



The impact of the **Racial Equality Directive**

Views of trade unions and employers in the European Union

Summary Report

October 2010

This report addresses matters related to the principle of non-discrimination (Article 21) falling under Chapter III 'Equality' of the Charter of Fundamental Rights of the European Union.

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Foreword

The fundamental rights architecture in the European Union has developed over time and continues to evolve. Regular 'health checks' on this situation are needed, not least when great change is taking place.

This summary report highlights the main findings of the European Union Agency for Fundamental Rights (FRA) report on the views of employer organisations and trade unions regarding the impact of the Racial Equality Directive. It is one of four reports issued by the FRA that looks at closely related issues, institutions and EU legislation, which contribute to the overarching architecture of fundamental rights in the European Union. The building blocks of this fundamental rights landscape are the data protection authorities and national human rights institutions (NHRIs), as well as Equality Bodies set up under the Racial Equality Directive (2000/43/EC).

Article 17 of the Racial Equality Directive obliges the FRA to contribute to the Commission's review of the implementation of the directive, by providing evidence on its impact on the ground. This report is part of this exercise, and it presents the assessment of the directive's implementation in the world of work, as seen by the representatives of trade unions and employers organisations. It is complemented by the Agency's EU-MIDIS Data in Focus report on 'Rights Awareness and Equality Bodies', as well as the legal analysis of the impact of the directive on the ground.

As this report illustrates, awareness of Equality Bodies among the ethnic minority and migrant workforce in the EU is limited. Numerous FRA publications point to the low rates of reporting in cases of ethnic discrimination, despite the establishment of complaint channels under the directive. The representatives of trade unions and employers interviewed for this report attribute the low number of complaints to the slow and burdensome complaints' procedures established by Equality Bodies, and the fear of retribution among victims of discrimination should they complain.

The prohibition of discrimination is a key principle in EU legislation, as set out in the Charter of Fundamental Rights of the European Union. Although efforts to eliminate discrimination on the grounds of race and ethnic origin in the EU have progressed, the challenge to make non-discrimination a reality still has a long way to go. Practical initiatives by social partners – namely employers and trade unions – and social dialogue promoting equal treatment at the workplace, are critical to eliminating discrimination on the grounds of race and ethnicity.

Morten Kjaerum
Director

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Introduction

According to Article 17 of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin – also known as Racial Equality Directive – the European Union Agency for Fundamental Rights (FRA) shall contribute to the European Commission report to the European Parliament and the Council on the application of the directive.

In 2008, the FRA launched an interdisciplinary research project on the application of the Racial Equality Directive. The project aims to collect evidence of the changing context of racial and ethnic discrimination in Europe and of the application of Directive 2000/43/EC across the European Union. The project consists of four work packages:

(1) secondary data collection on the impact of anti-discrimination practices in all 27 European Union Member States (data collected by RAXEN network);¹

(2) secondary data collection of complaints statistics (data collected by FRALEX network of legal experts);

(3) the first ever EU-wide survey of immigrant and ethnic minority group experiences of discrimination and victimisation in everyday life, the European Union Minorities and Discrimination Survey (EU-MIDIS);²

(4) primary qualitative data collection on the views of social partner organisations in the EU Member States on the impact of the Racial Equality Directive in the area of employment.

This report summarises the key findings of the research on the views of employer organisations, trade unions and non-governmental organisations (NGOs) in the EU concerning the application of the directive in practice, with a **sole focus on the area of employment**.

1 For more information on the FRA RAXEN network, please see: http://194.30.12.221/fraWebsite/partners_networks/research_partners/raxen/nfp/nfp_en.htm.

2 FRA (2010), 'Rights Awareness and Equality Bodies', *EU-MIDIS Data in Focus 3*, Luxembourg: Publications Office.

1. Racial Equality Directive

One of the key principles in the European Union law is prohibition of discrimination as laid out in Article 21 of the Charter of Fundamental Rights of the European Union. The Racial Equality Directive (2000/43/EC) is the **key piece of EU legislation** combating discrimination on the grounds of race or ethnic origin. It emphasises that individuals should receive no less favourable treatment because of their racial or ethnic characteristics. It was adopted in 2000 and prohibits discrimination in the areas of employment, education, social protection including social security and healthcare, and in access to and the supply of goods and services, including housing. The directive had to be transposed into each Member State's national legislation by 2003, with the Member States that joined the EU in 2004 and 2007 having a slightly extended deadline.

The Racial Equality Directive required the creation of specialised **Equality Bodies promoting equal treatment** in each EU Member State. The Equality Bodies have an important function in providing assistance to victims of discrimination so as to make the legal system more accessible to them.

Since experience had shown that it was difficult in practice to prove discrimination, the directive stipulated that victims need only bring forward facts 'from which it may be presumed that discrimination has occurred'. The **burden of proof then shifts to the defendant**: the court will assume the principle of equal treatment has been breached, unless the defendant can prove otherwise.

The directive also gave clear definitions as to what constituted the denial of equal treatment, and carefully defined direct discrimination, indirect discrimination and harassment.

The directive also included an obligation for the Member States to promote **social dialogue** between employers and employees to further equal treatment and encourage agreements between the social partners on anti-discrimination rules, as well as dialogue with non-governmental organisations involved in the fight against discrimination.

The meaning of 'racial origin' in the directive

"The reference to 'racial origin' was a controversial issue in the negotiations among the Member States about the Equality Directives.³ A compromise was reached with the inclusion in the preamble of the explicit statement that the use of the term 'race' in the directive did not imply any admission by the EU of 'theories which attempt to determine the existence of separate human races'. The different views taken by the Member States are reflected in the formulations adopted in national legislations: Austria and Sweden for instance do not mention 'race', referring only to 'ethnic' belonging or origin. Belgium refers to 'presumed race' and France to 'real or presumed' racial belonging.

The directive does not define what 'ethnic or racial origin' should be taken to mean. Many countries explicitly mention skin colour – such as Belgium, Bulgaria, Estonia, and Slovakia – and nationality or national origin – such as Latvia, the Netherlands, Poland, and Romania. France prohibits discrimination on physical appearance and name. Language is included as a separate protected ground in Estonia, Finland, Lithuania, Romania and Slovakia. In Hungary, belonging to a national or ethnic minority is cited as a protected ground. The boundary between religion and ethnicity is ambiguous: in Dutch case law and in the UK, discrimination against Jews, Muslims and Sikhs has been recognised as race discrimination."⁴

3 The Equality Directives referred to here are the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC).
4 FRA (2010), *Migrants, Minorities and Employment – Exclusion and Discrimination in the EU-27 Member States of the European Union*, Vienna: FRA.

2. Research approach and objectives

In the scope of this research, national experts in all 27 EU Member States conducted more than 300 interviews with key actors, including:

- (1) individual employers;
- (2) employer associations at national and regional levels;
- (3) trade unions at national and regional levels;
- (4) trade union confederations and trade union federations;
- (5) national Equality Bodies and non-governmental organisations concerned with discrimination in employment in selected countries.

The choice of organisations approached was made with the intention to best cover the issues concerned. In most countries, this involved interviewing representatives of the peak employer or trade union organisations, and targeting employers and trade unions where there were significant proportions of ethnic minority or migrant workers in their workforces or among their memberships.

The interviews were carried out between March and June 2009. The research resulted in 27 national reports, a comparative report and this summary report.⁵

The **specific objectives** of the research were to:

- (1) gather primary qualitative data on the awareness of Member State social partners of the Racial Equality Directive and the corresponding national legislation;
- (2) collect information on what the social partners have done to prevent and combat discrimination based on racial or ethnic origin in employment since 2003;
- (3) identify good employment practices that have been encouraged by the presence of the Racial Equality Directive;
- (4) explore, which in the opinion of the social partners are the factors behind the low level of public complaints of racial and ethnic discrimination in employment reported to the new Equality Bodies, established under the directive;
- (5) assess the extent of active social dialogue on combating discrimination in employment during the five years since the EU key instrument intended to prevent and combat discrimination based on racial or ethnic origin was supposed to have been implemented in 2003–2004.

For more details on the study's methodology, please consult the comparative report.⁶

5 Stephen Jefferys and Sonia McKay of the Working Lives Research Institute (WLRI) of London Metropolitan University prepared this report under a service contract with the FRA. It was edited by the FRA, which is responsible for its conclusions and opinions.

6 FRA (2010) *The impact of the Racial Equality Directive – Views of trade unions and employers in the European Union*, Luxembourg: Publications Office.

3. Challenges in assessing the impact of the directive

Assessing the effectiveness of the Racial Equality Directive is not a straightforward process. The respondents commented on and referred to several discrete political and economic developments as complicating any evaluation. These are namely:

- almost parallel introduction of **two Equality Directives** – Directive 2000/43/EC and Directive 2000/78/EC – into respective national legislations; for many interviewees, the two pieces of legislation became largely indistinguishable. Many companies and trade unions understood supporting ‘equality’ as actions towards gender equality, rather than challenging “racial discrimination”.
- **EU enlargement** by a total of 12 Member States (EU-12) in May 2004 and January 2007 since drafting of the directive – according to the assessments of the national experts, there is a noticeable gap in awareness of the directive between the respondents from the 15 EU Member States that formed the EU prior to enlargement in May 2004 (EU-15) and the EU-12, with the latter being less aware of and less responsive to the new legislation.
- an increased **migration** and mobility within the EU – some social partners understood that the directive aims at protection of migrant workers, while in other countries it is assumed that it is actually only about equality for workers who are ‘visibly’ different. The result has been that in some countries considerable attention was reported in relation to the directive encouraging social partner activities aimed at the integration of recent migrants; at the same time, much less attention was reported about actions aimed at the full inclusion of EU citizens of minority racial or ethnic origin. In a parallel, equally misplaced understanding of the directive, in some other countries the absence of significant populations of black citizens led social partners to conclude that the directive did not apply to them, despite the presence of minorities who experienced considerable discrimination.
- the global **economic crisis** – the crisis reportedly encouraged protectionist tendencies; in addition, the social partners interviewed often reflected that the ‘crisis’ and ‘jobs’ had a higher priority than respect and real racial and ethnic equality.
- in the aftermath of the 9/11 terrorist attacks, **Islamophobia** fuelled ideologies and discriminatory behaviour that the Racial Equality Directive was drafted to address.

4. Employer views and perspectives

The employer views on the impact of the Racial Equality Directive on the ground ranged from positive to overly critical ones.

Positive impact of the directive

Many representatives of employer organisations expressed the view that the Racial Equality Directive had made a moral contribution to a 'more open Europe'. The employer organisations that were positive in their assessment of the Racial Equality Directive were more likely to have responded to its implementation by adopting specific actions. These included: advising member organisations of the legislation; conducting diversity audits; support for language classes; introducing new or enhanced training; adopting codes of conduct; or introducing new complaints procedures. Several employer organisations also reported the adoption of diversity management strategies. There was limited evidence of positive measures in relation to recruitment strategies. Some of the employer organisations argued that since the legislation was new in their countries, they would be responding to the directive's requirements in the future, thereby emphasising the need for capacity building. Lastly, some employers also saw the positive impact of the directive in the 'symbolic' value it had.

Little or no impact of the directive

A second group of employer organisations felt the directive had made little or no difference and considered it a *post-factum* recognition of a new reality. This group of employer organisations believed that labour market changes, such as increased migration of workers, had been more instrumental than the directive in changing employment practices to support anti-discrimination measures. Some argued that in today's labour market workers' skills mattered more than their ethnic origin. Lastly, employers who saw little or no impact of the directive argued that the pre-existing practices and existing laws or national constitutions already proscribed discrimination on the grounds of race or ethnic origin. Therefore, in their views the directive had little or no impact.

Negative view of the directive

Criticisms of the directive expressed by some employers were driven by the resistance to any legally binding instruments that might interfere with the freedom of enterprise. Some employer organisations participating in this research believed that **regulating** attitudes and behaviours in this area was **not possible**. Others saw the directive as an **unnecessary burden**: it imposed additional costs and bureaucracy on businesses – the clause on the burden of proof was singled out by some respondents.

Ignorance and lack of awareness of the directive

Finally, there were employer organisations who may or may not have heard of the legislation, but which believed that it did not concern their organisations or their country. This attitude was particularly visible among the employer organisations in the 12 new Member States of the EU (EU-12) that joined the European Union in 2004 and 2007. In fact, some of the employer organisations in these countries treated anti-discrimination legislation as part of a 'western Europe package' of 'exotic' issues forced upon them from the outside in the process of EU accession negotiations. Others simply denied that ethnic discrimination existed in their countries. This view was particularly tangible in relation to Roma population – many employers identified their poor labour market position as a consequence of individual characteristics, accepting as 'natural' that Roma have a different social status. However, some organisations also expressed the view that implementation and change were a question of time and that the new Member States needed time to 'catch up'.

5. Trade union views and perspectives

Historically, there has been a tension between inclusion and exclusion of ethnic minority and migrant workers in the trade unions policies. There has been a conflict between exclusive, national or skills-based protectionism and an inclusive internationalism. 'Foreign' workers were essentially seen as a threat to jobs, wages and working conditions. However, nowadays most trade unions developed policies of toleration, support and 'equal opportunities' towards ethnic minority workers.⁷

Trade union interviewees generally had a higher awareness of the Racial Equality Directive and corresponding national legislation compared with the employer respondents. However, their views were not homogenous and could be divided into four broad groups.

Positive impact of the directive

Many trade union respondents considered that the directive helped spread the general awareness of workers' rights among the general public. Several active policy changes were identified by the trade union respondents as a direct or indirect consequence of the directive. Some referred to one result being a reconsideration of traditional trade union views of opposing ethnic monitoring.

Little or no impact of the directive

It was argued that the adoption of the directive had not led to any improvements because pre-existing national legislation on ethnic discrimination already provided protection. Furthermore, some of the trade union respondents believed there was not enough readiness of individuals and organisations to challenge discrimination. This was ascribed to fear of raising a 'controversial' issue in the workplace both on the side of trade unions as well as employers. Some trade union respondents believed that the directive was not a right mechanism to fight discrimination.

Negative view of the directive

Some concerns were voiced that a policy of pursuing legal remedies on an individual level could lead to a weakening of trade unions' collective bargaining. Some also argued that workers did not pursue claims because the legal processes were complicated and slow, the remedies were limited and the desire to remain in work meant that individuals were reluctant to use the law because of a fear of reprisals.

Ignorance and lack of awareness of the directive

Several interviewees exhibited a lack of knowledge of and unease with the concept of racial discrimination. Furthermore they insisted on denying the presence of discrimination despite admitting that particular groups, especially the Roma or linguistic minorities, do experience generalised disadvantage. Some appeared to define racial or ethnic discrimination in ways that were so narrow that they automatically concluded that such discrimination could not be present in their countries or trade unions. In other instances, trade union officials interviewed in this study displayed attitudes tolerant of discrimination on the grounds of racial origin.

7 Martens, A. (1999) "Migratory Movements: The Position, the Outlook. Charting a Theory and Practice for Trade Unions», in: Wrench, J. and Ouali, N. (eds.) (1999) *Migrants, Ethnic Minorities and the Labour Market*, Macmillan: Basingstoke.

6. The way forward: views and perspectives of social partners

Employer and trade union respondents participating in this research were asked whether they had suggestions as to how anti-discrimination policies on the grounds of racial or ethnic origin could be improved. Both agreed that **more rights awareness is needed**, especially among the target population. The interviewees indicated the need for anti-discrimination training to be mainstreamed into the social partner development programmes to strengthen the impact of Racial Equality Directive.

Furthermore, the trade unions put forward an idea for introducing **equality impact assessments** also in the private sector. In doing so, establishments should be expected to yearly account for the racial and ethnic profiles of their workforce and propose detailed initiatives aimed at ensuring greater equality among their staff.

In addition, several trade unions thought that all private establishments tendering for public contracts within the EU should be required to demonstrate their compliance with the Racial Equality Directive. Proceeding as such would guarantee that anti-discrimination practice will be included as **a public procurement requirement**.

Trade unions would also like to see the directive to give them the possibility to take up **collective legal actions** on behalf of whole groups of employees, rather than just individuals.

Lastly, the Unions argued for ensuring greater independence of Equality Bodies and possibility for them to issue higher penalties.

The employer organisations interviewed within the scope of this research were more divided than the trade unions in their views on how to improve the impact of the Racial Equality Directive on the ground.

In cases where they had clear views about ways of improving anti-racial discrimination practices, the employers, on the whole, tended to argue for greater reliance on general education in society and voluntarism. Some employer organisations argued for allocating greater funds to the implementation of the directive and encouraging compliance with the directive through incentives.

On the other hand, some employers wished to see the Racial Equality Directive removed or at least the burden of proof change reversed. More generally, the employers would prefer to see the role of the law being reduced rather than strengthened.

Key findings

- There are **geographical differences** in the awareness of the directive and corresponding national legislation among the social partners in the EU-27. In general, the social partner organisations in the 15 EU Member States (EU-15) that constituted the EU before enlargement in 2004 and 2007 were more aware than their peers in the EU-12. In some of the EU-12 countries, it was opined that anti-discrimination laws were so ineffective as to not merit consideration. They were treated by some respondents as part of a 'western Europe package' of 'exotic' issues that are marginal in their countries. On the other hand, EU-15 countries, which in themselves are not homogeneous, had greater awareness of the legislation, since most respondents were in some way involved in preparations of the directive.
- **Trade union and employer organisation views differ.** Trade union interviewees generally had a higher awareness and more positive assessment of the Racial Equality Directive and corresponding national legislation. Overall, while trade unions prefer compulsory regulations, the employer organisations would opt for voluntary solutions. Small and medium-sized enterprises (SMEs) reported facing greater problems in developing diversity policies at the workplace. On the other hand, for the trade unions the challenge remains to reflect ethnic diversity in their ranks and convince their membership that real equality would benefit all workers.
- Neither employer organisations nor trade unions displayed a comprehensive understanding of racial discrimination as it affects the **Roma** population, for instance. In some countries, Roma were referred to, but their discriminatory treatment was often not conceptualised as racism. With few exceptions, the Roma were generally not acknowledged as coming under the protection of the directive.
- In most EU Member States, the **Equality Bodies** are not yet viewed as being entirely appropriate vehicles to use in articulating complaints about racial or ethnic discrimination in employment and in securing satisfactory outcomes. The social partner organisations interviewed voiced concerns about their lack of independence and powers.
- **Social dialogue** encouraged by the directive has led to many joint initiatives to challenge racial and ethnic discrimination. In many instances, social dialogue at EU, national or even company level has established common ground between employers and trade unions on the importance of fully integrating minority-origin workers, as well as of taking steps to end all forms of racial or ethnic discrimination. European funding, especially from the EQUAL Programme, has been used extensively to finance joint actions in this area. However, considerable room for improvement remains. While awareness of the directive is highest at the level of confederations and peak organisations of both employers and trade unions, it often does not reach organisations at lower levels, such as sectoral or regional social partner organisations.

European Union Agency for Fundamental Rights

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The Racial Equality Directive (2000/43/EC) is the key piece of EU legislation combating discrimination on the grounds of race or ethnic origin. It encourages employers and trade unions to engage in social dialogue to promote diversity and challenge racial and ethnic discrimination. Social dialogue initiatives at various levels established common ground between employers and trade unions on the importance of fully integrating minority-origin workers, as well as of taking steps to end all forms of racial or ethnic discrimination. Nevertheless, geographical differences in the awareness of the directive and corresponding national legislation remain among the social partners in the 27 EU Member States. Their views on the directive also differ, with trade union representatives generally showing a more positive assessment of the directive. These are the findings of the FRA research on the views of the social partner organisations in the EU concerning the application of the Racial Equality Directive in practice, with a sole focus on the area of employment.

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