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Policy | brief

The Racial Equality Directive – from law to practice

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The transposition of the Racial Equality Directive (2000/43/EC) has immensely enhanced legal protection against discrimination on the grounds of racial and ethnic origin throughout the EU. More than 10 years after its adoption, the main challenge identified in many Member States is the enforcement of anti-discrimination laws in practice, in particular with regard to access to justice. Ultimately it is up to the domestic courts to ensure effective implementation of anti-discrimination law. Polls regularly show that the discrepancy between the levels of discrimination experienced and discrimination reported by victims must be seriously addressed. Awareness is low not only among the public but also among the members of the legal professions, leading to under-reporting of discrimination cases. In addition, data that reflect the ethnic or racial composition of the population are scarce which makes it difficult to prove discrimination before the competent authorities. Moreover, certain procedural difficulties that affect access to justice and effective enforcement also stem from the short limitation periods foreseen in legislation, lengthy procedures, evidence, high costs and failures in the provision of legal aid, ineffective sanctions, as well as barriers in the form of language and issues relating to legal standing or legitimate interest. The law remains complex and remedies often inadequate.

The transposition of Directive 2000/43/EC (the Racial Equality Directive), adopted in 2000, has immensely enhanced legal protection against discrimination on the grounds of racial and ethnic origin throughout the European Union (EU). Before EU anti-discrimination legislation was passed in 2000, only 6 Member States had dedicated anti-racism laws. The directive presented profound challenges to the existing approaches to combating discrimination based on racial or ethnic origin and set up high expectations in terms of protection of vulnerable groups. It created a legal framework with minimum standards of protection which could be enforced before domestic courts. After a brief presentation of the content and the objectives of the racial equality directive, the policy brief will provide an overview of the main challenges regarding its implementation and will propose some recommendations.

The Racial Equality Directive: content and objectives

The Racial Equality Directive prohibits discrimination based on racial and ethnic origin in various fields: (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; (e) social protection, including social security and healthcare; (f) social advantages; (g) education; (h) access to and supply of goods and services which are available to the public, including housing.

The directive intended to provide strong and effective protection against discrimination based on racial/ethnic origin. The shift of the burden of proof constitutes one of the key mechanisms of the anti-discrimination legislation and aims at ensuring that victims are not deprived of effective means of enforcing the principle of equal treatment. It is sufficient for victims to establish facts from

which it may be presumed that discrimination has occurred, as the burden of proof will then shift to the respondent who must show that there has been no breach of the principle of equal treatment. In addition, Article 13 of the Racial Equality Directive requires Member States to establish a body or bodies responsible for the promotion of equal treatment. Equality bodies are assigned three tasks to be carried out on an independent basis, namely to offer assistance to victims, to conduct surveys on discrimination and to publish reports and make recommendations on discrimination. Finally, the Racial Equality Directive recognises the legal standing of organisations with a legitimate interest to bring enforcement actions either on behalf or in support of the complainant.

The implementation challenges

The extent to which the Racial Equality Directive provides effective protection against discrimination greatly depends on how it is being applied by national courts. In that regard, the Court of Justice of the European Union (CJEU) plays a key role in ensuring consistent application of EU law throughout the Member States, which ultimately influences the practice of domestic courts. As far as racial and ethnic origin are concerned, only two cases dealing exclusively with that specific ground (Feryn and Belov) have reached the CJEU since the end of the transposition period, 10 years ago.[1]

In the light of those observations, where do we stand with regard to the implementation of the Racial Equality Directive in practice? Two policy evaluation tools (amongst others) allow us to portray a first impression of where implementation stands and how it differs between Member States: the Migrant Integration Policy Index (MIPEX)[2] and the EU Justice Scoreboard. MIPEX aims at measuring integration policies in 31 countries, including anti-discrimination policies. Around 150 indicators have been created from highest standards drawn from international and European instruments. Results show that victims of discrimination are best protected in Belgium, France, Sweden and the UK. The Baltics, Malta and Austria have only done the minimum that the EU requires. The Czech Republic, Denmark, Germany and Spain go somewhat beyond by adopting broader protections that are still ineffective because of weak equality policies. More than 10 years after its adoption, the main challenges identified in many Member States are the effective enforcement of those provisions and the problem relating to access to justice, whilst the Directive provides for a right to effective remedy.[3]

The EU Justice Scoreboard is a new comparative tool developed by the European Commission and modelled on a similar mechanisms in related fields to promote effective justice systems in the Union.[4] Key findings of the EU Justice Scoreboard reflect lasting concerns in the field of anti-discrimination relating to access to justice, in particular the length of judicial proceedings which varies considerably between EU Member States, the perceptions of the independence of national judicial systems and monitoring systems to improve the quality of justice.[5]

Ultimately it is up to the domestic courts and the equality bodies to ensure effective implementation. Polls regularly recall the discrepancy between the levels of discrimination experienced and the number of cases actually reported or that go to court. The 2012 Eurobarometer reveals that 56% of the respondents considered that discrimination on grounds of ethnic origin is common in the EU Member States.[6] The EU-Midis survey shows that 82 per cent of those who had experienced discrimination in the past year did not report discrimination to a competent authority.[7] There is a lack of comparable data with regard to the number of complaints before the equality bodies, but the share of complaints based on racial or ethnic origin, of all complaints received by equality bodies in 2011, ranged between 2,4% and 50%.[8]

Awareness of the anti-discrimination provisions is low, not only among the public but also among members of the legal profession. This in turn affects the degree to which victims pursue their rights as shown by the low rate of claims brought before domestic courts or equality bodies and the ECJ. Some noteworthy initiatives have tried to fill the gap either at the EU level or the national level, including training seminars targeted at civil society organisations throughout the EU. Those training seminars include modules on how to collect information, conduct lobbying and advocacy activities, constitute partnerships, use the media, establish and collect codes of practice or use situation testing[9] to uncover and document discrimination.[10]

Certain procedural difficulties that affect access to justice and effective enforcement also stem from the short limitation periods foreseen in legislation, lengthy procedures, high costs and failures in the provision of legal aid, effective sanctions, as well as barriers in the form of language and issues relating to legal standing or legitimate interest. The law remains complex and remedies often inadequate. Moreover, there are serious concerns in some countries where judicial proceedings take over three years to complete.

Finally, a minority of states appear to have failed to transpose the 'burden of proof provision' in line with the Directives. In addition, if direct discrimination is easier to prove, difficulties proving 'indirect discrimination' (where an apparently neutral

provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage) may arise. It also seems that equality bodies face difficulties, in particular in gathering evidence and securing necessary data. Ethnic/racial data in Europe are scarce and the debate around methodologies to collect data based on racial and ethnic origin is still ongoing. The unavailability of data has been further intensified with the recent budgetary cuts due to the economic crisis which have resulted in inadequate financial and human resources for equality bodies. The European Commission will place equality bodies under closer scrutiny, as the budgetary cuts for such bodies may undermine the right to effective remedy as enshrined in the Racial Equality Directive and thus in breach of EU law.

Dispute settlement mechanisms alone are not sufficient to combat discrimination, as they contribute to an individualistic approach to equal treatment. They need to be complemented with positive action which has the advantage of addressing discrimination issues experienced by vulnerable groups as a whole in a preventive manner. The Racial Equality Directive specifically allows Member States to adopt specific measures to prevent or compensate disadvantages, to ensure full equality in practice.

Best practices and recommendations

The following two best practices are worth mentioning as laudable equality tools: the first shows that all public authorities in Britain have a duty to take equality into account in each of their actions instead of waiting for an individual legal action to redress discriminatory situations, and the second depicts how public authorities can shape private economic operators to include social considerations in their business practices. Since April 2011, all public authorities in Britain have been under positive obligation to have due regard to the need to 'eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2011 Equality Act. They are obliged to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; [and] foster good relations between persons who share a relevant protected characteristic and persons who do not share it'. In other terms, all new policies and practices must be assessed for their impact on racial or ethnic origin. This also includes public procurement, where contracting authorities are under the obligation to take racial and ethnic origin into consideration when they intend to purchase a good or a service.[11]

France has developed a Diversity Label[12] which aims at establishing a standard on diversity in recruitment and human resource management in both the public and private sector. Public and private employers must meet a certain number of objective criteria concerning the recruitment and career management of their employees. The label, created in 2008 by the French state, covers the prevention of all types of discrimination recognised by the law, in particular that relate to origin. As of 1 January 2013, 381 legal entities (large corporations, SMEs, ministries, cities and public institutions) have obtained the label, with 817,000 employees or agents affected in total. There is a mid-term evaluation which enables the employer to continuously enhance and promote diversity and equal treatment. It imposes strong obligations, such as the creation of an equality and diversity commission and a counselling and complaints unit within the company, appropriate training and awareness-raising measures and evaluation mechanisms.

As a complement to these innovative measures, there is a great need to continue training initiatives to ensure a sound understanding of non-discrimination legislation to address effective access to justice. In a communication on European judicial training, the European Commission stressed the need to train judges and prosecutors, as well as legal practitioners, to ensure uniform and effective enforcement and respect of EU law.[13] In addition, most NGOs have little access to up-to-date and relevant information, or depending on their partnerships and networks, to only a small portion of it. A single point of access to information would allow NGOs throughout Europe to share their own experience and to establish a collection of practices. Local NGOs would more easily look at each others' work with possibilities for further networking and partnerships and experience from other countries could inspire their action or provide some guidelines. The European Commission has already developed such initiatives, for instance the European Integration Website[14] that provides a very interesting example of a successful tool for practitioners. This allows national stakeholders to be more aware of the various initiatives or events taking place on the national or European level and also to read about what happens in other countries. Good practices could eventually serve as examples or lead to action at their own national level, including for the purpose of strategic litigation.

The European Commission is currently carrying out an extensive consultation in the context of the forthcoming report on the implementation of the Racial Equality Directive. The directive indeed states that "Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive (Article 17))." To that effect, independent experts and EU organisations are being consulted to provide their own views on the implementation of the directive, to complete the Member States' answers. The report is due to be published in October 2013. In light of

the report's outcomes, it is hoped that further steps will be taken with a view to redressing the gaps relating to implementation and effective enforcement of the Racial Equality Directive.

Notes

[1]Discrimination cases represent around 4,7% of all cases before the CJEU.

[2]www.mipex.eu

[3]See also Isabelle Chopin and Thien Uyen Do, Developing anti-discrimination law in Europe – the 27 Member states, Croatia, the Former Yugoslav Republic of Macedonia and Turkey compared, European Network of independent legal experts in the field of non-discrimination, European Commission, Directorate General Justice, 2012. http://bookshop.europa.eu/en/developing-anti-discrimination-law-in-europe-pbDS3112692/

[4]http://europa.eu/rapid/press-release_IP-13-285_en.htm

[5]The EU Justice Scoreboard – A tool to promote effective justice and growth, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2013) 160 final, March 2013.

[6]Special Eurobarometer 393, Discrimination in the EU in 2012, European Commission, Directorate-General Justice, November 2012 http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf

[7]The Racial Equality Directive: application and challenges, Fundamental Rights Agency, 2012.

[8]Equality bodies combating discrimination on the ground of racial or ethnic origin - an Equinet perspective, European Network of Equality Bodies, December 2012.

[9]"Situation testing is a method according to which pairs (of applicants for accommodation or a job vacancy or clients of a restaurant, a nightclub, etc.) are established in such a way that they differ solely on the basis of a single characteristic reflecting the discriminatory ground (gender, ethnicity, age, disability, religion or belief, sexual orientation) under scrutiny", Isabelle Rorive, Handbook on proving discrimination cases – the role of situation testing, Migration Policy Group and the Swedish Centre For Equal Rights, 2009.

[10]http://migpolgroup.com/projects_detail.php?id=56

[11]The Equality and Human Rights Commission published in March 2013 guidance to help public authorities in England comply with the duty to pay due regard in their procurement processes: http://www.equalityhumanrights.com/news/2013/march/commission-publishes-guidance-on-public-sector-procurement/

[12]The Diversity Label is granted for four years by a committee composed of representatives of competent ministries (the Ministry of the Interior, the Ministry for Employment and Labour, the Ministry for the Budget, Public Accounts, the Civil Service and State Reform, and the Ministry of Housing and Urban Affairs), employers' organisations, trade unions and experts appointed by the national association of HR directors.

[13]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions building trust in EU-wide justice a new dimension to European judicial training, COM(2011) 551 final.

[14]http://ec.europa.eu/ewsi/en/

About the author

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She first joined the Migration Policy Group as a Policy Analyst on immigration issues before she started working in 2010 as a Legal Policy Analyst on anti-discrimination. Her main work focuses on the European Network of Legal Experts in the field of non-discrimination which produces annual country reports, flash reports and thematic reports on anti-discrimination law in the EU 28, EU candidate countries and EEA countries. She is the Managing Editor/Researcher of the European Anti-discrimination Law Review, a bi-annual publication of the Network. She authors the annual report "Developing anti-discrimination law in Europe – The 27 EU Member states, Croatia, the Former Yugoslav Republic of Macedonia, Turkey, Iceland, Lichtenstein and Norway compared". She was also involved in a large EU-wide project aiming to strengthen the capacity of civil society organisations working on non-discrimination and equality by developing awareness-raising, training materials and activities.

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