

# EQUALITY IN THE EU 20 YEARS ON FROM THE INITIAL IMPLEMENTATION OF THE EQUALITY DIRECTIVES –

## FRA OPINION 1/2021 – SUMMARY

FRA Opinion 1/21 illustrates the extent and nature of lived experiences of inequality and discrimination across the EU. It does so with reference to the grounds of discrimination and areas of life covered by the racial and employment equality directives, as well as by the proposed Equal Treatment Directive. It was issued on 30 April 2021. This summary presents the main recommendations ('Key findings and opinions') outlined in FRA Opinion 1/21.

**6**  
Realising the principle of equal treatment in compliance with the Racial Equality Directive and the Employment Equality Directive

**10**  
Taking account of uneven protection against discrimination in EU legal provisions

**13**  
Recognising potential new means of discrimination

**14**  
Non-reporting of discrimination and lack of rights awareness

**19**  
Developments in the role of equality bodies

**22**  
Promoting the collection and use of equality data, including correct application of the General Data Protection Regulation

**25**  
Equality data collection under the General Data Protection Regulation

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## Abbreviations

<b>AI</b>	Artificial intelligence
<b>Charter</b>	Charter of Fundamental Rights of the European Union
<b>EDPB</b>	European Data Protection Board
<b>EDPS</b>	European Data Protection Supervisor
<b>Equinet</b>	European Network of Equality Bodies
<b>EU-27</b>	27 Member States of the EU
<b>EU-MIDIS</b>	European Union Minorities and Discrimination Survey
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>GDPR</b>	General Data Protection Regulation
<b>LGBTIQ</b>	Lesbian, gay, bisexual, trans, intersex and queer
<b>TFEU</b>	Treaty on the Functioning of the European Union

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# THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS,

Bearing in mind the Treaty on European Union, in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, in particular Article 2 with the objective of the agency “to provide the relevant institutions, bodies, offices and agencies of the Community and its EU 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”,

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of the agency to “formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission”,

Having regard to the European Commission’s 2014 and 2021 reports on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Employment Equality Directive’),

Considering that according to Article 17 of the Racial Equality Directive, the Commission’s report “shall take into account, as appropriate, the views of the European Monitoring Centre on Racism and Xenophobia” as replaced by the European Union Agency for Fundamental Rights,

Building on evidence collected and analysed by the EU Agency for Fundamental Rights, including in its large-scale surveys, as well as in its thematic and annual reports,

Following up on earlier detailed input provided to the European Commission in this context,

SUBMITS THE FOLLOWING OPINION:

# KEY FINDINGS AND OPINIONS

Article 17 (1) of Directive 2000/43/EC (Racial Equality Directive) and Article 19 of Directive 2000/78/EC (Employment Equality Directive) mandate the European Commission to draw up every five years a report to the European Parliament and the Council on the application of these directives. Article 17 (2) of the Racial Equality Directive stipulates that the Commission's report must take into account, as appropriate, the views of the European Monitoring Centre on Racism and Xenophobia, now the European Union Agency for Fundamental Rights (FRA).

The opinions presented here complement, reinforce and, sometimes, reiterate previous opinions FRA has formulated in its extensive body of work to date on equality, non-discrimination and racism.<sup>1</sup> The opinions pertain to the state of equality in the EU – on different grounds and in different areas of life – up to the end of 2020.

Objective, reliable and comparable data documenting experiences of inequality and discrimination are an essential tool for evidence-based policymaking. FRA Opinion 1/2021 draws on data generated through FRA's surveys and other evidence collected by the agency through its multidisciplinary research network, Franet, and in cooperation with the European Network of Equality Bodies (Equinet).

FRA Opinion 1/2021 illustrates the extent and nature of lived experiences of inequality and discrimination across the EU. It does so with reference to the grounds of discrimination and areas of life covered by the racial and employment equality directives, as well as in relation to the grounds and areas covered by the proposed Equal Treatment Directive.<sup>2</sup>

The main sources of data referred to in FRA Opinion 1/2021 include five FRA surveys that cover a range of protected grounds in EU law and areas of life in which discrimination can occur. FRA collects survey data directly from those who are affected by discrimination, and these data offer a unique insight into the absence of equivalent data in many EU Member States. Specifically, FRA Opinion 1/2021 draws on data and evidence from the following sources (see the annex for more information on FRA surveys):

- ★ **EU-MIDIS II: Second European Union Minorities and Discrimination Survey** (2016)
- ★ **EU-MIDIS II: Being Black in the EU** (2018)
- ★ **EU-MIDIS II: Muslims – Selected findings** (2017)
- ★ **EU-MIDIS II: Roma – Selected findings** (2016)
- ★ **Second survey on discrimination and hate crime against Jews in the EU** (2018)
- ★ **EU LGBTI Survey II** (2019)
- ★ **Roma and Travellers Survey** (2019)
- ★ **Fundamental Rights Survey** (2019)
- ★ ad hoc data collection on experiences of discrimination in the area of employment and occupation on the grounds of disability and age
- ★ ad hoc data collection on the status and functioning of equality bodies, in cooperation with Equinet.

FRA Opinion 1/2021 presents FRA evidence of experiences of discrimination on the grounds and areas of life covered by the racial and employment equality directives. It also presents evidence of experiences of discrimination that go beyond the grounds and areas of life covered by these two directives. This information is relevant to the protracted negotiations on the 2008 proposal for a Council Directive on implementing the principle of equal treatment between persons, irrespective of religion or belief, disability, age or sexual orientation.<sup>3</sup>

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1 FRA (2021), 'Equality, non-discrimination and racism'.

2 European Commission (2008), *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM(2008) 426 final, Brussels, 27 July 2008.

3 *Ibid.*

Section 4 of FRA Opinion 1/2021 examines developments in the role of equality bodies in Member States. This examination responds to the European Commission's 2018 recommendation on standards for equality bodies,<sup>4</sup> and to the potential proposal for legislation to strengthen equality bodies that was announced for 2022 in the EU anti-racism action plan 2020–2025.<sup>5</sup>

In these respects, FRA Opinion 1/2021 complements the European Commission's 2021 report on the application of the Racial Equality Directive and the Employment Equality Directive,<sup>6</sup> and its accompanying Staff Working Document on equality bodies and the implementation of the Commission Recommendation on standards for equality bodies.<sup>7</sup>

The European Commission's report analyses difficulties Member States have with the interpretation of the provisions of both directives and includes clarifications from the Court of Justice of the European Union in this regard. In summary, the staff working document compares the situation of equality bodies with the measures proposed in the European Commission's recommendation on standards for equality bodies.

FRA Opinion 1/2021 does not analyse case law on discrimination, to avoid duplication with the European Commission's report on the application of the directives. FRA covers selected developments in case law in its annual Fundamental Rights Report,<sup>8</sup> and periodically updates information on cases and rulings in its database on anti-Muslim hatred.<sup>9</sup> The European Equality Law Review provides regular updates on legal and policy developments in the area of equality and non-discrimination.<sup>10</sup>

Finally, FRA Opinion 1/2021 considers how equality data can be used as a tool to monitor the realisation of the principle of equal treatment in the EU and its Member States.

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4 European Commission (2018), *Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies*, OJ 2018 L 167.

5 European Commission (2020), *A Union of equality – EU anti-racism action plan 2020–2025*, COM(2020) 565 final, Brussels, 18 September 2020.

6 European Commission (2021), *Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC of 29 June 2000 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 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')*, COM(2021) 139 final, Brussels, 19 March 2021.

7 European Commission (2021), *Commission Staff Working Document: Equality bodies and the implementation of the Commission Recommendation on standards for equality bodies*, SWD(2021) 63 final, Brussels, 19 March 2021.

8 FRA (2020), *Fundamental Rights Report 2020*, Luxembourg, Publications Office of the European Union (Publications Office). See also FRA (2020), *Fundamental Rights Report 2020 – Country research*.

9 FRA (2021), 'Database 2012–2019 on anti-Muslim hatred – Cases and rulings'.

10 European Equality Law Network (2021), 'Law reviews'.

## Commonalities and differences between the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC)

### Commonalities

- Both directives give effect to the principle of equal treatment.
- They lay down frameworks to combat discrimination.
- The prohibition of discrimination encompasses direct discrimination, indirect discrimination, harassment and instructions to discriminate.
- They prohibit discrimination in employment and occupation.
- Differences in treatment based on genuine and determining occupational requirements are justified.
- They contain equivalent provisions regarding positive action, defence of rights, burden of proof, victimisation, dissemination of information, social dialogue, dialogue with non-governmental organisations and sanctions.

### Differences

- The Racial Equality Directive prohibits discrimination on the grounds of racial or ethnic origin.
- The Employment Equality Directive prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation.
- The Racial Equality Directive prohibits discrimination with regard to social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and services that are available to the public, including housing.
- The Employment Equality Directive covers only the area of employment and occupation.
- The Racial Equality Directive obliges Member States to designate bodies for the promotion of equal treatment. The Employment Equality Directive does not contain such an obligation.
- The Employment Equality Directive provides for reasonable accommodation for persons with disabilities.

## REALISING THE PRINCIPLE OF EQUAL TREATMENT IN COMPLIANCE WITH THE RACIAL EQUALITY DIRECTIVE AND THE EMPLOYMENT EQUALITY DIRECTIVE

Data and evidence collected by FRA consistently show that people across the EU regularly experience discrimination on the grounds and in the areas of life listed in the Racial Equality Directive and in the Employment Equality Directive. This is the case despite the directives having been in force since 2000.

This calls into question the effectiveness of the measures and institutional arrangements Member States have put in place to enforce non-discrimination legislation, including the rules they have laid down as regards the effectiveness, proportionality and dissuasiveness of sanctions in cases of discrimination (Article 15 of the Racial Equality Directive; Article 17 of the Employment Equality Directive). Further shortcomings in the application of the EU legal provisions on non-discrimination identified by legal practitioners relate to the sanctions applied across Member States, which currently “do not guarantee effective redress nor do they act as an effective deterrent”.<sup>11</sup>

The Racial Equality Directive prohibits direct and indirect discrimination on the grounds of racial or ethnic origin. Article 3 on the scope of the directive specifies that it applies to employment and occupation, vocational training, working conditions and membership of workers’ or employers’ organisations; social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and services that are available to the public, including housing.

The Employment Equality Directive prohibits direct and indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation. Article 3 on the scope of the directive specifies that it applies to the areas of employment and occupation, vocational training, working conditions and membership of workers’ or employers’ organisations.

**Concerning the Racial Equality Directive**, FRA survey data show the following.

- The prevalence of discrimination on the grounds of racial or ethnic origin remains consistently high, both over time and across different population groups in different Member States. For example, EU-MIDIS II data show that almost one out of four respondents (24 %) felt discriminated against in the 12 months preceding the survey in one or more areas of daily life in 2016 because of their ethnic or immigrant background. Data from EU-MIDIS I in 2007 show that almost one in three respondents (30 %) stated that they felt discriminated against because of their ethnicity (with respect to one or more areas of life) during the 12 months preceding the survey.<sup>12</sup> Improvements in the sampling methodology and the application of sample design weights for the analysis of the EU-MIDIS II data restrict, to some extent, direct comparability between the two surveys. The findings nevertheless indicate little progress over time, as the rates remain high.
- FRA survey data show that people with ethnic minority or immigrant backgrounds (including Roma and Travellers, Muslims, Jews and people of African descent) regularly experience high levels of discrimination based on their ethnic or racial origin (as well as their religion or belief) in different areas of life. For example, in the five years preceding the respective survey, 41 % of Roma, 45 % of persons with a North African background, 39 % of sub-Saharan Africans,<sup>13</sup> 60 % of Roma and Travellers<sup>14</sup> and 25 % of Jews<sup>15</sup> felt discriminated against because of their ethnic or immigrant background.

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11 Equinet (2020), *Future of equality legislation in Europe – Synthesis report of the online roundtable*, Brussels, Equinet Secretariat.

12 FRA (2017), *EU-MIDIS II – Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office, p. 13; FRA (2010), *European Union Minorities and Discrimination Survey – Main results report*, Publications Office, p. 36.

13 FRA (2017), *EU-MIDIS II – Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office.

14 FRA (2020), *Roma and Travellers in six countries – Roma and Travellers Survey*, Luxembourg, Publications Office; FRA (2017), *EU-MIDIS II – Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office.

15 FRA (2018), *Experiences and perceptions of antisemitism – Second survey on discrimination and hate crime against Jews in the EU*, Luxembourg, Publications Office, p. 60. The second antisemitism survey

- People describe discrimination as a recurring experience: although some people experience discrimination daily, the average number of experiences of discrimination stands at 4.6 incidents per year.<sup>16</sup>
- The prevalence of discrimination based on racial or ethnic origin varies greatly not only across Member States but also between the different groups surveyed in a single country. For example, Roma and Travellers, people of African descent, and immigrants and descendants of immigrants from North Africa experience higher levels of discrimination than other groups surveyed in the same country.<sup>17</sup>
- Visible signs of difference – such as skin colour, physical appearance, or wearing traditional or religious clothing (e.g. headscarves) in public spaces – trigger high levels of unequal treatment for people of African descent, Roma and Muslim women across the EU.<sup>18</sup>
- Although Roma respondents and people of African descent mostly noted encountering discrimination based on their physical appearance, immigrants and descendants of immigrants from North Africa and Turkey mainly indicated experiencing discrimination based on their first or last names.<sup>19</sup> A respondent's name was the main reason for discrimination in access to housing and second in importance in all other areas of life covered by the survey.
- Experiences of discrimination vary across age groups and generations, with descendants of immigrants with a North African background, for example, indicating that they experience higher rates of ethnic and religious discrimination than first-generation immigrants.<sup>20</sup> This finding may also reflect a number of factors, including increased awareness of equality and rights among later generations, and/or the impact of different legal status – and resultant rights – enjoyed by descendants of immigrants, and – conversely – a lower expectation of equal treatment among first-generation immigrants. However, these findings warrant further exploration.
- On average, there are no substantial differences between women's and men's experiences of discrimination based on ethnic or immigrant background. There are, however, substantial gender differences within and across target groups in some Member States.<sup>21</sup>
- Most respondents experience racial discrimination at work or when looking for work, particularly Roma and respondents with a North African background. North and sub-Saharan Africans often experience discrimination at work.<sup>22</sup>
- Other areas of life with particularly high rates of experienced discrimination are access to housing and accessing other public or private services, such as public administration, public transport, shops, restaurants or bars.<sup>23</sup>

**Concerning the Employment Equality Directive,** FRA survey data and ad hoc data FRA collected on experiences of discrimination in employment and occupation on the grounds of disability and age for the purposes of FRA Opinion 1/2021 show the following.

- Little progress has been achieved on the ground since the European Commission published its report on the application of the directive in 2014:<sup>24</sup> the prevalence of discrimination

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provides only the 12-month discrimination rate.

<sup>16</sup> FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office, p. 14.

<sup>17</sup> *Ibid.*, pp. 29–32.

<sup>18</sup> *Ibid.*, p. 32

<sup>19</sup> *Ibid.*, p. 36.

<sup>20</sup> FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office, p. 30. FRA (2017), *Second European Union Minorities and Discrimination Survey: Muslims – Selected findings*, Luxembourg, Publications Office, p. 24.

<sup>21</sup> FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office.

<sup>22</sup> *Ibid.*, p. 34 and p. 38.

<sup>23</sup> FRA (2020), *Roma and Travellers in six countries – Roma and Travellers Survey*, Luxembourg, Publications Office. FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office.

<sup>24</sup> European Commission (2014), *Report from the Commission to the European Parliament and the Council – Joint report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial*

in employment on the grounds of religion or belief, disability, age and sexual orientation in most EU Member States has remained high.

- The share of people in 2019 identifying as lesbian, gay, bisexual and trans (LGBT) who felt discriminated against when looking for work (11 %) is about the same as the share in 2012 (13 %). The same is true of the proportion of LGBT people who felt discriminated against at work (21 % in 2019 versus 19 % in 2012).<sup>25</sup> People who identify as trans are included in these figures for purposes of comparison between the two surveys.
- People with ethnic minority, religious or immigrant backgrounds regularly experience discrimination on the grounds of religion or belief in employment, and to a higher degree than the general population.
- The prevalence of discrimination on the grounds of religion or belief in employment is relatively high for people with ethnic minority or immigrant backgrounds (five-year rate: 12 %), and members of religious minorities such as Muslims (five-year rate: 17 %) and Jews (12-month rate: 16 %).<sup>26</sup>
- Only 1 % of respondents from the general population felt discriminated against in employment because of their religion or belief in the five years preceding the survey, as data from the Fundamental Rights Survey show. However, 15 % of respondents in the same survey who self-identify as Muslim say they felt discriminated against in employment because of their religion or belief in the five years before the survey.
- Muslim women mention ‘the way they dress’ (wearing a headscarf/turban) as the main reason for experiencing discrimination in employment.<sup>27</sup>
- Concerning disability, data from the Fundamental Rights Survey show that discrimination in employment increases with the degree of limitation in daily activities. Persons with severe limitations are more likely to experience discrimination than those without severe limitations and those without any limitations in daily activities. Note that the Fundamental Rights Survey addressed issues pertaining to discrimination on the grounds of disability through the questions of the Minimum European Health Module, developed by Eurostat to collect data on self-perceived health. The module includes the following question: “For at least the past six months, to what extent have you been limited because of a health problem in activities people usually do? Would you say you have been ... [Answer categories: ‘Severely limited’; ‘Limited but not severely’; ‘Not limited at all’; ‘Prefer not to say’; ‘Don’t know’]”. According to Eurostat, this question can be used as a measure of long-standing limitations related to physical or mental health problems, illness or disability.<sup>28</sup>
- Persons with disabilities regularly experience discrimination at work, and more so when looking for work, as data collected for the purposes of FRA Opinion 1/2021 show. FRA collected these data through Franet. Such data were available only in a limited number of EU Member States.<sup>29</sup>
- Women with disabilities are more likely than men with disabilities to experience discrimination on the grounds of disability in employment.
- Findings from the Fundamental Rights Survey show relatively high rates of age discrimination in employment for the general population (five-year rate: 15 %), with substantial differences between countries.

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Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Employment Equality Directive’), COM(2014) 2 final, Brussels, 17 January 2014.

<sup>25</sup> FRA (2020), *EU-LGBTI II – A long way to go for LGBTI equality*, Luxembourg, Publications Office, p. 10.

<sup>26</sup> FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office; FRA (2018), *Experiences and perceptions of antisemitism – Second survey on discrimination and hate crime against Jews in the EU*, Luxembourg, Publications Office.

<sup>27</sup> FRA (2017), *Second European Union Minorities and Discrimination Survey: Muslims – Selected Findings*, Luxembourg, Publications Office, p. 24.

<sup>28</sup> See Eurostat (2013), *European Health Interview Survey (EHIS wave 2) – Methodological manual*, Luxembourg, Publications Office, pp. 16–17.

<sup>29</sup> For detailed references, see Section 1.2.2. of FRA Opinion 1/2021.

- Data from the Fundamental Rights Survey show that twice as many people say they experience discrimination in employment because they are ‘too old’ as those who are ‘too young’ (10 % versus 6 %).
- There is a high prevalence of experiences of age discrimination in employment for older people, as data collected for the purposes of FRA Opinion 1/2021 show.
  - ★ The prevalence tends to increase with the respondent’s age and is particularly high for those aged 50 years and above. These data were available only in a limited number of EU Member States.<sup>30</sup>
  - ★ The prevalence of experiences of age discrimination is higher when looking for work than at work.
  - ★ Women tend to experience age discrimination in employment more often than men.
- Data from the Fundamental Rights Survey also show that the five-year prevalence of discrimination in employment on any ground is almost twice as high for those who self-identify as lesbian, gay and bisexual (LGB) or ‘other’ (41 %) than for those who self-identify as heterosexual (22 %).<sup>31</sup>
- LGB persons experience higher discrimination rates at work than when looking for work, with no substantial differences between lesbians, gay men and bisexual people.<sup>32</sup>
- Age discrimination in employment for LGB people increases with age and is particularly high for those aged 55 years and above.<sup>33</sup>

## ↑ FRA OPINION 1

In line with Article 5 of the Racial Equality Directive and Article 7 of the Employment Equality Directive – on what both directives refer to as positive action – EU Member States could introduce measures “to prevent or compensate for disadvantages linked to” the grounds of discrimination and areas of life listed in these directives, as evidenced by FRA research and national data sources.

EU Member States could identify such disadvantages and trends in discrimination through the systematic data collection and analysis of the lived experiences and socio-economic conditions of members of population groups at risk of discrimination, as outlined in FRA opinion No. 6 on equality data.

In line with Article 15 of the Racial Equality Directive and Article 17 of the Employment Equality Directive, EU Member States should step up efforts to improve the effectiveness of measures and institutional arrangements they have in place to enforce anti-discrimination legislation, and ensure that “sanctions applicable to infringements of the national provisions adopted pursuant to” the directives are “effective, proportionate and dissuasive”.

<sup>30</sup> For detailed references, see Section 1.2.3 of FRA Opinion 1/2021.

<sup>31</sup> FRA (2020), *What do fundamental rights mean for people in the EU? Fundamental Rights Survey*, Luxembourg, Publications Office.

<sup>32</sup> FRA (2020), *EU-LGBTI II – A long way to go for LGBTI equality*, Luxembourg, Publications Office, p. 31.

<sup>33</sup> FRA (2020), *EU-LGBTI II – A long way to go for LGBTI equality*, Luxembourg, Publications Office; FRA (2020), *What do fundamental rights mean for people in the EU? Fundamental Rights Survey*, Luxembourg, Publications Office.

## TAKING ACCOUNT OF UNEVEN PROTECTION AGAINST DISCRIMINATION IN EU LEGAL PROVISIONS

Article 10 of the Treaty on the Functioning of the European Union (TFEU) states that, “in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

Article 19 of the TFEU further specifies that “the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

Article 21 of the Charter prohibits “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”. Article 21 also prohibits any discrimination on the grounds of nationality “within the scope of application of the Treaties and without prejudice to any of their specific provisions”. The Charter is binding on EU institutions in all their actions and on Member States when they implement EU law. According to Article 51 (1), the provisions of the Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to Member States only when they are implementing Union law.

In addition, the EU signed and ratified the United Nations Convention on the Rights of Persons with Disabilities, which includes non-discrimination as a principle of the convention (Article 3), with Article 5 further prohibiting all discrimination against persons with disabilities.

Despite these provisions, the EU legal framework on equality continues to be marked by gaps in the promotion of equal treatment. The applicable secondary Union law – that is, the racial, employment and gender equality directives<sup>34</sup> – has gaps in its protection and leads to an artificial hierarchy of grounds, which limits the breadth and the scope of EU-level protection against discrimination. In contrast to the grounds of sex and racial or ethnic origin, which are extensively protected in EU legal provisions, the grounds of religion or belief, disability, age and sexual orientation are not protected to the same degree.

In addition, protection against discrimination is inconsistent across Member States, although most have adopted legislation that goes beyond the minimum standards introduced by the racial, employment and gender equality directives. By covering additional grounds and areas of life in national legislation, most Member States recognise the need to protect people from discrimination beyond the existing EU legal framework on equality.

However, despite calls by the European Parliament and the efforts of the European Commission, the Commission’s 2008 proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – the Equal Treatment Directive – remains blocked in the Council, where it needs to be adopted unanimously. Although 14 Member States fully endorse the proposal, an unspecified number of Member States remain opposed to it.<sup>35</sup>

FRA survey data show that, for example, many Roma, Travellers, Muslims, Jews, and immigrants and their descendants cannot say with certainty whether they experience discrimination on the grounds of race and ethnicity or on the grounds of religion or belief. Data also consistently show that many people across the EU experience multiple and intersectional discrimination, based on varied combinations of grounds.

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34 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, OJ 2010 L 180; 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), OJ 2006 L 204; 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, OJ 2004 L 373.

35 Council of the European Union (2020), *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Information from the Presidency on responses to its questionnaire*, Brussels, 4 November 2020.

Intersectional discrimination describes a situation in which several grounds operate and interact with each other at the same time in such a way that they are inseparable and produce specific types of discrimination. Practitioners in the field recognise, however, that addressing discrimination from the perspective of a single ground fails to capture the diversity of how people experience discrimination in their daily lives. However, intersectional discrimination is not protected under EU law, and only a few Member States have adopted legal provisions that pertain to either multiple or intersectional discrimination.

There is also concern that phenomena of systemic or structural discrimination affect equal treatment. The Council Recommendation on Roma equality, inclusion and participation defines systemic or structural discrimination “as being evident in the inequalities that result from legislation, policy and practice, not by intent but resulting from a range of institutional factors in the elaboration, implementation and review of legislation, policy and practice”.<sup>36</sup>

Data collected by FRA reveal evidence of structural discrimination across Member States, as illustrated by the findings on Roma and people of African descent in EU-MIDIS II and the Roma and Travellers Survey. These results indicate that people who experience some of the highest rates of discrimination also tend to face high and above average rates of material deprivation.

- A substantial proportion of Roma respondents and their children (80 %) live with an income below the at-risk-of-poverty thresholds of their respective countries; every fourth Roma (27 %) and every third Roma child (30 %) live in a household that faced hunger at least once in the month preceding EU-MIDIS II; one in three Roma live in housing without tap water, and one in 10 live in housing without electricity. When asked if the total household income is sufficient to make ends meet, 92 % of Roma surveyed indicate that they face some difficulties in this regard, with 45 % facing ‘great difficulties’.<sup>37</sup>
- In stark contrast to the general population, every fourth Roma and Traveller child (23 %) across the six countries covered by FRA’s Roma and Travellers Survey lives in a household affected by severe material deprivation. This means that household members cannot afford basic items, such as healthy food or heating, or are in arrears with paying the rent and cannot afford a week of holiday in a year.<sup>38</sup>
- More than one in two (55 %) respondents of African descent have a household income below the at-risk-of-poverty threshold after social transfers in the country where they live. Their at-risk-of-poverty rate is high for second-generation respondents (48 %) and respondents who are citizens (49 %), and is higher than that of the general population. One in two respondents of African descent reported living in overcrowded housing (45 %), compared with 17 % of the general population in the then 28 Member States of the EU. One in 10 (12 %) of these respondents experience housing deprivation, which includes living in a dwelling without a bath and a toilet or in a dwelling that is too dark, has rot in the walls or windows, or has a leaking roof.<sup>39</sup>

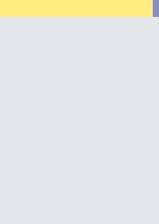
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<sup>36</sup> Council of the European Union (2021), *Council Recommendation on Roma equality, inclusion and participation*, Brussels, 2 March 2021, p. 20.

<sup>37</sup> FRA (2016) *Second European Union Minorities and Discrimination Survey Roma – Selected findings*, Luxembourg, Publications Office.

<sup>38</sup> FRA (2020), *Roma and Travellers in six countries – Roma and Travellers Survey* Luxembourg, Publications Office.

<sup>39</sup> FRA (2018), *Being Black in the EU*, Luxembourg, Publications Office.



## FRA OPINION 2

The EU legislator and Member States should strive to ensure comparable, consistent and high levels of protection against discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in different areas of life. In doing so, Member States could draw inspiration from strategies and action plans of the European Commission that set out to achieve a Union of equality. These include the EU anti-racism action plan 2020–2025; the EU Roma strategic framework for equality, inclusion and participation 2020–2030; the LGBTIQ [lesbian, gay, bisexual, trans, intersex and queer] equality strategy 2020–2025; the strategy for the rights of persons with disabilities 2021–2030; the Action plan on Integration and Inclusion 2021–2027; and, the EU Gender Equality Strategy 2020–2025.

The EU and its Member States should continue exploring all possible options to unblock the negotiations on the proposed Equal Treatment Directive. Adopting the directive without further delay would remove the artificial hierarchy of grounds that has installed itself in the Union, ensuring that the EU and its Member States provide comprehensive and consistent protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation in key areas of life currently not covered by EU secondary legislation.

The EU legislator should consider broadening the concept of discrimination to include intersectional discrimination in existing and new legislation in the area of equality and non-discrimination. This would enable the EU and Member States to reinforce legal protection against intersectional discrimination, in particular for women who face discrimination based on the combination of different grounds of discrimination.

## RECOGNISING POTENTIAL NEW MEANS OF DISCRIMINATION

The past few years have seen an exponential increase in the use of algorithms and artificial intelligence (AI) for decision-making in a variety of societal areas. FRA, among other actors, has shown that the use of algorithms and AI can have a major impact on the principle of equal treatment and non-discrimination. This was also highlighted by the EU High Level Expert Group on AI.

However, knowledge of the potential for discrimination when using algorithms and AI varies considerably among users, with many being unaware of how such systems can lead to and perpetuate or even reinforce discrimination, in particular indirect discrimination. Such discrimination occurs when an apparently neutral rule disadvantages a person or a group sharing the same characteristics compared with other persons, as noted in the racial and employment equality directives. FRA evidence – based on the agency’s published research on AI – shows that developers, and public and private sector users of AI, often do not assess in detail, if at all, whether or not the automated systems they operate are discriminatory.

Acknowledging the important challenge of using AI in a non-discriminatory manner and to increase, not reduce, equality, international organisations, the EU and Member States are variously active in relation to policymaking and drafting legislation on AI, which should also address the need for non-discrimination. In its *White Paper on artificial intelligence – A European approach to excellence and trust*,<sup>40</sup> which outlines plans for a possible legislative proposal, the European Commission underlined that AI entails several risks, including discrimination based on different protected grounds. This was also highlighted in the **EU anti-racism action plan 2020–2025**.

These initiatives and concerns highlight the risk of discrimination when using AI in various areas of life and the need for further regulation. The potential wide uptake of AI may lead to discrimination in areas of life and on grounds that go beyond those covered in existing EU secondary law on anti-discrimination.

### ↑ FRA OPINION 3

The EU and its Member States should assess in detail the impact of the increased reliance on algorithms and AI in decision-making on equal treatment and non-discrimination and introduce relevant fundamental rights safeguards to limit this impact. This would contribute to alleviating risks related to potential discriminatory biases being built into algorithms and AI used in decision-making.

In this respect, the EU should also consider funding targeted research on discrimination by means of AI and algorithms.

<sup>40</sup> European Commission (2020), *White Paper on Artificial Intelligence: a European approach to excellence and trust*.

## NON-REPORTING OF DISCRIMINATION AND LACK OF RIGHTS AWARENESS

FRA survey data show that victims of discrimination tend not to report incidents they experience to any authority or body for a number of reasons, including not knowing where to turn to. This is the case despite the existence of equality bodies in all Member States, as required under Article 13 of the Racial Equality Directive, which also stipulates that such bodies should provide “independent assistance to victims of discrimination in pursuing their complaints about discrimination”.<sup>41</sup>

Findings from FRA’s surveys show significant levels of under-reporting of discrimination in general, with equality bodies across the EU receiving the fewer reports of discrimination than other places where complaints can be made. This indicates that existing processes and systems for reporting experiences of discrimination are often ineffective and do not always aid victims of discrimination in seeking redress and access to justice.

Specifically:

- findings from all FRA surveys show low rates of reporting of discriminatory incidents among all the population groups surveyed;<sup>42</sup>
- low rates of reporting are consistent over time, across countries and across the different population groups covered in the FRA surveys – the average reporting rates for the different population groups are:
  - ★ 12 % (2016 EU-MIDIS II)
  - ★ 23 % (2018 second antisemitism survey)
  - ★ 11 % (2019 EU LGBTI [Lesbian, Gay, Bisexual, Trans and Intersex] Survey II)
  - ★ 10 % (2019 Fundamental Rights Survey)
  - ★ 21 % (2019 Roma and Travellers Survey);
- as a result, incidents of discrimination remain largely invisible to institutions that have a legal obligation to assist victims of discrimination, including equality bodies;
- data from EU-MIDIS II in 2016 show that most complaints were made to an employer (36 %), with some 13 % of incidents reported to trade unions and staff committees, and another 17 % reported to the police when related to entering a night club or a bar;<sup>43</sup>
- only 4 % of all reports of discrimination were made to an equality body, a worryingly low figure;
- although overall reporting rates of discrimination are low, variations are apparent across Member States and groups surveyed – victims of discrimination with ethnic minority and immigrant backgrounds (including Roma and Travellers) residing in Finland, the Netherlands, Ireland, Sweden and Denmark (countries listed in numerical order) tend to report discriminatory incidents more often than respondents in other countries.<sup>44</sup>

Low or high numbers of reported incidents of discrimination in Member States do not necessarily reflect the prevalence or nature of discrimination in these Member States. Instead, the number of reported incidents can act as an indicator of people’s willingness to report discrimination, which is affected by levels of trust in institutions and by levels of awareness of equality law, equality rights and equality bodies.

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<sup>41</sup> For more information on when equality bodies were established in EU Member States, see the ‘[European directory of equality bodies](#)’ maintained by Equinet.

<sup>42</sup> FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office; FRA (2018), *Experiences and perceptions of antisemitism – Second survey on discrimination and hate crime against Jews in the EU*, Luxembourg, Publications Office; FRA (2020), *Roma and Travellers in six countries – Roma and Travellers Survey*, Luxembourg, Publications Office; FRA (2020), *EU-LGBTI II – A long way to go for LGBTI equality*, Luxembourg, Publications Office; FRA (2019), *Fundamental Rights Survey*.

<sup>43</sup> FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office, p. 22.

<sup>44</sup> FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office, p. 43; FRA (2020), *Roma and Travellers in six countries – Roma and Travellers Survey*, Luxembourg, Publications Office, p. 31.

High numbers of reported cases of discrimination can sometimes indicate that reporting systems are functioning, whereas low numbers potentially indicate the contrary. In addition, year-on-year variations in reporting rates do not necessarily indicate fluctuations in the prevalence of discrimination. Instead, they might reflect changes in the reporting systems, increased willingness and ability among victims and witnesses to report incidents, or improved capacity of the competent bodies to deal with such incidents accordingly.

FRA survey data show that the main reasons for non-reporting include the following.

- Across all FRA surveys, the main reason given for not reporting a discriminatory incident is the belief that nothing would happen or change as a result of reporting. This specific reason was mentioned by:
  - ★ 52 % of respondents in the second survey on antisemitism who did not report the last discriminatory incident;<sup>45</sup>
  - ★ 41 % of victims of discrimination in EU LGBTI Survey II;<sup>46</sup>
  - ★ 35 % of victims of discrimination with an ethnic minority or immigrant background in EU-MIDIS II;<sup>47</sup>
  - ★ more than 36 % of respondents from the general population in the Fundamental Rights Survey who did not report the last incident of discrimination they experienced.<sup>48</sup>
- Other frequently mentioned reasons for not reporting include the belief that discrimination is not easy to prove and that the incident might be too trivial or not worth reporting.

As illustrated by findings from FRA's EU LGBTI Survey II, additional reasons given for not reporting incidents include:

- ★ that it is not worth reporting discrimination, as it happens all the time (33 %);
- ★ not wanting to reveal the fact that they identify as LGBTI (21 %);
- ★ not trusting the authorities (21 %);
- ★ being concerned that the incident will not be taken seriously (23 %);
- ★ not knowing how or where to report (15 %);
- ★ feeling hurt, traumatised and too stressed to actively deal with reporting (13 %).<sup>49</sup>

These findings point to varying degrees of effectiveness of existing laws, policies and bodies that aim to counteract discrimination and ensure equality for all in Member States. They also suggest varying levels of rights awareness among the different groups surveyed in the different countries. Indeed, FRA survey data show that, in contrast to findings for the general population, equality bodies remain largely unknown among population groups at risk of discrimination, such as ethnic minorities or immigrants. In addition, awareness of anti-discrimination legislation and possible redress mechanisms, including equality bodies, varies strongly across countries and groups surveyed.

- On average, the level of awareness of discrimination being unlawful among respondents in EU-MIDIS II is relatively high (67 %).<sup>50</sup>
- By contrast, the level of EU-MIDIS II respondents' awareness of any organisation that offers support or advice to victims of discrimination, including equality bodies, is very low: 71 % are not aware of any such organisation, whereas 62 % do not recognise the name of any equality body in their country.<sup>51</sup>
- The awareness of equality bodies among the general population is relatively high, compared with ethnic minorities or immigrants and their descendants. On average, in the 27 Member States of the EU (EU-27), three out of five respondents (61 %) in the

45 FRA (2018), *Experiences and perceptions of antisemitism – Second survey on discrimination and hate crime against Jews in the EU*, Luxembourg, Publications Office, p. 59.

46 FRA (2020), *EU-LGBTI II – A long way to go for LGBTI equality*, Luxembourg, Publications Office, p. 37.

47 FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office, p. 49.

48 FRA (2020), *What do fundamental rights mean for people in the EU? Fundamental Rights Survey 2019*, Luxembourg, Publications Office.

49 FRA (2020), *EU-LGBTI II – A long way to go for LGBTI equality*, Luxembourg, Publications Office, p. 37.

50 FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office, p. 55.

51 *Ibid.*, pp. 51–53.

Fundamental Rights Survey are aware of at least one equality body in their country – which includes the awareness of equality bodies that cover racial and ethnic origin and gender as grounds of discrimination. More than half (52 %) of all respondents are aware of an equality body that covers racial or ethnic origin as a ground of discrimination in their mandate.<sup>52</sup>

- However, this proportion is lower among those who are not citizens of the survey country (34 %) than among those who are citizens (53 %). Similarly, 45 % of respondents in the Fundamental Rights Survey who consider themselves to belong to an ethnic minority are aware of an equality body that covers racial or ethnic origin as a ground of discrimination, compared with 53 % of those who do not consider themselves belonging to an ethnic minority.<sup>53</sup>
- Data from the Fundamental Rights Survey further show that, in the EU-27, the general population’s awareness of an equality body differs slightly by disability. More than half (55 %) of respondents who are severely limited in their daily activities indicate that they are aware of an equality body, followed by 57 % of respondents who are limited but not severely and 63 % of respondents who are not limited.
- Overall and across different FRA surveys, respondents’ awareness of an equality body varies with their level of education – respondents with lower educational levels tend to be less aware of such institutions.
- Even if the knowledge of specific equality bodies is higher (for example in the case of the general population and LGBTI people),<sup>54</sup> this fact does not correlate with a substantially higher reporting rate.
- FRA data on equality bodies show that the bodies in Czechia, Denmark, Ireland, Latvia, Poland and Sweden are at the higher end in terms of staff and budget size relative to the countries’ populations, and 50 % or more of respondents in FRA’s EU-MIDIS II say they are aware of equality bodies in these countries (with a slightly lower level of awareness in Ireland and Sweden at around 40 %).
- In comparison, FRA data show that equality bodies in Austria, Bulgaria, Germany, Greece, Hungary, Italy, Luxembourg, Malta, the Netherlands, Romania, Slovenia and Spain are at the lower end in terms of staff and budget size relative to the countries’ populations, with 30 % or less of respondents in FRA’s EU-MIDIS II being aware of the equality bodies in these countries.

Low levels of awareness of equality bodies undermine the important role they should play in providing assistance to victims of discrimination. The available evidence confirms a link between the resources allocated to equality bodies (staff and budget) and the awareness of these bodies among the population. This indicates that equality bodies that are legally and financially stronger are likely able to play a more effective role in increasing the level of rights awareness of both potential victims of discrimination and witnesses of such incidents. This would include their capacity to implement targeted measures to reach out to persons or groups most at risk of discrimination.

It is notable, however, that higher levels of awareness of equality bodies do not necessarily always correlate with higher levels of reporting to these bodies. This is the case even for some of the bodies that find themselves in the higher tier as regards the ratio of their human and financial resources to the size of population of the country where they are established.

The EU and its Member States initiated concrete efforts to encourage reporting to relevant bodies and authorities in the area of hate crime, which is one of the most severe forms of

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<sup>52</sup> FRA (2020), *What do fundamental rights mean for people in the EU? Fundamental Rights Survey*, Luxembourg, Publications Office.

<sup>53</sup> *Ibid.*

<sup>54</sup> FRA (2020), *What do fundamental rights mean for people in the EU? Fundamental Rights Survey 2019*, Luxembourg, Publications Office; FRA (2020), *EU LGBTI II – A long way to go for LGBTI equality*, Luxembourg, Publications Office, pp. 35–37.

discrimination.<sup>55</sup> In March 2021, the EU High Level Group on combating racism, xenophobia and other forms of intolerance endorsed a set of key guiding principles to encourage victims to report hate crime to law enforcement authorities.<sup>56</sup> The Working Group on hate crime recording, data collection and encouraging reporting developed these principles, through activities facilitated by FRA.

Some aspects of the key guiding principles on encouraging the reporting of hate crime are relevant in the context of encouraging reporting of discrimination to equality bodies. This is the case despite the fact that the mandates of a few equality bodies explicitly cover hate crime, which is usually addressed under the provisions of criminal law.

Principles 5, 6, 8 and 9 are of particular interest in the context of encouraging reporting to equality bodies. These principles broadly relate to:

- establishing structural and formalised cooperation between equality bodies, the police and civil society organisations, including effective systems for referrals;
- setting up accessible channels of reporting for victims and witnesses, such as third-party reporting;
- providing tailored outreach to individuals at risk of bias-motivated victimisation.

Victims of bias-motivated crime and harassment may reach out to equality bodies in relation to incidents that do not meet the threshold for being classified as a criminal offence. Formalised and effective referral protocols between the relevant authorities, depending on their competence for a particular case, constitute an important step for victims of discrimination towards seeking support, protection and redress. Such interinstitutional cooperation encompasses raising awareness of rights and leveraging the knowledge of equality bodies among the general population and those most at risk of discrimination.

#### FRA OPINION 4

The European Commission and EU Member States should consider developing specific guiding principles on encouraging reporting of discrimination to equality bodies under the activities of the High Level Group on Non-discrimination, Equality and Diversity, and in close cooperation with Equinet, equality bodies and relevant civil society organisations.

With respect to encouraging reporting, the EU and Member States should consider transferring lessons learned from activities facilitated by FRA on encouraging reporting of hate crime under the EU High Level Group on combating racism, xenophobia and other forms of intolerance to the context of encouraging discrimination reporting to equality bodies. The key guiding principles on encouraging reporting of hate crime, as endorsed by the High Level Group, could be adapted to the context of reporting discrimination to equality bodies, particularly as regards:

- setting up effective systems for referrals between equality bodies, the police and civil society organisations;
- providing accessible reporting channels, including third-party reporting;
- providing tailored outreach to people at risk of discrimination.

<sup>55</sup> FRA (2012), *Making hate crime visible in the European Union: Acknowledging victims' rights*, Luxembourg, Publications Office.

<sup>56</sup> European Commission, EU High Level Group on combating racism, xenophobia and other forms of intolerance, Working Group on hate crime recording, data collection and encouraging reporting (2021), *Key guiding principles on encouraging reporting of hate crime – The role of law enforcement and relevant authorities*, Luxembourg, Publications Office.

Member States should step up their efforts to ensure that equality bodies have the means necessary to raise awareness of their existence and remit, in particular among population groups at risk of discrimination as well as among the general population.

The European Commission and Member States should foster independent research with groups in the population most affected by discrimination to explore the various factors that may influence people's decision on whether or not to report to equality bodies.

EU Member States should strengthen efforts to raise awareness of anti-discrimination legislation and relevant redress mechanisms, in particular among all the population groups at risk of discrimination, in line with Article 10 of the Racial Equality Directive and Article 12 of the Employment Equality Directive.

EU Member States should step up efforts to use tools, such as public sector equality duties and equality impact assessments, to ensure implementation of the principle of equal treatment.

## DEVELOPMENTS IN THE ROLE OF EQUALITY BODIES

Effective implementation of existing legislation requires appropriate structures and mechanisms to enhance respect of the law, as well as trust in bodies involved in promoting equality. In this regard, it is crucial for equality bodies to be effective.

Article 13 of the Racial Equality Directive stipulates that “Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals’ rights.”

Under the terms of the directive, the competences of these equality bodies should include providing independent assistance to victims of discrimination in pursuing their complaints about discrimination; conducting independent surveys concerning discrimination; and publishing independent reports and making recommendations on any issue relating to such discrimination. The directive leaves Member States a broad margin to set up equality bodies according to their own institutional traditions and arrangements.

In 2018, the European Commission published a recommendation on standards for equality bodies identifying three areas in which Member States could implement measures to enable equality bodies to fully promote equal treatment and effectively perform the tasks assigned to them under EU law. These pertain to their mandate; their independence and effectiveness; and how they cooperate and coordinate with one another, public authorities and other organisations.

As the European Commission notes,<sup>57</sup> the role and status of equality bodies still differ considerably across Member States, with a great degree of diversity in their structure, the grounds of discrimination and areas of life covered by their mandates, their functions, their independence, and the human, financial and technical resources available to them. This lack of uniformity between equality bodies across Member States leads to gaps in protection against discrimination in the EU. This evidence of continued diversity of equality bodies – despite the European Commission Recommendation on standards for equality bodies, which aimed to address some of those gaps, having been adopted back in 2018 – confirms that there is room to harmonise the role and standing of equality bodies in the EU, and strengthen their mandates.

The European Commission further announced in the EU anti-racism action plan 2020–2025 that it will explore the possibility of proposing new legislation to strengthen equality bodies by 2022.

Equinet developed two sets of indicators that can assist the EU and its Member States in their efforts to strengthen equality bodies.

The set of indicators on mandates focuses on the grounds of discrimination and areas of life covered by equality bodies, their nature and extent of their competences with regard to providing independent assistance to victims of discrimination, their decision-making powers, their ability to conduct surveys and research, and their advisory function.

The set of indicators on independence focuses on the legal frameworks setting up equality bodies, their ability to perform their functions without interference, the budget and resources allocated to equality bodies, and appointment and accountability of the leadership of equality bodies.

The important role of equality bodies in giving effect to the principle of equal treatment is also evidenced in the roles assigned to equality bodies in various EU initiatives: the EU anti-racism action plan 2020–2025;<sup>58</sup> the EU strategy on victims’ rights;<sup>59</sup> the Council

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<sup>57</sup> European Commission (2021), *Commission Staff Working Document – Equality bodies and the implementation of the Commission Recommendation on standards for equality bodies*, SWD(2021) 63 final, Brussels, 19 March 2021.

<sup>58</sup> European Commission (2020), *A Union of equality – EU anti-racism action plan 2020–2025*, COM(2020) 565 final, Brussels, 18 September 2020.

<sup>59</sup> European Commission (2020), *EU strategy on victims’ rights (2020–2025)*, COM(2020) 258 final, Brussels, 24 June 2020.

Recommendation on Roma equality, inclusion and participation;<sup>60</sup> the proposal for a Regulation laying down common provisions on EU funds for the period 2021–2027 (Common Provisions Regulation);<sup>61</sup> and the proposal for binding pay transparency measures.<sup>62</sup> Each of these assigns active roles to equality bodies that call for these bodies to allocate resources so that they can fulfil these tasks effectively and independently.

More specifically, the Common Provisions Regulation provides for the participation of equality bodies in the monitoring committees of EU-funded programmes. These committees will be responsible for examining whether or not the EU-funded programmes comply with the enabling conditions that are necessary for accessing and using EU funds throughout the programming period.

## ↑ FRA OPINION 5

EU Member States should ensure that equality bodies can effectively fulfil their tasks, as assigned by the Racial Equality Directive, and with respect to the roles provided for them in the EU anti-racism action plan; the EU strategy on victims' rights; the Council Recommendation on Roma equality, inclusion and participation; the proposal for a Regulation laying down common provisions on EU funds for the period 2021–2027; and the proposal for binding pay transparency measures.

This entails ensuring that equality bodies are given sufficiently broad mandates and allocated adequate human, financial and technical resources to perform all their statutory tasks effectively and independently. The European Commission's 2021 report on the application of the racial and employment equality directives also highlights this necessity.

When doing so, Member States should give due consideration to the European Commission's Recommendation (EU) 2018/951 of June 2018 on standards for equality bodies. This includes enabling equality bodies to receive and handle complaints (including complaints by third parties) and assist victims of discrimination; publish independent reports and recommendations on any issues related to discrimination; collect data through independent surveys, which contributes to the evidence base for monitoring levels of discrimination; and promote awareness of the existence of equality bodies among the populations they were set up to serve.

Member States are encouraged to fully implement the measures included in the European Commission Recommendation on standards for equality bodies, to ensure that these bodies can fulfil their immense potential and promote equal treatment in practice.

In addition, the European Commission is encouraged to propose new legislation by 2022 to strengthen equality bodies, as outlined in the EU anti-racism action plan 2020–2025. The unequal protection against discrimination across the EU that results from the variety in the setup of equality bodies speaks in favour of such legislation, particularly when considering that equality is one of the founding values of the Union.

<sup>60</sup> Council of the European Union (2021), *Council Recommendation on Roma equality, inclusion and participation*, Brussels, 2 March 2021.

<sup>61</sup> European Commission (2018), *Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument*, COM(2018) 375 final, Brussels, 29 May 2018.

<sup>62</sup> European Commission (2021), *Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms*, COM(2021) 93 final, Brussels, 4 March 2021.

Considering the variety of legal traditions and systems in Member States, continuing an exchange of practices is encouraged to identify how measures implemented in one country – to strengthen equality bodies – could be transferred to another. Member States could request the assistance of the European Commission, FRA and Equinet to facilitate such exchanges of practices.

Member States are encouraged to apply the indicators developed by Equinet to measure compliance with standards for equality bodies and to adopt measures to strengthen these bodies accordingly.

The EU should ensure that Equinet is provided with the adequate human, technical and financial resources to enable it to further develop and ensure implementation of its sets of indicators, to assist the European Commission, Member States and equality bodies in monitoring the practical implementation of the Recommendation on standards for equality bodies. This would contribute to strengthening equality bodies.

## PROMOTING THE COLLECTION AND USE OF EQUALITY DATA, INCLUDING CORRECT APPLICATION OF THE GENERAL DATA PROTECTION REGULATION

According to the *European handbook on equality data*,<sup>63</sup> ‘equality data’ means any piece of information that is useful for the purposes of describing and analysing the state of equality. Such data are indispensable to informing an evidence-based assessment of the application of non-discrimination policies at EU and Member State levels, and to empowering population groups at risk of discrimination.

When collected regularly and systematically, such information is essential to helping Member States assess their compliance with human rights obligations. It also enables policymakers to monitor trends in outcomes of the application of legislation, policies and measures the EU and its Member States adopt to promote equal treatment. Against this background, the European Court of Auditors – in its 2016 special report **EU policy initiatives and financial support for Roma integration** – called on the European Commission to work with Member States to develop a common methodology and encourage Member States to collect statistical data on ethnicity.<sup>64</sup> In response, the European Commission and FRA cooperated with national Roma contact points in a working party that developed a framework of indicators on Roma equality, inclusion and participation and populated it with data. This work is ongoing.

To date, few Member States operate comprehensive systems or a coordinated approach to the collection and use of equality data, as noted in the *Guidelines on improving the collection and use of equality data*, which the European Commission’s High Level Group on Non-discrimination, Equality and Diversity endorsed in 2018.<sup>65</sup> A dedicated Subgroup on Equality Data, facilitated by FRA, developed these guidelines to offer concrete guidance on how to improve the collection and use of equality data at national level.

Some Member States have begun to implement these guidelines, which pertain to the institutional, structural and operational dimensions of the collection and use of equality data. A **compendium of promising practices**<sup>66</sup> and a diagnostic mapping tool complement the guidelines.

The Subgroup on Equality Data identified a number of challenges in the use and collection of equality data common to many Member States, including an imbalance in the grounds of discrimination and areas of life for which data are collected; a lack of consistency and coherence of definitions, classifications and categorisations, which affects the comparability of equality statistics across and within Member States; insufficient consultations with relevant stakeholders and affected groups when designing and implementing data collection; intermittent data collection that does not allow for an analysis of trends over time; and the inaccurate interpretation of data protection frameworks, as they relate to data on equality.

This lack of data means that the EU and Member States do not have the full picture when wanting to address the experiences of millions of people across the EU, characterised by discrimination on different grounds and in different areas of life. Moreover, the resulting paucity of relevant data prevents the EU and Member States from effectively monitoring the state of equality. Equality data can also help improve the assessment of potential discrimination and bias when algorithms and AI are increasingly used in decision-making.

The absence of robust and systematically collected equality data, combined with the very small number of discrimination cases brought to the attention of relevant authorities, competent bodies and courts, paints an incomplete picture of the reality of discrimination in the EU. As noted in guideline no. 1 on equality data, a national statistical office, equality body

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63 European Commission (2016), *European handbook on equality data*, Luxembourg, Publications Office, p. 15.

64 European Court of Auditors (2016), *EU policy initiatives and financial support for Roma integration: Significant progress made over the last decade, but additional efforts needed on the ground*, Luxembourg, Publications Office.

65 European Commission, High Level Group on Non-discrimination, Equality and Diversity, Subgroup on Equality Data (2018), *Guidelines on improving the collection and use of equality data*, Brussels, European Commission.

66 FRA (2020), ‘*Compendium of practices for equality data collection*’.

or research institute could map “existing sources of equality data in Member States [...] and establish a baseline for a more systematic approach towards equality data collection”.<sup>67</sup>

To address the shortcomings identified through such a mapping, guideline no. 2 on equality data suggests that relevant authorities could set up an interinstitutional working group comprising, for example, “ministries, national statistical offices, equality bodies, national human rights institutions, research institutions and the scientific community, as well as other relevant actors and data providers such as representatives of relevant local authorities, the judiciary, the police, etc.”<sup>68</sup>

In its 2018 **guidance note to data collection and disaggregation for monitoring progress in achieving the goals of the 2030 Agenda for Sustainable Development**, the Office of the United Nations High Commissioner for Human Rights stresses the human rights principle of ‘doing no harm’.<sup>69</sup> As acknowledged in the *Guidelines on improving the collection and use of equality data*, ‘doing no harm’ means that no data collection activity should create or reinforce existing discrimination, bias or stereotypes and that the data collected should be used for the benefit of the groups they describe and society as a whole.<sup>70</sup>

## ↑ FRA OPINION 6

EU Member States should ensure the systematic collection of reliable, valid and comparable equality data, disaggregated by sex, racial and ethnic origin, religion or belief, disability, age or sexual orientation. Member States should collect these data through the means described below, based on the self-identification of those at risk of discrimination. Civil society organisations representative of these population groups should contribute to developing relevant definitions and indicators.

Member States should draw on the fullest possible range of sources of equality data, including, at the national level, alongside FRA data, population censuses; administrative registers; household and individual surveys; victimisation surveys; attitudinal surveys; complaints data and research from equality bodies; situation testing; diversity monitoring by employers and service providers; and data generated through qualitative research strategies, such as case studies, in-depth interviews and expert interviews.

Member States should reinforce regular and comprehensive collection of equality data through their national statistical institutes and other relevant government agencies. This includes systematic compilation of equality statistics based on population and household censuses, administrative registers and official EU-wide surveys, such as the European Union Statistics on Income and Living Conditions, the Labour Force Survey and other representative surveys. To enable the monitoring of equality outcomes, such data sources should (i) cover under-represented groups at risk of discrimination and (ii) include information on experiences of discrimination on the grounds of sex, racial and ethnic origin, religion or belief, disability, age or sexual orientation.

67 European Commission, High Level Group on Non-discrimination, Equality and Diversity, Subgroup on Equality Data (2018), *Guidelines on improving the collection and use of equality data*, Brussels, European Commission, p. 9.

68 *Ibid.*, p. 10.

69 Office of the United Nations High Commissioner for Human Rights (2018), *A human rights-based approach to data – Leaving no one behind in the 2030 agenda for sustainable development*, New York, United Nations.

70 European Commission, High Level Group on Non-discrimination, Equality and Diversity, Subgroup on Equality Data (2018), *Guidelines on improving the collection and use of equality data*, Brussels, European Commission, p. 4.

To develop strategies to adequately capture situations in which different grounds of discrimination intersect or act in combination with one another – that is, multiple and intersectional discrimination – EU Member States should use a comprehensive set of equality data collection tools, including large-scale quantitative surveys covering different population groups and grounds of discrimination, alongside discrimination testing, which is an established method for generating objective evidence of discrimination.

Member States should step up efforts towards a coordinated approach to equality data collection and use such data as a basis for developing evidence-based policies to foster equality and non-discrimination. In this regard, Member States should give due consideration to the Guidelines on improving the collection and use of equality data endorsed by the EU High Level Group on Non-discrimination, Equality and Diversity. Member States are encouraged to use the mapping tool and compendium of practices that complement these guidelines. EU institutions and bodies should consider applying these guidelines within their own structures.

In line with Guideline No. 2 in the Guidelines on improving the collection and use of equality data, Member States should consider enabling equality bodies to foster interinstitutional cooperation in the collection and use of equality data. This could be achieved through setting up structures (e.g. an interinstitutional working group) that enable systematic and long-term cooperation between relevant entities in any given country. Member States that mandate equality bodies with such a coordination function should ensure that these bodies are provided with the necessary capacity, expertise and resources.

## EQUALITY DATA COLLECTION UNDER THE GENERAL DATA PROTECTION REGULATION

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 – the General Data Protection Regulation (GDPR) – came into force on 25 May 2018. This has triggered reflections about how to legally collect and process special categories of personal data (Article 9 of the GDPR), such as those related to a person’s racial or ethnic origin, health, religion or belief, or sexual orientation. For example, the *Guidelines on improving the collection and use of equality data* endorsed by the High Level Group on Non-discrimination, Equality and Diversity note that “data protection requirements are [sometimes] understood as prohibiting collection of personal data such as a person’s ethnic origin, religion or sexual orientation”.<sup>71</sup> However, in line with Article 9 (2) (j) of the GDPR, processing of special categories of personal data are prohibited, **unless** “processing is necessary for [...] statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject”.

Member States can therefore collect and process equality data based on special categories of personal data for reasons of substantial public interest, statistical purposes and scientific or historical research purposes by ensuring that the data subject has given explicit consent to the processing of those personal data for one or more specified purposes (Article 9 (2) (a)).

In addition, recital 26 of the GDPR clarifies that the principles of data protection apply to special categories of personal data that concern an identified or identifiable natural person and should not apply to anonymous information or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable, such as data used for aggregate statistical purposes to identify and record trends in equality.

The European Data Protection Supervisor (EDPS) published a **preliminary opinion on data protection and scientific research** to provide legal certainty about the conditions under which processing of such data are allowed and what safeguards must be in place when collecting them. This opinion of the EDPS is relevant to data collectors and processors, which include research institutions, academia, government agencies at national and local levels, equality bodies, human rights institutions, EU agencies and bodies (including FRA) and civil society organisations.

### ↑ FRA OPINION 7

The GDPR allows for the collection and processing of special categories of personal data under certain conditions, including for statistical or research purposes (Article 9 (2) (a), (g) and (j)).

Data collectors and data processors in EU Member States should seek the advice of their national data protection authorities and further guidance from the European Data Protection Board (EDPB) and the EDPS about the safeguards that need to be applied when collecting and processing special categories of personal data, including for the purpose of scientific research (Article 9 (2) (j) of the GDPR). In doing so, they should take due consideration of the **EDPS preliminary opinion on data protection and scientific research from 6 January 2020** and the upcoming EDPB guidance on data protection and scientific research.

All equality data collection and processing should be done in full compliance with the principles and safeguards set out under the GDPR.

<sup>71</sup> *Ibid.*, p. 7.







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For the full FRA Opinion 1/2021 of 30 April 2021, see:  
<https://fra.europa.eu/en/publication/2021/fra-opinion-eu-equality-20-years>

FURTHER INFORMATION



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