European Coalition *of* Cities Against Racism

International Coalition of Inclusive and Sustainable Cities – ICCAR

United Nations Educational, Scientific and Cultural Organization

2022 April 11

ECCAR Response - EU consultation on the Racial Equality Directive (Directive 2000/43/EC) concerning potential gaps and suitable measures to address those gaps

ECCAR as an organisation decided to submit a response to the Commission's consultation due to the unique knowledge base of the European Coalition of Cities Against Racism. ECCAR was launched on 10 December 2004 at the occasion of the fourth European Conference of Cities for Human Rights that took place in Nuremberg. On this occasion, the Ten-Point Plan of Action was adopted. Today, ECCAR has 130 member cities all across Europe. Most are within the European Union.

Cities are a major focus for the ongoing increase in ethnic and cultural diversity of Europe. They are the home to an ever greater number of people with migration history, national ethnic minorities and internationals, internationals from all parts, seeking freedom, work, knowledge and opportunity. Cities are the places where the everyday meeting of differences sparks competition, clashing interests and fears that feed the development of the ideologies and practices of discrimination. Cities are also the dynamic laboratories where new forms of urban citizenship and new ways of living together are being invented. They are a key space within which to conduct a struggle against racism that facilitates effective implementation of the various instruments enacted by States.

Cities are run by local authorities who are often close to their citizens and the ongoing changes in society. They generally have a degree of autonomy, resources, support and solidarity networks. They thus have the capacity to launch brave and innovative initiatives that can be effective against racism on the ground. Local authorities, especially at city level, have a key role in mobilising forces and in implementing anti-discrimination policies that can make a real difference, even in areas that do not fall within their administrative competence. ECCAR's 10 Point Plan of Action as well as its Toolkit for Equality can be found at https://www.eccar.info/en.

Based on these experiences and knowledge, and recognizing the importance of the Racial Equality Directive (Directive 2000/43/EC) in establishing legal protections against racial and ethnic discrimination throughout the EU, ECCAR is submitting this response to the Commission's consultation request.

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1. Introduction

Some key starting points for the issues to be solved by the Racial Equality Directive are illustrated by the picture above where the employer for some reason cannot see, or chooses not to see the qualifications of the persons in the illustration.

- **Civil law and not criminal law is the primary tool used by RED to counteract discrimination.** Criminal law in relation to racism is primarily intended to control very deviant behaviour that has a foundation in some sort of conscious ideology based on ideology, whereas civil law relates to controlling and guiding more common widespread behaviour, i.e. changing the status quo.
- **People with the power to discriminate and prevent discrimination (employers, unions, businesses, government agencies) are generally not considered to be those motivated by extreme ideologies, while assuming they are motivated by rational considerations.** The incentive for potential discriminators in terms of civil law to not discriminate relates to the cost risks involved in carrying out what to them is their normal behaviour.
- **If individuals are to effectively use civil laws against discrimination, there have to practical possibilities of bringing claims that will affect the norms in society. In other words, access to justice is a key.** National laws based on the Racial Equality Directive (RED) rely on individuals enforcing their rights not only to receive compensation as individuals, but also as a means to achieve the social goal embedded in RED of changing societal norms so that individuals are not

subjected to racial discrimination in the first place. This requires both strategic litigation that fills out the legislation, as well as a critical mass of cases underpinning the change in norms. Here it is important to understand the imbalance in legal and economic power between potential discriminators and the potential victims of discrimination.

- **Addressing the access to justice issue relies in part on procedural rules as well as on one or more effective equality bodies.** Equality bodies can play an important role in taking on cases, providing advice etc. However, if they have a monopoly on enforcement there is a risk that as government civil servants, they can lose sight of the idea that their primary reason for existence is bringing some balance of power to the limited legal power of the potential victims. This means that civil society, through individuals or through NGOs also have an important role to play in enforcement of the law.

2. The material scope of RED is relatively satisfactory except in relation to the legal system.

Article 3, 1 (a-h) requires protection against discrimination in relation to a broad variety of fields in society from employment to education to goods and services. This essentially covers the entire public sector, including essentially of the fields where cities / local governments operate. The area where more clarity concerning scope is needed is in regard to discrimination carried out by public officials in exercising their official duties, for example, the police. What happens for example when police officers exercise their powers in a discriminatory fashion? When they stop and search people only on the basis of their race? Or when courts exclude members of the public from an open hearing due to their ethnicity/religion? While, for example, the issue of discrimination in lower courts, should be dealt with on appeal, the examples mentioned here would not be covered. In some jurisdictions, discrimination carried out purportedly within the ambit of an official duty (carrying out an arrest, maintaining order) is simply excluded.

Thus greater clarity is needed Article 3 in relation to e.g. discriminatory behaviour by public servants, such as the police, when acting in their official capacity.

Article 3 (2) of RED causes some confusion as to the allowance of differential treatment related to third country nationals. As written, it is all too often interpreted broadly as allowing differential treatment.

A clarification is needed stating that Article 3 (2) of RED is to be interpreted restrictively and that third country nationals clearly have a right to protection against discrimination in the fields stated in Article 3 (1).

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3. Is positive action allowed under RED? Should it be emphasised more clearly?

Positive action is allowed. Article 5 states: "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."

This is similar to the phrasing that applies to positive treatment and sex discrimination in DIRECTIVE 2006/54/EC on equal opportunities and equal treatment of men and women in matters of employment and occupation (recast): "Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life." This can also be found in DIRECTIVE 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services. Article 6 states:

> With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

Positive action is not required by the EU concerning any ground, but it is allowed within certain limits. The CJEU, with good reason, has clearly indicated that there are important limits concerning positive action concerning sex discrimination. Presumably these same principles apply to the field of racial and ethnic origin (as well as other grounds). Nevertheless, at the national level positive action concerning gender equality is often treated quite differently compared to ethnic equality. Concerning gender equality, positive action is often considered an important tool, while it is considered to be illegal, improper or unworkable concerning ethnic equality.

A step forward would be clarity in RED indicating that positive action concerning ethnicity is subject to the same restrictions and possibilities as apply to EU law concerning gender equality. While positive action concerning ethnicity is not a magic solution to the problems in this field, it can nevertheless be appropriate in certain circumstances. Similarly, although positive action concerning gender equality has not been a magic solution, it has been a part of the tools that have been available.

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4. Intersectionality is not covered by RED or any of the other EU equality directives.

People who are subjected to discrimination due to their racial or ethnic origin are also at risk of being subjected to discrimination on other grounds such as sex, disability, sexual orientation, disability or age. One reason as to why the prohibition of age discrimination was particularly relevant concerning ethnic discrimination as well as sex discrimination was that age discrimination was no longer a legal defence in discussing ethnic or sex discrimination. Up until that point it was not uncommon for employers to clarify their actions as being due to the age of e.g. the job applicant. This is also an indication of the intersectionality of discrimination grounds, e.g. ethnic origin combined with age, where fully qualified immigrants had relevant educations, but had gone through them at an older age due to moving from one country to another. The problem is that RED does not open up for the possibility of intersectional discrimination, i.e. that the discrimination was not solely due to ethnicity (as required by most laws concerning ethnic discrimination), but was a result of the intersection between ethnicity and age. There are other important intersections concerning ethnic origin and e.g. religion and/or sex. In the context of intersectionality, RED should refer to the specific impact the overlapping of discrimination mechanisms which in turn produce specific situations of discrimination that have their own quality. In other words, the effect is that the individual is subjected to discrimination, even if the discrimination is due to overlapping or complementary grounds.

RED should clarify that intersectional discrimination shall be covered when other grounds contribute to the occurrence of discrimination, when the net effect of e.g. ethnicity and age combine to constitute discrimination even if the proof concerning the separate grounds is insufficient to prove the occurrence of discrimination.

Beyond that, at a minimum, the 2008 proposal for a gap directive should be adopted (COM(2008) 426 final). This would potentially allow for the development of an intersectional protection against discrimination through case law.

5. The primary problems at the national level relate to a lack of remedies and enforcement (RED Articles 7-12). Loser pays rule.

How are victims of discrimination to enforce their rights? Article 7.1 on Defence of Rights requires Member States to establish judicial and/or administrative procedures for the enforcement of obligations under the Directive that are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them. As a practical matter, some special procedures have been introduced at the national level that are intended to deal with the access to justice issue that is a primary hindrance to those that want to enforce their rights. However, in general, most member states have

assumed that the ordinary court system and the general rules of procedure will function to protect rights – without any adjustments. In other words, an equality of arms between potential discriminators and potential victims is assumed. This is simply not true, resulting in a lack of enforcement, through the courts or otherwise. Victims of discrimination have problems with the issue of awareness of rights and familiarity with the legal system. In addition, a key roadblock that applies to most victims is the loser pays rule that is a part of the general legal system of most Member States. This means that in order to recover a small amount of compensation e.g. EUR 1000 - 5000, a discrimination victim who files a case risks being ordered to pay EUR 10000 – 20000 in costs for the other party in addition to paying their own costs. The loser pays rule, on its own, provides a key explanation to the very small number of cases found across the EU.

In some jurisdictions internationally, this problem is resolved by allowing those with the economic means to bear the costs of litigation assuming that the claim was brought in good faith. The EU Commission deals with this issue in its 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 (Brussels, 4.3.2021 COM(2021) 93 final 2021/0050 (COD). According to Article 19 on Legal and Judicial Costs:

> Claimants who prevail on a pay discrimination claim shall have the right to recover from the defendant, in addition to any other damages, reasonable legal and experts' fees and costs. Defendants who prevail on a pay discrimination claim shall not have the right to recover any legal and experts' fees from the claimant(s) and costs, unless the claim was brought in bad faith, was clearly frivolous or where such non-recovery is considered manifestly unreasonable under the specific circumstances of the case.

The wording in the proposed directive should be adapted to ethnic equality and be included in RED. If a discrimination victim is able to find a lawyer privately or e.g. through an NGO, they at least have some certainty as to the cost risks, assuming the case was not brought in bad faith. This would allow more individuals to assert their rights and possibly recover compensation while at the same time helping to generate the case law that is needed to bring about the underlying goal of RED and non-discrimination law in general. It would be important to note such a rule is motivated by the fact that individuals, through their cases are helping to give real meaning to the fundamental right of equality.

At least in some Member States, essentially the only potential remedy is compensation in the form of money. There are situations where the courts should have broader enforcement powers concerning the issuance of orders related to compliance and prevention. Broader powers in this regard could also induce potential discriminators to be more proactive in their own equality promotion efforts. The EU Commission, in addition

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to compensation, in its Proposal for a DIRECTIVE 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 (Brussels, 4.3.2021 COM(2021) 93 final), through Article 15 concerning other remedies states:

> Member States shall ensure that, in legal proceedings aimed at ensuring the enforcement of any right or obligation related to the principle of equal pay between men and women for equal work or work of equal value, the courts or other competent authorities may order, at the request of the claimant and at the expense of the defendant:
>
> (a) an injunction order establishing an infringement of any right or obligation related to the principle of equal pay between men and women for equal work or work of equal value and stopping the infringement;
>
> (b) an injunction order ordering the defendant to take structural or organisational measures to comply with any right or obligation related to the principle of equal pay between men and women for equal work or work of equal value or to stop an infringement thereof.
>
> Non-compliance with any of these orders shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance.

The wording in Article 15 of the proposed directive should be adapted to ethnic equality and included in RED.

6. Empowering the enforcement capacity of civil society

According to RED, NGOs are to have the right to engage either on behalf or in support of a complainant, with her or his approval. This is an idea transplanted from systems where NGOs have a tradition of advocacy through the courts on behalf of their members' interests. Many Member States lack such a tradition, which means that NGOs representing victims of discrimination are generally unprepared for this type of advocacy. While RED itself is not necessarily the right place, the Commission in other respects could encourage the development of e.g. an EU-wide strategic litigation fund for NGOs or at least the development of such funds at the national level. Such a fund could gain inspiration from the Canadian Court Challenges Program (https://pcjccp.ca) which provides support to cases concerning e.g. equality.

Equality law is not going to enforce itself. Civil society engagement is a key, even if equality bodies have an important complementary role to play as well. The potential of civil society litigation is important to individuals enforcing their rights. It is also important to keeping equality bodies focused on their primary role as well. Concerning equality bodies, see below.

Some cities provide support to enforcement through subsidies to local anti-discrimination bureaus which can provide advice and assistance, and in some cases representation in the courts. This is one of the examples brought up as a good practice in the ECCAR Toolkit for Equality.

As an added means of providing tools for enforcing RED, the Commission should encourage the development of either an EU-wide strategic litigation fund or at least encourage the establishment of such funds at the national level so that NGOs can take on strategic litigation.

Beyond this the Commission, in relation to empowerment of civil society, should also encourage Member States to support the establishment of local anti-discrimination bureaus that are run by civil society.

7. Are today's sanctions effective, proportionate and dissuasive?

According to Chapter IV, FINAL PROVISIONS, Article 15 on sanctions states:

> Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive…

Given the actual results of cases around the EU, as noted in THE COM(2021) 139 final REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL (COM(2021) 139 final) on the application of 'the Racial Equality Directive' and 'the Employment Equality Directive' (p. 10)

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

This seems to be a diplomatic means of stating that in many Member States the incentives for victims to take legal action are extremely limited, especially given the cost risks related to the loser pays rule that applies in most Member States. Without the risk of cases actually being taken to court along with the potential of substantial sanctions, those with the

power to discriminate have little incentive, at least based on the law against discrimination, to change their behaviour.

RED should be amended to emphasise that the dissuasive portion of the sanctions needs to be examined separately from the idea of effective compensation for the individual. Compensation damages awards in EU Member States have traditionally been low. Such a tradition is hard to change. All too often the dissuasive portion of the sanctions is related to the individual compensation awards which are generally low.
As they are so low, the dissuasive portion of the sanctions can hardly be dissuasive if the sanction is not related somehow to the size of the organisation, or the turnover of the organisation, responsible for the discrimination. If the personal compensation award concerning ethnic discrimination by a large bus company amounts to EUR 1 500 with an additional EUR 1 000 as the dissuasive portion, this will hardly function as an effective dissuasive sanction if the company has an annual turnover of ca EUR 25 000 000. Currently, the sanctions that apply seem to be more symbolic than *effective, proportionate and dissuasive.*

Concerning effectiveness in relation to dissuasive sanctions, the courts seem to be very concerned about the unjust enrichment of the victims of discrimination. Although the concern seems exaggerated, one possible means of dealing with this would be the establishment of an NGO-run strategic litigation fund based on the idea that a portion of every dissuasive award shall be turned over to such a litigation fund. This would limit the concern with unjust enrichment of discrimination victims as well as empowering civil society and providing some resources for such litigation funds.

The EU Commission, in its Proposal for a DIRECTIVE 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 (Brussels, 4.3.2021 COM(2021) 93 final 2021/0050 (COD), through Article 20 underlines the importance of effective remedies including potential specific penalties such as "the revocation of public benefits or the exclusion, for a certain period of time, from any award of financial inducements." Through Article 21, the Commission proposes a clear connection between equal pay and public contracts by stating that the appropriate measures undertaken by Member States "shall include measures to ensure that, in the performance of public contracts or concessions, economic operators comply with the obligations relating to equal pay between men and women for equal work or work of equal value" and that "Member States shall consider for contracting authorities to introduce, as appropriate, penalties and termination conditions ensuring compliance with the principle of equal pay in the performance of public contracts and concessions."

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The wording of Articles 20 and 21 of the proposed Directive should be adapted to ethnic equality and be included in RED. Also see below concerning complementary incentives to prevent discrimination.

8. Clarity concerning the role of equality bodies, particularly concerning enforcement – Article 13

The Commission is in the process of developing binding standards for Equality Bodies (EBs). The EBs have various challenges in how they operate as their mandate, powers, status, independence, resources and effectiveness vary widely across the EU. It is important that the Commission set minimum standards concerning their mandate, powers, status etc in that process. These are clearly needed. EBs have an important role to play concerning enforcement, strategic litigation and a critical mass of cases.

At the same time, EBs need guidance as to why they were established. Are they neutral civil servants? Or are they advocates on behalf of victims of discrimination? The binding standards are to be issued separately.

However, when RED is amended, Article 13 on Bodies for the Promotion of Equal Treatment should also point out that they play an important role in terms of enforcement and that a primary purpose they have is to bring some balance of power on behalf of victims of discrimination concerning the imbalance that exists in relation to those with the power to discriminate. Without this clarity of purpose, an EB even with resources, a broad mandate and independence, can all too easily conclude that it is better to avoid conflicts with more powerful interests in society rather than enforcing the law.

Another change that might assist equality bodies in understanding that enforcement of the law is a primary role, would be placing Article 13 under the heading of Chapter II REMEDIES AND ENFORCEMENT rather than being placed under a separate Chapter III with the heading BODIES FOR THE PROMOTION OF EQUAL TREATMENT. This would then clearly emphasise the idea that actually taking cases to court is an important part of equal treatment promotion. While training and education can be important, in some countries the equality body, in spite of its broad mandate, independence and resources, has chosen to focus on equality promotion in terms of awareness-raising and dialogue, asserting that it is more effective broadly in achieving the goals of the anti-discrimination legislation through information rather than taking cases to court on behalf of individuals.
This type of rationale undermines the incentives for change in the direction of increased non-discrimination. If employers, businesses, unions and government agencies (i.e. those with the power to discriminate) know that there is almost no chance of enforcement of the law, they can naturally take part in awareness-raising and dialogue with the Equality

Body, without ever changing their actual behaviour. If, on the other hand, there is a real risk that the law will be enforced, it is in that situation that awareness-raising and dialogue concerning discrimination and the law can have a real effect.

RED should clearly indicate that the primary role of an EB is to provide assistance to individuals, particularly as a means of ensuring that the national law and RED have a real effect concerning discrimination, i.e. enforcement of the law is lays the necessary foundation for other work concerning equality promotion.

9. Time limits for bringing cases

In various jurisdictions, the time limits that apply for filing discrimination cases are a hindrance.

According to the Commission's Proposal for a Pay Transparency Directive, Article 18 states that

> 2. Limitation periods shall not begin to run before the violation of the principle of equal pay between men and women for equal work or for work of equal value or infringement of the rights or obligations under this Directive has ceased and the claimant knows, or can reasonably be expected to know, about the violation or infringement.
> 3. Member States shall ensure that the limitation periods for bringing claims are set at three years at least.

Again, the wording in the proposed directive concerning time limits should be adapted to ethnic equality and be included in RED.

10. Complementary incentives to prevent discrimination

There are also complementary means to provide incentives to businesses to not discriminate. This would not require a change in RED, but would use the potential in other directives. The 2014 EU public procurement directives (Directive 2014/24/EU on public procurement, and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors) seek to "ensure greater inclusion of common societal goals in the procurement process.
These goals include environmental protection, social responsibility, innovation, combating climate change, employment, public health and other social and environmental considerations" (at https://ec.europa.eu/environment/gpp/eu_public_directives_en.htm). See e.g. Article 70 in Directive 2014/24/EU. Following along these lines, some local governments and even national governments have included anti-discrimination clauses in some of their public contracts. If such contracts specify that the public entity retains the

right to cancel the contract if the contractor violates the applicable law against discrimination, this adds a clear incentive for the contractor to prevent discrimination in e.g. the workplace as well as acting proactively to promote equality.

In spite of the clarity of the 2014 Directives, those working with public procurement at the local and national levels have expressed uncertainty. Therefore, if the EU Commission takes the lead in formulating anti-discrimination clauses that are designed to have a dissuasive effect concerning discrimination, local and national governments would feel more comfortable in following the lead of the EU.

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