roma Strategic Framework for Equality, Inclusion and Participation 20212030 addresses attention to those subgroups of the Roma population in which it notes conditions that increase vulnerability and for whom the risk of discrimination and social exclusion intersect, such as: sex, gender identity or expression, sexual orientation, disability status, migrant or refugee status, ethnicity, nationality, disease, race or age.

The Swedish 2016 national plan, 'A comprehensive approach to combat racism and hate crime: National plan to combat racism, similar forms of hostility and hate crime', notes that in the same way that

87 Crowley, N. (2016), *Innovating at the intersections: Equality bodies tackling intersectional discrimination*, Equinet, Brussels, p. 3.

88 European Commission (2020), Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, *'A Union of Equality: EU anti-racism action plan 2020-2025'*, Brussels, 18.9.2020, COM(2020) 565 final, p. 13.

89 European Commission (2020), Communication from the Commission to the European Parliament and the Council, *'A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion and Participation'*, Brussels, COM(2020) 620 final, p. 7.

90 Finland, Ministry of Social Affairs and Health (2019), *National Roma Policy (ROMPO) 2018-2022*, p. 20.

91 Government of Malta (2021), *Anti-racism strategy 2021-2023*, p. 9.

racism is structural, differences based on sex, disability and sexuality are structural too, and that these differences can interact and reinforce each other.

In a number of instances, the focus on intersectionality is present but confined to the ground of gender. The Hungarian National Strategy for Social Inclusion includes an explicit focus on Roma women in some of its measures. The Portuguese National Roma Communities Integration Strategy includes among its aims the promotion of equality between women and men in Roma integration measures.

The Irish National Traveller and Roma Inclusion Strategy includes a strong focus on gender, including some positive action measures targeted at Traveller and Roma women. However, it is noted that commitments made in relation to Traveller and Roma women in the Irish National Strategy for Women and Girls are limited, merely making reference to how it was intended to include a focus on Traveller and Roma women in the then forthcoming National Traveller and Roma Inclusion Strategy, rather than building an intersectional focus into the core actions of the strategy for women and girls itself.⁹² A similar approach is evident in the strategy for women and girls in relation to migrant women, with reference made solely to their inclusion in the Irish Migrant Integration Strategy. An intersectional focus, that includes the ground of racial or ethnic origin, needs to be applied across all policy strategies targeting groups experiencing inequality, just as an intersectional approach is required in policy strategies targeting the ground of racial or ethnic origin.

3.2.5 Review

Structural discrimination on the ground of racial or ethnic origin is only beginning to come on to the policy agenda at Member State level. The EU Anti-Racism Action Plan, given its specific encouragement to address structural racism, and within that structural discrimination on the ground of racial or ethnic origin, will drive further progress in this regard. Nonetheless, this is not a new concept, and progress must be deemed to be slow in its adoption. It will be important to sustain and build on the progress that has been made if this key issue for equality is to be adequately and effectively addressed across the EU.

The Netherlands and Sweden provide interesting case studies on the emergence of a policy concern to address structural discrimination that was driven by developments at Member State level. In the Netherlands, the issue of structural discrimination on the ground of racial or ethnic origin became a matter for public and political debate as a result of the Black Lives Matter protests in 2020 and the childcare benefits scandal in the same year, involving allegations of racial/ethnic discrimination by the Dutch Tax Agency. In Sweden, it was a Government report of a 2005 inquiry into structural discrimination that focused attention on the issue: *The blue and yellow glass house: Structural discrimination in Sweden*.⁹³

92 Department of Justice and Equality (2017), *National Strategy for Women and Girls 2017-2020: creating a better society for all*.

93 Swedish Government (2005), *The blue and yellow glass house: Structural discrimination in Sweden*, SOU 2005:56, 2005 with English translation, pp. 40-61.

The Netherlands:

The childcare benefits scandal in the Netherlands involved tens of thousands of parents being wrongly accused of fraud in relation to childcare benefits, with many of them forced into debt due to having to pay back the benefits. In some instances, children were placed in foster care as a result. While investigations are still ongoing, it has already emerged that risk profiles applied by the Dutch Tax Agency to detect fraud unlawfully used dual nationality and even origin as risk indicators. In May 2022, the Dutch Government acknowledged that there had been institutional racism in the Tax Agency.

This scandal sparked a wide range of initiatives including: removal of data on (dual) nationality from the Dutch Tax Agency benefits department computer systems; investigation into the use of such data by its other departments; training for Dutch Tax Agency Staff and staff of other relevant bodies; increased attention to the risk of indirect discrimination in the assessment of new legislation; referral by public authorities of complainants to local anti-discrimination bureaux to receive support when a complaint has been lodged with the Netherlands Institute for Human Rights (NIHR); and engagement by Government with the NIHR on how better use can be made of the investigative function of the NIHR and how public authorities might have policy measures examined by the NIHR from a compliance perspective.

Sweden:

The inquiry of the Swedish Government defined structural discrimination due to ethnicity or religion in terms of the rules, norms, routines, patterns of attitudes and behaviour in institutions and other societal structures that present obstacles to ethnic or religious minorities in achieving the same rights and opportunities available to the majority.

The inquiry conclusions emphasised the need for proactive measures by power holders to prevent discrimination and promote equality. One proposal was for a regulation to include an anti-discrimination clause in all national public contracts. A Regulation on Anti-Discrimination Conditions in Public Contracts (2006:260) was eventually adopted, but even though it can be understood to address structural discrimination, it is seen to be a watered-down version of the original proposal.

A key idea noted within the Glass House inquiry was that the discussion of structural discrimination needs to be brought down to the variety of measures that can be undertaken, rather than trying to determine a general all-encompassing solution. The idea is that law itself does not on its own lead to change, that research on its own does not lead to change, and that mobilisation on its own does not lead to change; however, much can be achieved when there is an interplay between law, research and mobilisation, such that structures can be challenged.

There is specific reference in only five Member States to structural discrimination on the ground of racial or ethnic origin in their current national action plans against racism (Finland, Germany, Malta, Portugal, Sweden). In a sixth instance, no focus on structural discrimination on the ground of racial or ethnic origin in the action plan is noted (Greece). In a seventh instance, an interim report indicates that the forthcoming action plan will include a focus on structural discrimination on the ground of racial or ethnic origin (Ireland). While there is no national (federal) action plan against racism in Belgium, a regional action plan does reference structural discrimination. Associated actions of relevance to the issue are noted in the five of the national action plans against racism and the regional plan that name the issue. This situation should improve as further action plans are published.

There is no coherence in the understanding of structural discrimination on the ground of racial or ethnic origin across these different action plans or in the framework of action that is engaged to address it. The various definitions tend to focus around the institutional element of structural discrimination. In only one case, that of Portugal, do the societal and historical elements secure some focus. The framework for action on the issue is limited in range and ambition and there is no evident strategy underpinning this. Strategy is key in effectively addressing a phenomenon as widespread, complex, and pernicious as structural discrimination.

In the other policy strategies reported on, structural discrimination was referenced in some national Roma strategic frameworks. This was the case in only six Member States, with the reference to structural discrimination experienced by Roma accompanied by action to address it in only two of these cases. In two further instances, while reference is not made to structural discrimination experienced by Roma, there were actions noted that would contribute to addressing this issue. This reflects a very limited engagement with the issue of structural discrimination on the ground of racial or ethnic origin.

The national experts identified implementation issues. There is a concern about the predominance of an understanding of discrimination on the ground of racial or ethnic origin as an issue at the individual level. Action is principally, therefore, guided by the need to overcome stereotypes and/or unconscious bias held by the individual, or to address the individual acts that exclude or disadvantage. This does not lend itself to a focus on structural discrimination, or, where the issue is acknowledged, to an effective response.

There are, further, some instances noted where terms such as ‘structural barriers’ is used, which is not underpinned by any adequate understanding of the term, nor accompanied by any conscious attention or will to address the phenomenon of structural discrimination. It is noted in one instance that the concern to address overt racism and hate speech and hate crime has taken precedence over investment in addressing the more hidden forms of structural discrimination that might be more controversial. This can lead to situations in which there might be recognition of the issue but a failure to act on it.

In many instances, there are more mundane, but equally pertinent barriers to policy implementation in this field. These include a lack of dedicated budget, absence of political will, inadequate administrative capacity, and lack of disaggregated data. A specific issue noted for some Member States lies in their federal nature, where combating discrimination does not fall within the exclusive competence of the Federal State, but is also a shared competence with the federated entities, which leads to fragmentation and barriers where multiple factors fall under the jurisdiction of different authorities or where coordination and agreement is difficult to secure. This is noted in particular for Belgium.

A good practice of interest in relation to data is noted in Belgium, in the work of the equality body, Unia, in partnership with the Equal Opportunities Team of the Federal Public Service for Justice, in a project co-funded by the Rights, Equality and Citizenship programme of the European Commission. A report entitled ‘Improving equality data collection in Belgium’ was published.⁹⁴ The project aimed to improve the collection and processing of equality data. The Unia website now includes a data hub with data on (in)equality and discrimination in Belgium,⁹⁵ freely accessible, compiled through input from civil society organisations and public institutions and through its own research.

In Estonia, the Estonia 2020 strategy and the Cohesive Estonia 2030 strategy, which cover a range of groups under the grounds of nationality, ethnic origin and racial origin, are informed by large scale population surveys commissioned by the Estonian Ministry of Culture every three or four years, covering a wide range of areas from education and the labour market to media and equal opportunities. However, while the results of the 2020 survey indicated inequalities on these grounds including those of a systemic nature, the Cohesive Estonia 2030 strategy is noted as not addressing structural discrimination or naming discrimination in any form, although an action plan is currently awaited.

The increasingly numerous decision-making systems that make use of artificial intelligence and algorithms, which can be powerful vectors of structural discrimination, is a new challenge to be addressed in relation to structural discrimination on the ground of racial or ethnic origin. The risk in such new technologies is

94 Unia (2021), *Improving equality data collection in Belgium*.

95 See the [Equality data hub](#) on Unia’s website.

recognised in the EU Anti-Racism Action Plan⁹⁶ and in the European Commission proposal for a Regulation on harmonised rules on artificial intelligence.⁹⁷

There are only a small number of actions in Member States' plans on this issue. These include: the Finnish Action Plan for Combating Racism and Promoting Good Relations between Population Groups, which commits to monitoring the impact of AI use on people's equality, 'The aim is to ensure that the operating models used by AI systems do not include direct or indirect discrimination',⁹⁸ and the Portuguese National Plan to Combat Racism and Discrimination which commits to supporting 'research on the development of artificial intelligence (AI) and awareness of algorithms, with a view to defining responses to the challenges presented by automated decision-making processes, in terms of discrimination'.⁹⁹

This reflects the findings of the Allen and Masters report. They emphasise the need for action on this issue at European and national level and point to the important role to be played by equality bodies in this field. Among other recommendations, they recommend that:

- at the European level, action to ensure that the independent oversight over the discriminatory effects of AI systems that equality bodies provide is adequately and securely resourced and that equality bodies are equipped with sufficiently broad powers to address the new challenges posed by AI; and
- at the national level, national authorities undertake a legal 'gap analysis' to understand how AI systems can be regulated to protect from and prevent breaches of human rights, with due regard to the principle of equality and non-discrimination, and to identify whether there is a need for legislative or administrative reform.¹⁰⁰

Provisions for positive action measures tend to be narrow in their construction in these policy strategies, emphasising employability and access to the labour market but not always capturing the full range of dimensions required across situation, experience, voice and identity. These measures appear to be designed to address disadvantage, which is important. However, it should be noted that this is a lesser ambition than that set out in the directives, where positive action is deemed to be required with a view to the achievement of full equality in practice. The link with equality and equality goals is missing in most instances. The provision made for positive action measures in these strategies, in the absence of any understanding of or action on structural discrimination, however, can only be understood as addressing the symptoms rather than the causes of this inequality.

Overall, the focus on intersectionality in these policy strategies remains underdeveloped, both in terms of its low level on the policy agenda, and the limited manner in which it is addressed. It is not uniformly addressed across the Member States. There is little shared understanding evident of the concept and its complexity. In some instances, the absence of any understanding of the term and its policy implications is noted.

There is a positive emphasis on gender as an intersectional dimension, sometimes linked to positive action measures addressing this intersection. The same emphasis rarely extends to the intersections with other grounds such as age, disability, religion or belief, and sexual orientation, and even less so when it comes to positive action measures targeting people at these intersections. It is further important that

96 European Commission (2020), *Commission white paper on artificial intelligence - A European approach to excellence and trust*, COM(2020) 65 final.

97 European Commission (2021), *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence systems (Artificial Intelligence Act) and amending certain Union legislative acts*, COM(2021) 206 final.

98 See: Finnish Ministry of Justice (2022), *An equal Finland. Government action plan for combating racism and promoting good relations between population groups*, p. 32.

99 See: https://ec.europa.eu/migrant-integration/news/portugal-national-plan-combat-racism-and-discrimination-2021-2025_en, p. 72, in Portuguese.

100 Allen, R., Masters, D. (2020), *Regulation for an equal AI: A new role for equality bodies, Meeting the new challenges to equality and non-discrimination posed from increasing digitisation and the use of artificial intelligence*, Equinet, pp. 24-26.

this focus on intersectionality works in both directions, being addressed in policy strategies targeting Black and minority ethnic groups, including Roma and Travellers, and being addressed in policy strategies targeting these other groups.

Issues of implementation, and implementation failure, as noted in Section 3.2.2 above, focus attention on the model for examining policy implementation developed by Matland.¹⁰¹ In his analysis of policies that invoke ‘highly salient symbols’, such as structural racism, he notes the risk of policy implementation failure, in a context where such policies face challenges of lack of clarity (ambiguity) and lack of agreement on policy framing and the means of implementation. Such a context clearly pertains in relation to structural racism, with the absence of a clear definition to shape action on the issue leading to what he refers to as ‘policy ambiguity’, and with the lack of agreement as to how best to make progress and as to what is required to address the issue, leading to what he refers to as ‘policy conflict’.

In contexts of high policy conflict and high policy ambiguity, Matland’s analysis points to the importance of action at the point of delivery. The symbol has been valuably established in policy at European level in terms of naming structural racism as the underlying problem. Attention in relation to policy implementation needs, therefore, to focus on the national, regional and local levels. Matland suggests the need to attend to the coalitional strength of actors at the local level to drive and secure policy implementation in such a context.¹⁰²

The European level also has a contribution to make in progressing implementation in this context. This involves addressing policy conflict, by enabling deliberation and agreement on the priority to be given to the issue of structural discrimination on the ground of racial or ethnic origin and on the most effective means of combating and addressing this structural discrimination. It also includes addressing policy ambiguity, by enabling clarity through deliberation and agreement on a shared understanding of structural discrimination, how it functions and its impact.

European-level actors need to deploy their capacity to enable policy implementation. The ongoing development of guidance materials will be important. The arenas established for dialogue and peer-support across the Member States have a role to play in deliberating and finding agreement in relation to policy implementation issues. The provision of resources and incentives through the appropriate funding channels can be valuable in stimulating attention to these issues at other levels. The monitoring of progress facilitates policy learning to further drive policy implementation.¹⁰³

101 Matland (1995), ‘Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation’, *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174.

102 Matland (1995), ‘Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation’, *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174, p. 168.

103 Matland (1995), ‘Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation’, *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174, p. 170.

4 Key drivers for action

4.1 Institutional infrastructure at national level

4.1.1 Introduction

An imperative to address structural discrimination on the ground of racial or ethnic origin, and a commitment to do so, has been established at European level through the EU Anti-Racism Action Plan in its commitment to address structural racism. In moving to a policy implementation focus, attention shifts to the national level, and further to the regional and local levels. The engagement and mobilisation of the institutional drivers at these levels to give practical expression to the commitment made at European level becomes key. At national level this is what can be called the national-level institutional infrastructure.

The importance of a national-level institutional infrastructure for the achievement of equality has been well established on the ground of gender, though less so on the other grounds such as racial or ethnic origin. The 1995 Beijing Platform for Action reflects this in establishing what it refers to as 'institutional mechanisms' for the advancement of women as one of its 12 areas of critical concern, which specifically include: to create or strengthen national mechanisms and other governmental bodies (Strategic Objective H1).¹⁰⁴ Action taken over the years, including in particular by the presidencies of the European Council with the support of the European Institute for Gender Equality (EIGE), has clarified a standard for such national mechanisms.

Such national mechanisms have been deemed key to shaping, developing and progressing laws, policies and programmes for the advancement of gender equality. The necessary conditions for an effective functioning of such national mechanisms are deemed to include: location at the highest possible level in the Government; institutional mechanisms or processes that facilitate the involvement of non-governmental organisations from the grassroots upwards; sufficient resources in terms of budget and professional capacity; and the possibility of influencing the development of all Government policies.¹⁰⁵

An effective response to structural discrimination on the ground of racial or ethnic origin requires an attentive and empowered national-level institutional infrastructure to drive policy implementation on this issue – in terms of leadership, coordination and collaboration. This institutional infrastructure needs to be coherent in its approach, in terms of a shared commitment to addressing such discrimination and a shared understanding of what this would involve. It needs to start from governmental institutions that give leadership for and have responsibility for this policy focus. In its design, it needs to involve coordination of relevant policy fields and to be cross-sectoral in engaging with other sectors, in particular civil society. Key actors in a cross-sectoral approach include equality bodies and civil society platforms. The private sector is usefully encompassed in such an infrastructure, often through social partnership structures.

4.1.2 Governmental bodies

Equality on the ground of racial or ethnic origin, the elimination of racism and the dismantling of structural discrimination on the ground of racial or ethnic origin requires a national-level institutional infrastructure akin to that developed on the ground of sex. This national-level institutional infrastructure would provide leadership, ensure a focus on the issue, enable coordination and collaboration in addressing it, and bring forward the policy tools necessary to address the issue. The institutional infrastructure starts from governmental bodies charged with such an agenda. It is beyond the scope of this report to review the

104 [Beijing Declaration and Platform for Action](#), Fourth World Conference on Women, UN, 1995, p. 85.

105 See: Council of the European Union (2006), [Review of the implementation by the Member States and the EU institutions of the Beijing Platform for Action - Indicators in respect of Institutional Mechanisms: Draft Council Conclusions](#), The Social Questions Working Party, SOC 483, 14376/2006, p. 4.

current situation in detail across the Member States, but an indication is provided in terms of a snapshot of the governmental bodies in place to deal with issues of racism.

There is no clear standard for a national-level institutional infrastructure in this field of combating racism. This is reflected in the diversity and limited nature of what the non-discrimination experts of the European network of legal experts in gender equality and non-discrimination identified. The governmental institutional infrastructure, giving leadership for and holding policy responsibility for these issues, noted by the experts predominantly has a broad and multi-ground responsibility in relation to equality and/or non-discrimination. At its best, in terms of institutional location, it takes the form of a dedicated ministry, given the influence such a location can exercise across the wider government. Examples of this include:

- Belgium: The Secretary of State for Gender Equality, Equal Opportunities and Diversity was formed in 2020 by the Federal Government. An Equal Opportunities Team was formed in 2016, and is part of the Federal Public Service for Justice since 2018, to promote federal equal opportunities policy and to support the Federal Minister or Federal State Secretary responsible for equal opportunities.
- France: There is the Minister for Equality between Women and Men, Diversity, and Equal Opportunities. There is also the Interministerial Delegation for the fight against racism, antisemitism and homophobia (DILCRAH), which coordinates Government action with regard to racism and antisemitism. Its activity has been focused on combating hate crime, racism on the internet and antisemitism.
- Germany: The Federal Government Commissioner for Migration, Refugees and Integration is appointed by the Federal Government, and has the rank of Minister of State with a role that includes to counteract racism.
- Ireland: There is the Department of Children, Equality, Disability, Integration and Youth. Within this Department, there is the International Protection, Integration and Equality Division, which is responsible for developing and promoting policy on equality across the grounds of anti-discrimination law, including the race and Traveller community grounds. This division coordinates relevant whole-Government strategies such as the Migrant Integration Strategy and the National Traveller and Roma Inclusion Strategy.
- Italy: A Department for Equal Opportunities forms part of the Presidency of the Council of Ministers. This Department coordinates and promotes action for equality of opportunity.
- Malta: There is the Ministry for Equality, Research and Innovation. This has a Human Rights Directorate with an Intercultural and Anti-Racism Unit that is responsible for anti-racism and intercultural inclusion policy development.
- Portugal: The Secretary of State for Citizenship and Equality, a department of the Portuguese Government, is accorded specific responsibility for issues related to equality and discrimination. The Secretary of State is a member the Presidency of the Council of Ministers.
- Spain: The Ministry for Equality is responsible for Government policy on equality. Within this, there is a Directorate General for Equal Treatment and Ethnic-Racial Diversity, responsible for policy coordination.

Another model is where equality and/or non-discrimination forms part of a ministerial brief. This approach does not appear to allow for the same level of influence as a full ministry, or to allow, as easily, for inter-ministerial coordination. This can, however, depend on the status, standing and resources of that part of the ministry holding this responsibility. Again, this tends to be a multi-ground approach, though not in all circumstances. In this regard, there is the example of:

- Denmark: The Ministry for Immigration and Integration is responsible for integration measures, and the Ministry for Justice has recently announced agreement on drawing up a national action plan against racism, though it is unclear if the Ministry for Justice is to play a coordinating role.
- Estonia: The Cultural Diversity Department of the Ministry of Culture is responsible for the development, coordination and monitoring of integration policy.
- Finland: The Department for Democracy and Public Law in the Ministry of Justice is responsible for tasks related to fundamental rights policy and legislation. Within this, the Unit of Autonomy

and Equality promotes equality, good relations between different ethnic groups and realisation of linguistic rights, and is in charge of the coordination and preparation of the Government Action Plan for Combating Racism and Promoting Good Relations between Population Groups.

- Greece: The Ministry of Justice, Transparency and Human Rights includes a General Secretariat for Human Rights, which convenes a National Council against Racism and Intolerance.
- Hungary: There is the Ministry of the Interior with a Secretary of State for Social Inclusion (Roma).
- Latvia: The Ministry of Culture is responsible for national policy in the field of social integration, facilitating the development of civil society, intercultural dialogue, promoting the integration of migrants, and policy measures concerning Roma, through its Society Integration Department.
- Lithuania: The Ministry of Social Security and Labour is responsible for the Action Plan for Promoting Non-Discrimination and the Action Plan for the Integration of Foreigners, with a Department of National Minorities responsible for coordination and implementation of measures to promote intercultural dialogue between different national minorities.
- Netherlands: The Ministry of the Interior has a coordinating role for anti-discrimination policies.
- Slovakia: The Ministry of Labour, Social Affairs and Family is formally responsible for Government policy on equality.
- Spain: The Ministry of Social Rights and 2030 Agenda is responsible for Roma policy.
- Sweden: The Ministry of Employment is responsible for discrimination and anti-racism.

Croatia and Poland present a slightly different model where dedicated offices or structures linked to Government play a role in policy development in the field of equality and non-discrimination. Again, issues of lack of influence on Government or inability to effectively coordinate different ministries could be at play.

- Croatia: The Office for Human Rights and the Rights of National Minorities is an expert body of the Government established by the Act of Government of the Republic of Croatia with a director, appointed by the Government, at the proposal of the Prime Minister. The responsibilities of the Office include to support and monitor implementation of the policies for the protection and promotion of human rights and the rights of national minorities, and examine the state of human rights and the rights of national minorities.
- Poland: The Office of the Government Plenipotentiary for Equal Treatment is located within the Ministry of Family and Social Policy, with the deputy minister appointed to the function. This represents a repositioning and weakening of the Office given that it was previously located in the Chancellery of the Prime Minister.

The multi-ground nature of many of these structures would require further examination of how this policy agenda is managed in a manner that ensures visibility of and policy attention to the ground of racial or ethnic origin.

Coordination across the different parts of government is an important element of, and function required for, this governmental institutional infrastructure. Coordination responds to the need for a coherent approach in combating racism and progressing equality on the ground of racial or ethnic origin, across the range of policy fields that must contribute to such goals. Combating structural discrimination in particular requires inter-agency and inter-ministerial coordination and collaboration.

The European Network Against Racism, in its previous work on national action plans against racism (NAPARs) emphasises that ‘a comprehensive strategy to tackle racism cannot operate in isolation from other government policies that might be relevant to achieving its objectives’ and that ‘NAPARs should make the appropriate links to other government agendas and departments, where crossover can be established. Mainstreamed and targeted actions should go hand in hand to be as efficient as possible’.¹⁰⁶

106 European Network Against Racism (2019), *Lessons for effective anti-racism policies: National Action Plans Against Racism*, p. 27.

There are positive exemplars of a governmental institutional infrastructure for coordination across Government ministries and agencies, although these do not cover all Member States. These include:

- France: Inter-ministerial Delegate for the fight against racism, antisemitism, and homophobia.
- Germany: The inter-ministerial working group for promoting democracy and preventing extremism has been accorded responsibilities in relation to coordination and implementation of the measures in the National Action Plan Against Racism.
- Hungary: The Inter-Ministerial Committee for Social Inclusion and Roma Affairs, coordinates Government activities promoting the social integration of people in extreme poverty, including Roma.
- Italy: UNAR, the equality body, serves as national focal point and plays a role in connecting the Ministries of Labour and Social Policies, the Interior, Health, Education, University and Research, and Justice alongside representatives of regional and local authorities and Roma, Sinti and Caminanti representatives.
- Lithuania: The Commission of the Government of the Republic of Lithuania on National Minorities has a mandate to strengthen inter-ministerial cooperation in coordinating state policy towards national minorities.
- Malta: A high-level inter-ministerial committee will be convened by the Human Rights Directorate and will include the equality body, under the anti-racism strategy, to ensure: a whole-of-Government approach to anti-racism and intercultural inclusion; mainstreaming of anti-racism and intercultural inclusion; and peer support, mutual exchange and stimulus for best practice.
- Netherlands: An inter-ministerial steering group on discrimination and racism serves to improve coordination of anti-discrimination policies between ministries.
- Portugal: The high-level inter-ministerial commission, which is responsible for analysing, monitoring and evaluating implementation of the anti-racism plan, is chaired by the Government member responsible for the Presidency area, and includes Government members responsible for internal administration, justice, public administration, education, work and housing.

Cross-sectoral collaboration has a particular contribution to make in combating racism, including structural discrimination on the ground of racial or ethnic origin, in bringing different sectors together behind common goals and agendas. Cross-sectoral collaboration with civil society organisations has a particular importance for its capacity to bring forward the voice and perspective of those exposed to structural discrimination and enable an engagement with policy makers.

The European Network Against Racism, in its previous work on national action plans against racism (NAPARs), has emphasised that ‘although the leadership behind the setting up of a NAPAR should come from governments, this should be done with the input and active participation of civil society organisations and representatives of the communities affected by racism’.¹⁰⁷

An institutional infrastructure for such collaboration, involving Government and civil society organisations, is evident in a number of instances. In four instances, they are broad in their composition, including labour market organisations (Finland, France, Latvia, Malta). In three instances, they are narrow in their focus, limited to a specific group exposed to racism (Czechia, Hungary, Spain). National institutional infrastructure includes:

- Bulgaria: The National Council for Cooperation on Ethnic and Integrational Issues is a consultative body to assist governmental policy on minorities, and coordinate dialogue between government and NGOs representing minorities. It oversees implementation of the national Roma strategic framework, and includes a Commission for Roma Integration.
- Czechia: The Government Council for Roma Minority Affairs is an advisory body to Government on strategies for Roma integration. The head of the Government presides over the Council.

107 European Network Against Racism (2019), *Lessons for effective anti-racism policies: National Action Plans Against Racism*, p. 28.

- Finland: The Advisory Board for Ethnic Relations is appointed by Government and involves registered associations representing immigrants and ethnic minorities, registered religious communities, labour market organisations and political parties represented in Parliament. This is a forum for dialogue, but can issue opinions, recommendations, and statements.
- France: The National Consultative Commission on Human Rights advises the Prime Minister and is consulted on all legislative reforms affecting human rights, with one of its committees publishing an annual report on racism and antisemitism. It is composed of representatives of all the main human rights and anti-racism NGOs, trade unions and branches of the public sector.
- Germany: The Forum against Racism was set up at federal level in 1998 to give non-governmental organisations and the Federal Government the chance to share information and to discuss racism and ideologies of inequality. The implementation of the national action plan against racism is discussed on a regular basis with the Forum against Racism.
- Greece: The National Council Against Racism and Intolerance has a role in designing policies to combat racism, supervising implementation of laws against racism, and promoting and coordinating activities among its members, and comes under the General Secretariat for Human Rights of the Ministry of Justice, Transparency and Human Rights.
- Hungary: The Roma Coordination Council is a monitoring body for inclusion policies; and the Consultation Council for Roma Affairs is a consultative and recommendation-making body, chaired by the Prime Minister and including other relevant ministers.
- Latvia: The intersectoral dialogue platform facilitates practical cooperation and discussion among institutions and organisations working in the realm of migrant integration, involving NGOs, public administration, municipal institutions and private entities. The Ministry of Culture set up a regional expert network on Roma integration issues to facilitate regular exchange of information among municipal experts and develop cooperation between the responsible ministry and the Roma community, with 18 municipalities involved in the network in 2020.
- Lithuania: A working group was established in 2020 by the Minister of the Interior to increase the effectiveness of the fight against hate crime and hate speech by bringing together public authorities and non-governmental organisations.
- Malta: An Anti-Racism Platform will be convened and supported by the Human Rights Directorate under the anti-racism strategy, composed of representatives from civil society, academia, and the social partners. This is to enable shared leadership for the implementation of the strategy, ongoing dialogue with key partners on the content, direction, and impact of the strategy, and critical reflection on its ongoing implementation.
- Netherlands: Committee of State on Discrimination, an advisory committee, instituted by the Dutch Government to advise on a particular issue and usually consisting of experts and persons who hold or held public office, is to be appointed.
- Slovakia: The Council of the Government of the Slovak Republic for Human Rights, National Minorities and Gender Equality is a forum for expert discussion, networking, and exchange of opinions between Government, NGOs and academia, with seven committees including one on national minorities and ethnic groups and one on the prevention and elimination of racism, xenophobia and other forms of intolerance.
- Spain: There is the State Council for the Roma People.

While underdeveloped in terms of its spread across the Member States and structure within Member States, there are exemplars for this governmental part of the national-level institutional infrastructure on addressing racism. However, even these exemplars have yet to be mobilised adequately behind addressing the issue of structural discrimination on the ground of racial or ethnic origin, given the lack of focus on this issue in policy strategies.

4.1.3 Equality bodies

Equality bodies with their broad mandate to promote equality and combat discrimination across a wide range of grounds, including the ground of racial or ethnic origin, are well placed to play a role in driving action to dismantle structural discrimination on the ground of racial or ethnic origin, in particular the institutional element of this. This potential has been recognised at European level in the standards in place for equality bodies.

The European Commission, in its Recommendation on standards for equality bodies, recommends that the competence of equality bodies to provide independent assistance to victims should include granting equality bodies the possibility to engage in or assist in litigation, in order to ‘address structural and systematic discrimination’ and that such ‘litigation could take place either in the body’s own name or in the name of the victims or organisations representing the victims’.¹⁰⁸

This focus on the potential contribution of equality bodies to addressing structural discrimination is mirrored in the standard developed for equality bodies by the European Commission against Racism and Intolerance (ECRI) of the Council of Europe. This recommendation states that the mandates of equality bodies should include the prevention and elimination of structural discrimination, that their promotion and prevention competences should include conducting inquiries in relation to both individual and structural discrimination, and that their litigation competences should include bringing cases of individual and structural discrimination before the courts in their own name.¹⁰⁹

Equinet, in its work on institutional racism, has identified how equality bodies work to address institutional racism across all their functions:

- Promotion and prevention: equality bodies make institutional racism visible and a focus for informed debate and action; they promote, inform, and support policies, programmes, and practices to dismantle institutional racism and to address its impact. They do this by undertaking research, promoting good practice, providing policy advice, and communication.¹¹⁰
- Litigation: equality bodies enable those exposed to institutional racism to challenge this; take own-initiative cases to challenge incidents of institutional racism, render the workings of and the impact of institutional racism visible through findings of discrimination, and build a culture of compliance among policy makers, employers, and service providers that would assist in dismantling institutional racism, through a critical mass of casework. They do this by providing legal advice and support, providing legal representation, acting as *amicus curiae*, and taking own-initiative cases.¹¹¹
- Decision-making: equality bodies render the workings of and the impact of institutional racism visible through findings of discrimination, secure action on instances of institutional racism in the orders made, and serve to dissuade those holding responsibility for institutional racism. They do this by hearing and deciding on cases, making recommendations and orders, and imposing sanctions that are effective, proportionate and dissuasive.¹¹²

There is an uneven engagement by equality bodies across the Member States with the issue of structural discrimination on the ground of racial or ethnic discrimination. While many equality bodies have been able to take action on the issue, thirteen equality bodies are noted as having little or no engagement with such issues. For those that have taken up the issue, there are barriers noted for these equality bodies in addressing it on the scale needed to make an impact. This could reflect the barriers, noted by Equinet,

108 European Commission (2018), Commission Recommendation of 22.6.2018 on Standards for Equality Bodies, COM(2018) 3850 final, p. 6.

109 ECRI (2017), ECRI General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level, adopted on 7 December 2017, pp. 4-6.

110 Crowley, N. (2021), *Tackling institutional racism: Realising the potential of equality bodies*, Equinet, p. 9.

111 Crowley, N. (2021), *Tackling institutional racism: Realising the potential of equality bodies*, Equinet, p. 17.

112 Crowley, N. (2021), *Tackling institutional racism: Realising the potential of equality bodies*, Equinet, p. 20.

to equality bodies taking up this issue, in particular of limited resources, and inadequate mandate and powers.¹¹³ A further problem of reluctance within the leadership of the equality body to taking up what can be a controversial issue was noted.

Equality bodies face particular challenges in gearing up to and engaging with issues of equality and non-discrimination in relation to artificial intelligence systems. Allen and Masters point to the need for equality bodies to: identify the resources they need in light of the unique challenges posed by AI; ensure that their individual mandates are sufficiently broad to address the new challenges; map the ways in which these new technologies can affect equality and non-discrimination principles within their states; and identify any legal gaps that need to be addressed in this regard. They emphasise the need for Member States to ensure they are able to respond adequately and appropriately to the challenges posed by artificial intelligence.¹¹⁴

There are instances of substantive and effective intervention by equality bodies on the issue. These encompass action with a focus on structural discrimination on the ground of racial or ethnic origin in: taking and supporting cases and issuing casework decisions; undertaking research and publishing reports; offering policy advice and making policy recommendations to government; and providing reports to international human rights monitoring bodies. It is noted, however, that the scale of endeavour can be too limited in some instances to achieve significant impact, primarily due to the limited resources made available to the equality body.

Exemplar equality bodies in this regard, identified by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination include: Unia in Belgium; the Irish Human Rights and Equality Commission in Ireland; the Netherlands Institute for Human Rights in the Netherlands; and the Non-Discrimination Ombudsman in Finland.

Belgium:

Unia, the Belgian equality body for the ground of racial or ethnic origin, has been particularly active on the issue of structural discrimination. It has undertaken work of conceptualisation in relation to racism that included defining structural racism in the following terms: 'Structural, institutional, authoritarian or systemic racism occurs at the level of society, institutions and the state. It manifests itself in discrimination or in highly stratified inequalities (for example, according to origin). It is more difficult to pinpoint as racism, but tends to be manifested by its consequences, even if the mechanisms that cause these consequences may remain diffuse'.¹¹⁵

Unia has undertaken research and prepared reports on the issue, with recommendations. It has done extensive work on data collection, such as developing its Diversity Barometer, which is a long-term, structural measurement tool to scientifically draw up an inventory of the behaviour (level of discrimination) and attitudes (level of tolerance) towards the different target groups protected by anti-discrimination laws, as well as the actual participation (level of participation) of these target groups in society. It is published every two years and analyses three sectors in turn – employment, housing and education. It has taken action to promote equality data collection with its initiative to improve the collection and processing of equality data in Belgium, described in section 3.2.5 above.

Ireland:

The Irish Human Rights and Equality Commission has also been active on this issue. In particular, it has used its power to invite organisations to undertake an equality review and prepare an equality action plan on both the race and Traveller grounds of the equal treatment legislation. An equality review involves an examination of an organisation's policies, procedures, practices and staff perceptions to

113 Crowley, N. (2021), *Tackling institutional racism: Realising the potential of equality bodies*, Equinet, pp. 23-24.

114 Allen, R., Masters, D. (2020), *Regulation for an equal AI: A new role for equality bodies, Meeting the new challenges to equality and non-discrimination posed from increasing digitisation and the use of artificial intelligence*, Equinet, p. 19.

115 See 'Understanding racism' on Unia's website.

assess their contribution to the situation of equality of opportunity within the organisation, alongside a review of the equality institutional infrastructure within an organisation. An equality action plan involves identifying those actions required to improve that situation of equality of opportunity, based on the review undertaken.¹¹⁶ The use of this power is still at an embryonic stage and it remains to be seen how the equality body will invoke its powers to ensure implementation of equality action plans. The Irish Human Rights and Equality Commission has also engaged in litigation on these grounds in cases that encompass a focus on structural discrimination, including as *amicus curiae*.

The Netherlands:

The Netherlands Institute for Human Rights is noted as being particularly and valuably active on the issue, starting a project to combat institutional racism in 2021. It has published a vision statement that sets out and explains the issue of institutional racism and identifies the steps that the Government should take to address it, developed an Assessment Framework for civil servants responsible for fraud detection, to inform good practice in preventing ethnic profiling in fraud investigations, and published a report on a 'human rights-based approach to combating institutional racism'.¹¹⁷ The Minister of the Interior recently announced a range of initiatives to combat unlawful ethnic profiling as a result of the work of the Netherlands Institute for Human Rights on the issue.

Finland:

The Non-Discrimination Ombudsman in Finland published research on 'Racism and discrimination – everyday experiences for People of African descent in Finland' in 2020.¹¹⁸ This identified discrimination at the institutional level, establishing institutional racism in a number of fields, including education, employment, and security services and law enforcement, and made recommendations to address those structures identified as reflecting institutional racism.

4.1.4 Civil society platforms

Civil society platforms play an important role in empowering representative organisations and breaking down the fragmentation that can afflict this sector. Such platforms, in this instance, involve organisations representative of those who are exposed to discrimination, including structural discrimination, on the ground of racial or ethnic origin, in creating shared spaces for deliberation and action on common issues. This is important in bringing forward the perspective of those exposed to racism and in providing a platform from which to articulate these perspectives with some influence.

There is limited evidence of such civil society platforms advocating on intercultural issues or issues related to racism. Some of these are deemed to be active on the issue of structural discrimination on the ground of racial or ethnic origin. However, they are more noted as being active in promoting discussion on issues around racism more broadly, though still holding potential for further evolution and impact. These include in:

- Belgium: A Coalition for an Inter-federal Action Plan Against Racism has been formed to advocate for the adoption of such a plan. It is made up of some 60 civil society organisations, and in its memorandum, stresses the importance of adopting a clear and constructed definition of structural racism and an intersectional policy analysis, as well as increasing the training of various individuals and bodies (including teachers) on structural and institutional racism.
- Estonia: The Equal Treatment Network, formed in 2013, includes NGOs working on equality and human rights across a wide range of groups including refugees and indigenous people, LGBTQI

116 Crowley, N. (2006), *An ambition for equality*, Irish Academic Press, p. 162.

117 See the [themes](#) section of the NIHR website.

118 Non-Discrimination Ombudsman (Finland) (2020), *Report of the Non-Discrimination Ombudsman: Racism and discrimination - everyday experiences for people of African descent in Finland*.

- people, disabled people, and women. The objective of the network is to support its members and cooperate on common interests in defending the value of equality.
- Greece: The Racist Violence Recording Network, has established a focus on structural discrimination as a result of issues identified as part of its recording.
 - Hungary: Roma and non-Roma civil society organisations convene in an informal platform to monitor implementation of the national Roma strategic framework and to issue civil society monitoring reports in relation to Roma. A Working Group against Hate Crime is focused on responses to hate crime against groups, including Roma.
 - Ireland: The Irish Network Against Racism, a network of 166 civil society organisations, conducts research, runs campaigns, makes policy submissions, conducts anti-racism training, and collects and records incidents of discrimination and ethnic profiling by the *Garda Síochána* (the Irish police force). Structural racism has been a sustained focus within these activities.
 - Netherlands: The Knowledge Platform for Inclusive Society conducts policy-oriented research and disseminates knowledge on issues of ethnic, cultural and religious diversity. While structural discrimination is not addressed as a theme, the platform has produced guidance for employers and municipalities on how to prevent discrimination, and a monitoring tool for municipalities to evaluate the living circumstances of different groups according to migration background.¹¹⁹
 - Romania: Two informal networks advocate on equality and non-discrimination, and one informal network advocates on migrant rights. All three refer to anti-racism, but have no focus on structural discrimination. The informal Anti-discrimination Coalition brings together NGOs working with people from all the protected grounds, and conducts strategic litigation and advocacy work on issues relevant to these grounds.
 - Slovenia: The Glas Ljudstva (Voice of the People) is a broad informal coalition of 103 CSOs. It put forward agreed proposals prior to the 2022 parliamentary elections that included proposals for the protection of Roma, of rights of migrants, and, more broadly, from discrimination.

Some models of interest are apparent. The Irish Network Against Racism, for example, seeks to find common strategies and policy positions, complement one another's work, and offer cross-community solidarity across its member organisations. Its concerns include to develop collective cohesive responses to the various forms of racism (including structural) and progress a society free of racism.

The Equal Treatment Network in Estonia takes a multi-ground approach with a membership covering grounds of racial or ethnic origin, gender, disability, age, and sexual orientation, and is concerned with protecting the rights of these groups. The network seeks to support its members, cooperate in finding common interests, and speak up jointly to advance these interests. In this, it collaborates with national institutions to better follow and value the principle of equal treatment.

The situation in relation to the national-level institutional infrastructure active on the issue of structural discrimination on the ground of racial or ethnic origin (governmental institutional infrastructure, coordination and cross-sectoral structures, equality bodies and civil society platforms) and issues pertaining to these, as identified by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination in January 2022, is set out in Table 3, below.

119 Knowledge Platform for Inclusive Society (2021), *Neighbourhood monitor*.

Table 3: Institutional infrastructure reported at national level¹²⁰

Country	Dedicated Governmental Institutional Infrastructure addressing Issues of Racism	Governmental Coordination & Cross-sectoral Structures	Equality Body Active on Structural Discrimination	Civil society platform active on Structural Discrimination	Issues
Austria	No	No	No	No	
Belgium	Secretary of State for Gender Equality, Equal Opportunities and Diversity. Equal Opportunities Team, FPS Justice.	No	Research, reports, and recommendations. Data collection initiatives.	Coalition for an Inter-federal Action Plan Against Racism	
Bulgaria	No	Cross-sectoral: National Council for Cooperation on Ethnic and Integrational Issues.	No	No	No focus on structural discrimination. Barriers of institutional culture in this regard.
Croatia	Office for Human Rights and the Rights of National Minorities.	No	Annual report.	No	There is, to-date, a lack of activity by the institutions on the issue.
Cyprus	No	No	Not currently. Previously, conducted investigations with recommendations.	No	Leadership is needed for an equality body focus on this issue.
Czechia	No	Cross-sectoral: Government Council for Roma Minority Affairs.	No	No	
Denmark	Ministry of Foreigners and Integration. Ministry of Justice.	No	Research and reports.	No	
Estonia	Ministry of Culture, Cultural Diversity Department.	No	No	Equal Treatment Network.	
Finland	Ministry of Justice, Department for Democracy and Public Law.	Cross-sectoral: Advisory Board for Ethnic Relations.	Research study. Communications work.	No	

120 This table is based on information provided by the non-discrimination experts in each Member State from the European network of legal experts in gender equality and non-discrimination in January 2022.

TO NAME AND ADDRESS THE UNDERLYING PROBLEM: STRUCTURAL DISCRIMINATION ON THE GROUND OF RACIAL OR ETHNIC ORIGIN

Country	Dedicated Governmental Institutional Infrastructure addressing Issues of Racism	Governmental Coordination & Cross-sectoral Structures	Equality Body Active on Structural Discrimination	Civil society platform active on Structural Discrimination	Issues
France	Minister of Equality between Women and Men, Diversity, and Equal Opportunities.	Coordination: Inter-ministerial Delegate for the Combat of Racism, Antisemitism, and Homophobia. Cross-sectoral: National Consultative Commission on Human Rights.	Reports and recommendations. Guidance. Litigation (amicus curiae).	No	The equality body is the only institution addressing structural discrimination. Lack of resources to pursue this issue on a wider scale, beyond integrating the issues in its analytical framework in the claims it investigates, the observations it presents before court and the reports it produces.
Germany	Federal Government Commissioner for Migration, Refugees and Integration.	Coordination: Inter-ministerial working group for promoting democracy and preventing extremism. Cross-sectoral: Forum Against Racism.	Survey initiatives. Annual report.	No	
Greece	Ministry of Justice, Transparency and Human Rights, General Secretariat for Human Rights.	Cross-sectoral: National Council Against Racism and Intolerance.	No	Racist Violence Recording Network.	
Hungary	Secretary of State for Social Inclusion (Roma) within the Ministry of Interior.	Coordination: Inter-Ministerial Committee for Social Inclusion and Roma Affairs. Cross-sectoral: Consultation Council for Roma Affairs. Roma Coordination Council.	Not currently. Previously, ex-officio cases on Roma, and ESF funded research on discriminatory mechanisms at municipal level.	Working Group against Hate Crime. Informal platform of Roma and non-Roma civil society organisations.	Structural discrimination not on the agenda. Leadership need for equality body to focus on this issue. Imperative on equality bodies with a decision-making function to be reactive and, thus, unable to use full range of powers due to scarce resources. Lack of meaningful engagement by the authorities with the platform working on Roma issues.
Ireland	Department of Children, Equality, Disability, Integration and Youth	No	Inviting public bodies to undertake equality reviews and action plans. Casework (<i>amicus curiae</i>).	Irish Network Against Racism	Lack of critical mass of casework by the equality body.

Country	Dedicated Governmental Institutional Infrastructure addressing Issues of Racism	Governmental Coordination & Cross-sectoral Structures	Equality Body Active on Structural Discrimination	Civil society platform active on Structural Discrimination	Issues
Italy	Department for Equal Opportunities.	<i>Coordination:</i> UNAR, equality body, as hub for Ministries on Roma issues.	No	No	Anti-discrimination is noted as having only a marginal focus within government policies.
Latvia	Ministry of Culture, Society Integration Department.	<i>Cross-sectoral:</i> Intersectoral Dialogue Platform. Regional expert network on Roma integration issues.	No	No	
Lithuania	Ministry of Social Security and Labour Department of National Minorities.	<i>Coordination:</i> Commission of the Government of the Republic of Lithuania on National Minorities. <i>Cross-sectoral:</i> Working group on hate crime and hate speech, with public authorities and NGOs.	Survey initiatives.	No	
Luxembourg	No	No	No	No	
Malta	Ministry for Equality, Research and Innovation, Human Rights Directorate, and Intercultural and Anti-Racism Unit.	<i>Coordination:</i> High-level inter-ministerial committee to be convened. <i>Cross-sectoral:</i> Anti-Racist Platform to be established under the Anti-Racism Strategy.	No	No	
Netherlands	Ministry of the Interior, coordinating role on anti-discrimination policies. National Coordinator Against Discrimination and Racism appointed 2021. National Coordinator for Combating Antisemitism, appointed 2021.	<i>Coordination:</i> Inter-ministerial steering group on discrimination and racism to improve coordination of anti-discrimination policies. <i>Cross-sectoral:</i> Committee of State on Discrimination to advise on this issue, to be appointed.	Casework recommendations. Reports and policy recommendations.	The Knowledge Platform for Inclusive Society.	Significant recent development in governmental infrastructure noted.
Poland	Government Plenipotentiary for Equal Treatment	<i>Coordination:</i> Previously, a Council for Countering Racial, discrimination, Xenophobia and Related Intolerance, advised Council of Ministers, but abolished in 2016.	Casework recommendations. Policy advice recommendations relevant to the issue.	Previously, Coalition for Equal Opportunities campaigned on equal treatment legislation but no longer active.	Government Plenipotentiary for Equal Treatment should have developed a 'National Programme for Equal Treatment' and submitted it to the Council of Ministers by this point, but has not done so since the previous programme ended in 2016.

TO NAME AND ADDRESS THE UNDERLYING PROBLEM: STRUCTURAL DISCRIMINATION ON THE GROUND OF RACIAL OR ETHNIC ORIGIN

Country	Dedicated Governmental Institutional Infrastructure addressing Issues of Racism	Governmental Coordination & Cross-sectoral Structures	Equality Body Active on Structural Discrimination	Civil society platform active on Structural Discrimination	Issues
Portugal	Secretary of State for Citizenship and Equality.	<i>Coordination:</i> High-level inter-ministerial commission.	No	No	
Romania	No	No	No	Two informal networks advocating for equality and non-discrimination and one informal network on migrant rights.	
Slovakia	Ministry of Labour, Social Affairs and Family formally responsible for Government policy on equality.	<i>Cross-sectoral:</i> Council of the Government of the Slovak Republic for Human Rights, National Minorities and Gender Equality.	Reports, including to international human rights bodies.	No	Lack of use of strategic litigation powers by the equality body.
Slovenia	No	No	Casework decisions. Policy recommendations to Government.	Glas Ljudstva (Voice of the People), a broad informal coalition.	
Spain	Ministry for Equality, responsible for government policy on equality, with a Directorate General for Equal Treatment and Ethnic-Racial Diversity, responsible for policy coordination. Ministry of Social Rights and 2030 Agenda, responsible for Roma policy.	<i>Cross-sectoral:</i> State Council for the Roma People.	Recommendation adopted on measures to prevent racism and related intolerance in the field of education, which recognises education as a key tool in understanding the structural nature of racism.	No	
Sweden	Labour Ministry responsible for discrimination and anti-racism.	No	Research work. Guidance on statutory equality duties.	No	Lack of critical mass of casework by the equality body. Limited civil society advocacy or influence to secure policy implementation.

4.1.5 Review

There is an uneven development in the scale and nature of the governmental institutional infrastructure on the issue of racism evident across the Member States. Such institutional infrastructure as is in place is limited in some Member States. This situation reflects the absence of setting and monitoring any standard in this regard, such as that which has evolved in relation to gender equality following agreement on the Beijing Platform for Action.

Influence is one important measure of the effectiveness of the governmental institutional infrastructure that is in place. Issues of influence are evident in the choice to have a dedicated institution, such as a ministry responsible for equality, or for the issue to be part of an institution with other and wider responsibilities. Issues of influence further arise, in the latter context, in the choices made as to the scale, location, and seniority of the leadership of the department that is given responsibility for this issue within the institution.

In a number of instances, the institutional infrastructure reported appears somewhat distant from the key decision-making locations in Government, with the potential for limited influence on such decisions. This focus on influence is particularly relevant in some specific instances, including, for example, Poland, where the Office of the Government Plenipotentiary for Equal Treatment has the function to develop a 'National Programme for Equal Treatment' and submit to the Council of Ministers, but has not actually done so since the previous programme expired in 2016.

Coordination of action on racism is another important measure of effectiveness of the governmental institutional infrastructure that is in place. There are positive examples of inter-ministerial structures with a focus on the issue of racism. However, they are few in number with exemplars noted only in France, Germany, the Netherlands, Portugal, and Malta (in development) on the broad issue of racism, and, more specifically, in Hungary on Roma and in Lithuania on national minorities.

Structures for collaboration with civil society with a broad focus on racism, ethnic relations or human rights are equally limited. Such examples are evident in Finland, France, Germany, Greece, Latvia, Netherlands, Slovakia, and, most recently, Malta (in development). It is of interest that labour market organisations feature as partners in four of these, alongside civil society organisations directly focused on issues of racism (Finland, France, Latvia, and Malta). Structures for collaboration with civil society limited to a specific focus on Roma issues are evident in Czechia, Hungary and Spain.

However, the focus on structural discrimination on the ground of racial or ethnic origin within this governmental institutional infrastructure is not evident to any significant extent, particularly in a context of limited focus on this issue within the relevant policy strategies. There is a challenge to engage this institutional infrastructure with the commitment to this issue set out in the EU Anti-Racism Action Plan, as well as to further develop its design.

This engagement and further growth should be assisted through the development of national action plans against racism across the Member States in response to the encouragement of the EU Anti-Racism Action Plan to have such action plans in place by the end of 2022. However, further initiative could be required for an issue such as structural discrimination on the ground of racial or ethnic origin in order to secure some focus on the agendas and some priority for it in the actions of this institutional infrastructure.

New energy and new impetus are needed in many instances for this engagement and growth required in governmental institutional infrastructure. The Netherlands, Germany and Malta evidence such new energy and impetus in a positive manner, with significant recent developments in governmental institutional infrastructure identified.

Netherlands:

Alongside the responsibilities of the Ministry of the Interior and the role of the inter-ministerial steering group, a National Coordinator Against Discrimination and Racism and a National Coordinator for Combating Antisemitism were appointed in 2021, and a Committee of State on Discrimination is to be appointed with an advisory function to Government, composed of experts on the issue along with current and former office-holders.

Germany:

The Independent Commissioner against Racism and the Federal Commissioner on Antigypsyism were appointed in 2022. The coalition partners of the Federal Government, in their 2021 coalition agreement, underlined their commitment to create a relevant legal framework that could address structural discrimination, by introducing a Federal Participation Act. In 2020, the Federal Government set up a Cabinet Committee for the fight against racism and right-wing extremism, which presented a catalogue of 89 specific measures, including: protection of and support for victims of racist discrimination; sustainable structures for the fight against racism; improved cooperation between the police, the judicial system and civil society; prevention; political education; and more empirical research on racism in society. EUR 1 billion has been allocated to the implementation of these measures over the period between 2021 and 2024.

Malta:

The first ever anti-racism strategy was launched by the Ministry for Equality, Research and Innovation in 2021. This will lead to new institutional infrastructure with a commitment to establish: a high-level inter-ministerial committee for a whole-of-Government approach, mainstreaming and peer support; an anti-racism platform composed of representatives from civil society, academia and the social partners, to enable shared leadership for the implementation of the strategy; ongoing dialogue; and critical reflection on its ongoing implementation. Further coordination will ensue from the preparation by each ministry of its own anti-racism action plan based on a common template prepared by the Human Rights Directorate of the Ministry.

Equality bodies emerge as actors of some potential in addressing the issue of structural discrimination on the ground of racial or ethnic discrimination, particularly its institutional element. The work done by equality bodies on the issue is broad and encompasses undertaking research, preparing reports, making policy recommendations to government, litigation, *amicus curiae* interventions, casework recommendations, promotion of guidance, communications work, undertaking equality reviews, and work on equality data.

However, 13 equality bodies are not active on this issue. A key impediment is the lack of adequate resources, but there are also barriers in the lack of appropriate powers and competences, and limitations in leadership. The work done is largely dominated by action in the one field of undertaking research, preparing reports and making policy recommendations to government. This is followed by action in litigation, *amicus curiae*, and casework recommendations.

Few civil society platforms, bringing representative associations together to join forces in addressing the issue of racism, are identified – such activity is reported in only eight Member States. Some platforms have been formed in response to a national action plan against racism, national Roma strategic framework or in seeking such a policy strategy. Some are formal and other informal in nature. Most identify campaigning and advocacy as their primary function, others identify recording of racism, research and knowledge development, mutual support, and monitoring relevant policy strategies as their primary function. Currently, few of these directly address structural discrimination on the ground of racial or ethnic origin. A lack of meaningful engagement by the national authorities with such civil society platforms is noted as an issue affecting their potential and impact. Limited access to resources adequate for forming and operating an effective platform is a barrier to their formation and functioning.

In the context of the significant policy implementation challenge inherent in seeking to move from the marker on structural racism put down at European level by the EU Anti-Racism Action Plan to action at Member State level, the apparent weakness of the institutional infrastructure on racism at national level and its limited focus on structural discrimination on the ground of racial or ethnic origin is of concern.

This concern is emphasised if we consider Matland's analysis of progressing policy implementation in the context of policies that invoke 'highly salient symbols', such as structural racism, given the policy conflict and policy ambiguity that these must confront. Matland, noting the importance of such 'symbolic' policies, stresses an imperative for coalition building at the policy delivery level as key in securing policy implementation. He suggests that the coalitional strength of actors who control resources at this policy delivery level determines the policy outcome.¹²¹

There remains a challenge to mobilise and enable this coalitional strength at national level to address structural discrimination on the ground of racial or ethnic origin. Such coalitions will inevitably involve governmental institutions, equality bodies and civil society platforms.

At national level, these various actors need, in many cases, to be further strengthened, engaged and resourced. A more uniform development is required of the necessary governmental institutional infrastructure, with sufficient influence to secure a focus on structural discrimination on the ground of racial or ethnic origin and the capacity to coordinate a response to this. A higher standard is required in the conditions created for equality bodies to enable them to realise their potential in addressing structural discrimination. Civil society platforms addressing racism need to be stimulated and resourced in order to bring forward the perspective and voice of those exposed to this issue with some influence and, through this, to focus policy attention on structural discrimination.

At a European level, steps need to be taken to enable necessary coalition building at the national, regional and local levels to secure policy implementation on this issue. This includes standard setting for the required national-level institutional infrastructure, stimulation for and support of the development of the necessary institutional infrastructure at Member State level, and resourcing for such coalitions to function effectively, using the appropriate funding mechanisms available.

121 Matland (1995), 'Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation', *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174, p. 168.

5 Case law

5.1 Introduction

As noted in Section 3.1.2 above, there are no provisions in national legislation reported by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination that could be identified as specifically addressing structural discrimination on the ground of racial or ethnic origin, in any Member State. This mirrors the situation with regard to the European Union equal treatment directives. This provides an unpromising starting point for any case law specifically in relation to the issue of structural discrimination on this ground.

However, there are provisions in the equal treatment directives and in equal treatment legislation at national level of a nature that enable some responses to structural discrimination to emerge in case law. These provisions, as noted in Section 3.1.2 above, include, in particular provisions in relation to indirect discrimination, and, in some instances, the breadth of definition provided for direct discrimination in equal treatment legislation.

The absence of specific provisions in national legislation in relation to structural discrimination likewise means that complaints processes and the imposition of remedies or sanctions suitable and adequate to this form of discrimination are unlikely to be widely available. Again, as noted in Section 3.1.2, there can be provisions whereby equality bodies with decision-making functions are empowered with the competence to make orders for action by respondents found to have discriminated, which can then be relevant to addressing structural discrimination.

5.2 Case law on structural discrimination

With two limited and specific exceptions, in France and the Netherlands, there is no case law identified by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination that explicitly addresses the issue of structural discrimination on the ground of racial or ethnic origin. This situation flows directly from the lack of specific provisions in legislation to define and prohibit this phenomenon in a manner that would provide a basis for such an explicit focus. It is further noted that, just like policy makers that are wedded to a focus on the individual act of discrimination, the courts, too, can be reluctant to acknowledge that discrimination may not only be at the level of the individual act, which can lead to their interpretation of indirect discrimination being on such an individual basis that it leaves little room to take an institutional perspective.

France:

A 2019 decision of the Paris Labour Tribunal, in accordance with a decision of the Defender of Rights (the equality body), found systemic discrimination against migrant workers in a case relating to degrading working conditions of illegal migrant workers on a construction site.¹²² A sociological analysis of the management of the labour force in the construction industry was admitted in evidence, that allowed the conclusion that a system of employment and management organised around discriminatory practices had created an ethnic hierarchy of rights and functions on the construction site. The court found that the distribution of work on the ground of origin, imposing the most difficult and degrading work on undocumented Malian workers, was at the core of the work organisation. It found that abusive treatment of undocumented workers constituted discrimination and that such practices, based on

122 Labour Tribunal of Paris, 17 December 2019, No. 17/10051, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=30907.

racial distribution of work and racist management in the construction industry, were reflective of systemic discrimination.¹²³

The Netherlands:

A Roma couple, whose baby had been taken into foster care immediately after birth as a child protection measure, brought a case. One of the reasons for the measure was that the couple did not have a fixed address. The couple argued that this lack of a permanent address was linked to their lifestyle as Roma, and that the requirement of having a fixed address enabled the taking away of babies born to Roma parents on a structural basis. In their view this amounted to institutional discrimination (the term used by the applicants and the courts). The courts (the district court followed by the Court of Appeal) did not find institutional discrimination. Instead they ruled that the child protection measure had been justified by the individual circumstances of the couple. The district court stated, however, that ‘the possibility of institutional discrimination could not have been excluded if, in the policy of the child protection service, the sole lack of a permanent address had been sufficient reason to allow children being taken away from their parents’.¹²⁴

Case law of relevance to structural discrimination on the ground of racial or ethnic origin, without explicitly addressing the concept, is found. This is reported in only a small number of jurisdictions: 11 Member States. This case law is limited in extent and could not yet be considered a body of case law adequate to building an effective response to structural discrimination.

Such case law is most prevalent in relation to the most visible forms of structural discrimination, in particular issues of Roma and Traveller segregation and of ethnic profiling by the police. Examples of case law of relevance to structural discrimination, addressing Roma and Traveller segregation, include:

Croatia:

In 2003, a group of Roma students initiated judicial proceedings claiming discrimination and segregation in primary education. All the children had been placed in separate classes because of their insufficient knowledge of Croatian language, without clear criteria, and this was well established practice. After all domestic remedies had been exhausted, the students filed an application before the European Court of Human Rights (ECtHR). In March 2010, the Grand Chamber of the ECtHR issued a judgment finding discrimination in that Croatian law did not provide a clear and specific legal basis for placing children lacking an adequate command of Croatian in separate classes, and that the tests used to decide whether to assign pupils to Roma-only classes had not been specifically designed to test their command of that language.¹²⁵

Greece:

In the 2012 case of *Ioanna Sampani and Others v. Greece*,¹²⁶ filed by 140 Roma, the European Court of Human Rights (ECtHR) found discrimination in that the continuing educational segregation of Roma children in a Roma-only ghetto school constituted a violation of Article 14 of the European Convention on Human Rights, in conjunction with Article 2 of Protocol No. 1. This case occurred in spite of the judgment of 5 June 2008 in the case of *Sampanis and Others v. Greece*, when the ECtHR found a violation through the initial exclusion from school of Roma children living in the Psari settlement of Aspropyrgos and their subsequent segregation in a ghetto school. Subsequently, the *Lavida and Others v. Greece* judgment,¹²⁷ issued in May 2013, again confirmed as discriminatory the segregation

123 See Flash report : <https://www.equalitylaw.eu/downloads/5054-france-labour-tribunal-of-paris-17-december-2019-n-17-10051>.

124 District court (*Rechtbank Midden-Nederland*), 25 October 2017, ECLI:NL:RBMNE:2017:6780 and Court of Appeal Arnhem-Leeuwarden (*Gerechtshof Arnhem-Leeuwarden*) 9 July 2019, ECLI:NL:GHARL:2019:5666.

125 European Court of Human Rights, *Oršuš and Others v. Croatia*, Application No. 15766/03.

126 European Court of Human Rights, *Sampanis and Others v. Greece*, Application No. 32526/05, *Sampanis and Others v. Greece*, Application No. 59608/09.

127 European Court of Human Rights, *Lavida and Others v. Greece*, Application No. 7973/10.

of Roma pupils in Sofades in a ghetto school, with the non-Roma pupils attending two other schools. Despite these ECtHR rulings, Greece has failed to address this ongoing discrimination against Roma schoolchildren. After the judgment in relation to the Aspropyrgos ghetto school, the school was closed down in 2014, whereas in Sofades the issue has not been resolved at all, and there have been no efforts to integrate the Roma children into general education provision.

Hungary:

In 2009, the Chance For Children Foundation initiated an *actio popularis* lawsuit against the Ministry of Human Capacities for systemic segregation of Roma pupils. The Budapest Regional Court concluded that the Ministry had violated the requirement of equal treatment in relation to Roma pupils in 28 primary schools.¹²⁸ The Metropolitan Appeals Court, acting as the second instance court, agreed that the Ministry's failure to take sufficient action against the widespread segregation, that it had been aware of, had amounted to a violation of the requirement of equal treatment.¹²⁹

Ireland:

In a 2007 case, a Traveller man, represented by the Equality Authority (the equality body at the time), successfully challenged a social welfare policy that was found to directly discriminate on the Traveller community ground under the Equal Status Acts.¹³⁰ Travellers who applied for a social welfare payment (supplementary welfare allowance) in Dublin were required to attend a segregated service in the city centre. The Equality Tribunal (the tribunal hearing such cases at the time) ordered compensation and directed that the complainant be paid at his local health centre or any other venue open to non-Travellers. The respondent was directed to ensure that all Travellers could access payments in the same manner as members of the settled community.

Slovakia:

The Centre for Civil and Human Rights initiated an *actio popularis* lawsuit against a primary school in a village for educating Roma pupils attending the school in segregated classrooms. On 30 October 2012, the Regional Court in Prešov upheld the decision of the first instance court and ruled that the school had discriminated against Roma children by teaching them in separate classrooms without reasonable justification. In its reasoning, the court addressed the wider societal context, implying long-term failures of primary schools and other relevant state institutions to introduce principles of inclusive education as a counterbalance to the existing segregation and to ensure full realisation of the right to education for every child. The court presented its views on why segregation is unacceptable in a democratic society and on the importance and benefits of inclusive education in general. The decision is generally considered to be groundbreaking in Slovakia.¹³¹

In another case, three Roma children brought a claim in relation to being educated at a primary school in special classes for children with mild intellectual disabilities, due to inadequate psychological diagnostics by a private centre for special pedagogical counselling. The lawsuit further targeted the primary school and the Slovak Ministry of Education. The district court upheld the lawsuit to a substantial extent, ruling that the centre for special pedagogical counselling had discriminated against Roma children in failing to prove: that the complainants should have been educated in special classes; and that their psychological diagnostics were sufficiently made. However, the court did not find responsibility of the state, which is now subject to appeal.¹³² The decision is the first in favour of Roma children illegally educated in the special education system in Slovakia.

128 Budapest Regional Court, Decision No. 40.P.23.675/2015/84, 18 April 2018.

129 Budapest Appeals Court, Judgment No. 2.Pf.21.145/2018/6/l, 14 February 2019.

130 Irish Equality Tribunal, *Reilly v Health Service Executive*, DEC S2007-059, 25 July 2007, <https://www.workplacelrelations.ie/en/cases/2007/july/dec-s2007-059-full-case-report.html>.

131 Prešov Regional Court, 25C 133/10-229, available in English at: <https://www.poradna-prava.sk/en/documents/judgment-of-the-district-court-in-presov-in-the-case-of-segregation-of-roma-children-at-the-sarisske-michalany-school/>.

132 See flash report: <https://www.equalitylaw.eu/downloads/5558-slovakia-first-instance-court-ruled-that-educating-romani-children-in-special-classes-for-intellectually-disabled-was-illegal-94-kb>.

Ethnic profiling by the police, another more visible form of structural discrimination, also features quite broadly in case law across the Member States.

Finland:

The National Non-Discrimination and Equality Tribunal found that Helsinki Police had practised ethnic profiling, and considered it as direct discrimination on the ground of ethnic origin. The Tribunal prohibited the discrimination and set a conditional fine not only against further discrimination of the specific claimants but for the police in general in relation to the use of discriminatory stop and search practices.¹³³ The police appealed the decision and the Helsinki Administrative Court overturned the decision in 2021; this decision has been appealed to the Supreme Administrative Court.

France:

In November 2016, the Court of Cassation found the state liable for racial profiling in police checks.¹³⁴ The Defender of Rights (the equality body) acted as *amicus curiae*. Thirteen claimants sued the state for civil damages for racial profiling, in relation to identity checks and searches they were subjected to without being arrested, and as a result of no justification for this being forthcoming from the police. The 13 cases were dismissed by the first instance court on the basis that the actions of the police officers, who acted within the parameters of the law, could not give rise to liability of the state.¹³⁵ The Court of Appeal admitted the appeals in 5 of the 13 cases, following the observations made by the Defender of Rights that the state had a positive obligation to take action to prevent police checks based on racial grounds. The eight claimants who did not succeed before the Court of Appeal brought their claim before the Court of Cassation. The state also challenged the decision of the Court of Appeal before the Court of Cassation, arguing that in applying a magistrate's order invoking repression of illegal immigration, the police were justified in controlling Black and north African persons on the basis of their appearance of being foreign. In two instances, the Court of Cassation reversed the finding of the Court of Appeal, and in three it dismissed the claim of the state. According to the Court, even when checking persons in relation to their potential illegal presence on the territory, a police check is discriminatory if, in the absence of pre-existing objective reasons related to the context of the check or the behaviour of the person, it is enforced in relation to physical characteristics of persons subjectively associated with the real or deemed origin of the person. It affirmed there can be no physical characteristic of being foreign.

Hungary:

A 2012 case before the Equal Treatment Authority concerned complaints about police action disproportionately targeting Roma people for lack of mandatory bicycle accessories.¹³⁶ By conducting a statistical analysis of police fines, the Hungarian Helsinki Committee demonstrated that the police practice of imposing fines was ethnically disproportionate. The case ended with a friendly settlement in which the police agreed to ensure that officers received non-discrimination training, provide the Equal Treatment Authority with detailed data on fines for two years, and hand out bicycle accessories instead of fining cyclists for a period.¹³⁷

Roma and Traveller issues are particularly evident in the case law found to be of relevance to structural discrimination. Housing issues for Roma and Travellers are evident to some significant extent in this case law. In these cases, the structural discrimination becomes less visible and the challenge to uncover it becomes more significant. The case law reported includes:

133 See: <https://www.equalitylaw.eu/downloads/4840-finland-police-stop-and-search-found-to-be-discriminatory-pdf-111-kb>.

134 Court of Cassation, First Civil Chamber, 9 November 2016, Nos. 15-24.207 to 15-25.877: https://www.courdecassation.fr/jurisprudence/2/premiere_chambre_civile/568/relatifs_contr_35473.html.

135 High Court of Paris, 2 October 2013, Nos. RG 12/05876, RG 12/05884, and seq.

136 Equal Treatment Authority, EBH/190/2012.

137 <https://helsinki.hu/en/practice-of-racial-profiling-against-the-roma-community-is-acknowledged-by-the-police/>.

Hungary:

The Equal Treatment Authority established that the municipality of Miskolc subjected the residents of the Numbered Streets to the threat of homelessness or having to move to other segregated areas, and by doing so, discriminated against them on the basis of their social status, financial situation and Roma origin.¹³⁸ This followed an *actio popularis* case filed by an NGO in 2014. The Equal Treatment Authority imposed a fine and obliged the municipality to put an end to the discriminatory situation by developing an action plan detailing where in Miskolc it would provide the tenants of the Numbered Streets with adequate housing, and an action plan on how it would house those who had already become homeless or faced a direct threat thereof. The Budapest Administrative and Labour Court rejected the municipality's request for a judicial review and upheld the Authority's decision in 2016 and authorised the Equal Treatment Authority to oblige the municipality to draft action plans.¹³⁹

Ireland:

The issues of discrimination in assessing social housing applications by members of the Traveller community was considered in 2018.¹⁴⁰ The complainant family had been living in the respondent county council's geographic area for two years by the roadside in a caravan lacking basic facilities. They applied unsuccessfully to the county council to be placed on the council's housing list. The application was declined largely on the basis that the county council considered that the family's roadside site was not a legal residence and, therefore, the family was not normally resident in the county and, as such, did not comply with the Social Housing Assessment Regulations 2011. The Regulations refer only to the criterion of 'normal residence', lawful residence was not a qualifying criterion. Further, it seems that the county council did not routinely assesses the lawfulness of the current residence of all social housing applicants. The Irish Human Rights and Equality Commission (the equality body) provided legal assistance to the complainants. The Workplace Relations Commission (the tribunal charged with hearing such cases) found that, in interpreting 'normal residence' as only referring to a legal residence, the respondent had introduced an additional criterion which disproportionately affected members of the Traveller community and was, therefore, discriminatory, amounting to direct discrimination under the Equal Status Acts. The county council was ordered to pay a fine and review its policy.

Slovakia:

Nine members of a Roma community, who were forcibly evicted from their homes in 2012 under the pretext of waste removal by the city authorities, brought this case. They were offered no alternative accommodation after their homes were demolished, and as a result, became homeless. Some of them were bussed to a different part of the country. In 2013, the Public Defender of Rights found that there had been a violation of the rights of those who were evicted. The district court subsequently ruled in 2022 that the City of Košice violated human dignity and the right to privacy of the complainants and committed illegal discrimination on the basis of their ethnicity.¹⁴¹ The court ruled there has been also discrimination in the form of harassment. The decision is one of the first in favour of Roma concerning forced evictions in Slovakia.

The workplace emerges as another significant focus in the limited range of case law found. Some of this case law touched on the less visible forms of structural discrimination in bringing forward a focus on stereotypes. In other instances, international conventions, national legislation and local collective agreements are identified as the source of structural discrimination. The case law includes:

138 Equal Treatment Authority, EBH/67/22/2015, 15 July 2015.

139 Metropolitan Administrative and Labour Court, 6.K.33.048/2015/17, 25 January 2016, available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara>.

140 Workplace Relations Commission, *A Member of the Travelling Community v A County Council*, ADJ-00008050, 26 April 2018, <https://www.workplacerelements.ie/en/cases/2018/august/adj-00008050.html>. Similar findings were issued in four further cases against the same respondent.

141 District Court Košice II, Decision of 21 January 2022, No. 15C/190/2014-650 concerning the case of *nine Roma complainants v. the town of Košice*.

Belgium:

In this case, the defendant tried to justify the non-recruitment of a person of foreign origin by the fact that people of foreign origin would not have a good command of Dutch. According to the Court of First Instance of East Flanders, however, the language requirements cannot justify the categorical and unreserved exclusion of all persons of foreign origin from the recruitment process. In 2021, the court noted, 'Diversity in the workplace is crucial in a democratic society. This is only possible with a correct recruitment procedure that screens for competencies and not one that starts from stereotyping, racism and exclusion of certain people or groups of people. The behaviour of the defendant shows an anti-social attitude and cannot be tolerated'.¹⁴²

In another case, the multinational temp agency Adecco was listing jobseekers depending on their race and ethnic origin. Native Belgian people without foreign roots were registered in the computer system under the code BBB, by reference to the Belgian breed of cattle, *Blanc Bleu Belge*. The system was put in place to satisfy certain clients. In 2009, the French NGO SOS Racisme, which was involved in another similar procedure in France against Adecco, and a Belgian trade union (the FGTB), launched a procedure before the Court of First instance of Brussels, claiming that thousands of jobseekers had been discriminated against on the ground of racial or ethnic origin. The Tribunal found discrimination and sanctioned Adecco with a fine. In 2015, the Appeal Court of Brussels upheld the decision and increased the fine.¹⁴³

France:

The Paris Court of Appeal, in 2018, upheld a decision against the national railway company for systemic discrimination on the ground of nationality towards 820 Moroccan employees who claimed discrimination in their career on the ground that they were not hired under the same conditions as French employees and that their employment conditions were less favourable than those of French employees.¹⁴⁴ The decision found discrimination based on the application of a bilateral convention with Morocco that was contrary to Article 14 ECHR and based on a policy to limit costs. The Defender of Rights (the equality body) presented an *amicus curiae* brief.¹⁴⁵

The Netherlands:

A non-profit foundation had used 'cultural scans' to assess its employees, whereby particular personal characteristics and communication styles were presented as being typical for particular cultures or nationalities. In 2020, the Netherlands Institute for Human Rights (the equality body) set out that, although the scans were meant as analytical or descriptive instruments, they carried the risk of stereotyping on the ground of racial or ethnic origin and recommended their use be reviewed. Although the foundation had already indicated that it would stop using the scan, the NIHR found that 'cultural scans' were commonly used, and, as such, the recommendation did not only address structural discrimination by the party concerned but also more generally.¹⁴⁶

International agreements come into focus again as a potential source of structural discrimination, in a case related to international anti-terrorist regulations in relation to financial transfers:

142 Published on the website of Unia: https://www.unia.be/files/Documenten/Rechtspraak/2021_02_17_Corr_Gent.pdf. See also Labour Court of Antwerp, 16 June 2019, published on the website of Unia: https://www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Antwerpen_16_januari_2019.pdf.

143 Appeal Court of Brussels, 10 February 2015, available on the website of Unia (www.unia.be).

144 Paris Court of Appeal, Decision 2016-188 of 21 July 2018: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=19095&opac_view=-1.

145 See Flash report: <https://www.equalitylaw.eu/downloads/4570-france-paris-court-of-appeal-social-chamber-31-january-2018-no-15-11389-in-the-case-of-the-848-moroccan-railroad-workers-pdf-119-kb>.

146 Netherlands Institute of Human Rights, Opinion 2020-76.

Sweden:

Two men with Muslim names were not allowed to send or receive money through Western Union, as their names were confused with names on the international sanctions lists. When the lists were consulted, large numbers of customers with Arabic or Muslim names had their transactions blocked or delayed. The court determined in this case that it was indirect discrimination when their names were confused with names on the lists. The manner in which the names were checked was insufficiently effective. There was no recognition of the fact that the names of the two men were very common among Muslim men. To reduce the risk of confusion, Western Union should have had a more specific form, including e.g. date of birth. Thus, this was a case of indirect discrimination related to ethnicity and religion.¹⁴⁷

The media is another site for potential issues of stereotyping as a form of structural discrimination. This too emerges in the case law. One example reported:

Portugal:

SOS Racism sought the reopening of the instruction phase of a criminal procedure (an interlocutory decision) regarding an article published in the Journal *Público* in 2017, which the lower court decided to archive. The Lisbon Court of Appeal decided to reopen the instruction phase with the reasoning that ‘the statements made by the defendant, because made in a generalising manner, are directed at groups identified by ethnicity, skin colour or national origin – “Africans” and “gypsies” – and the characteristics apportioned to them translate into value judgments’.¹⁴⁸ The court concluded that these generalisations revealed a manifestation of supposed inferiority of these groups to another group deemed more civilised, intellectually developed and with higher moral values. The court concluded ‘that this assessment is explicitly and unequivocally discriminatory and offensive to those groups identified as “gypsies” and “Africans”, and is ‘damaging to their right to equality, honour, and consideration’.¹⁴⁹

Another subtler form of structural discrimination is evident in relation to failing to take account of cultural difference in making provision for Black and minority ethnic groups, including Roma and Travellers. One example reported:

Hungary:

The Chance For Children Foundation and the European Roma Rights Centre launched a lawsuit against the ministry responsible for education, regarding the systemic failure of expert panels to use culture-neutral tests to assess the school suitability of Roma children. In its first instance decision in 2016, the Eger Regional Court found that the Pedagogical Service had been indirectly discriminating against Roma pupils in Heves County since 2004 due to its practice of testing their suitability for school using diagnostic methods that were not culture-neutral.¹⁵⁰ The state authority responsible for operating the school and the ministry were also found to be in violation of equal treatment for failing to take the legally prescribed measures to monitor the activities of the Pedagogical Service. The Debrecen Appeals Court upheld the judgment in 2020, also concluding that the respondents had failed to offer evidence that the discriminatory practice had been terminated after the delivery of the first instance judgment.¹⁵¹

The potential for welfare anti-fraud controls to reflect and be a source of structural discrimination emerged with some force in the childcare benefits scandal that erupted in the Netherlands, as described in Section 3.2.5 above. Issues of a similar nature have emerged in case law in other jurisdictions. One example reported:

147 Stockholm District Court, 13 April 2011, *Equality Ombudsman v. Western Union*, Case T 9176-08.

148 Lisbon Court of Appeal, [Decision of 06-07-2021](#), in proc. 5551/19.0T9LSB-5.

149 Lisbon Court of Appeal, [Decision of 06-07-2021](#), in proc. 5551/19.0T9LSB-5.

150 Eger Regional Court, Decision No. 12.P.20.166/2014/92 handed down on 10 March 2016.

151 Debrecen Appeals Court, Decision No. Kfv.III.37.881/2018/6 of 24 September 2020.

Ireland:

In *Smith v. Department of Social Protection*, an Irish citizen who was born in Indonesia lodged a successful race ground complaint concerning correspondence issued by the Department of Social Protection.¹⁵² She was sent a series of letters seeking proof of her nationality in the context of accessing child benefit payments. The respondent acknowledged that such correspondence was issued to non-Irish nationals as an anti-fraud measure. The Workplace Relations Commission found that the Department's practice was a form of direct discrimination, and that the complainant was subjected to less favourable treatment based on an assumption as to her race (nationality). An order for compensation was made and the respondent was directed to review its fraud detection practices for the child benefit scheme to ensure compliance with the Equal Status Acts.

5.3 Complaint processes and remedies/sanctions

There are few complaints processes with remedies or sanctions with the capacity to address the issue of structural discrimination effectively, identified by the non-discrimination experts from the European network of legal experts in gender equality and non-discrimination. Where such a capacity to respond effectively to structural discrimination is found, it has tended to rest in the powers accorded to the national equality body. By way of example, such powers are found in Bulgaria, Ireland, and the Netherlands.

Bulgaria:

The equality body, the Commission for Protection Against Discrimination, which has a decision-making function, is empowered to issue remedial orders in cases where discrimination has been found. It has issued such orders, for example, to media companies that it found had discriminated by allowing racist statements to be broadcast, or published, including instructions for the companies to adopt internal policies to prevent any similar occurrences in future. The courts exercising judicial review functions in relation to these decisions have confirmed such instructions.

Ireland:

The Employment Equality Acts and Equal Status Acts empower the Workplace Relations Commission (the tribunal that hears cases of discrimination) to issue remedial orders that a person or persons take a specified course of action.¹⁵³ These orders may pertain to an individual by, for example, directing that they be provided with access to a service, but may also be formulated in a manner that has been described as having 'a radiating or more systematic effect in combating discriminatory practices.'¹⁵⁴ Respondents in Equal Status Acts cases have been directed to create an equal opportunities policy, retrain staff, and revise discriminatory policies. In discrimination cases under the Employment Equality Acts, employers have been directed to put in place pathways for discrimination complaints to be addressed, revise staff handbooks, and review recruitment or other employment procedures.

The Netherlands:

A mother of Chinese origin brought a complaint before the Netherlands Institute for Human Rights (NIHR, the equality body) in 2021, about a birthday song performed in her son's primary school on the basis that, while singing it children would make fun of the complainant's son and make jokes about his appearance. The boy indicated that this made him uneasy, following which the teacher decided that the song would not be performed anymore. Both the mother and the school board asked the NIHR to take a general stance on stereotypes being expressed in educational environments. The NIHR found that the mother, as an individual applicant, could not base her complaint on a general interest. However, the NIHR saw space to issue a recommendation that did address the issue from a more

152 Workplace Relations Commission, DEC-S2015-014, 20 October 2015, <https://www.workplacelrelations.ie/en/Cases/2015/October/DEC-S2015-014.html>.

153 Ireland, EEA, Section 82(1)(e); ESA, Section 27(1)(b).

154 Fennelly, D. (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, Irish Human Rights and Equality Commission, p. 28.

general perspective. In the recommendation, the NIHR stated that educational institutions should be proactive in addressing potential discrimination and should include discrimination and equal treatment in the curriculum as a form of citizenship education, should strive to put in place anti-discrimination policies, preferably in consultation with people from minority backgrounds, stated that while it is good to teach children how to deal with ethnic and cultural diversity this should not be done in a way that reinforces stereotypes and risks portraying some groups as inferior, and finally stated that schools should strive to regularly assess song texts and other educational materials with a view to eliminating discrimination.¹⁵⁵

In one instance, in Hungary, it is reported that there has been a positive development in the jurisprudence in prescribing sanctions that are capable of having a systemic impact in situations of structural discrimination. This largely relates to cases of Roma segregation, and mark an important evolution from recommendations that were very general in nature, calling on the perpetrators to put an end to the discrimination without being willing to prescribe actual steps. This has not been an easy or uncontested development:

Hungary:

In a case concerning a segregated school in Kaposvár, the second instance court banned the respondents from admitting first-grade pupils to the segregated school from the 2017/2018 academic year onward, and obliged them to adopt and publish by 31 March 2017 on their websites a detailed desegregation plan on the admission and placement of those first-grade pupils who were in the school's catchment area. A review by the Kúria (Hungary's supreme court) was requested by the respondents. The Kúria upheld the decision of the Pécs Appeals Court in 2017 and also upheld the sanctions that it had imposed.¹⁵⁶ The Kúria held that courts could do more than simply declare that a violation had taken place and order in general terms, without specifying the 'how', and that the defendant should put an end to the violation; they may also order specific measures to be taken in order to enforce the requirement of equal treatment.

5.4 Review

Case law that explicitly addresses structural discrimination on the ground of racial or ethnic origin is not currently noted, except in two specific instances. This reflects the lack of specific legal provision in relation to this issue as well as a judicial mindset that might continue to focus on discrimination as an individual act. This points to the need to review and strengthen equal treatment legislation in place, as well as the implementation processes for this equal treatment legislation. In the latter case, judicial training would appear to have an important contribution to make.

Case law of relevance to structural discrimination on the ground of racial or ethnic origin, but which is not explicit on the issue, has emerged on the basis of current legal provisions for both direct and indirect discrimination. While there is a significant level of such case law emerging in relation to the more visible forms of such discrimination, such as ethnic profiling by the police and segregation in provision for Roma and Travellers, this is not the same across the full spectrum of discrimination fields. The case law is, therefore, not yet at an adequate scale or coverage such that a body of case law capable of underpinning and shaping action on such discrimination might be available.

The case law of this nature that is available is concentrated on the institutional element of structural discrimination, which is more easily captured under current provisions in equal treatment legislation on indirect and, in some instances, direct discrimination. This focuses attention on organisational procedures and processes that exclude or disadvantage on the ground of racial or ethnic origin, as well as broader legislation or international agreements that have a similar impact.

155 Netherlands Institute for Human Rights, Opinion 2021-157.

156 Kúria, Judgment No. Pfv.IV.20.085/20.

The societal element to structural discrimination comes into focus to a limited extent in the case law available. This emerges in cases that include a focus on stereotypes and on notions of superiority and inferiority. These, however, are few, and the discriminatory impact of societal or organisational culture has yet to be addressed.

Despite the emerging case law of relevance to structural discrimination on the ground of racial or ethnic origin, the context remains one in which sanctions and remedies are not designed for dealing with such a phenomenon. Limitations in the sanctions and remedies available limit the impact of these cases. Remedies of a structural nature are required if such structural discrimination is to be adequately dismantled through such case law. Sanctions of a significant scale are required if such structural discrimination is to be adequately dissuaded.

Case law is an important driver for change. It secures change in behaviour on the part of those organisations found to have discriminated, and, through a critical mass of casework, it further builds a culture of compliance across wider sectors of organisations. Case law gives definition to the issues around structural discrimination and, through the remedies made available, to what is required in its dismantling. Such a body of case law is clearly not available as of yet.

6 Conclusions and proposals

Structural discrimination on the ground of racial or ethnic origin is not a new phenomenon nor a newly recognised one. Black and minority ethnic groups, including Roma and Travellers have been disadvantaged and excluded over generations due to structural discrimination. Academics, civil society organisations and the affected communities themselves have recognised for many years the issue of structural discrimination and its deleterious consequences. Such recognition, however, has not found resonance among policymakers, nor has it gained a foothold within legislation or policy to any significant or adequate extent.

There is a strong and positive body of work, at European and Member State levels, addressing discrimination on the ground of racial or ethnic origin at the individual level. This is apparent in both legislation and policy. However, such initiative has not adequately extended to the structural level of discrimination, and it is at this structural level that racism finds its sustained inter-generational momentum. It is as if there is some significant unarticulated resistance among policymakers to moving beyond the focus on the individual level.

Structural discrimination on the ground of racial or ethnic origin is not a product of obvious intent. As such, there can be defensiveness when the issue is raised and a challenge is posed to look for fault in one's own legislation, policy or organisational systems. Structural discrimination is less visible than at the individual level, only being apparent in unequal outcomes and disadvantage for Black and minority ethnic groups, including Roma and Travellers. As such, it can be hard to pinpoint or to establish where the problem lies and what needs to be corrected. There is a scale to the injustice involved and the range and depth of the inequalities engendered by structural discrimination, such that there can be reluctance in acknowledging and taking up the level of action required to address this issue.

Structural discrimination exists and is visible in the inequalities for Black and minority ethnic groups, including Roma and Travellers. It is evident in relation to their:

- Situation: access to and distribution of key resources including income and employment, and social goods such as education, health, and housing.
- Experience: access to relationships of solidarity, care and respect when participating in society and community, and when engaging with institutions, employers, and service providers.
- Voice: access to influence, having a say in decisions that impact on one, and participating in governance of society and its institutions.
- Identity: access to recognition for culture and identity and to the flexibility and resources required to address the practical implications of cultural difference and how different groups chose to live out their identity.

These outcomes are experienced across the diversity within Black and minority ethnic groups, including Roma and Travellers. Responses to structural discrimination on the ground of racial or ethnic origin, if they are to be effective, must also address those groups at the intersections of the ground of racial or ethnic origin and other grounds such as gender, age, disability, religion or belief, and sexual orientation.

However, legislation with provisions explicitly addressing structural discrimination on the ground of racial or ethnic origin is not found in any Member State. This reflects the situation that pertains at European level, with a lack of specific provisions addressing structural discrimination in the European Union equal treatment directives. Despite provisions in the directives and in Member State legislation on direct and indirect discrimination that have been used to some effect in addressing structural discrimination, this failure to name and define the issue of structural discrimination in legislation makes for a difficult point of departure for sustained action on structural discrimination, with the absence of any normative standard

on the issue being set down in law. It limits casework on the issue and is unhelpful in a context of high levels of under-reporting.

At Member State level, national policy strategies related to equality and non-discrimination that include action on structural discrimination on the ground of racial or ethnic origin are not widely apparent. This could be at a point of change. There is evidence of structural discrimination on the ground of racial or ethnic origin appearing on the policy agenda at Member State level, as Member States prepare national action plans against racism as a result of the encouragement given by the EU Anti-Racism Action Plan 2020-2025¹⁵⁷ and the Common Guiding Principles developed for national action plans against racism.¹⁵⁸ The national action plans are envisaged as being in place by the end of 2022.

Such national action plans against racism are already emerging at Member State level, with six instances identified in this report, and two further instances where such action plans are at an advanced stage of preparation. There is specific reference to structural discrimination on the ground of racial or ethnic origin in the action plans of five of these Member States. In another instance, an interim report indicates that the forthcoming action plan will include a focus on structural discrimination. There is, however, little coherence evident in the actions proposed to address structural discrimination in the action plans of the different Member States.

The European Commission, in the EU Anti-Racism Action Plan, has, by naming structural racism as the underlying problem, put down an important marker for future action on the issue of structural racism, presenting a key challenge to be addressed if racism is to be effectively combated and eliminated. This marker recognises that discrimination occurs at different levels – the level of the individual and the level of the structural – and suggests that both levels must be a focus in legislation, policy and practice if the inter-generational nature of racism is to be cut short.

In naming structural racism in this manner, the EU Anti-Racism Action Plan takes on important symbolic functions that stretch beyond its more immediate practical value. Matland in his work on policy implementation has noted the importance of what he refers to as ‘symbolic policy making’, in policies that: introduce and confirm new goals; reaffirm commitment to old goals in need of reinforcement; or emphasise core and important values and principles. However, he also warns that such policies, which invoke ‘highly salient symbols’, face challenges of implementation.¹⁵⁹

Matland’s analysis of policy implementation, when it comes to policy with valuable symbolic content, points to issues of high policy conflict and high policy ambiguity in such situations. He emphasises the importance of action at the point of delivery to secure policy implementation.

Policy ambiguity, understood as lack of clarity, is evident in the absence of a clear and shared definition of structural discrimination on the ground of racial or ethnic origin. Policy conflict, understood as lack of agreement about policy goals or means of implementation, is evident in the lack of focus on structural discrimination on the ground of racial or ethnic origin in legislation or policy to date, and the lack of any shared understanding as to how best to address the issue. Effective policy implementation requires that agreement and clarity are achieved on the nature of the issues involved and the policy goals for and the means of addressing structural discrimination. Such agreement is needed to reduce the policy conflict and the policy ambiguity that impede effective action.

157 European Commission (2020) Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, [A Union of Equality: EU anti-racism action plan 2020-2025](#), Brussels, 18.9.2020 COM(2020) 565 final.

158 European Commission (2021), [Common guiding principles for national action plans against racism and racial discrimination](#), European Commission Subgroup on the National Implementation of the EU Anti-Racism Action Plan 2020-2025, DG Justice and Consumers.

159 Matland, R. E. (1995), ‘[Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation](#)’, *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174.

As such, it is proposed that the European Commission could usefully:

Generate deliberations and facilitate good practice exchange on structural discrimination on the ground of racial or ethnic origin and the responses required to address this within the High-level group on combating racism, xenophobia and other forms of intolerance and the High-level group on non-discrimination, equality and diversity, with a view to building shared understanding, generating policy learning and creating agreement on:

- a definition for the various elements of this concept of structural discrimination on the ground of racial or ethnic origin; and
- a framework of the types of responses required to effectively address structural discrimination on the ground of racial or ethnic origin.

In these deliberations, the three core elements of structural discrimination on the ground of racial or ethnic origin would usefully be kept in focus in seeking to reduce policy ambiguity. These are:

- Historical: the untold or inadequately analysed history of slavery, colonialism and exploitation, with its ongoing consequences unrecognised and unaddressed; the justificatory and inaccurate ideology that the single human race could be understood as made up of separate races, defined in biological terms that are then given false significance; and the manner in which this history, uncorrected or hidden, has shaped an oppressive common sense in relation to Black and minority ethnic groups, including Roma and Travellers.
- Societal: the culture, values, norms and discourse dominant at societal level that are imbued with notions of superiority and inferiority and characterised by hostility to the detriment of Black and minority ethnic groups, including Roma and Travellers.
- Institutional: the policies, procedures, practices and perceptions within organisations that serve, often inadvertently, to exclude, hamper or disadvantage Black and minority ethnic groups, including Roma and Travellers.

Equal treatment legislation will be a central focus in any strategy to address structural discrimination on the ground of racial or ethnic origin. While currently provision is not made in this legislation across the EU that explicitly addresses this issue, there are existing provisions that have been used to address incidents of such discrimination. These include the provisions on indirect discrimination, and in some instances, where it is broadly defined, the provisions on direct discrimination. There is a further tactical potential to address structural discrimination by progressing a critical mass of individual level cases, under this legislation, on a specific and relevant issue.

Given the lack of explicit provision on structural discrimination on the ground of racial or ethnic origin in equal treatment legislation, it is not surprising that it is difficult to find case law that explicitly addresses the issue. This is problematic in that case law would give important definition to the issues around structural discrimination and, through the remedies made available, to what is required in order to dismantle it. A sufficient scale of case law would stimulate a culture of compliance and drive the organisational change required to make an impact on structural discrimination, at a minimum in relation to its institutional element.

There is case law of relevance to structural discrimination on the ground of racial or ethnic origin, although it does not explicitly address the concept. This is noted in this report, however, in only 11 Member States, and is limited in its range. Such case law is most prevalent in relation to the more visible forms of structural discrimination, in particular issues of Roma and Traveller segregation and of ethnic profiling by the police. Housing issues for Roma and Travellers are evident to some significant extent in this case law. The workplace emerges as another significant focus. Some of this case law touches on the less visible forms of structural discrimination, including a focus on stereotypes. Roma and Traveller issues are particularly evident in the case law found to be of relevance to structural discrimination.

This case law is largely concentrated on the institutional element of structural discrimination, which is more easily captured under current provisions in equal treatment legislation in relation to indirect discrimination and, in some instances, direct discrimination. The societal element of structural discrimination comes into focus to a limited extent in cases that include an emphasis on the impact of stereotypes and of notions of superiority and inferiority.

There are few remedies or sanctions provided for with the capacity to effectively address the issue of structural discrimination on the ground of racial or ethnic origin. Where such a capacity of remedy is found, it has tended to rest in powers accorded to the equality body to order remedial action in cases where they have found discrimination. Positive developments in the jurisprudence in prescribing sanctions that are capable of having a systemic impact in situations of structural discrimination are rare. The courts appear to be reluctant to acknowledge that discrimination may not only be at the level of the individual act.

Furthermore, there is the European Commission's proposal for a regulation in the field of artificial intelligence which seeks to address issues of algorithmic discrimination in artificial intelligence systems, an emerging and significant form of structural discrimination.

As such, it is proposed that the European Commission could usefully:

Support and enable legislative change at the national level and/or advance legislative change at the European level with regard to the explicit naming, defining and prohibition of structural discrimination on the ground of racial or ethnic origin under equal treatment legislation, alongside provision for appropriate remedies and sanctions where such discrimination is found.

At national level, Member States could usefully:

Make provisions, under equal treatment legislation, to explicitly name, define and prohibit structural discrimination on the ground of racial or ethnic origin, alongside provision for appropriate remedies and sanctions where such discrimination is found.

Support and enable a focus on the issue of structural discrimination on the ground of racial or ethnic origin, the provisions of equal treatment legislation governing this issue, and the case law in this field, within judicial training mechanisms.

Legislation, in the form of statutory equality duties provided for under equal treatment legislation, has a further role to play in addressing structural discrimination on the ground of racial or ethnic origin. Such duties can drive a dismantling of those institutional systems and processes that generate inequality, and their replacement in organisations with systems and processes that advance the achievement of equality on the ground of racial or ethnic origin. The European Commission, in its EU Anti-Racism Action Plan, usefully encourages Member States to introduce such statutory equality duties.

There is limited and uneven development across the Member States in making provision for statutory equality duties. No such duty is evident in 16 Member States. A further five Member States only evidence a preventative type duty. This type of duty requires an organisation to take measures to ensure compliance with equal treatment legislation and is not deemed to have the potential to address structural discrimination.

Only four Member States evidence a mainstreaming duty, which does carry such potential in requiring public organisations to take the steps necessary to have regard to an imperative to eliminate discrimination and promote equality in carrying out their functions. A further two Member States have an institutional duty, which requires organisations to take proactive steps to promote equality for employees and service

users from across the grounds covered by equal treatment legislation. This also has the capacity to address structural discrimination.

There are barriers to the implementation of the statutory equality duties in place. These include: a lack of enforcement mechanisms to secure implementation; lack of detail on the steps to be taken under the duty; lack of awareness of the duty; lack of understanding of the issues including that of structural discrimination; and lack of support and follow-up to ensure quality of implementation.

As such, it is proposed that the European Commission could usefully:

Support and enable legislative change at the national level and/or advance legislative change at the European level with regard to provision for statutory equality duties on the ground of racial or ethnic origin, of an institutional and a mainstreaming type, with a capacity to drive the institutional change required to dismantle the elements of structural discrimination on the ground of racial or ethnic origin, and to drive the necessary action to rectify the long-term consequences of such discrimination.

At national level, Member States could usefully:

Make provision, under equal treatment legislation, for statutory equality duties, of an institutional and a mainstreaming type, with adequate detail as to the steps required to be taken by the duty bearer, alongside provision for sanctions where these steps are not adequately implemented; and ensure adequate and appropriate support for and enforcement of their implementation.

National policy strategies will be another important focus in any strategy to address structural discrimination on the ground of racial or ethnic origin. While, such policy strategies are not yet widely apparent across the Member States, this will change with implementation of the EU Anti-Racism Action Plan. National action plans against racism, encouraged under the EU Action Plan and the Common Guiding Principles, should provide a framework for implementation of commitments made in relation to structural racism in the EU Action Plan.

However, there is no coherence evident in the understanding of structural discrimination on the ground of racial or ethnic origin across the different national action plans currently in place or in the framework of action that is engaged within these plans to address the issue. The various definitions used tend to focus on the institutional element of structural discrimination. In only one case do the societal and historical elements secure some focus. The framework for action on the issue is limited and there is no evident strategy underpinning the actions identified.

Actions noted addressing structural discrimination encompass: equality planning; equality-related training; equality reviews undertaken by an equality body; investigative projects regarding the memory of slavery, colonialism and the historical presence of discriminated groups; recruitment strategies to increase diversity; addressing artificial intelligence systems; development of education resources; and enabling association building and political participation.

It is noteworthy and of concern that the focus on artificial intelligence systems is limited. This is an emerging area of significance in relation to structural discrimination that requires a deeper focus in national-level action on structural discrimination, in terms of both legislative and administrative reforms. The European Commission's proposal for a regulation in this field will assist in this regard.

Few of the national policy strategies in place in relation to Roma include reference to structural discrimination. In those that do, there are issues of incoherence about or lack of definition of structural discrimination, and there are limited actions to address it. There is no reference to structural discrimination

identified in other national policy strategies of relevance, such as those targeted at specific groups or those that address a wider anti-discrimination agenda.

Positive action is required to address the unequal outcomes that result from structural discrimination, and to reverse these in progressing the achievement of full equality in practice. While not an antidote to structural discrimination on the ground of racial or ethnic origin, as it addresses the impact rather than the causes, positive action is a necessary part of any strategy to eliminate structural discrimination. Positive action measures are noted in some of these national policy strategies, principally those related to Roma, although not in all of these.

The positive action measures identified are largely designed to address disadvantage, which is important, but the link to equality and equality goals is missing in most instances. The measures tend to emphasise a narrow focus on the fields of employment, training and education with a strong labour market and employability emphasis. The fields of healthcare, social inclusion, housing and political participation are evident in some instances. There is no systematic approach evident in seeking to ensure coverage of all dimensions of unequal outcomes across situation, experience, voice and identity.

There is some limited focus on intersectionality in these national policy strategies, most specifically those in relation to Roma. An intersectional focus, addressing diversity within the groups exposed to structural discrimination on the ground of racial or ethnic origin, is necessary for its effective and comprehensive elimination. Overall, the focus on intersectionality remains underdeveloped, both in terms of its low level on the policy agenda and the limited manner in which it is understood and addressed.

As such, it is proposed that the European Commission could usefully:

Ensure a focus on the responses implemented to structural discrimination on the ground of racial or ethnic origin, including a concern for positive action and an intersectional approach in the monitoring and tracking of national action plans against racism at European level, with a view to strengthening these responses over time and extracting the policy learning from the experience of the design and implementation of these national action plans.

At national level, Member States could usefully:

Set out an understanding of structural discrimination on the ground of racial or ethnic origin and its different elements, and include and invest in adequate and appropriate steps towards its elimination in the national action plan against racism, along with positive action measures to address current outcomes of disadvantage for Black and minority ethnic groups, including Roma and Travellers, across the spectrum of situation, experience, voice and identity, and to do so in an intersectional manner.

Establish and respond to the challenges posed by artificial intelligence systems in relation to structural discrimination, including by identifying how best to regulate artificial intelligence systems from an equality and non-discrimination perspective and developing the necessary legislative and administrative reforms found necessary to this end.

There are issues of implementation failure hindering the impact of these national policy strategies. These result from an understanding which predominates of discrimination on the ground of racial or ethnic origin as being an issue solely at the individual level. Investment, where this is made available, is preferred in addressing the more visible forms of structural discrimination to investment in addressing its more hidden forms that might be more controversial. The language or terminology of structural discrimination is used, such as 'structural barriers' or 'structural change', but it is not underpinned by any adequate understanding of the term, nor accompanied by any conscious attention or will to address the issue.

In many instances, the barriers to policy implementation involve lack of dedicated budget, absence of political will, inadequate administrative capacity, and lack of disaggregated data.

Matland's analysis of policy implementation, for policy with symbolic content, points to the dangers of policy implementation failure. He emphasises the imperative of coalitions formed at the point of policy delivery and the need to underpin their coalitional strength, to ensure policy implementation. This imperative focuses attention on the quality of the institutional drivers for action on racism, including structural discrimination on the ground of racial or ethnic origin, at national level and the importance of high standards in their design and functioning.

These institutional drivers, in particular, encompass governmental bodies, equality bodies and civil society organisations. The private sector is usefully included, principally through social partnership structures. This national-level institutional infrastructure needs to hold a shared commitment to addressing structural discrimination on the ground of racial or ethnic origin, and to be established in a manner that reflects a capacity and the means to make a contribution to this goal. There is no clear standard established, however, for such a national-level institutional infrastructure.

The governmental element to this national-level institutional infrastructure is underdeveloped in its spread across the Member States. There are issues of design in several areas.

- Institutional location: responsibility for equality and non-discrimination is noted as taking the form of a dedicated ministry in only 8 Member States; it forms part of the brief of a ministry with wider responsibilities in 11 Member States, and of dedicated structures linked to Government in 2 Member States. This issue of location raises issues of potential lack of influence and inability to coordinate different ministries.
- Coordination across the different policy fields: inter-ministerial structures focused on issues of racism are noted in only eight Member States. Limited coordination raises issues in relation to incoherence or lack of mobilisation across the full range of policy fields of relevance to issues of racism.
- Cross-sectoral collaboration: structures for such collaboration are reported in only 12 Member States, and are limited to a focus on Roma in 3 of these. Labour market organisations are noted as being involved in these structures in four instances. Limited collaboration raises issues of incoherence in failing to establish and pursue common goals and agendas across the sectors, and issues of voice where the perspective of those experiencing racism is not articulated through civil society organisations.

The multi-ground nature of many of these structures would require further examination to establish whether they are managed in a manner that ensures visibility of and attention to the ground of racial or ethnic origin.

In relation to the equality body element of this national institutional infrastructure, there is an uneven engagement by equality bodies across the Member States with the issue of structural discrimination on the ground of racial or ethnic discrimination. Thirteen equality bodies have little engagement with the issue. Where initiative has been taken, the potential contribution of equality bodies is evident in the work done. This encompasses: undertaking research, preparing reports, and making policy recommendations to government; litigation, *amicus curiae* interventions, and casework recommendations; promotion of guidance; communications work; undertaking equality reviews; and work on equality data. Equality bodies face particular challenges in gearing up to and engaging with issues of equality and non-discrimination in relation to artificial intelligence systems.

Limited resources, and inadequate mandate and powers are noted as barriers to equality bodies working on issues of structural discrimination. A further barrier of reluctance within the leadership of the equality body to taking up what can be a controversial issue is also noted. However, even where equality bodies

have taken action, the scale of endeavour can in some cases be too limited to achieve significant impact, primarily due to the limited resources of equality bodies.

There is limited evidence of civil society platforms working on issues related to racism. Such civil society platforms create shared spaces for deliberation and action on common issues and break down fragmentation that can weaken the contribution of this sector. They enable the perspectives of those experiencing racism to be brought forward and ensure their articulation to policy makers and policy implementers. Such platforms are noted in eight Member States and only some of these are active on the issue of structural discrimination on the ground of racial or ethnic origin. These civil society platforms are reported as being active in promoting discussion on issues around racism more broadly, but have potential for further evolution and impact. A lack of meaningful engagement by national authorities with such civil society platforms is noted as an issue affecting their potential and impact, with limited access to adequate resources acting as a barrier to their formation and functioning.

As such, it is proposed that the European Commission could usefully:

Stimulate and support the development of the national institutional infrastructure within Member States on the issue of racism, including structural discrimination on the ground of racial or ethnic origin, including by:

- devising models, and subsequently securing agreement on standards and indicators, for such a national institutional infrastructure;
- supporting Member-State-level coalition-building to enable and drive policy implementation in relation to structural discrimination on the ground of racial or ethnic origin at this level;
- providing stimuli in the form of resources and support for the further development of this national institutional infrastructure through the appropriate funding mechanisms available; and
- providing stimuli, in the form of resources and support, through the appropriate funding mechanisms available, for civil society platforms at Member State level addressing the issue of racism, and with a contribution to make to rendering visible and tackling structural discrimination on the ground of racial or ethnic origin.

Ensure the place and contribution of equality bodies within the national institutional infrastructure for the issue of racism, including structural discrimination on the ground of racial or ethnic origin, within Member States, by progressing the current commitment to and work on standards for equality bodies, in a manner that includes a particular focus on: adequate resourcing of equality bodies; the adequacy of their mandate, competences and powers to address structural discrimination on the ground of racial or ethnic origin; securing the role of equality bodies in supporting and enforcing statutory equality duties; and ensuring they are adequately and appropriately resourced and empowered to address new challenges posed by artificial intelligence systems.

At national level, Member States could usefully:

Review and strengthen the governmental institutional infrastructure concerned with racism, including structural discrimination on the ground of racial or ethnic origin, to ensure: a governmental institutional infrastructure with a capacity to give leadership within government on the issue; to secure coordination across the different parts of government in this area; and to develop collaboration on it across different sectors.

Enable and empower equality bodies by affording them the mandate, competences, powers and resources to fully realise their potential in combating structural discrimination on the ground of racial or ethnic origin, including in litigating on and/or enforcing a critical mass of casework on this issue; in providing

TO NAME AND ADDRESS THE UNDERLYING PROBLEM: STRUCTURAL DISCRIMINATION ON THE GROUND OF RACIAL OR ETHNIC ORIGIN

support and guidance on, setting standards for, and enforcing implementation of statutory equality duties; and in addressing the challenges posed in this area by artificial intelligence systems.

Build collaboration with civil society behind shared goals and agendas of combating structural discrimination on the ground of racial or ethnic origin, and invest resources to enable civil society to engage in platform building on this issue.

Bibliography

Allen, R., Masters, D. (2020), *Regulation for an equal AI: A new role for equality bodies, Meeting the new challenges to equality and non-discrimination posed from increasing digitisation and the use of artificial intelligence*, Equinet.

Council of the European Union (2006), *Review of the implementation by the Member States and the EU institutions of the Beijing Platform for Action – Indicators in respect of Institutional Mechanisms: Draft Council Conclusions*, The Social Questions Working Party, SOC 483, 14376/2006.

Council of the European Union (2021), Council Recommendation of 12 March 2021 on Roma equality, inclusion and participation, (2021/C 93/01).

Council of Europe (2020), 'Identifying and preventing systemic discrimination at the local level', policy brief, Intercultural Cities Programme.

Crenshaw, K. (1989), 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', in *University of Chicago Legal Forum*.

Crowley, N. (2006), *An ambition for equality*, Irish Academic Press.

Crowley, N. (2016), *Innovating at the intersections: Equality bodies tackling intersectional discrimination*, Equinet, Brussels.

Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination and DG Justice and Consumers, Brussels.

Crowley, N. (2016), *Making Europe more equal: A legal duty?*, Equinet, Brussels.

Crowley, N. (2021), *Tackling institutional racism: Realising the potential of equality bodies*, Equinet.

ECRI (2017), General Policy Recommendations No. 2: Equality Bodies to Combat Racism and Intolerance at National Level, adopted on 7 December 2017.

Equinet (2021), *Exploring positive action as a means to fight structural discrimination in Europe*, Equality Law in Practice Working Group.

European Commission (2021), *Common guiding principles for national action plans against racism and racial discrimination*, European Commission Subgroup on the National Implementation of the EU Anti-Racism Action Plan 2020-2025, DG Justice and Consumers.

European Commission (2018), Commission Recommendation of 22.6.2018 on Standards for Equality Bodies, COM(2018) 3850 final.

European Commission (2020), *Commission white paper on artificial intelligence – A European approach to excellence and trust*, COM(2020) 65 final.

European Commission (2020), *Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, A Union of Equality: EU anti-racism action plan 2020-2025*, Brussels, 18.9.2020, COM(2020) 565 final.

European Commission (2020), *Communication from the Commission to the European Parliament and the Council, A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion, and Participation*, Brussels, COM(2020) 620 final.

European Commission (2021), 'Guidance note on the collection and use of equality data based on racial or ethnic origin', High-level group on equality, non-discrimination and diversity, subgroup on equality data, DG Justice and Consumers.

European Commission (2021), *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence systems (Artificial Intelligence Act) and amending certain Union legislative acts*, COM(2021) 206 final.

European Commission (2021), *Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive)*, COM(2021) 139 final.

European Network Against Racism (2019), *Lessons for effective anti-racism policies: National action plans against racism*.

Fennelly, D. (2012), *Selected issues in Irish equality case law 2008 – 2011*, Irish Human Rights and Equality Commission.

Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, European Commission.

Matland, R. E. (1995), 'Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation', *Journal of Public Administration Research and Theory*, J-PART, 5(1995):2:145-174.

Mulder, J. (2020), *Indirect sex discrimination in employment*, European network of legal experts in gender equality and non-discrimination and DG Justice and Consumers European Commission.

Non-Discrimination Ombudsman (Finland) (2020), *Report of the Non-Discrimination Ombudsman: Racism and discrimination – everyday experiences for people of African descent in Finland*.

United Nations High Commissioner for Human Rights (2021), *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, Report of the United Nations High Commissioner for Human Rights, Human Rights Council Forty-seventh session, 21 June-9 July 2021.

GETTING IN TOUCH WITH THE EU

In person

All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at:

https://europa.eu/european-union/contact_en

On the phone or by email

Europe Direct is a service that answers your questions about the European Union. You can contact this service: – by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls), – at the following standard number: +32 22999696, or – by email via:

https://europa.eu/european-union/contact_en

FINDING INFORMATION ABOUT THE EU

Online

Information about the European Union in all the official languages of the EU is available on the Europa website at: https://europa.eu/european-union/index_en

EU publications

You can download or order free and priced EU publications from:

<https://publications.europa.eu/en/publications>. Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see https://europa.eu/european-union/contact_en).

EU law and related documents

For access to legal information from the EU, including all EU law since 1951 in all the official language versions, go to EUR-Lex at: <http://eur-lex.europa.eu>

Open data from the EU

The EU Open Data Portal (<http://data.europa.eu/euodp/en>) provides access to datasets from the EU. Data can be downloaded and reused for free, for both commercial and non-commercial purposes.



Publications Office
of the European Union