PRESERVERE

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

PROJECT 101049763 - CERV-2021-EQUAL

THE IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN 6 EUROPEAN STATES:

Bulgaria, Cyprus, Greece, Italy, Malta, and the Netherlands

E-BOOK 1

WP2 - Deliverable 2.2
"Common Report and PRESERVERE eBook"

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TABLE OF CONTENTS

LIST OF TABLES

1 INTRODUCTION

NASIA HADJIGEORGIOU
UCLAN CYPRUS

1.1 Overview of PRESERVERE

The starting point of PRESERVERE, short for 'Preventing Racism and Discrimination: Enabling the Effective Implementation of the EU Anti-Racism Legal Framework', is that the EU already possesses a largely comprehensive anti-racism legal framework. In other words, the EU law on tackling racism, discrimination and xenophobia is already in place and, on paper, appears to be working well. At the same time, racist and discriminatory incidents, hate speech and hate crimes are on the rise in the EU, especially among the specific groups that PRESERVERE seeks to indirectly empower: Muslims, Jews, Roma and people of African descent. This raises the obvious question of why the implementation of this anti-racism legal framework has not brought about the expected results. There are three possible explanations, for this: first, the EU anti-racism legal framework is insufficiently protective of vulnerable groups. Second, the EU law is in itself sufficient, but it has not been adequately transposed or implementated in national legislation. Third, the EU and national laws are perfectly adequate, but they are not being properly applied in practice. Of course, a combination of these factors is also entirely possible. Thus, the objective of PRESERVERE is to identify the reasons for why the EU anti-racism legal framework has not had the anticipated results and propose actions, primarily in the form of training, to address this.

PRESERVERE involves eight partners from six countries: Bulgaria, Cyprus, Greece, Italy, Malta, and the Netherlands. The partners that participate from each country are a combination of academic and civil society organisations. Each of the partner countries has been selected either because it faces problems, or because of good practices it has adopted, in relation to one or more of the four racial/ethnic groups. Further, these countries were chosen because they each have large (relative to their size) populations of at least one of the four racial/ethnic groups that are most often victims of racist or discriminatory practices, and that the project aims to help.

This e-book is a collection of research that has been conducted in the six partner countries. The main research question that the different chapters are concerned with is identifying the reasons why the EU legal framework has not proven to be more effective in practice. These reasons have been identified through desktop and empirical research. A detailed discussion of the methodology that was adopted in gathering the information is found in 'Chapter 3 – A Comparative Analysis of the Different Case Studies'. The actions that will follow to address the needs identified by this research will mostly take the form of an online toolkit offering information for the better implementation of the EU anti-racism legal framework, and a series of training sessions in each partner country. The educational material and training activities will be designed to be used in existing continuous professional development schemes or professional induction/training days. This will make PRESERVERE's outputs complementary to activities already carried out by, or in, Member States, thus mainstreaming them and enhancing their potential.

Both the toolkit and training sessions will be targeting two types of professionals. These are (a) professionals in the field of law, or law enforcement, including lawyers, judges, prosecutors, police officers; and (b) legal officers or other relevant employees in institutions and public/social services and NGOs. Individuals in the second category are professionals who confront racist or discriminatory incidents on a regular, even daily, basis, and include for example, legal officers in social services, prisons, asylum seeker reception centres, and border control authorities. In short, PRESERVERE targets people who, in their line of work, are expected to enforce the European legal framework and whose training is expected to have the greatest impact in the more effective implementation of the Law. Engaging with these professionals is likely to have two positive effects. On the one hand, it will help them become familiarised with, and therefore more keen to use, the relevant EU Directives. On the other hand, it will alert them to possible gaps in the transposed legislation, which will mobilise them to lobby for the amendments of the law.

1.2 Making the case for a better implementation of the EU anti-racism legal framework

The EU anti-racism legal framework is extensive and largely robust. A detailed description and discussion of the relevant EU legal provisions is found in 'Chapter 2 – An Overview and Critical Analysis of the EU Anti-Racism Legal Framework', but in summary, there are anti-racism provisions in the Treaty on the Functioning of the European Union, the EU Charter of Fundamental Rights, and EU Directives. The most relevant Directives for the purposes of fighting racism and discrimination are 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'). Combined, the two Directives lay down obligations for the combating of direct or indirect discrimination and other discriminatory practices on the grounds of racial or ethnic origin and empower victims of crime, including hate crimes, to receive appropriate information, support and protection, and participate in criminal proceedings throughout the EU. The Directives enjoy supremacy over other national laws, including Constitutions.[1]

Despite the existence of this framework, racism, discrimination and xenophobia in the EU are on the rise. In 2021, the European Commission acknowledged that 'little progress has been made in the fight against discrimination since 2014.'[2] The Commission continued to note that '[t]he general population recognises that discrimination is widespread in the EU and discrimination is also experienced frequently in most Member States',[3] with 59 percent of Europeans believing that discrimination based on ethnic origin is a common phenomenon in their country.[4] The problem, however, is not only one of perception. In 2017, 24 percent of people from ethnic minority groups within the EU reported they had felt discriminated against in the last year.[5] The need to fight racism is even more pressing for specific groups: in 2021, the European Commission noted that Roma people are particularly affected by discrimination and have been disproportionately impacted by COVID-19 in the areas of education, healthcare and employment.[6] 89 percent of Jewish people participating in a 2018 survey of the EU Agency for Fundamental Rights reported that antisemitism had increased in their country in the five years before the survey, with 85 percent considering it to be a serious problem.[7] According to the same survey, 39 percent of people of African descent

[1] Judgment of 15 July 1964, *Flaminio Costa v ENEL*, C-6/64, EU:C:1964:66, [1964] ECR 585.
[2] European Commission, 'Report 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')', COM(2021) 139 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN, p.2.
[3] Ibid.
[4] European Commission, 'Special Eurobarometer 493 on Discrimination in the EU' (October 2019), available at https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2251.
[5] European Union Agency for Fundamental Rights, 'Second European Union Minorities and Discrimination Survey: Main results' (2017), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf, p. 13.
[6] European Commission, 'Report 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')', COM(2021) 139 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN, p. 20.
[7] European Union Agency for Fundamental Rights, 'Experiences and perceptions of antisemitism; Second survey on discrimination and hate crime against Jews in the EU' (2018), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-experiences-and-perceptions-of-antisemitism-survey_en.pdf, p. 11.

reported suffering racial discrimination in the five years before the survey had been conducted.[8] Finally, one in three Muslim persons indicated in 2017 that they suffered discrimination when looking for a job, with the number being even higher among Muslim women wearing a headscarf.[9]

The EU anti-racism legal framework is not perfect. Ways in which it could be improved are discussed in Chapter 2 of this e-book, but two are worth raising here as well. The first is that the Court of Justice of the EU (CJEU) recently refused to find a practice that treated individuals differently on the basis of their nationality as discriminatory because 'nationality' is not a protected characteristic under the Racial Equality Directive and the different treatment for which the applicant complained was not necessarily a result of his ethnic origin.[10] Rejecting the significant overlap between ethnic origin and nationality, the CJEU held that 'the country of birth cannot, in general and absolute terms, act as a substitute for all the criteria' for what constitutes 'ethnic origin'.[11] While strictly speaking the Court is right to make a distinction between nationality and ethnicity, this does raise concerns that the case will be used to justify indirect discrimination and behaviour that ethnic (and not just national groups) experience as discriminatory. The second limitation of the existing anti-racism legal framework concerns another refusal of the CJEU, this time in 2016, to recognise 'intersectional discrimination' as a protected ground, as this had no clear basis in the Race Equality Directive.[12] Intersectional discrimination takes place when an individual is discriminated against based on grounds that are intertwined in such a way that they produce a new type of discrimination. For instance, a Muslim woman being discriminated against in the workplace because she wears the headscarf is experiencing discrimination that is substantively different to the experiencees of both a woman in the majority ethnic group and those of a Muslim man. The concept of intersectional discrimination is useful because it more accurately reflects the complex identities and real life experiences of those who are most likely to be victimised by discriminatory behaviour. The unwillingness of the Court to acknowledge this in relation to the most vulnerable members of ethnic and racial groups, namely women and girls, and victims of other grounds of discrimination, such as disability, is regretable.

Limitations in the Law notwithstanding, they are not the main reason why racism, discrimination and xenophobia are on the rise in the EU. What is also not providing an (adequate) explanation for these worrying phenomena is the problematic implementation of the EU Directives in national

[8] Ibid.
[9] European Union Agency for Fundamental Rights, 'Second European Union Minorities and Discrimination Survey Muslims – Selected findings' (2017) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf.
[10] Judgment of 6 April 2017, *Jyske Finans,* C-668/15, ECLI:EU:C:2017:278, para. 19.
[11] Ibid.
[12] Judgment of 24 November 2016, *David L. Parris v Trinity College Dublin and Others*, C-443/15, ECLI:EU:C:2016:897

> ***Limitations in the Law notwithstanding, they are not the main reason why racism, discrimination and xenophobia are on the rise in the EU.***

laws. Admittedly, there are situations in which the Directives could have been implemented more broadly or where additional, or free-standing crimes, could have been introduced. For instance, the Italian legal framework criminalises racist defamation because of its defamatory, rather than because of its racist nature, a state of affairs that does not appear to be compatible with the objectives of the Racial Equality Directive.[13] Similarly, while the national law in Malta mostly transposed the Racial Equality Directive, it did so by making amendments to, or passing, six different domestic laws, thus resulting in provisions that are difficult to navigate or that produce different procedures and remedies through which someone can be protected.[14]

Yet, the most important reason why the law fails to protect its intended beneficiaries is not so much because of its letter, but because it is not being applied in an effective manner. This has also been highlighted by the Agency for Fundamental Rights, which notes that of those who suffered racial or ethnic discrimination in 2017, only 12 percent reported the most recent discriminatory incident to anybody (with the number being as low as 4 percent for those who reported the incident to an equality body).[15] It is therefore unsurprising that the European Commission identified as 'pressing' the need to ensure that the existing legal framework truly protects victimised racial or ethnic groups.[16] Perhaps no state exemplifies this to a greater extent than Bulgaria, which scores the highest (100/100 points) in the field of anti-discrimination in the 2020 Migrant Integration Policy Index (MIPEX) from 2020.[17] Nevertheless, MIPEX only provides an indicator of just the legal framework and policies, and not their implementation only the legal framework and policies, and not their implementation. Thus, while Bulgaria, on paper at least, appears to have the perfect anti-discrimination legal framework, in practice, it continues discriminating against the different groups that PRESERVERE seeks to empower.

[13] See, Chapter 7 of this collection for more details.
[14] See Chapter 8 of this collection for more details.
[15] European Union Agency for Fundamental Rights, 'Second European Union Minorities and Discrimination Survey: Main results' (2017), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf, p. 15.
[16] European Commission, 'EU Anti-racism Action plan 2020-2025' (2020), available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en, p. 17.
[17] Bulgaria, Migrant Integration Policy Index MIPEX 2020, https://www.mipex.eu/bulgaria 'Muslims – Selected findings' (2017), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf.

In a report from the Commission to the European Parliament, several factors were identified as contributing to the legal framework's inadequate implementation.[18] These translate in a series of specific needs addressed by PRESERVERE. First, the need to ensure that there are no gaps to the letter of the law, both on the European and national levels. Important in this respect are the ongoing infringement proceedings in relation to the Racial Equality Directive (against the Czech Republic, Slovakia and Hungary); there are currently no ongoing infringement proceedings in relation to the Victims' Rights Directive.[19] Second, there is a need to bring legal protection to the attention of those concerned, including law enforcement personnel, legal professionals, equality bodies and civil society. This will be especially impactful in Member States that have transposed the law, but offer no formal training to key stakeholders. An example of this is Cyprus, where no training in relevant Directives or case law of the CJEU or the European Court of Human Rights is provided to judges, lawyers, prosecutors, the police or legal officers in social services, prisons, and asylum seeker reception centres. In fact, one can qualify as a lawyer in Cyprus without that person ever having been taught or examined in EU law. Third, there is a need to collect data that quantify discrimination and evaluate the implementation and application of equality legislation in different Member States. And finally, a need exists to encourage reporting from victims. The Commission suggests that reporting can be promoted by reducing the costs and risks to bringing a complaint or by making the complaints procedure and key actors within it more accessible to potential victims.[20] Both strategies can be enhanced if stakeholders become familiarised with the legal provisions they are called to implement, which is one of the key objectives of this project.

Combined, the needs that the Commission has identified above, and which PRESERVERE endorses, suggest that we must urgently focus on and assist the effective implementation of the existing anti-racism legislative framework. This conclusion is shared by the EU Anti-Racism Action Plan 2020-25, which notes that a system that protects groups vulnerable to racial or ethnic discrimination must, first and foremost, rely on the effective enforcement of the legal framework.[21] The importance of focusing on the implementation and application of the law is practically reflected in the renewed

[18] European Commission, 'Report 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')', COM(2021) 139 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN.

[19] See Chapter 2 of this collection for more details.

[20] European Commission, 'Report 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')', COM(2021) 139 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN.

[21] European Commission, 'EU Anti-racism Action plan 2020-2025' (2020), available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en.

attention the European Commission has paid to this need, shown, *inter alia*, through its stated commitment to fund projects promoting this objective through its 'Citizens, Equality, Rights and Values' and 'Justice' programmes.[22] The emphasis on research-informed training activities and educational material for those who are primarily responsible for the enforcement of the European legislative framework in respective Member States, speaks to this need.

Additionally, the implementation of the EU anti-racism legal framework is among the key priorities of the EU Anti-Racism Action Plan and the EU Roma Strategic Framework for Equality, Inclusion and Participation for 2020-2030.[23] Better transposition and implementation of the law is also included in the Agency for Fundamental Rights' recommendations to combat both antisemitism[24] and anti-Muslim hatred.[25] Moreover, the European Commission has highlighted as a problem the fact that 83 percent of victims of racist violence of African descent expressed dissatisfaction over the way their most recently reported incident had been handled by the authorities.[26] Finally, better implementation of the law is directly relevant to several of the priorities of the Call that funded this project, such as (a) 'addressing antigyptyism, including hate speech and hate crime and discrimination of Roma', (b) 'supporting victims of antisemitism [by …] encouraging reporting of such incidents', (c) supporting 'the fight against Muslim hatred and discrimination' through taking action 'to raise awareness of public authorities [and] foster reporting by victims' and (d) taking action 'to respond to the structural forms of racism faced by people of colour and people of African descent'. Reporting of discriminatory incidents will be encouraged and a better-targeted response to structural forms of racism will follow if legal professionals, responsible for implementing the law, are familiarised with, and therefore more comfortable to use it. It is for this reason that research-informed trainings and educational material, tailored to the specific needs of each Member States, are central to the project.

[22] European Commission, 'Report 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')', COM(2021) 139 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN.

[23] European Commission, 'A Union of Equality: EU Roma strategic framework for equality, inclusion and participation', COM(2020) 620 final, available at https://ec.europa.eu/info/sites/default/files/eu_roma_strategic_framework_for_equality_inclusion_and_participation_for_2020_-_2030_0.pdf.

[24] European Agency for Fundamental Rights, 'Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU' (2018), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-experiences-and-perceptions-of-antisemitism-survey_en.pdf.

[25] European Union Agency for Fundamental Rights, 'Second European Union Minorities and Discrimination Survey'.

[26] European Commission, 'EU High Level Group on combating racism, xenophobia and other forms of intolerance; Afrophobia: Acknowledging and Understanding the Challenges to Ensure Effective Responses' (November 2018), available at https://ec.europa.eu/newsroom/just/document.cfm?doc_id=55651.

1.3 A short note on the terminology

> ***The Racial Equality Directive aims to implement the equal treatment between persons irrespective of racial or ethnic origin.***

The Racial Equality Directive, which is at the centre of this research, seeks to implement 'the principle of equal treatment between persons irrespective of racial or ethnic origin'.[27] It does not define what is meant by 'race' or 'ethnicity', other than to make two peripheral, but practically important points. First, that '[t]he European Union 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.'[28] Second, that the 'prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality'.

The theoretical literature has debated extensively whether the term 'ethnicity' encapsulates within it the concept of 'race', or whether racial differences are somehow distinct from ethnic ones.[29] Cornell and Hartman, for instance, argue that ethnicity is concerned with certain *given* attributes that create a shared sense of belonging (such as a shared language, religion or culture), while race relates to physical characteristics (like skin colour).[30] As a result, racial identity (in contrast to, or more so than the ethnic one) is typically perceived as inherent, something that the individual is born with, rather than having the power to choose.[31] Conversely, Horowitz groups race among the characteristics encapsulated by ethnicity and argues that when compared to the more traditionally understood ethnic markers, skin colour differences are neither more likely to give rise to uniquely intense emotions, nor serve as unusually reliable signs of an individual's group identity.[32] Ultimately, if one accepts Kymlicka's argument that ethnicity plays a central role in most people's lives because it provides a context in which individuals make decisions and in which these decisions acquire significance, to the extent that race also provides this context, it should be understood as falling within the definition of ethnicity.[33]

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[27] Full title of Racial Equality Directive.
[28] Racial Equality Directive, Preamble, para. 6.
[29] Nasia Hadjigeorgiou, 'Ethnicity', in *The Max Planck Encyclopedia of Comparative Constitutional Law*, (Oxford University Press, 2022).
[30] Stephen Cornell and Douglas Hartman, *Ethnicity and Race: Making Identities in a Changing World* (Pine Forge Press, 2nd edn, 2007), p. 24-29
[31] See also Rogers Brubaker, 'Ethnicity, Race and Nationalism' (2009) 35(1) *Annual Review of Sociology* 21; Faye V. Harrison, 'The Persistent Power of "Race" in the Cultural and Political Economy of Racism' (1995) 24 *Annual Review of Anthropology* 47.
[32] Donald Horowitz, *Ethnic Groups in Conflict* (University of California Press, 1985), chapter 1.
[33] Kymlicka, W, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995), p. 108.

In light of these theoretical debates and the EU's clear rejection of any negative connotations relating to the concept of race, authors in this e-book were given discretion to decide whether they would use the term 'race' or 'ethnicity'. Such decisions were shaped, not so much by personal preferences, but mostly by how the terms have been used in the national legislation of each Member State.

1.4 An Overview of the e-Book

In addition to this introductory chapter, the e-book consists of eight more chapters. The first two are more theoretical in nature and aim to set the scene for the practical chapters that follow. Chapter 2 provides an overview and critique of the EU anti-racism legal framework and is an excellent tool for legal professionals or frontline workers who regularly interact with ethnic or racial minorities and want to familiarise themselves with the prevailing law. Chapter 3 briefly outlines the project's research methodology, offers a comparative analysis of the different case studies, and draws some preliminary conclusions about the state of the implementation of the law in the six countries under examination. Chapter 2 was written by Dr Katerina Kalaitzaki and Chapter 3 by Dr Nasia Hadjigeorgiou, both at UCLan Cyprus. Chapters 4-9 delve in detail into the transposition and implementation of the EU anti-racism legal framework in Bulgaria, Cyprus, Greece, Italy, Malta and the Netherlands.

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

KATERINA KALAITZAKI
UCLAN CYPRUS

2.1. 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.[1] 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.[2] 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.[3]

[1] 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.

[2] 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.'

[3] Article 6 of Consolidated version of the Treaty on European Union OJ C 326, 26.10.2012 ('TEU').

However, despite these major steps, the general population recognises that discrimination is still widespread in the EU and frequently experienced in Member States.[4] The Commission itself, has acknowledged the fact that little progress has been made in the fight against discrimination since 2014.[5] 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,[6] 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.[7]

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

[4] 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".

[5] 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.

[6] 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>

[7] For more information on this in relation to each Member State, see the national reports.

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).

2.2. 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.

2.2.1 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'.[8] 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".[8] 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

[8] 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.'

as one of the objectives of the Union, particularly relevant to the measures adopted in criminal matters and security.[9]

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, 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.[10]

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

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.[11] 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,[12] the children's right to such protection and care as is necessary for their well-being,[13] the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life,[14] and the right of persons with disabilities to benefit from measures

[9] 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.'
[10] Article 3(3) TEU.
[11] Article 6(1) TEU.
[12] Article 20 of the Charter.
[13] Article 24 of the Charter.
[14] Article 25 of the Charter.

designed to ensure their independence, social and occupational integration, and participation in the life of the community.[15]

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.[16] 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 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.[17] 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.[18]

2.2.2 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.[19] 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.[20] As will be seen in the sections that follow, the Racial Equality

[15] Article 26 of the Charter.
[16] Article 51(1) of the Charter.
[17] 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.
[18] 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.
[19] Article 5 TEU.
[20] See section 3 of the current Report for the full analysis.

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,[21] 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.[22] Therefore, in contrast to the Racial Equality Directive, the material scope 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.[23] 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.[24]

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,[25] while the interest in their rights on the EU level only emerged in 2001.[26] 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,

[21] 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.
[22] 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.'
[23] 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".
[24] 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'.
[25] 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.
[26] 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.

on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement".[27] 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.[28] As will be discussed 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".[29] 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.[30] 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.[31]

2.3. The Racial Equality Directive: Ripe for reform?

The Racial Equality Directive,[32] lays down a common framework, for combating racism and discrimination, by implementing the principle of equal treatment between persons irrespective of

[27] Judgment of 2 February 1989, *Cowan v Trésor public*, C-186/87, ECLI:EU:C:1989:47.
[28] 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.
[29] Article 1 of the Council Framework Decision 2008/913/JHA of 28 November 2008.
[30] Ibid, Article 9(1).
[31] Ibid, Article 9(2).
[32] 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.

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. [33]

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.

2.3.1. 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".[34] The protection includes third country nationals, but does not extend to protection for discrimination based on nationality or statelessness.[35] 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.[36] 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.

[33] Fernne Brennan, 'The European Race Directive: A Bridge so Far?' in Raphael Walden (ed.), *Racism and Human Rights* (Martinus Nijhoff Publishers 2004) 143-164.
[34] Article 3(1) of the Racial Equality Directive.
[35] Article 3(2) of the Racial Equality Directive.
[36] 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/>

> ***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 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',[37] 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.[38] 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'.[39]

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".[40]

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".[41] 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

[37] '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).
[38] Leila Brannstrom, 'The Terms of Ethnoracial Equality: Swedish Courts' Reading of Ethnic Affiliation, Race and Culture' (2018) 27 *Social & Legal Studies* 616-635.
[39] Mathias Möschel, 'Race in mainland European legal analysis: Towards a European critical race theory' (2011) 34 *Ethnic and Racial Studies* 1648-1664.
[40] *Timishev v. Russia*, Applications nos. 55762/00 and 55974/00), para. 55.
[41] Article 1.1. ICERD.

faith, language, cultural and traditional origins and backgrounds".[42] The judgment particularly concerned a case of discrimination against a non-Roma person 'together with the Roma'.[43] 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 heigh of 1.70 meters, was attributed to the fact that most of the inhabitants of the district were of Roma origin.[44] 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.[45] 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.[46] 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.[47] 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*.[48] 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

[42] Judgment of the Court of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, ECLI:EU:C:2015:480, para. 46.
[43] Ibid, para. 73.
[44] Ibid, para. 22.
[45] Ibid, paras 49 and 56; See also Judgment of 17 July 2008, Coleman, C-303/06, EU:C:2008:415, paras 38 and 50.
[46] 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.
[47] Swedish Government Bill, 1997/98:177: 59 and Government Bill, 2002/03:65:91.
[48] Judgment of 6 April 2017, *Jyske Finans*, C-668/15, ECLI:EU:C:2017:278.

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". [49] 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…".[50]

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.[51] 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.[52] 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.[53]

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.[54]

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

[49] Shreya Atrey, *'Race discrimination in EU Law after Jyske Finans'* (2018) 55 Common Market Law Review 625-642.
[50] Judgment of 6 April 2017, *Jyske Finans*, C-668/15, ECLI:EU:C:2017:278, para. 19.
[51] Article 3(2) of the Racial Equality Directive.
[52] Göta Court of Appeal case no. T 1666-09 *The Equality Ombudsman v. Skarets Fastigheter Aktiebolag*, judgment of 25 February 2010.
[53] Leila Brännström, 'The Terms of Ethnoracial Equality: Swedish Courts' Reading of Ethnic Affiliation, Race and Culture' (2018) 27 Social & Legal Studies 616-635, 622.
[54] Article 6 and Recital 25 of the Racial Equality Directive.

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[55] and the difficulty of winning cases on grounds of ethnic discrimination.[56] 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.[57] 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[58] as well as the exercise of employment and working conditions, including dismissals and pay.[59] 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.[60] 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.[61] Lastly, education and access to and supply of goods and services that are available to the public, including housing.[62]

[55] 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.
[56] Leila Brännström, 'The Terms of Ethnoracial Equality: Swedish Courts' Reading of Ethnic Affiliation, Race and Culture' (2018) 27 Social & Legal Studies 616-635.
[57] Article 3(1)(a) of the Racial Equality Directive.
[58] Ibid, Article 3(1)(b).
[59] Ibid, Article 3(1)(c).
[60] Ibid, 3(1)(e) and (f).
[61] Opinion of AG Sharpston of 11 September 2018, Maniero, C-457-17, ECLI:EU:C:2018:697, para. 47.
[62] Article 3(1)(g) and (h) of the Racial Equality Directive.

> ***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 higher percentages than other groups of people in those sectors.[63] 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".[64] 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".[65]

The Directive has been characterised as providing a 'uniquely high level of protection' from structural discrimination especially in education.[66] 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.[67] In other words, a multi-faceted definition for these minority groups that can capture all the relevant social attributes.

[63] 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.
[64] 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.
[65] Ibid.
[66] 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>
[67] Ibid.

2.3.2. 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 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".[68] 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.[69] 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.[70] 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.[71] 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".[72] 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

[68] Article 2(1)(a) of the Racial Equality Directive.
[69] Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, ECLI:EU:C:2015:480, para. 99.
[70] Ibid, para. 91.
[71] Judgment of 10 July 2008, *Feryn*, C-54/07, ECLI:EU:C:2008:397, para. 25.
[72] Article 2(1)(b) of the Racial Equality Directive.

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".[73]

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.[74] 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".[75] 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.[76] 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.[77] 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.

[73] 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.
[74] Lisa Waddington and Mark Bell, 'More equal than others: Distinguishing European Union Equality Directives' (2001) 38 *Common Market Law Review* 587-611.
[75] Article 4 of the Racial Equality Directive.
[76] Ibid, Article 5.
[77] Fernne Brennan, 'The European Race Directive: A Bridge so Far?' in Raphael Walden (ed.), *Racism and Human Rights* (Martinus Nijhoff Publishers 2004) 143-164.

2.3.3. 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 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. [78] This development is noteworthy because it has eased the path for victims to pursue complaints,[79] 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,[80] 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.[81] 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.[82]

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.[83] Contrary to other equality directives, which provide strikingly detailed provisions on compensation or reparation of victims,[84] the Racial Equality Directive leaves the detailed application of the principles that govern national remedies in discrimination cases to the national discretion. This restrain 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

[78] Article 13 of the Racial Equality Directive.
[79] 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>
[80] Ibid, Article 8.
[81] Judgment of 10 July 2008, *Feryn*, C-54/07, ECLI:EU:C:2008:397.
[82] Article 13(2) of the Racial Equality Directive.
[83] Article 15 of the Racial Equality Directive.
[84] 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.

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.[85]

2.4. 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.[86] 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.[87]

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.[88] 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.[89] 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

[85] Judgment of 10 July 2008, *Feryn*, C-54/07, ECLI:EU:C:2008:397, paras 35-40.
[86] Recital 9 of the Victims' Rights Directive.
[87] Articles 3, 6, 7, 8, 13 and 14 of the Victims' Rights Directive.
[88] Ibid, Article 2(1)(b).
[89] 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.

and increased costs.[90] 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 out in the Directive taking into account the individual circumstances and determine which family members have priority in relation to the exercise of rights.[91]

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.[92] 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.[93] To this end, an individual assessment concerning the circumstances of the victim must be conducted, where 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.[94] 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.[95] 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.

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

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,[96] 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

[90] Ibid.
[91] Article 2(2) of the Victims' Rights Directive.
[92] Preamble of the Victims' Rights Directive.
[93] Article 19 of the Victims' Rights Directive.
[94] Article 22 of the Victims' Rights Directive.
[95] 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.
[96] 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.

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.[97] However, the Directive does not provide for a more integrated approach of what the 'general' and 'specialist' trainings should or could involve nationally. This 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.[98] 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.

2.5. 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.[99] This can be primarily done through Article 258 TFEU, and the initiation of proceedings against a Member

[97] Recital 61 of the Victims' Rights Directive.
[98] 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
[99] Article 17 TEU.

State for failing to fulfil an obligation under EU law. The procedure is divided into the administrate (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 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.[100] 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 again Roma children in education that are surprisingly still ongoing.[101]

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.[102] 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.[103] 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.[104]

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

[100] European Commission, The Race Equality Directive, MEMO/07/257 (Brussels, 27 June 2007) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_07_257>
[101] 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.
[102] Austria, Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Greece, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Romania, Slovenia and Slovakia.
[103] Formal letters were sent on 25/7/2019 to the Czech Republic, Estonia, Germany, Hungary, Italy, Malta, Poland, Portugal, and Sweden.
[104] 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.

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 approach towards racial discrimination still appears wanting,[105] 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",[106] 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.

2.6. 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.

[105] 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>

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

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 the Directives does not seem to be satisfactory, due to incomplete and/or incorrect transposition,[107] 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.[108]

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.[109]

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 racists 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.

[107] 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.
[108] Lisa Waddington and Mark Bell, 'More equal than others: Distinguishing European Union Equality Directives' (2001) 38 Common Market Law Review 587-611.
[109] 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.

3 A COMPARATIVE ANALYSIS OF THE DIFFERENT CASE STUDIES

3.1. Introduction

Six national reports have been drafted for the purposes of PRESERVERE. These concern Bulgaria, Cyprus, Greece, Italy, Malta and the Netherlands. Each of the national reports addressed a series of research questions, that are summarised below:

(i) How faithfully have the Racial Equality Directive and the Victims' Rights Directive been transposed into national legislation?[1]
(ii) Does the legal framework, at European and national levels remain fit for purpose, or are there gaps to be filled? In other words, is the legal framework of practical use to potential victims? If no, how is it failing them and why?
(iii) What are the gaps (and reasons these exist) in the implementation of the law in each Member State?
(iv) What are the procedures for someone to bring a complaint or start a legal case for discrimination or hate speech/crimes on grounds of race or ethnicity in each Member State?
(v) What are the available remedies to someone who initiates a procedure as described in (iv) above?
(vi) What good practices have been adopted for the implementation of the EU Law framework in each Member State?
(vii) What steps have been taken to ensure that key stakeholders in the country are familiar with, and can use, the EU Law framework?

[1] The full names of the two Directives are: 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 national reports being compared here examine the effectiveness the EU anti-racism legal framework in terms of offering protection to four vulnerable groups: Muslims, Jews, Roma and persons of African descent.

This report reaches conclusions from, and compares, the six national reports in order to draw lessons that will be useful when preparing and delivering training to legal professionals and frontline workers working in the area of non-discrimination. Section 2 outlines the comparative methodology that was adopted in the PRESERVERE project as a whole. Section 3 identifies three common themes from the national reports. These concern (a) the implementation of the EU legal framework in the respective Member States; (b) structural problems that are hindering the application of the law in the different countries; (c) the lack of knowledge among legal professionals and frontline workers about the two Directives. Section 4 provides insights from the case analysis that was conducted for PRESERVERE and Section 5 outlines lessons learned about training needs in the different Member States.

3.2. The comparative methodology

In order to facilitate the comparison between the different Member States, the six reports were drafted using the same methodology, which consists of three components: (a) library-based research; (b) case analysis; and (c) empirical research. The library-based research focused on a literature review of relevant primary and secondary sources relating to the anti-racism legal framework in each of the six countries. In addition to the legislation that transposed the Directives themselves, this included a review of case law from the Court of Justice of the EU (discussed in detail in Chapter 2 of this e-book), guidance and research that has been issued by European bodies, such as the Commission, Parliament and the Fundamental Rights Agency (discussed in the country chapters and the Introduction of this e-book) and recent secondary literature.

The case analysis part of the methodology was an attempt to identify cases that relied on the EU anti-racism legal framework and gather relevant information about them that would provide an indication of how this is used in practice by the relevant authorities. 'Cases' in this instance related to two slightly different pieces of data: (a) discrimination cases that have reached national courts; and (b) discrimination cases that have been reported in national equality bodies. These related to complaints concerning different instances of discrimination against a member of one of the protected groups, such as hate crimes and hate speech, or instances of discrimination in different areas of life. Depending on the size of the country, partners could provide either a full list of cases

[2] PRESERVERE focuses on four protected groups: Muslims, Jews, Roma and persons of African descent.

that are dealing with these themes, or a selection of representative cases. The relevant information provided for each case included the date on which it was decided, the name of court or equality body that heard this, the type of discrimination that was raised (in other words, whether it related to hate speech, discrimination in the employment sphere, discrimination in the provision of social services etc), the outcome of the case and the remedies ordered. The case analysis took place between 2016 and 2021. The reason 2016 was chosen as the starting point for this data collection and analysis is because the deadline for the implementation of the Victims' Rights Directive was 16 November 2015, while the deadline for the Racial Equality Directive was 19 July 2003. By 1 January 2016, both Directives should have been transposed to (or, in any case, under conditions, were directly applicable in) the Member States, thus making it possible for them to be used by legal professionals and frontline workers.

The empirical research consisted of two focus groups per country, with five participants in each focus group and six in-depth interviews with professional and frontline workers. Some countries were able to meet the empirical research guidelines, others exceeded them, while others were unable to hold the required number of focus groups and interviews. The numbers of focus group participants and interviewees that were engaged in each country are listed in the table below. More detailed information about the occupation and gender of each interviewee and focus group participant is found in the country reports.

Table 1: Number of focus groups, focus groups participants and interviewees

Country	**Number of focus groups**	**Number of focus group participants**	**Number of interviewees**
Bulgaria	2	8	8
Cyprus	2	12	6
Greece	2	10	6
Italy	2	14	10
Malta	3	14	6
Netherlands	2	12	6
Total	**13**	**70**	**42**

Partners in almost all of the countries participating in this research reported that they had difficulties recruiting individuals to take part in the empirical part of the research, especially in the

focus groups. Different reasons were given for this difficulty faced by the partners, with two being the most prominent. The first reason was that potential interviewees and focus group participants felt they did not have enough information about the Directives in order to meaningfully contribute to the discussion. This is despite the fact that these individuals had been hand-picked by the researchers precisely because their professional background meant that they should have a good understanding of anti-discrimination law. This is itself an interesting finding that lends support to the need to develop better, more comprehensive and more widely accessible training on the EU anti-racism legal framework.

The second reason concerns the fact that potential interviewees and focus group participants – and in particular, the lawyers among them – were extremely busy and did not have the time to participate in the empirical research (this appears to be a long-standing problem in different Member States, but was exacerbated in the case of Bulgaria because of the recent war in Ukraine). This is relevant to the findings of the research project in two ways. On the one hand, the fact that lawyers and frontline workers are so busy and overwhelmed points to the conclusion that those dealing with anti-discrimination cases are often overworked and underfunded. This provides an explanation for why they and most of their colleagues have been unable to keep up with developments in the law. If they barely have time to keep up with their day-to-day workload, training and continuous professional development is unlikely to be among their priorities. On the other hand, the fact that our intended audience is so busy must be taken into account for when we are developing the training that we will be delivering to them: what type of training, and modes of delivery must we adopt in order to ensure that the information we want to convey reaches out target audience in the most efficient way possible? What should be the duration and focus of these trainings? These are questions that we return to in the last section of the comparative report.

3.3. Common themes from the different national reports

The different national reports point to distinct challenges or good practices that exist in each of the countries that participated in the research. However, several common themes or conclusions arose from a comparison of the six reports. Three are discussed in more detail here.

(a) The implementation of the EU anti-racism legal framework

The initial hypothesis before conducting in-depth research in the different countries was that the wording of the EU Directives provided sufficient protection to the victims and that these protections had been adequately implemented in national laws. If there were any problems with the protection of vulnerable groups therefore, this must have been the result of the problematic

application of the law in the respective Member States. This hypothesis has been partly proven to be correct; at the same time however, the picture is also somewhat more nuanced. On the one hand, as the EU chapter of this e-book suggests, the provisions of the two Directives go a long way towards providing a comprehensive protection of victims' rights. While some criticism can be made of specific cases decided by the Court of Justice of the EU, by and large, the letter of the law is satisfactory. In fact, so extensive are the protections of the law that one interviewee described them as 'the ideal', something that lawyers can only aspire to in real life situations.

> ***The research revealed issues in the substantive transposition of the Directives.***

At the same time, on paper and at a fairly superficial level, the six countries have taken steps to transpose the two Directives in their national legislation. They have all adopted or amended legislation that adds to the protection of these groups' rights and there are no infringement proceedings by the European Commission against any of them. Nevertheless, Cyprus, Malta and Greece faced delays – sometimes year-long delays – in the implementation of the Directives. In addition to these, the research revealed issues in the substantive transposition of the Directives. For example, while the two Directives have been implemented in Malta, this has been done in a fragmented way, with the relevant protections being scattered in a range of primary and secondary domestic laws. Most problematic in this respect is the fact that the scope of the Racial Equality Directive is being transposed through three Acts that are not equal in the protections they are offering. Italy and Cyprus also face problems in the implementation of the two Directives, although these are, admittedly smaller ones. For instance, in Italy, the EU anti-racism legal framework has been transposed in a manner that is, by and large, faithful to the intentions of the Directives and appropriate to the national regulatory context. However, issues remain, for example, the fact that racial discrimination itself is not criminalised under the Italian legal system. Similarly, while Cyprus has largely implemented the Victims' Rights Directive, domestic legislation makes no reference to restorative justice measures, which are a key part of the protections it provides.

These gaps in the implementation of the EU anti-racism legal framework are especially problematic in situations where the lawyers and judges tend to only look at the implementing national legislation, instead of also being familiar with the EU Directives that the national law gives effect to (this is, for instance, the case in both Greece and Bulgaria). A final problem in the implementation of EU Law concerns the fact that research from some countries has reported that law-makers merely copy verbatim the provisions of the relevant Directive into domestic law, without ensuring that there is an institutional framework in place that will make possible the Law's application in practice. The Bulgarian case offers an example of this. While the law clearly states that victim

support will be provided, the country lacks a generic victim support entity. Instead, it has come to rely on NGOs that provide this support, which creates several problems in practice, such as the fact that support is available for victims of certain crimes but not others (it is available for victims of human trafficking and domestic violence, but not for victims of sexual violence more generally) and only in certain geographic regions of the country.[3] While the unavailability of institutions to implement provisions of domestic legislation, an issue that was also raised by participants in the Maltese focus groups, provides a good explanation for the disparity between the letter of the law and the situation on the ground, it has not been flagged up as a problem in many jurisdictions. For instance, participants in focus groups in Greece did acknowledge that this is the verbatim copying of the law 'standard practice' adopted in Greece but they did not perceive this to be a problem in any way.

(b) Structural problems hindering the application of the EU anti-racism legal framework

Even in situations where the Directives were properly implemented – which were the majority of cases – members of the groups that the law was intended to protect remained unlikely to make use of relevant provisions due to a number of structural problems. PRESERVERE and the emphasis it places on training of legal professionals will not be able to address these. After all, imparting information on judges, lawyers or frontline workers cannot be a substitute for structural or social reforms. Nevertheless, we must still be aware of these structural problems if we are to have a complete picture of why the EU anti-racism legal framework has been less effective in practice than anticipated. Four insights stand out and are worth discussing more fully.

The first insight concerns the fact that social perceptions and the legal culture of each country shape the extent to which a law is applied successfully in practice. Three examples – one from Malta and two from Cyprus – can be used to illustrate this point. The Maltese country report, in Chapter 8, uses recent statistics to show the prevalence of racist perceptions among society; such perceptions have undoubtedly partly been shaped by the high number of irregular migrants and asylum seekers that arrive on the island on a daily basis. Thus, it points out that four in 10 Maltese persons would feel uncomfortable, if their child's partner was Roma and 35 percent would feel the same, if their child's partner was Muslim.[4] It is not unlikely that at least some lawyers and judges share such racist perceptions. Thus, one possible explanation for the minimal use of the Directives

[3] Diliana Markova and Donka Petrova, 'Review and Analysis of the Bulgarian National Legal Framework on the Rights and Protection of Victims of Crime and its Application: Contributing to an Effective Implementation of Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime' (17 May 2018, Animus Association Foundation, Bulgaria), available at https://www.supportvoc.eu/wp-content/uploads/2019/03/National_Report-Bulgaria_EN.pdf.

[4] The Special Eurobarometer (2019) <Discrimination in the European Union - Malta> accessed 9 June 2022, p. 2.

in Maltese courts is that key stakeholders do not consider racism to be a problem that affects them personally, and therefore, they are not willing to prioritise taking actions against it.

Cyprus offers two examples of how the legal culture of a country can have an impact on the successful application of the law. Adopting a more historical methodological approach, the Cyprus country report in Chapter 5, notes that the Cypriot legal system has traditionally focused more on retribution, rather than prevention and protection. Therefore, the Victims' Rights Directive's emphasis on the latter often clashes with the prevailing legal culture and is, ultimately, ignored (this could provide an explanation, for instance, on why the Directive's provisions on restorative justice have not been transposed in national legislation). Similarly, the Cypriot legal system has prioritised international over EU law – this is reflected both in the fact that international law is supreme over domestic law, and that Chapter 2 of the Constitution ('The Bill of Rights') uses the same language as the European Convention on Human Rights. As a result, EU law tends to be used to a far lesser extent in court than its international counterpart.

The second insight concerns the victims, who are the intended beneficiaries of the EU anti-racism legal framework. Often, these individuals come from the most vulnerable communities within the country and/or are themselves irregular migrants. This creates problems in the effective application of the Directives because victims are unable to approach the authorities and report discriminatory conduct because they are afraid that this will result in problems for them, including their immediate deportation. While this concern is most acute among irregular migrants who are actively avoiding any contact with the authorities, it is a consideration shared even by those who are lawfully residing in the country. Thus, in the aftermath of the arrest of a serial killer who was targeting migrant women in Cyprus in 2019, a sample of 150 foreign domestic workers were asked whether they would contact the authorities if they were the victims of sexual or physical violence. Jarringly, three in four replied that they would not.[5]

Even if victims did not distrust the authorities, there are still significant hurdles that would discourage them from reporting and following through their complaint of discrimination. Key among these are the fact that they might not speak the language, are unaware of their rights, and remain uninformed about who they should contact in case they want to complain. Finally, since legal aid is often unavailable to the victims, at least in some of the countries under examination, their financially precarious situation makes it impossible for them to pursue their claims. This is despite the fact that Article 13 of the Victims' Rights Directive expressly provides that 'Member

[5] Nasia Hadjigeorgiou and the Ombudsman of the Republic of Cyprus, *'The Status of Foreign Domestic Workers in Cyprus'* (December 2020), p. 24, available at http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/2358C433C1A0F629C2258646002B79DA/$file/Domestic%20workers%20.pdf?OpenElement

States shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings.'

The third insight concerns the impact of delays in court proceedings in countries like Italy, Malta and Cyprus. If the adjudication of a case is going to take several years, victims might reasonably think that it is best to forget about the injustice they suffered and move on, rather than become embroiled in a never-ending, potentially expensive legal dispute. The final insight relating to structural problems that undermine the effective application of the law concerns complaints from frontline workers in several countries that national bodies or non-government organisations dealing with anti-discrimination are underfunded. Such complaints have even been made in countries, like the Netherlands, that are generally believed to place a high priority on the protection of human rights and EU Law. The impact of underfunded anti-discrimination institutions is two-fold: on the one hand, it might lead to decisions to turn down victims they should have helped because they do not have the resources to take them on. On the other hand, the training needs of the staff in these bodies will be further deprioritised, as receiving training is costly, both financially (hiring trainers, developing the relevant courses etc) and in terms of the hours spent to learn something new.

(c) Lack of knowledge among legal professionals and frontline workers about the EU anti-racism legal framework

For the purposes of PRESERVERE, the most relevant insight from the research is the widespread acknowledgement of those who are expected to make use of the two Directives that they are not adequately familiar with their provisions. This was clear across the board with lawyers, legal professionals and employees of equality bodies, all of whom noted the need for further training.

> ***"It was reported that lawyers only know about the EU anti-racism legal framework in extremely general terms, or not at all."***

The different country reports show a clear recognition among legal professionals that they are not familiar with the two Directives, and especially the Victims' Rights Directive. Thus, it was reported that lawyers only know about the EU anti-racism legal framework in extremely general terms, or not at all. Perhaps this was most striking in Cyprus, where one interviewee noted that they had interactions with legal officers who raised basic questions on the general applicability of EU Directives in national courts. The problem of lack of knowledge was even more prevalent among frontline workers (labour inspectors, police officers etc), who were sometimes not aware at all of the existence of such Directives. The most knowledgeable of the two Directives in all countries were those employed in equality bodies.

Nevertheless, even they pointed to the need for further training, as this can provide relevant institutions with knowledge, and result in better quality publications and decisions. In turn, an improvement in the quality of such outputs can also have a positive effect on the decisions of the Courts, even if equality bodies do not have standing to unilaterally intervene in individual cases. Relevant here is the fact that, according to Article 7(2) the Race Relations Directive, equality bodies should have standing in legal proceedings, even though this provision has not been implemented in all countries (e.g. Cyprus does not allow for this; the Dutch law does allow for it, but the provision is rarely used in practice).[6]

3.4. Case analysis

The preceding analysis provides a more complete explanation for why the EU anti-racism legal framework has not had the expected impact in fighting discrimination on the ground. It suggests that this is not due to a single factor; rather, three explanations stand out: (a) the Directives have not always been faithfully transposed in national legislation; (b) there are several structural problems that make it less likely that victims will resort to the law and that they will do so successfully; and (c) those who are expected to make use of the Directives, such as lawyers and frontline workers, often lack basic knowledge about their provisions, or even existence. The practical impact of these problems in each country is discussed in more detail in the chapters that follow, but this section provides a comparative overview of the extent to which the legal framework has actually been used by the courts in practice. The picture is a relatively bleak one.

The case analysis that took place in the six countries concerned the period between 2016 and 2021. In the years between 2016 and 2021, Maltese courts heard six relevant cases – all dealing with hate speech – yet, in none of these did the judiciary rely on either of the two Directives. In Greece, four relevant cases were identified: three had to do with hate speech and one concerned discrimination in the provision of social services. Two of the cases (both relating to hate speech) had been decided by the Areopagus, the Supreme Court of the country. None of the four cases mentioned either of the Directives, although in some, references had been made to the relevant national laws that transposed these. Italy and Cyprus show a somewhat more promising record. Thus, in Italy, eight representative leading cases dealing with discrimination in a range of different settings (hate speech, discrimination in the sphere of employment, and discrimination in the provision of public services) were identified. Applicants sought to rely on the Racial Equality Directive in five of them

[6] Article 7(2) of the Race Relations Directive provides that 'Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, *either on behalf or in support of the complainant*, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.' (emphasis added)

and the Court referred to the Directive in two of them. Applicants tried to rely on the Victims' Rights Directive in three cases; the Court did not refer to the Directive in any of these cases, but it did find that discrimination had taken place in all of them.

Finally, in Cyprus, nine cases in which lawyers and courts relied on one of the two Directives were identified; the finding was one of no discrimination in eight of them. Additionally, there were 11 relevant interventions from the Ombudsman, some of which were directly related to themes covered in the Directives (they concerned, for example, complaints relating to hate speech or to discrimination in the provision of social services). Yet, the Directives were not mentioned in 10 of the Ombudsman's interventions, which lends support to the conclusion that training those employed by national equality bodies, who are in principle the most knowledgeable of the Directives, is likely to have a positive impact on the practical application of the EU anti-racism legal framework.

3.5. Lessons about training needs in different Member States

The analysis so far suggests that while training legal professionals and frontline workers is unlikely to solve the poor application of the EU anti-racism legal framework on its own, it can have an important and positive impact. This is something that was clear to the drafters of the Victims' Rights Directive itself, which includes specific provisions on the training of practitioners. Thus, Article 25(1) of the Directive states that

> Member States shall ensure that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.

A similar provision is included in Article 25(2) with regards to judges and prosecutors, in Article 25(3) in respect to lawyers, and in Article 25(4) in relation to those providing victim support and restorative services. Nevertheless, *how* this training is provided will have an impact on the number and type of individuals it is likely to attract and the amount and type of knowledge they will be able to gain from it.

> ***"The interviews and focus groups were useful in this respect because they provided us with a series of guidelines."***

The interviews and focus groups implemented as part of the research methodology were useful in this respect because they provided us with a series of guidelines for the most efficient planning of the trainings. These guidelines are, of course, important for PRESERVERE, but could serve as useful

tools in other projects that are planning similar types of trainings. The research we conducted resulted in the following conclusions: First, bar associations and other relevant professional bodis must be utilised in order to inform their members of the trainings that will be provided. This will not only help with the visibility and dissemination of the trainings, but also the organisations' endorsement will provide the trainings with additional credibility. If there is a way in each country to provide some professional acknowledgement that individuals have undertaken the training (for example, in the form of continuous professional development credits), this is something that partners should pursue.

Second, while *ad hoc* training sessions are valuable, what would add to the sustainability of the project and the impact of the training to a greater extent is their integration in existing training schemes offered by already established bodies. The two Cyprus-specific examples that follow could be amended to fit the needs of other partner countries (e.g. in Bulgaria, where similar problems have been identified). First, all law graduates who wish to qualify as Advocates in the Republic of Cyprus must attend state-mandated classes over a period of 12 months and sit 10 subject-specific exams to prove their satisfactory knowledge of Cyprus law. None of the 10 exams focuses on EU Law – which is in itself a problem and an indication of the weight the profession pays to the *acquis communataire* – but one is concerned with the Constitution of the Republic of Cyprus. Since according to Article 1A of the Constitution, EU Law is supreme over all laws of the Republic of Cyprus, including all constitutional provisions, the training that will be developed could become part of this course. This will ensure that all new lawyers in the Republic will have at least some knowledge of the Directives. The second way in which training could be integrated in existing structures and training programmes in Cyprus is if it becomes part of the regular trainings provided to police officers by the Cyprus Police Academy. The Academy provides classes in 'Law' and 'Human Rights', thus allowing ample room in which (part of) this training could be incorporated.

The third insight from the empirical research concerns the fact that, in almost all of the countries where research was conducted, the intended audience of the trainings, and lawyers, in particular, stated that they were too busy to participate in the focus groups and interviews. This is a hurdle that we might be asked to overcome when delivering the trainings as well. While the intended audience might, in principle, be interested in finding out more about the EU anti-racism legal framework, in practice, they might be reluctant to participate because of their overloaded schedule. This is something that should be considered when planning the trainings. Possible solutions include offering the option of attending only parts of the training, or supplementing the training itself with continuous digital access to training materials that could be accessed at a time that is more convenient for each individual trainee.

Two other insights must be taken into account when planning for the trainings. On the one hand, training should be tailored to its recipients. Lawyers and frontline workers might be working on similar themes, but they are likely to be faced with different challenges and their respective trainings should reflect this. While, for instance, frontline workers would like to acquire a more all-rounded knowledge of the rights that are protected under the Directives, lawyers would be more interested in greater analysis of case law and other documents they could use in court. On the other hand, it was a unanimous request of interviewees and focus group participants in the different countries that the trainings should provide specific, practical help in the form of real-life scenarios. General training on the legislation is welcome, it was often stated, but this should always be supplemented by case studies.

TRANSPOSITION AND IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN BULGARIA

4 TRANSPOSITION AND IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN BULGARIA

BISTRA IVANOVA AND PANAYOT CHAFKAROV,
MULTI KULTI COLLECTIVE

4.1. Introduction

The aim of this report is to shed light on the implementation of the EU anti-racism law in Bulgaria with a focus on Roma, Jewish people, Muslims, and people of African descent. The presented information is based on Multi Kulti Collective's national research conducted as part of the EU-funded project 'PRESERVERE – Preventing Racism and Discrimination: Enabling the Effective Implementation of the EU Anti-Racism Legal Framework' conducted in six EU countries – Bulgaria, Cyprus, Greece, Italy, Malta and the Netherlands – in 2022. The research focuses on the national legislation transposing the relevant EU Directives and the effectiveness of their application by the Bulgarian courts and relevant professionals.

The study focused on two EU Directives – Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (henceforth, the Racial Equality Directive)[1] 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 (henceforth, the Victims' Rights Directive).[2] In particular, the research was interested in how faithfully these two EU Directives have been transposed into national legislation, the extent and quality of the protection provided to the vulnerable groups, the main gaps and good practices observed by various stakeholders in this regard.

The first stage of the research was desk research. It reviewed the national legislation transposing the two EU directives in question, relevant documents and reports published by various institutions

1 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.
2 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 OJ L 315, 14.11.2012, p. 57–73.

(including state institutions, independent experts, think-tanks, etc.) and case law. The second stage was field research. It proactively sought the opinions of various actors such as legal professionals and frontline workers in order to identify the practical challenges and gaps between the written laws and their implementation as well as good practices in dealing with these questions. In this context, focus groups as well as individual interviews were organised with representatives of various institutions such as international organisations, NGOs, think-tanks, etc.

4.2. Methodology

The research methodology envisioned two main stages of the research – desk research and fieldwork. The purpose of the desk research was to establish how the relevant EU Directives have been transposed into national law and observe possible gaps. This is why the research team first looked at the Bulgarian legislation transposing the European anti-racism legal framework and analysed the extent to which this has been done. Secondly, the team reviewed the application of these laws by the judiciary. In addition, various reports and documents published by both state institutors and independent stakeholders such as NGOs, think-tanks and academia members were examined in order to find additional points of view towards the discussed problems.

The second method consisted of empirical research which aimed to examine the practical implementation and identify potential gaps. Both focus groups and individual interviews were conducted using a semi-structured questionnaire aimed at identifying different points of view based on the professional expertise and the experience of the participants. Special attention was placed on gender balance when inviting the participants. The invited participants came from two main groups – lawyers and frontline workers. The interviews were conducted online via Zoom or by phone. Before diving into the prepared questions, the interviewer started with a brief introductory session offering key information about the project, main goals and rules of the focus group/ interview. In total, two focus groups and eight individual interviews were organised. In total, 41 lawyers, frontline workers and other experts were invited via email which contained information about the project, its main goals as well as an attachment of the questionnaire, however, only 19 accepted the invitation and eventually only 16 joined the focus groups and/or scheduled an individual interview.

The gender and profession data of the participants are outlined below:

Table 2. Gender and profession of 1st focus group participants

Participant 1	Male	Lawyer
Participant 2	Female	Lawyer

Table 3. Gender and profession of 2nd focus group participants

Participant 1	Female	Frontline worker
Participant 2	Male	Frontline worker
Participant 3	Male	Frontline worker
Participant 4	Female	Frontline worker
Participant 5	Female	Frontline worker
Participant 6	Female	Frontline worker

Table 4. Gender and profession of interviewees

Interviewee 1	Female	Frontline worker
Interviewee 2	Female	Frontline worker
Interviewee 3	Female	Frontline worker
Interviewee 4	Female	Frontline worker
Interviewee 5	Female	Integration expert
Interviewee 6	Female	Frontline worker
Interviewee 7	Male	Frontline worker
Interviewee 8	Female	Lawyer

Both focus groups and interviews were interested in the same areas that included questions related to the legal framework, key stakeholders, legal process, training needs, and others. The information collected was transcribed and carefully analysed.

There were several challenges in recruiting participants for both focus groups and individual interviews. The first one was very little interest from legal professionals due to heavy workload,

partly because of the Ukrainian crisis and increased numbers of refugees in Bulgaria. Many organisations increased their capacities and hired additional lawyers to support the newly arrived temporary protection holders. It is important to highlight that only a limited number of professionals work in the area of human rights and some of them collaborate with numerous organisations, therefore their time is scarce. In addition, even the lawyers who did participate shared that they have very limited experience with case law on the topics. The second challenge was the limited knowledge about this topic among frontline workers which led to last minute cancellation even when a meeting had already been scheduled. There were, in fact, several cases when experts gladly agreed to participate but after reviewing the exact questions in preparation for the meeting, they apologised because they felt that they did not possess enough knowledge on the subject.

4.3. Setting the scene

The Republic of Bulgaria is a historically diverse society. Its strategic geographical location at the border between Europe and Asia, between Christianity and Islam has left a mark on its population. Bulgaria has large 'traditional minorities' (formed before 1878) such as Turks, Roma, Russians, Armenians, Vlachs, Sarakatsani, Greeks, Tatar and Jewish people.[3] The biggest ethnic minority is the Turkish one due to historical and geographical reasons, such as five centuries of Ottoman rule in the territory of current Bulgaria and geographical proximity with Turkey.

> ***Bulgaria has large 'traditional minorities' (formed before 1878) such as Turks, Roma, Russians, Armenians, Vlachs, Sarakatsani, Greeks, Tatar and Jewish people.***

The 10-yearly national Census contains detailed data about citizens' ethnic background and their legal status, among others. The 2021 Census data has only been partly published at the time of concluding this report, so for some data we have to go back to the 2011 Census. The 2011 Census found out that 588,318 people (8.8 percent) of the total population (6,680,980) self-identifies as belonging to the Turkish minority.[4] This means that this is the biggest ethnic minority in Bulgaria. The second biggest ethnic minority is Roma. The 2011 Census shows that 325,343 persons (4.9

[3] Ethnic minorities, National Council for Cooperation on Ethnic and Integration Issues, available at https://nccedi.government.bg/bg/node/196.
[4] Book 2: Demographic and social characteristics, Census 2011, National Statistical Institute, p. 125, available at https://www.nsi.bg/statlib/bg/lister.php?iid=DO-010007505.

percent of the total population) has self-identified as Roma. However, for both groups we have to be aware about citizens' actual ethnic background, as large groups of citizens self-identify as Bulgarian but keep their own mother tongue, which is not Bulgarian.[5] The 2011 Census also established that 49,304 persons (0.7 percent of respondents) have answered that they belong to 'Others' and 53,391 persons (0.8 percent of the total) refused to self-identify.[6] For comparison, historical data shows that back in 1900, 14.2 percent of the population self-identified as belonging to the Turkish minority, 2.4 percent to the Roma minority, and 6.3 percent to 'Others' which shows significant changes in the last century.[7]

The 2021 Census data shows that there are 49,453 third-country nationals who reside in Bulgaria (about 0.7 percent of the total population) as well as 10,549 EU citizens (0.2 percent of the total population).[8] Expert interviews, conducted in the framework of the current research, however, highlight that these data are not to be trusted fully as large groups of migrants did not participate in the census and have not been counted.[9] In any case, these data show that the numbers of third-country nationals are very low compared to the EU average which was 5.3 percent as of 1 January 2021.[10]

At the same time, Bulgaria has been exposed to more recent migration flows, especially as a transit country for various groups of migrants (including asylum seekers and irregular migrants) who wish to reach Western Europe. In the last 10 years, the numbers of asylum seekers have significantly increased from 1,387 in 2012 to 20,391 in 2015 in the peak of the 2015 European Migration Crisis and subsequently lowered to 10,999 in 2021.[11] Up until September 2022, however, the number of asylum seekers has already reached 11,877[12] which demonstrates an increase compared to the previous year. At the same time, the top 5 countries of origin in the last 10 years are Syria, Afghanistan, Iraq, Pakistan as well as stateless people.[13] These groups of migrants are predominantly Muslims and fall into the scope of the PRESERVERE project. In more recent years (2021 and 2022) Morocco also appears in the top 5 countries of origin.[14]

[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Population by citizenship as of 7 September 2021, Final data, National Statistical Institute, available at https://nsi.bg/sites/default/files/files/pressreleases/Census2021_population.pdf.
[9] Focus group conducted on 1 October 2022.
[10] Non-EU citizens make up 5.3% of the EU population, Eurostat, available at https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220330-2.
[11] Information on the number of persons who applied for international protection and the number of decisions made in the period 1993-2021, State Agency for Refugees, available at https://www.aref.government.bg/bg/node/238.
[12] Ibid.
[13] Top 5 countries of origin by number of submitted applications – 2022, State Agency for Refugees, available at https://www.aref.government.bg/bg/node/238.
[14] Ibid.

In addition, in light of the Ukrainian crisis of 2022, by the time of concluding the report (October 2022), about 815,000 Ukrainian citizens have entered Bulgaria, out of which about 145,000 have been registered for temporary protection and about 55,000 have remained in Bulgaria.[15] This data is highly accurate due to the fact that Bulgaria is not part of the Schengen zone and there is strict border control.

The PRESERVERE project is primarily focused on four target groups – Roma, Jewish people, Muslims, and persons of African descent. They all face some degree of discrimination and hate speech. According to a 2018 Open Society Institute – Sofia report, 81 percent of the respondents have heard hate speech, in the last 12 months. This hate speech targeted 26 percent of Roma, 21 percent of Turks, 12 percent of foreigners,[16] 8 percent of Black people and 1 percent of Jewish people.[17]

As demonstrated by the statistics above, the Roma community is one of the biggest ethnic minorities in Bulgaria. They settled on the Bulgarian lands during the Ottoman period in the 14th–19th century, but there were also earlier settlements.[18] Roma in Bulgaria are not a homogenous group – they differ in community identity, language, festivity and religion, lifestyle in the past and economic migrations today, delineate the cultural boundaries between the individual Roma communities. These differences are not visible to the rest of the Bulgarian citizens, who accept them as 'Roma' or 'Gypsies' and thus have the image of a single community.[19]

This community, as a whole, enjoys serious policy attention and throughout the years there have been numerous policy documents such as strategies, measures, and programmes that relate to them. The most important ones are the National Strategy of the Republic of Bulgaria for Roma Integration (2012–2020)[20] and its successor, the National Strategy of the Republic of Bulgaria for Equality, Inclusion and Participation of the Roma (2021–2030).[21]

[15] Statistics, Bulgaria for Ukraine national portal, available at https://ukraine.gov.bg/.
[16] As a broad term.
[17] Hate speech and social distances, April 2018, Open Society Institute – Sofia, available at https://opendata.bg/opendata.php?q=44&s=4&c=87&i=1380&t=2&sel=3.
[18] Roma, Bulgarian Ethnology, Bulgarian Academy of Science, available at https://balgarskaetnografia.com/grupi-i-obshtosti/etnicheski-grupi-i-obshtnosti/romi.html.
[19] Ibid.
[20] National Strategy of the Republic of Bulgaria for Roma Integration (2012–2020), available at https://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=726.
[21] National Strategy of the Republic of Bulgaria for Equality, Inclusion and Participation of the Roma (2021–2030), available at https://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=1541.

The previous National Strategy (2012–2020) has been evaluated in several key documents. Firstly, the European Commission published two reports which were prepared by a group of Bulgarian NGOs in 2019[22] and 2020[23]. Besides these, there are the reports by the Bulgarian Academy of Science in 2020[24] and by Bulgaria's leading NGO focused on Roma issues – Amalipe Center for Interethnic Dialogue and Tolerance in 2020.[25]

The European Commission report covering the period of 2016–2017 concluded that, even though improvements have been observed in the usage of EU funds for Roma inclusion and education[26], there have not been any significant advances in the implementation of the National Strategy.[27] Deterioration was obvious in the fields of governance and anti-gypsyism. Regarding the latter, a significant rise in anti-Roma rhetoric, publications and even actions was observed.[28] Serious challenges remained in all fields of integration.[29] The next year's monitoring report observed a new peak in hate speech against Roma in the context of the May 2019 European Parliament elections and the local government elections in October/November 2019.[30] Politicians and journalists got used to discuss the Roma topic as a means of provoking political and ethnic tension.[31]

[22] Civil society monitoring report on implementation of the national Roma integration strategies in Bulgaria: Focusing on structural and horizontal preconditions for successful implementation of the strategy, Amalipe Center for Interethnic Dialogue and Tolerance, Directorate-General for Justice and Consumers (European Commission), Education and Gender Alternatives Foundation, IndiRoma Foundation, Roma Academy for Culture, World Without Borders Association, available at https://op.europa.eu/en/publication-detail/-/publication/0831834f-b1aa-11e9-9d01-01aa75ed71a1/language-bg/format-PDF.

[23] Civil society monitoring report on implementation of the national Roma integration strategy in Bulgaria: Identifying blind spots in Roma inclusion policy, Amalipe Center for Interethnic Dialogue and Tolerance, World without Borders Association, Gender Alternatives Foundation, available at https://op.europa.eu/en/publication-detail/-/publication/ce81b2a0-06e0-11ec-b5d3-01aa75ed71a1/language-bg/format-PDF/source-search.

[24] Comprehensive report on the assessment of the integration policies towards the Roma in Bulgaria in the period 2012-2019, with included recommendations on the target areas of public policies, including incl. anti-discrimination, gender equality and interaction with civil society, Bulgarian Academy of Science, available at https://nccedi.government.bg/sites/default/files/2021-01/Final_Assessment_Report_Roma_Strategy_2020_Final.pdf.

[25] The Implementation of the National Strategy for Integration of Roma, Amalipe Center for Interethnic Dialogue and Tolerance, available at https://amalipe.bg/izpulnenieto-na-nacionalnata-strategia/.

[26] Civil society monitoring report on implementation of the national Roma integration strategies in Bulgaria: Focusing on structural and horizontal preconditions for successful implementation of the strategy, Amalipe Center for Interethnic Dialogue and Tolerance, Directorate-General for Justice and Consumers (European Commission), Education and Gender Alternatives Foundation, IndiRoma Foundation, Roma Academy for Culture, World Without Borders Association, available at https://op.europa.eu/en/publication-detail/-/publication/0831834f-b1aa-11e9-9d01-01aa75ed71a1/language-bg/format-PDF.

[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] Civil society monitoring report on implementation of the national Roma integration strategy in Bulgaria: Identifying blind spots in Roma inclusion policy, Amalipe Center for Interethnic Dialogue and Tolerance, World without Borders Association, Gender Alternatives Foundation, available at https://op.europa.eu/en/publication-detail/-/publication/ce81b2a0-06e0-11ec-b5d3-01aa75ed71a1/language-bg/format-PDF/source-search.

[31] Ibid.

The 2020 Bulgarian Academy of Sciences' report found a big variety in the implementation of the measures between the different responsible institutions.[32] The study observed some inappropriately defined and implemented policies such as 'Rule of Law and Non-Discrimination' which, instead of overcoming discrimination, actually deepened it. Such policies demonstrated a lack of institutional capacity to recognise discrimination and hate speech in those bodies that should protect the Roma community from them.[33] The report criticised the fact that despite the registered growth of hate speech and hate crimes against the Roma, in a number of civil and international reports after 2012, the measures envisaged in the National Strategy were not even transposed into the Nationals Actions Plans.[34] One of the recommendations for the next National Strategy (2021–2030) was to place a major emphasis on overcoming prejudice and discrimination based on aporophobia and xenophobia, which are the key cause of segregation in education, employment and living conditions.[35]

Last but not least, the 2020 Amalipe monitoring report highlighted that there were no planned measures nor activities, no budget and no responsible institutions in the priority 'Rule of Law and Non-Discrimination'.[36] Moreover, this policy had a counterproductive effect, strengthening the conditions for discrimination, instead of reducing them.[37] Non-discrimination measures ended up promoting discrimination insofar as they directly related ethnicity to crime.[38] In addition, institutional racism was observed in Bulgaria, which had severely affected the judicial system. In this respect it was no coincidence that a case for racism was filed against Bulgaria (and in particular against the General Prosecutor Ivan Geshev) in the European Court of Human Rights (ECHR), because of the use of the word 'gypsies' as an insult in public speaking.[39]

The current National Strategy (2021–2030) sets, besides the three horizontal goals included in the title – equality, inclusion, and participation – four sectoral goals in the fields of education, healthcare, housing, and employment. It highlights that many Roma still suffer from extreme poverty, unemployment, low levels of education, inadequate housing conditions, poor healthcare

[32] Comprehensive report on the assessment of the integration policies towards the Roma in Bulgaria in the period 2012-2019, with included recommendations on the target areas of public policies, including incl. anti-discrimination, gender equality and interaction with civil society, Bulgarian Academy of Science, available at https://nccedi.government.bg/sites/default/files/2021-01/Final_Assessment_Report_Roma_Strategy_2020_Final.pdf.
[33] Ibid.
[34] Ibid
[35] Ibid.
[36] The Implementation of the National Strategy for Integration of Roma, Amalipe Center for Interethnic Dialogue and Tolerance, available at https://amalipe.bg/izpulnenieto-na-nacionalnata-strategia/.
[37] Ibid.
[38] Ibid.
[39] Ibid.

and wellbeing.[40] It also notes that social exclusion reinforces prejudice against the Roma, making their marginalisation socially acceptable.[41] The document highlights the main reasons for these problems – persisting inequality and discrimination (including stereotyping and hate speech), intersectional discrimination – a combination of gender-based violence and racism and anti-Roma attitudes.[42] The Strategy also includes a separate chapter on the 'Rule of Law and Anti-Discrimination' which lists nine goals related to reducing discrimination. Examples are the increase of the guarantees for effective protection of the rights of Bulgarian citizens of different ethnic groups in a vulnerable social situation; the enhancement of the institutional culture and expertise of public institutions regarding diversity, equality, dignity and fundamental human rights policies, and the enhancement of the capacity of law enforcement agencies to combat crimes and acts of discrimination, violence or hatred based on ethnicity.

In addition, there are a few more strategic documents related to Roma integration, such as the broader Strategy for Educational Integration of Children and Pupils from Ethnic Minorities (2015–2020).[43] It has four strategic goals: full socialisation of children and students from ethnic minorities; ensuring equal access to quality education for children and students from ethnic minority; affirmation of intercultural education as an integral part of the process of modernisation of the Bulgarian education system; and preserving and developing the cultural identity of ethnic minority children and students.[44]

A fundamental problem which a large number of Roma in Bulgaria still face is the lack of access to identity documents. This is a premise of inhuman or degrading treatment, it violates the right to equality before the law and non-discrimination under the Charter of Fundamental Rights of the EU. A 2020 study conducted by Foundation for Access to Rights – FAR focused primarily on the issue with statelessness among Roma in Bulgaria.[45] It described the legal change in 2011 which introduced the requirement that in order to obtain a new or renewed identity document, persons need to provide

> ***A large number of Roma in Bulgaria still face is the lack of access to identity documents.***

[40] National Strategy of the Republic of Bulgaria for Equality, Inclusion and Participation of the Roma (2021–2030), available at https://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=1541.
[41] Ibid.
[42] Ibid.
[43] Strategy for Educational Integration of Children and Pupils from Ethnic Minorities (2015–2020), available at https://www.mon.bg/upload/6532/Strategy_obrazovatelna_integracia_2015.pdf.
[44] Ibid
[45] Report on the risk of statelessness of the Roma population in Bulgaria, Foundation for Access to Rights – FAR, available at https://farbg.eu/bg/doklad_romi_v_risk_ot_bezgrajdanstvenost.

a certificate of registration of a permanent address. This led to the impossibility of certain groups of Bulgarian citizens – mainly of Roma origin – to fulfill their obligation to declare a permanent and current address[46]. The problem is that a large part of the Roma population in the country lives in large urban and suburban ghettos, without property ownership documents, where the buildings are often illegal, and therefore the citizens cannot present the necessary documents for address registration.[47] Due to this, citizens often have no access to birth certificates or to new or renewed identity documents.[48] As a result, Roma's marginalisation deepens as they become invisible to the legal system, which inevitably affects their socio-economic rights (such as education, employment, social security, housing, healthcare) as well as their civil and political rights (such as freedom of movement, freedom from arbitrary detention and the right to vote in national, local and European elections). A 2021 study lead by Equal Opportunities Initiative Association concluded that about 244,822 Roma do not have identity documents and about 121,073 have never had.[49] This also raises the question if these people have been included in the national Census.[50]

A series of studies conducted by the Open Society Institute – Sofia in the last decade show that Roma are the largest targets of hate speech in Bulgaria and that negative narratives have been 'normalised' with time.[51] This trend is also included in the annual reports of the national Ombudsman. The 2021 report of the Ombudsman highlights that in that year, the ECHR ruled in the twin cases *Behar and Gutman v. Bulgaria*[52] and *Budinova and Chaprazov v. Bulgaria*[53], that the national courts had not fulfilled the positive duty to protect citizens of Roma and Jewish origin from anti-Roma and anti-Semitic statements by a political party leader.[54] The national courts had accepted the anti-Roma and anti-Semitic statements of the Bulgarian politician as part of a legitimate public dispute and had not correctly assessed the balance of rights protected by the Convention.[55] In the practice of the ECHR, the presentation in a negative light of an entire ethnic, religious or other group does not benefit from the protection of Art. 10 of the Convention or enjoys very narrow protection.[56] These decisions of the ECHR outline the important standard that hate speech cannot be protected

[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Collection and analysis of additional information about persons without personal documents in Bulgaria, Equal Opportunities Initiative Association, Hayachi Association, IGA Fund, available here.
[50] Did Bulgaria manage to count its Roma?, Roma Standing Conference, available at https://romastandingconference.org/uspq-li-bulgaria-da-prebroi-svoite-romi/.
[51] Public Attitudes to Hate Speech in Bulgaria in 2018, Open Society Institute – Sofia, available at https://osis.bg/wp-content/uploads/2019/02/2018-Hate-speech-ENG.pdf.
[52] Case of Behar and Gutman v. Bulgaria (Application no. 29335/13), available at https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-207929%22]}.
[53] Case of Budinova and Chaprazov v. Bulgaria, available at https://hudoc.echr.coe.int/eng#{%22appno%22:[%2212567/13%22],%22itemid%22:[%22001-207928%22]}.
[54] 2021 Annual report of the Ombudsman, Ombudsman of the Republic of Bulgaria, available at https://ombudsman.bg/pictures/REPORT%202021-ANNUAL%20FINAL-BG.pdf.
[55] Ibid.
[56] Ibid.

and automatically accepted as freedom of expression. This understanding should serve all anti-discrimination law enforcement authorities.[57]

The Open Society Institute – Sofia has also been measuring the levels of ethnic and racial prejudice on a regular basis, using the same methodology since the Bulgarian accession in the EU in 2007. The study is based on the concept of 'social distancing' and compares answers to various questions which gauge to which extent respondents would accept the presence of various groups in their surroundings. The initial study in 2008 covered 24 ethnicities, while the follow-up waves included different numbers of ethnicities. However, all groups covered by the PRESERVERE report – Roma, Jewish, Muslim, and people of African descent have been covered. The social distances measured in 2008 showed low levels of acceptance for all groups – from marriage to the right to live in Bulgaria. The middle marker on the scale (agreement to live in the same neighbourhood with Roma, Turkish and Arab people), marked between 30 and 35 percent. However, until 2013 the middle marker showed a positive growing trend (45–50 percent). Ever since, the trend has been negative and in May 2018 the acceptance rates dropped to 20–35 percent. This clearly demonstrates that welcoming attitudes in society have been declining. One of the reasons for this is found at the highest political level, where several of the parties in the ruling coalition are openly using anti-Roma, anti-migrant, anti-Semitic and homophobic rhetoric, including in the National Parliament and in media interviews.[58]

In the last decade, there have been numerous civil society initiatives that aim to support the Roma community, including in the field of anti-discrimination. A recent example which is relevant for the current research is the 'Handbook for legal practitioners: Handbook against discrimination of the Roma community' published by Amalipe in 2022.[59] It provides all legal professionals with detailed information about the national and EU legal standards in the field of anti-discrimination as well as examples of case law.

The Jewish community has been part of the population for centuries and is also considered to be a 'traditional minority'.[60] Nowadays, Jewish people in Bulgaria belong to two main groups – Sephardi

[57] Ibid.
[58] Human Rights in Bulgaria 2017, Bulgarian Helsinki Committee, available at https://www.bghelsinki.org/en/news/bulgarian-helsinki-committee-published-its-report-human-rights-bulgaria-2017/.
[59] Handbook for legal practitioners. Handbook against discrimination in the Roma community, Amalipe Center for Interethnic Dialogue and Tolerance, available at https://amalipe.bg/wp-content/uploads/2022/10/Manual-discrimination-lawers.pdf.
[60] Ethnic minorities, National Council for Cooperation on Ethnic and Integration Issues, available at https://nccedi.government.bg/bg/node/196.

and Ashkenazi. The Sephardi are descendants of the Jewish who, after being expelled from Spain at the end of the 15th century and passing through Western Europe, settled in the Balkans. Ashkenazi are the Jewish who came to the Balkans from the countries of Central and Eastern Europe in the 19th and 20th centuries. The great majority of Bulgarian Jewish are Sephardic Jews. After Bulgaria's liberation from the Ottoman rule in 1878, Jewish people have lived mostly in the cities and have worked in trade, craftsmanship and practiced liberal professions such as law, medicine and engineering.[61] There were synagogues in a number of Bulgarian cities (Sofia, Vidin, Samokov, Varna, Dupnitsa, Vratsa, Lovech). Currently, however, there are only two working synagogues in Bulgaria.[62] World War II was an important period when it comes to the Jewish population in Bulgaria. During the war, Bulgaria joined the Axis alliance. In 1940, it passed anti-Jewish legislation which restricted the civil, political and economic rights of Jewish people. Jewish men were sent to labour camps at various construction sites across the country. At the same time, the Bulgarian public did not allow the deportation of Jewish people from the pre-war borders of the country to concentration camps. The planned deportation of about 48,000 Jewish people was never carried out. The event became known as the 'Rescue of the Bulgarian Jews' and is considered as a moment of national pride in recent history.[63] In 1946, about 44,209 Jewish people lived in Bulgaria and later the majority moved to the new State of Israel. In 2011, their number in Bulgaria was only about 1,162 persons (self-identified).[64] The majority (586 persons) professed Judaism.[65] According to the 2018 Open Society Institute – Sofia study on social distances, only 35 percent of respondents would agree to Jewish people living in their neighbourhood.[66] The same study, however, found out that only 1 percent of the respondents have heard hate speech towards Jewish people.[67] This demonstrates that Jewish people are discriminated in society, but to a lesser extent compared to other ethnic groups.

The Muslim community is the second biggest religious community in Bulgaria after the Christian one. In 2011 it was estimated to be about 10 percent of the total population (self-identified)[68]. Islam is practiced by most representatives of the Turkish ethnic minority, the Muslim Bulgarians

[61] Jews, Bulgarian Ethnology, Bulgarian Academy of Science, available at https://balgarskaetnografia.com/grupi-i-obshtosti/etnicheski-grupi-i-obshtnosti/evrei.html.
[62] Jewish News, Shalom – Organization of Jews in Bulgaria, available at https://www.shalom.bg/wp-content/uploads/2017/08/EvrV2017-15-16.pdf.
[63] Bulgaria – Remembrance day, Council of Europe, available at https://www.coe.int/en/web/roma-genocide/virtual-library/-/asset_publisher/M35KN9VVoZTe/content/bosnia-and-herzegovina-remembrance-day.
[64] Ibid.
[65] Ibid.
[66] Hate speech and social distances, April 2018, Open Society Institute – Sofia, available at https://opendata.bg/opendata.php?q=44&s=4&c=87&i=1361&t=2&sel=21.
[67] Ibid.
[68] 2011 Census, National Statistical Institute, available at https://www.nsi.bg/sites/default/files/files/pressreleases/Census2011final.pdf.

(Pomaks), some Roma as well as various groups of migrants. Islam arrived in Bulgaria through the Ottoman empire in the 14th–15th century.[69] Most Bulgarian Muslims are Sunni, as Sunnism was the form of Islam officially supported by the Ottoman Empire, which ruled the country for five centuries. Muslims are a major victim of discrimination and hate speech due to the historical context and contemporary issues (Ottoman past and terrorism). According to a 2016 Open Society Institute – Sofia study, in the last 12 months, 38 percent of the respondents have heard hate speech targeting Muslims.[70] 2018, however, marked a decrease to 21 percent.[71]

Persons of African descent represent a very small community whose number is difficult to establish due to limited and fragmented data. Expert interviews highlight that this group is very mobile and has numerous challenges to integrate in Bulgaria due to discrimination. This results in difficulties to find a job, housing and a social environment, as well as suffering from hate speech and hate crimes which often go unreported and unprosecuted because of a lack of trust in the judicial system. A 2018 Open Society Institute – Sofia study, for example, found out that about 8 percent of the respondents have heard hate speech towards Black people in the last 12 months.

4.4. The anti-racism legal framework in Bulgaria

4.4.1 Transposition of Directive 2000/43/EC

The Racial Equality Directive, which was adopted in 2000, is a key EU measure that laid down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view of putting into effect the principle of equal treatment in the Member States.[72] It has been transposed into the Bulgarian national legislation through the Protection Against Discrimination Act, adopted on 30 September 2003 that came into force in 2004.[73] The legal document has been amended more

[69] Turks in Bulgaria, Bulgarian Ethnology, Bulgarian Academy of Science, available at https://balgarskaetnografia.com/grupi-i-obshtosti/etnicheski-grupi-i-obshtnosti/turcite-v-balgaria.html.
[70] Hate speech and social distance, May 2016, Open Society Institute – Sofia, available at https://opendata.bg/opendata.php?q=44&s=4&c=78&i=1205&t=2&sel=3.
[71] Hate speech and social distances, April 2018, Open Society Institute – Sofia, available at https://opendata.bg/opendata.php?q=44&s=4&c=87&i=1380&t=2&sel=3.
[72] Art. 1, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0043.
[73] Protection Against Discrimination Act, available at https://www.lex.bg/laws/ldoc/2135472223.

than 20 times ever since, with its most recent amendment in January 2018.[74] Monitoring reports found out that the EU Directive has been fully transposed.[75]

The Protection Against Discrimination Act served as a basis for creating the Commission for Protection Against Discrimination, the national equality body. It serves as Bulgaria's national independent specialised quasi-judicial body for the prevention of discrimination, protection against discrimination and implementation of state policy in the field of equal opportunities and equal treatment of all citizens on the territory of Bulgaria.[76] The Commission for Protection Against Discrimination is accredited as a National Human Rights Institution under the United Nations Paris Principles. It is also a national hate crime contact point at the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE).

In 2004, when the Protection Against Discrimination Act came into force, it was considered as one of the most progressive such laws in Europe.[77] Bulgaria still scores the highest (100/100 points) in the field of anti-discrimination in the 2020 Migrant Integration Policy Index (MIPEX) which attests to its favourable legal framework.[78] It is important, however, to highlight that MIPEX evaluates only the legal framework and policies, and not their implementation.[79]

> ***"Bulgarian legislation prohibits all direct or indirect discrimination based on 19 grounds."***

The text of the Directive has been transposed fully. In accordance with the Directive, Bulgarian legislation prohibits all direct or indirect discrimination based on 19 grounds – gender, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, beliefs, political affiliation, personal or public status, disability, age, sexual orientation, marital status, property status or any other signs established by law or in an international treaty to which the Republic of Bulgaria is a party.[80] In addition, it also defines 'harassment' as 'any unwanted behaviour based on the signs under art. 4(1), expressed physically, verbally or otherwise, which

[74] Ibid.
[75] Civil society monitoring report on implementation of the national Roma integration strategies in Bulgaria: Focusing on structural and horizontal preconditions for successful implementation of the strategy, Amalipe Center for Interethnic Dialogue and Tolerance, Directorate-General for Justice and Consumers (European Commission), Education and Gender Alternatives Foundation, IndiRoma Foundation, Roma Academy for Culture, World Without Borders Association, available at https://op.europa.eu/en/publication-detail/-/publication/0831834f-b1aa-11e9-9d01-01aa75ed71a1/language-bg/format-PDF.
[76] Art. 40(1), Protection Against Discrimination Act, available at https://www.lex.bg/laws/ldoc/2135472223.
[77] Discrimination, Bulgarian Helsinki Committee, available at https://www.bghelsinki.org/bg/themes/diskriminacija.
[78] Bulgaria, Migrant Integration Policy Index MIPEX 2020, available at https://www.mipex.eu/bulgaria.
[79] Methodology, Migrant Integration Policy Index MIPEX 2020, available at https://www.mipex.eu/methodology.
[80] Art. 4(1), Protection Against Discrimination Act, available at https://www.lex.bg/laws/ldoc/2135472223.

has the purpose or effect of offending the dignity of the person and creating a hostile, degrading, humiliating, offensive or threatening environment'.[81]

Although not directly transposing the Racial Equality Directive, the Bulgarian Penal Code also includes several regulations related to anti-racism which are relevant for this research. They are placed in various chapters of the Penal Code. One of them stipulates that a murder committed with racist motives shall be punished more severely compared to a murder without racist motives.[82] Under the same chapter, a stricter punishment is foreseen if bodily harm is caused with racist motives.[83]

The Penal Code also contains several other provisions related to anti-racism. One of them is related to inciting discrimination, violence or hatred on the bases of race, nationality or ethnicity.[84] These are the only three characteristics mentioned. The Penal Code does not offer specific protection when it comes to discrimination based on gender, citizenship, religion, disability, age, or sexual orientation, among others. In this sense, it is clear that the Protection Against Discrimination Act provides much broader protection. Another provision relates to uses of violence against another or damage of his property on the bases of his race, nationality, ethnicity, religion or political opinion.[85] The Penal Code also has a special provision which foresees punishments for persons who form or lead organisations or groups that aim to commit acts of inciting discrimination, violence or hatred on the bases of race, nationality or ethnicity or systematically allow such acts to be committed.[86] In addition, membership of such groups or the participation in such a group is also a crime under the Penal Code.[87] The Penal Code also criminalises the participation in a mob assembled to attack groups of the population, individual citizens or their property in relation to their national, ethnic or racial affiliation.[88]

The Penal Code also prohibits preventing anyone from entering employment or forcing him to leave employment because of his nationality, race, religion, social origin, membership or non-membership in a trade union or other organisation, political party, movement or coalition with a political purpose or because of his own or of his neighbours' political or other beliefs.[89] The

[81] Additional provisions, § 1, point 1, Protection Against Discrimination Act, available at https://www.lex.bg/laws/ldoc/2135472223.
[82] Art. 115, 116(1), point 11, Penal Code, available at https://www.lex.bg/laws/ldoc/1589654529;
[83] Art. 128(1), 129(1), 131(1), point 12, Penal Code, available at https://www.lex.bg/laws/ldoc/1589654529.
[84] Art. 162(1), Penal Code, available at https://www.lex.bg/laws/ldoc/1589654529.
[85] Art. 162(2), Penal Code, available at https://www.lex.bg/laws/ldoc/1589654529.
[86] Art. 162(3), Penal Code, available at https://www.lex.bg/laws/ldoc/1589654529.
[87] Art. 162(4), Penal Code, available at https://www.lex.bg/laws/ldoc/1589654529.
[88] Art. 163(1), Penal Code, available at https://www.lex.bg/laws/ldoc/1589654529.
[89] Art. 172(1), Penal Code, available at https://www.lex.bg/laws/ldoc/1589654529.

Penal Code also addresses 'Crimes Against Peace and Humanity', and specifically the 'Destruction of population groups (genocide) and apartheid'. There are several provisions which prohibit destructing, dominating or systematically oppressing and imprisoning population groups. Further, it criminalises hindering the participation of population groups in the political, social, economic and cultural life of the country; implementing measures to separate the population by creating reservations and ghettos; prohibiting intermarriage between members of different racial groups; expropriating their land property and taking away fundamental rights and freedoms of organizations or individuals.[90]

Despite the above-mentioned legislation, it is important to highlight that there is no anti-discrimination or anti-racism plan at the national level. There is also no official national reporting on racist and hate related crime or other incidents, therefore data is fragmented and incomplete.

4.4.2 Transposition of Directive 2012/29/EU

The Victims' Rights Directive is the EU instrument that aims to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.[91] It has been transposed in Bulgaria in two main national laws. The Criminal Procedure Code regulates the order in which criminal proceedings are carried out to ensure that crimes are detected, the guilty are convicted and the law is properly applied.[92] The Law on Assistance and Financial Compensation for Crime Victims regulates the terms and conditions for assistance and financial compensation from the state to Bulgarian citizens and citizens of EU member states who are victims of crime.[93] The Victims' Rights Directive has been only partially transposed to the Bulgarian national law and there are still areas for improvement.[94] In general, the country does not have sufficiently efficient procedural mechanisms to guarantee the full realisation of victims' rights.[95]

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[90] Section III. Destruction of population groups (genocide) and apartheid, Art. 416-418, Penal Code, available at https://www.lex.bg/laws/ldoc/1589654529.

[91] Art. 1, 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 OJ L 315, 14.11.2012, p. 57–73, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0029.

[92] Art 1(1), Criminal Procedure Code, available at https://www.lex.bg/laws/ldoc/2135512224.

[93] Art. 1(1), (2) Law on Assistance and Financial Compensation for Crime Victims, available at https://www.lex.bg/laws/ldoc/2135540550.

[94] Review and analysis of the Bulgarian national legal framework on the rights and protection of victims of crime and its application: contributing to an effective implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, Animus Association Foundation, available at https://www.supportvoc.eu/wp-content/uploads/2019/03/National_Report-Bulgaria_EN.pdf.

[95] Protection of Crime Victims – An Essential Function of the Rule of Law State, Prof. Dobrinka Chankova, PhD, available at http://research.bfu.bg:8080/jspui/handle/123456789/1012.

Apart from the special Chapter Eight of the Criminal Procedure Code, which regulates for the first time the status of the victim in the pre-trial proceedings and in the judicial phase, more recently, with a view to the transposition of the European Directive, a number of new provisions were introduced.[96] For example, in 2015, a number of measures to protect the victim were introduced, including the prohibition of the accused to approach the victim directly; making contact with him/her in any form; visiting certain areas where the victim resides or visits, etc.[97] An obligation was provided for the court to notify the victim of the possibility of issuing a European Protection Order[98], while a special Law on the European Protection Order was adopted.[99] In case the accused violates these protective measures, a measure of remand is taken or the determined measure of remand is changed to a more severe one,[100] and measures are also adopted to cover for costs in the case.[101]

In 2019 and 2020, the transposition of the Victims Directive continued. It introduced an obligation of the prosecutor to inform the victim with specific protection needs about new circumstances, such as measures for the detention of the accused, or the release of convicted.[102]

The Law on Assistance and Financial Compensation for Crime Victims was amended in July 2016 to reflect better the Victims' Rights Directive in several aspects. The amendments expand the scope of the entities that provide information about the victims' rights; ensure free access for all crime victims to organisations that provide free psychological counselling and expand the scope of crimes for which victims are entitled to financial compensation.[103] However, when it comes to the provision of related to information, according to expert interviews, in practice there is no way to ensure that these requirements are met.

When it comes to procedural rights of crime victims, the regulation of involving witnesses with special protection needs is not clear, especially how these special needs are established.[104] Children, for example, are not treated by law as witnesses with special protection needs by default;

[96] Ibid.
[97] Art. 67(1), Criminal Procedure Code, available at https://www.lex.bg/laws/ldoc/2135512224.
[98] Art. 67(2), Criminal Procedure Code, available at https://www.lex.bg/laws/ldoc/2135512224.
[99] Law on the European Protection Order, available at https://www.lex.bg/en/laws/ldoc/2136529544.
[100] Art. 68a, Criminal Procedure Code, available at https://www.lex.bg/laws/ldoc/2135512224.
[101] Art. 73a, Criminal Procedure Code, available at https://www.lex.bg/laws/ldoc/2135512224.
[102] Protection of Crime Victims – An Essential Function of the Rule of Law State, Prof. Dobrinka Chankova, PhD, available at http://research.bfu.bg:8080/jspui/handle/123456789/1012.
[103] Review and analysis of the Bulgarian national legal framework on the rights and protection of victims of crime and its application: contributing to an effective implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, Animus Association Foundation, available at https://www.supportvoc.eu/wp-content/uploads/2019/03/National_Report-Bulgaria_EN.pdf.
[104] Review and analysis of the Bulgarian national legal framework on the rights and protection of victims of crime and its application: contributing to an effective implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, Animus Association Foundation, available at https://www.supportvoc.eu/wp-content/uploads/2019/03/National_Report-Bulgaria_EN.pdf.

this decision is left to the discretion of the courts to ensure their involvement in a child-friendly manner.[105] A good practice in this regard are the safe spaces for child-friendly questioning of children ('blue rooms'), however, they need to be regulated by law.[106] Another child-related issue is the fact that the law provides free legal aid, but it does not envision mandatory legal representation for children in all legal proceedings.[107] Thus, the state-subsidised legal aid does not ensure specialised legal support for vulnerable groups, including children.[108]

Additionally, there is no generic victim support entity and support is provided to specific groups by licensed NGOs.[109] Not all vulnerable groups are covered as, for example, there is no specialised support for victims of sexual violence or rape.[110] An additional issue is that these support services focus on crisis interventions and not on long-term programmes which encourage reintegration and empowerment.[111]

Although already relatively well developed, the legal regulation of the victim's participation in the criminal process continues to suffer from some deficiencies. For example, the victim is often excluded from the proceedings to resolve the case by agreement.[112] When the agreement is reached at the pre-trial proceedings, the victim is notified only after the court approves the agreement, indicating that the victim can file a civil claim for non-pecuniary damages before the civil court.[113] However, this is less favourable for the victim, since he/she should lead the process himself/herself.[114]

4.5. Implementation of the anti-racism legal framework in Bulgaria

4.5.1 Commission for Protection Against Discrimination

The Commission for Protection Against Discrimination was created on the basis of the Protection Against Discrimination Act as a national equality body for the prevention of discrimination, protection against discrimination and implementation of state policy in the field of equal opportunities and equal treatment of all citizens on the territory of Bulgaria.[115] The Commission has several specialised permanent committees focused on specific protection characteristics:

[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Art. 381-384, Criminal Procedure Code, available at https://www.lex.bg/laws/ldoc/2135512224.
[113] Ibid.
[114] Ibid.
[115] Art. 40(1), Protection Against Discrimination Act, available at https://www.lex.bg/laws/ldoc/2135472223.

- First specialised committee – race and ethnicity;
- Second specialised committee – gender, human genome, protection when exercising the right to work, trade union membership;
- Third specialised committee – personal situation, nationality, citizenship, origin, religion and faith;
- Fourth specialised committee – education, conviction, political affiliation, social status and property status;
- Fifth specialised committee – disability, age, sexual orientation, marital status;
- Five-member extended committee – discrimination on more than one basis (multiple discrimination).

The Commission maintains an online register with all decisions taken which is not organised well and is difficult to explore.[116] It does not keep records on the complainants' ethnicity which does not allow presenting statistical data for the cases related to a particular ethnic group.[117] Additionally, the composition of the Commission has been widely criticized by all interviewees as its members are appointed through political quotas. This means that they tend to remain loyal to the politicians who have appointed them. The current composition of the Commission was realised by appointments done by the coalition between the pro-European political party GERB and the far-right coalition United Patriots. In 2017, to describe the political context, the key national human rights monitoring report wrote that 'for the first time since the beginning of the democratic transition, blatantly anti-democratic formations have landed in the government, having entered politics through the use of anti-Roma, anti-migrant, anti-Semitic and homophobic rhetoric'.[118]

Human rights professionals have also criticised the work of the Commission claiming that it has been working successfully when it comes to minor cases of discrimination but has been avoiding dealing with more serious cases, especially cases involving the public authorities and politicians.[119] The Commission has been also criticised for not being active enough in cases involving the demolition of Roma-occupied houses as well as cases of discrimination involving police officers.[120]

[116] Decision Register, Commission for Protection Against Discriminatio, available at https://kzd-nondiscrimination.com/layout/index.php/publi4en-registyr/cat_view/19---.
[117] Civil society monitoring report on implementation of the national Roma integration strategies in Bulgaria: Focusing on structural and horizontal preconditions for successful implementation of the strategy, Amalipe Center for Interethnic Dialogue and Tolerance, Directorate-General for Justice and Consumers (European Commission), Education and Gender Alternatives Foundation, IndiRoma Foundation, Roma Academy for Culture, World Without Borders Association, available at https://op.europa.eu/en/publication-detail/-/publication/0831834f-b1aa-11e9-9d01-01aa75ed71a1/language-bg/format-PDF
[118] Human Rights in Bulgaria 2017, Bulgarian Helsinki Committee, available at https://www.bghelsinki.org/en/news/bulgarian-helsinki-committee-published-its-report-human-rights-bulgaria-2017/.
[119] Ibid.
[120] Ibid.

Even though the Commission has been putting efforts in promoting its services as well as co-organising activities together with NGOs for occasions such as International Day of Tolerance or International Human Rights Days, it cannot be concluded that this outreaching work has been sufficient.[121] For example, the Commission has still not addressed the recommendations of the European Commission against Racism and Intolerance to publish its materials in all languages spoken in Bulgaria. Instead, they are still published only in the Bulgarian language and occasionally, in English.[122] In addition, there has been no state support for vulnerable groups to file complaints. Such support is necessary given the language barrier for Roma, Turks and migrants and, often, their lower educational level.[123]

Data shows that the Roma community is still not well informed about their possibilities to complain or report cases of discrimination in labour or other contexts.[124] Expert interviews conducted for the present study confirm that this is also the case for migrant and refugee communities, including for people of African descent. It means that more efforts need to be put in empowering vulnerable groups.

4.5.2 Familiarity of stakeholders with the EU Directives

The fieldwork conducted in the framework of the PRESERVERE project revealed that the two EU Directives, the Racial Equality Directive and the Victims' Rights Directive, are relatively unknown to the wide groups of legal professionals and frontline workers in Bulgaria. The main reason is a lack of formal and/or informal training as well as lack of practice. One of the participants who recently obtained a Law degree at Sofia University, shared that these EU Directives are not part of the university curriculum and she only got to know them because she started a job at a human rights NGO. Only three frontline workers shared that they have been trained in the topic through an EU project. However, at the same time there are lawyers specialised in human rights who are very familiar with all the EU legislation and national laws in the field of anti-discrimination and anti-racism.

In general, the legal professionals demonstrated a better understanding of the content of the two EU Directives compared to the frontline workers, even if they had very limited practice in working on such cases. Another lawyer highlighted that most legal professionals who work on human rights are familiar with the existence of the Directives but do not know their detailed content very well

[121] Ibid.
[122] Ibid.
[123] Iibd.
[124] Ibid.

> ***In general, the legal professionals demonstrated a better understanding of the content of the two EU Directives compared to the frontline workers.***

because, in practice, they rarely use them. As described above, many of the vulnerable groups such as Roma, Muslims, migrants do not have enough knowledge about the anti-discrimination legal framework and legal possibilities. In addition, discrimination and racism have been normalised in society and sometimes victims fail to recognise that they have suffered from direct or indirect discrimination. Key educational stakeholders such as university and postgraduate programmes as well as shorter training classes provide limited or no training in human rights law.

Frontline workers were largely unfamiliar with the EU and national legislation related to ant-racism and victim's rights. They also shared that victims themselves are unfamiliar with them and as a result, these groups are not in a position to seek their rights. In fact, all frontline workers were interested in participating in a practical interactive training covering these topics so that they could acquire relevant knowledge and provide better support to the beneficiaries they work with.

4.5.3 Practical use of the EU directives

The Bulgarian courts and the Commission for Protection Against Discrimination use the national law when dealing with cases of anti-racism and anti-discrimination. They can sometimes refer directly to the Directives and use it for their legal reasoning.

When the Commission does not rule in favor of the requesting party, one of the interviewed lawyers often appeals in front of the Supreme Administrative Court. In most cases, she is able to receive a positive decision there which raises the question of the quality of the Commission's procedures.

The empirical research was not able to identify any good practices. There are no known cases of any handbooks or collection of good practices published in Bulgaria.

4.5.4 Education and training relevant to the EU Directives

All participants agreed that there is large room for improvement when it comes to training on the EU and the national anti-racism legal framework of both legal professionals and frontline workers. An interviewee who recently completed her university studies, highlighted that most Bulgarian universities largely ignore human rights law and include it mostly in their master's programmes, where they focus on international law rather than European law. This demonstrates a possibility

for cooperation with universities so that the future legal professionals get trained in human rights and European law in particular.

Most active lawyers who work on human rights find ways to educate themselves, by benefiting from European and national courses, when being offered. They mentioned that case law could be particularly interesting for them because they do not have enough time to follow it.

The interviewed frontline workers demonstrated solid interest in participating in training in the field of anti-racism and anti-discrimination. They prefer a practical focus – how to identify if someone is a victim of racism/discrimination, how to teach him/her to self-identity himself/herself in various situations, how to prepare the necessary documents, where to apply for legal aid from, etc.

4.6. Conclusion

The report assessed the implementation of the EU anti-racism legal framework in Bulgaria. It focused on the main target groups and their characteristics in Bulgaria – Roma, Jewish people, Muslims, and people of African descent and summarised their situations. Following the research methodology, the study first analysed the relevant national legislation implementing two EU directives (Racial Equality Directive and the Victims' Rights Directive) and racial discrimination in general. Then the research team conducted a series of focus group interviews and individual interviews with legal professionals and frontline workers.

The analysis demonstrated that even through both Directives have been transposed relatively well in Bulgaria, their implementation could still be improved. Some of the most important recommendations are:

- Develop and implement a national multi-stakeholder anti-discrimination or anti-racism action plan;
- Develop and implement a national communication strategy to counter discrimination and racism;
- Realise an effective awareness raising campaign about victims' rights among the target groups and the society as a whole;
- Increase the capacities of Prosecutor's Office, Police, Commission for Protection Against Discrimination, Electronic Media Council, etc. to counter discrimination and racism;
- Prepare to support all victims' rights in practical terms;
- Provide long-term support to victims of crime, including reintegration and empowerment;
- Provide various types of training:

- case law-centered training for legal professionals who are already practicing in the field of human rights;
- hands-on training for frontline workers who want to be equipped to support their beneficiaries in case they are victims of racism or discrimination;
- basic training for university students who have not had the chance to study human rights law before.

TRANSPOSITION AND IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN CYPRUS

5 THE TRANSPOSITION AND IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN CYPRUS

NADIA KORNIOTI, UCLAN CYPRUS

VAGGELIS GETTOS, CENTER FOR SOCIAL INNOVATION

5.1. Introduction

The present National Report, prepared in the framework of the PRESERVE project, aims to evaluate the practical impact of the EU's anti-racism legal framework in Cyprus, with a focus on Roma, Jews, Muslims, and persons of African descent. Its purpose is to study and analyse the legal framework within which the EU's Racial Equality[1] and Victims' Rights Protection[2] Directives have been applied in the Republic of Cyprus to date. It identifies both good practices and challenges that preclude the Directives' effective implementation.

The Republic of Cyprus was established in 1960, and joined the EU during the big enlargement of 1 May 2004. It covers the majority of the territory of the Island of Cyprus, located at the eastern corner of the Mediterranean Sea. From the total of the territory of the island are excluded two British Sovereign Base Areas which fall under the jurisdiction of the United Kingdom.[3] Since 1974, the northern part of the island has been under the effective control of the Turkish Republic and the internationally unrecognised 'Turkish Republic of Northern Cyprus'. Under EU Law the total of the territory of the Republic of Cyprus is recognised as EU territory. However, due to the lack of a political solution to the 'Cyprus Problem', the applicability of the *acquis communauttaire* is today suspended in the northern occupied territory of the island.[4] Therefore, it needs to be clarified at

[1] 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.

[2] 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 OJ L 315, 14.11.2012, p. 57-73.

[3] Treaty (with annexes, schedules and detailed plans) concerning the Establishment of the Republic of Cyprus (signed 16 August 1960) 382 UNTS 5476; The status of EU Law in the Sovereign Base Areas is different than its status in the Republic of Cyprus. For more information see: Nasia Hadjigeorgiou, 'Sovereign Base Areas (SBA)' *Max Planck Encyclopaedia of Public International Law* (June 2021) <https://opil.ouplaw.com/view/10.1093/law-epil/9780199231690/law-9780199231690-e2261> accessed 30 November 2021.

[4] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded - Protocol No 10 on Cyprus OJ L 236, 23.9.2003, p. 955–955.

the outset that the present report concerns only the situation as it currently stands – in spring 2022 – within the territory under the effective control of the Republic of Cyprus.

Translations from Greek into English throughout the text are by the authors, unless otherwise specified.

5.2 Methodology

The methodology adopted in the production of the present report comprises of two separate, but interrelated, strands. The first strand involved a comprehensive desk research of primary and secondary legal sources. Primary legal sources include court cases, and ordinary laws passed by the Republic of Cyprus House of Representatives (Parliament). Secondary legal sources include academic literature review on the topic, as well as policy reports drafted by international and regional organisations, the EU, national authorities, and Non-Governmental Organisations (NGOs).

Relevant case law was identified through 'CyLaw' the freely-accessible database of Cypriot Law administered by the Cyprus Bar Association.[5] A search based on the identification number of each Directive across all court jurisdictions brought up only one case referring to the Victims' Rights Directive, and ten cases referring to the Racial Equality Directive. From them, three are not directly relevant to the Racial Equality Directive, but to the national law which jointly transposed that Directive and Directive 2000/78/EK[6] (see Section 4 below for further information).

A separate search of the database of Reports produced by the Office of the Commissioner for Administration (Ombudsperson) of the Republic of Cyprus was also undertaken, covering the period 2016-2021.[7] A total of 13 Reports of relevance were identified, of which five are reports drafted on the Commissioner's own initiative and eight concern investigations following complaints submitted to the Commissioner's Office. The vast majority of Reports make no reference to either Directive, albeit the relevance of each Directive can be inferred from the content. It is worth noting these reports were drafted based on powers given to the Commissioner through one of the laws partly transposing the Racial Equality Directive in the Cypriot legal order, as discussed in detail below (Section 4).

[5] The database is available at <http://www.cylaw.org/index.html> accessed 25 May 2022.
[6] 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.
[7] All interventions by the Commissioner are available at: <http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/table_new_en/table_new_en?openform> accessed 2 June 2022.

The second methodological strand involved empirical research comprised of two focus groups – one for legal professionals and one for front-line workers, respectively – and six semi-structured interviews. These took place in April 2022 and were organised by the Centre for Social Innovation (CSI). Each of the three activities involved six individuals whose work relates to anti-discrimination. Out of a total of 18 individuals, only three were men; one in the front-liners' focus group and two among the interviewees. Among the interviewees there were a member of the House of Representatives, a police officer, a researcher/NGO representative, and three civil servants involved in policy-making. Participants in the front-liners' focus group had a varied disciplinary background; among them, an academic researcher, a university professor/ member of a professional association, and three NGO representatives. Regarding the lawyers' focus group, whereas the participants had their legal training as a common denominator, they came from a variety of working environments. Only one among them was a practicing lawyer,[8] two were employed by NGOs, one was a civil servant, and the remaining two worked for an international agency. The varied background of participants in all three activities provided information from various perspectives, offering a broad scope of analysis. CSI prepared detailed notes of what was said during the interviews and focus groups, which were then used for the drafting of this report.

5.3 The Republic of Cyprus in context

> ***"The geographical location of Cyprus has made the island a centuries-long centre concentrating Roma, Muslims, Jews, and persons of African descent."***

The Republic of Cyprus is an historically pluralist society. The geographical location of Cyprus at the cusp of Asia, Africa and Europe, has made the island a centuries-long centre concentrating people from all four groups which are at the focus of the present project: Roma, Muslims, Jews, and persons of African descent. Thus, from an ethnographic perspective, Cyprus has both 'diasporic minorities', deriving from population movements within large Empires of the past and whose members are today Cypriot nationals, as well as 'migrant minority' groups,[9] among whom there are individuals identifying as Roma, Muslim, Jews, or persons of African descent. Though historical relations have no direct impact on policy considerations, the subtle distinction is significant in understanding the local context.

[8] 'Practicing Lawyers' meaning an 'Advocate' as defined in Advocates Law (Capital 2), art 2.
[9] Panikos Panayi, 'Ethnic Minority Creation in Modern Europe: Cyprus in Context' in Andrekos Varnava, Nicholas Coureas and Marina Elia (eds), *The Minorities of Cyprus: Development Patterns and the Identity of the Internal-Exclusion* (Cambridge Scholar Publishing 2009) 1, p. 5-6.

Due to historical reasons, the Republic's originally consociational Constitution recognises two distinct and equal political entities – a 'Greek' and a 'Turkish' community, respectively – each defined on the basis of 'mother tongue', 'cultural traditions', 'religion' and, controversially, 'race'.[10] In practice, this means that whereas the Turkish Cypriot community is numerically smaller than the Greek Cypriot one, under the Constitution the former are not a minority group, but an equal partner in the governance of the island. Three additional Christian denominations form three separate 'religious groups' – the Armenians, the Maronites and the Latins (Roman Catholics) – which are also recognised by the Constitution.[11] Following independence these three groups, came under the 'Greek community', in regard to governance, regulation, and participation in public institutions.

Hence, the Constitution of the Republic makes the issue of 'minorities' itself rather complex, especially in view of the collapse of the original constitutional structure in December 1963, and the armed conflict of 1974. In the latest periodic report to the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), for instance, the government expressly stated that the status of 'national minority' under the Framework Convention is only recognised for the Armenian, Maronite and Latin 'religious groups', reiterating the status of the Turkish Cypriots as a *community* under the Constitution.[12]

The original constitutional arrangement excludes the members of the Cypriot 'Gypsies', or 'Kurbet' or 'Roma' community, who first settled on the island in the 14th century.[13] Instead, in 1960, the Cypriot Roma were brought automatically under the 'Turkish Community', given the fact they spoke predominantly the Turkish-Cypriot dialect and followed the Muslim religion.[14] Their separate status as a minority group has now been recognised following Cyprus' EU membership.[15] According to ACFC despite the lack of recognition of the Cypriot Roma as a distinct 'national minority' under the Framework Convention, the fact that the Convention applied to the Cypriot Roma on an 'article-by-article basis', was considered satisfactory.[16] These contradictions illustrate rather clearly some

[10] Republic of Cyprus Constitution 1960, art 2(1) and 2(2). The commonly used terms 'Greek-Cypriot' and 'Turkish-Cypriot', which are also employed here, do not exist in the Constitution which refers to 'Greeks' and 'Turks' only.
[11] Republic of Cyprus Constitution 1960, art 2(3).
[12] CoE, Fifth Report submitted by Cyprus – Pursuant to Article 25(2) of the Framework Convention for the Protection of National Minorities – received on 1 February 2019 Doc No. ACFC/SR/V (2019)003 paras 5-6.; Framework Convention for the Protection of National Minorities (adopted 1 February 1995, entry into force 1 February 1998) ETS No. 157; Law (Ratification) on the 1995 Framework Convention for the Protection of National Minorities (Law 28(III)/1995).
[13] Nicos Trimikliniotis and Corina Demetriou 'The Cypriot Roma and the Failure of Education: Anti-discrimination and Multiculturalism as a post-accession challenge' in Andrekos Varnava, Nicholas Coureas and Marina Elia (eds), *The Minorities of Cyprus: Development patterns and the identity of the internal-exclusion* (Cambridge Scholars Publishing 2009) 241, p. 244.
[14] Ibid.
[15] FRA, 'Country thematic studies on the situation of Roma – Cyprus' (21 June 2013) <https://fra.europa.eu/en/country-data/2013/country-thematic-studies-situation-roma> accessed 12 April 2021.
[16] Ibid para 2.

of the intersectional problems that arise in Cyprus with regard to Roma and Muslim persons, in particular, as a result of the political situation on the island.

Jews and persons of African descent, be those from northern or sub-Saharan Africa, constitute two of numerous groups – religious, ethnic or other – whose 'local visibility' in contemporary Cyprus has been 'irrevocably lost'.[17] At present, little is known about the Jewish community in Cyprus. However, an internet search revealed that there are currently some 100 to 300 Jews permanently residing on the island.[18] At the moment of writing there are also five synagogues/community centres, as well as a recently-built museum in the city of Larnaca. In regard to persons of African descent, those present on the island today are an amalgamation of persons married to Cypriots, economic migrants, and persons with or in search of international protection. They originate from diverse corners of the African continent, and follow various religions. Like in other EU member States, in Cyprus too, there is no accurate estimate of the size of the population of people of African descent.[19]

By the early 1990s, extensive economic growth in the Republic-controlled areas transformed Cyprus form a traditional emigration-dominated region to a migrant-receiving State, receiving both 'subaltern' racialised migrant labourers, and distinguished 'elite' business-oriented migrants.[20] The origin of migrant populations in Cyprus covers a spectrum significantly broader than the four groups upon which the present research focuses, including other EU nationals, persons from the Caucasus region, and south-east Asia, who are not of relevance to the present research. Moreover, in recent years, asylum seekers and persons with international protection form a non-negligible proportion of the migrant population.

According to the preliminary results of the 2021 Census, 918,100 persons currently reside within the area controlled by the Republic.[21] Among them, 193,300 (21.1 per cent of the total population) are foreign nationals.[22] In 2021, asylum applicants were a mere 7.13 per cent of the total of foreigners,

[17] Costas M Constantinou, 'Cyprus, Minority Politics and Surplus Ethnicity' in Andrekos Varnava, Nicholas Coureas and Marina Elia (eds), *The Minorities of Cyprus: Development patterns and the identity of the internal-exclusion* (Cambridge Scholars Publishing 2009) 361, p. 362.
[18] World Jewish Congress, Cyprus <www.worldjewishcongress.org/en/about/communities/CY> accessed 25 May 2022 citing 2016 statistics from Sergio Della Pergola, Hebrew University.
[19] European Commission, EU High Level Group on combating racism, xenophobia and other forms of intolerance – Afrophobia: Acknowledging and understanding the challenges to ensure effective responses (November 2018).
[20] Nicos Trimikliniotis, 'Migration and Freedom of Movement of Workers: EU Law, Crisis and the Cypriot States of Exception' (2013) 2 Laws 440, p. 443.
[21] Press Release, Απογραφή Πληθυσμού και Κατοίκων 2021 – Προκαταρκτικά Αποτελέσματα (Statistical Service, 18 May 2022) available at <www.cystat.gov.cy/el/PressRelease?id=66207> accessed 25 May 2022.
[22] Ibid; A further break down of statistics has not yet been released. at the time of writing.

the top five countries of origin being Syria, the Democratic Republic of the Congo, Nigeria, Pakistan and India.[23] At the time of writing, Cyprus is the EU member State with most asylum applications per capita.[24]

A broad and detailed overview of the ongoing situation in Cyprus over the last decade is given in the latest report on Cyprus, published by the United Nations (UN) Committee on the Elimination of Racial Discrimination (CERD), under the International Convention on the Elimination of all forms of Racial Discrimination (ICERD).[25] CERD raised concerns over the 'lack of comprehensive data on the enjoyment of economic and social rights by ethnic groups and the representation of ethnic minorities in State and public institutions,' [26] further regretting the fact that the State provided no information on efforts to address gaps in the existing legal framework on racial discrimination, and lack of efforts in amending or repealing discriminatory laws, regulations and policies. Hate crimes and hate speech were also recorded:

> The Committee is concerned at reports of racially motivated verbal abuse and physical attacks by right-wing extremists and neo-Nazi groups against persons of foreign origin, including persons of African descent, as well as against human rights defenders and Turkish Cypriots. The Committee is also concerned at the use of racist stereotypes and hate speech in the public sphere, sometimes promulgated by the media against members of certain minority groups, including the Roma (Kurbet) community, and against ethnic minorities who are Muslims. The Committee is further concerned at the lack of enforcement and the lack of sufficient legislation to obtain accountability for such acts.[28]

CERD further identified the lack of a comprehensive strategy for the inclusion of the Cypriot Roma (Kurbet) community, including the lack of adequate housing, education, employment and health care, amidst discrimination and stigmatisation.[29] Despite its reference to neo-Nazi groups, the report made no reference at all to Jews. Though neo-Nazi symbols and slogans are often displayed

[23] Ibid.
[24] Cyprus Refugee Council, *Country Report: Cyprus – 2021 Update* (ECRE Asylum Information Database AIDA, 2021) 15 available at < https://asylumineurope.org/reports/country/cyprus/> accessed 25 May 2022.
[25] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13.
[26] CERD, Concluding observation on the combined twenty-third and twenty-fourth periodic reports of Cyprus (2 June 2017) UN Doc. CERD/C/CYP/CO/23-24 para 8.
[27] Ibid. para 10
[28] Ibid. para 16; For a more recent source see: EQUINET, 'Cyprus: The Dangers of Hate Speech' (2 September 2021) < https://equineteurope.org/cyprus-the-dangers-of-hate-speech/> accessed 25 May 2022
[29] Ibid. paras 18-19; See also: Commissioner for Administration, *Τοποθέτηση Επιτρόπου Διοικήσεως και Προστασίας Ανθρωπίνων Δικαιωμάτων ως Εθνική Ανεξάρτητη Αρχή Ανθρωπίνων Δικαιωμάτων (NHRI) σχετικά με τις συνθήκες διαβίωσης της Ρομά κοινότητας στην Κύπρο* (AYT 3/2020, 22 December 2020) [Report by the Commissioner for Administration as National Human Rights Institution on the living conditions of the Cyprus Roma community] (in Greek).

in public, as graffiti or in other forms, no antisemitic incidents have been recorded by the Cyprus Police since 2015, when such information started being available.[30]

In addition, while CERD welcomed the provision of data on the submission of racial discrimination complaints in the period 2005-2016, the Committee was cautious to also note the low number of such complaints.[31] It further emphasised the lack of measures to address intersectional discrimination.[32] While it welcomed information on the provision of training for the police, it regretted that no analogous information was provided for training programmes and workshops addressed to representatives of State bodies, local government entities, and associations, law enforcement officers, judges and lawyers.[33] An in-depth report on the topic of institutional racism is currently pending publication, and was not accessible for the present report.[34]

5.4 The anti-racism legal framework in Cyprus

The legal system of the Republic of Cyprus belongs primarily to the Common Law legal family, especially in the areas of private and criminal law, including civil and criminal procedural law, and the hierarchy of the courts.[35] Case-law and judicial precedent, therefore, play a paramount role in interpreting and applying codified laws. Administrative law, however, is a major exception to the common law character of the legal system.[36] This is of particular significance in this report, since by virtue of article 146 of the Constitution, any person in the Republic (not necessarily a national) is eligible to submit an administrative recourse to the Administrative Court,[37] to challenge any decision, act, or omission by a public authority that affects their direct, personal and legitimate interest,[38] including discriminatory decisions, acts or omissions.

The Republic is party to all major international human rights treaties,[39] and all treaties have superior force to any municipal law,[40] but not to the Constitution itself. The Republic is a party

[30] FRA, Antisemitism – Overview of antisemitic incidents recorded in the European Union (2009-2019) (FRA 2020) p. 34.
[31] CERD Report (n 26) paras 24-25.
[32] Ibid. paras 20-23.
[33] Ibid. para 26
[34] Natalie Alkiviadou, 'Shadow Report: Racism and related discriminatory practices in Cyprus between 2016 and 2021' (ENAR, forthcoming 2022).
[35] Nikitas E Hatzimihail, 'Reconstructing Mixity: Sources of Law and Legal Method in Cyprus' in Vernon V Palmer and Mohamed Y Mattar (eds) *Mixed Legal Systems, East and West* (Routledge 2017) 75, p. 77.
[36] Ibid.
[37] This Court was established in 2015. Prior to its establishment Administrative Law cases were heard by the Supreme Court under its Review Jurisdiction.; Law on the Establishment and Functioning of an Administrative Court (Law 131(I)/2015).
[38] Republic of Cyprus Constitution, art 146(2).
[39] For a comprehensive list of treaties and protocols ratified until 2004 see: Republic of Cyprus, Έκθεση της Κυπριακής Δημοκρατίας κατά των Διακρίσεων σε τομείς του κοινοτικού κεκτημένου – Πολιτική και Μέτρα κατά των Διακρίσεων (Updated Edition, September 2004) [Report of the Republic of Cyprus against discrimination in areas of the community acquis] p. 44, available at <http://www.mjpo.gov.cy/MJPO/mjpo.nsf/All/B4ACE8ECD8E09626C2258513002AFD32/$file/Ekthesis%20kata%20ton%20diakrisevn%20grk.pdf?OpenElement> accessed 25 May 2022 (in Greek).
[40] Republic of Cyprus Constitution, art 169.

to the ECHR, and ECHR's anti-discrimination Protocol No. 12.[41] The Republic has also ratified the 1966 International Covenants[42] and, more importantly for this report, ICERD, already mentioned above.[43] The 1979 Convention on the Elimination of All Forms of Discrimination against Women,[44] and the Optional Protocol thereof of 1999 have also been ratified.[45]

> ***"Article 28 of the Constitution of the Republic of Cyprus states that no person shall be discriminated on any ground"***

The Constitution is the supreme law of the Republic,[46] superseded only by EU Law. None of the Constitutional provisions is to be interpreted and applied contrary to EU law, and all legally binding instruments from any EU institution are legally binding in the Republic.[47] It encloses a total of 30 articles listing 'fundamental rights and freedoms', protected under the supreme law of the Republic. In terms of anti-discrimination, Article 28 is the most significant provision, recognised by case-law as an expression of the principle of equality.[48] states that everyone is equal before the law, and that no person shall be discriminated against directly or indirectly, on the grounds of 'community [as defined in the Constitution], race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or any ground whatsoever, unless there is express provision to the contrary in this Constitution'.[49] Another relevant provision is article 18 on Freedom of thought, conscience and religion, which is based and builds on the corresponding article 9 of the ECHR. Moreover, articles 35 and 179(2) bind the Legislative, the Executive and Administrative authorities of the Republic to ensure the effective application of all constitutional provisions relevant to human rights and liberties throughout their work, and not to pass laws, acts or decisions which are contrary or incompatible with any constitutional provision, including those relating to human rights.

[41] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entry into force 1 April 2005) ETS No. 177, art 1; Law on the European Convention for the Protection of Human Rights and Fundamental Freedoms (Twelfth Protocol) (Ratification) (Law 13(III)/2002).
[42] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Ratification law for the United Nations International Covenant on Economic, Social and Cultural rights of 16 December 1966 and for the United Nations International Covenant on Civil and Political Rights of 16 December 1966 (Law 14/1969).
[43] Law (Ratification) on the International Convention on the Elimination of All Forms of Racial Discrimination (Law 12/1967).
[44] Law (Ratification) Convention on the Elimination of All Forms of Discrimination against Women (Law 78/1985).
[45] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 1999 (adopted 6 October 1999, entry into force 22 December 2000) 2131 UNTS 83; Law (Ratification) on the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 1(III)/2002).
[46] Republic of Cyprus Constitution, art 179.
[47] Fifth Constitutional Amendment Law (Law 127(1)/2006); Republic of Cyprus Constitution, art 1A.
[48] *Κυπριακή Δημοκρατία μέσω Επιτροπής Δημόσιας Υπηρεσίας ν Ελένης Κωνσταντίνου* (2002) 3 CLR 534.
[49] Republic of Cyprus Constitution, art 28(2).

5.4.1 Racial Equality Directive

The Racial Equality Directive was adopted nearly four years before Cyprus joined the EU. Therefore, national transposing legislation was passed in March 2004, in anticipation of EU membership starting on 1 May 2004, through three national legislative acts:

a) Law on the Combating of Racial and Certain Other types of Discrimination (Commissioner) Law of 2004 (hereinafter Law 42(I)/2004);
b) Law on Equal Treatment in Employment and Occupation of 2004 (hereinafter Law 58 (1)/2004);
c) Law on Equal Treatment (Race and Ethnic Origin) Law of 2004 (hereinafter Law 59(I)/2004).

A primary role here is played by the Office of the Commissioner for Administration (Ombudsperson), which was established in 1991, empowering an independent authority to undertake investigations concerning any executive or administrative public body.[50] Law 42(I)/2004 is an all-inclusive legislation, expanding the mandate of the Ombudsperson in light of a number of regional and international instruments, including the ECHR and its Protocols, other European and United Nations Conventions ratified by the Republic, and Part II on Fundamental Rights and Freedoms of the Constitution.[51]

Regarding the Racial Equality Directive, Law 42(I)/2004 transposes article 13 of the Directive, designating the Office as the body responsible for 'the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin'.[52] It contains a total of 56 articles, stating the exact responsibilities of the Commissioner under the law, and the procedures that ought to be followed.[53] It gives the Commissioner a broad range of powers, including monitoring, the issuing of orders and administrative fines, as well as recommendations.[54] The Commissioner is also empowered to issue Regulations for the improved application of Law 42(I)/2004.[55] Articles 40-44 of Law 42(I)/2004 appear to be the closest provisions reflecting articles 10 and 11 of the Directive, dealing with the dissemination of information and the promotion of social dialogue, respectively.

[50] Law on the Commissioner for Administration of 1991 (Law 3/1991).
[51] Law 42(I)/2004, Preamble.
[52] Racial Equality Directive, art 13.
[53] Law 42(I)/2004, art 3.
[54] Law 42(I)/2004, arts14-39, 45-52.
[55] Law 42(I)/2004, art 42, 53.

The full scope of the Racial Equality Directive is covered by Laws 58(I)/2004 and 59(I)/2004 taken together. Law 58(I)/2004 brings into the national legal system the Racial Equality Directive, but also Directive 2000/78/EC,[56] on equal treatment in employment and occupation. It counts 20 articles, and identifies the Commissioner for Administration and the Ministry of Labour and Social Insurance as the authorities responsible for the implementation of the Law. Law 59(I)/2004 is shorter, with a total of 15 articles. In addition to the Commissioner for Administration, the other responsible authority for its implementation is the Ministry of Justice and Public Order.[57]

Both laws follow closely the definitions and objectives of the Directive. They do, however, have a separate scope. Article 4 Law 58(I)/2004 covers article 4(1) sub-paragraphs (a) to (d) of the Directive; conditions for access to employment, self-employment and occupation at all levels of professional hierarchy, access to vocational guidance and training, employment and working conditions, including dismissals and pay, and membership of and involvement in an organisation of workers or employers. Article 4 Law 59(I)/2004 covers article 4(1) sub-paragraphs (e) to (h) of the Directive; social protection, including social security and healthcare, social advantages, education, and access to and supply of goods and services which are available to the public, including housing.

To ensure the appropriate transposition of article 7 (Defence of rights) of the Directive, Law 59(I)/2004 includes three separate articles which allow individuals alleging to have been discriminated against to submit either a judicial complaint to the Administrative or the Civil District Courts,[58] or an extra-judicial complaint to the Commissioner for Administration.[59] Law 58(I)/2004 follows a similar structure,[60] yet in addition to the Administrative and Civil Courts, it also recognises the jurisdiction of the Industrial Disputes Tribunal (i.e. Employment Tribunal).[61] In fact, according to the lawyers' focus group, the Industrial Dispute Tribunals are the only courts that have applied anti-discrimination laws with some success. These cases, however, concerned primarily discrimination on the basis of gender, and not race or ethnic origin. This was evident in the cases identified during the desk research, which relied on national legislation transposing the Racial Equality Directive, albeit for discrimination based on age,[62] or disability.[63] One case was identified relevant to discrimination on the basis of nationality/ethnic origin, concerning a Greek national.[64]

[56] Council Directive 2000/78/EC (n 6).
[57] Law 59(I)/2004, art 2.
[58] Law 59(I)/2004, art 8.
[59] Law 59(I)/2004, art 9.
[60] Law 58(I)/2004, arts 11, 12, 13.
[61] Annual Remuneration Law (Law 8/1967), art 12; Law 58(I)/2004, art 12(3).
[62] *Αυγουστίνα Χατζηαβραάμ ν Συνεργατική Πιστωτική Εταιρεία* Μόρφου (2011) CLR 1222 (Civ Appeal 287/2008).
[63] *Κώστας Τσίκκας ν Κυπριακής Δημοκρατίας, Μέσω Επιτροπής Εκπαιδευτικής Υπηρεσίες, Ηλίας Παλούκης ν Κυπριακής Δημοκρατίας, Μέσω Επιτροπής Εκπαιδευτικής Υπηρεσίες* (Συνεκδ. Υποθέσεις 1519/2010, 1520/2010)
[64] *Εμμανουηλ Μικράκης ν Γενικού Εισαγγελέα της Δημοκρατίας* (Empl. Dispute 962/2012).

It must be noted that the application of article 7(2) of the Directive, which allows for other legal persons to submit a complaint *on behalf* of an individual has no applicability in Cyprus, especially in administrative cases, since legal persons representing another have no 'direct, personal and legitimate interest' per article 146 of the Constitution, and subsequently no standing before Administrative Courts. *Actio popularis*, also does not apply in Cyprus, an obstacle identified in the focus groups, and the interviews conducted.

This is contradicted in article 12 of Law 59(I)/2004. Whereas article 12 of the Directive simply calls for member States to 'encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin',[65] article 12 Law 59(I)/2004 allows 'organisations or other legal persons whose constitution states the eradication of discrimination on the basis of race or ethnic origin' as an objective, to represent an individual, subject to the complainant's consent. It is unclear how the contradiction is overcome in practice. The practical difficulties of applying Law 59(I)/2004 in court were confirmed in the focus groups conducted for the present research, where it was also stated that judges show unwillingness and/or inability in applying the reversed burden of proof in discrimination cases.[66]

Laws 58(I)/2004 and 59(I)/2004 provide for criminal sanctions if a natural or legal person acts in breach of the law. Law 58(I)/2004 empowers the incumbent Minister of Labour, Welfare and Social Insurance to appoint Inspectors that will overlook the effective implementation of the law in the working place, the exact powers and duties to be determined through additional regulatory acts.[67] Law 59(I)/2004 does not provide for the possibility of regulatory acts issued by the Council of Ministers. However, Law 42(I)/2004 provides for analogous powers to the Commissioner for Administration, who is empowered to issue regulations containing a 'Practice Code of Conduct',[68] as well as Regulations for the better implementation of Law 42(I)/2004.[69] In both cases the issuing of such Regulations is subject to the consent of the Council of Ministers.

Though such extension of the powers of the Commissioner is overall beneficial, it must be said that the acts and decisions of the Commissioner are not subjected to the same public scrutiny as the acts of Ministers, and initiatives by the Commissioner's Office more often than not fall under the radar. At the same time, more importantly, this approach separates potentially unfavourable

[65] Racial Equality Directive, art 12.
[66] Racial Equality Directive, art 8; Law 59(I)/2004, art 7.
[67] Law 58(I)/2004, art. 19.
[68] Law 42(I)/2004, art 42.
[69] Law 42(I)/2004, art 53.

governmental policies from the implementation of the EU's anti-discrimination framework examined here. It makes its implementation dependable primarily on the discretion of each incumbent Commissioner, an unelected official, as opposed to the elected government. This problem was identified in a 2010 EU-wide study on the effectiveness of Equality Bodies set up under the Racial Equality and other Directives, which stated that in Cyprus it was likely for decisions of the Ombudsperson to be disregarded, if they conflicted with State policy.[70]

5.4.2 Victims' Rights Directive

The Victims' Rights Directive was adopted on 25 October 2012. It was transposed into national legislation through the Law on the Enactment of Minimum Standards regarding the Rights, Support, and Protection of Victims of Crime (hereinafter Law 51(I)/2016) in April 2016;[71] five months after the official transposition deadline of 16 November 2015.[72]

To a significant extent the national legislation reflects the text of the Directive. The authorities responsible for its implementation are the Law Office of the Republic (Attorney General's Office), the Ministry of Interior, the Cyprus Police, the Ministry of Foreign Affairs, the Ministry of Labour, Welfare and Social Insurance, the Ministry of Health and the Ministry of Education and Culture.[73] The Ministry of Justice and Public Order, which normally looks into non-discrimination issues and is also the Ministry responsible for the Police Force is notably not mentioned at all in Law 51(I)/2016. Further, it needs to be clarified that the Office of the Attorney General in Cyprus, contrary to some other common law jurisdictions, acts as both a Legal Advisor to the State, and a prosecution service of the Republic.[74] Albeit appointed by the President of the Republic, both the Attorney General and their Deputy are Independent Officers of the State, entitled to hold their office until retirement.

The Attorney General enjoys extensive discretionary powers in deciding whether to proceed with prosecution or not in any case,[75] and the Legal Officers acting as Prosecutors work in close collaboration with the Police at all stages of a trial, including communication with victims of crime. For this reason, Law 51(I)/2016 defines as both the Law Office of the Republic and the Cyprus Police as 'prosecuting authorities' (*διωκτικές αρχές*).[76] The central role of the Police and the Law Office of

[70] Margit Ammer, Niall Crowley and others, 'Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC' (Human European Consultancy and Boltzmann Institute for Human Rights, 2010) available at <https://ec.europa.eu/social/BlobServlet?docId=6454> accessed 25 May 2022, para 294.

[71] Official Gazette of the Republic, Issue 4563, 22 April 2016; Law on the enactment of minimum standards regarding the Rights, Support, and Protection of Victims of Crime of 2016 (Law 51(I)/2016).

[72] Victims' Rights Directive, art 27.

[73] Law 51(I)/2016, art 2.

[74] Republic of Cyprus Constitution, art 113.

[75] Criminal Procedure Law (Capital 155).

[76] Law 51(I)/2016, art 2.

the Republic makes difficult the evaluation of their work during investigation and prosecution, due to the very nature of these procedures, where information is confidential. One of the interviewees for the present research, who works for another governmental department, mentioned that Legal Officers of the Republic would often raise questions on the applicability of the Directives with their department, indicating a general lack of awareness and understanding of the details behind these legislative acts.

> ***Victims under the law are all natural persons that have suffered damage (physical, mental, emotional, financial) due to a criminal act.***

According to the national law, 'procedure' (*διαδικασία*) means all contacts a victim may have with any authority or victim support service, whereas 'criminal procedure' (*ποινική διαδικασία*) means the stages of investigation, prosecution and trial up to the sentencing stage, for any crime committed against the victim.[77] Victims under the law are all natural persons that have suffered damage (physical, mental, emotional, financial) due to a criminal act. In case of death or incapacitation of the victim, the rights of the victim are transferred to 'family members', defined as the spouse, a cohabitant, the siblings or dependants of the victim.[78] To be recognised as a victim of crime does not require the detection, arrest, prosecution and conviction of the perpetrator. A 'victim of terrorism' is defined separately as a person who has been 'subjected to an attack, the ultimate aim of which is to harm society'.[79]

Notably, contrary to the Directive there is no definition for the term 'restorative justice', and no such relevant provisions have been transposed in the national legislation.[80] Indeed, there are no known restorative justice initiatives or programmes currently operating in the Republic. On the other hand, the Directive has no directly equivalent provision as the one found in article 4 of Law 51(I)/2016. This article sets a list of obligations for all relevant authorities and NGOs offering services to victims of crime, binding them to act 'with respect, sensitivity, tailor-made, professional and without discriminations approach'.[81] The rest of the article determines the grounds for discrimination, the need to consider the 'best interest of the child' in cases of victims who are minors, the need to consider the special needs and best interests of persons with disabilities, the needs of victims of terrorism, the need to provide such support and protection to victims of gender-based violence,

[77] Law 51(I)/2016, art 2.
[78] Ibid.
[79] In Greek: 'πρόσωπο που έχει υποστεί επίθεση, της οποίας απώτερος σκοπός είναι να βλάψει την κοινωνία'; Law 51(I)/2016, art 2
[80] Victims' Rights Directive, arts 4((j), 12, 25(4)
[81] Law 51(I)/2016, art 4(1)(α).

preventing repeat and secondary victimisation.[82] Special reference is made to victims of intimate relationship violence, and in particular women in cases where the victim is dependent on the perpetrator financially, socially or in terms of securing her right of residency in the Republic.[83]

Article 4 of the Directive is copied almost in its entirety in article 6 Law 51(I)/2016. However, the national legislation makes no reference to provisions under article 4(d) and (j), on the need to offer services on how to have access to legal advice and restorative justice, respectively. The first is especially problematic, deriving from broader difficulties in the Cypriot justice system regarding access to legal services, addressed in detail in the next section. It is possible that due to these constraints article 13 of the Directive, on the Right to Legal Aid, is not transposed in any way into national legislation.

Article 9 of Law 51(I)/2016 transposes the absolute minimum standard set by the Directive (article 7), on the victims' rights to interpretation and translation. The Directive refers explicitly to 'criminal procedure' and therefore, the Cypriot legislation only tasks the Police and the Courts with ensuring the respect of this right. Arguably, both the national and the supra-national provisions are generally weak, since they only enable the victim to have a piecemeal understanding of the ongoing procedures. Cypriot legislation explicitly prevents the victim from requiring access to translation for documents that are not directly relevant to the victims' 'active participation' in the criminal procedure.[84]

Articles 10 and 11 of Law 51(I)/2016, contain concrete provisions for support services to victims. The law gives a coordinating role to the Social Welfare Services (SWS) of the Ministry of Labour, Welfare and Social Insurance, which may transfer their tasks to NGOs offering such services.[85] Such outsourcing of services has been long-term practice in Cyprus, where for instance, the SWS have been collaborating closely with NGOs regarding victims of domestic violence, human trafficking victims, children victims of abuse, sexual abuse and exploitation, and unaccompanied minors. Law 51(I)/2016 also provides that in cases where the victim is a student in primary or secondary education then the SWS needs to coordinate with the Education Psychology Service of the Ministry of Education for targeted and comprehensive provision of support, taking into account any special needs, including disabilities, mental state, and type of violence.[86] It must be noted that in 2016 the

[82] Law 51(I)/2016, art 4(1)(β) – (ζ).
[83] Law 51(I)/2016, art 4(1)(η); This provision is further evidence of the extensive vulnerability of foreign women.
[84] Law 51(I)/2016, art 9(6).
[85] Law 51(I)/2016, art 10(3) and (4).
[86] Law 51(I)/2016, art 11(2).

Ministry of Education published a Code of Conduct against Racism and Guide for Managing and Recording Racist Incidents, offering practical guidance to teachers.[87]

Article 24 of the Directive (Right to protection of child victims) is transposed in article 23 of Law 51(I)/2016, which extends the full provision to victims of crime with a 'serious mental or psychosocial disability'.[88] As far as children are concerned, the article is supplemented by the provisions of other relevant national laws.[89] Like the Directive, the national legislation also refers to unaccompanied minors, where minors are to be represented by the Director of the SWS in collaboration with the Office of the Commissioner for the Rights of the Child.[90] A practice which has been problematic for years, since responsibility lies with the government, yet minors' representation by public-sector advocates is not possible due to a conflict of interest in administrative and criminal cases.

Law 51(I)/2016 contains a general provision (article 24) on the need for funding for the training of the officers of all public services dealing with any of the procedures foreseen in the law, adding that public servants ought to invite professionals who do not work in the Public Service to attend relevant trainings.[91] The law does not provide for specific categories of professionals other than those who participate in any relevant procedures or 'come in contact in any other way with victims or potential victims'.[92] This provision was recently supplemented by the insertion of article 24A, which tasks each relevant service to draft a Code of Conduct for dealing with victims of crime, and appoint an officer to oversee adherence with it.[93] Though Law 51(I)/2016 provides for the adoption of additional regulatory acts by the Council of Minister, no such secondary legislation has been identified.

5.4.3 General remarks

Based on previous experience, national legislation in Cyprus rarely deviates from the black letter of EU Directives. This appears to be the case also with the Racial Equality Directive and the Victims'

[87] Elena Papamichael and Michalinos Zembylas, *Code for Conduct against Racism and Guide for Managing and Recording Racist Incidents* (Pedagogical Institute, Ministry of Education and Culture 2016) An English version of the guide is available here <http://naos.risbo.org/wp-content/uploads/2017/04/Cyprus-antiracism-code.pdf> accessed 25 May 2022.
[88] Law 51(I)/2016, art 23(4).
[89] Law 51(I)/2016, art 23(2); Witness Protection Law (Law 95(I)/2001); Law on the protection from Violence in the Family (Law 119(I)/2000); Law on the Prevention and Combat of Sexual Abuse and Sexual Exploitation of Children and Child Pornography (Law 91(I)/2014).
[90] Law 51(I)/2016, art 23(2)(γ)(ii) and (iii).
[91] Law 51(I)/2016, art 24.
[92] Ibid.
[93] Public Services were given three months to draft the Code, the deadline expires on 30 June 2022.

Rights Directive. In view of the former, the most significant weaknesses identified is the fact that the national legislation depends extensively on the Office of the Commissioner for Administration, indirectly reducing the responsibility and accountability of the Ministry of Justice and Pubic Order, and other policy-making organs of the State.

In view of the Law transposing the Victims' Rights Directive, the most significant theoretical and practical weakness identified is the complete disregard for the introduction of restorative justice mechanisms. It is, therefore, not surprising that Cyprus is one of 21 members States against which the European Commission initiated infringement proceedings for the Directive's incomplete transposition.[94] In terms of vulnerable groups, there is a clear emphasis on children, whereas special provisions on the protection of women are kept to a bare minimum. This is potentially overcome by other legislative acts, such as those dealing with the preventing and combating violence against women and domestic violence.[95]

5.5 Implementation of the anti-racism legal framework in Cyprus

An in depth evaluation of the above legislation in Cyprus was published in 2021.[96] The aim here is to emphasise particularly problematic elements of concern. Reports from various monitoring bodies show persisting difficulties in the implementation of EU and international standards in terms of non-discrimination in Cyprus.[97]

Following the establishment of the 'House of the Child' in 2018, a one-shop specialised centre offering support to children victims of abuse, on 3 March 2022 the government launched the 'Home for Women', an analogous centre providing victim support services to women that have

[94] European Commission, 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, Doc. COM (2020) 188 final (11 May 2020) p. 3; At present, all infringement procedures have been terminated. See: Katerina Kalaitzaki in this Volume.

[95] Convention on preventing and combating violence against women and domestic violence (adopted on 11 May 2011, entry into force 1 August 2014) CETS No. 210; Law on the Convention of the Council of Europe on Preventing and Combating Violence against Women and Domestic Violence (Law 14(III)/2017); Law on the prevention and combating of violence against women and domestic violence and other relevant matters of 2021 (Law 115(I)/2021).

[96] Corina Demetriou, Country Report Non-discrimination: Transposition and implementation at national level of Council Directives 2000/43 and 2000/78 – Cyprus (Reporting period 1 January 2020 – 31 December 2020) (European Commission, 2021).

[97] E.g GRETA, Evaluation Report Cyprus – Third Evaluation Round, Doc No. GRETA(2020)04 (11 June 2020) available at <https://rm.coe.int/greta-2020-04-fgr-cyp-en/16809eb53f> accessed 25 May 2022, p. 4; MIGS, Response submitted by the Mediterranean Institute of Gender Studies (MIGS) to Questionnaire on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (September 2021) available at <http://www.familyviolence.gov.cy/upload/20220311/1647009084-32685.pdf> accessed 25 May 2022, p. 8.

been subjected to violence.[98] At the time of writing, Cyprus has two ongoing National Plans of relevance; a National Action Plan for Equality between Men and Women (2019-2023),[99] and a National Plan for the Integration of Migrants (2021-2027).[100] Neither of these plans refer directly to the Racial Equality Directive or the Victims' Rights Directive, though their relevance is evident. Having been only recently implemented there are no reports or indicators to help evaluate the plans' effectiveness in full at present. They should, however, be used as guidance in the design of future activities under the PRESERVERE project.

The focus groups and interviews conducted for the present project confirmed some of the findings deriving from the literature, and also gave insights on the practical issues faced. Two overarching comments were firstly, that very few people are aware of the Victims' Rights Directive, and secondly, that the Cypriot legal system at present focuses more on punitive issues, rather than prevention of and protection from discrimination. Among those interviewed, only one interviewee who conducts research on anti-discrimination matters said she was familiar with the Directives and that she makes reference to them in research. This suggests that the instruments are yet to become part of usual practice for public authorities.

When asked about the adequacy of the transposition laws, three of the interviewees – each of a different professional background – rejected the view that there are legal gaps in the existing legislation, saying that the transposition is satisfactory. Others, however, mentioned that the Racial Equality Directive itself could be expanded to cover additional areas of practice, such as contact with public administration, access to political, cultural and social life, and housing matters. The combination of the desk research, and the comparative analysis of the text of the Directives with the national transposing legislation, juxtaposed with information received during the interviews and focus group exercises, led to the following main observations.

5.5.1 Systemic Challenges within the Justice System

According to the EU Justice Scoreboard, Cyprus is the EU member with the longest time needed to resolve judicial cases. This constitutes the Cypriot judicial system one of the least efficient in

[98] The final proposal submitted to the Ministries of Labour, Welfare and Social Insurances, Justice and Public Order, and Health is available here: <http://www.familyviolence.gov.cy/upload/20200506/1588765852-03622.pdf> accessed 25 May 2022 (in Greek).
[99] Ministry of Justice and Public Order, Εθνικό Σχέδιο Δράσης για την Ισότητα μεταξύ Ανδρών και Γυναικών (2019-2023) available at <http://www.institutionforgenderequality.gov.cy/equality/equality.nsf/All/0276C88652C8317AC225850500403411?OpenDocument> accessed 25 May 2022 (in Greek).
[100] University of Cyprus and partners, Εθνικό Σχέδιο για την Ένταξη των Μεταναστών (2021-2027) available at <https://tcnintegration.com.cy/schedio-entaksis-se-ekseliksi/> accessed 25 May 2022 (in Greek).

the EU.[101] Indeed, one of the cases relevant to this report was lodged in 2017 and was decided at first instance in March 2022.[102]

Moreover, the desk research identified only a handful of cases that have relied upon the Racial Equality Directive. Only one case recognised discrimination under Law 58(I)/2004, awarding monetary damages to the Applicant, but that case concerned discrimination on the basis of age.[103] The only other successful case identified was an administrative case, where the Court repealed the challenged decision of the respective public authority.[104] Virtually no cases relying on the Victims' Rights Directive were identified through the desk research.[105] However, based on information received informally by the author, there are Advocates who rely on the provisions of the Directive in Court proceedings. Points raised under the Directive are rarely challenged by the opposing side, and therefore, the judges do not address these points in their judgments. Subsequently, even if the Victims' Rights Directive and the accompanying national law may be used in Court, such references are not available in public records.

In addition, the legal professionals we consulted with observe a lack of uniformity in applying anti-discrimination legislation among the judiciary and across jurisdictions. No members of the Judiciary were interviewed for the present research. Thus, it is difficult to assess these allegations. It is worth investigating this issue further and discuss it with members of the Judiciary during the future phases of the project. Moreover, some focus group participants and interviewees have observed a reluctance on behalf of judges to engage with evidence presented in support of discrimination claims. It was also mentioned that when more than one national legislative acts are relevant, judges may fail to consider the underlying issues that make separate laws relevant to the same case. The problems identified, however, do not only concern the judges, but also the Advocates, given the limited interest shown by the Cyprus Bar Association in such matters.

Both the case law and the reports of the Commissioner for Administration reveal the persistence of long-term practice of Cypriot courts (and arguably here, of authorities too) in engaging more directly with international, as opposed to EU, instruments. It is unknown here whether this is due to lack of knowledge or confidence in arguing cases on the basis of EU Law. It is, however, estimated

[101] European Commission, The 2022 EU Justice Scoreboard Doc No. COM(2022) 234, p. 11.
[102] *Alipinah and Alipinah v Κυπριακή Δημοκρατίας, μέσω Γενικής Διευθύντριας Υπουργείου Παιδείας και Πολιτισμού* (Admin Case 108/2017).
[103] *Αυγουστίνα Χατζηαβραάμ ν Συνεργατική Πιστωτική Εταιρεία Μόρφου* (2011) CLR 1222 (Civ Appeal 287/2008).
[104] *M R Chiasvand v Κυπριακής Δημοκρατίας, μέσω Διευθύντριας Τμήματος Κοινωνικής Ενσωμάτωσης Ατόμων με αναπηρίες του Υπουργείου Εργασίας, Προνοίας και Κοινωνικών Ασφαλίσεων* (Admin Case 464/2016).
[105] The Victim's Rights Directive was relied upon in a procedure for the issuing of a Certiorari Prerogative Writ, where the Supreme Court rejected the relevance of the Directive: *Αναφορικά με την αίτητη του Boyko για την έκδοση προνομιακού εντάλματος Ceriorari* (Civ. Appeal 126/2020).

that even if this were the case, the resistance to EU Law is also due to a long-term reliance on ECHR instead, which plays a deep-rooted role in the Cypriot legal culture and tradition. As concluded by Kyriakou in 2010, the case law of the Supreme Court of Cyprus showed an alignment of the court with the provisions of the ECHR, and following EU membership the Supreme Court was resistant to the hierarchy of norms within the EU legal order.[106] This was further elaborated on by Laulhé Shaelou and Kalaitzaki, who have argued that issues falling within the scope of the Constitution – fundamental rights and anti-discrimination issues most prominently – 'are not usually raised in their EU context'. This was also confirmed by one of the interviewees for the present research, who stated that anti-discrimination issues will usually be argued through the Constitutional provisions, which are ECHR-inspired, and not the Directives.

5.5.2 Insufficient Access to Justice

The Advocates' Law (Capital 2), which regulates the legal profession in Cyprus, puts constraints to the ways in which an Advocate can provide their services, and until March 2022 completely prohibited the provision of any *pro bono* services.[108] Moreover, in practice NGOs cannot directly employ qualified Advocates, who are the only professionals who can represent individuals in cases pending before courts and public authorities. As a result, vulnerable persons, have limited – if any – access to legal advice. The sole law on Legal Aid is also very weak, in some instances being available only at first instance and if the case has a reasonable expectation of success.[109] This further precludes effective access to both legal representation and access to legal advice, and reduces the willingness of people to challenge discriminatory behaviours and practices before a tribunal.

5.5.3 The role of the Commissioner for Administration

A 2010 study on the role of the Commissioner under the Racial Equality Directive, had revealed a number of weaknesses regarding the Commissioner's role as an Equality Body.[110] Officers from

[106] Nikolas Kyriakou, 'National judges and supranational laws on the effective application of the EC Law and the ECHR: The case of Cyprus' (EUI, 2010) 20-21, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623560> accessed 2 June 2022

[107] Stéphanie Laulhé Shaelou and Katerina Kalaitzaki, ,Towards an internalization of EU Law in Cyprus: The effectiveness and application of EU Law by National Courts' in Christian N. K Franklin (ed) *The effectiveness and application of EU and EEA Law in National Courts* (Intersentia 2018) 495, p. 512

[108] Advocates Law (Capital 2), art 17(9); This paragraph has now been completely removed through Advocates (Amendment) Law (Law 38(I)/2022); Official Gazette of the Republic, Issue 4882, 30 March 2022. It is unknown how this amendment to the Law will impact relevant legislation and access to justice in practice.

[109] Legal Aid Law (Law 165(I)/2002)]

[110] Ammer, Crowley and others (n 70).

the Commissioner's office pointed out that many of the issues identified therein have either been resolved or improved. They also stressed that the Office of the Commissioner for Administration is actively taking part in policy-related matters, and it is now usual practice to attend deliberations before the Human Rights Committee of the House of Representatives.

Despite the detailed provisions of Law 42(I)/2004, and the apparent positive contribution of the Commissioner for Administration in the combat against discrimination in Cyprus, the focus groups revealed certain dissatisfaction overall. One general point raised was the inevitable complexity of Law 42(I)/2004, as well as the lack of power for officers of the Commissioner's Office to represent victims of discrimination in Court, despite their undeniable expertise on the matter. As already explained above, this is the result of the strict regulations determining who can 'practice advocacy' before courts. The submission of amicus curiae briefs is also not practiced in Cypriot courts, further precluding the active participation of expert bodies in hearings.

It needs to be pointed out, however, that there is no consensus across EU member States on whether Equality Bodies should represent alleged victims of discrimination before judicial procedures. Whether, therefore, the role of the Office of the Commissioner for Administration could or should be expanded in the future is subject to debate, which falls outside the scope of the present report. We were informed in the interviews that in international debates at the moment, more and more often the conclusion is reached that Equality Bodies and other analogous mechanisms cannot be of much help, unless interested individual themselves have a good understanding of their own rights.

5.5.4 Lack of awareness and training

Neither the legal professionals, nor the front-line workers had received specialised training on anti-discrimination in general, or on the two Directives at the epicentre of the present project. One of the lawyers stressed the need to offer basic training on the submission and assessment of evidence used in discrimination claims. A request also made by the front-line workers, who often try to gather information before accompanying an alleged victim of crime to the police for a statement. Among the Social Workers, one clarified that basic legal training is part of the university degree for Social Work, but even then, focus is usually on Family Law and cases of violence, not anti-discrimination law.

The discussion with the front-line workers revealed a complete lack of guidance and clarity in the way the Directives ought to be implemented in practice, including in regard to the duties and the obligations of persons working with vulnerable groups. Most participants in this focus group had

a vague knowledge of the existence of the two Directives, either hearing about them incidentally during trainings and presentations on different topics, or through colleagues. Overall, each NGO consulted for the present research has developed its own internal processes to deal with cases of discrimination, or identify vulnerable victims of crime – such as trafficking victims, for instance – among their beneficiaries. Some also have the capacity to hold interdisciplinary meetings, where legally trained colleagues will instruct them if needed.

To illustrate the breadth of lack of familiarity with minority groups across various sectors, one focus group participant mentioned how a medical practitioner once admitted that whereas they could assess the wounds of a black attack victim, they were unable to assess the bruises due to beneficiary's dark skin. This unfamiliarity with the assessment of the physical condition of persons is a known fact in the field, and an issue which may have a direct impact on the availability of reliable evidence in court, for instance.

5.5.5 The role of the Police

The lack of training for front-line works impacts directly their contact with the authorities. When asked about any positive or negative experience with the authorities, participants from more than one organisations expressed complete disappointment with the Police, since officers were often reluctant to hear the victim, would openly state they would not believe a person was a victim of a crime, or sometimes even expressed hostility towards the accompanying NGO officer. One participant in particular stated that she would often be in a dilemma when considering whether it was worth advising a beneficiary to submit a complaint, fearing that they might end up in more trouble.[111] One way to cope has been the collection of as much evidence as possible by the first-line worker before accompanying somebody to the Police, to ensure that there is no room left for a potentially hostile police officer to dismiss the case. They did admit, however, that this is highly inefficient, due to lack of training, but also because this is not a responsibility that should lie with them.

One of the interviewees referred to a recent case where the Police had argued there was a legal gap in a recent case which received broad international publicity involving a British woman who alleged she was a rape victim,[112] but eventually was convicted herself for making false allegations. According

[111] This trend is also evident in research concerning other vulnerable migrant groups, which do not fall under the subject matter of the present report. See: Nasia Hadjigeorgiou and Commissioner for the Administration and the Protection of Human Rights, 'The Status of Foreign Domestic Workers in Cyprus' (December 2020), available at <http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/2358C433C1A0F629C2258646002B79DA/$file/Domestic%20workers%20.pdf?OpenElement> accessed 30 June 2022.

[112] Chiara Giordano, 'Ayia Napa: British woman wins appeal against conviction for lying about gang rape in Cyprus' (Independent, 31 January 2022) available at <www.independent.co.uk/news/world/europe/ayia-napa-rape-guilty-court-cyprus-b2004065.html> accessed 2 June 2022.

to the interviewee, in that case the Police completely ignored the Victims' Rights Directive, despite efforts by certain NGOs to point out its relevance. At the time, it was noted by the same person, the strong protections of the Istanbul Convention on Preventing and Combating Violence against Women were still not applicable in Cyprus, so arguably the Victims' Rights Directive was the only relevant legal instrument that could have applied to protect the woman involved in this case.

Nonetheless, one of the interviewees noted that the Police themselves face challenges that prevent the appropriate implementation of the Directives, these being underreporting, inadequate sanctions, difficulties in substantiating/ proving the case due to its nature and lack of trust in the authorities. We were also informed of a number of improvements promoted by the Police Headquarters, including the appointment of Liaison Officers across all districts, who are to inform the Police Human Rights and Combating Discrimination Office of complaints reported through a specialised template on 'racist offense or incident with racist motive or other related hate offenses'. A questionnaire has also been prepared for officers to use as guidance in the investigation of discrimination cases, and additional 'Racism/Discrimination' materials have been uploaded on the internal portal of the Police. Informative leaflets have also been uploaded to the website of the Police, under the category of 'Racism/Diversity', and a Memorandum of Cooperation with NGOs has been signed, to foster collaboration between the Police and NGOs for the protection and promotion of human rights. The Code of Police Ethics has also been revised, and a 'Human Rights Handbook' with a chapter on 'Fight against Racism, Xenophobia and Intolerance' is currently pending publication.

Furthermore, regarding the Victims' Rights Directive, in addition to the guidelines included in Law 51(I)/2016, two documents entitled 'Rights of Victims of Crime' and a 'Victim Complaint Certificate' has been distributed to all members of the force. The former has been translated in nine languages (Greek, English, Turkish, Arabic, French, Russian Chinese, Bulgarian and Romanian) and has been uploaded on the Police website. An additional Braille-script version of the document has been distributed to all Police District Departments. A class on 'Rights and Protection of Victims of Crime' has also been included in the curriculum of the Cyprus Police Academy, which apart from a theoretical component, includes exercises and role play, introducing new recruits to the needs of victims, the procedures that need to be followed and the obligations of other relevant public services. We were also reminded that citizens can contact the Police through the designated 'Citizen Line' (1460) and submit complaints for alleged misconduct to the Independent Authority for the Investigation of Allegations and Complaints Against the Police, which should also be information provided to victims.

Our estimation is that many of these measures have only been recently implemented, and therefore, no positive results are yet to be observed. One of the professionals interviewed for the present report cautioned that the training programme of the police has not been assessed for its quality, and organisations working in advocacy and policy are not aware whether such training is updated with the latest trends and research findings. The same person added that in any case quality assurance should be conducted by the government, and it is not NGOs that should undertake such responsibility, albeit information from the government is lacking.

5.5.6 General remarks

Overall, despite the clear indications of efforts for improvement, these efforts are yet to bring the desirable level of positive change. In practice, many of the challenges derive from long-term structural problems faced across the Public Service, resulting in lack of coordination among different authorities, and sometimes within each authority separately. This has led to long-term weaknesses in promoting the constructive dialogue among public authorities, civil society, academia, and interested groups of people. One of the interviewees stressed the need for a multi-dimensional approach which would involve legislative measures combined with anti-racism strategies, (more) awareness raising campaigns on anti-discrimination, the proper training of public officials, and more dedication to the recording of statistical data.

Regarding the substance of the law, we have observed that it is challenging for EU laws to penetrate the more familiar dependence on the framework provided by the Constitution, the ECHR and other international treaties. Though the strengthening of efforts to provide training on EU Law to legal and other relevant professionals is certainly necessary, such training should also take into account the broader international obligations of the Republic, and function as an opportunity to bring together various professionals to share their views on the practical problems they face, with the objective to address persisting gaps.

> ***“It is challenging for EU laws to penetrate the more familiar dependence on the framework provided by the Constitution, the ECHR and other international treaties.”***

6. Steps forward

Considering the four groups that are the focus of the PRESERVERE project, it derives from the desk and the empirical research that in recent years there has been an emphasis on monitoring the rights of Muslims and persons of African descent, primarily in the context of migration and asylum.

Asylum seekers and persons with international protection, however, are only one minor part of the Muslim and African population on the island. In addition, monitoring is only the first step in taking measures to protect minority and other vulnerable groups from discriminatory practices, and protection is yet to reach a satisfactory level. Regarding the Roma community, information has only been available regarding the Cypriot Roma, and not Roma persons of other nationalities. In view of the Jews, apart from the public display of neo-Nazi symbols, there is at present no other evidence of concerning trends, analogous to those observed in other EU member States.

The vast majority of problems identified with the implementation of the Racial Equality and Victims' Rights Directives in Cyprus relate to long-term structural problems of the Cypriot justice system. Its long-term rigidity and inefficiency lead to challenges such as the lack of a comprehensive system of legal aid, precluding the effective access to justice for the most vulnerable, and the lack of a restorative justice mechanisms. I would add here that in terms of the Racial Equality Directive, the over-reliance of the law on the Commission for Administration, who as already explained, is not a policy-making body as such, and whose role should be complementary to the policies and laws drafted and implemented by governmental organs like the Council of Ministers and the House of Representatives. Similarly, the almost exclusive reliance on the Law Office of the Republic and the Police to properly implement the Victims' Rights Directive causes analogous problems, since justice-related matters fall also under the mandate of the Ministry of Justice and Public Order, which is not mentioned at all in the transposing national law.

Undoubtedly, there has been an obvious ongoing effort to strengthen the national anti-discrimination framework in Cyprus over the last decade, complemented by a comprehensive reform of the justice system, which is still ongoing. However, the multi-dimensional nature of the problem remains a major challenge. At the time of writing, many reforms and new strategic plans have either just been drafted or are still being debated. This makes difficult the drawing of conclusions and estimations for the future. It is therefore suggested that any future training should aim firstly, at building awareness about the problems faced on the ground across sectors, inform on best practices from other EU member States, and also facilitate a cross-disciplinary and cross-sectional dialogue among all three powers (Executive, Legislative, Judiciary), the authorities, civil society organisations, and interest groups, which have a direct interest in the effective implementation of the two Directives discussed here.

IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN GREECE

6 IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN GREECE

DR. MARIA MOUSMOUTI, OLGA MARINEA, DIMITRA MALANDRAKI

THEMISTOKLES AND DIMITRIS TSATSOS FOUNDATION - CENTRE FOR EUROPEAN CONSTITUTIONAL LAW

6.1. Introduction

The purpose of this report is to present the information collected during the implementation of national desk and field research, in the framework of Work Package 2 of the PRESERVERE project. Within the scope of these activities, the research team at the Centre for European Constitutional Law (CECL) focused on the national laws implementing the relevant EU Directives in the national legislation and the effectiveness of their application by the Greek courts, professionals and agencies. In view of the primary objective of this work package, which is to assess whether the EU anti-racism legal framework is applied effectively, the research phase included the conduct of both desk and field research.

In the effort to identify gaps and analyse needs, the team reviewed national and foreign literature surrounding the transposition of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (henceforth, '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 (henceforth, the 'Victims' Rights Directive') in the national legislation. It also provided a legal review of the relevant national laws, as well as case law in order to assess the extent of effective implementation of the European framework to the national context. The research, at this stage, focused on how faithfully the EU Directives have been transposed into national legislation, the extent to which the national laws provide additional protections to vulnerable groups, and the good practices that have been adopted for the implementation of the European framework.

The empirical research, which was the next stage, gave a much clearer idea of the gaps between the letter of the law and its implementation. In this context, the team conducted two focus groups, and six interviews with legal and frontline professionals, either being involved in the study, practice

6.2 Methodology

This section aims to provide a detailed presentation of the research activities conducted in the framework of the PRESERVERE data collection and national reporting in Greece. The desktop and empirical research in Greece included a literature review and implementation of two focus groups of five people each and six in-depth interviews. The purpose of the literature review was to identify and analyse the existing gaps in the implementation of the national anti-racism legal framework in Greece in terms of interpretation, implementation, and effectiveness in the protection of vulnerable groups. The purpose of using focus groups and interviews was to discuss the application of the EU anti-racism legal framework in the field and identify gaps in the implementation of the EU Directives with a sample of legal and frontline professionals and to elicit suggestions for improvement.

The focus groups were conducted within the first week of May, while the interviews followed within the second and third week of May 2022. The identification of participants took into account data regarding their gender, profession and involvement in the study, handling or managing discrimination issues in the field. Potential participants were invited to participate in online focus groups conducted via the Zoom platform, while information on the topic was provided in advance and relevant consent forms were also required. Email invitations included a briefing note that outlined the purpose of the focus groups; explained how issues of confidentiality would be dealt with; made clear that participation was voluntary; described what will be done with outputs, suggestions for action etc; and offered a contact point for further information.

25 legal professionals and frontline officers were originally invited to take part in the focus groups. 17 of the invitees accepted the invitation to participate, but ultimately only 10 joined the online focus groups. What is more, six interviews were conducted with female professionals from the field to facilitate the collection of more detailed information. The interviews took place online. The demographic data of the participants to the field research are outlined below:

Table 5. Gender and profession of focus group 1 participants

Participant 1	Woman	Lawyer
Participant 2	Woman	Prosecutor
Participant 3	Woman	Lawyer
Participant 4	Woman	Lawyer
Participant 5	Woman	Lawyer

Table 6: Gender and profession of focus group 2 participants

Participant 1	Man	Lawyer
Participant 2	Woman	Frontline professional
Participant 3	Woman	Frontline professional
Participant 4	Woman	Frontline professional
Participant 5	Woman	Lawyer

Table 7: Gender and profession of semi-structured interviews participants

Interviewee 2	Woman	Lawyer
Interviewee 2	Woman	Lawyer
Interviewee 3	Woman	Lawyer
Interviewee 4	Woman	Lawyer
Interviewee 5	Woman	Lawyer
Interviewee 6	Woman	Lawyer

All discussions were recorded and analysed afterwards. The collection and coding of legal data was focused on the transposition of the EU Directives of Racial Equality Directive and Victims' Rights Directive to the national legal framework and case laws, during the period 2000 and 2022. The subscription-based legal database NOMOS was the main source of case law data, including Greek national law, European Union law (CELEX integrated), case law and legal journals.

There were two main difficulties dealt with during the implementation of the focus groups; one administrative and one technical. On the one hand, it was difficult to achieve the participation of all relevant target group representatives within the same date and time due to their busy schedule, which led to a shortage of participants in both focus groups. Not being able to attend a focus group during working hours was the most common reason provided by the participants. The participants that dropped out of the focus groups were invited to participate in individual interviews, which were carried out through the ZOOM platform.

On the other hand, both focus groups' participants demonstrated hesitation to discuss topics regarding the EU Directives, but preferred to focus on the implementation of the national legal framework and the gaps between the national law and the field practice. Frontline professionals were reluctant to speak about the EU Directives due to the practical nature of their work, but also legal professionals were hesitant to take a clear stand having little case law knowledge on these specific Directives.

All in all, the participants raised important issues and agreed on the main difficulties regarding the implementation of the laws in Greece. More information on their views is provided on the relevant section.

6.2.1 Setting the scene

According to the Greek legal framework, 'vulnerable social groups or high-risk groups are those groups of the population that have limited or no access to social and public goods and have difficulty or are unable at many levels and in various areas to have a quality of life (e.g., housing, work, satisfactory income, education, medical care, social security, etc.). These are mainly homeless, unemployed/long-term unemployed, people with disabilities (disabled), sufferers (serious pathological problems, mental illness), released prisoners, users and former users of addictive substances, HIV-positive, people from religious or cultural minorities, Roma families, juvenile offenders, battered women, victims of trafficking, refugees, migrants, returnees, victims of natural disasters and natural disasters (fire victims, earthquake victims, flood victims)'.[1]

> ***"Vulnerable population groups" generally refers to the social groups of the population whose participation in social and economic life is difficult.***

Furthermore, Law 4019/2011 (Government Gazette 216 AD[2]) on Social Economy and Social Entrepreneurship defines in article 1 par. 4 the vulnerable groups of the population as 'vulnerable population groups' generally referring to the social groups of the population whose participation in social and economic life is difficult, either due to social and economic problems or physical or mental disorders.[3] The term 'vulnerable population groups' includes those groups of the population whose

[1] See ΕΚΚΕ: Εθνικό Κέντρο Κοινωνικών Ερευνών (2014) Δ. Μπαλούρδος, Ν. Σαρρής, Α. Τραμουντάνης, Μ. Χρυσάκης «Ευάλωτες Κοινωνικά Ομάδες και διακρίσεις στην αγορά εργασίας», Εκδόσεις Παπαζήση, Αθήνα 2014.
[2] See Νόμος 4019/2011 - ΦΕΚ 216/Α/30-9-2011
[3] Ombudsman (2019) Vulnerable Groups. Available from: https://www.synigoros-solidarity.gr/452/evalotes-efpatheis-omades#_ftn1

integration into social and economic life is hindered by physical and mental causes. Further to the people with disabilities or mental disorders and people addicted to drugs, the law also includes 'special groups of the population' referring to those social groups at a disadvantage in terms of their integration into the labour market for economic, social and cultural reasons. These include, in particular, unemployed young people, unemployed people over the age of 50, unemployed women, single-parents, illiterate and long-term unemployed, the inhabitants of remote mountainous and island areas, former or current inmates, people with linguistic or cultural particularities, and immigrants.[4] The target groups of the PRESERVERE project, namely Roma, Jews, Muslims, persons of African descent, fall under these categories, including refugees, immigrants and generally people with linguistic or cultural particularities.

The dominant ethnic minority groups in Greece include Albanians (62 percent of the migrant population), Georgian (4.4 percent of the migrant population), Chinese (4 percent of the migrant population), Pakistani (3.8 percent of the migrant population), Ukrainian (3.1 percent of the migrant population), Russian (2.7 percent of the migrant population), Indian (2.4 percent of the migrant population), Egyptian (2.2 percent of the migrant population), Filipino (1.9 percent of the migrant population) and Bangladeshi (1.8 percent of the migrant population) populations, according to the data of the Ministry of Immigration, which provides long-term residence permits.[5] The Albanian population is the largest estimated to be about 500,000 people in a population of 10,7 million people (i.e. 4.7 percent of the total population). Although Albanians represent a significant demographic in Greece, none of the political parties feature Albanian representatives and despite their economic, religious and (in many cases) cultural integration, Albanian immigrants or second-generation residents still face discriminatory behaviours.[6]

The Roma community in Greece is a different case. The Roma population in Greece is about 265,000 people, according to estimations of the Council of Europe,[7] though difficulties to provide an exact estimate (due to their nomadic nature) have been accounted in the past. The racism and discrimination towards Roma stems primarily from claims that Roma commit crimes, such as thefts, robbery, drug trafficking, and even murder in some rare instances.[8] Roma people in Greece

[4] Ibid
[5] Ministry of Migration (2022) Information Note B, Legal Immigration. Available from: https://migration.gov.gr/tag/enimerotika/
[6] Speed, M.; Alikaj, A. (2020) Albanians make up the biggest immigrant population in Greece, but many still don't feel accepted, Balkan Insight. Available from: https://balkaninsight.com/2020/07/01/rights-denied-albanians-in-greece-face-long-term-limbo/
[7] European Commission (2022) EU Funding for Roma Integration Available from: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/roma-eu/roma-equality-inclusion-and-participation-eu-country/greece_en
[8] Chrysopoulos, P. (2022) International Roma Day: The Stigmatized People of Greece, Greek Reporter. Available from: https://greekreporter.com/2022/04/08/roma-people-greece/

face extreme poverty, at a percentage as high as 100 percent,[9] while integration challenges in the educational, social and political system have been the source of several state interventions, promoting social inclusion of Roma through educational, housing and social care programmes.

People of Sub-Saharan African descent are a population much harder to estimate, due to their legal status. The group is divided into two sub-groups of migrants: a) the first sub-group consists of the long-established migrant populations who came to Greece prior to 1990, including Ghanaians, Nigerians, Ethiopians and Congolese; and b) the second sub-group is the result of more recent migration flows (2008-2011), including from Senegal, Somalia and Guinea.[10] The recent African migration flows consist of males mostly, single in their large majority, relatively young, who transit through Greece in search of a better future in Europe. The long-established groups of immigrants are older on average and better educated. According to estimates, although the number of African newcomers dropped noticeably after 2012, African immigrants suffer a disproportionately large number of racist attacks compared to their population, based on data from the Racist Violence Recording Network (RVRN).[11] At present, most of the migrants from sub-Saharan Africa are undocumented and less than 5,000 individuals have a valid residence permit. Certain Sub-Saharan African nationalities have a record of being better integrated into the Greek labour market, such as Ethiopians, Senegalese, Nigerians and Ghanaians who have obtained employment in Greece, in contrast to the very small number of Guineans and Somalis.

When it comes to the Muslim communities in Greece, the Muslim minority of Greece is the only explicitly recognized minority, which officially forms 0.9 percent of the population.[12] However the actual number is uncertain, with Turkish sources claiming that the Muslim population has reached around 150,000 people, more than 3,5 percent of the population.[13] The minority enjoys full equality with the Greek majority and prohibition against discrimination and freedom of religion, provided under Article 5 and Article 13 of the Greek Constitution, which extends to all Muslim communities regardless of their nationality. Moreover, the Turkish/Muslim minority enjoys additional specific minority rights regarding religious freedom and linguistic rights in parallel to the nexus of rights that (Greek) citizenship entails. There are three domains in which minority rights result in distinct

[9] The Economist (2016) Poverty among Europe's Roma community: A new report sheds light on the continent's biggest ethnic minority. Available from: https://www.economist.com/graphic-detail/2016/11/30/poverty-among-europes-roma-community

[10] Papadopoulos, A. (2015) African immigrants in Greece, Heinrich Boell Stiftung. Available from: https://gr.boell.org/en/2015/10/21/african-immigrants-greece

[11] UNHCR Greece (2020) Racist Violence Recording Network: Annual Report 2020. Available from: https://www.unhcr.org/gr/en/19763-racist-violence-recording-network-annual-report-2020.html

[12] Υπουργείο Εξωτερικών (2018) ΜΟΥΣΟΥΛΜΑΝΙΚΗ ΜΕΙΟΝΟΤΗΤΑ ΘΡΑΚΗΣ. Available from: http://www.hri.org/MFA/foreign/musmingr.htm

[13] Usta, B. (2021) Greece rejects legal demands of Muslims for place of worship, Daily Sabah. Available from: https://www.dailysabah.com/world/europe/greece-rejects-legal-demands-of-muslims-for-place-of-worship

bodies or institutions, including three muftis (religious authorities), minority schools offering bilingual education and Muslim community property. Finally, there are approximately 300 mosques and 270 local practising imams in Thrace. The predominance of the Greek Orthodox Church in the country makes many Greeks consider non-Orthodox individuals as fundamentally non-Greek. Greeks embrace Christianity as a key part of their national identity. The large majority of Greeks consider their Orthodoxy as part of their national identity. These attitudes are sometimes reflected in the cultural integration process of the Muslim populations in Greece.

6.3 The anti-racism legal framework in Greece

This section focuses on the presentation of the Greek laws that transposed/implemented the EU Directives into national legislation, an overview of the process of transposition and a legal review of the content incorporated, the extension of the national laws to offer additional protections to vulnerable groups and the identification of good practices that have been adopted for the more effective application of the European framework.

6.3.1 Transposition of Directive 2000/43/EC

The Racial Equality Directive represents a key measure in this regard as a framework for combating discrimination and giving effect to the principle of equal treatment. The Directive was adopted in 2000 and has brought about the introduction of new or the strengthening of existing equality regimes in the Member States. As with many other Member States, the transposition procedure of the Racial Equality Directive in Greece did not go smoothly. In 2004, the European Commission instigated infringement proceedings against Greece, among several countries, due to their non-compliance with the Racial Equality Directive.[14] Proceedings against Greece ceased due to Law 3304/2005 transposing the Directive, thereby covering the principle of equal treatment in relation to the five established grounds in the areas designated by the Directive.[15]

Article 1 of the Directive notes that its purpose is to lay down a general regulatory framework for combating discrimination on the grounds of racial or ethnic origin, as well as combating discrimination on the grounds of religion or other beliefs, disability, age or sexual orientation in the spheres of occupation and employment. It becomes evident that the Greek legislature did not intend to provide specific regulations with regard to the implementation of the principle of equal

[14] Delays in transposition of EU Directives have emerged before. These do not represent an opposition to the Directives; rather, the delays are due to bureaucratic reasons in Greece.
[15] Alkiviadou, N. (2017) A critical assessment of the impact of the 2000 equality Directives on Greece. International Journal of Discrimination and the Law, 17 (4). pp. 220-238. Available at: http://clok.uclan.ac.uk/21364/

treatment, but a general framework.[16] According to Alkiviadou, Law 3304/2005 provides an identical transfer of the scope of protection provided in the Directive.[17] Chapter 2 extends the prohibition of discrimination to occupation, membership of an association of workers or employers, vocational training, social protection, social advantages, education and access to and supply of goods and services. Chapter 3 limits its scope to employment, membership of an association of workers or employers and vocational training. Although the law is implementing the provisions of the Directives, the provisions on racial discrimination are granted a wider scope encompassing additional provisions.

> ***"Greek legislature did not intend to provide specific regulations with regard to the implementation of the principle of equal treatment, but a general framework."***

In September 2014, a new anti-racism law, Law 4285/2014 was adopted by the Greek Parliament aiming at strengthening the existing anti-racism criminal legislation.[18] Law N. 4285/2014 sets a national framework for combatting certain forms and manifestation of racism and xenophobia through criminal law, on the (perceived) characteristics of the victim including race, colour, genealogical background, national or ethnic origin, religion, sexual orientation, gender identity and disability (Law 4285/2014, Art. 1). The new Law amends the previous Anti-racism Law (927/79) by specifically including all the grounds of discrimination, except age.[19]

The legislation was delivered during a period of (state) racist discourses and the systematic targeting of the nation's racial, gender, religious and sexual 'others'. Arguably, the murder of anti-fascist rapper Pavlos Fyssas by a Golden Dawn (the far-right ultranationalist political party in Greece) supporter was the turning point at which the Minister of Public Order and Citizen Protection (N. Dendias) forwarded to the public prosecutor a file including several cases of similar attacks, instigating the criminal investigation that led to the arrest of the party's MPs for organised criminal activity.[20] Following the initiation of the judicial process against Golden Dawn in 2013, the strengthening of the legal framework against 'racist crimes' remained a strong demand of international actors, as well as the national left-wing forces.[21]

[16] Theodoris, A. (2014) "Report on Measures to Combat Discrimination: Directives 2000/43/ EC and 2000/78/EC, Country Report 2013 - Greece, State of Affairs up to January 1, 2014," European network of legal experts in the non-discrimination field, 8.
[17] Alkiviadou, N. (2017) A critical assessment of the impact of the 2000 equality Directives on Greece. International Journal of Discrimination and the Law, 17 (4). pp. 220-238. Available at: http://clok.uclan.ac.uk/21364/
[18] ECRI report on Greece (2015) CRI(2015)1. Available from: https://rm.coe.int/fifth-report-on-greece/16808b5796
[19] European Commission (2016) Country report on Greece. Non-discrimination. Available from: https://ec.europa.eu/info/sites/default/files/2016-el-country_report_nd_final_en.pdf
[20] Psarras, D. (2015) Golden Dawn on trial. Athens: Rosa-Luxemburg-Stiftung.
[21] Kasapidou, R. (2021) The introduction of "anti-racist legislation" in the Greek legal order: Political strategies, legalised violence and the formal protection of gender identity. Vol 10, No 2.

Therefore, the government was forced to renegotiate the introduction of what was widely known as the 'anti-racist bill' that had already been postponed in the past. The resulting law, Law 4285/2014, was adopted in order to transpose the European 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.[22] Overall, the introduction of the new legislation against 'racist crimes' touched upon the ongoing political conflicts within Greek society and took a central place at the national political agenda from the outset of its negotiation.

Article 82A of the Penal Code (as amended by Law 4619/2019) dealing with 'Crimes with racist characteristics', covers all crimes committed on the basis of race, colour, national or ethnic group, religion, disability, sexual identity/ sexual orientation and gender identity. According to article 82A, a crime with racist characteristics has been committed, if the victim was selected on the basis of their race, colour, nationality or ethnicity, genealogical decent, religion, disability, sexual orientation, identity or gender characteristics. This crime leads to increased punishment. That is, the crime (e.g. homicide, bodily harm, lechery, rape, insult to sexual dignity, threat - intimidation, insult, etc.) is punished more severely when committed with a racist motive. In the case of a misdemeanour, punishable by imprisonment of up to one year, the minimum sentence shall be increased by six months. In other cases of misdemeanours, the minimum limit of the sentence is increased by one year. In the case of a felony, the minimum sentence is increased by two years.[23]

6.3.2 Transposition of Directive 2012/29/EU

The **Victims' Rights Directive** establishes minimum standards on the rights, support and protection of victims of crime and ensures that persons who have fallen victims to crime are recognised and treated with respect. The Directive was adopted in 2012 and 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. The Directive also requires that EU countries ensure appropriate training on victims' needs for those officials who are likely to come into contact with victims.

The implementation of the Victims' Directive was not a fortunate example of transposition in Greece. Providing that the deadline for the harmonisation of the national legislation was 16th November 2015, Greece was amongst the 16 Member-States which did not send a communication

[22] Liger, Q. & Guhteil, M. (2022) Protection against racism, xenophobia and racial discrimination, and the EU Anti-racism Action Plan, European Parliament. Available from: www.europarl.europa.eu/RegData/etudes/STUD/2022/730304/IPOL_STU(2022)730304_EN.pdf

[23] Ministry of Justice (2020) National action plan against racism and intolerance 2020-2023. Available from: https://moj.gov.gr/wp-content/uploads/2021/03/NAPRI-en.pdf

to the European Commission, but ultimately transposed the Directive 17 months later, in June 2017. This was due to the fact that the law-making procedure only started in late 2016, thus reducing the time provided for the completion of the individual steps of the process. The Directive was finally transposed in June 2017 when Law 4478/2017 entered into force. The country adopted the new law on 23rd June 2017 and communicated the enactment to the Commission before the referral of the case to the CJEU.[24]

In 2017, the European Parliament verified that the Victims' Directive had been fully transposed to the national legal order. Articles 54-71 of Part IV of Law 4478/2017 are dedicated to the harmonisation of the Greek legislation with the Directive's requirements and have incorporated the majority of the Directive's provisions. As illustrated in the Correspondence Table, the remaining articles of the Victims Directive were deliberately not repeated in the new law, because they overlap with existing provisions of the Criminal Penal Code and other Greek legal documents.[25] The fourth part of the law is supplemented by Articles 72-77, which specify the details for the foundation and operation of the relevant agencies, authorised with the assessment of the individual needs of victims of crime.

According to Ververidou's review, the comprehensiveness of the national transposition does not indicate a faultless adoption of the Victims' Directive. Article 68 of Law 4478/2017 corresponds to Article 22 Victim's Directive and somewhat follows the structure of the original provision. Paragraph 1 of Article 68 repeats the content of the correspondent article of the Directive. However, two additions were made: first, a reservation was introduced in the Greek version, giving precedence to the personal and professional freedom of the judicial authorities over the importance of the individual assessment. Therefore, the judicial authorities have an increased authority to assess the personal characteristics of the victim, the nature and the circumstances of the crime. Second, the referral of the victim to the competent authorities for the procedure depends upon the victim's relevant request. Paragraph 2 of Art. 68 offers a far more detailed explanation of the criteria which constitute the basis of the individual assessment in Article 22 of the Directive. This was articulated in accordance with the relevant Recital 56 Victim's Directive and the EU guidelines for the implementation of the Directive's provisions in Member States. Finally, given the fact that the wording of paragraph 7 Article 22 of the Victims' Rights Directive, which makes reference to the update of the individual assessment, was copied in paragraph 5 Article 68 Law 4478/2017 the conditions of 'significant change' mentioned in the Directive remain largely ambiguous and thus unaddressed at a national level.

[24] Ververidou, F. (2019) Raising the standards of child victims' protection: An in-depth review of the transposition of the EU Victims' Directive in Greece, See-View Working Paper No 4. Available from: https://www.seerc.org/new/images/SEE_VIEW_-_Working_paper_No.4.pdf

[25] Υπουργείο Δικαιοσύνης (2017) Ενσωμάτωση της Οδηγίας 2012/29/ΕΕ για τη θέσπιση ελάχιστων προτύπων. Available from: http://www.opengov.gr/ministryofjustice/?p=7978

> ***The exact translation of the European leagl act has been disapproved by law professionals for being inconsistent with the Greek legal terminology***

In most aspects, the European legal act was adopted verbatim, enriched with clarifications provided in the respective Recitals and the DG Justice's guidelines. Furthermore, the exact translation of certain terms has been disapproved by law professionals for being inconsistent with the Greek legal terminology. In some respects, Law 4478/2017 went beyond the minimum regulatory framework of the Victims' Rights Directive. This is reflected, for example, in the expansion of the legal protection of victims through broader definitions of main terms, such as indirect victims or in specific provisions; through the inclusion of additional categories of persons who benefit from the victim support service; and by the elaborated description of certain measures and orders to improve their implementation. The few shortcomings of the new law are associated with delays in administrative procedures, rather than substantial omissions in the transposition of the European Directive.

6.4 Application of the anti-racism legal framework in Greece

On the basis of the collection and coding of the relevant case laws, it has become evident that while the transposition of the EU Directives did not occur without challenges, the national laws provide a comprehensive and effective framework of protection to vulnerable population groups, as defined by law. The main findings of the empirical research conducted are outlined below:

6.4.1 Familiarity of stakeholders with the EU Directives

The knowledge of the two EU Directives, namely Directive 2000/43/EC and Directive 2012/29/EU, is limited among the two project target groups, even among legal professionals. EU Directives are incorporated into domestic law by statute, by presidential order or by ministerial decision and therefore become national laws following the transposition procedure. Despite the fact that the two Directives exceeded their required timeframe for transposition to the national legal framework, no case law has relied directly on the EU Directives.

Legal professionals showcased (at the focus groups/ interviews) a better understanding of the content of the EU Directives and the comprehension of their transposed national laws, even though they, allegedly, lack specific training in European secondary law - except for the cases where they are specialised in European or International law. This being said, not all lawyers would be comfortable with discussing the two Directives in question, unless they have been involved in, e.g. a relevant

case as a defender, or as part of their profession they are exposed to racist incidents, e.g. as a legal representative of an NGO supporting migrants. As one of the interviewees noted, usually the transposition of an EU Directive includes the 'word-to-word' transfer of the legal text from English to Greek. The Racial Equality and Victims' Rights Directives are examples of this phenomenon and are generally considered to be a satisfactory transposition case in the national legal framework.

Frontline professionals were largely unfamiliar with the EU legal or national framework, and hence the two EU Directives. What is more, the potential victims of racism are seldom aware of the European or the national laws surrounding racial equality or victims' rights, unless they consult a legal professional or a non-governmental organisation and are driven to this conclusion.

6.4.2 Practical use of the EU Directives

The Greek courts normally rely on the national legal framework, which is the reason that there is little knowledge of the EU Directives even among prosecutors or judges. Nevertheless, the transposed national anti-racism laws, as cited in the previous sections of the report, are used by the Greek courts when developing their legal reasoning, and there is an increased number of cases between 2015 and 2020, as noted during the coding of data phase of the research.

When it comes to potential victims of racism, the service of legal aid is only available to them through their communities (e.g. Greek Forum of Migrants, Albanian community, Pakistani community etc.) or non-governmental organisations that provide aid (e.g. ActionAid, Hellenic League for Human Rights etc.). As the majority of potential victims are undocumented migrants (roughly estimated around 100,000 arriving a year), all research participants agreed that it is unlikely for victims to address the official authorities, especially due to the fear of 'getting caught' and deported. This reality eliminates their options when it comes to declaring an incident to the authorities, without the support of a trusted agent. What is more shocking in this context, is that (according to the Racist Violence Recording Network) as high as 30 percent of racist violence towards migrants often comes from the police.

Non-governmental organisations (representatives of which participated in the focus groups) are generally supportive in the application of the anti-racist national laws either by virtue of legal consulting or practical support, including e.g. the provision of medical and/or social services to victims of racist violence or other violent attacks motivated by hatred or prejudice. Additionally, the Racist Violence Recording Network (RVRN), which operates under the auspices of the Greek National Commission for Human Rights (GNCHR) and the Office of the United Nations High Commissioner for Refugees in Greece (UNHCR), currently provides legal, medical, social or other

support services to victims of racist violence, in the absence of a formal and effective system for recording incidents of racist violence and due to the need to liaise with those who record incidents involving persons who come to their services. The RVRN, established in 2011, constitutes the only organisation to date that collects and processes data regarding the statistics of racist violence in Greece. Nevertheless, the RVRN, alongside the Greek Ombudsman and the Migrant & Refugee Integration Council of the Municipality of Athens, have an observer status and cannot substitute the state authorities in the legal procedure.

6.4.3 Education and training relevant to the EU Directives

According to the feedback collected from the participants to our study, there is large room for improvement when it comes to the provision of training on the EU and national anti-racism legal framework. At first, there is no state provision of training to active legal professionals and practising lawyers, unless they have attended relevant courses at the university. On the one hand, it is expected that relevant training would resonate among legal professionals, who are involved in similar cases or are employed by organisations in the field of human rights. Nevertheless, similar specialised training courses should utilise the role of the bar associations in order to achieve high attendance of individual lawyers. Additionally, practicing lawyers seek to receive practical, case-specific training rather than a theoretical overview of the Directives.

On the other hand, frontline professionals are less familiar with the legal terminology, and therefore a highly specialised training course would discourage them to attend. However, they are interested in the practical application of the laws, in terms of protection of potential victims. As they have noted during the first focus group, frontline professionals are usually called upon providing aid and support to people via utilising their hands-on knowledge, experience from previous cases or as liaisons to other organisations. Only when a non-governmental organisation features a well-organised legal service, will frontline officers step back from their duty to support and follow up with potential victims. In rare cases, they receive specialised training in the context of co-funded projects, which however is provided in an irregular, ad hoc basis. All in all, they are eager to receive training in a regular and methodical fashion, which should not focus on the theoretic but the applied aspects of the law.

All participants underlined the absence of state provision of legal training to the relevant stakeholders, which is allegedly the main reason of the gap that ensues between a comprehensive legal framework and its ineffective application, especially to vulnerable populations groups in Greece, with a special focus on irregular migrants. The public authorities, including especially public services and the police, should be further involved, informed and trained on the application of the anti-racism legal framework (both national and European).

IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN ITALY

7 IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN ITALY

GABRIELLA FABRIZI, VALENTINA IACONO QUARANTINO
COOPERATIVA SOCIALE S. SATURNINO ONLUS

NICOLÒ PALMIERI, MARTINA PIERFEDERICI
LAI-MOMO COOPERATIVA SOCIALE

7.1 Introduction

The Italian regulatory system against racism and discrimination is various and overall well done, despite official data show that cases of racism are the order of the day. This inconsistency has already been pointed out by another European project: 'Voci di Confine'.[1]

The European project 'PRESERVERE' (Preventing Racism and Discrimination – Enabling the Effective Implementation of the EU Anti-Racist Legal Framework) aims to propose actions to prevent and combat racism and xenophobia through a more effective implementation of the European legal framework already transposed in the Member States of the partnership: Italy, Cyprus, Netherlands, Greece, Bulgaria and Malta. In particular, the project will develop educational materials for legal professionals and frontline practitioners. To this purpose, it will make use of preliminary research: the findings of the Italian research are set out in this report.

The Italian legal framework has fully and correctly implemented both the 'Racial Equality Directive'[2] and the 'Victims' Rights Directive'[3]. As for the concrete implementation of the two Directives, in this research we have referred to the jurisprudential pronouncements of several Courts or Courts of Appeal in Italy (Rome, Milan, Brescia, Ferrara, Florence) in addition to the two most significant

[1] 'Voci di confine. La migrazione è una bella storia' (Progetto Melting Pot Europa) <https://www.meltingpot.org/2017/05/voci-di-confine-la-migrazione-e-una-bella-storia/> accessed 25 May 2022. [Voices of the Border. Migration is a beautiful story]

[2] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origins [2000] GU L 180/22.

[3] 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 the Framework Decision 2001/220/GAI [2012] GU L 315/57

pronouncements at the national level, namely the Supreme Court of Cassation Judgments No. 11165 and 11166 of 8 May 2017 in Rome. The implementation of the European Directives only passes through a jurisprudential elaboration of the issue since the crime of racial discrimination does not yet exist in the Italian legal system. The analysis conducted in this report also made use of interviews and focus groups with experts in the field, who are engaged in the front line of anti-discrimination. Interviews and focus groups were conducted in both Rome and Bologna, cities where the organisations involved in this report are based. The research identified good practices, as we will see below.

7.2 Methodology

This report is based on an analysis of: (a) primary sources, (b) secondary sources and (c) field research using focus groups and individual interviews. The primary sources, (a) i.e. legislation and court decisions, formed the basis for the drafting of Chapter 4 of the report, concerning the Italian legislation. Chapter 3, which outlines the landscape of the discriminated categories under analysis in this report, made extensive use of secondary sources (b). Chapter 5, on the implementation of anti-discrimination legislation in Italy, is based on the results gathered from the individual interviews and focus groups (c). Chapter 6 which puts forward some recommendations for possible future actions, also drew on the focus groups and individual interviews (c).

A total of 20 people were interviewed, divided by two focus groups and single interviews. Two focus groups were held: one with professionals working in direct contact with ethnic discrimination cases; the other with legal professionals. The first focus group included two members of the police force (a man and a woman), five legal advisors of third sector's organisation who supports migrants (two men and three women) and one female counsellor of an experimental territorial anti-discrimination support and guidance service. The second one included one (male) labour judge and five lawyers (four women and one man).

The interviews involved 10 women: three lawyers; four counsellors of an experimental territorial anti-discrimination support and guidance service; one counsellor of an information, guidance, and specialist advice desk; one municipal officer involved in combating racial and ethnic discrimination; finally, one member of UNAR. Four people took part both in focus groups and in single interviews. The majority of the people who took part in the interviews and focus groups came from Bologna (82 percent of the people involved), the others from Rome (18 percent of the people involved).

Both focus groups and interviews took place in April and May 2022 and were organised by contacting the referents of the territorial services that assist and support foreign persons

(especially asylum seekers), the Order of Lawyers of Bologna, the Bologna Bar Association and the various legal associations that deal with research-related issues. Lawyers belonging to the Rome Bar Association were also involved. An overall number of 45 people were contacted to participate in either interviews or focus groups.

The most evident difficulties were of an organisational nature: the schedule of meetings had to be redefined several times and, in some circumstances, participants had to be replaced due to last-minute commitments, which did not allow those invited to attend. Lawyers, in particular, were

the most difficult subjects to involve, due to the large number of commitments and the difficulty in dedicating extended time to interviews. As for practitioners, some uncertainties concerned the self-perception of 'inadequacy' that sometimes prompted them to withdraw their consent. These challenges resulted in the drop-out of some of the contacted practitioners who had first accepted to take part in the research.

The empirical research was based on the case study approach. It referred to the cities of Rome and Bologna. Therefore, it does not aspire to outline an exhaustive picture of the Italian context.

7.3 The reference panorama

The total of residents in Italy in 2020 amounted to 59,257,566 people.[4] In Italy, several groups of people are discriminated against on a racial and ethnic basis. Information gathered by the United Nations High Commissioner for Human Rights (OHCHR) shows that particular groups are more negatively affected by discrimination. These include migrants and people belonging to minorities, including Roma, religious minorities, and people of African descent.[5]

The Observatory for Security Against Discriminatory Acts (OSCAD) recorded 1,048 hate crimes in 2017, of which 828 (79 percent) were based on race, nationality, language and religion.[6] In 2018, hate crimes reported to the police amounted to 1,111, of which 613 were prosecuted and 49 sentenced. In 2019, hate crimes reported to the police numbered 1,119, but there is no break-down into categories available. In 2020, they amounted to 1,111. Italy also regularly reports hate crime data to the Office for Democratic Institutions and Human Rights (ODIHR), an institution that is part of the Organisation for Cooperation and Security in Europe (OSCE). Italy's Criminal Code contains a

[4] Centro Studi e Ricerche IDOS, Dossier Statistico Immigrazione 2021 (Idos Edizioni 2021) 14.
[5] Anne Bayefsky (ed), The UN Human Rights Treaty System in the 21 Century (Brill | Nijhoff 2000).
[6] OSCE ODHIR, 'Hate crime reporting' (Italy | HCRW) <https://hatecrime.osce.org/italy> accessed 8 June 2022.

general penalty and aggravating circumstances. Hate crime data are collected by law enforcement authorities and the Ministry of Interior. Data are not made publicly available.

Table 8. Hate crimes recorded, prosecuted and sentenced by police

Year	Hate crimes recorded	Hate crimes prosecuted	Hate crimes sentenced
2016	736	424	31
2017	1048	613	40
2018	1111	613	46
2019	1119	-	-
2020	1111	Not available	Not available

This report will consider ethnic discrimination perpetrated against people of African descent, Roma and Sinti, people of Muslim religion and Jews in Italy.

7.3.1 Discrimination against people of African descent and Muslims

A reference to the category of persons of African descent can be found in the 'European Parliament resolution of 26 March 2019 on the fundamental rights of persons of African descent in Europe'. According to this Resolution, 'the expression "persons of African descent" [...] refers to people of African ancestry or descent who are born in, citizens of, or living in Europe'[7].

In Italy, there does not seem to be any data on the overall numerical presence of this category of people, at least to the knowledge of the research team that prepared this report. However, it may be of help to report relevant data in this regard, even if they were processed using different methodologies.[8]

An initial set of data useful for the analysis in question is provided by the 'Immigration Statistics Dossier 2021', produced by the IDOS Study and Research Centre in collaboration with the Confronti Study Centre and the 'S. Pio V' Institute for Political Studies.[9] It reports the National Institute of

[7] European Parliament resolution of 26 March 2019 on fundamental rights of people of African descent in Europe (2018/2899(RSP).
[8] The purpose of the research on which this report is based is not to systematise these data in a coherent methodological perspective, but rather to provide an overall overview of the presence in Italy of people of African descent.
[9] IDOS (n 4) 106.

Statistics (ISTAT) data of the 'Survey on the movement and calculation of the resident foreign population and structure by citizenship'. According to this data, in 2020, foreign resident in Italy with citizenship from African countries numbered 1,099,938, or 21.9 percent of the total number of foreigners.[10]

In order to draw a complete statistical picture of people of African descent, further categories of people would also have to be taken into account, in particular, naturalised and undocumented persons. As for the naturalised, the Neodemos website shows that on 1 January 2019 there were 1,457,784 foreigners who acquire Italian citizenship.[11] This estimate results from the data of the ISTAT Annual Report of 2019. By adding to this data the one of citizenships issued in 2018 (112,523) (ISTAT data), one reaches the total number of 1,457,784 foreigners who acquire Italian citizenship. Of these, according to the author of the Neodemos publication, the Italian sociologist Fabrizio Ciocca, people coming from the African continent would be estimated 'at well over 300,000 (including 200,000 Moroccans, 25,000 Egyptians, followed by Tunisians and Senegalese)'.[12] These would be people who have become 'Italian by residence, marriage, or transmission of citizenship received from parents to children in the case of minors'.[13]

As for the irregular foreign population in Italy, the sociologist Ciocca goes on to point out that, according to estimates by the Initiatives and Studies on Multiethnicity (ISMU) Foundation, at the beginning of 2018, there were about 533,000 non-EU citizens, especially from Asia and Africa. Given the lack of more precise information on irregular foreigners in Italy of African nationality, he assumed an estimate of approximately 200,000 people, based on a logical-deductive reasoning based on pre-existing data.[14]

A 2018 survey by Fundamental Rights Agency (FRA) that interviewed people of African descent[15] in 12 Member States shows that, in Italy, 23 percent of the respondents reported an overall prevalence of discrimination based on 'ethnic or immigrant background' in the 12 months prior to the survey.[16] 49 percent of respondents reported prevalence of the same type of discrimination in five years prior to the survey.[17]

[10] Fabrizio Ciocca, 'Africani d'Italia' (Neodemos, 12 Novembre 2019) <www.neodemos.info/2019/11/12/africani-ditalia/> accessed 21 May 2022.
[11] ISTAT, *Rapporto annuale 2019: La situazione del Paese* (Istituto nazionale di statistica 2019).
[12] Ciocca (n 10).
[13] Ibid.
[14] Ibid.
[15] This EU survey considers people of African descent as involving 'first-generation immigrants living in the EU and born in a Sub-Saharan African country and for persons with at least one parent born in Sub-Saharan Africa (second-generation respondents)'. European Union Agency for Fundamental Rights, *Being Black in the EU: Second European Union Minorities and Discrimination Survey* (2018) 8 <https://ec.europa.eu/migrant-integration/library-document/being-black-eu-second-european-union-minorities-and-discrimination-survey_en> accessed 17 May 2022.
[16] Ibid 41.
[17] Ibid.

With regard to the number of Muslims in Italy, according to the 'Pew Research Center', in 2020 there were about 2.7 million, or 4.9 percent of the resident population in Italy, the third largest in terms of religious affiliation (the first largest group is represented by Christians, while the second one by atheists and agnostics). This figure includes both Italian citizens and residents with foreign citizenship.[18]

According to the results of a 2017 statistical survey conducted by FRA, Muslim respondents from North Africa are the most likely to be discriminated against on the basis of ethnic or immigrant background in Italy (33 percent of the respondents to the survey).[19] Muslim women experience this form of discrimination more than men in the same reference group (31 percent of the respondents to the survey versus 20 percent in Italy).[20]

For Muslim respondents with Sub-Saharan African origins, in Italy skin colour or physical appearance is the most important reason for discrimination when looking for work or in the workplace.[21] On average, Muslim respondents from North and Sub-Saharan Africa say they have been stopped more often by the police and perceive these stops as discriminatory.[22] 73 percent and 69 percent respectively from North Africa and Sub-Saharan Africa in Italy believe they were stopped by police because of their ethnic origin or because they were immigrants.[23]

7.3.2 Discrimination against Roma and Sinti

A further ethnic minority examined in this report is the Roma and Sinti population. This is an ethnic minority 'without territory'[24] subdivided into groups and subgroups. People belonging to this ethnic minority are referred to as 'Roma' or 'Sinti' (the latter appellation is used 'in case they have historically settled in northern Italian regions').[25]

[18] Openpolis, 'La presenza dei musulmani in Italia' (Openpolis, 18 June 2021) <www.openpolis.it/la-presenza-dei-musulmani-in-italia/> accessed 23 May 2022; Pew Research Center's Religion & Public Life Project, 'Religions in Italy' *(PEW-GRF)* <http://globalreligiousfutures.org/countries/italy#/?affiliations_religion_id=0&affiliations_year=2020&region_name=All%20Countries&restrictions_year=2016> accessed 24 May 2022.
[19] European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey. Muslims – Selected findings* (2018) 28 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf > accessed 23 May 2022.
[20] Ibid 30
[21] Ibid 34-35.
[22] Ibid 53.
[23] Ibid.
[24] Maurizio Ambrosini, *Sociologia delle migrazioni* (Il Mulino 2020) 341.
[25] Ibid.

Regarding the population of Roma and Sinti in Italy, it is equally difficult to find data. According to Associazione 21 Luglio, Italy has no instruments to identify and quantify the number of Roma and Sinti persons in the country.[26] This Association reports that currently available official estimates, although lacking supporting sources, refer to approximately 180,000 people. The 'Immigration Statistics Dossier 2018' refers to a relative numerical presence in Italy of approximately 150,000-170,000 people.[27] However, these figures have allegedly increased in recent years, according to the Italian sociologist Maurizio Ambrosini.[28]

As illustrated by Associazione 21 Luglio,

> the vast majority of Roma and Sinti live in conventional housing. Only 13,400, mistakenly considered as 'nomads', have been living for decades within ethnically designed institutional spaces: Roma/Sinti camps, assembly centres, mono-ethnic residential areas. About 5,500 in informal settlements.[29]

Discrimination against Roma and Sinti is multi-faceted. In its 2019 annual report, Associazione 21 Luglio pointed out an element regarding the Roma community, and specifically those who experience ethnic segregation and social marginalization in institutional and informal slums. Namely, the rhetorical national politics and episodes of anti-gypsyism recorded reached their peak during the 'census' of Roma settlements and the closure of and/or eviction from the slums scattered throughout the country.[30] In 2019, the Observatory of Associazione 21 Luglio recorded a total of 102 incidents of hate speech against toward Roma and Sinti, of which 39 (38.2 percent of the total) were classified as of a certain severity.[31]

7.3.3 Discrimination against the Jewish population

The numerical presence of Jews in Italy according to UCEI (Union of Italian Jewish Communities) would be around 28,000.[32] A similar estimate was provided by the World Jewish Congress, to which UCEI is affiliated: the Jews present in Italy in mid-2020 would be 30,000.[33]

[26] Associazione 21 Luglio, 'Il Paese dei Campi' *(Il Paese dei Campi)* <www.ilpaesedeicampi.it/> accessed 23 May 2022.
[27] Ambrosini (n 24) 342–343.
[28] Ibid 343.
[29] Associazione 21 Luglio (n 26).
[30] Associazione 21 Luglio, *Periferie lontane: Comunità rom negli insediamenti formali e informali in Italia. Rapporto 2019* (*Associazione 21 Luglio Onlus*, 2020) <www.21luglio.org/2018/wp-content/uploads/2020/11/periferie-lontane.pdf> accessed 10 June 2022.
[31] Ibid 48.
[32] Office of the Special Envoy for Holocaust Issues United States Department of State, 'The JUST Act Report: Italy' *(United States Department of State)* <www.state.gov/reports/just-act-report-to-congress/italy/> accessed 17 May 2022.
[33] World Jewish Congress, 'Communities. Italy' *(World Jewish Congress)* <www.worldjewishcongress.org/en/about/communities/it> accessed 17 May 2022.

Data collected by the EU Agency for Fundamental Rights (FRA) in 2018, show a strong entrenchment of anti-Semitism in Europe, leading to a feeling among Jews of an increased likelihood 'of being faced with a sustained stream of abuse expressed in different forms, wherever they go, whatever they read and with whomever they engage'.[34] As for Italy, out of a total of 692 Jewish people interviewed in the course of the research, 73 percent recognised that anti-Semitism is a problem in the country and that its severity has increased.[35]

In recent years, hate speech and bullying on the Internet have been the most common forms of anti-Semitic attacks. The 'Map of intolerance' drawn up by the Italian Observatory on Rights-VOX reports for 2020 a radicalisation of hatred via social media that sees women 'the most affected category, followed by Jews'.[36] According to the study, anti-Semitism was found to be 'on the rise in absolute terms over 2019', confirming a constant 'upward trend' since 2016.[37] This trend is confirmed by the Anti-Semitism Observatory of the Contemporary Jewish Documentation Centre Foundation CDEC Onlus.[38] In 2021, the Observatory received 400 reports, of which 226 were classified as acts of anti-Semitism. In particular, 181 episodes took place on the internet, while 45 happened in the "real" world, including one episode of "extreme violence" and 5 'physical assaults'. It has been years since the last time that six violent incidents were recorded in a single year.[39]

In order to contain these incidents and protect community members, in 2020, 123 anti-Semitic incidents have been reported, including acts of violence, and more than 2,000 police officers guarded synagogues and other Jewish community sites across the country.[40] Furthermore, in January 2020, the government appointed a National Coordinator for the fight against anti-Semitism.[41]

[34] European Union Agency for Fundamental Rights, *Experiences and perceptions of antisemitism. Second Survey on discrimination and hate crimes against Jews in the EU* (2018) 11 <https://fra.europa.eu/en/publication/2018/experiences-and-perceptions-antisemitism-second-survey-discrimination-and-hate> accessed 23 May 2022.
[35] Ibid 19.
[36] Redazione VOX, 'La nuova mappa dell'intolleranza 5' *(Osservatorio italiano sui Diritti VOX)* <www.voxdiritti.it/la-nuova-mappa-dellintolleranza-5/> accessed 23 May 2022.
[37] Ibid.
[38] Betti Guetta, Stefano Gatti, Murilo H. Cambruzzi (ed), *Annual report on antisemitism in Italy: 2021* (Fondazione Centro di Documentazione Ebraica Contemporanea 2022) 7 <https://osservatorioantisemitismo.b-cdn.net/wp-content/uploads/2022/01/ANNUALE_2021_ENGLISH.pdf> accessed 21 May 2022.
[39] Ibid 3.
[40] Bureau of Democracy United States Department of State Human Rights, and Labor, '2021 Country Reports on Human Rights Practices: Italy' *(United States Department of State)* <www.state.gov/reports/2021-country-reports-on-human-rights-practices/italy/> accessed 21 May 2022.
[41] Governo Italiano Presidenza Consiglio dei Ministri, 'Il Coordinatore Nazionale per la lotta contro l'antisemitismo' (*Governo italiano*, 12 January 2022) <www.governo.it/it/noantisemitismo/il-coordinatore-nazionale-la-lotta-contro-l-antisemitismo/18979> accessed 24 May 2022.

7.4 The anti-racism legal framework in Italy

7.4.1 The transposition of the Racial Equality and Victims' Rights Directives in the Italian legal framework

It's important at first to understand how faithfully the relevant Directives (Race Equality Directive[42] and Victims' Rights Directive[43]) have been transposed into Italian law. In Italy, these two Directives have been transposed respectively by Legislative Decree 9 July 215/2003[44] and by Legislative Decree 15 December 212/2015.[45] Legislative Decree No. 215 transposes the guiding criteria of the Racial Equality Directive, specifying the concepts of harassment, 'direct discrimination' and 'indirect discrimination', and recognising the right to take legal action also for associations representing interests harmed by discrimination.

Based on the definitions offered by the legislation, 'direct discrimination' occurs when, because of ethnic origin, one person is treated less favourably than another is, has been or would be treated in a similar situation (e.g. the employer refuses to hire a skilled worker not because he/she is unqualified, but because he/she is black). On the other hand, 'indirect discrimination' occurs when an apparently neutral provision, criterion, practice, act, covenant or conduct may put persons of a certain ethnic origin at a particular disadvantage compared to other persons (e.g. the employer requires high standards of knowledge and use of the Italian language; in itself, the request is legitimate when the job in question involves activities for which such knowledge is indispensable, but may constitute indirect discrimination when it involves, for example, manual work).

With Legislative Decree No. 212 of 15 December 2015, the Italian legislature transposed the EU Directive establishing minimum standards on the rights, support and protection of victims of crime. The Directive is organised in macro-areas, devoted respectively to the victim's right to information (Arts. 3-7); the right to access support services (Arts. 8-9); the right to participate in criminal proceedings (Arts. 10-17); and, finally, the right to receive protection, individualised according

[42] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.
[43] 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 Framework Decision 2001/220/JHA [2012] OJ L 315/57.
[44] Legislative Decree No 215 of 9 July 2003 Implementing Directive 2000/43/EC for equal treatment between persons irrespective of racial or ethnic origin, in Official Gazette of the Italian Republic No 186 of 12/8/2003.
[45] Legislative Decree No. 212 of 15 December 2015 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 Framework Decision 2001/220/JHA, in Official Gazette of the Italian Republic General Series No. 3 of 05/01/2016.

to any specific protection needs (Art. 18-23). Legislative Decree No. 212/2015, transposing the Directive, amended eight articles of the Code of Criminal Procedure (artt. 90, 134, 190-bis, 351, 362, 392, 398 e 498), coined four new ones (artt. 90-bis, 90-ter, 90-quater, 143-bis) and introduced two implementing rules (Articles 107-ter and 108-ter of the Implementing Provisions of the Code of Criminal Procedure). According to what the Government indicated in the explanatory report of the Law,[46] the 'streamlined' nature of the decree is explained by the fact that many of the provisions of the Directive would already be present in the Italian legal system, which, therefore, would appear to be 'substantially compliant' with the requirements of the European Union.

All this considered it can be concluded that the European provisions have been transposed into national law in a manner that is faithful to their intentions and appropriate to the national regulatory context.

7.4.2 Other Italian laws and rules on discrimination

In addition to the legislative decrees mentioned above, there are many other laws and regulations on the issue of discrimination in Italy. The EU has also produced several Directives and Recommendations on the subject. The intention of such rich legislation is to cover all possible areas of intervention. The main shortcomings stem from the integration and coordination of all the different provisions. By way of example, Italy has ratified Law 167 of 20 November 2017: Provisions for the fulfilment of obligations arising from Italy's membership of the European Union - European Law 2017,[47] composed of 30 articles, structured in eight Chapters, addressing three infringement procedures and, in total, eight EU pilot cases. The EU Pilot Cases of our interest addressed in the 2017 European Law include criminal provisions against particular forms and expressions of racism and xenophobia/negationism (EU Pilot Case 8184/15/JUST). The provision implements Framework Decision 2008/913/JHA,[48] which obliges Member States to combat and punish certain forms and expressions of racism and xenophobia. In particular, the provision expressly punishes the minimisation and apologia of the Shoah[49] or crimes of genocide, crimes against humanity and

[46] Explanatory Report to Legislative Decree15 December 2015 No 212 <www.governo.it/sites/governo.it/files/REL_ILL.pdf> accessed 23 May 2022.
[47] Law No. 167 of 20 November 2017 Dispositions for the fulfilment of obligations arising from Italy's membership of the European Union - European Law 2017, in Official Gazette of the Italian Republic No. 277 of 27/11/2017 (Art. 5 - Dispositions for the full implementation of Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law - Case EU-Pilot 8184/15/JUST).
[48] 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.
[49] The word 'Shoah' is the term used in Hebrew to refer to the extermination of the Jewish people during the Second World War. It is preferred to the term Holocaust as it does not, like the latter, evoke the idea of an inevitable sacrifice. Enciclopedia Treccani, 'Shoah nell'Enciclopedia Treccani' <www.treccani.it/enciclopedia/shoah> accessed 9 June 2022.

war crimes, and introduces administrative liability of companies and entities in relation to these criminal offences.

The transposition of European Law 2017 also provided for the introduction of Article 25 *terdecies*[50] of Legislative Decree 231/2001[51] entitled 'Racism and Xenophobia'. This last one elevates the offence referred to in Article 3, paragraph 3-bis, of Law no. 654 comma 3-bis, of 13 October 1975,[52] to a predicate offence for the Administrative Liability of Entities. In this way, the law aims to punish participants in organisations, associations, movements or groups whose purposes include incitement to discrimination or violence on ethnic, national or religious grounds. It also punishes propaganda or incitement, committed in such a way as to determine a concrete danger of dissemination, based in whole or in part on the denial, gross trivialisation or apologia of the Shoah[47] or crimes of genocide, crimes against humanity and war crimes.

On the other hand, Legislative Decree 21/2018[54] repealed Article 3[55] of Law 654/75, yet without directly intervening on Legislative Decree 231/2001. At the same time, the crime of propaganda and incitement to commit ethnic and religious discrimination was introduced into the Criminal Code in Article 604 bis. This is a case of *abrogatio sine abolitione* that also creates confusion among legal practitioners.[56]

As far as Italian law is concerned, the concept of multiple discrimination was introduced by Legislative Decree 215/2003[57] and Legislative Decree 216/2003[58] implementing, respectively, Directive 2000/43/EC[59] and Directive 2000/78/EC[60]. UNAR can certainly contribute to disseminate

[50] This is a Latin term meaning thirteenth. It refers to the way articles of law are numbered.
[51] Legislative Decree No 231 of 8 June 2001, Discipline of the administrative liability of legal persons, companies and associations, including those without legal personality, pursuant to Article 11 of Law No 300 of 29 September 2000, in Official Gazette of the Italian Republic No 140 of 19/06/2001.
[52] Law no. 654 of 13 October 1975, Ratification and Execution of the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature in New York on 7 March 1966, in Official Gazette of the Italian Republic General Series no. 337.
[53] Enciclopedia Treccani (n 49).
[54] Legislative Decree No. 21 of 1 March 2018, Provisions implementing the principle of delegation of code reservation in criminal matters pursuant to Article 1, paragraph 85, letter q) of Law No. 103 of 23 June 2017, in Official Gazette of the Italian Republic No.68 of 22 March 2018.
[55] This article prohibited any organisation, association, movement or group whose aims include incitement to discrimination or violence on racial, ethnic, national or religious grounds.
[56] *Abrogatio sine abolitione* occurs when a rule is repealed (e.g. it is eliminated), but the offence (the case) is not abolished, so it remains governed by criminal law.
[57] Legislative Decree 9 July 2003 No. 215 Implementation of Directive 2000/43/EC for equal treatment between persons irrespective of racial or ethnic origin, in Official Gazette of the Italian Republic No. 186 of 12 August 2003.
[58] Legislative Decree No. 216 of 9 July 2003 Implementation of Directive 2000/78/EC for equal treatment in employment and occupation, in Official Gazette of the Italian Republic No. 187 of 13 August 2003.
[59] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.
[60] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

the awareness of the existence of multiple discriminations (in its various forms) and to promote protection against them. Indeed, it has had its mandate extended since 2010 (albeit only on the basis of a ministerial decree on internal organisation in 2010,[61] renewed in 2012[62]) and can deal not only with discrimination on the grounds of ethnic origin, but also discrimination on the grounds of sexual orientation and gender identity, age, religion and belief, or disability.[63]

As for the remedies available to those who initiate proceedings, it all depends on the type of discrimination perpetrated and the type of protection sought. For example, insult is the behaviour of a person who offends another person in order to humiliate him/her regardless of the lawfulness of the motives. The so-called 'emptying of prisons' Decree (Legislative Decree 7/2016)[64] has provided for its decriminalisation and transformation into a civil offence; it is therefore no longer an offence and is not criminally punishable, and there is no longer the possibility of suing those who utter insults. This also applies to racially motivated insults; according to the Court of Cassation, Judgment No. 2461/19 of 18 January 2019,[65] one who utters racially motivated insults cannot be criminally punished, as the conduct no longer has 'criminal relevance'. Whoever offends a person can, however, suffer a lawsuit for damages and, eventually, a judge-imposed fine. Evidence, however, is complex because in the civil process, which is the process of obtaining damages, you have to prove three elements: the fact; the damage; and the relationship between the previous two.

Thus, two types of criminal cases remain:

(a) defamation, i.e. the behaviour of a person who, in the absence of the victim, speaks ill of him in the presence of at least two persons. For example, offending a tenant in front of other tenants constitutes the offence of defamation.

(b) intimidation, i.e. the threat of an unjust evil. For example, saying 'filthy nigger, I'll set you on fire' is an offence, not for saying 'filthy nigger' but for saying 'I'll set you on fire'. Regardless of the intentions behind this statement, this is criminal because it constitutes intimidation.

[61] Decree of the President of the Council of Ministers 22 November 2010 Discipline of the accounting and financial autonomy of the Presidency of the Council of Ministers, in Official Gazette of the Italian Republic No 286 of 7 December 2010.
[62] Ministerial Decree of 4 December 2012 Internal Organisation of the Department for Equal Opportunities, in Official Gazette of the Italian Republic no. 41 of 18 February 2013.
[63] See, Chapter 5.3 for more details about UNAR.
[64] Legislative Decree No. 7 of 15 January 2016 Provisions on the repeal of offences and the introduction of offences with civil monetary penalties, pursuant to Article 2(3) of Law No. 67 of 28 April 2014, in Official Gazette of the Italian Republic No. 17 of 22/01/2016.
[65] Penal Cassation, Section no V, 18 January 2019, no 2461.

7.4.3 Circumstances under which racism is a crime

> ***The Italian legal system punishes discrimination in all fields.66 The Italian Constitution condemns first and foremost all forms of racism.***

The Italian legal system punishes discrimination in all fields.[66] The Italian Constitution condemns first and foremost all forms of racism, stating in Article 3 that 'all citizens have equal social dignity and are equal before the law without distinction of sex, race, language, religion, political opinion, personal and social conditions'.

From a penal point of view, the Italian legal system has been punishing racial discrimination since the ratification of the New York Convention of 7 March 1966 by Law No. 654/1975,[67] the so-called 'Reale Law', through which, together with the other signatory states, a political commitment was made to eliminate all forms of racism. Law No. 205/1993,[68] the so-called 'Mancino Law', modified the sanctions and extended the above-mentioned measures to religious discrimination, introducing a specific aggravating circumstance for all crimes committed for the purpose of ethnic-racial discrimination.

With Legislative Decree 21/2018,[69] the contents of the Mancino Law were transfused into the new Articles 604bis and 604ter of the Criminal Code, i.e. the crimes of ethnic, national and religious discrimination. Entitled 'Of crimes against equality', the two new articles are respectively entitled 'Propaganda and incitement to commit racial, ethnic and religious discrimination' and 'Aggravating circumstance'. These two new articles prescribe punishments for several categories of offenders. These refer to: (a) anyone who propagates ideas based on racial or ethnic superiority or hatred, or incites to commit or commits acts of discrimination on racial, ethnic, national or religious grounds; (b) anyone who, in any way, incites to commit or commits violence or acts of provocation to violence on racial, ethnic, national or religious grounds; (c) anyone who participates in or assists organisations, associations, movements or groups whose purposes include incitement to discrimination or violence on racial, ethnic, national or religious grounds; (d) anyone who promotes

[66] In the employment sphere, for example, dismissal on the grounds of ethnic origin is considered null and void and obliges the company to reinstate the employee. Law No. 108 of 11 May 1990 art. 3.
[67] Law No. 654 of 13 October 1975 Ratifying and executing the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature in New York on 7 March 1966, in Official Gazette of the Italian Republic No. 337 of 23 December 1975.
[68] Law No. 205 of 25 June 1993, Conversion into law, with amendments, of Decree-Law No. 122 of 26 April 1993, containing urgent measures on racial, ethnic and religious discrimination, in Official Gazette of the Italian Republic No. 148 of 26 June 1993.
[69] Legislative Decree No. 21 of 1 March 2018, Provisions implementing the principle of delegation of code reservation in criminal matters pursuant to Article 1, paragraph 85, letter q) of Law No. 103 of 23 June 2017, in Official Gazette of the Italian Republic No.68 of 22 March 2018.

or directs organisations, associations, movements or groups whose purposes include incitement to discrimination or violence on racial, ethnic, national or religious grounds.

The punishment of imprisonment ranges from two to six years if the propaganda, or incitement and instigation, committed with concrete danger of dissemination, is based on the denial, gross trivialisation or apologia of the Shoah[70] or crimes of genocide, crimes against humanity and war crimes. What makes discrimination punishable is propaganda, not the crime directed against the foreigner. 'Propaganda' is understood as that activity aimed at publicly manifesting personal beliefs in order to influence public opinion and change the ideas and behaviour of the recipients. This type of dissemination is considered punishable as a crime because it is likely to generate the same feelings of aversion and hatred in the public as those who publicly manifest them. The law also refers to ideas of superiority or racial hatred. In the first case we speak of supremacist racism (discrimination based on the idea that there is one race superior to another), in the second of racial hatred (feeling of hostility that results in the desire for death or harm to the discriminated person).

In conclusion, protection always passes through the system of national codification as amended by the ratification of the various European conventions: Criminal Code and Criminal Procedure, Labour Code and Civil Code and Civil Procedure for claims for damages. Italian law seems to adequately transpose the provisions of the two Directives under consideration in this report. The next section will assess whether implementation is adequate or whether it is lacking.

7.5 The implementation of anti-racism legislation in Italy

7.5.1 Differences between the letter and the implementation of the European anti-ethnic-racial discrimination legislation

Most respondents and focus group participants[71] claimed that the Racial Equality Directive and the Victims' Rights Directive have been correctly transposed into Italian law. However, the most relevant aspect with respect to the critical features of this transposition is the non-existence in the Italian criminal system of a racial crime. This deficiency was underscored by Participant No. 2 in the focus group with front line workers, a member of OSCAD (Observatory for Security against Discriminatory Acts). This is a problem, he argued, 'because the element of racially motivated discrimination can only be framed as a "corollary" to other committed crimes'.

[70] Enciclopedia Treccani (n 49).
[71] In this report, the term 'participant' refers to a person who took part in focus groups, whereas the term 'respondent' refers to a person who took part in a single interview.

Participant No. 3 in the focus group with legal professionals, a labour judge, pointed out another aspect in which the Italian legislation implementing the two European Directives has been deficient. He reported that the European legislation refers to sanctions with punitive content that go beyond compensation for pecuniary damage. Italian legislation, in his opinion, has transposed these aspects 'timidly', and so have the courts, in their jurisprudential development. This is also due, in his opinion, to the 'laziness of lawyers', who set up appeals poorly, as they do not state the grounds on which they claim damages.

Where the Italian legislation on racial and ethnic-based anti-discrimination has on the whole correctly implemented the European one, critical issues emerged from the focus group and the interviews with legal professionals regarding the implementation of the two European Directives under analysis. Specifically, Participant No. 4, a lawyer working in the area of family law and gender-based violence, reported that Italy has been slow to implement the European anti-discrimination legislation.

Further details emerged from the testimony of Participant No. 3 in the focus group dedicated to legal experts, who reported that the problem is not the transposition of the European legislation, but its effectiveness and the good practices. Especially, in his view, there is a need to increase the awareness of both practitioners and victims of discrimination of the existing legislation. An additional critical issue is, according to him, the failure to make use of the potential of the Equality Councillors of the regions. The Equality Councillor is an institutional figure envisaged by legislation[72] to promote and monitor the implementation of the principles of equality, equal opportunity and non-discrimination between women and men in access to employment, promotion and training, professional and career progression, working conditions and pay.[73]

Participant No. 1 in the focus group with legal experts, a lawyer active in the fight against discrimination, including ethnic-racial discrimination, also reported that while in the European legislation there has been an evolution as to the categories of discrimination (there is also talk in this regard of 'intersectional discrimination'), in Italy the legislation has remained firm on the distinction between direct and indirect discrimination. What's more, in Italy there is a 'gap between victims and the police', which consists of 'mutual prejudice', as highlighted by Participant No. 1

[72] Law No. 125 of 10 April 1991 Positive Actions for the realisation of equality between men and women at work, in Official Gazette General Series No. 88 of 15 April 1991 of 15 April 1991; Legislative Decree No. 196 of 23 May 2000 Discipline of the activities of equal opportunities councillors and councillors and provisions on positive actions, pursuant to Article 47 of Law No. 144 of 17 May 1999, in Official Gazette No. 166 of 18 July 2000; Legislative Decree No. 198 of 11 April 2006 Code of equal opportunities between men and women, pursuant to Article 6 of Law No. 246 of 28 November 2005, in Official Gazette No. 125 of 31 May 2006 - Ordinary Supplement No. 133.

[73] 'Consigliera di parità: ruolo e compiti' (Regione Autonoma Friuli Venezia Giulia) <www.regione.fvg.it/rafvg/cms/RAFVG/formazione-lavoro/lavoro/pari-opportunita-qualita-lavoro/FOGLIA6/> accessed 11 June 2022.

in the focus group dedicated to professionals (a professional belonging to the Local Police and working in the field of countering discrimination and hate crimes related to sexual orientation and gender identity).

7.5.2 The knowledge of the legislation

As regards the frontline workers' knowledge of European legislation, the focus groups and interviews revealed a general awareness of the Directives and their transposition into Italian law. However, almost all emphasised an incomplete mastery of the anti-discrimination discipline and the need for constant updating and in-depth study. Those involved in assisting and guiding people facing discrimination all stated that they had taken part in one or more trainings as part of their pathway. For instance, respondent No. 5, a counsellor at an experimental territorial anti-discrimination support and guidance service, recounted that she had undergone training on anti-discrimination on areas specific to the work she and her colleagues would be doing. Specifically, with regard to legislation, she explained that they looked at Directives 2000/43/EC and 2000/78/EU, which she felt were the most relevant to their activities. In addition, they also looked at some Directives that regulate aspects of access to benefits regarding the requirements based on different types of residence permits. In particular, they studied how these Directives have been transposed into Italian law.

The training received is not always considered sufficient by the operators to cope with the victim support work to be carried out. According to the testimony of Respondent No. 1, the training she received as a UNAR 'Antenna' at the beginning of her career needed constant updating and deepening. However, these were not carried out due to organisational difficulties that existed even before the SARS-COV-2 pandemic.[74]

As for the knowledge of European and Italian regulations on racial and ethnic anti-discrimination on the part of legal professionals, Participant No. 3 in the relevant focus group, a labour judge, believes that the problem lies not so much with legal professionals' lack of actual knowledge of the regulations, but rather with the 'shyness' of the legal world: lawyers would be afraid to take up lawsuits because they do not know what the answers are from judges. Similarly, he continues,

[74] UNAR's territorial network system of Observatories is essentially based on points of reference: territorial Antenna, Connecting and Information Points. The territorial Antenna, which may be headed by municipalities, third sector organisations, trade unions, trade associations, and others, in addition to the usual informational, promotional, and awareness-raising activities, perform the function of concrete access points for users and are able to collect reports, and use the software directly connected to the UNAR Contact Center and all the forms of the network Antenna. For more information see UNAR, *Linee guida per la rete nazionale antidiscriminazioni. Costituzione e funzionamento di centri /osservatori territoriali e antenne anti-discriminazione* (2011) 40 <http://briguglio.asgi.it/immigrazione-e-asilo/2013/marzo/linee-guida-unar-rete.pdf> accessed 20 May 2022.

when judges deliver judgments, they 'have a bit of a handbrake on them', especially when it comes to establishing the amount of financial damages. In contrast, Participant No. 2 in the same focus group, a lawyer, took the opposite view, as he believed that 'judges are quite strict in combating discrimination'.

7.5.3 The role of national equality bodies in implementing racial-ethnic anti-discrimination legislation

Also contributing to the implementation of Directive 2000/43/EC and Directive 2012/29/EU in Italy is UNAR, the Italian national body for equal treatment on the basis of ethnic origin. UNAR was established in 2003 by Legislative Decree No. 215/2003.[75] Specifically, it is responsible for monitoring causes and phenomena related to all types of discrimination, studying possible solutions, promoting a culture of respect for human rights and equal opportunities, and providing concrete assistance to victims.[76]

This body also conducts monitoring of discrimination on racial and ethnic grounds through its Contact Center. This is a free, multilingual service aimed at victims or witnesses of discrimination to: collect reports, complaints and testimonies about discriminatory behaviour or facts; and provides information, guidance, and support to prevent or counter them.[77] UNAR's Contact Center can be reached through a toll-free number and the use of an online form. Monitoring by UNAR also makes use of a press review of newspapers, social media, and non-traditional media,[78] as highlighted by the person interviewed. In 2020, UNAR's Contact Center processed 1002 cases, of which 913 were relevant to UNAR's criteria to take charge of a discrimination case and 89 were not relevant.

UNAR's monitoring activities result in the processing of data, but also in the drafting and publication of opinions. The interview with the UNAR representative revealed that these opinions are drafted in the form of recommendations to users, public administrations, and employers. In 2020, UNAR found many cases of institutional discrimination, and therefore the Director 'decided to provide generalized opinions'. As of today, there are two published opinions: one entitled 'Guidelines on food solidarity interventions', and another published under the name 'Guidelines on access to

[75] Legislative Decree No. 215, July 9, 2003, Implementation of Directive 2000/43/EC for equal treatment of persons irrespective of racial or ethnic origin, in Official Gazette of the Italian Republic No. 186, 12/8/2003.
[76] Ufficio Nazionale Antidiscriminazioni Razziali, 'Che cos'è UNAR' (UNAR) <https://unar.it/portale/web/guest/che-cos-e-unar> accessed 24 May 2022.
[77] Ufficio Nazionale Antidiscriminazioni Razziali, 'Contact Center' (UNAR) <https://unar.it/portale/web/guest/contact-center> accessed 22 May 2022.
[78] In 2020, the press review of Italian websites identified 101 cases of discrimination. This figure was reported during the interview with the UNAR representative.

public housing'.[79] It is important to point out that in April 2020, the L'Aquila Regional Administrative Court cited UNAR's guidelines to justify its decision to uphold an appeal.[80]

In the respondent's opinion, the major limitation of UNAR since its establishment in 2003 is that it has no sanctioning power. When it detects institutional discrimination, UNAR has only a power of moral persuasion and cannot take legal action, unlike the active Equality Councils with regard to gender issues. An interview conducted with a municipal official involved in countering racial-ethnic discrimination identified another limitation of UNAR: its lack of independence from the Italian government, since it is connected to the Equal Opportunity Department of the Prime Minister's Office.

7.5.4 The good practices

Despite the above said weaknesses in the execution and implementation in Italy of the European legislation on racial and ethnic-based anti-discrimination, good practices related to the Italian context also emerged from both the interviews and focus groups. They specifically include the presence of the SPAD (Anti Racial Discrimination Desk) of the Municipality of Bologna;[81] the Punto Migranti Desks (information, guidance and specialist advice desks) present in 17 municipalities in the Province of Bologna; the ECCAR network (European Coalition of Cities against Racism)[82]; the PAL[83] (Local Action Plan for a non-discriminatory and human rights-based administrative action towards new citizens) of the Municipality of Bologna; the PRIS[84] (Social Over territorial Prompt Intervention) of the Municipality of Bologna; the European project SUPER[85] (SUPporting Everyday fight against Racism); and finally the above mentioned OSCAD. Finally, Respondent No. 10 explained that important in combating ethnic-racial discrimination are also the Municipalities of Turin, Reggio Emilia and Trento.

Empirical research has gathered information in particular on SPAD. SPAD has five different functions: (a) listening to and orienting people who are victims, witnesses, or reporting cases of racial-ethnic discrimination, followed by eventual redirection to other third-sector services (where a detected

[79] Ufficio Nazionale Antidiscriminazioni Razziali, 'Pareri' (UNAR) <https://unar.it/portale/web/guest/pareri> accessed 24 May 2022.
[80] TAR Abruzzo, L'Aquila, Sec. I, April 22, 2020, Decree No. 79.
[81] Lai-momo Società Cooperativa Sociale, 'Sportelli Punto Migranti' (Lai-momo Coop. Sociale) <www.laimomo.it/sociale_post/sportelli-punto-migranti/> accessed 9 May 2022.
[82] Iperbole, 'Eccar - Coalizione di Città contro il Razzismo | Relazioni e progetti internazionali | Rete Civica Iperbole' <www.comune.bologna.it/relazioniinternazionali/servizi/159:14330/16444/> accessed 24 May 2022.
[84] Iperbole, 'Al via il nuovo PRIS, pronto intervento sociale, del Comune di Bologna e dei Comuni dell'area metropolitana | Iperbole' <www.iperbole.bologna.it/sportellosociale/notizie/2731/38992> accessed 24 May 2022.
[85] Comune di Torino, 'Progetto Super - Città Di Torino' <www.comune.torino.it/dirittiepartecipazione/super.shtml> accessed 8 May 2022.

case of discrimination does not fall within the SPAD's mandate) or intake (where the case of discrimination does); (b) mediation, especially intercultural one; (c) information; (d) training; and (e) reporting. Third-sector associations also collaborate with SPAD on a voluntary basis. People who have approached SPAD so far have reported discrimination on religious grounds, related to citizenship or origin, or were from the LGBTQI+ (Lesbian, Gay, Bisexual, Transgender, Queer, Intersex +) category. There was only one case of a person of Roma ethnicity who approached SPAD. Not all cases of discrimination reported to the SPAD operators have found a legal basis by lawyers.

7.5.5 The Courts' references to ethnic-racial anti-discrimination legislation

When ruling on cases of racial and ethnic discrimination, judges refer to the relevant Italian legislation transposing European Directives.[86] One of the most recurring aspects of the Italian legislation in question that emerges from an analysis of the mentioned judgments is the active legitimacy of entities and associations registered in the list referred to in Article 5 of Legislative Decree 215/03. This means that the entities and associations registered thereby can ask a judge to rule on a case of discrimination falling in the scope of that Legislative Decree. They can do so even if they are not the direct victims of a discrimination.

Regarding how the Courts interpret the Italian legislation under analysis, it must be pointed out that it appears to be both systematic and extensive. An example of systematic interpretation in this sense is provided by the Supreme Court's rulings Nos. 11165/17 and 11166/17. These cases regard a Circular by the National Insurance Agency (INPS) that limited the entitlement to the allowance for long-term residents to only the period after July 1, 2013. The Court here refers also to the T.U.I (Consolidated Act on Immigration), in particular Articles 43 and 44.[87] Specifically, it bases some of its arguments on a combination of Articles 2[88] and 4[89] of Legislative Decree 215/2003 and Article 43[90] T.U.I.

As for the extensive interpretation, the two Supreme Court rulings, Nos. 11165/17 and 11166/17, can be cited as examples. Indeed, discrimination on the basis of nationality, which is outside the normative dictate of the aforementioned legislative decree, is also made to fall within the

[86] The following judgments are of relevance to the analysis conducted here: December 11, 2012 Supreme Court Judgment No. 47894; 8 May 2017 Supreme Court Judgments No. 11165 and 11166; Civil Cassation, Section One, Order No. 19443 of 20 July 2018; Milan Court of Appeal, Judgment No. 617 of 15 May 2018; Brescia Court of Appeal, Judgment No. 96 of 18 January 2019; Florence Court of Appeal, Judgment No. 572/2019 of 4 July 2019.
[87] Legislative Decree No. 286 of 25 July 1998 Consolidated text of provisions concerning immigration regulations and norms on the condition of foreigners, in Official Gazette of the Italian Republic No. 91 of 18 August 1998.
[88] On the definition of discrimination.
[89] On judicial remedies.
[90] On discrimination on racial, ethnic, national or religious grounds

framework protected by Legislative Decree 215/2003. Specifically, the Court held that not granting the entitlement to the allowance for long-term residents in Italy before July 1, 2013, amounted to collective discrimination based on grounds of nationality. It also stated that when collective discriminations based on nationality occur, active legitimacy of entities and associations registered in the list referred to in Article 5 of Legislative Decree 215/03 applies.

7.5.6 The chance for victims to rely on racial and ethnic anti-discrimination legislation

In order to assess the ease in Italy for victims of racial-ethnic discrimination to rely on the two Directives under analysis, several elements must be examined. At first, field research revealed that it would be necessary to increase victims' awareness of the content of the Racial Equality Directive and the Victims' Rights Directive. In addition, it must be also increased the awareness of the means of protection that the legal system makes available to those who suffer discrimination.

Focus groups and interviews also revealed that the delay of the Italian justice system is a major obstacle to the decision to take legal action. The considerable costs of litigation are also a major disincentive for victims who often do not have sufficient means to take legal action. As Participant No. 2 in the focus group with legal experts pointed out, these Italian justice system limitations' mean that 'there are few legal cases undertaken by victims of ethnic-racial discrimination and that the existing ones are only "the tip of the iceberg"'. Despite this, Respondent No. 6 emphasises that the tendency still seems to be to draw on legal rather than extra-judicial remedies even if this does indeed create an obstacle to obtaining any damage repair.

A further problematic element was indicated by Participant No. 1 in the focus group with professionals (a member of the local police). She argued that, in her opinion, there is little motivation on the part of victims to acknowledge discrimination and proceed with justice. This would be mainly related to a problem of the victim's fragility and connected to the 'lack of knowledge of the Italian language and culture'. This lack of awareness of the victims was confirmed by Participant No. 5 (a counsellor at an experimental territorial anti-discrimination support and guidance service) who reported that victims of racial-ethnic discrimination 'do not always know the real border between discrimination and non-discrimination'. These difficulties in becoming aware of one's situation are also found in cases of intersectional discrimination. This element of intersectionality was stressed several times during the interviews and focus groups. In particular, professionals report a frequent coexistence of ethnic and gender discrimination.[91]

[91] This concept exists only at the doctrinal level since it has not been transposed into national legislation.

> ***Support from specialised associations or organisations is an important factor in encouraging victims to become aware of the discrimination***

These difficulties considered, it appears that support from specialised associations or organisations is an important factor in encouraging victims to become aware of the discrimination they have suffered and decide to report it. Participant No. 1, in the focus group with legal experts, a lawyer active in the field of ethnic-racial discrimination, declared that 'victims are persuaded and supported to sue by associations, because the victim alone does not sue'.

7.6 Future steps to undertake

The focus groups and the interviews revealed a strong demand for adequate training on European legislation on countering ethnic-racial discrimination (and the relevant Italian legislation transposing it). In relation to this demand, concrete proposals also emerged.

Specifically, Participant No. 5 in the focus group with professionals who are in direct contact with victims of this type of discrimination asked for a training path based on a guide of the diverse services of anti-discrimination initiatives carried out in the municipality where she works. In addition, Participant No. 4, a legal worker, believed that general basic training on legislation can be useful, but that it should also be supplemented by the analysis of case studies, with the participation of different professionals. Participant No. 1, who belongs to OSCAD, also expressed a very similar position.

Respondent No. 7, a case manager of a desk that provides a territorial anti-discrimination support and guidance service, also indicated that, since the legislation is complex, there is a need to focus the training as much as possible on a concrete dimension: the legislation should be summarized adding practical examples. Moreover, she claimed the implementation of workshops and was highly enthusiastic when she was informed that the European project 'PRESERVERE' will also produce an educational toolkit as an output. Respondent No. 8, who holds the same position, is of the same opinion about the need for simplification of regulations.

A further suggestion made in the focus group with legal experts, specifically by Participant No. 3, a labour judge, was the need for training of labour inspectors, which would cooperate with law enforcement agencies and magistrates, working together in combating racial and ethnic-based discrimination. Also of the same opinion was Participant No. 2, a lawyer.
Respondent No. 2, a lawyer involved in countering gender-related violence and discrimination,

suggested the inclusion of figures such as interpreters and mediators, on countering violence against foreign women. Since this already happens for the section of the court dealing with international protection, she argued, this procedure could be extended to all foreigners. This is a proposal that could be useful to countering intersectional discrimination based on gender.

In addition to these considerations, Respondent No. 10, a municipal official involved in combating racial and ethnic discrimination, argued that 'every city needs to have a rights or anti-discrimination office'. To do this, in her opinion, there is a need for staff trained on these issues, hence 'a general training' should be carried out in all public bodies in Italy. There is also a need, she continued, for political sensitivity, not only at times when these issues become important for election campaigns, but always. She also highlighted the fundamental importance of empowerment work for people at risk, 'who may not even know that they have certain rights or that certain behaviours are discriminatory'. Moreover, she remarked on the centrality of anti-discrimination work in schools, on teachers and male and female students, as well as in the universities. Finally, she underlined that 'the normative is absolutely central to everything' and that the protection of rights stemming from case law is fundamental as well. Respondent No. 5, a counsellor at an experimental territorial anti-discrimination support and guidance service, also reiterated the importance to know not only the written legislation but also the case law.

7.7 Conclusions

This report focused on an assessment of the implementation of the EU anti-racism legal framework in Italy. Following an overall appraisal of the statistical presence and discriminations against the categories of people under analysis (i.e. people of African descent, Muslims, Roma and Sinti, and Jews), the report provided a thorough illustration of the relevant Italian legislation implementing the Racial Equality Directive and the Victims' Rights Directive and on racial discrimination in general.

The Italian legal framework transposing those two Directives has proven to be comprehensive. However, shortcomings are found especially in implementation. A glaring element is the lack of the crime of racial discrimination in the Italian legal system. Moreover, the knowledge of this legislation needs to be further developed by practitioners called upon to support victims of discrimination. There is also a lack of awareness on the part of victims who, as has been pointed out, face cultural and material obstacles that prevent them from obtaining effective protection against discrimination.

The UNAR (National Anti-Racial Discrimination Office) makes a valuable contribution to the fight against discrimination as well. Yet, this seems to apply more at the national level than at the regional level. On the other hand, the references that Italian courts make to the legislation at stake appear significant. Nonetheless, the compensation of non-pecuniary damages, which are small, seems to signal excessive caution on the part of magistrates.

Interesting proposals to increase the effectiveness of the implementation of the anti-discrimination legislation in question have emerged from the empirical research. These emphasise the importance of training, in various forms.

TRANSPOSITION AND IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN MALTA

8 THE TRANSPOSITION AND IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN MALTA

SONIA MARCANTONIO, MARIA MANOLESCU, BETHANY WILKES
THE PEOPLE FOR CHANGE FOUNDATION

8.1 Introduction

The issue of racial equality in Malta is often associated with undocumented migrants arriving by boat from the coasts of Northern Africa, commonly called 'klandestini' in the Maltese language. The reason for this is the dramatic increase of migrants in recent years. Malta has always been a country of emigration rather than immigration, and this new inflow of people has had significant consequences on the Maltese society. As irregular immigration has continued during these years, the government has adopted several protectionist policies to stop this. The issue has increasingly become a social and political problem, leading to racism and inequalities against black communities.[1] There are no Romas living in Malta, and Jews are, for the most part, integrated into society. As a result, this report refers to Muslims and persons of African descent. Participants interviewed in the project identified asylum seekers and refugees as the most vulnerable victims in Malta.

The main findings of the desk research show that Malta's anti-racism legal framework is overly complex, with many provisions scattered across multiple legislative Acts. Victims are given different rights according to the context in which discrimination occurs, and it is not always clear which laws apply in a particular situation. Many protections foreseen by the two Directives are either weakly transposed or not implemented at all.

The main findings of the empirical research indicate that legal professionals, frontline workers, and victims in Malta have little to no knowledge of the Directives. In practice, relying on these Directives in Malta is challenging due to language barriers, socio-economic pressures, the cost and length of court procedures, and a general reluctance to report discrimination, among other

[1] Björn Kårén, Malta and Immigration <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1317141&fileOId=1317142> accessed 22 June 2022, 2

issues. Furthermore, the implementation of the Directives is fragmented. Malta is just meeting the minimum criteria of the Directives, as there are concerns with the right to translation and interpretation, as well as legal aid, and an absence of promising practices.

Chapter 2 describes the methodology, while Chapter 3 sets the scene and Chapter 4 discusses the anti-racism legal framework in Malta based on qualitative legal research. Chapter 5 explores the implementation of the anti-racism legal framework using qualitative-empirical research, and Chapter 6 recommends steps forward that Malta needs to take to fight racial discrimination.

8.2 Methodology

This paper explores the extent to which the EU anti-racism legal framework is effectively implemented in Malta by using two research methods. The first consists of qualitative-legal research to determine how the EU Directives have been transposed into the national legislation. The research is written from a human rights perspective, based on a comparative analysis between the European anti-racism legal framework and the Maltese legislation. Maltese anti-discrimination law is fragmented, and numerous Acts implement the two Directives. For this reason, it was necessary to compare the Directives with the Maltese law, assessing each Article one by one. After reviewing the relevant laws, researchers looked for the application of those Acts by the judiciary. Case law is available on the eCourts online service, the website of the Court Services Agency, where the government publishes all the Maltese Courts' decisions[2]. The website has a search function based on case references, parties, dates, and keywords. To find relevant cases, researchers used different keywords in both Maltese and English.[3] Researchers also searched cases by the name of the acts or Directives. Each case selected by the search engine was analysed in great detail to identify the parts and reasonings relevant to the research question. Besides these sources, academic literature was used to support and discuss normative notions and judicial decisions. Furthermore, other sources examined include documents written by EU organisations such as reports and general comments, policy documents, articles that explain legal issues, and reports produced by NGOs.

The second method consists of qualitative-empirical research to further examine the gaps between the letter of the law and its implementation. Interviews allowed the researchers to explore the Maltese anti-discrimination legal framework from a different perspective. The participants were

[2] Malta eCourts online service <Illoggja biex Tidħol - eCourts.gov.mt> accessed 9 June 2022
[3] Under Article 5(3) of the Constitution of Malta, Judicial proceedings are conducted in the Maltese language. However, Articles 2 and 3 of the Judicial Proceedings (Use of English Language) Act 1965 stipulate that where the parties in civil or criminal proceedings are not Maltese-speaking, proceedings may be conducted in the English language. According to Article 7(c) of the same Act, parties are presumed to be Maltese-speaking unless this is proven to be otherwise.

selected based on their professional experience, keeping gender balance in mind. As Malta is a small country, most interviewees and focus group participants were identified through personal connections (i.e. the snowballing method was adopted to recruit participants). Researchers sought to include representatives from various fields, such as representatives of equality bodies, law enforcement branches tasked with promoting racial equality, civil society organisations, and frontline workers (police officers, nurses, reception centres workers, and social workers). Several activists from African groups, such as the Eritrean, Chad, and Sudanese communities, showed great interest in the project and accepted the invitation.

Table 9. Profession of Interviewees

Participant 1	Frontline worker for an NGO in Gozo
Participant 2	Frontline worker for an NGO in Gozo
Participant 3	Criminal and Human Rights lawyer and Professor at the University of Malta
Participant 4	Criminal and Human Rights lawyer, Professor at the University of Malta, and a former Member of Parliament
Participant 5	Manager at the Human Rights Directorate (HRD)
Participant 6	Member of Parliament

Table 10. Gender and Profession of Focus Group 1 Participants

Participant 1	Woman	Representative of the Department for Industrial and Trade Relations (DIER)
Participant 2	Woman	Representative of the International Organization for Migration (IOM), Malta
Participant 3	Woman	Representative of the National Commission for the Promotion of Equality (NCPE)
Participant 4	Man	Representative of the Victim Support Agency (VSA)
Participant 5	Man	Representative of an NGO focusing on international development, human rights, and migration
Participant 6	Woman	Nurse and a representative of the Chad Community
Participant 7	Woman	Representative of the United Nations High Commissioner for Refugees (UNHCR), Malta

Table 11. Gender and Profession of Focus Group 2 Participants

Participant 1	Man	Representative of the Chad community
Participant 2	Woman	Representative of an NGO that teaches English to migrants and refugees
Participant 3	Woman	Representative of an NGO that facilitated the integration of minority groups in Malta and the Sudanese community

Table 12: Gender and Profession of Focus Group 3 Participants

Participant 1	Man	Representative of an organisation that rescues migrants at sea
Participant 2	Man	Representative of the Eritrean community
Participant 3	Woman	Representative of Black Lives Matter, Malta
Participant 4	Man	Representative of a refugee-led youth organisation

Focus groups and interviews were conducted online using Zoom. Before focusing on the questionnaire, researchers prepared a speech and a short PowerPoint presentation. They introduced PRESERVERE, explained the Directives, and then asked the questions following the order of the questionnaire. Interviews were recorded with the permission of interviewees, who were informed in advance via email and during the meeting. The following tables list the participants interviewed.

There were several challenges in recruiting participants for the interviews and focus groups. Numerous professionals declined to participate because they had limited or no knowledge of the Directives. Researchers tried to overcome this by explaining they did not need to be experts on these Directives and that the scope of the research was to gauge how well these Directives are understood in Malta. However, some invitees did not change their opinion and refused to participate.

The Jewish, Muslim, and Islamic communities declined the invitation. A member of the Malta Police Force working in a new hate crime department was invited to attend the focus group but was unable to participate due to health issues. Representatives from public agencies working with refugees and asylum seekers, such as the International Protection Agency (IPA) and the Agency for the Welfare of Asylum Seekers (AWAS) were invited. The IPA, however, declined to participate in

the project as they believed that the subject of the research fell outside of their remit. While AWAS agreed to participate in the project, they did not attend the focus group due to their busy schedule.

8.3 Setting the scene

Malta is a small island of 516,100 people in the middle of the Mediterranean Sea, consisting of the main island of Malta and the smaller islands of Gozo and Comino.[4] Among EU Member States, Malta has one of the highest proportions of non-nationals living in its territory. 20 percent of the population are foreign, with 8 percent of residents being citizens of other EU Member States and 12 percent being citizens of non-EU countries.[5]

According to Article 5 of the Constitution, Maltese and English are the official languages of Malta.[6] The Constitution also establishes Roman Catholicism as Malta's official religion; however, freedom of conscience and religious worship are guaranteed, and discriminatory treatment based on creed is prohibited.[7] Any restriction on freedom of religion should be reasonably justifiable and in the interest of public safety, order, morality, health, or protection of the rights and freedoms of others.[8] According to a 2018 survey by local newspaper Malta Today, 94 percent of respondents identified themselves as Catholic, 3.8 percent as Atheists, and 1.3 percent reported belonging to non-Catholic Christian denominations. The survey also found that 88.8 percent of people were against removing the designation of Catholicism as Malta's official religion from the Constitution.[9]

No official national data exists detailing the specific number of Muslims, Jews, and persons of African descent living in Malta. Information on these groups should be disclosed in the 2021 Census; however, the results have yet to be publicly released. According to the U.S State Department, the World Islamic Call Society estimates that 6 to 7 percent of the population in Malta is Muslim, primarily Sunni, with a smaller Shia and Ahmadi presence. On the other hand, Jewish community leaders estimate that the Jewish population comprises around 200 persons.[10] Migration has resulted in a sizable African presence in Malta. In 2020, the National Statistic Office revealed that 84.8 percent of persons brought to shore were citizens of African countries, and most of the applicants – 77,8 percent – applying to the IPA were African.[11]

[4] Migrants-Refugees (2021) <Migration Profile - Malta> accessed 9 June 2022; The National Statistics Office, News Release (2021) News Release - World Refugee Day para 1
[5] Eurostat (2022) <Non-EU citizens make up 5.3% of the EU population> accessed 30 March 2022
[6] The Constitution of Malta 1964, art. 5(1)
[7] The Constitution of Malta 1964, art. 2 (1)
[8] The Constitution of Malta 1964 art. 40 and art. 45
[9] Malta Today (2018) <Maltese identity still very much rooted in Catholicism> accessed 2 April 2018
[10] The U.S State Department, International religious freedom (2021), Malta 2021 International Religious Freedom Report para 4
[11] The National Statistic Office, News Release (2021) World Refugee Day para 2

> ***The growing number of undocumented migrants has created negative perceptions amongst the Maltese.***

The growing number of undocumented migrants has created negative perceptions amongst the Maltese. Racism and distrust often hinder migrants' prospects of finding decent work and housing and limit their access to goods and services. These migrants typically work in the informal economy, with poor working conditions, especially in the construction industry. Others work in low-skilled jobs that Maltese people generally refuse to do, such as collecting rubbish, cleaning hotels, or catering.[12] People of African descent in Malta are regularly discriminated against because of their skin colour, ethnic origin, or religion. According to a report detailing the experiences of persons of African descent by the European Union Agency of Fundamental Rights (FRA), employment and housing are areas where discrimination is particularly prevalent. For example, 30 percent of respondents in the FRA survey said they were discriminated against when searching for employment.[13]

In terms of housing, only two percent of persons of African descent live in accommodation they own, compared to 81 percent of the general population. Skin colour and citizenship status are said to be the leading cause of discrimination in access to decent housing. When asked about encountering racial discrimination in access to housing in Malta in the previous five years, 23 percent of persons of African descent reported that they had faced some type of discrimination, according to the FRA survey. At the same time, 84 percent of respondents were said to be living in overcrowded housing, compared to 3 percent of the general population.[14]

Analysing the opinions and attitudes of Maltese citizens in 2019, the Special Eurobarometer on Discrimination in the European Union indicates negative attitudes towards Roma, Jews, Muslims, and black people in Malta.[15] The survey found that a significant percentage of Maltese respondents would be 'uncomfortable' having a work colleague belonging to an ethnic or religious minority: 18 percent in respect of a Roma colleague, 9 percent for a Muslim colleague, 7 percent if asked to work alongside a Jewish colleague, and 6 percent if the prospective colleague was a black person.[16]

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[12] Borg. A. (No date) <The impact of the Racial Equality Directive: a survey of trade unions and employers in the Member States of the European Union> accessed 7 June 2022, 2
[13] The European Union Agency for Fundamental Rights (FRA) (2018) <Being Black in the EU/Second European Union Minorities and Discrimination Survey> accessed 8 June 2022, 55
[14] The European Union Agency for Fundamental Rights (FRA) (2018) <Being Black in the EU/Second European Union Minorities and Discrimination Survey, 58-63
[15] The Special Eurobarometer (2019) <Discrimination in the European Union - Malta> accessed 9 June 2022, 2
[16] Ibid.

When asked how comfortable respondents would feel if their child was in a 'love relationship' with someone from the same minority groups, the percentage who reported they would be 'uncomfortable' were notably higher: 39 percent for a Roma person, 24 percent if the person was Jewish, 35 percent if their child's partner was Muslim, and 24 percent in respect of a black person.[17] In regards to this second question, the reported levels of Maltese discomfort were many percentage points above the EU average.

In the same year, the Migrant Integration Policy Index (MIPEX) described Malta's overall approach to integration, giving a score of 48 on the 100-point MIPEX scale and placing it in the 'Comprehensive integration (halfway favourable)' category.[18] The low score received by Malta is partly due to its recent shift toward integration. The Maltese government adopted its first Migrant Integration Strategy and Action Plan, 'Integration = Belonging,' in 2017, and its first Anti-Racism Strategy in 2021.[19] Despite these recent advances, according to MIPEX, Malta's integration policies still create many obstacles to integration. As put by MIPEX:

> Malta is trying to promote a comprehensive approach to integration but only goes halfway to actually guarantee equal rights, opportunities, and security for immigrants. Immigrants have greater obstacles to access these in Malta than in other countries with comprehensive policies.[20]

8.4 The anti-racism legal framework in Malta

8.4.1 The chance for victims to rely on racial and ethnic anti-discrimination legislation

Malta's anti-racism legal framework can best be characterised as chaotic, convoluted, and contradictory. Victims of racially motivated discrimination, harassment, or violence wishing to know their rights are confronted by more than 15 Acts of primary and secondary legislation containing potentially relevant provisions which tend to compete, rather than cooperate, with each other.

[17] Ibid.
[18] Migrant Integration Policy (2020) <Main Findings Policy Indicators: Key Findings> accessed 6 June 2022
[19] The European Commission (No date) <Governance of migrant integration in Malta> accessed 6 June 2022; Government of Malta (2021) <Press Release by the Ministry for Equality, Research and Innovation and by the Ministry for Tourism and Consumer Protection: Malta's First Anti-Racism Strategy Launched> accessed 21 June 2022
[20] Migrant Integration Policy (2020) <Key Findings - Malta> accessed 6 June 2022

As described by the NGO Aditus:

> The current legal framework is piecemeal and is found in various legal instruments, each having a different scope which in some instances overlap, a variety of actions for redress and different reporting or equality bodies.[21]

The fractured transposition of the Racial Equality Directive can most clearly be seen in the defined scopes of the implementing acts. Article 3 of the Racial Equality Directive lists the protected fields in which its provisions apply and prohibits discrimination based on race and ethnic origin. In Malta, these eight areas have been fragmented across three implementing acts.

The Equal Treatment in Employment Regulations scope covers the areas in Articles 3(1)(a)-3(1)(d) (access to employment; access to vocational training and guidance; employment and working conditions, including dismissal and pay; and membership and involvement in organisations of workers), with the exception of self-employment as found in Article 3(1)(a), which is covered by the Equal Treatment in Self-Employment and Occupation Order.[22] The latter Order also extends the substantive rights found therein to spouses of self-employed persons who are not formally a business partner or employee of their spouse, but who 'habitually participate in the activities of the self-employed or occupied person and perform the same tasks or ancillary tasks.'[23]

The Equal Treatment of Persons Order covers the remaining areas of scope found in Articles 3(1)(e)-3(1)(h) of the Directive (social protections, including social security and healthcare; social advantages; education; and access to and supply of goods and services, including housing).[24] The Equal Treatment of Persons Order also expands the scope of the Directive by specifically prohibiting discriminatory advertising.[25] The segregation of the Directive's scope across multiple Acts 'illustrates the complexity of… the legal framework… resulting in the enormous difficulty that individuals and their legal advisors face when filing a complaint.'[26]

The previous government proposed remedying this fragmentation through the introduction of two Bills: the 'Equality Bill', Bill No. 96, which would have served as a single source of equality and non-

[21] Aditus, Unfulfilled potential: Human Rights and Equality Commision BIll and Equality Bill (2019) <https://aditus.org.mt/Publications/inputonproposedequalityacts_2019.pdf> para 3
[22] Equal Treatment in Employment Regulations 2004 LN 2004/461, arts. 1(4)(a)-1(4)(d); Equal Treatment in Self-Employment and Occupation Order 2007 LN 2007/86, art. 4
[23] Equal Treatment in Self-Employment and Occupation Order 2007 LN 2007/86, art. 4
[24] Equal Treatment of Persons Order 2007 SL 2007/460/15, arts. 4(1)(a)- 4(1)(d)
[25] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 8
[26] Aditus, Unfulfilled potential: Human Rights and Equality Commision BIll and Equality Bill (2019) <https://aditus.org.mt/Publications/inputonproposedequalityacts_2019.pdf> para 3

discrimination legislation, seeking to ensure uniform, but tailored, protection across the protected grounds, and would therefore end the asymmetric protection offered under the current legislative framework.[27] At the same time, the government also introduced the 'Human Rights and Equality Commission Bill', Bill No. 97, which would have replaced Malta's current main Equality Body, the National Commission for the Promotion of Equality (NCPE) with a new 'Human Rights and Equality Commission'.[28] The new Commission was planned to be an independent body reporting directly to Parliament and able to open investigations by its own initiative, including proceedings against the Attorney General or before the Civil Court, First Hall in its constitutional jurisdiction.[29] The two Bills have been debated in parliament for several years and are not yet law. Protests and concerns raised by various groups in the Maltese community were one of the reasons preventing their enactment. For instance, the Medical Association of Malta (MAM) and the Chamber of Pharmacists raised concerns about Bill No. 96. In their view, the draft violates their professional and moral autonomy by not including a conscientious objection clause that would allow them to refuse to provide services such as abortion and euthanasia in Malta. They asked the Minister of Justice to consult appropriately with healthcare professionals before reformulating the law.[30] The two bills stalled following their Second Readings, and a new parliamentary session has since begun. No information is available on whether or not the new government intends to discuss the two bills.
As opposed to the Racial Equality Directive, the implementation of the Victims' Rights Directive is fairly straightforward. However, its transposition is lacking in several key areas. In July 2019, the European Commission sent a letter of formal notice to Malta citing incorrect transposition of the Victims Rights Directive.[31] Following infringement proceedings, most of the Victims' Rights Directive has been implemented. On 16 April 2021, Act No. XVII of 2021 was adopted to amend the Victims of Crimes Act - Chapter 539, and in September 2021, the infringement proceedings were closed against Malta.[32]

Despite these numerous sources of law, Malta lacks adequate measures in several areas, particularly in the protections afforded to victims after experiencing a racially-motivated crime. The following paragraphs analyse the gaps in the Maltese legislation that prevent adequate redress and effective protection for victims and their family members.

[27] The Parliament of Malta, Equality Bill (2019) <https://www.parlament.mt/en/13th-leg/bills/bill-no-096-equality/?page=1&numItems=5&text=&number=96&totalItems=1> accessed 8 June 2022
[28] The Parliament of Malta, Human Rights and Equality Commision Bill (2019) <https://www.parlament.mt/en/13th-leg/bills/bill-no-097-human-rights/#:~:text=AN%20ACT%20to%20provide%20for,of%20human%20rights%20including%20the> accessed 8 June 2022
[29] Human Rights and Equality Commision Bill (2019) art. 3
[30] The Malta Independent, Conscientious objection must be included in equality bill, pharmacists say (2020)
[31] The European Commission (2021) <July Infringement Package: Key Decisions> accessed 9 June 2022
[32] Victims of Crime (Amendment) Act 2021

8.4.2 Racial Equality Directive Implementation in Malta

> ***The result is that people have different rights in regard to anti-discrimination, depending on which context they find themselves in***

Assessing the compliance of the Maltese implementing Acts with the Racial Equality Directive is less than straightforward: while the scope of the Directive is divided across the three previously discussed Acts, those are not equal in their content. The result is that people have different rights in regard to anti-discrimination, depending on which context they find themselves in. The following analysis of the Maltese transposition of the Racial Equality Directive will proceed according to the chapters of the Directive. The contents of each chapter will be compared to the contents of the three main implementing acts, highlighting important lapses and notable additions in terms of the rights and protections granted.

All three acts faithfully implement the principle of equal treatment found in the first Chapter of the Directive.[33] All three exclude differential treatment on the grounds of nationality from the concept of discrimination, in line with the Directive.[34] The definitions in the implementing Acts expand the definition of discrimination by adding that a failure to supress harassment by employers or other individuals responsible for a workplace, organisation, or establishment constitutes a form of discrimination.[35]

Chapter II of the Directive (on 'Remedies and enforcement') is moderately well transposed. The three main Maltese Acts give victims of discrimination the right to pursue action before a civil court and allow for organisations or associations with a legitimate interest to support victims in such actions (Article 7 of the Directive).[36] The Equal Treatment in Employment Regulations also gives victims the right to raise the issue with the Industrial Tribunal, as per the Employment and Industrial Relations Act.[37]

For issues which fall under the Equal Treatment of Persons Order, the chairperson of the National Commission for the Promotion of Equality (NCPE), dubbed the 'Commissioner', can also initiate

[33] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 2; Equal Treatment in Employment Regulations 2004 LN 2004/461, arts. 1-3; Equal Treatment in Self-Employment and Occupation Order 2007 LN 2007/86, arts. 2, 4
[34] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 2(2)(4); Equal Treatment in Employment Regulations 2004 LN 2004/461, art. 1(5)(a); Equal Treatment in Self-Employment and Occupation Order 2007 LN 2007/86, art. 2
[35] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 4(2); Equal Treatment in Employment Regulations 2004 LN 2004/461, art. 3(4)(b)
[36] Equal Treatment of Persons Order 2007 SL 2007/460/15, arts. 15-16; Equal Treatment in Employment Regulations 2004 LN 2004/461, arts. 10-11; Equal Treatment in Self-Employment and Occupation Order 2007 LN 2007/86, arts. 6-7
[37] Equal Treatment in Employment Regulations 2004 LN 2004/461, art. 10; Employment and Industrial Relations Act 2002, art. 30

investigations and assist individual victims in the complaint process.[38] In all of the aforementioned complaint actions and proceedings, the burden of proof is upon the person(s) alleged to have acted in a discriminatory manner, faithfully transposing Article 8 of the Directive.[39] The Equal Treatment of Persons Order strongly protects persons against victimisation (Article 9 of the Directive), forbidding it not only against a victim who complains or initiates proceedings on the grounds of the Order, but also against any person who participates in such proceedings, or who discloses 'information, confidential or otherwise, to a designated public regulating body, regarding alleged acts of discrimination or discriminatory treatment.' The other two implementing Acts, however, omit protection against victimisation, failing to transpose this element of the Directive.

Conversely, they do implement the provision regarding the dissemination of information (Article 10 of the Directive), while the Equal Treatment of Persons Order does not. Article 12 of the Equal Treatment in Employment Regulations requires employers and organisations to:

> bring the provisions of these regulations as well as of any measure taken to further the aim of these regulations to the attention of his employees, or of the organisation's members, as the case may be, or to any other persons who may be affected by the actions of the employer or the organisation concerned.[41]

The Equal Treatment in Self-Employment and Occupation Order refers to Article 12, implying this requirement.[42] None of the three Acts implement the provisions regarding social dialogue (Article 11 of the Directive) or dialogue with non-governmental organisations (Article 12 of the Directive).

8.4.3 Bodies for the promotion of equal treatment and sanctions

The designation of bodies for the promotion of equal treatment (Chapter III, Article 13 of the Directive) is another example of how complex is the implementation of the Racial Equality Directive in Malta.

The Equal Treatment of Persons Order refers to the National Commission for the Promotion of Equality (NCPE), as defined in the Equality for Men and Women Act.[43] The NCPE works to achieve

[38] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 11
[39] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 13; Equal Treatment in Employment Regulations 2004 LN 2004/461, art. 10(3); Equal Treatment in Self-Employment and Occupation Order 2007 LN 2007/86, art. 6(2)
[40] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 7
[41] Equal Treatment in Employment Regulations 2004 LN 2004/461, art. 12
[42] Equal Treatment in Self-Employment and Occupation Order 2007 LN 2007/86, art. 4
[43] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 2(1); Equality for Men and Women Act 2003, art. 11

general equal treatment against discrimination of racial and ethnic origin. In addition to this, the Commission commits to fight discrimination based on racial/ethnic origin and gender in access to goods and services which are available to the public, including housing.[44] On the other hand, the Equal Treatment in Employment Regulations states that the 'Department of Industrial and Employment Relations (DIER) shall act as the equality body in respect of issues relating to race or ethnic origin falling under these regulations.'[45] The DIER monitors compliance with employment laws in the following areas protected by the Racial Equality Directive: employment and occupation, vocational training, and membership of employer and employee organisations.[46]

The sanctions applicable to infringements of the Maltese law adopted under Article 15 of the Directive depend on the context in which discrimination occurs and, therefore, which of the three implementing Acts applies. As previously described, all three of the main implementing acts give victims the right of action before a civil court. If discrimination has occurred, a victim may ask the court 'to order the defendant to cease such unlawful acts' and, where applicable, request compensation.[47] Where the action is made in regards to the Equal Treatment of Persons Order, the court may also order the payment of further compensation beyond 'actually suffered' damages.[48] All three Acts also stipulate that a person who has violated the provisions therein may be criminally liable. Possible penalties for criminal liability are a fine up to 2,329.37 Euros and/or imprisonment for up to six months.[49] If a person experiences discrimination in the scope of the Equal Treatment in Employment Regulations and chooses to raise an action with the Industrial Tribunal, Article 30 of the Employment and Industrial Relations Act applies. This stipulates that the Tribunal may take action as it deems appropriate, including the possibility to order the cancellation of any discriminatory contracts or clauses or the payment of compensation for actual loss and or damages suffered.[50]

Under Article 48(4) of the same Act, violations of the Equal Treatment in Employment Regulations are subject to fines of up to 11,646.87 Euros.[51]

In addition to the officially transposed sanctions, Article 82A of the Criminal Code criminalises incitement to violence or hatred against individuals or groups of persons on grounds including

[44] NCPE Remit (2020) <https://ncpe.gov.mt/en/Pages/About_Us/NCPE-Remit.aspx#> accessed 9 June 2022
[45] Equal Treatment in Employment Regulations 2004 LN 2004/461, art. 5A
[46] Equal Treatment in Employment Regulations 2004 LN 2004/461, art. 1(4)
[47] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 15(1); Equal Treatment in Employment Regulations 2004 LN 2004/461, art. 10(2); Equal Treatment in Self-Employment and Occupation Order 2007 LN 2007/86, art. 6(1)
[48] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 15(3)
[49] Equal Treatment of Persons Order 2007 SL 2007/460/15, art. 6; Equal Treatment in Employment Regulations 2004 LN 2004/461, art. 14; Equal Treatment in Self-Employment and Occupation Order 2007 LN 2007/86, art. 4
[50] Employment and Industrial Relations Act 2002, art. 30
[51] Employment and Industrial Relations Act 2002, art. 48(4)

race, colour, language, and national or ethnic origin. Violation of this provision is punishable by a prison sentence between six and 18 months.[52]

8.4.4 Victims Right Directive

Article 2 of The Victims of Crime Act defines a victim using the same wording as the Victims' Rights Directive. A victim is a 'natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence.'[53] Victims are also '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.'[54] In addition, Article 2(c) includes a third category not mentioned in the Victims' Rights Directive: 'minors who are witnesses to forms of violence'.[55] As Article 2, many other articles in the Victims of Crime Act are just a literal transposition of the Directive, using the same order and structure. Although the wording is often identical, the Maltese Act fails to transpose many parts of the Directive; those gaps will be discussed below.

Maltese law successfully incorporates Chapter 2 of the Directive on Information and Support, except for the right to interpretation and translation. The Directive's provisions on the right to receive information from the first contact with a competent authority (Article 4 of the Directive), the rights of victims when making a complaint (Article 5 of the Directive), and the right for victims to receive information about their case (Article 6 of the Directive) are all faithfully transposed in Articles 4, 5, and 6 respectively of the Victims of Crime Act 2015.[56] Access to victims' support services (Article 8 of the Directive) and the support they should provide (Article 9 of the Directive) are completely transposed, with the addition to the Maltese law that victims should receive immediate medical treatment for as long as necessary.[57] Victim support services as referred to in Articles 8 and 9 of the Directive are provided by the government's Victim Support Agency. The VSA (Establishment) Order created the Agency in 2020.[58] Prior to its establishment, victim support was provided by the Victim Support Unit in the Malta Police Force, established in 2017; this unit now acts in cooperation with the Victim Support Agency.[59]

On the other hand, the right to interpretation and translation (Article 7 of the Directive) is weakly transposed into the Maltese act, omitting the minimum requirements as to which stages during

[52] Criminal Code 1854, art. 82A
[53] Victims of Crime Act 2015, art. 2(a),
[54] Victims of Crime Act 2015, art. 2(b)
[55] Victims of Crime Act 2015, art. 2(c)
[56] Victims of Crime Act 2015, arts. 4-6
[57] Victims of Crime Act 2015, arts. 12-13
[58] Victim Support Agency (Establishment) Order 2020 SL 2020/595/37
[59] Malta Police Force (no date) <Victim Support Unit> accessed 7 June 2022

the process a victim should receive these facilities.[60] The provision in Article 7(2) of the Directive regarding the use of communication technology is also not referred to in the Victims of Crime Act.

8.4.5 Participation in criminal proceedings

Many of the provisions found in Chapter 3 of the Directive on Participation in Criminal Proceedings are also absent from the Maltese Act. Such is the case in respect of the right to be heard during criminal proceedings (Article 10 of the Directive), while the rights a victim has in the event of a decision not to prosecute (Article 11 of the Directive) are significantly fewer than those foreseen in the Directive. For instance, Maltese victims have no right to challenge a decision not to prosecute under the Victims of Crime Act. The Victims of Crime Act dictates that in such circumstances a victim should be informed and given a reason as to why no prosecution will occur. This information will be disclosed only if it 'would not be contrary to the public policy or the internal public law of Malta,' and may be excluded 'if the ends of justice would be prejudiced if such disclosure is made.'[61] However, while the right to review a decision not to prosecute is not included in the official transposing act, one is present in Malta's Criminal Code.[62] This is not included in Malta's notification of national transposition to the Commission nor do the relevant provisions reference the Directive. Under Article 541 of the Criminal Code, the procedure to be followed depends on whether the responsibility for prosecution for the offence falls to the Police or the Attorney General. Generally, this depends on the severity of the offence.

If the case falls under the authority of the Police, the victim may write to the Court of Magistrates requesting an order that the Police institute proceedings.[63] If the application is successful, both the Commissioner of Police and the Attorney General are notified. The Attorney General may apply to the Criminal Court to request a reversal of the Court of Magistrate's decision.[64] The victim also has a right to appeal to the Criminal Court if the Court of Magistrates refuses the initial application.[65] On the other hand, if the authority to prosecute is held by the Attorney General, a different procedure applies. The victim must write to the Attorney General within one month of learning of the decision not to prosecute, requesting a reconsideration of this decision, and give reasons why the Attorney General should in fact reconsider.[66] The Attorney General has one month to respond. If no response is given in that time period or the Attorney General responds that they affirm the decision not to prosecute, the victim has the right to seek judicial review under Article 469B of the Code of

[60] Victims of Crime Act 2015, art. 7
[61] Victims of Crime Act 2015, art. 8
[62] Criminal Code 1854, art. 541
[63] Criminal Code 1854, art. 541(1)
[64] Criminal Code 1854, art. 541(3)
[65] Criminal Code 1854, art. 541(3)
[66] Criminal Code 1854, art. 541(4)(a)

Organization and Civil Procedure.[67] The weak transposition of Article 10 of the Directive into Maltese law means that victims have few rights in the context of criminal proceedings. Victims in Malta do have the right to legal aid and a reimbursement of costs as foreseen in the Directive (Articles 13 and 14 of the Directive), but this has limited value given the absence of a right to be heard.[68]

The Victims of Crime Act also fails to transpose Article 16 of the Directive regarding payment of compensation to victims by offenders. Malta separately has a 'Criminal Injuries Compensation Scheme'; however, the scope of the scheme is quite limited, operating only in the event of a 'violent intentional crime.'[69] The Criminal Injuries Compensation Scheme Regulations define a 'violent intentional crime' according to a limited number of offences found in Malta's Criminal Code. The Scheme would operate where someone was the victim of a particularly violent racially-motivated assault, but would fail to apply in the discriminatory circumstances prohibited by the Racial Equality Directive.

8.4.6 Protection of victims and recognition of victims with specific protection needs

As with the previous chapters of the Victims' Rights Directive, Chapter 4 is poorly implemented in Maltese law. Of the seven articles within Chapter 4, only two are fully transposed in the Victims of Crime Act: the right to protection of victims during criminal investigations (Article 20 of the Directive) and the individual assessment of victims to identify specific protection needs (Article 22 of the Directive).[70]

> ***Maltese law includes the special measures to be provided to victims during criminal investigations but the measures for court proceedings are not transposed***

Maltese law includes the special measures to be provided to victims during criminal investigations (Article 23(2) of the Directive) but the measures for court proceedings are not transposed.[71] Victims in Malta therefore, are not afforded the ability to avoid visual contact with the offender when testifying or to give evidence without being physically present in the courtroom. There are also no provisions

[67] Criminal Code 1854, art. 541(4)(b); Code of Organization and Civil Procedure 1855, art. 469B
[68] Victims of Crime Act 2015, arts. 10-10A
[69] Criminal Injuries Compensation Scheme Regulations 2012, art. 2
[70] Victims of Crime Act 2015, arts. 6(4), 12, 14(4)
[71] Victims of Crime Act 2015, art. 14B

forbidding unnecessarily intrusive and irrelevant questions about a victim's personal life, nor on having the proceedings take place without a public presence. The transposition of the right to protection of child victims during proceedings (Article 24 of the Directive) is more faithful, however, the presentation of a child's testimony in court via a pre-recorded interview is not foreseen in the Maltese act.[72] This is, however, possible for children below the age of 16 under the Criminal Code.[73] Children are further neglected by the Maltese act, as the extra care to be taken in protecting the identities of child victims found in the right to protection of privacy (Article 21 of the Directive) is not included.[74] Also missing from the Victims of Crime Act is the right for victims to avoid coming in contact with offenders (Article 19 of the Directive).

Last but not least, Chapter 5 of the Directive including Article 25 on Training of Practitioners is not considered in the Maltese implementing Act. Malta is not ensuring that 'officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training.'[75] Lack of training will be discussed in the last section of the report when suggesting the steps forward.

To conclude, the unequal protections afforded by the three Acts implementing the Racial Equality Directive, together with the many gaps in the implementation of the Victims' Rights Directive leave victims in Malta with a patchwork assembly of provisions that are not fit for purpose. These issues, along with more practical problems affecting Malta's anti-racism framework as identified during interviews, are further explored in the following sections.

8.5 Implementation of the anti-racism legal framework in Malta

8.5.1 Knowledge of the Directives

Participants in the focus groups and interviews displayed an overall lack of knowledge of the Directives. They generally reported having, at most, heard of them. Most participants had a basic comprehension of national anti-racism laws and procedures. However, they did not know how Maltese legislation related to the two Directives. There were exceptions to this, such as the two lawyers (Interviewees 3 and 4). Additionally, two of the participants in Focus Group 1 (Participants 3 and 4), were knowledgeable in one of the Directives, but not both. This is because of the nature of their work: Participant 3 works for the Maltese equality body, the NCPE, and thus was well-versed

[72] Victims of Crime Act 2015, art. 14
[73] Criminal Code 1854, art. 646(2)
[74] Victims of Crime Act 2015, art. 10B
[75] Victims of Crime Act 2015, art. 25(1)

in the Racial Equality Directive, while Participant 4 is employed by the Victims Support Agency and was familiar with the Victims' Rights Directive.

The frontline workers who took part were the least informed, admitting they and their colleagues were unaware of the Directives or how they could be used. As explained by Interviewee 1, a representative from an NGO that supports Malta's migrant population, 'there are not many programmes being run in Malta to help frontline workers to really understand what the laws are. I don't think they are aware of these Directives.' Many frontline workers agreed, however, that knowledge in this regard would be an asset and allow them to assist better the people they work with.

When asked whether legal professionals were aware of the Directives, the two lawyers interviewed, Interviewee 3 and Interviewee 4, agreed that lawyers are not generally knowledgeable of the two Directives. Interviewee 3 could not recall the Directives being a topic of the many emails distributed or events held by the Chamber of Advocates, Malta's professional association for lawyers. Both interviewees also credited this lack of knowledge to the fact that lawyers focus on topics and legislation relevant to their field of practice. Interviewee 3 further elaborated on this point by explaining that lawyers in specific fields, such as environmental law, are generally well-versed in EU legislation. She continued, saying that, by contrast, anti-racism legislation, including the domestic provisions, is generally not an area to which Maltese lawyers pay attention to:

> I think, in general, lawyers do know about the EU Law and if they want to make a point in Court they will research it. Whereas the anti-racism laws are ignored, keep in mind that we often think of anti-racism as something related to migrants, outsiders, or second-class citizens, not to Maltese; so knowing less about these laws is about the Maltese racist problem. It affects everyone: it is also about Maltese. The Directive deals with race, but for Maltese, who are probably white people who speak Maltese, there is this idea that racism is for outsiders, not locals.

Interviewee 4 argued that simply asking whether her colleagues were 'aware' of the Directives would not address what truly matters: competency (or, as is the case in Malta in her view, incompetency) in applying the Directives. Similarly to Interviewee 3, she also reflected that the reason for this may represent a deeper cultural problem:

> How I would rather interpret this question is, are legal professionals sufficiently aware to use it in their cases? No, I don't think they are, not to that extent. I wonder whether that's because they follow the same cultural perception of race and racism. I mean, these Directives

> are a super starting point. For any graduated lawyer, they should technically not even need to be trained, but they can read them and understand them, and take action in that regard. However, no, I haven't seen that level of willingness. If they are aware, there hasn't been much practice on it.

Regarding victims, Focus Group Participants and Interviewees adamantly agreed that most (prospective) victims in Malta are unaware of their rights under domestic legislation and the two EU Directives. They also reported that in the rare cases where victims are better informed, they are usually unwilling to report the offence. Several frontline workers reiterated their desire to learn more about the Directives, as this would allow them to impart their knowledge to the communities they assist.

8.5.2 Use of legal framework by national courts

Empirical research and project participants' responses have revealed that Malta does not use the anti-racism legal framework. Analysis of Maltese court judgements issued between 2016 and 2021 revealed only six decisions on racial or ethnic discrimination cases. All these cases concerned the use of hate speech as defined in Article 82A of the Criminal Code.[76] Neither the judges nor the attorneys in the cases, referred to either the two Directives or the national legislation which transposed them. There are several potential explanations for why these laws are so under-cited.

First, victims do not report racial discrimination incidents. In Focus Group 2, Participants 2 and 3 discussed how many victims, mainly migrants with little knowledge of Malta, do not know where to report incidents. Focus Group 1, Participant 5 described the social and economic vulnerabilities that disproportionately affect Malta's migrant community – those most likely to experience racial discrimination in the country. Difficulties obtaining housing might prevent someone from reporting their landlord, while fear of losing one's job and being deported would weigh heavily in a decision to complain about an employer. Interviewee 2 offered another explanation, crediting a lack of reporting to a general distrust of Maltese authorities by migrants.

As previously discussed, the courts' neglect of the anti-racism framework might also be explained by the lack of knowledge held by legal professionals. If attorneys do not know how to use the legislation and therefore do not include the Directives or the transposing Acts in their submissions to the Court, then the judges are unlikely to use them in their reasoning. Several participants also believed Malta's judges are, like the attorneys, unfamiliar with the Directives and their transposition.

[76] Criminal Code 1854, art. 82A

Interviewee 3 thought this might be due to the novelty of the framework – that judges simply had not had enough time to familiarise themselves. She also wondered whether judges had failed to interest themselves in the legislation because they held the same negative views about migrants highlighted as being endemic to the Maltese population. Focus Group 2, Participant 3 similarly believed that judges in Malta are indifferent to racism as it does not personally affect them. The same participant additionally noted that Maltese judges and magistrates struggle with caseloads, with insufficient judges to handle cases well and efficiently. This over-taxation might also means that the judiciary in Malta simply does not have the time to learn about new legislation, especially if they believe it is not particularly relevant. Interviewee 4 conversely thought that the judiciary was probably capable of applying the Directives or the transposing Acts but had simply not been allowed to do so due to the lack of relevant cases:

> I think the number of cases are so few that I can't truly assess whether it's the Court's lack of knowledge or the courts not being comfortable with the Directives. I've seen courts apply European Directives and International Law, and they were pretty comfortable with applying them. So, I would assume that if a case arose before them, they would be comfortable applying these Directives, as well their transposition into Maltese legislation, in a similar way that they've done with the Gender Directives on the gender equality aspect. There is not enough case law or proceedings for this question to be assessed on. I think, at least from my experience and from my angle, the judges and the judiciary would simply have a better understanding.

8.5.3 Role of equality bodies and other entities

There are several bodies in Malta which are directly implicated in the implementation of anti-discrimination measures. The primary body responsible is the equality body, the NCPE. One of the NCPE's main roles is to receive and investigate complaints regarding discriminatory conduct on various grounds, including racial or ethnic origin.[77] Once all the parties have been heard, the NCPE will decide whether or not the conduct amounts to discrimination. If the complaint is valid and the parties consent, the NCPE may attempt to mediate between the victim and offender. Otherwise, the NCPE can also issue a non-binding opinion. This will ask the responsible party to adopt a recommended form of redress towards the victim. Where it sees fit, the NCPE can choose to transmit the case to the Commissioner of Police (for a criminal investigation of the perpetrator), the Industrial Tribunal (for adjudication on discrimination in the context of employment), or the civil courts (for litigation between the parties). In addition to its role in receiving and assessing

[77] National Commission for the Promotion of Equality (NCPE) (2021) <Complaints> accessed 23 June 2022

complaints, the NCPE institutes public initiatives and conducts awareness-raising campaigns. The NCPE has, however, been the subject of criticism. Interviewee 4 discussed several perceived failings of the NCPE, including limited outputs and politicking. She alleged that because the NCPE is not independent, receiving its funding and appointments from politicians, it avoids taking actions which might upset them.

Regarding workplace discrimination, victims can seek assistance by filing a case with the Industrial Tribunal, administered by the Department for Industrial and Employment Relations (DIER). The Industrial Tribunal has the power to make legally binding decisions, including issuing redress or compensation orders.[78] As described by Focus Group 1, Participant 1, regarding the Racial Equality Directive, 'we (DIER) don't directly transpose this Directive, but we facilitate it in our work.' In the years between 2016 and 2021, however, the Tribunal did not hear any racial or ethnic discrimination cases.

Implementation of the Victims' Rights Directive falls within the remit of the Victim Support Agency (VSA). The VSA provides a wide range of services for victims, including accompanying them to Court, liaising with police to keep victims informed about their case, and providing emotional support.[79] These services are available to all victims free of charge.[80] The VSA also conducts awareness-raising activities about hate crimes and the harm they cause. Supporting the VSA in its activities is the Victim Support Unit of the Malta Police Force. This unit was responsible for all victim support activities before founding the VSA and now works in coordination with the VSA.[81]

8.5.4 Availability of remedies

Different remedies are available depending on which body or Court the victim has accessed. As explained by Focus Group 1, Participant 3, proper, enforceable remedies are obtainable from the civil or constitutional courts or the Industrial Tribunal. They have the ability to order financial compensation or other methods of redress. The Industrial Tribunal can, for example, cancel discriminatory contracts or clauses.[82] If the criminal courts hear the case, no remedies are available, only criminal penalties for the offender: custodial sentences and/or fines. Where the case is before the NCPE, all a victim may expect is an opinion with no binding force. 'The NCPE may transmit this opinion to the police or the courts; however, it has no legal value and the police and the courts are free to proceed as they so wish.'

[78] Department for Industrial and Employment Relations (DIER) (2020) <Information about the Industrial Tribunal> accessed 9 June 2022
[79] Victim Support Agency (VSA) (no date) <About Us> accessed 23 June 2022
[80] Victim Support Agency (VSA) (no date) <FAQs> accessed 23 June 2022
[81] Malta Police Force (no date) <Victim Support Unit> accessed 7 June 2022
[82] Employment and Industrial Relations Act 2002, art. 30

8.5.5 Practical application of the Directives

There is a marked difference between the theoretical and practical ability of Maltese victims to rely on the transposed Directives. The focus group participants and interviewees identified many practical issues impeding the ability of prospective victims to pursue justice. Many participants alleged that the legal framework is simply not respected by law enforcement and the courts. In their opinion, the Directives and transposing Acts were legally transposed but not applied in practice. Interviewee 3 highlighted this disparity:

> In general, the Directives will still apply in Malta. It is still possible to go to court and claim that [a victim's] rights under EU Law have not been effectively protected. I can say for a fact that, in regards to the victims… definitely their rights are not being granted and they rarely have any information about the case.

Several other participants made statements to this effect. Interviewee 2, for example, stated, 'I wouldn't rely on it at all because I've seen with my own eyes that it's not being followed.' Participants also discussed the hesitancy of victims to report cases in the first place. This was discussed as being due to the socio-economic reasons, and mistrust of authorities previously identified, but also because of the slow pace of Maltese courts. According to a 2020 report by the European Commission for the Efficiency of Justice, Maltese courts take between twice and eight times as long to conclude a case as the EU average. Furthermore, Malta's courts receive new cases at a higher rate than they can be resolved, leading to a backlog.[83] Focus Group 1, Participant 2 recounted those victims are fully aware of these delays and decide not to pursue cases because 'this really awful thing happened to me… but I don't want to wait years for this to be solved.' Victims who want to move forward with a complaint are frequently deprived of the measures foreseen by the Victims' Rights Directive or the Victims of Crime Act. Several participants described occasions when victims were not provided adequate translation or interpretation assistance.

Examples ranged from cases where the service was not provided to instances where the interpretation occurred in the wrong language or dialect. Interviewee 2, for example, described how a Somali man was given an Arabic interpreter on three separate occasions. This was despite the Court knowing he spoke Somali Arabic. Others expressed dissatisfaction with the quality of support given by Legal Aid Malta lawyers. Many cited the lack of adequate human and financial resources provided to the department, leading to its attorneys being overworked and under-informed. Interviewee 2 recounted:

[83] European Commission for the Efficiency of Justice (2020) <European judicial systems CEPEJ Evaluation Report> accessed 23 June 2022

> I've seen the legal aid lawyer wait until the day before the trial to contact them. They don't provide them with the information they need. People don't get a reply. It takes months to get answers. That's why we tend to use NGOs because the state system doesn't provide adequate legal aid for people. We shouldn't have to rely on NGOs, they have thousands of clients, and are working under pressure.

Interviewee 4 offered a potential explanation for these disparities between what the law says and what happens in practice. She highlighted that many provisions from the Directives were merely 'copied' verbatim into national law. This is problematic for two reasons. The first is that by copying the text in this manner, the legal obligation is created but without the necessary supporting framework. Maltese legislators failed to include the details of how these obligations should be met. As put by Interviewee 4, 'the legal obligations need to be accompanied by other measures.' The other problem with this transposition method is that these provisions were not adapted to the Maltese context. Interviewee 4 believed 'the social, cultural, and political situation in the different Member States may require a different level to the minimum level. They may require a higher standard.' In other words, she explained, the Directives were 'transposed, but not necessarily effectively.' On the other hand, the participants agreed that NGOs were invaluable in filling the gaps left by legislators. When asked whether any good practices were taking place, Interviewee 2 stated:

> There are good things going on, but a lot of the good things are done by NGOs. So, I can go on about NGOs having done great things, but not the government.

Interviewee 4 felt similarly, responding:

> I'm sure there must be some good practices, but…I think if I had to consider the levels of racial discrimination, and the extent of victimisation of victims, I don't think I would really highlight too many good practices, except for the work of NGOs. For the work of NGOs, it is to their credit, not to [Malta's] credit. So it's not a good practice of the government or the state, I would say. But, this is from what I see from outside the field.

Above all, participants recognised that the primary barrier is that victims do not know where to make complaints or receive support. They agreed that for victims to rely on the law or support services, they must first have the necessary information enabling them to do so.

8.6 Steps forward

Based on a review of the law, its implementation, and the opinions of relevant stakeholders, it is clear that the Maltese anti-racism legal framework requires improvement.

Many rights and protections envisioned in the Racial Equality Directive and the Victims' Rights Directive are omitted or only partially implemented. While some aspects of Maltese implementation are more inclusive than the Directives, the benefits they offer are far outweighed by the detriments caused by the fragmentation of the Racial Equality Directive across multiple acts. Malta's complicated implementation means victims are unlikely to understand their rights without legal assistance.

> ***"Many rights and protections envisioned in the Racial Equality Directive and the Victims' Rights Directive are omitted or only partially implemented."***

The interviewees confirmed the issues identified in the desk research, mentioning the confusing implementation of the Racial Equality Directive and the gaps between Maltese legislation and the two Directives. A single anti-discrimination Act, such as the failed Equality Bill, would guarantee better harmonisation of the Directive. Further, rectifying the gaps requires reform in both legislative and practical terms. Equality bodies, victim support organisations, and interpreters need adequate resources to provide decent services.

Awareness also needs to be raised in minority communities about the available forms of assistance. Knowledge of the two Directives among frontline workers, legal professionals, and potential victims in Malta is virtually non-existent. This impedes the ability of victims to access services and for legal professionals to adequately represent their clients.

It is clear from the numerous responses during interviews and focus groups indicating a lack of familiarity that training in both Directives would be highly beneficial. Interviewees and Focus Group participants all agreed that increased knowledge of the Directives would be an asset, as it would strengthen their ability to assist victims. In this respect, the participants of Focus Group 3 wished to emphasise the underlying need for reform. The group acknowledged that training would help victims take advantage of the current protections, but that those protections were not sufficient. However, they ultimately conceded that in the absence of foreseeable legislative change, training was the best available solution. When asked who should receive training, participants believed it should be given to all legal professionals, including judges. The respondents also strongly felt

that among frontline workers, police officers should be prioritised as recipients of training on the Directives. They further highlighted the employees of NGOs working with migrants, health care workers, construction workers or site managers, and educational staff as other potential trainees.

The participants identified several critical points in respect of any training. First, they emphasised that training should be tailored to its recipients. While judges and lawyers can easily understand a highly legalistic training session, frontline workers are likely to become overwhelmed if presented with too many legislative details. In that respect, the context was considered especially important when designing different training programs. In addition to this profession-tailored training, Interviewee 2 suggested periodic meetings between police, legal professionals, and NGOs, in which attendees could exchange questions and advice. She also thought representatives from minority communities and former victims could attend to provide contextual insight into how the law could best help them.

The importance of context was also highlighted in respect of who would provide training. Interviewee 4 reported that foreign organisations usually give activities in Malta; however, this means the training is not tailored to Malta specifically. It should therefore fall to local organisations to provide contextualised and more relevant training on the Directives.

Personal knowledge was also considered necessary in respect of the impact of the Directives. Interviewees 1, 2, and 4 described how training is, in most cases, provided by individuals who are not personally affected by the content. It is essential that representatives of minority groups, especially past victims, be involved in the design and administration of the training. This would ensure the training is relevant and responsive to victims' needs. Hearing from past victims would also provide an emotional dimension to training, which would help emphasise the practical importance of the topic for trainees.

The continuity of any training on the two Directives must be ensured. Training should be given periodically, with its content updated to reflect the current situation. This connects back to the other points made regarding the importance of context. Focus Group 2, Participant 3 highlighted the high turnover rate in Maltese government agencies–as staff tends to change quite often, the training frequency for agency employees should be relatively high. Stakeholders would also benefit from continuous digital access to training materials and current information, as observed by Interviewee 2.

IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN THE NETHERLANDS

9 IMPLEMENTATION OF THE EU ANTI-RACISM LEGAL FRAMEWORK IN THE NETHERLANDS

J.M.A. VAN WIJCK AND J. REUVER, DIGITAL SOCIETY SCHOOL, AMSTERDAM UNIVERSITY OF APPLIED SCIENCES

9.1. Introduction

This Dutch National Report, written as part of the Preventing Racism and Discrimination –Enabling the Effective Implementation of the EU Anti-Racist Legal Framework (henceforth PRESERVERE) project, is an evaluation of the practical implementation of the European Directives on victim rights and anti-racism in the Netherlands. We will focus on four minority groups: Muslims, persons of African descent, Roma & Sinti, and Jews. We have researched and analysed the legal framework within which the EU's Racial Equality[1] and Victims' Rights Protection[2] Directives have been applied in the Netherlands. The report shows good practices but also the challenges with respect to anti-racism law execution in the Netherlands and the implementation of the European Directives in the Dutch legal framework.

Transposing the Racial Equality Directive as well as the Victims' Rights Directive to the Dutch legal framework has been executed in a well-mannered way. In its 2020 report, the European Commission confirmed that the Netherlands had sufficiently transposed the Victims' Rights Directive 2012/29.[3] The Racial Equality Directive was implemented in 2004 through the General Equal Treatment Act, by means of the EC Implementation Act AWGB.[4] Although the Directives have been transposed to the Dutch Legal Framework, there are several flaws in the practical implementation of the domestic legislation that transposed them. Both legal workers and frontline workers that were

[1] 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.
[2] 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 OJ L 315, 14.11.2012, p. 57-73.
[3] European Parliament, 'REPORT on the Implementation of Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime' (2018) available at https://www.europarl.europa.eu/doceo/document/A-8-2018-0168_EN.html.
[4] Staatsblad 2004, 199. STB8534 ISSN 0920 - 2064 Sdu Uitgevers 's-Gravenhage 2004.

interviewed and participated in focus groups organised under the PRESERVERE project identified (a) a lack of financial support and awareness from the government and policymakers; (b) a lack of engagement by the courts and the prosecutor's office; and (c) the inadequate training of civil servants and police officers.

There is also positive feedback: opportunities to report discrimination are well organised via the anti-discrimination facilities and this infrastructure is available in every municipality. In addition, the Dutch government has doubled the financial support for Anti Discriminatie Voorziening (Anti-Discrimination facility, henceforth ADV) since the Toeslagen Affair.[5] And finally, the expansion of training and creating awareness is widely supported by all the participants in this study.

9.2. Methodology

To collect data, we have researched how the European framework has been transposed in the Netherlands and focused on features of the domestic legislation. We have collected data from the Netherlands Institute for Human Rights (henceforth, NIHR) and studied policies to establish the way the Dutch government has organized ADV and how the Dutch government acts towards minority groups in the country.

We have also conducted empirical research by approaching organisations within the Netherlands which are involved in anti-discrimination work. We have reached out to the NIHR and law enforcement bodies, but also on networks as LinkedIn and by cold calling. A total of 18 people were interviewed, divided into two focus groups of six participants each and six individual interviews. For the interviews, we have spoken to six legal female professionals to discuss discrimination and racism in the Dutch society and to present recommendations towards a better implementation of the EU legal framework. Their professions include director of a legal agency, policymaker at ADV Amsterdam, Quality Mark Director for educational youth organisations fighting discrimination,[6] chairwoman of the Asian Collective, intermediary officer within an institution of higher education and the director of Art. 1, a governmental organisation tasked with addressing discrimination. The interviews took place online. They were conducted in Dutch and translated to English; the translated drafts were presented to the interviewees for their consent.

[5] The Toeslagen Affaire (childcare allowance affair) is a Dutch political affair that arose out of unjustified suspicions of fraud involving allowances and a strict recovery policy of the central government. The case made the press with childcare allowances, but it turned out that there were similar problems with the repayment of rent allowance, health care allowance, child budget and income tax. Although the problem had been an issue since 2004, it only received attention from 2017. Investigations have identified instances of institutional racism, institutional bias, and discrimination.

[6] On the 28th of June 2022 a quality mark was introduced, named Fyjas. It is the first quality mark on discrimination in the Netherlands: it accredits how the pedagogical and/or anti-discrimination and anti-racism policy is conducted within a sports organization, school or other institution.

The first focus group consisted of six participants from the professional fields of law, academia, and civil rights groups. The second focus group consisted of six frontline workers from organisations such as the police, social help organisations, local municipal government and anti-racism bodies.
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9.3. Setting the scene

9.3.1 Discrimination against Roma and Sinti

> ***76 percent of Roma and Sinti people in the Netherlands believe they are discriminated against.***

Statistics Netherlands (CBS) has no data on Roma and Sinti but the Council of Europe estimates that there are around 37,500 Roma living in the Netherlands now (0.24 percent of the population).[7] According to a recent study conducted by the EU Fundamental Rights Agency (FRA), 76 percent of Roma and Sinti people in the Netherlands believe they are discriminated against.[8] Since 1999, numerous towns in the Netherlands have sought a so-called 'extinction policy' of caravan parks.[9] When a resident died, the town would demolish the pitch by placing concrete blocks on the ground, forcing other Roma and Travelers to relocate to conventional housing.[10] In 2017, the Ombudsman in the Netherlands published a report that stated that the municipalities, as well as the state, do not fully respect and facilitate the provision of caravan sites for Roma people according to their cultural identity.[11] The reduction of caravan sites is not allowed and the 'phasing-out' policy should be abolished. According to ECRI's General Policy Recommendation No. 13 on Combating Antigypyism and Discrimination against Roma, appropriate encampment areas and parking sites should be provided for much-needed housing purposes.[12]

[7] European Commission, 'Policy Measures In The Netherlands For The Equality, Inclusion, And Participation Of Roma And Sinti' (2021), available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/roma-eu/roma-inclusion-eu-country/roma-inclusion-netherlands_en.
[8] European Union Agency for Fundamental Rights, 'Roma Travelers in Six Countries' (2020) available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-travellers-six-countries_en.pdf.
[9] 'Roma And Travelers in Netherlands Fear For Their Culture' (POLITICO, 2022) available at https://www.politico.eu/article/roma-and-travelers-in-the-netherlands-fear-for-survival-of-their-traditions/.
[10] Ibid.
[11] European Commission Against Racism and Intolerance, 'ECRI Report on The Netherlands' (2019) available at https://zoek.officielebekendmakingen.nl/blg-885386.pdf.
[12] ECRI, 'General Policy Recommendation No. 13 on Combating Antigypyism and Discrimination against Roma' (2011), avalable at https://rm.coe.int/ecri-general-policy-recommendation-no-13-on-combating-anti-gypsyism-an/16808b5aee.

Travelers and Roma should be permitted to live their lives according to their customs, according to Dutch Interior Minister Kajsa Ollongren, who asked towns to alter their housing restrictions in July 2018.[13] She cited court rulings declaring the current housing policy unfair. Although many Dutch cities and villages have begun to analyse the housing needs of travellers and Roma, just a handful have made considerable progress. Several municipalities wrote to the Minister, expressing their concerns about an increase in crime rates.[14]

Equal treatment organisations carry out investigations and generate reports to combat antigypsyism. They also supply policymakers with recommendations and advice. For example, the NIHR was involved in the preparation of a policy suggestion with pitches, which resulted in the policy framework on municipal mobile homes and pitch policy. The new policy, which went into effect on July 12th, 2018, addresses the problem of human rights abuses.[15] The necessity of housing, as well as cultural preferences and the right to equality of treatment, are all addressed in the policy. The public housing policies of towns now include caravan pitches, where space is provided for camper occupants. Therefore, existing pitches must be kept in place, and new spaces will be built as needed with the aid of housing cooperatives.

In some circumstances, the NIHR has the authority to provide an opinion with regards to Roma people's situation in the Netherlands, also pertaining to discrimination. Furthermore, any Municipal AVD can offer Roma in distress counselling and legal assistance. One example is the assistance provided during the NIHR's proceedings against the municipal authorities.[16] Cooperation between the NIHR, the Ombudsman, public interest litigation organisations and the EU Commission resulted in a policy change regarding Roma housing which aims at preventing discrimination and provides legal security in that respect.[17]

9.3.2 Discrimination against Muslims

According to Statistics Netherlands (CBS), 5 percent of the Dutch population is Muslim (888,960 people). A study published by Unal reported that 40 percent of Muslim respondents experienced

[13] 'Roma And Travelers n Netherlands Fear For Their Culture' (POLITICO, 2022), available at https://www.politico.eu/article/roma-and-travelers-in-the-netherlands-fear-for-survival-of-their-traditions.
[14] Ibid.
[15] Ana Polgar and Irina Krottje, 'Caravan Dwellers Versus the Tiny Houses Movement' (2020), available at https://www.rug.nl/frw/education/related/human-geography-remastered/caravan-dwellers-versus-the-tiny-houses-movement-04-11-2020?lang=en.
[16] European Commission, 'Policy Measures in The Netherlands For The Equality, Inclusion, And Participation Of Roma And Sinti' (2021), available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/roma-eu/roma-inclusion-eu-country/roma-inclusion-netherlands_en.
[17] Ibid.

some form of Islamophobia in the period 2013-2018.[18] The most common form of Islamophobia is a verbal one that takes place during daily life, including in working places. According to the 'Second European Union Minorities and Discrimination Survey – Muslims – Selected findings' Report, 73 percent of Muslim respondents living in the Netherlands believe discrimination on grounds of ethnic origin or immigrant status is widespread in the country (additionally, 62 percent believe that discrimination on the grounds of skin colour is widespread in the Netherlands).[19]

Also, the level of trust in the legal system among first- and second-generation of immigrants is lower than the national average in the European Social Survey.[20] Minority groups feel that some legislative initiatives are targeted at them.[21] For example, in 2018, the Upper House of the Netherlands decided that wearing the full-face veil in public spaces is prohibited. Furthermore, according to ECRI, hate speech and xenophobic discourse are prevalent in the Dutch media and among Dutch politicians.[23]

9.3.3 Discrimination against Jews

According to Statistics Netherlands (CBS) 0,3 percent of the Dutch population is Jewish (53,247 people). In the survey conducted by the European Union Agency for Fundamental Rights, almost half of the respondents (47 percent out of 1,202 respondents) in the Netherlands, who considered themselves Jews, said that they had faced antisemitic harassment of some manner. 79 percent of the respondents stated that the Dutch government's efforts to fight antisemitism are ineffective.[24] In 2019, the number of anti-Semitic acts reported to the Israel Information and Documentation Centre (CIDI) grew by 35 percent. There were 182 reports of anti-Semitic behaviour, which is the highest number since records began.[25] For instance, in December 2021, a Dutch judge ordered

[18] Yavuz Unal, 'Ervaringen Met Moslim Discriminatie In De Turkse Gemeenschap', *Mikpunt Moskee* (Islamic Institute Netherlands for Education and Research 2019).
[19] European Union Agency for Fundamental Rights, 'Second European Union Minorities and Discrimination Survey – Muslims – Selected Findings' (2017), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf.
[20] Ibid.
[21] European Centre for Democracy and Development, Centre for Monitoring and Comparative Analysis of Intercultural Communications, 'Xenophobia, Radicalism, and Hate Crime in Europe' (2018), available at https://www.osce.org/files/f/documents/3/e/395336_1.pdf.
[22] Act Partially Prohibiting Face-Covering Clothing 2022.
[23] European Commission Against Racism and Intolerance, 'ECRI Report on The Netherlands' (2019), available at https://zoek.officielebekendmakingen.nl/blg-885386.pdf.
[24] European Union Agency for Fundamental Rights, 'Experiences and Perceptions Of Antisemitism Second Survey On Discrimination And Hate Crime Against Jews In The EU Factsheet – The Netherlands', available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-2nd-survey-on-discrimination-and-hate-crime-against-jews-in-eu-ms-country-sheet-netherlands_en.pdf.
[25] Nehra W, 'Sharp Increase In Anti-Semitic Incidents In The Netherlands' I am Expat (2020), available at https://www.iamexpat.nl/expat-info/dutch-expat-news/sharp-increase-anti-semitic-incidents-netherlands.

Dutch populist lawmaker Thierry Baudet to remove four tweets in which he drew parallels between coronavirus lockdown measures and the Nazi regime's treatment of Jews, claiming that they 'instrumentalized' Jewish suffering.[26]

Since 2000 both anti-Semitism and Islamophobia are on the rise, and consequently there have also been considerable changes in terms of the number of incidents reported. According to research, these changes are linked to violent outbursts in the Middle East as well as acts of violence committed in the name of Islam in the West. This trend is not only observed in the Netherlands, but globally as well.[27]

9.3.4 Discrimination against people of African descent

In the Netherlands there is no up-to-date information on the numbers of people of African descent. There is, however, a study from the Statistics Netherlands (CBS), which estimates the number of sub-Saharan African immigrants to be in the figure of 100,000 persons (± 0.6 % of the total population).[28] This group consists mostly of Somalis, Cape Verdeans, Ghanaians, Angolans, Ethiopians/Eritreans, Congolese (Democratic Republic), Nigerians and Sudanese people. The Netherlands also has inhabitants with African descent, but who immigrated from (former) colonies, like Surinam (360,868 persons, making up 2 percent of the total population)[29] and the Antilles (150,000 persons, making up 0.9 percent of the total population[30]). Discrimination against people of African descent is mostly addressed as 'anti-Black racism' and is defined as the structural undervaluation, exclusion, and dehumanisation of Black people.[31]

Discrimination against black people in the Netherlands expresses itself in its strongest form during the annual Sinterklaas celebration at the end of November until the beginning of December. The discussions around 'Black Pete,' a Dutch tradition in which Saint Nicholas is accompanied by a Black servant, exemplify Black people's feelings of exclusion. For many, this is an unacceptable caricature that reinforces racist stereotypes dating back to enslavement. Demonstrators in

[26] Hanelloes Pen, 'Thierry Baudet Verliest Kort Geding Over Holocaustvergelijking' Het Parool (2021) https://www.parool.nl/nederland/thierry-baudet-verliest-kort-geding-over-holocaustvergelijking~b83f1e15/.
[27] Sipco Vellenga, 'Anti-Semitism and Islamophobia in the Netherlands: concepts, developments, and backdrops' (2018), Journal of Contemporary Religion, 33:2, 175-192.
[28] CBS, Afrikanen in Nederland: Bevolkingstrends, 3e kwartaal (2005).
[29] Ibid.
[30] Ibid.
[31] Afrophobia in Europe ENAR Shadow Report 2014-2015 available at https://ec.europa.eu/migrant-integration/library-document/enar-shadow-report-2014-2015-afrophobia-europe_en and Second European Union Minorities and Discrimination Survey: Being Black in the EU available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-being-black-in-the-eu_en.pdf.

Dokkum who wanted to protest the use of the image of Black Pete were blocked on the highway by counterdemonstrators in November 2017. The municipality later prohibited the demonstration after declaring a state of emergency. The demonstrators believe the police did not take enough precautions to protect the planned course of the demonstration. The ones blocking the highway were sentenced by the court of Leeuwarden to community service of 80 to 240 hours.[32]

40,000 abusive comments were posted online because of the announcement of Sylvana Simons, a Black politician, actress and television personality running as a candidate for the party 'Denk'. 16 of 21 perpetrators who posted offensive comments and demonstrated hate speech were sentenced to fines ranging from 150 to 450 Euros and a few others to community service from 60 to 80 hours.[33] ECRI expressed concern that even though these sentences have been covered widely in the media, they do not have a sufficiently deterrent effect.[34]

9.4. The anti-racism legal framework in The Netherlands

Anti-discrimination in the Netherlands is enshrined in the Constitution. Article 1 of the Constitution (2002) states that, in the Netherlands, in situations involving equal circumstances, all people must be treated equally and discrimination is forbidden. Race and religion are two of the grounds of discrimination that Dutch law identifies: 'All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted.'[35] Nevertheless, it should be noted that Article 1 of the Constitution is a general provision. The article cannot easily be invoked in a lawsuit from one citizen against another. Lawyers usually assume that Article 1 primarily prohibits the government from discriminating against citizens (the so-called vertical effect). Thus, to be able to substantiate the right to equal treatment, Article 1 has been elaborated in several separate laws.[36]

> ***Race and religion are two of the grounds of discrimination that Dutch law identifies.***

Besides Article 1 of the Constitution, the General Equal Treatment Act (1994) is one of the statutory provisions that prohibit discrimination on the ground of race.[37] However, this Act does not clearly

[32] European Commission Against Racism and Intolerance, 'ECRI Report on The Netherlands' (2019), available at https://zoek.officielebekendmakingen.nl/blg-885386.pdf.
[33] Ibid.
[34] Ibid.
[35] 'Dutch Civil Law' (Dutchcivillaw.com, 2022), available at http://dutchcivillaw.com/legislation/constitution011.htm.
[36] Ibid.
[37] European Commission Against Racism and Intolerance, 'ECRI Report On The Netherlands' (2019), available at https://zoek.officielebekendmakingen.nl/blg-885386.pdf.

state that discrimination by association, segregation, inciting discrimination, or intention to discriminate, fall under discrimination prohibited by it. Furthermore, it does not explicitly state that the prohibition of discrimination applies to both the private and public sector, but it covers private and some part of the public sector. This is in contrast with § 7 of The European Commission against Racism and Intolerance (ECR)'s GPR No. 7 that fully encompasses both sectors.[38]

9.4.1 Directive 2000/43 and Directive 2012/29

In 2020, the European Implementation Assessment recognised that the Netherlands had sufficiently transposed Directive 2012/29. The Netherlands started developing victim support systems in 1970s.[40] The country has opt-out mechanisms that necessitate the coordination of broad networks of support services and a considerable amount of information is interchanged between them to reach all victims. According to research, opt-out systems are considered necessary to bring the desired outcomes.[41]

9.4.2 Anti-discrimination facilities

There are two sorts of equality bodies in the Netherlands. Firstly, there is a quasi-judicial (or tribunal-like) organisation tasked with reviewing complaints about uneven treatment, preparing reports, advising the government, and conducting independent investigations into probable cases of structural discrimination. The NIHR's mandate spans all areas covered by the General Equal Treatment Act (GETA) (1994), the Disability Discrimination Act (DDA) (2003), and the Age Discrimination Act (ADA) (2004), i.e., grosso modo employment, products, and services. The NIHR took over all responsibilities of the old Equal Treatment Commission (ETC) (Commissie Gelijke Behandeling) in 2012. The ETC was the first legally defined entity through which the Government enforced Article 13 of the Racial Equality Directive (2000).[42]

Secondly, Anti-discrimination Facilities (ADV) function at the local level. The ADV have a legal basis in the Municipal Anti-Discrimination Facilities Act (Wet gemeentelijke antidiscriminatievoorzieningen) (2009). These organisations are primarily responsible for assisting discrimination victims and

[38] Ibid
[39] European Parliament, 'REPORT on the Implementation of Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime' (2018) available at https://www.europarl.europa.eu/doceo/document/A-8-2018-0168_EN.html.
[40] Ibid.
[41] Ibid.
[42] Ibid.

keeping track of advances in the field of discrimination in society.[43] They bring many examples of discrimination to the NIHR's and courts' attention, including through general interest or collective initiatives. ADV were officially recognised as equality bodies (in accordance to Article 13 of the Racial Equality Directive) in 2004.[44] The Netherlands is one of the few countries in Europe that requires municipalities to provide their inhabitants with anti-discrimination services. Next to that, there is a national network of those local services.[45]

The Municipal Anti-Discrimination Facilities Act (2009) does not specify the way of the organisation of the above-mentioned services, but it is stressed that those services should be independent, so for example complaints cannot be handled by local authorities. The Public Prosecution Service and the police can use the information from ADVs (registered complaints) in tackling discrimination cases and escalate them further under the criminal law.

NIHR deals with all the non-discrimination grounds outlined in the GETA, DDA and ADA, as well as some more specific grounds (for example race, nationality, religion and belief).[46] NIHR is not seen as the body to provide independent assistance to victims, as opposed to ADVs, which are supposed to fulfil this role.[47] There are further differences with regards to the authority of the two bodies. NIHR has the authority to issue recommendations to the Government, Parliament, or administrative bodies in response to a request or on its own initiative, on all laws and regulations directly or indirectly relevant to human rights issues (Article 5 Directive 2000/43). ADV do not have this authority. Ex officio and on behalf of recognised victims, the NIHR has legal standing to bring discrimination charges to court. It can also intervene in discrimination-related judicial disputes. Although the NIHR possesses this authority (under Article 13 of the NIHR Act), it never uses it since it interferes with its primary mission of reviewing individual discrimination allegations fairly and subjectively.[48]

Furthermore, the National Ombudsman is an independent and unbiased authority that investigates citizen complaints against government bodies and can launch an investigation.[49] What the Ombudsman can do exactly is covered in the National Ombudsman Act (Wet Nationale

[43] European Comission, 'Country Report. Non-Discrimnation. Netherlands 2016.' (2016), available at https://ec.europa.eu/info/sites/default/files/2016-nl-country_report_nd_final_en.pdf.
[44] Karin de Vries, 'Country Report Non-Discrimination. The Netherlands 2020' (2019), available at https://research.vu.nl/ws/portalfiles/portal/119233258/2020_NL_Country_report_ND_final_for_WEB.pdf.
[45] Council of Europe, 'Examples of Good Practice In The Field of Protection And Promotion of Human Rights', available at https://www.coe.int/t/commissioner/Activities/GoodPractices/Netherlands_antidiscriminationservices.pdf.
[46] 'College Voor De Rechten Van De Mens' (Mensenrechten.nl) (2022), available at https://mensenrechten.nl/.
[47] Karin de Vries, 'Country Report Non-Discrimination. The Netherlands 2020.' (2019), available at https://research.vu.nl/ws/portalfiles/portal/119233258/2020_NL_Country_report_ND_final_for_WEB.pdf.
[48] Ibid.
[49] For more information, see https://www.nationaleombudsman.nl/international.

ombudsman) (1981) and the Dutch General Administrative Law Act (Algemene wet bestuursrecht) (1994). The National Ombudsman's existence is guaranteed by the Dutch Constitution (Chapter 4, Article 78a).[50] Finally, an important law, which came into effect in 1994, is the General Equal Treatment Act (AWGB).[51] This law contains rules that protect against discrimination on a wide range of grounds, including race, origin, skin colour and religion.

The situation in which the unequal treatment took place is also important. Broadly speaking, the General Equal Treatment Act can only be addressed in the following areas: labour, neighbourhood, collective provision, commercial services (for example, an incident at a shop or broker, but also public transport or insurance company), catering industry, housing, media and advertising, education, police/Public Prosecutor/Immigration Service, public and political opinion, public space, private atmosphere, sports and recreation.[52]

9.4.3 Criminal Code

The Criminal Code is the code that regulates which situations are considered as crimes and which are regarded as violations, and which types of penalties can be imposed on each of them. It is important to state that the Dutch Criminal Code differentiates between crimes and violations. Violations are minor offences, such as vandalism and public intoxication. Crimes are more serious offences, such as murder, theft, and rape. The Dutch Criminal Code, together with the Code of Criminal Procedure, forms the basis of Dutch criminal law.

Article 90quater of the Criminal Code provides a legal definition of discrimination: 'Discrimination or to discriminate is understood to mean: any form of distinction, exclusion, limitation or preference, the object or effect of which is that the recognition, enjoyment or the equal exercise of human rights and fundamental freedoms in the political, economic, social, cultural or other spheres of social life shall be nullified or impaired.'

Articles 137 ct/mg and 429quater of the Criminal Code criminalize the following forms of discrimination: 1. discriminatory insult, 2. inciting discrimination against or hatred against groups of people, 3. distributing material with discriminatory content, 4. participating in an organisation with a discriminatory character, 5. intentionally discriminating on the basis of race in the exercise of office, profession or business, 6. not intentionally discriminating in the exercise of office, profession

[50] Ibid.
[51] Discriminatie en wetgeving - Art. 1 Midden Nederland (2022), available at https://art1middennederland.nl/discriminatie/discriminatie-en-wetgeving.
[52] Ibid.

or business. The European Commission against Racism and Intolerance (ECRI) recommends that civil, criminal, and administrative law in the Netherlands is aligned and cooperates closely with local ADV.[53] Further recommendations are focussed on a stronger or more explicit incorporation of: 1. the grounds of colour, language, citizenship, national or ethnic origin and gender identity in all provisions of the Criminal Code that are aimed at combating racism and intolerance, 2. explicitly criminalise public denial, trivialisation, justification or condoning with a racist aim, 3. make sure that the law provides for effective, proportionate and dissuasive sanctions for racist offence and 4. provide explicitly in the Criminal Code that racist motivation constitutes an aggravating circumstance for any ordinary offence.[54]

9.5. Implementation of the anti-racism legal framework in the Netherlands

From our empirical research we can conclude that most of the interviewees and focus group participants have no active knowledge of the two Directives. They know there is a European legal framework, but they themselves have never been involved in its implementation. Participants, overall, have trust in the transposition protocols by the Dutch government. There is, however, a lack of in the execution of the Dutch anti-discrimination and victim rights law. In particular, 1. For alleged victims, there is a lack of knowledge and awareness in terms of how and where to report an incident. 2. Lack of trust in terms of the power of the ADV 3. Lack of trust in law enforcement as well as the judiciary. 4. Lack of funding of the ADV.

9.5.1 Victims' knowledge, awareness, and outcomes of reporting an incident

Participants in the focus group for frontline workers and interviewees could only name a few good practices. Key among them is that especially the police have advanced in implementing victim rights' protections concerning anti-discrimination. Focus group participant 4, who works for the Dutch police, stated that people who file a report are identified faster as victims and are also assessed in a standardised way. Other participants were more negative about good practices. There is lack of trust in a positive outcome if one takes legal steps. Victims think legal actions will not help: the process takes way too long, they are not taken seriously, or it has no use. As interviewee 5 stated: 'What use is there in bringing the case to court, if there are no consequences for the offenders?'

Another reason for the lack of engagement among victims is that they do not think they were

[53] European Commission Against Racism and Intolerance, 'ECRI Report on The Netherlands' (2019), available at https://zoek.officielebekendmakingen.nl/blg-885386.pdf.
[54] Ibid.

discriminated in the first place. When they have been spat at, beaten up or graffiti has been painted on their front door, they do not always interpret it as discrimination. Thus, discrimination exists in most organisations, companies and in public, but there is not enough awareness or acknowledgement of the phenomenon. A final observation was that victims will often seek reparation and acknowledgement of what happened to them, while punishment of an offender has less priority.

9.5.2 Legal framework implemented

> ***"In general, there is a lack of knowledge about the European Directives. At the same time, the general opinion is that the laws and infrastructure are in place."***

In general, the focus groups and interviews found that there is a lack of knowledge about the European Directives. At the same time, the general opinion also is that the Dutch anti-discrimination and victim rights laws are in place and that the infrastructure to report and process an incident within the legal framework is there. Every municipality in the Netherlands is required by law to have an anti-discrimination facility, police forces are trained, and courts and the prosecutor offices are aware of the laws.

Although there is an infrastructure with an ADV in every municipality, victims are reserved when reporting incidents or starting a legal procedure as these take up too much time and create negative energy. As participant 4 of the front workers focus group stated: 'We work a lot with the NIHR, but they have a waiting list of nine months. And they do not have the capacity to start a trial, which is normally 3 months.'

Finally, the intertwining of the Dutch constitution with the anti-discrimination laws leaves room for interpretation, especially in the case of alleged hate speech. The question pops up whether negative statements directly pointed towards certain ethnic groups are political statements deserving protection or constitute discrimination. In several cases of hate speech, discrimination was ruled out in favour of freedom of expression. Thus, interviewee 5 noted: 'Although discrimination exists in our society, it is difficult to take a stand. The Directive should be helpful in prosecution, yet in the Netherlands the Constitution (freedom of speech) seems to stand in the way of prosecuting offenders. In that sense, the Directive is open to interpretation.'

9.5.3 The judicial process

As stated above, participants in our research are satisfied with the infrastructure for and the implementation of the Directives for Victim Rights and Racial Equality. Although they are not all equally aware of the Directives, they are positive about the legal framework. Still, they are negative about the actual process, on how the protocols work. Victims who want to file a report are confronted by a police force that is not trained enough for an acceptable treatment of the alleged victims. In addition, the filing of the report is the first step in the process and Dutch police only wants to hand over a case to the public prosecutor if it has enough evidence. Prosecutors are directly involved in building a firm case and as prosecutors are not keen on weak anti-discrimination cases, they tend to drop the case. Thus, member 4 of the focus group for frontline workers, an advisor and policymaker for the National Police on anti-discrimination asked: 'How much confidence does a prosecutor need before bringing a case to the court? And there is also the role of the police. How well do we do our job? Is an official report complete and have both parties been heard sufficiently?'

For the ADV and the NIHR it is also hard to produce solid proof. As member 5 of the focus group for the frontline workers put it: 'When it comes to internship selection discrimination and job recruitment, it's hard to determine or to prove whether it is discrimination or anti-racism. You feel that something wrong is going on, you know, you just cannot prove it.'

9.5.4 Lack of funding

The ADV need to apply for yearly subsidies from the municipality they are based in. Every year it is uncertain how much funding they will receive.[55] The funding is being administered by the central government but is being managed by the municipalities. It is a fixed amount per inhabitant (around €0,35 per inhabitant), but the funding is not earmarked. Therefore, municipalities can decide for themselves whether they will use all the budget for anti-discrimination issues. Because of the lack of adequate funding, ADV's feel that they are insufficiently able to perform their statutory duties. They are only able to bring a few cases to justice and are unable to perform their statutory duties when it comes to their tasks of preventing and creating awareness about anti-discrimination. According to Interviewee 1, director of an ADV: 'How can my organisation do its legal task when funding is at risk? Offenders use expensive lawyers to fight their case. It is impossible to counteract that without sufficient funding.'

[55] For an extensive report on the local use of the central funding see Gemeentelijke Antidiscriminatievoorzieningen in 2010 available at https://zoek.officielebekendmakingen.nl/blg-93728.pdf. Igno Pröpper, Peter Struik, Marielle van Oosterhout & Stefanie den Dunnen. Eindrapportage Gemeentelijke Antidiscriminatievoorzieningen in 2010: Een Stand van Zakenrapportage in Opdracht van het Ministerie van Binnenlandse Zaken en Koninkrijksrelaties. Partners+Pröpper (2010)

9.6. Future steps

After conducting the empirical research, we conclude that there is a strong demand for more adequate training. This training will not only be on the formal mechanisms of the legal framework, but even more on the awareness, the impact of discrimination and racism on individuals and groups, their feelings, their victimhood, their need for reparations. By creating this awareness within all the different stakeholders involved in countering ethnical and racial discrimination and by the general public, the participants agree that the European legislation and its implementation in the Dutch legal framework will be much more effective.

The following proposals were derived from the interviews and the two focus groups:

- Training for all the frontline workers, especially on how to navigate the legal framework, and cooperate with police forces and the NHIR.
- Training through the police academy, not only on the legal aspects but also on the human aspects. As member 4 of the frontline workers focus group, national police and focus group frontline workers stated, 'We need to train or students on the political importance. Who can we help, who is it for? And what is the purpose?'
- Training of Diversity & Inclusion managers in professional organisations, not only in the legal framework. There should also be training in understanding what it feels to be to be discriminated against. This is supported by a member of the national police, who noted that 'we cannot imagine what it is like to be discriminated against. And not once, but dozens of times. How can we make people we train understand how discrimination feels, what it does do you, how it victimizes. I cannot stress this enough.'
- Training of the judiciary: national courts should address discrimination in a wider and less technical sense. The judges and public prosecutors should show empathy with the victims of discrimination and focus more on reparations for the victims instead of only focussing on the offender and their punishment.
- Train, inform the public to create awareness, transparency and open the conversation on discrimination and racism.

9.7. Conclusions

The report focussed on analysing and researching the transposing and the implementation of the EU anti-racism and victim rights directives into the Dutch legal framework. Through desk research, the report shows that people of African descent, Muslims, Roma and Sinti and Jews are still discriminated in Dutch society. Next, we conducted a qualitive empirical research with interviewees and participants of focus groups, who all have a professional relation within

the field of the anti-racism legal framework. The participants concluded that the Dutch legal framework has succeeded in transposing the two Directives into its national legal framework. Also, the formal implementation has been successful when it comes to disseminate legal protocols and setting up an infrastructure for reporting anti-discrimination incidents. However, there are many shortcomings when it comes a practical execution of the Directives. There is not enough funding, not enough capacity and problems with recognition of victims. As a result, relatively few cases are brought to court or reported to the Netherlands Institute for Human Rights. The empirical research ultimately led to interesting proposals to increase the effectiveness of the implementation of the Dutch legal framework on anti-discrimination.

This e-book is the product of research that had been conducted for the purposes of **PRESERVERE**, an EU-funded project focusing on the more effective implementation of the **EU anti-racism legal framework** through the training of legal professionals and frontline workers. The e-book consists of chapters on six EU Member States, namely Bulgaria, Cyprus, Greece, Italy, Malta, and the Netherlands. It also includes a chapter on the EU anti-racism legal framework, focusing in particular on the Racial Equality Directive and Victims' Rights Directive, and a chapter providing comparative analysis between the different case studies. The e-book is a useful supplementary guide to those undertaking the training provided by **PRESERVERE** (that will remain publicly available after the conclusion of the project) and to whoever is interested in the implementation of anti-discrimination law more generally.

Communication manager: Marta Meloni, Lai-momo soc. coop. soc.

Graphic designer: Alessia Capasso, Lai-momo soc. coop. soc.

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Co-funded by the European Union

ISBN 978-9963-2288-5-0