

# Evaluating the Implementation of the Race Equality Directive: Targeted Questions

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## Introduction



The **Open Society European Policy Institute (OSEPI)** is the EU policy arm of the Open Society Foundations. We work to influence and inform EU policies, funding and external action to ensure that open society values are at the heart of what the European Union does, both inside and outside its borders.

The **Open Society Justice Initiative** uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies.

## Context

- Work on Equality and Citizenship, strategic litigation at domestic level
- Traditional ECHR focus (*DH and others v Czech Republic*)
- Research and litigation work in FR, DE, IT, CZ, UK
- EU law-strategies: preliminary references and infringements – domestic litigation
- 2013 Review of the Equality Directives, Racial Equality Directive (RED)

## Content

May 2012 EC briefing paper “Evaluating the Implementation of the RED: Targeted questions”

- Applying the concept of indirect discrimination
- Scope and access to remedies
- Scope and exceptions
- Defence of rights
- Burden of proof – effective, proportionate
- and dissuasive sanctions

## 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.”

- 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?

## Indirect discrimination

“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.*

## Indirect discrimination

Importance of domestic case law:

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

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## 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.*

- 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?

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## Scope and Access to Remedies

- *Germany: General Equal Treatment Act (AGG)*  
Section 19 (2) defines the scope of the AGG in the areas of **civil law**
- **Public education** is not explicitly covered by the AGG, but remains governed *inter alia* by the School Acts of the Länder.

“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.”

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

## Scope and Access to Remedies

- Are **indirect discrimination, harassment, and instruction to discriminate** explicitly covered by domestic antidiscrimination provisions found in public law or with reference to public bodies?
- 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?

## Scope and exceptions

**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 ....”

- 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?

## Scope and exceptions

“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).*

## Scope and exceptions

- 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?

## 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."*

## Defence of rights

- 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?

“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).*

## 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.”



## Burden of proof: establishing facts

- 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?

“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.”

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

## Burden of proof – effective, proportionate and dissuasive sanctions

- 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 costs and compensation level awarded by the court serves as deterrent, and should therefore not be lowered.

## Conclusion

RED as policy measures focused on redress, especially but not only individual judicial redress

“Substantive rights” - legally enforceable concepts of discrimination, scope of action & “Procedural rights”

### **Implementation control:**

- European Commission
- Civil Society Organizations
- Equality Bodies?

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<http://www.opensocietyfoundations.org/sites/default/files/europe-discrimination-20120501.pdf>



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