

Policy Briefing*

May 2012

Evaluating the Implementation of the Race Equality Directive:
Targeted Questions

Since 2000, the Open Society Foundations have monitored the application of the *Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* ("the Race Equality Directive" or RED). The Open Society Justice Initiative, a human rights law reform programme of the Foundations, works extensively throughout Europe to combat ethnic discrimination through advocacy, technical assistance, and public interest litigation. The Justice Initiative is involved in several proceedings at the national and regional level to enforce antidiscrimination law on grounds of racial and ethnic origin in EU member states.

Given its experience in domestic and international courts and with national antidiscrimination legislation, the Open Society Foundations request the Commission to raise with all member states targeted questions regarding the RED's national implementation to help assess the level of protection, in law and practice, against racial and ethnic discrimination. The Justice Initiative has identified six key areas in which questions and review by the Commission could generally assist member states in identifying and remedying challenges in implementing the RED domestically.

1. Applying the concept of indirect discrimination
2. Scope and access to remedies
3. Scope and exceptions
4. Defence of rights
5. Burden of proof: establishing facts
6. Positive action

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1. Applying the concept of indirect discrimination

Article 2.2(b) of the RED provides that “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice 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.”

Questions to member states:

- ▶ How has the concept of **indirect discrimination** on ground of racial or ethnic origin been **applied** in national jurisprudence with reference to provisions transposing the RED?
- ▶ Please provide examples of judicial decisions applying and/or making reference to the concept of indirect discrimination on grounds of racial or ethnic origin in national jurisprudence.

Indirect discrimination in national jurisprudence

On 16 November 2011, more than three years after Italy declared a State of Emergency for the presence of nomadic settlements in some regions, the Italian Council of State struck down the Nomad Emergency Decree and its implementing orders (collectively, the “Nomad Emergency Measures”). The court found the Emergency Measures unlawful because they were not premised upon a genuine emergency connected to the presence of Romani and Sinti people.

The court further found that some of the regulations restricting access to and movement within the camps were disproportionate and illegitimate and also unlawful. Concerning racial discrimination, the Council of State failed to find that the Emergency Measures were directly or indirectly racially discriminatory or to award damages or any other remedies to the victims.

The decision, as phrased, left unclear whether Italian law prohibits the full scope of racial discrimination as defined in Article 2 of the RED or intent is required to enforce race antidiscrimination law (see box below).

“It is certainly a fact of common knowledge that the vast majority of individuals present in the concerned camps concretely has a precise ethnic background, insofar as they have Roma origins.

However, in the opinion of this Section, even though these elements are perhaps apt to reveal a discriminatory intent by some of the institutional subjects involved, they do not allow to conclude that the entire administrative action has been uniquely and principally finalized at establishing a racial discrimination of the Roma community....

Naturally, this does not exclude at all the fact that single measures or provisions have had concrete illegitimate and discriminatory effects ... but this is not sufficient to declare that the acts are illegitimate under this profile.”

Italy: Ministry of the Interior and others v. ERRC and others, Council of State, Ruling No 6050 of 16 November 2011, p. 19.

2. Scope and access to remedies

Article 3.1 of the RED states that the Directive “shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to eight different areas of application, from conditions for access to employment to access to and supply of goods and services that are available to the public, including housing.”

Questions to member states:

- ▶ Please list any **public bodies** (i.e. public schools, police, military, judiciary, etc.) that are not covered under national provisions transposing the RED.
- ▶ Are there areas for which the domestic transposition of the RED has been supplied exclusively through reference to pre-existing national provisions, for instance of public law?
- ▶ Do provisions on the **burden of proof, support by civil society organisations and effective remedies and sanctions** apply to antidiscrimination claims raised with reference to such public bodies and/or law? If so, please provide references to the relevant provisions of national legislation, and/or national judicial decisions.
- ▶ Are **indirect discrimination, harassment, and instruction to discriminate** explicitly covered by domestic antidiscrimination provisions found in public law or with reference to such public bodies? If so, please provide references to the relevant provisions of national legislation, and/or national judicial decisions.
- ▶ Is it compulsory for national courts to issue a **conclusion on discrimination**, once an allegation of discrimination is raised in a complaint? If so, please provide references to the relevant provisions of national legislation, and/or national judicial decisions, which make it so.

Public Education

The General Equal Treatment Act (AGG) of 2006 transposed inter alia the Racial Equality Directive into German law. According to its Section 2 (1), the material scope of the AGG embraces access to all types and levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Section 2 (3)) as well as all aspects of education (Section 2(7)).

However, the antidiscrimination provisions of the AGG apply only to private education, not to public education. Thus, section 19 (2) AGG provides as follows: “Any discrimination on the grounds of racial or ethnic origin is further prohibited at the initiation, execution and termination of contractual obligations according to civil law (*zivilrechtliches Schuldverhältnis*) within the meaning of section 2 (1) 5 to 8.” Public education is governed by public law, inter alia by the School Acts of the Länder. In public legal relationships, the prohibition of discrimination according to Article 3 of the Basic Law of Germany applies.

Thus, **the Federal Legislator in Germany has not transposed the Racial Equality Directive with respect to the public sector.**

“The applicability of other prohibitions of discrimination or obligations of equal treatment is not affected by this act. The same applies to public law provisions, which protect certain groups of people.”

General Equal Treatment Act (AGG), Section 2(3).

As a consequence, claimants in public schools cannot benefit from provisions sharing the burden of proof between claimants and defendants, establishing access to legal proceedings for civil society organisations wishing to support or act on behalf of a claimant, or establishing effective remedies and sanctions. In addition, it is unclear whether Article 3 of the Basic Law is to be read as covering indirect discrimination, harassment and instruction to discriminate.

Policing

There are several grounds upon which an individual may be subject to an identity check under French law. The majority of stops are carried out under Articles 78 of the Code of Criminal Procedure (CCP). Article 78-2 subsections 1 and 2 provide the necessary motivation for judicial police controls, while article 78-2 subsection 3 governs identity checks by the administrative police. The judicial police investigate specific offences, and the administrative police maintain public order. Article 78-2 subsection 1 permits the police to carry out an identity stop when there is reason to suspect that the individual has committed or attempted to commit an offence, is preparing to commit a felony or a misdemeanour, is able to give information useful for an inquiry into a felony or misdemeanour, or when the person is the object of inquiries ordered by a judicial authority. In principle, ethnic profiling violates French national non-discrimination standards, including the police code of ethics. It also violates European human rights standards which prohibit distinctions in relation to the exercise of another Convention right on the basis of race or ethnicity when these have no objective or reasonable justification. And yet, **there is no specific prohibition against discriminatory police checks under French law**, unless penal and immigration proceedings are initiated following the check.

British police have legal powers to stop and search members of the public whom they suspect may have committed, or are about to commit, an offence. In practice, these powers excessively target ethnic minorities. The legal basis for police ‘stop and search’ powers in the United Kingdom is embodied in various pieces of legislation that are regulated by the Police and Criminal Evidence Act (PACE) Code of Practice A. The vast majority of stop and searches are carried out under the auspices of three Acts - PACE 1984 (section 1), Misuse of Drugs Act 1971 (section 23) and the Firearms Act 1968 (section 47). **The use of exceptional stop and search powers that do not**

have the safeguard of reasonable suspicion – and which are contained in Section 60 of the Criminal Justice and Public Order Act 1994 and Section 44s and 47a and Schedule 7 of the Terrorism Act 2000 – **has substantially increased since 2008.**

“In seeking to protect the rights of the majority, the police at times infringe certain individual rights, such as the right to privacy or to freedom of movement and association. However, they are only permitted to do so if the infringement is rational, proportionate and lawful. Yet the evidence shows that, on the contrary, some police forces are using their powers disproportionately suggesting they are stopping and searching individuals in a way that is discriminatory, inefficient, and a waste of public money.”

UK: *Equalities and Human Rights Commission (2010), Stop and Think: A Critical Review of the Use of Stop and Search Powers in England and Wales. London: EHRC, p.3.*

The UK’s stop and search laws and practices are frequently justified on the basis of countering terrorism, averting potential violence or preventing and detecting crime. **Changes in law and policy since 2008 have resulted in greater reliance on ethnic stereotyping in conducting stops and searches – with fewer accountability mechanisms to prevent discriminatory abuse.** In March 2011, the UK government removed the requirement of recording of all “stops” and reduced the recording of “stop and search”. This fundamentally weakens existing accountability structures and the ability for victims to

seek redress. This weakening has been facilitated by amendments to the Police and Criminal Evidence Act (PACE) Code of Practice A, which governs the use and recording of stop and search. These changes give individual police forces the discretion to choose whether or not to record “stops” and to reduce the information recorded on “stop and search.” Under these changes, individual police forces have the discretion to choose whether they will continue to record the name and address of the person searched, whether any injury or damage was caused as a result of the search and whether anything was found as a consequence of the search.

The failure to record the name of the person stopped on the form makes it impossible to measure “repeat stop and searches” and for victims to demonstrate a pattern of stops amounting to “discrimination, harassment or victimization” as prohibited in the UK Equality Act 2010.

No effective protection or remedy exists for “less intrusive” encounters with police that fall outside the statutory “stop and search” powers – such as “stops” or “stop and account.” In these cases, police officers can detain members of the public and ask them to account for their actions, behaviour or presence in an area but do not go on to search them. The recent changes to PACE remove previous regulatory requirements for the police to record all stops. Police forces may reinstate the recording of stops and account when there are local concerns about the disproportionate use of stops, but the decision rests entirely in police hands, denying local communities a role in decision-making. The removal of a legal requirement to record stops means that it is possible that such stops will not be recorded, making it impossible for communities to demonstrate there are local concerns in order to require police forces to reinstate recording.

3. Scope and exceptions

Article 3.1 (h) of the RED establishes that the Directive “shall apply to the access to and supply of goods and services which are available to the public, including housing.”

Questions to member states:

- ▶ Do national law provisions transposing the Directive provide a definition for “goods and services that are available to the public” or distinguish between goods and services that are available to the public and other goods and services? Please provide relevant examples.
- ▶ If so, how does this distinction operate with reference to antidiscrimination law provisions and access to individual judicial redress?

Bulk business and housing

The German General Equal Treatment Act (AGG) provides a very restrictive definition of “goods and services that are available to the public, including housing”. In fact, the AGG only covers so-called “bulk businesses”, and insurances under private law. Bulk businesses (*Massengeschäfte*), are defined as “civil law obligations which typically arise without regard of person in a large number of cases under comparable conditions” (AGG section 19 (1), official translation). In other words, the AGG only applies to the contractual obligations which are typically concluded in more than one case, under comparable conditions, and irrespective of the person concerned, or in which “the special characteristics of a person are of inferior importance with regard to the nature of the contractual obligation” (*ibid.*).

In addition to that, the AGG exempts even more civil-law obligations from its scope of application, e.g. where the parties to a contract or their relatives are closely related or a relationship of trust exists (*besonderes Nähe- oder Vertrauensverhältnis*, section 19(5)).

With reference to housing, the AGG establishes one more vague exemption whenever differences of treatment “serve to create and maintain stable social structures regarding inhabitants and balanced settlement structures, as well as balanced economic, social and cultural relations” (section 19 (3)). Section 19 (5) AGG further provides that: “The rental of housing for not only temporary use shall generally not constitute business within the meaning of subsection (1) No 1 where the lessor does not let out more than 40 apartments in total.” In so doing, the AGG significantly narrows down the protection from discrimination in the field of housing.

Article 3.2 of the RED establishes that the Directive “does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.”

Questions to member states:

- ▶ Do national law provisions transposing the Directive provide for an explicit exception for **any treatment** that arises from the legal status of the third-country nationals and stateless persons concerned by discrimination?
- ▶ Does national law or national jurisprudence address the use of exemptions for third country nationals or immigrants as **an apparently neutral but concretely discriminatory criterion**, amounting to either direct or indirect discrimination on ground of racial and ethnic origin? Please provide relevant examples.
- ▶ Do national antidiscrimination provisions extend to discrimination on ground of nationality? For what areas of law? Please provide relevant examples.

Apparently neutral but de facto discriminatory criteria

In its 2008 decision in the case “Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn” (C-54/07 [ECR I-5187]), the Court of Justice of the European Union found that public statements concerning the possibilities of recruitment for “immigrants” or “non-indigenous” fitters established a difference of treatment relating to a certain racial or ethnic origin.

“Centrum voor gelijkheid van kansen en voor racismebestrijding is acting on the basis of the public statements of the director of Feryn to the effect that his undertaking was looking to recruit fitters, but that it could not employ ‘immigrants’ because its customers were reluctant to give them access to their private residences for the period of the works.

The fact that an employer states publicly that it will not recruit employees of a **certain racial or ethnic origin** constitutes direct discrimination in respect of recruitment within the meaning of Article 2 (2)(a) of Council Directive 2000/43/EC.”

CJEU: *Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn*, 2008, C-54/07 [ECR I-5187] (para. 16 and 28).

4. Defence of rights

Article 7.2 of the RED 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.”

Questions to member states:

- ▶ The RED protects all natural persons against discrimination on grounds of racial or ethnic origin. Do national law provisions transposing the Directive provide for protection also for **legal persons** where they suffer discrimination on grounds of the racial or ethnic origin of their members?
- ▶ Under national law, are antidiscrimination associations entitled to bring complaints also **in the absence of identified victims**? If so, under what conditions? Please provide relevant references.

Collective complaints

In Italy, civil society organisations (associations and other entities) are given full right to support victims in courts if they are registered on a list established by the Ministry of Equal Opportunities and updated by ministerial decree on an annual basis. In order to register, the associations and the other entities have to respect certain criteria concerning the official scope of the association, the timing of its establishment, and other formal requirements concerning the statute of its associates and chair

“Associations and agencies listed under paragraph 1 shall also be empowered to act pursuant to Article 4 in cases of collective discrimination if there are not victims of discrimination that are directly and immediately identifiable.”

Italy: Legislative Decree No 215 of 2003, Article 5 (3).

(Legislative Decree No 215 of 2003, Article 5.1). Associations and agencies that are so registered can act both on behalf and in support of a victim, and **even autonomously** if there are no victims of discrimination that are directly and immediately identifiable.

5. Burden of proof: establishing facts

Article 8.1 of the RED establishes that “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”

Questions to member states:

- ▶ How is the process **of establishing facts from which it may be presumed that there has been indirect discrimination** regulated under national law?
- ▶ Does national legislation provide for indirect discrimination to be established on the basis of **statistical evidence**? If not, is there any jurisprudence on the use of statistical evidence

to establish facts from which it may be presumed that there has been indirect discrimination?

- ▶ Does the member state **collect any disaggregated statistical data** that could be used to establish facts from which it may be presumed that there has been indirect discrimination in court?
- ▶ Under what conditions is **situation testing** – the means of collecting evidence according to which pairs of applicants are established in such a way that they differ solely on the basis of a single characteristic reflecting the discriminatory ground under scrutiny – considered as an admissible means to establish facts under which it may be presumed that there has been discrimination? Are these conditions less favourable to the complainant than other forms of proof?

Victims disadvantaged when using situation testing

In July 2008, the German General Equal Treatment Act (AGG) of 2006 implementing, *inter alia*, the Racial Equality Directive into German law was applied with reference to racial and ethnic origin. In this case the Civil Court of Oldenburg upheld a complaint of racial discrimination in access to a service (entry to a night club). However, the Court decided to halve the moral damages awarded to the claimant and have her bear half of the legal costs because the claimant used situation testing to shift to the defendant the burden of proof.

Situation testing is usually used where other “real” victims have been reporting problems and evidences systematic discrimination practices that are especially in need of punishment. The compensation level awarded by the court serves as deterrent, and should therefore not be lowered.

“The compensation shall convey a fine for the person who has been discriminated against. Here, in fact, the plaintiff can be reproached that he has provoked the incident. He had planned from the outset to test the behavior of the doormen and the operator and therefore had to count on being rejected. The resulting damage, the violation of his personality is, therefore, not as great as when someone is turned away at a disco and publicly discriminated against completely unexpectedly. He could also to some extent prepare himself for the discrimination, given that he had indeed expected it. As a consequence, the plaintiff has suffered no obvious psychological damage caused by the rejection. Of course he feels discriminated against by the actions of the defendant and his doormen, but he was aware of such a reaction from the outset, and he expected it and was also able to adjust to it.

Taking into account all the circumstances a reasonable compensation would be here of 500.00 €, whereas in this case the deliberate and tacitly taken into account induction of the differential treatment leads to a halving of the amount forfeited here above.”

Civil Court of Oldenburg, 23 July 2008, E2C2126/07, p.7.

6. Positive action

Article 5 of the RED affirms that “with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.”

Questions to member states:

- ▶ Does national legislation include reference to the possibility of adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin? Please provide relevant references.

- ▶ Has the member state adopted any such measures at the national or local level? Please provide relevant examples.

Positive actions to enforce equality jurisprudence

On 13 November 2007, the European Court of Human Rights issued a landmark judgment in the case of *DH and Others v Czech Republic*. The Court found that the Czech Republic had violated the European Convention on Human Rights by disproportionately placing Romani children into “special schools” in which they, along with children with disabilities, were subjected to a limited curriculum and segregated from the broader student population. The Court held that this racial segregation of Romani children had no justification and amounted to discrimination. It ordered the Czech government to remedy the violation both through individual measures for the plaintiffs, and **general measures to “redress so far as possible” the violation’s effects**. In June 2011, the Committee of Ministers of the Council of Europe registered its “concern” with the Czech Republic’s failure to implement the decision and noted that “considerable progress remains to be achieved on the ground” in addressing persistent discrimination against Roma children. It also called upon Czech authorities to achieve “concrete results” in the “perspective of the next school year” (CM/Del/Dec(2011)1115 of 10 June 2011).

In January 2012, the European Commission halted the payment of structural funds to the Czech Republic intended for inclusive education projects after an audit highlighted irregularities in the way the funds were being spent. It also raised concerns about the controls exercised over the spending of structural funds. This compounded pre-existing and related concerns among civil society that the government was not doing enough to ensure that structural funds were spent on promoting inclusive education, fuelling fears that the Czech Ministry may redirect unspent money for the current structural fund period to other projects unrelated to inclusive education or leave them unspent.

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