



**PRESERVERE**

Preventing Racism and Discrimination -  
Enabling the Effective Implementation of the  
EU Anti-Racist Legal Framework

# **AN OVERVIEW AND CRITICAL ANALYSIS OF THE EU ANTI-RACISM LEGAL FRAMEWORK**



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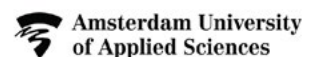


# PRESERVE

Preventing Racism and Discrimination -  
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PRESERVE is concerned with fighting intolerance, racism, xenophobia and discrimination against vulnerable ethnic and racial groups and, in particular, Roma, Jews, Muslims and people of African descent. Starting from the premise that any system tasked with protecting the vulnerable from discrimination must, first and foremost, rely on an effective legal framework, the project implements activities concerned with the better enforcement of the law.

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# AN OVERVIEW AND CRITICAL ANALYSIS OF THE EU ANTI-RACISM LEGAL FRAMEWORK

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## 1. Introduction

The EU places equality and the respect for human rights at the heart of its constitutional framework. In fact, the principle of equality has been an element of the Union's foundations from its early days, firstly developed within the context of gender equality.<sup>1</sup> The anti-discrimination framework was extensively expanded with the Treaty of Amsterdam which added further grounds for discrimination including those of race or ethnic origin, religion or belief, disability, age or sexual orientation and granted specific power to EU institutions to take appropriate action to combat discrimination based on these grounds.<sup>2</sup> Since then, major steps have been taken in developing the anti-discrimination legal framework in the EU, towards all directions beyond the initial 'gender equality ground' not only through the introduction of specialised secondary legislation but also through primary legislation such as the EU Charter of Fundamental Rights ('Charter'), which acquired the same legal value with the rest of the Treaties after the adoption of the Treaty of Lisbon.<sup>3</sup>

However, despite these major steps, the general population recognises that discrimination is still widespread in the EU and frequently experienced in Member States.<sup>4</sup> The Commission itself, has

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<sup>1</sup> Article 119 of the Treaty of Rome 1957 required that 'men and women should receive equal pay for equal work' and provided for the competence to adopt relevant Equality Directives. See for instance: Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

<sup>2</sup> Article 13 of the Treaty establishing the European Community (Consolidated version 1997) OJ C 340, 10.11.1997, p. 173–306 states that '...the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

<sup>3</sup> Article 6 of Consolidated version of the Treaty on European Union OJ C 326, 26.10.2012 ('TEU').

<sup>4</sup> According to the Special Eurobarometer 493, Report on Discrimination in the European Union (May 2019): "More than half [of the participants] say discrimination against Roma (61 percent), on the basis of ethnic origin (59 percent) [...] is widespread in their country".

acknowledged the fact that little progress has been made in the fight against discrimination since 2014.<sup>5</sup> During the pandemic a major increase has been seen in reports of racist and xenophobic incidents, and racial and ethnic minority groups have been disproportionately affected by the crisis, with higher death and infection rates. Similarly, the aftermath of terrorist attacks is another recent example where blame has been unjustly directed at people with a minority racial or ethnic background, while the need to fight racism is even more pressing for specific groups, including Roma, Jewish, Muslims and people of African descent on which the analysis of this Report will be giving more emphasis. The reason is because these minority groups have faced the highest levels of discrimination in the EU in several areas of life, including in the labour market, access to goods and services, housing, education, and healthcare,<sup>6</sup> whether through behaviour classified as direct discrimination or through less explicit forms of racism and racial discrimination, such as based on unconscious bias.

It is therefore contradictory, how the principle of non-discrimination constitutes a foundational value of the EU while at the same time not being effectively protected. Is the EU's legal framework inadequate itself, which requires a more centralised approach towards enhancing the current EU Anti-Racism framework? Or is the national implementation of the Directives weak or inadequate which prevents the effective prevention and fight against racism and xenophobia, which would require decentralised action on the part of the Member States? Such a decentralised approach also demands the involvement of professionals who are expected to enforce this framework.<sup>7</sup>

The report starts by setting out the relevant EU legal framework on anti-discrimination laws and minorities protection in the EU, both under primary and secondary legislation. Section 3 then discusses in more detail the Racial Equality Directive to assess its effectiveness and identify potential gaps. Within this framework the personal and material scope of application of the Directive are analysed, the prohibited behaviours and the enforcement practices. The Report subsequently discusses the Victims' Rights Directive (Section 4) and lastly, the relevant EU enforcement mechanism as well as the role of the Court of Justice of the EU (CJEU) in developing the law further (Section 5).

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<sup>5</sup> 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 ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive') {SWD(2021) 63 final}, p. 2.

<sup>6</sup> Fundamental Rights Agency, 'Being Black in the EU Second European Union Minorities and Discrimination Survey' (2018) <<https://fra.europa.eu/en/publication/2018/eumidis-ii-being-black>> "Up to 76 percent of young people of African descent in Austria are not in work, education or training, compared to 8 percent among the general population"; Fundamental Rights Agency, 'Second European Union Minorities and Discrimination Survey Roma' (2016) <[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-eu-minorities-survey-roma-selected-findings\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-eu-minorities-survey-roma-selected-findings_en.pdf)>

<sup>7</sup> For more information on this in relation to each Member State, see the national reports.

## 2. Setting the scene: Anti-discrimination laws and minorities protection under EU law

Action to combat discrimination, racism, xenophobia, and other types of intolerance at the European level rests on an established EU legal framework. The anti-discrimination legal framework in the EU derives from multiple sources, including primary and secondary legislation, as well as the general principles of EU law on non-discrimination and equality, and the case law of the CJEU. The victimised groups that the project aims to indirectly assist, are those subjected to intolerant and discriminatory practices on the basis of their ethnicity or race and, in particular, Roma, Jews, Muslims and persons of African descent.

### 2.1 Primary legislation

The principles of equality and non-discrimination on the grounds of ethnic and racial background are extensively covered by Treaty provisions of EU primary legislation. Primarily, Article 10 of the Treaty on the Functioning of the European Union ('TFEU') introduced a new significant provision requiring all the EU institutions to work towards eliminating discrimination. It states that 'in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.<sup>8</sup> In addition, Part Two of the TFEU is dedicated on non-discrimination and rights associated with citizenship of the EU. Article 19 TFEU (ex Article 13 Treaty establishing the European Community ('TEC')) specifically provides the power to EU institutions to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".<sup>8</sup> The part of the Treaty dedicated on the Area of Freedom, Security and Justice also makes an important reference to the prevention and combating of crime, racism and xenophobia as one of the objectives of the Union, particularly relevant to the measures adopted in criminal matters and security.<sup>9</sup>

In addition to the TFEU, the TEU also makes explicit references to the protection of individuals against various forms of discrimination and the right to equality. Specifically, Article 2 TEU sets out the foundational values of the EU which *inter alia* include "respect for human dignity,

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<sup>8</sup> Article 19 TFEU: 'Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

<sup>9</sup> Article 67(3) TFEU: 'The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.'

freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”, in a society where non-discrimination and equality prevail. Moreover, Article 3 TEU sets out the aims of the Union including the combat of social exclusion and discrimination, and the promotion of social justice and protection, equality between women and men, solidarity between generations and the protection of the rights of the child.<sup>10</sup>

More importantly, the TEU has explicitly given to the EU Charter the same legal value as the rest of the Treaties, thus granting it binding legal effect and incorporating it into the EU legal order and primary legislation.<sup>11</sup> Chapter III of the Charter is dedicated to issues of equality. Article 21 provides a freestanding right to non-discrimination in the implementation of EU law on “any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”. Importantly, Article 21 of the Charter is arguably broader in scope than the grounds for which the EU can legislate against discrimination under Article 19 TFEU discussed above, and unlike Article 14 of the European Convention on Human Rights (‘ECHR’), it is not required to invoke it in conjunction with another right in order for the provision to have effect. In addition, Chapter III of the Charter contains a number of other significant provisions on equality, including that everyone is equal before the law,<sup>12</sup> the children’s right to such protection and care as is necessary for their well-being,<sup>13</sup> the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life,<sup>14</sup> and the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community.<sup>15</sup>



**'Everyone is equal before the law' - Article 20, Charter of Fundamental Rights**



As part of the EU’s constitutional framework, the provisions of the Charter bind the EU institutions, bodies, offices, and agencies as well as the Member States when implementing Union law.<sup>16</sup> In other words, all EU legislation and policies adopted must comply with the provisions of the Charter, including the Directives that will be discussed below. The CJEU confirmed this position in the case of *Test-Achats and Others*, stating that the validity of the provision in question (Article

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<sup>10</sup> Article 3(3) TEU.

<sup>11</sup> Article 6(1) TEU.

<sup>12</sup> Article 20 of the Charter.

<sup>13</sup> Article 24 of the Charter.

<sup>14</sup> Article 25 of the Charter.

<sup>15</sup> Article 26 of the Charter.

<sup>16</sup> Article 51(1) of the Charter.

5(2) of Directive 2014/113) must be assessed in light of the relevant provisions of the Charter, since the Recitals of that Directive expressly referred to the Charter.<sup>17</sup> Yet the same principle applies to secondary legislation adopted which pre-dates the Charter of Fundamental Rights, such as the Racial Equality Directive, which can still be subject to validity questions if not compatible with the Charter.<sup>18</sup>

## 2.2 Secondary legislation

As discussed above, EU institutions are explicitly granted powers from the EU Treaties to take the appropriate actions to combat discrimination and/or adopt legislation to ensure a common high level of protection against discrimination in all the Member States, always in accordance with the principles of subsidiarity and proportionality.<sup>19</sup> As such, the EU has adopted a series of secondary legislation, Directives, Regulations and/or Decisions which the Member States are bound to follow. These include the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA ('Victims' Rights Directive').

The Racial Equality Directive lays down the framework for combating discrimination specifically on the grounds of racial or ethnic origin deriving from directly or indirectly discriminatory behaviour, including both acts and omissions.<sup>20</sup> As will be seen in the sections that follow, the Racial Equality Directive provides protection against such discrimination in a wide range of sectors including in the field of employment and occupation as well. For this reason, the Employment Equality Directive,<sup>21</sup> adopted within the same package of proposals by the end of November 2000, which implements equal treatment in employment and occupation, excludes the grounds of gender and race from its protection.<sup>22</sup> Therefore, in contrast to the Racial Equality Directive, the material scope

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<sup>17</sup> Judgment of 1 March 2011, 'Association Belge des Consommateurs Test-Achats and Others', C-236/09, ECLI:EU:C:2011:100, para. 21; See also Judgment of 9 November 2010, 'Volker und Markus Schecke and Eifert', C-92/09, ECLI:EU:C:2010:662.

<sup>18</sup> Sara Iglesias Sánchez, 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights' (2012) 49 Common Market Law Review 1565-1611.

<sup>19</sup> Article 5 TEU.

<sup>20</sup> See section 3 of the current Report for the full analysis.

<sup>21</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2.12.2000, p. 16–22.

<sup>22</sup> Ibid, Recital 10: 'On 29 June 2000 the Council adopted Directive 2000/43/EC(6) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. That Directive already provides protection against such discrimination in the field of employment and occupation.'



of the Employment Equality Directive is limited to employment and occupation, yet aiming to improve the employment opportunities for a wider range of groups of people, including people with disabilities.<sup>23</sup> Importantly, the Member States are allowed and should be actively encouraged to extend the principle of equal treatment in the Employment Equality Directive to areas of activity beyond employment while improving the level and quality of the protection that it affords.<sup>24</sup>

The other important secondary legislation within the EU race-relevant legal framework, is the Victims' Rights Directive which aims to ensure that victims of crime receive appropriate information, support and protection and may participate in criminal proceedings wherever in the EU the damage occurred. This Directive is considered as a major step forward, as victims constituted the "forgotten party" of the criminal justice system for years,<sup>25</sup> while the interest in their rights on the EU level only emerged in 2001.<sup>26</sup> With the integration of the policy on the Area of Freedom, Security and Justice, more attention was paid to victims' issues which eventually led to the adoption of the relevant Directive. Traditionally, the rationale behind victims' rights legal measures, is connected to the need to guarantee the fundamental freedom of movement within the Union, which is a well-established objective of the EU, in order to avoid cross-border victimisations. In other words, a citizen who resides in a Member State other than that of which they are a national, should receive the same level of protection as the nationals of that country. The CJEU also made this clear in several cases, stating that "when [Union] law guarantees a natural person the freedom to go to another Member State the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement".<sup>27</sup> In order however to avoid a situation where cross-border victims enjoy rights not available to nationals (reversed discrimination), the content of the former framework decision and now the Victims' Rights Directive, ultimately applies to all victims of crime.<sup>28</sup> As will be discussed

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<sup>23</sup> Employment Equality Directive, Article 1: "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment".

<sup>24</sup> R Whittle, 'The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective' (2002) 27 *European Law Review* 303; Article 8(1) of the Employment Equality Directive provides that Member States are entitled to 'introduce or maintain provisions which are more favourable to the protection of... equal treatment than those laid down [elsewhere] in this Directive'.

<sup>25</sup> Marta Muñoz de Morales Romero, 'Reality or Fiction? Strengthening Victims of Crime in Spain by Implementing the EU Victims' Rights Directive and other European Legal Instruments' (2018) 26 *European Journal of Crime, Criminal Law and Criminal Justice* 335-366.

<sup>26</sup> Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings; Council Directive 2004/80/ec of 29 April 2004 relating to compensation to crime victims.

<sup>27</sup> Judgment of 2 February 1989, *Cowan v Trésor public*, C-186/87, ECLI:EU:C:1989:47.

<sup>28</sup> Marta Muñoz de Morales Romero, 'Reality or Fiction? Strengthening Victims of Crime in Spain by Implementing the EU Victims' Rights Directive and other European Legal Instruments' (2018) 26 *European Journal of Crime, Criminal Law and Criminal Justice* 335-366.

below, the Member States reacted positively and supported the necessity to enhance victims' protection. However, some key issues were raised due to the divergent models of protection on the national legal systems which were successfully solved during the negotiations, yet further analysis is provided regarding its national implementation in practice in the country reports that follow.

The Racial Equality Directive and the Victims' Rights Directive, constitute the key instruments through which racism is tackled in the EU, but they are not the only race-relevant legal measures. The Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law refers to "publicly inciting to violence or hatred directed against a group of persons or a member of such a group, defined by reference to race, colour, religion, descent or national or ethnic origin".<sup>29</sup> The purpose of the Framework Decision is to ensure that certain serious manifestations of racism and xenophobia (including the instigating, aiding or abetting in the commission of those offences), constitute an offence in all EU countries and be punishable by effective, proportionate and dissuasive penalties. Therefore, it provides for the harmonisation of laws and regulations of EU countries involving hate crime and hate speech. The jurisdiction of the Framework Decision is positively quite broad as it applies within the territory of the Member States, or when the offender is a national of a Member State, or when the legal person has its head office in a Member State.<sup>30</sup> It also applies to online content when the offender is physically present in a Member State, irrespective of where the server on which the content is stored is, and also when the content is stored on a server located in a Member State.<sup>31</sup>

### 3. The Racial Equality Directive: Ripe for reform?

The Racial Equality Directive,<sup>32</sup> lays down a common framework, for combating racism and discrimination, by implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, which the Member States are then obliged to give effect to, by transposing it in their domestic laws. The use of a Directive as an instrument to provide minimum protection for victims of racial discrimination is useful as it is only binding as to the result to be achieved, allowing the Member States to choose the form and method of implementing the law nationally. Therefore, the Directive takes into account the divergent legal and cultural systems of the Member States when pursuing the principle of equal treatment.<sup>33</sup>

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<sup>29</sup> Article 1 of the Council Framework Decision 2008/913/JHA of 28 November 2008.

<sup>30</sup> *Ibid*, Article 9(1).

<sup>31</sup> *Ibid*, Article 9(2).

<sup>32</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180, 19.7.2000, p. 22–26.

<sup>33</sup> Fernne Brennan, 'The European Race Directive: A Bridge so Far?' in Raphael Walden (ed.), *Racism and Human Rights* (Martinus Nijhoff Publishers 2004) 143-164.

Despite the Directive counting more than ‘two-decades’ in force, its personal, material and territorial scope is sufficiently wide to allow the Directive to easily adapt to societal developments and provide a flexible tool that can be utilised in national systems with different historical and legal traditions. It is however argued that the ‘one size fits all’ approach and the extended flexibility granted, may not be the most appropriate approach on the EU level anymore, as the percentages of racism incidents and xenophobia are in fact rising. The report will therefore examine whether a need exists to adopt a particular framework / approach towards specific minority groups and the extent to which the flexibility or even ‘vagueness’ of the Directive, could have potentially ‘allowed’ the Member States to deviate from its main objectives which could in fact diminish its effectiveness, coupled with the refugees’ crisis and Covid-19 crisis.

### *3.1. Personal and material scope of application*

The Racial Equality Directive intends to protect “all persons” from discrimination on the grounds of racial or ethnic origin, “as regards both the public and private sectors, including public bodies”.<sup>34</sup> The protection includes third country nationals, but does not extend to protection for discrimination based on nationality or statelessness.<sup>35</sup> This exception relates to the immigration policy and Member States’ desire to retain control over such policy. Racial or ethnic origin can be seen as transversal personal characteristics that exist as a result of self-identification by ethnic minorities as people with a shared history, culture and traditions or as a result of social constructions deriving from bias and prejudices held by racial majorities.<sup>36</sup> The discrimination based on racial or ethnic origin can take the form of Afrophobia, Romaphobia, Islamophobia or Antisemitism, yet the grounds of racial and ethnic discrimination as referred to in the law, are not defined in the Directive or elsewhere in EU law.



***Racial discrimination is defined as any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin.***



Recital 6 of the Directive specifically states that the EU ‘rejects theories which attempt to determine the existence of separate human races. The use of the term “racial origin” in this Directive does not imply an acceptance of such theories.’. In other words, the Union is rejecting any influence from ‘theories

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<sup>34</sup> Article 3(1) of the Racial Equality Directive.

<sup>35</sup> Article 3(2) of the Racial Equality Directive.

<sup>36</sup> Euractiv, ‘Handbook on the Racial Equality Directive: with special focus on Italy, Romania and Sweden’ (Independent Report, September 2020) <<https://www.euractiv.com/section/non-discrimination/news/handbook-on-the-racial-equality-directive/>>

of inferior races' that go against the essence of inclusiveness and equality promoted from this Directive. In national laws there may be overlaps between race and ethnic origin or nationality, religion, language and belief. However, due to the increased criticism around the use of the term 'race',<sup>37</sup> several Member States have decided to erase the term from legal texts, which could create inconsistencies in the implementation of the Directive nationally. For instance, Sweden has abolished the term 'race' as a way of responding to racism by tabooing racial categorisation and by replacing the term with other 'softer' terms in public discourse and legal texts.<sup>38</sup> Similarly, Austria has replaced 'race' with 'ethnic affiliation' in the Federal Equal Treatment Act, while Finland replaced the words 'race' and 'skin colour' with 'descent'.<sup>39</sup>

The European Court of Human Rights (ECtHR) supports that ethnicity and race are related and overlapping concepts. It assessed that "whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds".<sup>40</sup>

The term 'racial discrimination' is explicitly defined in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin".<sup>41</sup> Recital 3 in the preamble of the Directive refers to various international agreements including the ICERD, while the CJEU has used this definition of 'racial discrimination' in its case law to interpret its own.

Such an example is the case of *CHEZ Razpredelenie Bulgaria* where the CJEU defined 'ethnic origin' as "the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds".<sup>42</sup> The judgment particularly concerned a case of discrimination against a non-Roma person 'together with the Roma'.<sup>43</sup> More specifically, the complainant was a woman of non-Roma origin who ran a shop in the district as a sole trader. She complained that the practice of installing electricity meters on the concrete pylons at a height of between six and seven meters, whereas in the other districts they are placed at a

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<sup>37</sup> 'Race' refers to the (erroneous) idea that people can be divided into groups based on their heritable physical traits (Official Report of the Swedish Government, 2003:39: 187–221).

<sup>38</sup> Leila Brannstrom, 'The Terms of Ethnoracial Equality: Swedish Courts' Reading of Ethnic Affiliation, Race and Culture' (2018) 27 *Social & Legal Studies* 616-635.

<sup>39</sup> Mathias Möschel, 'Race in mainland European legal analysis: Towards a European critical race theory' (2011) 34 *Ethnic and Racial Studies* 1648-1664.

<sup>40</sup> *Timishev v. Russia*, Applications nos. 55762/00 and 55974/00), para. 55.

<sup>41</sup> Article 1.1. ICERD.

<sup>42</sup> Judgment of the Court of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, ECLI:EU:C:2015:480, para. 46.

<sup>43</sup> *Ibid*, para. 73.

height of 1.70 meters, was attributed to the fact that most of the inhabitants of the district were of Roma origin.<sup>44</sup> The applicant argued that this practice caused her to suffer direct discrimination on the grounds of nationality as she was unable to check her electricity meter for the purpose of monitoring her consumption.

The CJEU held that the principle of equal treatment between persons irrespective of racial or ethnic origin, protected under Directive 2000/43/EC, extends to persons who, although not themselves members of the racial or ethnic group concerned, nevertheless suffer direct or indirect discrimination, as a result of less favourable treatment or particular disadvantages respectively.<sup>45</sup> Therefore, indirect discrimination can be invoked by persons disadvantaged by association with a protected characteristic and a finding of discrimination does not depend on the existence of an intimate or close relationship between the alleged victim and the group with which he or she is associated.<sup>46</sup> The protection is thus expanded to people who are mistakenly believed to belong to a particular group or those involved with members of a group with a protected characteristic. Some Member States recognised in their national law, *albeit* not expressly, that the ban on ethnic discrimination applies by reference to protected grounds, rather than to categories of persons.<sup>47</sup> In other words, the so-called discrimination by association.

On the other hand, contrary to its more progressive equality jurisprudence, the CJEU has limited the possibility of claiming racial discrimination under EU law in the more recent case of *Jyske Finans*.<sup>48</sup> The judgment concerned the less favourable treatment of a Danish citizen born outside the EU or the European Free Trade Association (EFTA), to provide additional identification documents when requesting for a loan attributed to his foreign origin. The Court denied a finding of either direct or indirect discrimination, as the Directive “does not cover different treatment on grounds of nationality” and the “different treatment was not necessarily directly based on his ethnic origin”.<sup>49</sup> The Court further stated that “Ethnic origin cannot be determined on the basis of a single criterion but, on the contrary, is based on a whole number of factors, some objective and others subjective. Moreover, it is not disputed that a country of birth cannot, in general and absolute terms, act as a substitute for all the criteria...”<sup>50</sup>

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<sup>44</sup> Ibid, para. 22.

<sup>45</sup> Ibid, paras 49 and 56; See also Judgment of 17 July 2008, *Coleman*, C-303/06, EU:C:2008:415, paras 38 and 50.

<sup>46</sup> 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 (‘the Racial Equality Directive’) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (‘the Employment Equality Directive’), (Brussels, 19.3.2021) COM(2021) 139 final.

<sup>47</sup> Swedish Government Bill, 1997/98:177: 59 and Government Bill, 2002/03:65:91.

<sup>48</sup> Judgment of 6 April 2017, *Jyske Finans*, C-668/15, ECLI:EU:C:2017:278.

<sup>49</sup> Shreya Atrey, ‘Race discrimination in EU Law after *Jyske Finans*’ (2018) 55 Common Market Law Review 625-642.

<sup>50</sup> Judgment of 6 April 2017, *Jyske Finans*, C-668/15, ECLI:EU:C:2017:278, para. 19.

Despite not explicitly defining the terms racial or ethnic origin, the Directive attempted to limit its jurisdiction by excluding the protection from discrimination when a person is treated differently to EU citizens on grounds of their nationality, from its scope.<sup>51</sup> This limitation has had a clear impact on individuals' rights (e.g. *Jyske Finans*) which is partly remedied through the legal expansion in *CHEZ* above, as well as possibly through the flexibility allowed to Member States when implementing the Directive and eventually applying it in Courts. For instance, in Sweden a real estate company argued that its differential rent rate for refugees and non-refugees was based on the idea that the former cause greater damages to apartments. The national courts had trouble establishing a link between refugeehood and ethnic discrimination and found that discriminating against refugees fell outside the scope of the national law implementing the Directive as they could be of different ethnicities or races.<sup>52</sup> However, the Göta Court of Appeal, broadly interpreted the law and found that belonging to the category of refugees, is indirectly related to a person's ethnic affiliation so the case amounted to ethnic discrimination.<sup>53</sup>

In addition, it is important to note that the Racial Equality Directive lays down minimum requirements in terms of protection, giving the Member States the option to introduce or maintain more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.<sup>54</sup>

In light of the above, it seems that the Directive is not only using 'contested' terminology in its text to provide protection against ethnic and racial discrimination, but it is also refraining from a unified approach in defining those terms. On the one hand, this lack of clarity and ambiguity can lead to further confusion and divergence between the legal systems of the Member States which could eventually diminish rather than promote equality and non-discrimination. On the other hand, the flexibility provided can also lead to positive developments deriving from national legislators and/or the courts such as the case of Sweden above. It can therefore be argued that it all boils down to how the Member States define racial or ethnic origin or even that they bear the larger share in applying its provisions. For instance, the Swedish prohibition on ethnic discrimination had in the past attracted scholarly criticism mainly because of its alleged ineffectiveness<sup>55</sup> and the difficulty

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<sup>51</sup> Article 3(2) of the Racial Equality Directive.

<sup>52</sup> Göta Court of Appeal case no. T 1666-09 *The Equality Ombudsman v. Skarets Fastigheter Aktiefbolag*, judgment of 25 February 2010.

<sup>53</sup> Leila Brännström, 'The Terms of Ethnoracial Equality: Swedish Courts' Reading of Ethnic Affiliation, Race and Culture' (2018) 27 *Social & Legal Studies* 616-635, 622.

<sup>54</sup> Article 6 and Recital 25 of the Racial Equality Directive.

<sup>55</sup> Reza Banakar, 'When do rights matter? A case study of the right to equal treatment in Sweden' in Halliday S and Schmitt P (eds), *Human Rights Brought Home* (Hart Publishing 2004) 165-184.

of winning cases on grounds of ethnic discrimination.<sup>56</sup> According to Brännström the criticism could be partly explained by reference to the Swedish courts' narrow reading of 'ethnic affiliation' which is understood as a question of bloodlines and body types which could restrict the scope of the Directive.

In terms of material scope, the Racial Equality Directive prohibits discrimination based on racial or ethnic origin in an exceptionally wide range of sectors, compared to other equality directives, such as the Employment Equality Directive which prohibits discrimination on almost every ground listed under Article 10 TFEU, but has a material scope limited to the context of employment and occupation only. In particular, the Racial Equality Directive prohibits discrimination in relation to employment including the conditions for access to employment, to self-employment and to occupation, such as selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.<sup>57</sup> It prohibits discrimination in relation to access to all types and levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience<sup>58</sup> as well as the exercise of employment and working conditions, including dismissals and pay.<sup>59</sup> Moreover, in relation to membership of and involvement in a workers' or employers' organisation, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations and importantly, in the area of social protection, including social security, healthcare and social advantages.<sup>60</sup> Social advantages are broadly interpreted to include both benefits of economic or cultural nature including public transport concessionary, reduced prices for access to events or subsidised meals in schools for children from low-income families.<sup>61</sup> Lastly, education and access to and supply of goods and services that are available to the public, including housing.<sup>62</sup>



***Inclusion of children in public education is key to social inclusion.***



The inclusion of sectors such as housing, education, and social protection under the Directive's protection, is particularly important to Roma, Muslim and people of African descent who have been experiencing discrimination (and still are), in

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<sup>56</sup> Leila Brännström, 'The Terms of Ethnoracial Equality: Swedish Courts' Reading of Ethnic Affiliation, Race and Culture' (2018) 27 Social & Legal Studies 616-635.

<sup>57</sup> Article 3(1)(a) of the Racial Equality Directive.

<sup>58</sup> Ibid, Article 3(1)(b).

<sup>59</sup> Ibid, Article 3(1)(c).

<sup>60</sup> Ibid, 3(1)(e) and (f).

<sup>61</sup> Opinion of AG Sharpston of 11 September 2018, Maniero, C-457-17, ECLI:EU:C:2018:697, para. 47.

<sup>62</sup> Article 3(1)(g) and (h) of the Racial Equality Directive.

higher percentages than other groups of people in those sectors.<sup>63</sup> Moreover, inclusion of children in public education is key to ensuring access to the labour market and more broadly, to social inclusion subsequently. Education to which the Directive applies is not specified or limited, but it suffices to say that all types of education are covered from pre-school to higher education. Therefore, due to this flexibility the Union supports that the Member States have the “primary responsibility and the competences to change the situation of marginalised populations, so action to support Roma lies first and foremost in their hands”.<sup>64</sup> In order to support the effective implementation of the Directive further and ensure for a more integrated approach, the EU adopted a wide range of legal, policy and financial instruments. Particularly, as a matter of priority in the area of education, the Commission instructed the Member States to “eliminate school segregation and misuse of special needs education; enforce full compulsory education and promote vocational training; increase enrolment in early childhood education and care; improve teacher training and school mediation; raise parents’ awareness of the importance of education”.<sup>65</sup>

The Directive has been characterised as providing a ‘uniquely high level of protection’ from structural discrimination especially in education.<sup>66</sup> However, in order to ensure the highest level of protection possible including for those groups of people that have been disproportionately affected by discriminatory behaviours including, Roma, Jewish, Muslims and people of African, it is not enough to ensure for a broad personal and material scope of application. It is argued that it is necessary to re-think the Directive’s ‘individual justice model’, for instance by including unified definitions of ethnic groups, *inter alia* for Roma as a dual racial and ethnic minority.<sup>67</sup> In other words, a multi-faceted definition for these minority groups that can capture all the relevant social attributes.

### 3.2. Prohibited behaviours

The purpose of the Racial Equality Directive is to put into effect the principle of equal treatment to prevent discrimination on the grounds of racial or ethnic origin. According to Article 2(1), equal

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<sup>63</sup> 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 7.10.2020) COM(2020) 620 final.

<sup>64</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘National Roma Integration Strategies: a first step in the implementation of the EU Framework’ (Brussels, 21.5.2012) COM(2012) 226 final.

<sup>65</sup> Ibid.

<sup>66</sup> Lilla Farkas, ‘Segregation of Roma Children in Education Addressing Structural Discrimination through the Race Equality Directive’ (Directorate-General for Employment, Social Affairs and Inclusion, European Commission, August 2008) <<https://op.europa.eu/en/publication-detail/-/publication/e3f92f42-d829-4abd-a5d2-34985e97162f>>

<sup>67</sup> Ibid.



treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin. The prohibition of direct and indirect discrimination is a familiar legal concept in the framework of EU law, *inter alia* within the context of the EU single market. EU law does not specifically define the types of prohibited conduct, therefore actions and omissions are equally covered.

The Directive defines direct discrimination as the situation where “one person is treated less favourably than another [...] in a comparable situation”.<sup>68</sup> In other words, it prohibits conducts and practices motivated by racial or ethnic preference. Examples of directly discriminatory behaviour could include denied access to employment, difficulties in enrolling to schools or more generally an ethnic minority and an ethnic majority person are not given equal treatment. Although theoretically easier to identify, the concept of ‘direct discrimination’ has been subject to interpretation before the CJEU. In particular, the CJEU clarified that direct discrimination would *not only* exist where there is a serious, obvious and particularly significant case of inequality.<sup>69</sup> It is sufficient that the measure at issue was introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned in the case.<sup>70</sup> In other words, even a formally neutral practice affecting one group only, could constitute direct discrimination according to the Court. Moreover, in the case of *Feryn*, the Court ruled that even in the absence of an identifiable complainant who claims to be the victim, direct discrimination could still occur.<sup>71</sup> The case concerned a public statement by NV Firma Feryn during a job recruitment process that it would not consider applications from persons of a certain ethnic origin.

Indirect discrimination is defined as an apparently neutral measure which 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”.<sup>72</sup> Therefore, indirect discrimination is harder to spot since it concerns conduct that may ‘hide’ discrimination well or lack apparent connections to racial or ethnic origin. According to the CJEU in order for a measure to be capable of constituting indirect discrimination under the Directive it is sufficient that “although using neutral criteria not based on the protected characteristic, it has the effect of placing particularly persons possessing that characteristic at a disadvantage”.<sup>73</sup>

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<sup>68</sup> Article 2(1)(a) of the Racial Equality Directive.

<sup>69</sup> Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, ECLI:EU:C:2015:480, para. 99.

<sup>70</sup> *Ibid*, para. 91.

<sup>71</sup> Judgment of 10 July 2008, *Feryn*, C-54/07, ECLI:EU:C:2008:397, para. 25.

<sup>72</sup> Article 2(1)(b) of the Racial Equality Directive.

<sup>73</sup> Judgment of the Court of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, ECLI:EU:C:2015:480, para. 96; See also, Judgment of 18 March 2014, *Z.*, C-363/12, ECLI:EU:C:2014:159, para. 56.

The distinction between direct and indirect discrimination is important since the former is more difficult to justify. In general, the Racial Equality Directive has fewer exceptions as compared to discrimination on the grounds of sex, disability, sexual orientation, age or religion.<sup>74</sup> The Directive sets out two grounds on which a difference of treatment can be justified. Firstly, where “by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate, and the requirement is proportionate”.<sup>75</sup> The second concerns a positive action with a view to ensuring full equality in practice, prevent or compensate for disadvantages linked to racial or ethnic origin, by maintaining or adopting specific measures.<sup>76</sup> For instance, additional language classes for minority students.

The Directive also prohibits discriminatory harassment on the grounds of racial or ethnic origin under Article 2(3), when the unwanted conduct “takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States”. It is therefore clear that harassment can be established without proving intent, since the consequence of the behaviour is the key factor here. On the other hand, uncertainties exist in relation to the meaning of degrading or humiliating environment which can be a rather subjective concept leading to a lot of discrepancies between the Member States’ national implementation.

In addition, as part of the recognition of the stigmatisation and ‘blame culture’ that appears to prevail in various Member States towards people who suffer from racial or ethnic discrimination, the Directive has given legal effect to the notion of victimisation under Article 9.<sup>77</sup> This provision appears to impose a positive duty on Member States to provide a legal remedy to protect those who may be victimised for bringing a complaining or initiating legal proceedings, through adverse treatment as a reaction.

### 3.3. Enforcement practices: Remedies and Sanctions

The Racial Equality Directive has been characterised as innovative for a variety of reasons including the mere fact that it sets the minimum standards for the protection of individuals

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<sup>74</sup> Lisa Waddington and Mark Bell, ‘More equal than others: Distinguishing European Union Equality Directives’ (2001) 38 *Common Market Law Review* 587-611.

<sup>75</sup> Article 4 of the Racial Equality Directive.

<sup>76</sup> *Ibid*, Article 5.

<sup>77</sup> Fernne Brennan, ‘The European Race Directive: A Bridge so Far?’ in Raphael Walden (ed.), *Racism and Human Rights* (Martinus Nijhoff Publishers 2004) 143-164.

against racial or ethnic discrimination. Before its introduction, most countries had a legal patchwork of antidiscrimination provisions that lacked effectiveness. Another important aspect is the requirement of creating bodies for the promotion of equal treatment.<sup>78</sup> This development is noteworthy because it has eased the path for victims to pursue complaints,<sup>79</sup> firstly by reversing the burden of proof, making it the respondent's responsibility to prove that there has been no breach of the principle of equal treatment,<sup>80</sup> and secondly by stipulating that the intermediaries could potentially initiate the legal process on behalf of individuals. The case of *Feryn* discussed above, is a prominent example of this development, since the discrimination case was in fact brought by the Belgian Centre for Equal Opportunities and Combating Racism against the Belgian company at issue.<sup>81</sup> The equality bodies must, as a minimum, be able to provide independent assistance to victims of discrimination in pursuing their complaints, conduct independent surveys concerning discrimination and publish independent reports on any issues relating to discrimination.<sup>82</sup>

The Directive also provides for sanctions applicable to infringements of the national provisions adopted pursuant to the Directive, in order to ensure better enforcement of their provisions. The sanctions may comprise the payment of compensation to the victim and must be effective, proportionate and dissuasive.<sup>83</sup> Contrary to other equality directives, which provide strikingly detailed provisions on compensation or reparation of victims,<sup>84</sup> the Racial Equality Directive leaves the detailed application of the principles that govern national remedies in discrimination cases to the national discretion. This restraint does not necessarily make the sanctions less effective, since the standards must be equivalent, yet the sanction could differ depending on the legal avenues available in the different Member States. According to the CJEU, other than fines and compensation, sanctions can take the form of prohibitory injunctions according to the rules of national law, ordering the employer to cease the discriminatory practice, where appropriate a fine, or in conjunction with an adequate level of publicity such as an apology the cost of which is to be borne by the defendant.<sup>85</sup>

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<sup>78</sup> Article 13 of the Racial Equality Directive.

<sup>79</sup> Natalia Banulescu-Bogdan and Terri Givens, 'The State of Antidiscrimination Policies in Europe: Ten Years after the Passage of the Racial Equality Directive' (Migration Policy Institute, 2010) <[https://equineteurope.org/wp-content/uploads/2010/11/discrimination\\_draft\\_nov\\_1\\_2\\_-1.pdf](https://equineteurope.org/wp-content/uploads/2010/11/discrimination_draft_nov_1_2_-1.pdf)>

<sup>80</sup> *Ibid*, Article 8.

<sup>81</sup> Judgment of 10 July 2008, *Feryn*, C-54/07, ECLI:EU:C:2008:397.

<sup>82</sup> Article 13(2) of the Racial Equality Directive.

<sup>83</sup> Article 15 of the Racial Equality Directive.

<sup>84</sup> Article 18 of the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

<sup>85</sup> Judgment of 10 July 2008, *Feryn*, C-54/07, ECLI:EU:C:2008:397, paras 35-40.

## 4. Victims' Rights Directive

The Victims' Rights Directive was adopted roughly a decade after the Racial Equality Directive and EU countries had to implement its provisions into their national laws by 16 November 2015. This Directive is considered to be a major step forward, as it has turned the interest to the victims' rights to ensure that they receive the support and protection they need, including appropriate information, support and protection, and are able to participate in the criminal proceedings. It is therefore imposing a duty on the Member States to ensure that victims of crime are recognised and treated in a respectful, sensitive and professional manner according to their individual needs and without any discrimination.<sup>86</sup> The list of rights established in the Victims' Rights Directive includes among others, the right to understand and to be understood, right to receive information about the case, right to interpretation and translation, right to access victim support services, right to legal aid and right to reimbursement of expenses.<sup>87</sup>

Article 2 of the Directive defined the notion of 'victim' to mean (a) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by a criminal offence, or (b) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death. Since the beginning of negotiations, a majority of Member States agreed that family members should be defined by national law, yet the Commission strongly opposed this view. According to the Directive, the notion 'family members' includes the spouse; the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis; the relatives in direct line; the siblings; and the dependants of the victim.<sup>88</sup> In addition, a distinction is made between family members of a victim whose death has been directly caused by a criminal offence and who has suffered harm as a result, and family members of victims who do not fall within the definition of victim, but are still granted a number of the rights under this Directive.<sup>89</sup> Member States' concerns related to fears that the course of criminal proceedings might be affected, and regarding the likely delay of proceedings and the additional administrative burden and increased costs.<sup>90</sup> Eventually, a compromise worked out and the Member States are free to establish procedures to limit the number of family members who may benefit from the rights set

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<sup>86</sup> Recital 9 of the Victims' Rights Directive.

<sup>87</sup> Articles 3, 6, 7, 8, 13 and 14 of the Victims' Rights Directive.

<sup>88</sup> Ibid, Article 2(1)(b).

<sup>89</sup> Sławomir R. Buczma, 'An overview of the law concerning protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union' (2013) 14 ERA Forum 235-250, 242.

<sup>90</sup> Ibid.

out in the Directive taking into account the individual circumstances and determine which family members have priority in relation to the exercise of rights.<sup>91</sup>

The Directive has interestingly paid particular attention to violence against women, children, and sexual identity violence, and far less to victims of racial and ethnic discrimination.<sup>92</sup> A special category is also included in the Directive dedicated to victims with specific protection needs including for instance the right to avoid contact between victim and offender.<sup>93</sup> To this end, an individual assessment concerning the circumstances of the victim must be conducted, where



**Police officers and court staff should receive training to increase their awareness of the needs of victims.**



particular attention is to be paid to victims who have suffered a crime committed with a bias or discriminatory motive, and victims of hate crimes.<sup>94</sup> The attention to specific groups of victims has been judged to be a positive development, although it has been also

considered that it might generate a hierarchy between groups of victims and fragmentation of the rights given.<sup>95</sup> However, the mechanism of individual assessment to determine who is a victim with specific protection needs, is arguably balancing this criticism, since *any* victim could be vulnerable, including victims of racial and ethnic discrimination, harassment or victimisation.

One of the most important achievements of the Directive, is the training of practitioners which was only mentioned as an idea in older legal instruments,<sup>96</sup> while the latest Directive formally included it as a significant tool to strengthen victims' rights. More specifically, under Article 25, the Directive imposes an obligation on the Member States to ensure that officials, such as police officers or court staff, likely to come into contact with victims, receive both general and specialist training "to a level appropriate [...] to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner". Equally, training should be promoted for lawyers, prosecutors and judges and for practitioners who provide victim support or restorative justice services.<sup>97</sup> However, the Directive does not provide for a more integrated approach of what the 'general' and 'specialist' trainings should or could involve nationally. This

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<sup>91</sup> Article 2(2) of the Victims' Rights Directive.

<sup>92</sup> Preamble of the Victims' Rights Directive.

<sup>93</sup> Article 19 of the Victims' Rights Directive.

<sup>94</sup> Article 22 of the Victims' Rights Directive.

<sup>95</sup> Marta Muñoz de Morales Romero, 'Reality or Fiction? Strengthening Victims of Crime in Spain by Implementing the EU Victims' Rights Directive and other European Legal Instruments' (2018) 26 *European Journal of Crime, Criminal Law and Criminal Justice* 335-366.

<sup>96</sup> Council Decision 2011/220/EU of 31 March 2011 on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

<sup>97</sup> Recital 61 of the Victims' Rights Directive.

gap becomes problematic in cases where the victims have disabilities of any type such as sensory or mental disability. Despite, the centralised definition possibly needed, the training also requires resources varying from one Member State to another.

The general assessment of the content of the Directive is positive. The Directive considerably strengthens the rights of victims and their family members to information, support and protection. It further strengthens the victims' procedural rights in criminal proceedings. However, the legal recognition of rights will only have credibility amongst the victims of crimes, if they are applied in practice.<sup>98</sup> A potential drawback that the Member States could face when implementing the Directive, is the need for economic resources to make the rights effective. Most of the rights included in the law require the provision of material and human resources, including the training of professionals working in this field discussed above. Moreover, the approximation of procedural rights in criminal proceedings in the 27 Member States is not a simple aim to achieve, considering the practical difficulties that could arise. For instance, not all courts and police premises are well-suited to prevent the contact between the victim and the offender. Therefore, the achievement of the Directive's objective is depended upon its effective implementation nationally and the practical use of that national law.

## 5. EU enforcement and the role of Court of Justice

Individuals can enforce the Racial Equality Directive before the courts, administrative authorities, or mediatory or reconciliatory Alternative Dispute Resolution ('ADR') bodies. A duty is thus imposed on the Member States to make available judicial and/or administrative procedures to victims of discrimination nationally. The judicial proceedings in each Member State can follow a different legal avenue; civil, criminal, labour or administrative.

The European Commission on the other hand, holds the responsibility of ensuring the application of the Treaties and the effective enforcement of EU law nationally, including Directives.<sup>99</sup> This can be primarily done through Article 258 TFEU, and the initiation of proceedings against a Member State for failing to fulfil an obligation under EU law. The procedure is divided into the administrative (or preliminary) stage and the judicial stage. Under the Racial Equality Directive, the Commission had initiated infringement procedures against various Member States for poor and/or wrongful implementation of the Directive. For instance, in relation to Article 2 the Commission identified lack

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<sup>98</sup> Marta Muñoz de Morales Romero, 'Reality or Fiction? Strengthening Victims of Crime in Spain by Implementing the EU Victims' Rights Directive and other European Legal Instruments' (2018) 26 *European Journal of Crime, Criminal Law and Criminal Justice* 335-366

<sup>99</sup> Article 17 TEU.

of several definitions of discrimination in the national laws or limited definition of harassment and indirect discrimination (e.g. not including future or possible events). In relation to the scope of the Directive, some Member States excluded the public sector or certain employment relationships of a private nature from the national legislation amongst others.<sup>100</sup> Besides the very early infringement procedures initiated that are mostly closed by now, further infringement procedures were also initiated since 2014 against the Czech Republic, Slovakia and Hungary on non-conformity with the Racial Equality Directive for discrimination against Roma children in education that are surprisingly still ongoing.<sup>101</sup>

Similarly, in January 2016, the Commission launched infringement proceedings against 16 Member States that had not communicated their transposition measures, for the Victims' Rights Directive, by the implementation date.<sup>102</sup> Formal letters and/or reasoned opinions were issued later to nine Member States for failing to completely transpose the Victims' Rights Directive. More specifically, the Member States at issue, had not implemented several provisions of the Directive including the right to be informed about both the victims' rights and the case, or the right to support and protection.<sup>103</sup> There are currently no active cases in relation to the implementation of the Victims' Rights Directive; 6 cases were closed on the 30/10/2020, 3 cases were closed on the 3/12/2020 and 4 cases were closed on the 18/2/2021, despite the very recent criticism of not satisfactory implementation diminishing the full potential of the Directive.<sup>104</sup>

The enforcement mechanisms established under the Racial Equality Directive as well as the efforts of the Commission, are reinforced by the CJEU and the judicial activism exercised. For instance, as discussed above the Court of Justice has formulated less obvious forms of exclusion as legal issues, has expanded the scope of 'discrimination' and allowed for a wider range of individuals to be covered by the protection of the Racial Equality Directive. However, despite these successful cases concerning discrimination on the grounds of ethnic origin in *Feryn* and *CHEZ*, the judicial

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<sup>100</sup> European Commission, The Race Equality Directive, MEMO/07/257 (Brussels, 27 June 2007) <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_07\\_257](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_07_257)>

<sup>101</sup> A reasoned opinion was issued against Slovakia on 10/10/2019 for non-conformity with Directive 2000/43/EC on Racial Equality - Discrimination of Roma children in education; A formal notice was issued against the Czech Republic on 25/9/2014 on the same grounds; A formal notice was issued against Hungary on 26/5/2016 on the same grounds.

<sup>102</sup> Austria, Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Greece, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Romania, Slovenia and Slovakia.

<sup>103</sup> Formal letters were sent on 25/7/2019 to the Czech Republic, Estonia, Germany, Hungary, Italy, Malta, Poland, Portugal, and Sweden.

<sup>104</sup> Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Brussels, 11.5.2020) COM(2020)188, 9.

approach towards racial discrimination still appears wanting,<sup>105</sup> lacking substantive rulings. As de Búrca put it “while the tiny trickle of cases concern[ing] race discrimination being referred is a factor largely outside the control of the CJEU, nevertheless the Court did not exactly embrace all the opportunities which were provided to address some possibly important questions of racial and ethnic discrimination”,<sup>106</sup> such as in the recent case of *Jyske Finans* discussed above.

The protection of victims should become an essential element of the operation of judicial authorities, both at national and at European levels and the enforcement on the part of the Commission combined with the judicial activism of the CJEU are important to achieve this aim.

## 6. Concluding remarks: achieving a Union of equality?

Major steps have been taken to protect individuals against discrimination on the grounds of racial or ethnic origin, compared to twenty years ago. However, the fight against racism is not an easy one to win as it is constantly reviving, *inter alia* because of recent societal and financial crises, electoral successes of extreme right-wing political movements, high-profile incidents of violent racism and deeply rooted discrimination against certain ethnic minorities. The primary position given to racial discrimination reflects these various contemporary factors. Returning to the questions posed in the introduction of this chapter, the fight against racism in the EU is a shared responsibility between the EU and the Member States even legally, requiring for joint and ongoing efforts.

Twenty years ago, most countries had a legal patchwork of anti-discrimination provisions but lacked a specific set of laws and a strong specialised body to enforce those laws. The Racial Equality Directive combined with the Victims’ Rights Directive constitute the core secondary legislation within the racial anti-discrimination legal framework, which attempted to fill these gaps. As discussed above both legal instruments provide for ambitious rules that are capable of decreasing racism incidents and improving the situation of victims in the EU. Therefore, the principal problem in the EU today is no longer the lack of legislation, but rather the lack of clarity and vagueness of some of the provisions in the Directives and most importantly the weak implementation of the Directives nationally.

While increasing awareness to combat discrimination is developed in most of the Member States, it is argued that the full potential of the Directives has not been reached yet. The implementation of

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<sup>105</sup> Gráinne de Búrca, 'The Decline of the EU Anti-Discrimination Law?', Note for the Colloquium on Comparative and Global Public Law' (NYU, 19 October 2016) <[http://www.law.nyu.edu/sites/default/files/upload\\_documents/The%20Decline%20of%20the%20EU%20Anti-Discrimination%20Law.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Decline%20of%20the%20EU%20Anti-Discrimination%20Law.pdf)>

<sup>106</sup> Shreya Atrey, 'Race discrimination in EU Law after *Jyske Finans*' (2018) 55 *Common Market Law Review* 625-642.



the Directives does not seem to be satisfactory, due to incomplete and/or incorrect transposition,<sup>107</sup> especially considering the ongoing infringement actions in relation to the Racial Equality Directive. In some cases, legislative measures have been undermined by a lack of political will and public support, factors exacerbated by constant changes in political leadership.<sup>108</sup>

Despite the Member States' need to take national actions and maximise the use of the tools available at their disposal, the EU is also considering amendments in the law to improve the protection against discrimination by filling in current gaps and aiming for increased clarity. Further to the evaluation of the Victims' Rights Directive, the European Commission announced in its 2022 Work Programme, a possible revision of the Directive or another legislative instrument to be proposed by the end of 2022. The revision of the Victims' Rights acquis would aim at improving victims' access to justice, strengthening victims' rights to information about the available State compensation and strengthening victims' physical protection by setting up minimum standards on the issuance and functioning of protection orders, including emergency barring orders.<sup>109</sup>

Both the Union and the Member States have taken effective and important steps forward in the fight against racism and xenophobia. However, the developments in this area should not be seen as ticking the boxes of an exhaustive list of actions. There is not first and final step to be taken. The numbers of racist incidents and xenophobic behaviours are constantly fluctuating depending on a variety of external factors. Fighting racial and ethnic discrimination is about continuous efforts legally and socially.

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<sup>107</sup> Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Brussels, 11.5.2020) COM(2020)188.

<sup>108</sup> Lisa Waddington and Mark Bell, 'More equal than others: Distinguishing European Union Equality Directives' (2001) 38 *Common Market Law Review* 587-611.

<sup>109</sup> Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Commission work programme 2022: Making Europe stronger together' (Strasbourg, 19.10.2021) COM(2021) 645 final, 11.