



Brussels, 19.3.2021
COM(2021) 139 final

**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}

1. INTRODUCTION

Equality is one of the EU's founding values¹. The Commission has taken important steps to promote and mainstream it and build a true **Union of equality**. With the support of its internal Task Force on Equality, created in 2019, the Commission is integrating an equality dimension in all EU policies and major initiatives. To take recent examples, the 2020-2025 gender equality strategy², the 2020-2025 EU anti-racism action plan³, the new Roma strategic framework for equality, inclusion and participation⁴, the 2020-2025 LGBTIQ equality strategy⁵, the EU Strategy to strengthen the application of the Charter⁶, the 2021-2030 strategy for the rights of persons with disabilities⁷ and the action plan implementing the European Pillar of Social Rights⁸ all stress the importance of preventing and tackling discrimination (e.g. by fighting stereotypes and biases), enforcing EU law and principles in this field and improving data collection.

This report focuses on the application of two EU Directives on equality:

- the **Racial Equality Directive**⁹, which requires that people be treated equally in the areas of employment and vocational training, education, social protection including social security, social advantages, access to and supply of goods and services (including housing) *regardless of their racial and ethnic origin*; and
- the **Employment Equality Directive**¹⁰, which requires that people be treated equally in employment and vocational training *regardless of their religion or belief, disability, age and sexual orientation*.

¹ Article 2 of the Treaty on European Union. Article 10 of the Treaty on the Functioning of the European Union provides: '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'.

² COM(2020) 152 final; https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_en

³ COM(2020) 565 final; https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en

⁴ See full package at: https://ec.europa.eu/info/publications/new-eu-roma-strategic-framework-equality-inclusion-and-participation-full-package_en

⁵ COM(2020) 698 final; https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en

⁶ COM(2020) 711 final; https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/eu-strategy-strengthen-application-charter_en. The EU Charter, in its Article 21(1), provides the following: 'Any discrimination based 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 shall be prohibited'.

⁷ COM(2021)101 final; <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8376&furtherPubs=yes>

⁸ COM(2021)102 final https://ec.europa.eu/info/european-pillar-social-rights/european-pillar-social-rights-action-plan_en

In addition to all initiatives mentioned in the list, an EU Strategy against antisemitism is announced to be adopted by the Commission in 2021.

⁹ 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).

¹⁰ 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).

Both Directives require the Commission to report every five years on their application¹¹. Since 2014, the Commission has opted to provide a joint report on these two Directives, as their regulatory approach and the content of many of their provisions are identical.

In order to have a good understanding of the situation on the ground, the Commission regularly conducts ‘Eurobarometer’ opinion surveys on discrimination in the EU¹². Surveys from the European Union Agency for Fundamental Rights (FRA) also produce useful figures and information on trends¹³.

There seems to be a general sentiment that little progress has been made in the fight against discrimination since 2014. The general population recognises that discrimination is widespread in the EU¹⁴ and discrimination is also experienced frequently in most Member States. Surveys found that almost one in four people from ethnic or immigrant minority groups (24%) had felt discriminated against in the previous 12 months in one or more areas of daily life because of their background¹⁵. In a 2019 Eurobarometer survey, about one in five respondents (21%) who had felt discriminated against on one or more grounds in the previous 12 months said that this had happened at work and 13% when looking for work¹⁶.

Against this background, it is crucial that the legislation based on EU non-discrimination rules is properly enforced at national level¹⁷. Following on from previous reports on the application of the Directives in 2006¹⁸, 2008¹⁹ and 2014²⁰, this report:

- assesses the *current situation and developments* since 2014;
- identifies the *main issues and challenges* stemming from developments in the area of non-discrimination;
- highlights a number of *good practices and initiatives*;
- shows how *cases before the Court of Justice* of the European Union (CJEU) have clarified how the Directives should be interpreted;

¹¹ Article 17 of Directive 2000/43/EC and Article 19 of Directive 2000/78/EC.

¹² Most recently, Special Eurobarometer 493 on *Discrimination in the EU* (October 2019); <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPICIAL/surveyKy/2251>

¹³ This report mainly draws on survey data from the 2019 Eurobarometer and various FRA surveys, dating from before the COVID-19 crisis.

¹⁴ 2019 Eurobarometer. For instance, 59% of Europeans believe discrimination based on ethnic origin is widespread in their country (compared to 64% in 2015). For sexual orientation, religion, disability and age, the numbers are 53%, 47%, 44% and 40% respectively.

¹⁵ *Second European Union minorities and discrimination survey — main results* (FRA EU-MIDIS II Survey, 2017); <https://fra.europa.eu/en/publication/2017/second-european-union-minorities-and-discrimination-survey-main-results>

FRA data from 2008 showed that about one in three (30%) felt discriminated against in these areas because of their ethnicity.

¹⁶ 2019 Eurobarometer. Many respondents felt that discrimination persists in recruitment – as a result of being considered too young or too old (47%), disability (41%), being Roma (38%), ethnic origin in general (32%), expressing a religious belief (28%), sexual orientation (22%).

¹⁷ The Commission received a number of complaints by citizens, the great majority of which concern individual cases of alleged discrimination rather than a Member State’s incorrect transposition or application of the Directives. In such cases, remedies must primarily be sought at national level.

¹⁸ COM(2006) 643 final (on the Racial Equality Directive).

¹⁹ COM(2008) 225 final (on the Employment Equality Directive).

²⁰ COM(2014) 2 final (joint report on the two Directives).

- looks into the implementation of the Commission’s 2018 Recommendation on *standards for equality bodies*²¹, in line with the LGBTIQ equality strategy, the Roma strategic framework for equality, inclusion and participation and the EU anti-racism action plan (see in particular the annex on equality bodies);
- presents, as indicated in the EU anti-racism action plan, *potential gaps* in the protection offered by the Racial Equality Directive.

The report builds on information sent to the Commission by Member States²² and consultations with the European Network of Equality Bodies (Equinet)²³, the FRA²⁴, social partners²⁵ and civil society organisations²⁶. It also draws on the Commission’s work in helping with the application of the Directives²⁷ and on relevant publications²⁸. It takes due account of relevant European Parliament resolutions²⁹ and studies³⁰.

2. ISSUES COMMON TO BOTH DIRECTIVES

The Directives contain similar provisions on the *concept of discrimination* and on *remedies and enforcement*.

Most Member States and stakeholders consulted did not highlight any major difficulties regarding the interpretation of those provisions. However, some indicated that a number of issues (continue to) pose challenges³¹, in particular as regards:

- the scope of the concept of ‘discrimination’ (see Section 2.1.); and
- the enforcement of rights (see 2.2.), e.g. when it comes to:

²¹ C(2018) 3850 final.

²² Article 17 of the Racial Equality Directive and Article 19 of the Employment Equality Directive require the Member States to communicate to the Commission every 5 years all the information it needs to draw up a report. All but two Member States (HR and SE) replied to the dedicated questionnaire the Commission had sent out for this purpose. No questionnaire was addressed to the United Kingdom.

²³ For Equinet’s input, based on replies to a questionnaire sent to all national equality bodies, see: <https://equineteurope.org/2020/a-perspective-from-the-work-of-equality-bodies-on-european-equality-policy/>

²⁴ Referred to in this report as ‘FRA’s submission’.

²⁵ A contribution was received from BusinessEurope.

²⁶ Contributions were received from Age Platform Europe, Amnesty International, European Disability Forum, European Roma Rights Centre and European Union of the Deaf.

²⁷ Such as responding to complaints from individuals, petitions and written questions in particular from the European Parliament and organising the work of the High Level Group on Non-Discrimination, Equality and Diversity including its Subgroup on Equality Data (in which the Commission brings together officials of Member States and the European Economic Area countries in order to exchange information and views on policy developments in the areas of non-discrimination, equality and diversity).

²⁸ Including by the European Network of Legal Experts in the Non-Discrimination Field, which assists the Commission in the field of anti-discrimination law; see <https://www.equalitylaw.eu/publications>

²⁹ E.g. own-initiative Resolution of 15 September 2016 on the application of Directive 2000/78/EC (P8_TA-PROV(2016)0360); Resolution of 10 March 2021 on the implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in light of the UNCRPD (P9_TA-PROV(2021)0075).

³⁰ Tymowski, J., *The Employment Equality Directive — European implementation assessment* (2016), [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)536346](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)536346); Anglmayer, I., ‘Implementation of the Employment Equality Directive in light of the UN CRPD - European Implementation Assessment’, 2020, at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2020\)654206](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2020)654206)

³¹ This was confirmed by evaluations of national anti-discrimination legislation. Such evaluations took place in BE, DE, FR, NL, AT, PL, SK, FI and SE.

- reporting complaints (see 2.2.1.);
- proving a case (see 2.2.2.);
- being protected against victimisation (see 2.2.3.); and
- applying adequate sanctions (see 2.2.4.).

Awareness-raising and dialogue with social partners and civil society organisations are key for the effective implementation of the Directives (see 2.3). The work of national equality bodies (see 2.4.) and the availability of equality data (see 2.5.) are cross-cutting issues, crucial for assisting victims of discrimination and supporting, monitoring and promoting equality and non-discrimination law.

2.1. The concept of ‘discrimination’

The concept of ‘discrimination’ covers *direct and indirect discrimination*, and includes *harassment*³².

Some stakeholders point to a limited awareness and application of indirect discrimination in domestic judicial practice. In addition, some Member States stress that national courts pay insufficient attention to harassment on grounds other than sex.

Recent CJEU case law has provided useful clarifications on the concept of indirect discrimination³³. The European Network of Legal Experts in the Non-Discrimination Field will issue a report on the application of this concept in 2021, updating its previous (2008) report³⁴.

The CJEU has not yet ruled on the interpretation (and the boundaries) of *harassment* under the two Directives. In national (case) law, the concept is used in relation to several types of conduct, including physical and psychological violence, intimidation, bullying and hate speech³⁵. In some EU countries, the concept seems underexplored by national courts.

In relation to the concept of ‘discrimination’, the CJEU provided useful clarification on various situations or concepts:

- *discrimination on a combination of grounds* – In 2016, the CJEU acknowledged that ‘discrimination may indeed be based on several of the grounds’ protected under EU law. Nevertheless, it also held that ‘... no new category of discrimination resulting from the combination of more than one of those grounds

³² See Article 2(2)(a) and (b) of each Directive on direct and indirect discrimination and Article 2(3) on harassment. The Directives allow for harassment to be defined in accordance with national laws and practices. To establish discrimination (including harassment), it is not necessary to demonstrate intention; this is generally applied at national level.

³³ Judgment of 16 July 2015 in ‘*CHEZ Razpredelenie Bulgaria*’ AD (C-83/14, EU:C:2015:480); judgment of 14 March 2017 in *Achbita* (C-157/15, ECLI:EU:C:2017:203).

³⁴ <https://www.migpolgroup.com/old/portfolio/limits-and-potential-of-the-concept-of-indirect-discrimination/>

³⁵ In some EU countries, a repetition of acts may be required to establish harassment. One country has reported about the concept of psychological harassment (at work) referring to a process comprising *several* behaviours spanning over a specific period of time. Another country has reported national law on harassment relating to the grounds covered by the two Directives requiring a *repetition* of acts (contrary to sexual harassment, which would require only one act).

... may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established³⁶.

Since ‘*intersectional discrimination*’ is about discrimination based on an inseparable combination of protected grounds, rather than one of the grounds taken separately, the Court did not recognise intersectional discrimination as a protected ground, as it currently has no clear legal basis in the Directives³⁷. Some stakeholders nevertheless stressed the importance of both intersectionality and the need to fight multiple discrimination more effectively³⁸.

The Commission acknowledged the importance of intersectional discrimination and the need to address this phenomenon in all its equality strategies³⁹. It has also offered its support for the effective recognition of *multiple discrimination* at national level by commissioning studies⁴⁰ and co-organising a seminar where government officials were able to explore challenges and good practices in addressing it in legislation and policymaking⁴¹;

- ‘*discrimination by association*’ (where a person or group is disadvantaged because of their association with a person or group who possesses the protected characteristic) – The *CHEZ* case showed that a person who was not of Roma origin could benefit from protection even though she was not ‘a member of the [protected] group concerned’, but ‘nevertheless suffer[ed] less favourable treatment or a particular disadvantage on one of those grounds’⁴². It follows from the case that 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 associated⁴³. Many Member States indicate that discrimination by association is covered in national (case) law.

The CJEU has yet explicitly to address the issue of ‘*discrimination by perception*’ or ‘*discrimination by assumption*’, i.e. when the different treatment follows from an *incorrect belief* or an *incorrect perception* that a person -himself or herself- has one of the protected characteristics. In several EU countries, although fewer compared to discrimination by association, there is an explicit protection against discrimination by assumption provided for in national (case) law.

³⁶ Judgment of 24 November 2016 in *David L. Parris* (C-443/15, EU:C:2016:897), paragraph 80.

³⁷ Discrimination may be based on one protected characteristic or on a combination of (multiple) grounds operating separately (‘additive discrimination’) or interacting with each other at the same time in such a way that they are inextricable (‘intersectional discrimination’).

The European Institute for Gender Equality has defined ‘multiple discrimination’ (<https://eige.europa.eu/thesaurus/terms/1297>) and ‘intersectionality’ (<https://eige.europa.eu/thesaurus/terms/1492>).

Recital 3 of the Employment Equality Directive and recital 14 of the Racial Equality Directive acknowledge the existence of ‘multiple discrimination’.

³⁸ Some Member States (e.g. DK, EL and ES) referred to studies and surveys on this issue.

³⁹ For an overview, see the first paragraph of this report.

⁴⁰ See, for example: <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>

⁴¹ The seminar was organised in cooperation with the Greek Ministry of Labour, Social Security and Social Solidarity and brought together the members of the EU High-Level Group on Non-Discrimination, Equality and Diversity on the issue.

⁴² *CHEZ* judgment (footnote 33), paragraphs 49 and 56, citing judgment of 17 July 2008 in *S. Coleman* (C-303/06, ECLI:EU:C:2008:415).

⁴³ Despite recognising discrimination by association, some national practices may still be restrictive on this specific point.

2.2. Remedies and enforcement

2.2.1. Defence of rights

Under the Directives, Member States have to provide all those who consider themselves to be victims of discrimination with *adequate means of legal protection*⁴⁴.

Besides general awareness-raising campaigns on non-discrimination, several Member States have indicated specific initiatives to facilitate reporting. Some are aimed at *alleviating the financial burden* of proceedings, e.g. by:

- ✓ reducing court fees for discrimination cases⁴⁵;
- ✓ creating tax incentives⁴⁶; and
- ✓ setting up funds that provide victims of discrimination with advance coverage of legal costs⁴⁷.

Other *good practices* include:

- ✓ enabling online reporting⁴⁸;
- ✓ improving the capacity and accessibility of local authorities and local intermediary or community organisations⁴⁹;
- ✓ setting up easily accessible dispute settlement bodies⁵⁰;
- ✓ providing for specialised legal advice clinics;⁵¹ and
- ✓ establishing networks of police officers and magistrates trained in discrimination issues⁵².

Reporting on discrimination and the number of complaints increased slightly since the 2014 report⁵³, but *under-reporting* remains a problem. Surveys show that those who felt discriminated against would not easily report the incident⁵⁴. As a consequence, many

⁴⁴ See Article 7(1) of the Racial Equality Directive and Article 9(1) of the Employment Equality Directive. In all Member States, discrimination disputes can be brought to court. In some, cases can also be treated by non-judicial or quasi-judicial procedures, e.g. through the intervention of inspectorates or specialised bodies, such as ombudspersons, National Human Rights Institutions (NHRIs) or equality bodies. Some Member States also propose mediation and conciliation.

⁴⁵ E.g. CZ and DK.

⁴⁶ E.g. BE and RO.

⁴⁷ E.g. IT.

⁴⁸ E.g. FR.

⁴⁹ E.g. BE and FI.

⁵⁰ E.g. in July 2017, Lithuania established a labour dispute commission that can hear labour disputes on discriminatory grounds in an easily accessible, not over-formal and quick procedure.

⁵¹ E.g. IE. A legal clinic is a place where one can obtain legal advice and assistance, paid for by legal aid.

⁵² E.g. FR.

⁵³ FRA's submission.

⁵⁴ For instance, 14% of LGB respondents to FRA's 2018 EU LGBTI II survey reported the last incident of discrimination in employment to anybody (FRA's submission; and see also at: <https://fra.europa.eu/en/project/2018/eu-lgbti-survey-ii>). The FRA EU-MIDIS II Survey showed that 12% of those who felt discriminated against on grounds of racial or ethnic origin reported the most recent incident of discrimination to anybody. Based on the EU-MIDIS II survey, most complaints were made to an employer (36%), some 13% of incidents were reported to trade unions and staff committees and 17% to the police when related to entering a night club or a bar. Only 4% of reports were made to

incidents may pass ‘under the radar’, leaving victims without any form of redress⁵⁵. This negatively affects access to justice, as well as the effectiveness of the Directives, more generally. While many Member States point to the important work of equality bodies at national and local level to tackle discrimination and address underreporting, few people would, according to the surveys, report an incident of discrimination to such bodies⁵⁶.

Reasons for not reporting cases of discrimination may include⁵⁷:

- ✗ doubt that there are serious chances of success;
- ✗ unawareness of rights and/or of the existence of equality bodies⁵⁸;
- ✗ difficulties to provide evidence; and/or
- ✗ fear of retaliation.

Other concrete problems that may hamper *access to justice*⁵⁹ (which particularly affect the most vulnerable or marginalised groups), include:

- ✗ short legal time limits for bringing action;
- ✗ the costs, complexity and length of proceedings;
- ✗ uncertainty as to the outcome of the case; and
- ✗ the prospect of a low level of compensation⁶⁰.

Organisations such as trade unions and equality bodies can help victims to seek individual redress, especially when they have *legal standing*⁶¹. They can also play an

an equality body. Similarly, findings of the 2019 FRA Roma and Travellers Survey (undertaken in six countries) show that only about 5% of respondents who felt discriminated against reported the last incident to an equality body. One out of six Roma and Travellers (17%) reported it to the police (<https://fra.europa.eu/en/project/2018/roma-and-travellers-survey-2018-2019>). According to the 2019 Fundamental Rights Survey, 9% of general population respondents reported the most recent incident of discrimination in employment on any ground. Of those respondents who reported such incidents, 12% reported to an equality body or national human rights institution and 24% to a trade union. The 2019 Eurobarometer (targeting the general population) found that 12% of respondents, when discriminated against, would prefer to report discrimination on any of the grounds surveyed to an equality body or ombudsperson. 35% would prefer to report to the police and 20% to a friend or family member.

⁵⁵ The right to an effective remedy is provided for in Article 47 of the EU Charter on Fundamental Rights.

⁵⁶ See footnote 54.

⁵⁷ It follows from several FRA surveys that the main reason for not reporting a discriminatory incident is the belief that nothing would happen or change as a result (FRA’s submission).

⁵⁸ On information and rights’ awareness, see Chapter 2.3.1.

⁵⁹ To improve access to justice throughout the EU, the Commission has set up a European e-justice portal (<https://e-justice.europa.eu/home.do>).

See also the annex to the 2014 report: *Know your rights — guidance to victims of discrimination*; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0005&from=EN>

On FRA’s work on clarifying obstacles to access to justice and on providing evidence-based advice on how to overcome them, see <https://fra.europa.eu/en/themes/justice-victims-rights-and-judicial-cooperation>

⁶⁰ See point 2.2.4.

⁶¹ ‘Legal standing’ refers to the right or ability to bring a legal action to a court of law or to appear in a court. Under Article 7(2) of the Racial Equality Directive and Article 9(2) of the Employment Equality Directive, associations, organisations or other legal entities with a legitimate interest in combating discrimination should be allowed, with the approval of the complainant, to engage in discrimination disputes on behalf or in support of the complainant. Member States have discretion in setting criteria and conditions for the legal standing of those entities and the legal frameworks vary among countries.

important role in supporting ‘strategic litigation’⁶² and/or seeking collective redress⁶³, particularly as the CJEU has long recognised that EU law also prohibits discrimination where there is no identifiable individual victim⁶⁴, e.g. in the case of an employer’s public statement of an intent to discriminate⁶⁵.

Some Member States reported that organisations’ legal standing plays a decisive role in cases of *collective discrimination* harming people who are not directly or immediately identifiable⁶⁶. Some equality bodies or organisations assisting victims of discrimination have also brought cases before the CJEU.

2.2.2. *Burden of proof*

To ease the challenges faced in proving discrimination claims⁶⁷, the Directives provide for a *shift in the burden of proof*⁶⁸. Where a complainant establishes facts from which a *prima facie* case of discrimination can be presumed, it falls to the respondent to prove that there has been no breach of the principle of equal treatment⁶⁹.

Some Member States’ higher courts provided clarification in this area⁷⁰ and other Member States amended their legislation⁷¹. However, some stakeholders reported that national courts still do not always apply the rules correctly or consistently, and standards of proof may vary in practice.

There are some situations in which it is especially difficult to establish *prima facie* evidence, e.g. for claims of *indirect discrimination*, where the claimant needs to establish facts from which it can be presumed that a certain measure or practice, which seems neutral, puts certain persons at a particular disadvantage compared to others. The collection of such facts is even more complicated where the alleged discrimination follows from the use of *artificial intelligence*⁷². Moreover, even where indirect

⁶² ‘Strategic litigation’ refers to the use of litigation strategies to elicit social, legal or policy change and is often carried out by civil society organisations and/or lawyers as a form of activism.

⁶³ ‘Collective redress’ refers to a legal mechanism that:

- (i) allows two or more natural or legal persons, or an entity entitled to bring a representative action, collectively to claim cessation of illegal behaviour;
- (ii) allows two or more natural or legal persons claiming to have been harmed in a mass harm situation, or an entity entitled to bring a representative action, collectively to claim compensation.

See Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ L 201, 26.7.2013, p. 60).

⁶⁴ Organisations acting in the public interest on their own behalf may bring *actio popularis* claims without a specific victim to support or represent.

⁶⁵ See judgment of 10 July 2008 in *Feryn* (C-54/07, ECLI:EU:C:2008:397), paragraph 15.

⁶⁶ E.g. IT.

⁶⁷ Claimants would have to establish not only that they were treated unfavourably, but also that a protected characteristic was the reason for such treatment.

⁶⁸ Article 8 of the Racial Equality Directive and Article 10 of the Employment Equality Directive. The reversed burden of proof applies to any judicial and/or administrative procedure (regardless of who brings the case) and to all forms of discrimination covered by the Directives.

⁶⁹ For CJEU case law on the matter, see the 2014 report.

⁷⁰ E.g. as reported by CZ, IT and HU.

⁷¹ E.g. BE, BG, ES, FR, SI, SK and FI.

⁷² Several Member States (e.g. BE, DK, DE, FR, LT and NL) pointed to risks of discrimination stemming from the use of AI. AI systems can be opaque and very complex, thus hampering access to evidence and, more generally, the verification of compliance with non-discrimination legislation; see the Commission’s white paper on *Artificial intelligence — a European approach to excellence and trust*

discrimination can be established on the basis of statistical evidence⁷³, stakeholders pointed to difficulties in the availability and accessibility of *relevant statistical data*, and how courts take them into account.

2.2.3. *Victimisation*

National legal systems have to ensure protection against *victimisation*⁷⁴ and offer adequate *legal measures against retaliation*; this is vital for the effective implementation of the right not to be discriminated against⁷⁵.

However, in a few Member States, such protection seems to be limited in practice. It appears that protection against victimisation applies mainly in the field of employment. Member States have different legal requirements when it comes to determining who is entitled to protection – some cover claimants, victims and witnesses only, while the CJEU extends protection to anyone who could be affected by the reaction of the party subject to a complaint or to proceedings⁷⁶. Other Member States reported a broad scope of protection at national level, e.g. covering individuals other than the victim⁷⁷, such as witnesses, those helping or supporting the victim, anyone treated less favourably because of a refusal to discriminate, and people who suffer victimisation by presumption or association⁷⁸.

The Commission monitors the implementation of the victimisation provision in the light of the CJEU's *Hakelbracht* judgment⁷⁹. The infringement proceedings⁸⁰ launched against Belgium for not correctly transposing that provision (among others) in both Directives

(COM(2020) 65 final).
https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf

⁷³ Recital 15 of the Racial Equality Directive says that rules of national law or practice ‘... may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence’. For more on equality data collection, see Section 2.5.

⁷⁴ This means Member States have to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

⁷⁵ Article 9 and recital 20 of the Racial Equality Directive; Article 11 of the Employment Equality Directive.

⁷⁶ In relation to Article 24 on victimisation of 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 (OJ L 204, 26.7.2006, p. 23), the CJEU issued an interpretation – that may be relevant for the understanding of ‘victimisation’ in both Directives – clarifying that ‘... the category of employees who are entitled to the protection ... must be interpreted broadly and include all employees who may be subject to retaliatory measures taken by an employer in response to a complaint of discrimination ..., without that category being otherwise delineated ... Article 24 does not limit the protection solely to employees who have lodged complaints or their representatives, or to those who comply with certain formal requirements governing the recognition of a certain status, such as that of a witness’. See judgment of 20 June 2019 in *Hakelbracht and Others* (C-404/18, ECLI:EU:C:2019:523), paragraphs 26-30.

⁷⁷ E.g. BG, DE, EE, IT, LT, PL and SI.

⁷⁸ E.g. in Bulgaria (2004 Protection Against Discrimination Act, Additional Provision §1.3.), victimisation is defined as:

- a) less favourable treatment of a person who has taken, is presumed to have taken or is likely to take any action for protection against discrimination;
- b) less favourable treatment of a person where a person associated with them has taken, is presumed to have taken or is likely to take any action for protection against discrimination; or
- c) less favourable treatment of a person who has refused to discriminate.

⁷⁹ *Hakelbracht* judgment (footnote 76).

⁸⁰ Cited in the 2014 report.

were later closed, but another procedure is still ongoing in relation to a similar provision in Directive 2006/54/EC⁸¹.

2.2.4. Sanctions

Member States must provide for *effective, proportionate and dissuasive sanctions* applicable to breaches of national provisions prohibiting discrimination in line with the Directives⁸². The Directives do not prescribe specific measures and allow Member States to decide on suitable remedies for achieving the objectives pursued⁸³. Depending on the legal avenue chosen, these can take various forms, such as a fine, compensation, an injunction for the wrongdoer to perform or refrain from certain action, publicising the wrongdoing, requiring an apology or imposing criminal sanctions⁸⁴.

The CJEU has issued guidance on how to interpret the legal requirements on sanctions, in particular:

- remedies must:
 - respect the principle of proportionality;
 - guarantee real and effective judicial protection⁸⁵; and
 - ensure a genuinely deterrent effect and prevent further discrimination; this involves imposing penalties even in the absence of an identifiable victim⁸⁶;
- any pecuniary reparation must be:
 - adequate in relation to the loss and damage sustained;
 - not subject to a pre-determined upper limit⁸⁷; and
- a purely symbolic sanction cannot be considered sufficient⁸⁸.

In practice, some difficulties in the implementation of the Directives seem to persist, e.g. in relation to *compensation ceilings* and *cases without an identifiable victim*. Some national courts tend to establish rather moderate levels of damages, favour non-monetary compensation or offer amounts of compensation at the lower end of the scale. Such tendencies may discourage victims from taking legal action or from asking for pecuniary compensation in court.

⁸¹ See footnote 76 for the full name of the Directive.

⁸² Article 15 of the Racial Equality Directive; Article 17 of the Employment Equality Directive.

⁸³ See, *inter alia*, judgment of 31 May 2013 in *Asociația Accept* (C-81/12, ECLI:EU:C:2013:275), paragraph 61; judgment of 17 December 2015 in *Arjona Camacho* (C-407/14 ECLI:EU:C:2015:831), paragraph 30.

⁸⁴ Sanctions may thus comprise financial compensation, but can also be non-pecuniary in nature. See, for instance, *Asociația Accept* judgment (footnote 83), paragraph 68.

⁸⁵ See, *inter alia*, *Asociația Accept* judgment (footnote 83), paragraph 63.

⁸⁶ See *Feryn* judgment (footnote 65), paragraph 38; *Asociația Accept* judgment (footnote 83), paragraph 62. In several Member States (e.g. AT, BE, CZ, IT, LT, LU, LV, RO and SI), national legislation provides that (under some conditions) penalties may be imposed in the absence of a specific victim.

⁸⁷ See judgment of 2 August 1993 in *Marshall* (C-271/91, ECLI:EU:C:1993:335), paragraphs 30-32.

⁸⁸ See *Asociația Accept* judgment (footnote 83), paragraph 64.

The Commission continues to monitor the standards applied in the use of sanctions and remedies in the Member States, although detailed information at national level is difficult to gather and often not available. Equinet also carries out important work on this issue⁸⁹.

2.3. Information, dialogue and gender mainstreaming

2.3.1. Information

The Directives require Member States to *bring their provisions to the attention of those concerned*⁹⁰. Many Member States, equality bodies, civil society organisations and social partners acknowledge the importance of raising awareness and are quite active in this respect, e.g. preparing brochures, guides and studies, carrying out general and targeted campaigns, and providing training.

Nevertheless, *low awareness* of the anti-discrimination legislation and of the existence of equality bodies that assist victims remain major challenges in fighting discrimination. For instance, 71% of members of ethnic or immigrant minority groups report to be unaware of any organisation offering support or advice to victims of discrimination⁹¹. In contrast, awareness among the general population of the existence of an institution offering support for victims of discrimination at work is relatively high (61%)⁹².

To contribute to awareness-raising, in 2019-2020 the Commission carried out an *information campaign* on combating discrimination in the workplace⁹³. This consisted of:

- a general strand raising awareness of people's rights and obligations under EU anti-discrimination legislation; and
- a targeted strand addressing employers and disability; this involved:
 - running seminars in eight Member States; and
 - producing a good practice guide for companies across the EU seeking to accommodate workers with disabilities⁹⁴.

As another example, the Commission, between 2015 and 2016, supported local authorities in targeted *communication activities to fight anti-Roma discrimination and stereotypes*⁹⁵.

The Commission also continued to encourage information activities through its support for Equinet⁹⁶ and the European Equality Law Network⁹⁷, which publish flashes, brochures, reports and studies on key issues relating to the Directives.

⁸⁹ See Wladasch, K., *The sanctions regime in discrimination cases and its effects* (Equinet, 2015); <https://equineteurope.org/publications/the-sanctions-regime-in-discrimination-cases-and-its-effects/>

⁹⁰ Article 10 of the Racial Equality Directive; Article 12 of the Employment Equality Directive.

⁹¹ FRA EU-MIDIS II Survey.

⁹² FRA's submission.

⁹³ <https://ec.europa.eu/social/EUvsDiscrimination>

⁹⁴ <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8341&furtherPubs=yes>

⁹⁵ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/roma-eu/communication-activities-fight-discrimination-against-roma_en

⁹⁶ <https://equineteurope.org/equinet-at-a-glance/equinet-activities/>

⁹⁷ <https://www.equalitylaw.eu/>

In addition, the Commission supports *training* for judges, lawyers and other professionals in the interpretation and application of the Directives, familiarising them with the key concepts, proof-related issues and sanctions for violations⁹⁸.

2.3.2. Dialogue

In several Member States, civil society organisations and social partners are consulted or actively involved in the preparation or implementation of equality legislation, action plans and strategies. Some Member States provide by law for regular dialogue or negotiations on equality with civil society organisations. Several have established advisory committees within their national equality bodies that bring together civil society organisations and/or social partners⁹⁹.

At the same time, civil society organisations in some Member States alleged that dialogue is usually limited or even lacking. Others reported difficulties in working properly in a few Member States, as a result of restrictive legislation¹⁰⁰ and problems with access to funding, but also harassment.

Social partners play a crucial role in fighting discrimination and promoting equality and diversity in the workplace¹⁰¹. Trade unions and employers' associations work together by concluding collective agreements, issuing joint texts and guidelines, and carrying out projects¹⁰².

2.3.3. Gender mainstreaming

Both Directives contain a requirement for the Commission to report on the impact of measures on women and men¹⁰³, in accordance the principle of gender mainstreaming¹⁰⁴.

Some Member States report a general gender mainstreaming obligation in their legislation. Others explain that gender is a factor in their overall approach to intersectionality¹⁰⁵. Accordingly, they pay special attention to the more vulnerable

⁹⁸ See, for example, Commission Communication on *Ensuring justice in the EU — a European judicial training strategy for 2021-2024* (COM(2020) 713 final). The Commission also supports the Academy of European Law (ERA); see: <https://www.era.int>

⁹⁹ E.g. DE, IE, EL, ES, RO and FI.

¹⁰⁰ See judgment of 18 June 2020 in *Commission v Hungary* (C- 78/18, ECLI:EU:C:2020:476) on a Hungarian law requiring civil society organisations that receive support from abroad to register as 'foreign-funded organisations'.

¹⁰¹ The Commission also supports EU Platform of Diversity Charters efforts to enable civil society organisations, public bodies and private companies to share experience and good practices on national diversity charters; https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/eu-platform-diversity-charters_en

¹⁰² Study on *Role of social partners in tackling discrimination at work*, 2020, at: <https://www.eurofound.europa.eu/publications/customised-report/2020/role-of-social-partners-in-tackling-discrimination-at-work>;

Study on *Trade union practices on non-discrimination and diversity*, 2019, at: https://ec.europa.eu/info/sites/info/files/final_report_tu_print_version.pdf

¹⁰³ Article 19(2) of the Employment Equality Directive; Article 17(2) of the Racial Equality Directive. On multiple and intersectional discrimination, see Section 2.1.

¹⁰⁴ 'Gender mainstreaming' involves assessing the impact of EU action on both women and men and taking responsibility for any readjustment necessary, so that women and men benefit equally and inequality is not perpetuated; https://ec.europa.eu/info/sites/info/files/strategic_engagement_en.pdf

¹⁰⁵ E.g. DK, IE, IT, LT, HU, PT and SI.

situation of, for instance, Roma women and girls, migrant women and women with disabilities.

2.4. Equality bodies

In accordance with the Racial Equality Directive, all Member States have designated one or more specialised bodies to be responsible for the promotion of equal treatment regardless of racial and ethnic origin. A number of Directives of the EU equal treatment legislation¹⁰⁶ have played a major role in this respect, as only 11 (of 27) Member States had established such a body prior to their adoption. While the Employment Equality Directive does not provide for the creation of an equality body, nearly all Member States' bodies¹⁰⁷ also have competence in relation to the scope of that Directive.

The Racial Equality Directive leaves Member States a wide margin of discretion on the functioning of equality bodies. Article 13 requires only that they have certain minimum competences:

- providing victims of discrimination with *independent assistance* in pursuing their complaints;
- conducting *independent surveys* on racial discrimination; and
- publishing *independent reports* and making *recommendations* on any issue relating to such discrimination.

Because Member States are responsible for the actual implementation of the provisions, there are *divergences between equality bodies* in terms of their mandate¹⁰⁸, powers, structure, leadership, independence, resources and effectiveness. In turn, these divergences have led to an *unequal enforcement of the Directive* across Member States, as regards the level and nature of protection and the promotion of equality and awareness-raising among the general public and national institutions.

Nevertheless, in most cases, equality bodies have proved to be key to promoting and enforcing equal treatment legislation. They have emerged as necessary and valuable institutions for change at the level of individuals, institutions and society at large.

On 22 June 2018, the Commission adopted a *Recommendation on standards for equality bodies*¹⁰⁹, in order for them all to achieve their full potential. In June 2019, to complement this, it co-organised a *good practice seminar* with government officials¹¹⁰.

¹⁰⁶ See Article 13 of the Racial Equality Directive, Article 12 of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 20 of Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) and Article 11 of Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

¹⁰⁷ With the exception of ES, FI and PT.

¹⁰⁸ For instance, in some EU countries, the equality body may be part of a National Human Rights Institution (NHRI).

¹⁰⁹ C(2018) 3850 final.

¹¹⁰ The seminar was organised in cooperation with the Swedish government and brought together the members of the EU High-Level Group on Non-Discrimination, Equality and Diversity, the FRA,

Equality bodies are essential for ensuring that individuals and groups facing discrimination can enjoy their right in full. They should therefore be able to effectively perform the tasks assigned to them under EU law. The Commission committed¹¹¹ to examine in more details to which extent Member States have followed the 2018 Recommendation, with a particular focus on the role and independence of equality bodies.

Over 2 years after the adoption of the Recommendation, four Member States have declared an intention to amend their national provisions on equality bodies to follow-up on some of the recommendations and around ten Member States have already done so for example by an increase in budget. However, the majority report either no change at all or no major reform.

The Staff Working Document attached to this report provides such a detailed analysis of *the implementation of the Recommendation*. It concludes that a limited and unequal level of implementation of the Recommendation continues to hinder some equality bodies in effectively exercising their role. In practice, this leads to different levels of protection against discrimination across the EU. Continuing to share good practice and/or guidance at EU level and raising awareness will be very beneficial to strengthen the role of equality bodies. However, the experience with the implementation of the Recommendation shows that this is not sufficient. The Commission will therefore assess whether to propose possible legislation to strengthen the role of national equality bodies by 2022.

2.5. Data collection

Equality data are crucial for raising awareness, sensitising people, quantifying discrimination, showing trends over time, proving the existence of discrimination, evaluating the implementation of equality legislation, demonstrating the need for positive action¹¹², and contributing to evidence-based policymaking¹¹³.

There is no general requirement under the Directives to collect, analyse and use equality data¹¹⁴. However, the Racial Equality Directive requires that equality bodies conduct independent surveys, publish independent reports and make recommendations on issues relating to racial discrimination (see above)¹¹⁵.

The following important steps have been taken at EU level to address the lack of equality data and the need for practical guidance on equality data collection¹¹⁶:

Equinet and some national equality bodies. It offered support for a shared understanding of the Recommendation and established good practices for its implementation.

¹¹¹ In the 2020-2025 EU anti-racism action plan, the new EU Roma Strategic Framework of equality, inclusion and participation, and the 2020-2025 LGBTIQ Equality Strategy.

¹¹² Article 5 of the Racial Equality Directive; Article 7 of the Employment Equality Directive.

¹¹³ As announced in the EU anti-racism action plan, the Commission will launch action to drive a consistent approach on equality data collection, in particular as regards data disaggregated by racial or ethnic origin.

¹¹⁴ For a full definition of equality data, see *Guidelines on improving the collection and use of equality data* (High-Level Group on Non-discrimination, Equality and Diversity, Subgroup on Equality Data, July 2018), p. 4;

https://ec.europa.eu/info/sites/info/files/final_guidelines_4-10-18_without_date_july.pdf

¹¹⁵ Article 13(2) of the Racial Equality Directive.

¹¹⁶ This need was identified in the 2014 report.

- ✓ the Commission presented *a series of studies on equality data*¹¹⁷
- ✓ the Commission supported the work of the Equality Data Subgroup of the EU High-Level Group on Non-Discrimination, Equality and Diversity¹¹⁸, which issued:
 - *guidelines on improving the collection and use of equality data at national level*¹¹⁹ – these underline that the General Data Protection Regulation (GDPR)¹²⁰ does not prevent equality data collection, including when disaggregated by racial and ethnic origin, if it is done in an appropriate way¹²¹;
 - a *'compendium of promising practices'*¹²²; and
 - a *diagnostic mapping tool*¹²³
- ✓ the Commission's 'rights, equality and citizenship' (REC) programme listed the improvement of equality data collection among its priorities¹²⁴.

Many Member States reported good practices on equality data collection¹²⁵, including:

- *involving (and coordinating between) a range of relevant actors*, e.g. statistical offices, public departments and agencies, inspectorates, universities, research centres, civil society organisations, data protection authorities and the private sector¹²⁶;
- *publishing data on complaints* received by equality bodies, the police, public services, inspectorates and the judiciary, and on *judgments*¹²⁷;

¹¹⁷ https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=112035

¹¹⁸ The Subgroup brings together representatives of Member States and Norway, the Commission, Eurostat and the FRA. It aims to help countries in their efforts to improve the collection and use of equality data.

¹¹⁹ https://ec.europa.eu/info/sites/info/files/final_guidelines_4-10-18_without_date_july.pdf

¹²⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

¹²¹ See, in particular, Article 9(2)(a), (g) and (j) and recital 26 GDPR. See also pp. 7-8 of the Subgroup's guidelines (cited above in footnote 114).

¹²² <https://fra.europa.eu/en/promising-practices-list?page=3>

¹²³ <https://fra.europa.eu/en/themes/equality-non-discrimination-and-racism/about-compendium#diagnostic-tool>

¹²⁴ For the most recent calls, see annexes to the Commission Implementing Decision on the financing of the Rights, Equality and Citizenship Programme and the adoption of the work programme for 2019 and 2020 (see respectively, C(2018) 7916 final, 29.11.2018, p. 20 and C(2019) 7824 final, 5.11.2019, p. 33). For both 2019 and 2020, five projects have signed grant agreements under the 'data collection' priority' covering maximum EU contributions between 100,000 euro and 200000 euro for each project.

¹²⁵ In addition, many Member States reported extensively on qualitative and quantitative research undertaken at national level on topics relating to non-discrimination and equality.

¹²⁶ About half of the replies received from the Member States mentioned good practices in this respect.

¹²⁷ Reported, for example, by:

- the Netherlands (on complaints to equality bodies, the police and antidiscrimination services);
- Slovakia (on courts reporting on discrimination disputes); and
- Poland (on labour inspection authorities publishing the number of discrimination complaints).

In general, Member States often reported data on complaints and/or decisions in relation to the work of equality bodies, but much less on the (publication of) data on complaints received by the police or complaints and/or decisions received by or delivered by courts. Czechia informed of a specialised report by its equality body on discrimination victims' access to justice, including numbers and data on

- using the FRA's expertise on data collection¹²⁸;
- fostering the collection and use of equality data through *dedicated projects*¹²⁹;
- using equality data to *examine and evaluate the impact and effectiveness* of non-discrimination legislation¹³⁰;
- using '*mystery shopping*' and *situation testing* to examine patterns of discrimination¹³¹;
- involving minority organisations in *collecting and disseminating* equality data¹³²;
- developing statistical data that can serve as *proof of indirect discrimination*¹³³; and
- collecting *disaggregated equality data* in population censuses¹³⁴.

Nevertheless, many Member States still consider the lack of equality data as a problem at national level. There is particular *room for improvement* in relation to the regularity and comparability of the data¹³⁵, the collection of data on complaints and on cases of discrimination (including on sanctions issued), the gathering of data disaggregated by racial or ethnic origin, the collection of data by private actors (including employers), and as regards cooperation among all those concerned.

3. ISSUES SPECIFIC TO THE RACIAL EQUALITY DIRECTIVE

A comprehensive system of legal protection against discrimination requires ensuring that there are no gaps in this protection. Twenty years after the adoption of the Racial Equality Directive, in line with the EU anti-racism action plan, potential gaps in the protection offered by the Directive are also presented.

Under-reporting on discrimination remains an issue¹³⁶ and the collection of data on complaints and on cases of discrimination is still to be improved¹³⁷. This makes it difficult to conduct a thorough assessment of the areas of life where incidents of discrimination materialise on the ground.

Surveys of the FRA show that people across the EU regularly experience high levels of discrimination because of their racial or ethnic origin. Of the areas covered by the Racial Equality Directive, FRA data make clear that employment is that in which discrimination

court cases. Luxembourg reported annual figures for judicial authorities' convictions in relation to racial discrimination, without clarifying whether these data had been published.

¹²⁸ Slovakia consulted the FRA on the development of a questionnaire on discrimination. Finland found guidance in FRA's activities for harmonising its questioning for purposes of equality data collection. Portugal analysed its national data in the light of findings from FRA surveys.

¹²⁹ Belgium mentioned a REC-funded project aimed at using new tools to collect and use equality data.

¹³⁰ E.g. BE and FI.

¹³¹ Reported by Belgium. Situation testing is a method helping to bring to light discrimination on the basis of a pair-comparison testing e.g. matched pairs test application for a job vacancy, using an identical application differing solely as regards a particular characteristic under examination (e.g. age).

¹³² E.g. FI and IT.

¹³³ E.g. LT.

¹³⁴ Poland's 2021 National Census of Population and Housing covered characteristics such as nationality, ethnicity and disability. Ireland's 2021 census included a question on ethnicity.

¹³⁵ Algorithms could be helpful for detecting discrimination, e.g. by showing patterns of disadvantages.

¹³⁶ See above under Chapter 2.2.1. on Defence of rights.

¹³⁷ See above under Chapter 2.5. on Data collection.

based on ethnic or immigrant background is experienced most¹³⁸. This covers situations in which people are ‘looking for work’ or ‘in the workplace’.

3.1. The notion of ‘ethnic and racial origin’

The Racial Equality Directive does not define the concept of ‘racial or ethnic origin’¹³⁹. The CJEU has offered guidance on interpreting the notion of ‘ethnic origin’¹⁴⁰; more specifically, the *CHEZ* judgment recognised that ‘the concept of “ethnicity” has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and background’¹⁴¹. Whether racial or ethnic origin is at play can thus be determined on the basis of diverse characteristics, including *language, religion, origin, skin colour and nationality*. As FRA data show that a person’s skin colour and/or religion represent specific triggers of ethnic or racial discrimination, this is of important practical relevance¹⁴².

In *Jyske Finans*, the CJEU stressed that a person’s *country of birth* could also be considered a relevant factor¹⁴³. However, it clarified that this cannot be accepted as a *sufficient* criterion. A person’s country of birth ‘is only one of the specific factors which may justify the conclusion that a person is a member of an ethnic group and is not decisive in that regard’¹⁴⁴. According to the Court, different treatment by a credit institution solely on the basis of a person’s country of birth (in the absence of any other factor) is insufficient to support a claim of discrimination based on ‘ethnic origin’. Therefore, to establish indirect discrimination, one would have to identify a *specific ethnic group* that has been disadvantaged, as compared with other groups. In the Court’s view, a claim that a person’s country of birth ‘is generally more likely to affect persons of a “given ethnicity” than “other persons” cannot be accepted’¹⁴⁵.

The CJEU confirmed its approach in its judgment in the *Maniero* case, which concerned an educational scholarship available only to individuals who had passed a German state law examination and not to those who had passed an equivalent exam in other countries.

¹³⁸ For more information, see FRA EU-MIDIS II survey, p.34.

When it comes to accessing the labour market, some Member States have also reported particular concerns for people of African descent.

¹³⁹ The Directive offers protection to everyone, including non-EU nationals. At the same time, it states that differences of treatment on the basis of *nationality* and arising from the *legal status* of non-EU nationals and stateless persons are not covered (see Article 3(2) and recital 13).

¹⁴⁰ Such guidance does not exist when it comes to the interpretation of the notion of ‘racial origin’. Some Member States do not refer to ‘race’ or ‘racial origin’ in domestic legislation, in order to avoid harmful group generalisations. This concern also underlies recital 6 of the Directive, which states that the EU ‘... rejects theories which attempt to determine the existence of separate human races’.

¹⁴¹ *CHEZ* judgment (footnote 33), paragraph 46. See also judgment of 6 April 2017 in *Jyske Finans AS* (C-668/15, EU:C:2017:278), paragraph 17. In developing this definition, the CJEU took account of the definitions used in the case law of the European Court of Human Rights, more particularly in the judgments of *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII, and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, §§ 43 to 45 and 50, ECHR 2009 (see *CHEZ* judgment, paragraph 46).

¹⁴² FRA’s submission.

¹⁴³ *Jyske Finans* judgment (footnote 141), paragraph 18. This case concerned a credit institution asking a Danish citizen born in Bosnia and Herzegovina to provide additional proof of identity, without requiring this of Danish citizens born in Denmark.

¹⁴⁴ *Jyske Finans* judgment (footnote 141), paragraphs 18 and 20.

¹⁴⁵ *Jyske Finans* judgment (footnote 141), paragraphs 34-35.

In line with its reasoning in *Jyske Finans*, the Court argued that no *specific ethnic group* could be considered as being disadvantaged, as compared with others¹⁴⁶.

When reporting on the application of the Racial Equality Directive, several Member States drew attention to the protection offered at national level against discrimination on grounds such as skin colour, place of birth, language, descent or national origin. Grounds such as colour, language and birth, among others, are explicitly mentioned in Article 21 of the Charter of Fundamental Rights of the European Union¹⁴⁷. The Charter applies within the scope of EU law and its Article 21 has been recognised as having direct horizontal effect¹⁴⁸. When interpreting the notion of ethnic origin, the CJEU has relied on the importance of ensuring effective protection for the right to equality and non-discrimination, as set out in Article 21 of the Charter¹⁴⁹. While it ruled that the scope of the Directive cannot be defined restrictively, it however made it clear that it may not be extended to discrimination on grounds other than those listed exhaustively in the Directive¹⁵⁰.

3.2. Scope

In this context, it is relevant to recall that Article 19 of the Treaty on the Functioning of the European Union (TFEU), which forms the legal basis of the Directive, empowers the Union legislator to combat discrimination only within the limits of the powers conferred by the Treaties upon the Union.

Article 3 of the Racial Equality Directive refers to employment and occupation, social protection/advantages, education and access to and supply of goods and services that are available to the public, including housing.

Within that scope, the Directive also applies to discrimination resulting from the use of *artificial intelligence*¹⁵¹.

As regards employment, the Directive applies to conditions for access to employment, self-employment and occupation, to access to all types and to all levels of vocational guidance and training and to employment and working conditions, including dismissals and pay. There is however an exception whereby a difference of treatment based on a characteristic related to racial or ethnic origin shall not constitute discrimination where it corresponds to a specific requirement indispensable for a certain professional activity¹⁵². This means, for example, that a casting director may seek for an actor of a particular racial origin for a role in a film.

¹⁴⁶ Judgment of 15 November 2018 in *Heiko Jonny Maniero* (C-457/17 ECLI:EU:C:2018:912), paragraphs 47 and 48.

¹⁴⁷ This provision, moreover, includes an *open* list of discrimination grounds.

¹⁴⁸ See judgment of 25 May 2018 in *Vera Egenberger* (C-414/16, EU:C:2018:257).

¹⁴⁹ See *CHEZ* judgment (footnote 33), paragraphs 42, 55 and 56.

¹⁵⁰ See, for example, judgment of 11 July 2006 in *Sonia Chacón Navas* (C-13/05 ECLI:EU:C:2006:456).

¹⁵¹ On 19 February 2020, the Commission published the Artificial Intelligence White Paper setting out the way towards a legislative proposal following a human centric approach, which the Commission will present in 2021. For more information relating to algorithmic discrimination, see among other relevant publications: FRA (2020), ‘Getting the future right – Artificial intelligence and fundamental rights’ (<https://fra.europa.eu/en/publication/2020/artificial-intelligence-and-fundamental-rights>); FRA (2018), ‘#BigData: Discrimination in data-supported decision making’ (<https://fra.europa.eu/en/publication/2018/bigdata-discrimination-data-supported-decision-making>)

¹⁵² See Article 4 of the Directive.

The Directive covers all types of *education*, general and vocational, public and private, religious and secular, from pre-school to higher education. In the *Maniero* judgment, the CJEU clarified the coverage of ‘education’. Reading the Directive in the light of its objective of promoting equality, it interpreted the notion widely, as including *access to education* and the *elimination of relevant financial hurdles*. The award of financial benefits closely linked to an individual’s participation in educational projects thus falls within the scope of the Directive¹⁵³.

The Racial Equality Directive covers access to and *supply of goods and services*, which are available to the public. The meaning of the *notion of ‘services’* is taken from Article 57 TFEU – they must constitute an economic activity, i.e. normally be provided for remuneration and include, in particular, activities of an industrial or commercial character.

The Directive applies regardless of whether the goods and services available to the public are supplied in the public or the private sector. *Public* services are thus covered, however only in as far as they correspond to the meaning of a ‘service’ in the sense of Article 57 TFEU, as outlined above.

Services within the meaning of the Directive include, for example, housing¹⁵⁴ or supply of electricity¹⁵⁵. Healthcare is covered as an aspect of social security but may also fall under the scope of services, however only if provided in return for remuneration by a profit-making body¹⁵⁶.

The legislator did not include in the Directive’s material scope of application public-sector actions that entail the ‘exercise of public authority’ (e.g. by the police, by fraud detection authorities, criminal and civil justice authorities) without any element of ‘service provision’¹⁵⁷. For example, the Directive is not applicable when a person is stopped or harassed by the police because of his or her racial or ethnic background¹⁵⁸.

The reference to goods and services ‘available to the public’ is a concept that sometimes raises questions. The condition of ‘availability to the public’ includes situations where the offer to provide a certain good or service has been made in the public domain (e.g. by an advertisement in a newspaper or on a publicly accessible website, or on a leaflet on a window) but not those offered only to the circle of family members.

¹⁵³ *Heiko Jonny Maniero* judgment (footnote 146).

¹⁵⁴ ‘Housing’ is not defined in the Directive; the boundaries of this term have so far been barely tested.

¹⁵⁵ *CHEZ* judgment (footnote 33), paragraph 43.

¹⁵⁶ See FRA Handbook on European non-discrimination law, 2018, p. 134, including references to CJEU case law.

¹⁵⁷ Judgment of 12 May 2011 in *Runevič-Vardyn* (C-391/09 ECLI:EU:C:2011:291), paragraphs 45, 47 and 48. The Court noted that, in the preparatory work on the Directive, the Council did not accept an amendment proposed by the European Parliament which would extend its scope to ‘the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions’.

¹⁵⁸ When people from ethnic or immigrant minority groups were surveyed, 14% said they were stopped by the police in the 12 months before the survey. Of those stopped during this timeframe, 40% believe that the most recent stop was because of their ethnic or immigrant background (FRA EU-MIDIS II survey, p. 69). Among respondents who experienced hate-motivated harassment, 3% said that the perpetrator was a police officer or a border guard (FRA EU-MIDIS II survey, p. 17).

3.3. Roma people are among the groups most affected by discrimination

Several Member States and stakeholders indicate that Roma people¹⁵⁹ are particularly affected by discrimination, mostly in the areas of education, access to employment and housing (this is in line with FRA surveys¹⁶⁰). Roma communities also face serious issues as regards rights awareness and access to justice¹⁶¹. The COVID-19 pandemic has affected Roma disproportionately, further aggravating inequalities, in particular in education, healthcare and employment¹⁶².

To tackle these challenges, Member States have reported specific policy actions, research and campaigns. Following its evaluation of the EU framework for national Roma integration strategies up to 2020¹⁶³, the Commission issued a reinforced and reformed EU *Roma strategic framework for equality, inclusion and participation* for 2020-2030¹⁶⁴. In a three-pillar structure, it complements socio-economic inclusion of Roma with fostering equality and promoting participation. Improved data collection is an important aspect of the initiative¹⁶⁵.

The new framework is accompanied by a proposal for a Council Recommendation on Roma equality, inclusion and participation. One of the key aims is the effective implementation of the Racial Equality Directive by preventing and combating discrimination against Roma people. It includes recommendations for tackling antigypsyism and encourages Member States to step up the involvement of, and cooperation with, national equality bodies and civil society organisations in reaching these objectives.

Since 2014, the Commission has initiated infringement procedures against three Member States for school segregation of Roma children¹⁶⁶. These procedures are still ongoing.

4. ISSUES SPECIFIC TO THE EMPLOYMENT EQUALITY DIRECTIVE

Member States did not flag any major difficulties with regard to the interpretation and application of the provisions of the Employment Equality Directive in 2014-2020, while noting some difficulties with concepts common to both Directives¹⁶⁷. Some stakeholders

¹⁵⁹ Ireland also refers to ‘Travellers’ (a nomadic indigenous ethnic group whose members maintain a set of traditions). Although sometimes assimilated to Roma people, because of (past) nomadic traditions and similar levels of discrimination and social exclusion, they are not linguistically related.

¹⁶⁰ A 2020 FRA survey undertaken in six countries show that 60% of Roma and Travellers felt discriminated against because of their Roma or Traveller background in the five preceding years, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-travellers-six-countries_en.pdf

¹⁶¹ Stakeholders have reported particularly low levels of rights awareness in the Roma community.

¹⁶² https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-roma_en.pdf

¹⁶³ *Report on the evaluation of the EU framework for national Roma integration strategies up to 2020* (COM(2018) 785 final).

¹⁶⁴ https://ec.europa.eu/info/publications/new-eu-roma-strategic-framework-equality-inclusion-and-participation-full-package_en

¹⁶⁵ Progress in achieving the objectives of the Roma Strategic Framework is proposed to be monitored through a common EU indicator framework that will take into account country specificities. For an outline of a portfolio of such indicators, see FRA Monitoring framework for an EU Roma Strategic Framework for Equality, Inclusion and Participation: Objectives and indicators, https://fra.europa.eu/sites/default/files/fra_uploads/2020-portfolio_of_indicators_working-paper_en.pdf

¹⁶⁶ CZ, HU (https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_1823, point 5);

SK (https://ec.europa.eu/commission/presscorner/detail/en/INF_19_5950, point 4).

¹⁶⁷ See Chapter 2 above.

focused in particular on the issue of reasonable accommodation of persons with disabilities including as regards challenges in understanding this concept, applying it in practice and having adequate guidance in this regard. A few stakeholders proposed to extend the obligation of reasonable accommodation to cover discrimination grounds other than disability.

There are currently no infringement proceedings in relation to the Directive. However, the CJEU issued an important number of judgments in preliminary cases submitted by several Member States' national courts regarding discrimination on all grounds covered by the Directive¹⁶⁸.

4.1. Scope

The CJEU handed down several important judgments on the *scope of application* of the Employment Equality Directive.

It clarified¹⁶⁹ that the concept of 'conditions for access to employment' in Article 3(1)(a) may cover an *employer's public statements*, even in the absence of a recruitment procedure, provided that they relate, in fact, to a firm's recruitment policy. The case concerned a lawyer's public statements that he would never recruit homosexual candidates for employment¹⁷⁰. The interpretation is not affected by the possible limitation to the exercise of freedom of expression.

In another judgment¹⁷¹, the Court held that the Directive applies to a *taxation* scheme designed to improve access to vocational training for young people, whereby the tax treatment of training costs differs according to the trainee's age. However, in another context in the case of *C*¹⁷², it ruled that national legislation on a supplementary tax on retirement pension income does not fall within the substantive scope of the Directive. Such legislation does not concern 'pay', but rather the rate of tax, which is external to the employment relationship¹⁷³.

The Court confirmed its case law that the *discrimination grounds* set out in Article 1 of the Directive are listed exhaustively and do not include the professional category¹⁷⁴ nor the nature of the employment relationship¹⁷⁵ of the individuals concerned.

4.2. Religion

For the first time since the adoption of the Directive, the CJEU had the opportunity to issue important judgments on the provisions relating to discrimination on the grounds of religion.

¹⁶⁸ Around 50 judgments since 2014; 10 preliminary cases are still pending.

¹⁶⁹ Judgment of 23 April 2020 in *Associazione Avvocatura per i diritti LGBTI*, (C-507/18, ECLI:EU:C:2020:289).

¹⁷⁰ The interpretation of this concept, as clarified by the CJEU in relation to the Employment Equality Directive, may also be relevant, by analogy, for the interpretation of the Racial Equality Directive, the scope of which also covers 'conditions for access to employment'.

¹⁷¹ Judgment of 10 November 2016 in *de Lange* (C-548/15, ECLI:EU:C:2016:850).

¹⁷² Judgment of 2 June 2016 in *C* (C-122/15, ECLI:EU:C:2016:391).

¹⁷³ Judgment of 24 September 2020 in *YS v NK AG* (C-223/19, ECLI:EU:C:2020:753).

¹⁷⁴ Judgment of 8 October 2020 in *FT* (C-644/19, ECLI:EU:C:2020:810).

¹⁷⁵ Judgment of 17 March 2017 in *Milkova* (ECLI:EU:C:2017:198).

In the *Achbita* case¹⁷⁶, the Court interpreted ‘religion’ in a broad sense covering people’s freedom to manifest their religious beliefs in public. It held that an internal rule of a private undertaking that prohibits the visible wearing of any political, philosophical or religious sign does not constitute direct discrimination, provided it applies to all workers in the same way. However, such an apparently neutral rule may constitute indirect discrimination unless it is objectively justified on the basis of appropriateness and necessity. A policy of political, philosophical and religious neutrality may constitute a legitimate objective.

In the *Bougnaoui* judgment¹⁷⁷, the Court held that, in the absence of a neutrality policy, an employer cannot require a worker not to wear an Islamic headscarf at work in response to a customer’s wishes. Such treatment does not constitute a ‘genuine and determining occupational requirement’ within the meaning of Article 4(1) of the Directive, justified by the nature/context of the worker’s occupational activities.

Two other CJEU judgments¹⁷⁸ concerned the interpretation of Article 4(2) of the Directive, which provides for an exception to the non-discrimination principle as regards churches or other ethos-based organisations. The Court held that national courts must subject occupational requirements imposed by ethos-based organisations to *effective judicial review*. The requirements have to be necessary and objectively linked to the nature/context of the occupational activity, taking into account the organisation’s ethos. They may not cover considerations foreign to that ethos or the organisation’s right to autonomy, and must comply with the proportionality principle.

The Court is expected to refine its jurisprudence further in two pending cases, namely C-804/18 and C-344/20¹⁷⁹. The latter also raises a question on the concept of ‘belief’. A number of Member States have said that they would welcome further clarification of the notion through EU case law.

4.3. Sexual orientation

Taking into account the objectives and fundamental values underpinning the Directive, the Court clarified the conditions under which *homophobic public statements* constitute discrimination¹⁸⁰. The expression of discriminatory opinions in matters of recruitment by an employer is likely to deter individuals from applying for a post.

In another judgment¹⁸¹, the Court pointed out that the Member States are free to regulate *marriage between persons of the same sex* or an alternative form of legal recognition of their relationship, and to lay down the date of effect of such a marriage. It concluded that a rule in Ireland, whereby the right to a survivor’s benefit was subject to a civil partnership having been entered into before the member of an occupational benefit scheme reached the age of 60, did not constitute discrimination on grounds of sexual orientation, even though national law did not allow civil partnerships before the partners reached that age.

¹⁷⁶ See *Achbita* judgment (footnote 33).

¹⁷⁷ Judgment of 14 March 2017 in *Bougnaoui* (C-188/15, ECLI:EU:C:2017:204).

¹⁷⁸ See *Vera Egenberger* judgment (footnote 148); judgment of 11 September 2018 in *IR* (C-68/17, ECLI:EU:C:2018:696).

¹⁷⁹ Pending case of *Wabe* (C-804/18); pending case of *S.C.R.L.* (C-344/20).

¹⁸⁰ See judgment in *Associazione Avvocatura per i diritti LGBTI* (footnote 169).

¹⁸¹ See *David L. Parris* judgment (footnote 36).

4.4. Disability

A few stakeholders mentioned some challenges in interpreting the notion of ‘disability’. In this regard, the CJEU provided useful clarification by referring to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which was approved on behalf of the European Community by Council Decision 2010/48/EC and has become from the time of its entry into force i.e. 3 May 2008, an integral part of the EU legal order. The Court held that the concepts of ‘disability’ and ‘long-term’ limitation of a person’s capacity at work must be given autonomous and uniform interpretation throughout the EU¹⁸².

The concept of ‘disability’ refers to a limitation resulting in particular from long-term physical, mental or psychological impairments, which in interaction with various barriers may hinder a person’s full and effective participation in professional life on an equal basis with other workers. The Court specified in its *Z* judgment¹⁸³ that the inability to have a child by conventional means¹⁸⁴ does not in itself constitute a hindrance to the exercise of a professional activity. In the *FOA* judgment¹⁸⁵, it held that, while obesity does not in itself constitute a ‘disability’, it may, under certain circumstances, meet the conditions required by the Directive and thus be covered by it.

The specific situation and needs of workers with a disability have to be taken into account in assessing whether they are placed at a disadvantage in comparison with others or whether national measures satisfy the proportionality test. Thus, in the *Ruiz Conejero* case¹⁸⁶ the Court held that people with disabilities have the additional risk of being absent from work by reason of an illness connected with their disability and run a greater risk of accumulating days of absence because of illness, and consequently of reaching the limits laid down in the law. The Court concluded that this is liable to place workers with disabilities at a disadvantage and so to bring about a difference of treatment indirectly based on disability. Furthermore, in assessing the proportionality of the national measures at issue, the Court held that it should not be overlooked that people with disabilities generally face greater difficulties than people without disabilities in re-entering the labour market¹⁸⁷.

In another case, the Court held that, if an employer did not provide reasonable accommodation (Article 5 of the Directive), the dismissal of a worker with a disability on the basis of criteria determined by the employer (low productivity, a low level of multi-skilling and a high rate of absenteeism) constitutes indirect discrimination on grounds of disability. In this regard, the Court cited Article 2 UNCRPD, under which denial of reasonable accommodation is a form of discrimination¹⁸⁸.

¹⁸² Judgment of 1 December 2016 in *Daouidi* (C-395/15, ECLI:EU:C:2016:917).

¹⁸³ Judgment of 18 March 2014 in *Z* (C-363/12, ECLI:EU:C:2014:159).

¹⁸⁴ The case concerned a woman who could not support a pregnancy due to a rare condition. Her employer refused to grant her paid leave equivalent to maternity leave or adoptive leave following the birth of a baby through a surrogacy arrangement.

¹⁸⁵ Judgment of 18 December 2014 in *FOA* (C-354/13, ECLI:EU:C:2014:2463).

¹⁸⁶ Judgment of 18 January 2018 in *Ruiz Conejero* (C-270/16, ECLI:EU:C:2018:17). This case concerned national (Spanish) legislation which permitted, subject to certain conditions, the dismissal of an employee by reason of intermittent absences from work, if these absences, even where justified, exceeded certain limits laid down in the law.

¹⁸⁷ Judgment of *Ruiz Conejero* (footnote 186).

¹⁸⁸ Judgment of 11 September 2019 in *DW v Nobel* (C-397/18, ECLI:EU:C:2019:703).

In a recent judgment, the Court interpreted the concept of ‘discrimination’ (Article 2 of the Directive) and ruled that the principle of equal treatment is intended to protect a worker who has a disability against any discrimination on the basis of that disability, not only as compared with workers who do not have disabilities, but also as compared with other workers with disabilities¹⁸⁹.

4.5. Age

The majority of CJEU judgments regarding the Employment Equality Directive concern age-related differences of treatment¹⁹⁰. While the Member States transposed the Directive properly, several issues of compatibility arose with regard to specific national laws. In assessing these, the Court examined in particular:

- the *comparability of situations*¹⁹¹;
- the possible existence of an *objective, neutral factor* that is unconnected to age¹⁹²;
- the *legitimacy of the objective(s)* pursued¹⁹³; and
- the *appropriateness/proportionality* of the means used¹⁹⁴.

Citing the *right to work* enshrined in Article 15(1) of the EU Charter of Fundamental Rights, the Court paid particular attention to the participation of older workers in the labour force and thus in economic, cultural and social life, and noted that retaining them promotes diversity¹⁹⁵. However, it also acknowledged that Member States may pursue a social or employment policy aiming at promoting young workers’ access to the labour market. It is for the competent authorities of the Member States to find the right balance between the different interests involved¹⁹⁶. In assessing the proportionality of the national legislation at issue, the Court accepted that account may be taken of the fact that the exclusion from work affected retired persons, whose professional life has ended and who are in receipt of a retirement pension. It left it to the national court that submitted the preliminary case to verify whether such exclusion is appropriate for ensuring attainment of the objective pursued and genuinely reflects a concern to attain it in a consistent and systematic manner.

Several cases concerned age discrimination with regard to *pay*. Some national laws on public-sector salaries used age as a proxy for years of service¹⁹⁷. Others did not take account of periods of service before the age of 18 when calculating salaries¹⁹⁸. In some

¹⁸⁹ Judgment of 26 January 2021 in *Szpital Kliniczny* (C-16/19, ECLI:EU:C:2021:64).

¹⁹⁰ See, in this regard Liu, K., and O’Cinneide, C., ‘The ongoing evolution of the case-law of the Court of Justice of the European Union on Directives 2000/43 and 2000/78/EC (European Commission 2019)’, pages 60 ff.

¹⁹¹ E.g. judgment of 1 October 2015 in *O* (C-432/14, ECLI:EU:C:2015:643); judgment of 7 February 2019 in *Vindel* (C-49/18, ECLI:EU:C:2019:106).

¹⁹² E.g. the date of recruitment; see judgment of 14 February 2019 in *Horgan and Keegan* (C-154/18, ECLI:EU:C:2019:113).

¹⁹³ E.g. judgment of 19 July 2017 in *Abercrombie* (C-143/16, ECLI:EU:C:2017:566).

¹⁹⁴ E.g. judgment of 2 April 2020 in *CO* (C-670/18, ECLI:EU:C:2020:272).

¹⁹⁵ Judgment of *CO* (footnote 194).

¹⁹⁶ *Ibid.* The case concerned national legislation that prohibited, as a general rule, public administrative authorities from awarding certain positions to persons who were retired.

¹⁹⁷ E.g. judgment of 19 June 2014 in *Specht* (joined cases C-501/12 to C-506/12, C-540/12 and C-541/12, ECLI:EU:C:2014:2005).

¹⁹⁸ E.g. judgment of 11 November 2014 in *Schmitzer* (C-530/13, ECLI:EU:C:2014:2359).

cases, the legal amendments intended to remedy the situation actually perpetuated the discrimination¹⁹⁹.

The Court also clarified the meaning of ‘genuine and determining occupational requirements’ in two cases concerning maximum recruitment ages for police forces, taking into account the specific nature of the jobs in question²⁰⁰.

5. CONCLUSIONS AND WAY FORWARD

The CJEU developed useful guidance on several provisions, thus clarifying some issues of interpretation. At both national and EU level, important initiatives have been taken to apply the non-discrimination provisions better in practice.

Those initiatives have led to some positive developments, *inter alia* as regards data collection. At the same time, major concerns remain, such as victims’ fear of retaliation, low and diverging levels of compensation, shortage of evidence, and little awareness of rights and support mechanisms (e.g. equality bodies). *These challenges all contribute to the under-reporting of discrimination.*

Follow-up action to address the challenges identified in this report could include the following:

- *closer monitoring* by Member States of the implementation of the Directives, in particular in relation to protection against victimisation and the application of effective, proportionate and dissuasive sanctions. The Commission will offer support in this regard, e.g. by commissioning a *study on sanctions*;
- continuing efforts at national and EU level to:
 - *raise awareness* among the public at large and among those particularly at risk of discrimination, in particular about their rights and existing support mechanisms;
 - support *projects*; the Commission will continue to promote equality and support victims through EU funding channels, including through the ‘citizens, equality, rights and values’ (CERV) programme and the Justice programme; and
 - offer regular *information and training* for policymakers, judges and lawyers on non-discrimination law, including key issues such as indirect discrimination, harassment, the burden of proof, sanctions, and algorithmic discrimination; and
- encouraging *data collection* at national level, with a focus on statistics, complaints, judgments, sanctions and breakdowns by equality factors (including those considered potentially sensitive, such as ethnic or racial origin). To ensure data comparability over time and between regions/countries, a coordinated approach at EU level remains essential²⁰¹.

¹⁹⁹ E.g. judgment of 8 May 2019 in *Leitner* (C-396/17, ECLI:EU:C:2019:375).

²⁰⁰ Judgment of 13 November 2014 in *Pérez* (C-416/13, ECLI:EU:C:2014:2371); judgment of 15 November 2016 in *Sorondo* (C-258/15, ECLI:EU:C:2016:873).

²⁰¹ As announced in the EU anti-racism action plan, the Commission will organise a roundtable on equality data bringing together key stakeholders.

In all these endeavours, *equality bodies* are key partners. A further strengthening of their visibility, their role and their effective and independent functioning is crucial as analysed in the Staff Working Document attached to this report. The continuing sharing of good practices at EU level and awareness-raising will also be very beneficial, including in the field of prevention. In addition, and as already announced²⁰², the Commission will assess whether to propose new legislation to strengthen the role of national equality bodies by 2022.

All stakeholders concerned, including trade unions, employers and their associations, and civil society organisations, have a role to play in their respective spheres of competence. To realise the full potential of the Directives, the Commission will continue to work with the Member States, equality bodies, the FRA, civil society organisations and social partners, in order to ensure the systematic protection of victims of discrimination.

Circumstances have changed since the adoption of the Racial Equality Directive on 29 June 2000, including due to technological advances. Despite the challenges posed by the under-reporting, experiences of discrimination on the grounds of racial or ethnic origin remain widespread in the EU, following from a wide range of causes, including stereotypes and bias. A further assessment would be required to determine the relationship between the persistence of racial discrimination experienced in the EU and possible shortcomings in the enforcement of EU rules. It would also allow looking into possible gaps in the scope and coverage of the legislation. Coherence between the Racial Equality Directive and other relevant EU instruments should also be analysed. Data should be gathered on the areas where incidents of discrimination materialise, including where law enforcement authorities may discriminate. Such assessment, which would need to include a consultation of all relevant stakeholders, would serve to obtain robust, good quality data to provide evidence of racial discrimination experienced on the ground.

²⁰² In the EU anti-racism action plan, the new EU Roma Strategic Framework of equality, inclusion and participation and the 2020-2025 LGBTIQ Equality Strategy.