

FRA's assistance and expertise on Portuguese draft Law number 61/XII/2 amending the law transposing Council Directive 2000/43/EC of 29 June

Background

In the context of FRA's work with national parliaments, FRA received a request from the Portuguese Parliament, namely from the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, to provide assistance and expertise on a draft Law that will amend the law transposing Council Directive 2000/43/EC of 29 June 2000 (hereafter the Racial Equality Directive). In accordance with Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing FRA, in particular Article 2 the objective of FRA is "*to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights*".

To this end, FRA has compiled a series of previous FRA opinions, reports and recommendations regarding the Racial Equality Directive and the theme of racism & related intolerance, *inter alia*: [The impact of the Racial Equality Directive - Views of trade unions and employers in the European Union](#); [New FRA report - The Racial Equality Directive: application and challenges](#); [Country Reports on the impact of the Racial Equality Directive: a survey of trade unions and employers](#); [EU-MIDIS Data in Focus Report 5: Multiple discrimination](#); [EU MIDIS - Data in Focus report - Rights Awareness and Equality Bodies](#); [FRA Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives](#), and [EU-MIDIS Data in focus report 6: Minorities as Victims of Crime](#).

In any event, this assessment and compilation of opinions does not serve to establish the correct transposition of the Racial Equality Directive by Portugal, since that is part of the European Commission role to ensure Member States' compliance with EU Law.

Introduction

The prohibition of discrimination is one of the essential principles of European Union Law as laid out in Article 21 of the EU Charter of Fundamental Rights. The Racial Equality Directive obliges EU Member States to implement a series of measures to establish and maintain a legal and procedural framework for the promotion of equality for racial and ethnic minorities, with the aim to establish a framework for combating discrimination and give effect to the principle of equal treatment in the EU Member States.

Under the Racial Equality Directive, EU Member States are required to prohibit discrimination on the grounds of racial or ethnic origin in the areas of employment, education, social protection including social security and healthcare, and in access to and the supply of goods and services, including housing, and they are authorised to adopt specific measures to prevent or compensate for disadvantages related to these grounds.

In order to give effect to these norms, Member States are required to adopt a range of measures and a particular framework: judicial and/or administrative procedures, which may include conciliation, must be available for individuals to pursue their rights. Another innovation foreseen is that the burden of proof should be shared between the claimant and the respondent, and the sanctions should be effective, proportionate and dissuasive.

The Racial Equality Directive, according to Article 13, also requires the creation of specialised Equality Bodies that should be assigned to offer assistance to victims of discrimination pursuing complaints and which should also be empowered to engage in a range of promotional activities, in particular the publication of reports and recommendations and the conduct of independent surveys.

Finally, the Directive, according to Article 11, clearly includes an obligation for the Member States to promote social dialogue between employers and employees to promote equal treatment and encourages agreements between the social partners on anti-discrimination rules, as well as dialogue with non-governmental organisations involved in the fight against discrimination.

Compilation of FRA Opinions, recommendations and thematic insight

Opinion #1 Rights awareness: intensify efforts - *Evidence collected by FRA indicates that the legal obligation and the resulting political efforts to bring EU anti-discrimination legislation to the public's attention have not raised sufficient awareness to render anti-discrimination legislation an efficient and sufficiently invoked instrument. National and local authorities should therefore substantially intensify awareness-raising activities, including among bodies that can help to disseminate information such as Equality Bodies, non-governmental organisations (NGOs), trade unions and employers. Targeting persons who belong to groups most at risk of discrimination, as well as those in a position to commit breaches, such as employers and service providers, may allow for a more effective use of resources.¹*

Taking into account the results of the EU MIDIS survey², which conducted face-to-face interviews during 2008 with 23,500 immigrants and members of ethnic minorities across 27 member States, it was found that on average 82 per cent of those who had experienced discrimination in the 12 months preceding the interview did not report the most recent incident to a competent authority. Moreover, 36 per cent of all victims of discrimination did not report their most recent experience as they did not know how to go about reporting or where to go.

In the case of **Portugal**, the numbers are even more striking: according to the EU MIDIS results, non-reporting of discrimination is the norm as **100%** of Sub-Saharan Africans and **98 %** of Brazilians who were discriminated against did not report their latest experience of discrimination.

These numbers illustrates the need for continuation and intensification of awareness-raising activities by national and local authorities, including among bodies that can help to disseminate information such as Equality Bodies, NGOs, trade unions and employers, in order to address this issue.

According to draft Law no. 61/XIII, the “*Commission for Equality and Against Racial Discrimination*” – “CEARD”), has under Article 8, number 2 the competence to:

(....)

¹ [Opinion of the European Union Agency for Fundamental Rights on the situation of equality in the European Union 10 years on from initial implementation of the Equality directives \(2013\), pp. 3](#)

² [FRA's European Union Minorities and Discrimination Survey \(2009\)](#) - EU-MIDIS provided the most extensive data set to date on discrimination and victimisation faced by ethnic minorities and immigrants in the EU. The survey was the first of its kind to systematically survey minority groups across the EU through face-to-face interviews using the same standard questionnaire.

- c) To make public, through all available means, the cases of actual violation of this law and in the terms defined herein;
 - (...)
 - f) Promote studies and research on discrimination based on the factors indicated in Article (...);
 - g) Provide the victims of discrimination with the necessary information for the defence of their rights;
 - (...)
 - n) To promote education, training and awareness on human rights and the prevention and combat of discrimination due to the factors indicated in the Article (...);
 - (...)
- 4) The Commission shall also draw up an annual report on the situation of equality and non-discrimination on the basis of the factors referred to in Article 1, including information collected on discriminatory practices and sanctions applied, as well as the assessment of the impact of measures taken on Men and women, for this purpose working with the Commission for Citizenship and Gender Equality and the Commission for Equality in Work and Employment.

Although it is evident that the draft Law stipulates the need for publicity regarding the application of the law, it however it does not stipulate how or by whom the law should be publicized among minorities who are normally the target of racial discrimination, or even among the general population. FRA's research findings on promising practices show the following approach to be particularly useful.³

Although, according to Article 8, n.2, and section n) the CEARD will be the body responsible for promoting education, training and awareness on human rights and the prevention and combatting of discrimination, it does not clearly stipulate that CEARD will be also the body responsible for raising awareness regarding the above mentioned legislation.

The fact is that awareness of the national legislative and procedural framework giving effect to the prohibition on discrimination appears to be low among racial and ethnic minorities in Portugal. This, in turn, affects the degree to which victims claim their rights. In itself this may reduce the frequency with which the prohibition of discrimination is enforced and remedies are obtained.

Therefore, lack of awareness of legislation, as set out in the Racial Equality Directive, severely hinders the implementation of this legislation on the ground as minorities will not identify their experiences as illegal – which is the first stepping stone to reporting discrimination.⁴ This situation needs to be addressed by policy makers in Portugal to ensure that awareness of the proposed Law is raised in a targeted, but also mainstreamed manner, through targeted interventions with specific groups within different minority populations as well as wider Equality campaigns targeting the general public.

Opinion #2 Need to make complaints channels more accessible for the public while increasing capacity of complaint channels - The EU MIDIS 2010 results indicated that a main reason given by minorities for not reporting discrimination was the inconvenience, bureaucracy and time involved in making a complaint. Action needs to be taken to identify ways in which the system of reporting and registering complaints can be made easier for the public. Examples of 'good practices' can be identified and shared between Member States, and regular

³ To see some examples of good practices:

- a) [Fundamental Rights Report 2017](#), pp. 65, 80
- b) [Fundamental Rights Report 2016](#), pp. 79, 82

⁴ [EU MIDIS - Data in Focus report - Rights Awareness and Equality Bodies](#) (2010), pp. 13

feedback from minority communities needs to be undertaken (including surveys at Member State level) to identify problems and solutions in this area.⁵

Access to a remedy through judicial or quasi-judicial procedures or mediation constitutes an essential part of ensuring implementation of the prohibition of discrimination. The effectiveness of such procedures is undermined where victims are reluctant to use them. Several factors have been noted that act as a disincentive to using complaints procedures: legal costs; a non-user-friendly system; fear of negative consequences; a perception that the situation would not alter and a tolerance of or failure to recognise discrimination.

Article 16 (and beyond) of draft Law number 61/XIII defines how a complaint could be submitted. It establishes a quasi-judicial system and indicates the bodies responsible for investigation and decision-making. The entirety of the procedure seems well-structured, establishing deadlines for all of the steps, thereby imposing some transparency in the process of complaint-handling. A procedure of (non-mandatory) mediation in Article 11 of the draft Law is included as one possible method for early dispute resolution, thus reducing possible legal costs and delays.

Effective complaints procedures should also be made available to deal with situations of multiple discrimination. In particular, legal procedures should ensure that a victim of multiple discrimination can file a single complaint encompassing more than one ground of discrimination in a single procedure, ideally before one complaint body. Avoiding overly complex complaints mechanisms is particularly important in consideration of certain minority groups – such as recent immigrants – who may have limited knowledge of the respective systems in a country for lodging discrimination complaints. Although the draft Law establishes the need to cooperate with other institutions regarding multiple discrimination (Article 8), it does not establish a complaint procedure dealing with the possibility of a multiple discrimination complaint.

Additionally, FRA research shows that knowledge of organisations where complaints about discrimination can be made needs to be significantly enhanced. In particular, Equality Bodies that have been mandated to receive complaints about discrimination, such as - in this particular case - the High Commissioner for Migration and the Commission for Equality against Racial Discrimination, should have the means and resources to be able to undertake this task in practice. There is thus a need to review the current and planned provision of resources to the High Commissioner so that the Commissioner is able to address the needs of members of the public who report incidents of discrimination to him/her. In addition, Equality Bodies need the resources to undertake campaigns to advertise their existence, which also applies to the High Commissioner.⁶

In addition to the need to improve the general awareness of the complaints system regarding the Portuguese bodies dealing directly with complaints, as stated above, there is a need to make sure that the system is user-friendly towards possible complainants and that information is available in different languages, taking into account the need to ensure complaints channels are made more accessible. It follows that the capacity for receiving and processing incidents by Equality Bodies need to be sufficiently supported by human and financial resources in order to ensure this is done.⁷

Opinion #3 Role of Civil Society - *In light of the fact that victims are often reluctant to bring claims, allowing civil society organisations, including Equality Bodies, to act of their own motion*

⁵ [EU-MIDIS - Data in Focus Report - Rights Awareness and Equality Bodies \(2010\) - pp. 13](#)

⁶ [EU-MIDIS - Data in Focus Report - Rights Awareness and Equality Bodies \(2010\) - pp. 13](#)

⁷ To see some examples: [The impact of the Racial Equality Directive - Views of trade unions and employers in the European Union \(Strengthening the fundamental rights architecture in the EU IV\)](#), (2010) pp. 59-60

in bringing claims to court or conducting investigations, without the consent of a victim, or without an identifiable victim, could constitute an important step towards facilitating enforcement.⁸

Article 7 of the Racial Equality directive obliges Member States to ensure, in accordance with national law that associations, organisations or other legal entities may engage in judicial or administrative proceedings on behalf of or in support of victims, with the victim's permission.

According to Article 12 of draft Law no. 61/XIII:

Procedural rights of associations and non-governmental organizations

1 - Associations and non-governmental organizations whose statutory purpose is essentially to prevent and combat discrimination because of the factors indicated in Article 1 have the right to propose and intervene in representation or in support of an interested party and with the consent of the interested party, or in defence of collective rights and interests.

2 - The entities referred to in the previous paragraph may constitute themselves as legal assistants in the processes of misconduct for discriminatory practice under the terms of this law.

3 - The provision of assistance shall be free of charge.

Civil society organisations play a vital role in supporting the implementation of fundamental rights, democracy and the rule of law. All surveys by FRA demonstrate and document the extent of underreporting of discrimination incidents⁹. An appropriate methodology on recording cases of violation of draft Law no. 61/XIII should include the possibility of civil society not only to act in representation of any victim of racial discrimination, but also to present the complaint on his/her behalf towards the competent authority, even without the consent of the victim.

The Court of Justice of the European Union clarified in the *Feryn* case that Member States may also adopt more generous rules of legal standing, allowing claims to be brought without the permission of the victim, or even where no identifiable victim exists.¹⁰

Allowing civil society organisations to act in this manner would help deal with underreporting of discrimination incidents, giving policy makers information on areas in which they need to take targeted action, given that they are the duty bearers responsible for protecting vulnerable minorities and for encouraging them to report cases of discrimination as a fundamental rights abuse. In addition, this would help to grant potential victims greater access to justice.

Furthermore, the claims that could be brought even in the absence of an identifiable victim, would allow for strategic litigation in order to correct those practices that result in discrimination against a large number of individuals.

Opinion #4 Effective, proportionate and dissuasive sanctions - The degree to which complaints procedures fulfil their role of repairing damage done and acting as a deterrent for

⁸ [The Racial Equality Directive: application and challenges \(2011\), pp. 25](#)

⁹ Some examples:

- a) [FRA's European Union Minorities and Discrimination Survey \(2009\) – pp. 272,](#)
- b) [The Racial Equality Directive: application and challenges \(2011\), pp. 20](#)
- c) [Opinion of the European Union Agency for Fundamental Rights on the situation of equality in the European Union 10 years on from initial implementation of the Equality directives \(2013\), pp. 17](#)

¹⁰ CJEU, Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn VN, [2008] ECR I-5187.

perpetrators depends on whether dispute settlement bodies are able to issue effective, proportionate and dissuasive sanctions.¹¹

Article 15 of the Racial Equality Directive requires Member States to ensure the application of effective, proportionate and dissuasive sanctions for breaches of the rules contained in the directive. Such sanctions may consist in the payment of compensation.

According to Article 16 of the Law Proposal 61/XIII:

*1 - Any discriminatory practice by a **private person**, under the terms of Article 4, constitutes a misdemeanour punishable with a fine graded between one to ten times the value of the index of social support, without prejudice to any civil liability or the application of another sanction if applicable.*

*2 - Any discriminatory practice by a **company**, public or private, in accordance with Article 4, constitutes a misdemeanour punishable with a fine graded between four to twenty times the value of the index of social support, without prejudice to any civil liability or the application of another penalty that may apply.*

According to the governmental decision number 4/2017¹², the value of the index of social support, in Portugal, for 2017 is **421,32 euros** (four hundred twenty-one euros and thirty-two cents), meaning that in principle and according to the referred proposal a private person could be fined in an amount between **421,32 euros** (Four hundred twenty-one euros and thirty-two cents) **and 4 213,20** (four thousand two hundred thirteen euros and twenty cents) as to companies, between **1 685,28** (one thousand six hundred and eighty-five and twenty-eight cents) **and 8 426,40 Euros** (eight thousand four hundred and twenty six and forty cents).

Taking into account the cost of living in Portugal and the average income, the range of penalties may be considered sufficient to have a deterrent effect on the offender.¹³

Opinion #5: Data collection: enhance availability of policy-relevant data

- without the collection of ethnically disaggregated data it is difficult to develop policies to prevent discrimination and promote equality.¹⁴

Without the collection of disaggregated data it is difficult to develop evidence based policies to prevent discrimination and promote equality, as FRA has repeatedly underlined¹⁵. The lack of disaggregated data makes it difficult to identify where problems exist, and to measure the success of steps to combat discrimination. EU Member States' systematic data collection would greatly facilitate the implementation of the EU obligation under Article 10 of the Treaty on the Functioning of the European Union (TFEU) to combat discrimination whenever "defining and implementing its policies and activities" as well as the

¹¹ [The Racial Equality Directive: application and challenges \(2011\), pp. 25](#)

¹² [Portuguese ordinance that carries out the annual updating of the value of the index of social support \(IAS\)](#)

¹³ Few Member States collect or publish data regarding the level of sanctions or compensation issued, making it difficult to comment on the overall picture of remedies. But to see some examples of sanctions applied on other countries, please see: [The Racial Equality Directive: application and challenges \(2011\), pp. 15](#)

¹⁴ [FRA Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives \(2013\), pp. 29](#)

¹⁵ Please see as examples:

- a) [FRA Annual reports 2010 - 2014](#)
- b) [FRA Annual report 2015](#), pp. 50
- c) [Fundamental Rights Report 2016](#) – chapter Racism, Xenophobia and related intolerance
- d) [FRA Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives \(2013\), pp. 29](#)

establishment of common EU-wide indicators. Such data is often also needed to prove claims of indirect discrimination.

Furthermore, data collection is particularly crucial for the development of effective and evidence based policies to promote equality and tackle discrimination, by:

- guiding policy and legal developments;
- assessing the effectiveness of national anti-discrimination legislation;
- revealing patterns suggestive of discrimination;
- developing positive action policies;
- monitoring the national situation and workplace practices;
- Assessing the effectiveness of Member States' and Equality Bodies' awareness and sensitivity-raising activities.¹⁶

The Special Eurobarometer 263 on Discrimination in the European Union¹⁷ shows that “*on average, there is a broad degree of willingness among the European public to provide personal information as part of a census on an anonymous basis to combat discrimination.*”

Article 8 number 2 m) of draft Law no. 61/XIII states that it is the competence of the Commission for Equality and Against Racial Discrimination to “[p]roduce periodic statistical information”. However, it is not clear if this periodic statistical information will be disaggregated data that will allow the development of targeted policies addressing discrimination in Portugal, although according to the activity reports of the Commission for Equality and against Discrimination¹⁸ in past years, such disaggregated data is already being published every year.

Clarification in the draft Law as to what kind of statistical information will be published and how it could shape public policies in Portugal would be useful. In the past interaction with the Agency, Portugal, through its National Liaison Officer, has inquired and advocated for adoption of an EU-MIDIS survey for national purposes. FRA stands ready to support Portugal in setting up a regular national survey on minority discrimination, which would help in gathering respective data.

Opinion #6 Police Stops and Minorities - The collection of anonymous, aggregate data on experiences of police stops by ethnicity, and other variables such as age, gender, nationality, can help to identify patterns in potentially discriminatory police profiling practices during stops. This evidence can serve to address discriminatory treatment where it exists. Efforts should be made to collect data on minority and majority populations' experiences of police stops to be able to identify and understand potentially differential treatment.¹⁹

Detailed information about the extent, frequency, circumstances and nature of stops can serve to highlight patterns of potential discriminatory treatment. This information can be used by the police to examine and review their own practices with respect to considerations about non-discriminatory treatment and effective policing with a view to develop training and awareness raising activities to address possible bias.

¹⁶ [FRA Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives \(2013\), pp. 26](#)

¹⁷ [Special Eurobarometer 263 on Discrimination in the European Union](#), (2007), pp. 28

¹⁸ [2004 - 2014 Activity reports of the Commission for Equality and against Discrimination](#)

¹⁹ [EU MIDIS - Data in focus report - Police Stops and Minorities \(2010\)](#) , pp. 17

The collection of such data is not foreseen in draft Law no. 61/XIII. Given that a great number of cases of racial discrimination are related to the police²⁰, consideration should be given to including a reference to monitoring and remedial measures, including in particular human rights and equality training in the police forces. In addition, collection of anonymous, aggregate data on experiences of police stops by ethnicity should be addressed in draft Law no. 61/XIII.

Concluding remarks

Seventeen years since its adoption, the Racial Equality Directive has led to the strengthening of existing frameworks to combat discrimination on the grounds of racial and ethnic origin and promote equality in the EU Member States. Still, a proper implementation of Equality Directives has not yet been achieved.²¹

FRA evidence shows that the existence of prejudicial attitudes and bias towards minorities lies at the root of incidences of discrimination.²² While this can be partially addressed by introducing sanctions and specific measures to deter discriminatory behaviour, other measures such as awareness raising, increasing capacities of Equality Bodies, human rights education and providing fora for balanced and informed debate and dialogue on the societal, economic and political benefits of equality could positively influence public opinion and attitudes. The joint efforts of political leaders, the media, community institutions and a fully equipped Equality body are pivotal in this regard.

²⁰ [2004 - 2014 Activity reports of the Commission for Equality and against Discrimination](#)

²¹ [FRA Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives \(2013\)](#)

²² [EU-MIDIS Data in Focus Report 6: Minorities as Victims of Crime \(2012\), pp. 16](#)