Europeanization through Judicial Enforcement?
The Case of Race Equality Policy

Costanza Hermanin

Thesis submitted for assessment with a view to obtaining the degree of Doctor of Political and Social Sciences of the European University Institute

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Abstract

Ten years after its enthusiastic adoption in 2000, the Race Equality Directive (RED) - a deeply innovative and indeed overall far-reaching piece of equal treatment legislation – seems to be still little enforced at the level of European courts. Why? Neither a sudden retrenchment of race discrimination in Europe, nor the inaptitude of the policy to generate European Union (EU)-law litigation, can easily explain the scarce signs of the extensive judicial enforcement that characterise other EU equal treatment policies, such as those on EU-nationality, gender and age.

This study zooms in on the realm of domestic politics and judicial enforcement to inquire into cross-sectional and cross-national variations in the implementation of EU equal treatment policy. To do so, I rely upon analytical tools developed by three branches of EU studies scholarship — Europeanization, compliance and judicial politics literature — and I apply them to the yet unexplored domain of race equality policy. Tracing the process of transposition, in the first place, and analysing case law databases and expert interviews with legal practitioners, in the second place, I inquire into compliance and judicial enforcement in three EU countries: France, Germany and Italy.

The findings of this comparative study confirm a very limited judicial enforcement of the RED, especially as domestic patterns of adversarial litigation in the domain of race equality are concerned.

I explain this divergence looking at the ‘containment’ action that domestic policy-makers may exert on directives at the moment of transposition. In the case of the RED, this action crucially impinged on aspects likely to determine enforcement dynamics, such as those elements of the process regulating access to judicial redress. This work shows that in the case of a policy measure such as the RED, focused on individual judicial redress and mainly targeted towards disadvantaged end-users, the harmonization of some process elements is crucial to determining converging implementation dynamics. If Europeanization is contained at the moment of transposition, judicial enforcement can be seriously hindered at the national as well as the supranational levels even in presence of domestic legal mobilization. In addition to that, the thesis shows how limited race-consciousness is to be found in contemporary European jurisprudence as well as in the claims filed by antidiscrimination law applicants.
Acknowledgments

The process of researching and writing this thesis has changed me profoundly, shifting my main research interests from studying policy-making in the EU, to assessing the impact of EU law in terms of enhancing equality and fundamental rights. Eventually, this process transformed the EU-enthusiastic young researcher and ex Commission stagiaire fascinated by EU policy-making and inter-institutional dynamics, into a more critical young scholar and human rights activist interested in non-discrimination and migration issues. This evolution was mainly due to the encounters, literary and physical, made during the completion of the thesis. This is why I feel the need to spend a few words to thank those who have made this process possible.

This thesis is the result of a significant investment by a large number of people to whom I am, and will always remain, highly indebted. First of all, Adrienne Héritier has been a patient and supportive mentor throughout these years. I thank her for never losing confidence in the fact that I would eventually conclude this work, in spite of the many distractions and travels that have characterized my PhD time. To Bruno de Witte goes the merit of stimulating my interest for EU equality law during the first year of the PhD. After then, Bruno has constantly been a point of reference for my intellectual and professional development. I feel extremely lucky to have met him in Florence. The first person who ever taught me about antidiscrimination law is Daniel Sabbagh, during a fantastic research seminar on positive action at Sciences-Po Paris that took place well before my arrival in Florence. Since then, Daniel has supported every step in my academic career, including providing the perfect conditions and contacts for my fieldwork in France. I wish to thank him for all of that. The combination of Daniel and Bruno’s fascinating way of teaching equality law and writing on it is to be blamed for the very choice of this topic of dissertation.

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Beyond the literature, the most crucial source for this work have been the many lawyers, judges, activists, victims, experts, public officers and paralegals that have given up some of their precious time to be interviewed by a PhD student. Meeting them made me understand the personal, normative, frequently completely pro-bono commitment of some of those who act in the field of race equality. This has strongly reinforced my own commitment for this topic and for finishing this thesis. Meeting the Open Society Justice Initiative almost by chance, during a hearing in the Court of Appeal in Hamburg, has developed this commitment further. I have learned enormously from Jim Goldston’s dedication in the past three years and hope to learn more in the years to come.

The EUI provided me with a marvelous – yet possibly difficult to replicate – work-related pretext and work environment to spend four fantastic years in my hometown. The staff at the EUI, from the former president Yves Mény to the language teachers, the administrative assistants, the librarians, the logisticians and the smiling catering staff has rendered this time unforgettable. Being in Florence made me able to be closer to my expanding family for at least a few years, allowing me to witness the birth of Diamante and Teresa, and to benefit from the love, the wise advice, and the crucial psychological support of their mother Camilla. Her counsel has always been there in the most difficult times of the PhD, and of life more in general. The presence of my mother, my father, my late grandmother and my nanny has enriched this already colorful picture.

Last but not least, the friends and the PhD colleagues have been a crucial support for the completion of the dissertation. The deep intellectual exchange that we built over the years was intersected with the many leisurely activities that have so fundamentally helped developing our scientific thinking! Thanks to Mathias and Michele for being those fantastic friends and indefatigable co-editors; I look forward to our holiday together once the book is out. Thanks to Juanan and Cengiz for their warm smiles and their help with the thesis. Thanks to Mi Ah, Martina, Sylvain, the Julias, Clara and Sophie for filling the breaks at the library and for joint travelling to conferences, summer schools and holidays. Thanks to Gherardo, Anna, Valentina and Marco for being there and always open to mix up with my international friends. Last, but absolutely not least, thanks to my special trio: Chiara, Francesca and Irene, especially for bearing my thesis-related crises through all the possible means of communications as well as frequent air travels. I can’t wait our next Pantelleria.
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Introduction

Discrimination is just choosing. However, the word tends to be used in case of illegitimate choices. In law, it tends to be used for choices made on the basis of factors that are not permitted to be so used. ... Discrimination and equality go together, as matching opposites. To discriminate is to violate the principle of equality. It is to choose on the basis of a factor that the law regards as illegitimate, does not accept as relevant to the decision. There has therefore been different treatment —only one has been chosen— without a legally acceptable difference between treatees.

(Davies, 2003: 10, Tobler, 2005)

A Black Caribbean Briton, a Français issu de l’immigration, the son of a Gastarbeiter in Germany, and an extracomunitario in Italy, have few things in common — apart from the fact, that is, that when they apply for a job or a place to live they are more likely to be rejected than other, “local,” applicants, or that they are almost systematically under-represented in the top universities of their country of residence. In terms of public policy, their countries of residence have in the past provided very different measures of public policy to address the concrete or potential disadvantage due to their national origin, race, ethnic background, or skin colour.

In the UK, where the census asks people to identify themselves in terms of specific racial categories so as to monitor using statistics the extent of racial inequality, victims of discrimination have been able to rely on adversarial proceedings and specialised civil antidiscrimination legislation to access judicial redress since the 1970s. Since then, a specialised public agency has been tasked with assisting individuals discriminated against on the basis of their race to claim in court their right to equal treatment. In the other three countries, race, Rasse, razza, are uncomfortable terms and contentious notions rarely mentioned in domestic statutes. With only a few exceptions, after World War Two the rejection of any form of racism in continental Europe has been translated into a complete absence of race as an epistemological notion and target for public policy. Such a colour-blind approach has also pervaded public actions designed to counter forms of racism, insofar as taking alleged race into account had become controversial in different ways, supposedly due to the common heritage of the holocaust.
L’Oréal et Adecco condamnées pour discrimination

Sept ans après les faits incriminés, la 1re chambre de la cour d’appel de Paris a condamné, vendredi 6 juillet, pour discrimination raciale à l’embauche la société de travail temporaire Adecco, une de ses filiales Districom (rebaptisée aujourd’hui Ajilon) ainsi que Garnier (groupe L’Oréal).

Les faits concernent le recrutement en 2000 d’animatrices pour des opérations de promotion de produits capillaires, Fructis Style, fabriquée par Garnier. Cette filiale de L’Oréal aurait, selon l’accusation, demandé de ne pas embaucher des jeunes femmes d’origine africaine, amère ou asiatique. SOS-Racisme avait décidé de saisir la justice. L’ accusation s’était appuyée sur des témoignages oraux et un fax de l’ex-directrice de Districom, Thérèse Coulange, envoyé à Adecco, indiquant que le type “BBR”, signifiant “bleu, blanc, rouge”, était requis. Les postulantes devaient aussi être âgées de 18 à 22 ans et leur taille de vêtement devait être comprise entre le 38 et le 42.

Le 1er juin 2006, en première instance, le tribunal correctionnel de Paris avait relaxé les trois sociétés et leurs cadres, estimant que les “poursuites” avaient “été engagées à partir de suppositions et d’approximations”. La cour d’appel a décidé de requalifier en partie les faits reprochés en retenant la qualification de subordonnation d’une offre d’emploi à un critère discriminatoire, au lieu de refus d’embauche en raison d’un critère discriminatoire. Ces trois sociétés verseront chacune 30 000 euros de dommages et intérêts ainsi que 10 000 euros pour payer les frais de procédure de SOS-Racisme. Deux cadres de Garnier et Adecco, Laurent Dubois et Jacques Delaut, ont été relaxés. En revanche, Thérèse Coulange, a été condamnée à trois mois d’emprisonnement avec sursis.

Figure 0.1 Events challenged as race discrimination in France, Germany and Italy
In France, for example, where most members of visible minorities are today fully-fledged citizens, their socio-economic conditions do not surface from studies focused on foreigners or third country nationals. Thus, some demographers and statisticians are nowadays eager to use ethno-racial categories in particular to investigate forms of indirect or systemic discrimination affecting second and third generations of immigrants’ descendants.\(^1\) The Constitutional court, however, recently ruled that race is a non-objective criteria that may not constitute a basis for public policy, studies, or surveys. And indeed, French antidiscrimination policy has traditionally been framed in terms of “anti-racism,” being channelled through criminal legislation, relying on the action of a public prosecutor to punish with fines and imprisonment those racially prejudiced individuals who intentionally committed discrimination. The case of the criminal conviction of the multinational firm L’Oréal-Adecco in 2007 for employment discrimination is emblematic of this “anti-racist” approach (see Figure 0.1).

In Italy, by contrast, which only recently became a country of immigration, a citizenship law grounded upon a ‘familistic’ *ius-sanguinis* rule conceived for the many Italian expatriates, currently prevents many individuals from immigrated visible minorities from acquiring Italian citizenship even when them and their parents are born in the country and have lived nowhere else (Zincone, 2006). Thus, individuals belonging to visible minorities are still mainly foreigners, short-term residents or, even, undocumented migrants. As a result, legal strategies against discrimination are mainly targeted at fighting nationality and immigration status as means by which access to public and private goods and jobs can legitimately be reserved for Italian and European Union citizens. Racial discrimination is generally subsumed into a categorization framed in terms of Italian versus non-EU nationality, long versus short length-of-residence, or stable residence versus “nomadic status.” The latter differentiation led to Roma communities becoming the object of State-sponsored specialised monitoring and profiling measures as late as in 2008 (cf. Figure 0.1). No court, however, has ever concluded that profiling measures targeted at “nomads/Roma” could constitute a form of race discrimination.\(^2\)

In Germany, the very idea of applying antidiscrimination policy to private relations sparked intense societal and academic debate about whether freedom to contract should be curtailed by antidiscrimination law. Should a white German lady be allowed to sublet a

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\(^1\)The concepts of indirect and systemic discrimination have several meaning differentiation but they both refer to a type of behaviour or practice in which the manifest intentional element of discrimination disappears or is ‘covered.’

\(^2\) Throughout the study, the term Roma is used as an umbrella category to indicate all those different groups who speak a Romani dialect, such as the Roma, Sinti and Travellers, whatever their sedentary or travelling status or the length of their permanence in a country.
room in her own flat to another white German lady, but not to a Turk? As a consequence of the intense debates, the Race Equality Directive was transposed late and mainly applied to employment relations for lower-profile yet still controversial matters such as German language proficiency, which was in this case conceived as a “proxy” for race or ethnic origin (see Figure 0.1).

Until very recently, debates over race antidiscrimination policies have been prominent issues within political science and legal scholarship mainly across the Atlantic, or the Channel. The civil rights revolution, in the United States of the 1960s, prompted the adoption of specialised antidiscrimination statutes centred on an adversarial enforcement model and “principled colour-blindness.” The same policy framework, however, allowed for the implementation of measures based on ethnic monitoring and, in some cases, also affirmative actions, i.e. race-conscious policy measures used to promote integration.

The European examples quoted above, instead, show how differently and discrepantly the few known legal challenges against race discrimination can be framed. What is even more interesting is that such a scattered situation seems to persist despite the adoption of a regional policy framework against race and ethnic origin discrimination at the level of the European Union (EU) almost a decade ago.3 My research investigates the process of implementing these policy measures, i.e. the 2000 Race Equality Directive (RED) in several national contexts. Of particular interest, for this purpose, are those Western European countries where the notions of ethnic and race distinction are invoked not only with reference to autochthonous minorities, frequently defined as “national minorities”, but also to the presence of minorities with an immigration background.4 The accommodation of minorities with an immigration background has, in fact, gained increasing salience since Western Europe became one of the most important immigrant-receiving parts of our world, a territory where, over 50 years, racial and ethnic diversification has replaced centuries-long prevailing uniformity. This process can be considered as substantially new for the entire continent, even though for some countries it is undoubtedly newer than for others. Migration dynamics have changed significantly over

3 The expressions antidiscrimination policy and equality/equal treatment policy are used interchangeably throughout this work.
4 As explained by Kymlicka (1995: 11) national minorities are historical communities more or less institutionally complete, occupying a given home land and sharing a distinct language and culture. As such, policies addressed towards these minorities, wherever they are recognised as such, traditionally go beyond redressing discrimination, and focus on providing specific services such as forms of self-government, language rights, and land use.
the post-war decades, being no longer limited to former colonial powers or worker-recruiting nations, but also to an increased number of ex-emigration countries, now targeted by asylum seekers and labour migration.

The main reason behind the increased interest in this topic is, in particular, the contents of the measures that were agreed under the EU framework for the equal treatment of persons irrespective of their racial or ethnic origin. Such measures have been almost unanimously identified as largely inspired by an Anglo-Saxon “race-conscious” policy paradigm (Geddes and Guiraudon, 2004, Lieberman, 2005, Joppke, 2007), relying mainly on the judicial enforcement of individual rights through adversarial litigation, possibly sponsored by civil society organizations (CSOs) engaging in some kind of class action, or by public enforcement agencies (equality bodies). That paradigm even foresaw that member states could take ‘positive actions,’ i.e. engage in specific measures to prevent or compensate the disadvantage suffered by ethnic and racial minorities.

By “race-conscious” I mean a policy approach that without recognizing any scientific or objective value to the notions of race or ethnic origin takes into account the fact that race and ethnic origin may constitute grounds for direct and, especially, indirect and unintentional discrimination. In particular, although I recognize a difference in the notions of race - a concept traditionally related to descent, and ethnicity – a notion fundamentally linked to that of culture (Kymlicka, 1995), I notice that EU measures purposefully bridge between the two concepts by coupling racial with ethnic “origin” i.e. linking the cultural notion of ethnicity to descent. In addition to that, I join the perspective of those scholars that suggest that post-World War Two racism is a new form of racism, where the lessened support for biologic racism is matched by a soaring ‘cultural racism’, founded upon beliefs regarding a supposed hierarchy of cultures (Barker, 1981).

It is in this spirit that the notion of race is used throughout this work also as a substitute for the other categories frequently evoked alongside race as parallel motives for discrimination, such as ethnic origin, colour, physical appearance, and parentage.5

In light of this constructivist or critical understanding of the notion of race, individuals belonging to ethno-racial minority groups, ‘people of colour,’ may be identified as targets of specific public policy measures aimed at removing or reducing the

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5 Throughout this work I will use the term “race”, “racial minorities” and “minorities of colour” to refer to the complex of suspect motives of discrimination commonly protected through international, regional and national legislation on discrimination grounded on race, ethnic or national origin, skin colour, physical appearance, etc. In the case of European Union policy, every mention of race should be intended as covering ‘racial and ethnic origin’.
comparative disadvantages they may face, monitoring and even possibly improving their situation in a specific area of social life (employment, housing, education, etc.).

 Returning to the RED, most of the basic characteristics of the directive are quite far removed from the established continental policy approaches to the treatment of race equality and racism, some of which have been recalled above. Thus, the RED seemed likely to encounter implementation problems once its transposition and enforcement fell into the hands of the member states. Policy implementation problems are not new to measures adopted at the level of European Union. Rather, to a large extent implementation depends on the conditions prevailing in the member states. Studies on the Europeanization of public policies – here provisionally defined as the penetration of European rules, directives and norms into the otherwise differentiated domestic spheres (Mair, 2004: 341) — have extensively addressed these questions for other fields of policy regulated by the EU. That said, the political science studies that have been dedicated so far to another domain of EU equality policy — gender — have generally highlighted that the enforcement of EU-generated policy measures have been rather successful in producing domestic change over the years and across various EU member states. In particular, domestic structures have been aligned towards an increased judicial protection from discrimination.

 The aim of this work is to explain why, so far, the implementation of the RED does not seem likely to spread similar enforcement dynamics converging towards an improved judicial protection against race discrimination in three EU member states which are countries of immigration: France, Germany and Italy. Turning the question around, this study aims to unveil how the RED was implemented in these three countries, at the level of national legislation and domestic court enforcement. Anecdotal evidence of a ‘limited Europeanization’ of racial equality policy leads me to try to explain why differential implementation occurs.

 EU policy in the race equality domain can be considered as having a three-fold character. On the one hand, the RED requires member states to establish a uniform and detailed regulatory template for the private redress of discrimination in access to employment, education, social benefits and other public and private goods and services. Second, it enables victims of discrimination to find support from civil society organizations or national public enforcement agencies, so-called “equality bodies”, whenever they seek an individual redress. In addition to the RED, a distributive policy provides funds to increase awareness of discrimination, gather substantive information from the member
states, and mainstream non-discrimination among different policy strands and policy recipients.

This study explores how the two first implementation mechanisms designed for antidiscrimination policy are put into operation. Analytically, research is based upon insights from public policy literature, and in particular from EU studies: from Europeanization and compliance studies, on the one hand, and scholarship on judicial politics, on the other.

Thus far, the compliance and Europeanization literatures have covered a number of policy fields and dedicated significant attention to the domain of EU social policy — to which equal treatment measures formally pertain — and gender equality. Regarding race anti-discrimination policy, however, while some explanations have been provided for the surprising uploading of an advanced “Anglo-Dutch framework” for race equality at the EU level, no study has yet attempted to explore the question of why, 10 years after the adoption of the RED, little seems to happen from the point of view of judicial enforcement.

The aims of this study are thus multiple. On the one hand, there is a need to expand our present knowledge on the domestic implementation of EU equal treatment policy beyond the sphere of gender equality and discrimination on grounds of nationality, to other “motives of discrimination.” In the last years, such a widening of the scope of research has been assisted by the increasing number of concrete policy initiatives that the EU institutions have engaged in different strands of equality, firstly a new directive enhancing the protection from discrimination based on sexual orientation, religion, age and disability to the same extent as that foreseen for race (European Commission, 2008b). Consequently, the study also offers a new test ground for those theories that have attempted to assess the relative importance of different ‘domestic variables’ impacting the process of Europeanization of domestic policies. This is why the analysis provided here attempts to discuss implementation dynamics in view of domestic institutional characteristics and path-dependency (a historical institutionalist perspective), as well as actor- and structure of opportunity-based explanations (a rational-choice institutionalist perspective).

Finally, this work explores a new methodology for assessing the domestic implementation of EU policy, relying on a quali-quantitative assessment of the judicial enforcement process of EU policy across several national jurisdictions.
Through these instruments, this research contributes fresh data and useful insights on a policy domain that remains under-researched for many continental European countries, in spite of the fact that race relations and xenophobia are still contentious political issues across the entire continent. The regional framework under scrutiny here comes at a moment of the history of policy responses to migration phenomena, which is critical from a number of viewpoints. At the beginning of the third millennium, both multiculturalism and integrationist policy approaches to the management of ethnic and cultural diversity are increasingly under scrutiny. In Europe, moreover, the management of policy measures regulating the sphere of migration is currently shifting to an increased supranational regulation, which is itself unbalanced between allowing high integration requirements for incoming foreigners and guaranteeing enhanced equal treatment for those who have already settled (Joppke, 2007). Understanding whether and how a common race equality policy intersects in this process is intriguing.

The work is structured in five parts. Drawing a comparison with the mechanisms of enforcement of gender equality policy, the first chapter explains the empirical puzzle behind the research question. It also addresses why and how race equality became an object of decision-making and the subject of policy measures in Brussels.

The second chapter offers essential information on the theoretical and analytical approaches adopted, on the research design, and the methods employed for the empirical assessment. The latter is presented in three comparative chapters focusing, respectively, on the state of domestic antidiscrimination policy before the transposition of EU norms (Chapter Three), on the transposition process (Chapter Four), and on the domestic judicial enforcement of race equality policy (Chapter Five).

The conclusions offer a comparative overview on the implementation process, showing how the new methodology adopted for the analysis of domestic enforcement enhances the study of EU policy implementation and, in particular, of differential Europeanization dynamics.

Second, my aim is to bring about an enhanced comprehension of the public policy tools that are better able to provide positive outcomes in the field of fighting race discrimination within countries of immigration. In particular, I shall try to assess the conditions under which a model based on enhanced race consciousness, judicial strategies, the involvement of civil society organizations and the activity of an equality body, might be the appropriate one for serving in several European countries. Does one policy template fit
all situations in this field, or different motives for discrimination? And how likely is it that an Anglo-Saxon-inspired, public-interest litigation model will enhance non-discrimination rights for minorities with an immigration background?

My main argument is that the current underuse of judicial redress in the context of EU racial antidiscrimination policy is mainly due to the way in which member states have framed procedures to access judicial redress. The RED proposed an innovative framework setting forth new equal treatment rights and proposing facilitated procedures to enforce those rights. However, the large degree of flexibility left to the member states in terms of defining the actual operation of these ‘process elements’ may crucially ‘contain’ (Conant, 2002) and constrain domestic legal mobilization, hindering the qualitative evolution of equal treatment law and jurisprudence, aside from the frequency of the recourse made of it.
1 Race Equality and the European Union

‘In short, the Community delivered a ‘shock’ to national policy systems and helped create a new policy area at the national level’ (Mazey, 1998: 131)

Introduction

In early June 2000, the employment and social affairs ministers of the then 15 members states of the European Union unanimously agreed to a proposal for a Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Race or Ethnic Origin (Council of Ministers, 2000b), hereafter: the Race Equality Directive, RED. A few weeks later, after an impressively short lapse of time from the filing of the original proposal by the European Commission in November 1999, the RED was formally adopted by the Council of Ministers of the European Union.

The two institutions, a Council composed of a solid majority of representatives from centre-left governments and an equally centre-left balanced European Commission, had engaged during the same time in an unprecedented “battle of principles” against one of the member states, Austria. European institutions and member states had taken a common stance against the inclusion in the newly appointed Austrian government of the Freiheitliche Partei Österreichs (FPÖ, Freedom party), the party of Jörg Haider, a political leader known for his openly xenophobic and anti-immigrant positions. Diplomatic sanctions were adopted alleging a risk of breaching then Article 6 of the Treaty on the European Union (current Article 2 TEU), establishing a duty for the members of the Union to respect ‘the principles of liberty, democracy, respect for human rights and fundamental freedoms, the rule of law as well as fundamental rights as guaranteed by the European Convention on Human Rights’. These unique measures, adopted in reaction to what might have otherwise been considered intimately domestic affairs of one of the member states, were mainly caused by the frequent use of racist and neo-Nazi tropes by the members of the FPÖ. However politically aggressive, the sanctions remained symbolic, without implying the suspension of Austria’s voting rights in Brussels, one of the possible outcomes foreseen by the procedure of warning established by Article 7 of the TEU.
Thus, five months after the ‘EU14-Austria crisis’ (Ulfgard 2005), with the diplomatic sanctions against the Schüssel-Haider government still in force, Ms Elisabeth Sick, the Austrian FPÖ social affairs minister, sat in her Brussels chair at the Council of Ministers without daring to oppose the unanimous adoption of a supranational binding legal instrument promoting race equality in Europe.

Whatever the weight of the Haider affaire in the ‘record adoption’ (Geddes and Guiraudon 2004) of the RED, a number of those who were interviewed for this study commented that, in the wake of the ‘EU14-Austria crisis’, almost none among the national delegations present in the Council of Ministers at that moment had a precise idea of the innovative character of the measures that they were putting into force.6

The RED was about to impose on all EU member states a duty to incorporate into their domestic legal systems specific norms aimed at granting effective protection from various types of unequal treatment grounded on racial and ethnic motives (direct discrimination) or covertly causing racial or ethnic disparity (indirect discrimination), and behaviours like harassment and orders to discriminate. In short, a kind of specialised legislation that at the beginning of the 21st century was, in some respects surprisingly, absent from many countries in continental Europe. Moreover, the provisions of the RED were conceived to apply beyond the traditional scope covered — at that time— by established EU equal treatment policies concerning gender, such as equal salary, access to employment, vocational training, working conditions, and dismissal. Equal treatment on grounds of race was to be protected also in policy fields not directly linked to employment such as social protection, including social security and healthcare, social advantages, and also education. In addition to that, the directive expanded its scope also to the realm of civil and contract law, covering the supply of all those services and goods that are made available to a public, including housing. A protection that was set not to operate only “vertically”, viz. in between individuals and public authorities, but also horizontally, for private relations among individuals, be they persons or firms. Finally, being even more encompassing than established EU policy on discrimination on ground of (EU) nationality, the RED would grant equal treatment in spite of race not only for EU citizens, but also, and quite exceptionally in relation to most other individual rights granted by EU law, it would

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6 Interviews: EU MPG, FR HALDE2.
set up equal non-discrimination rights for ‘all individuals’, thus including even third country nationals.\(^7\)

There were basically three policy instruments designed to enforce such an overtly ambitious framework of protection: the introduction in the member states’ legal systems of specialised civil legislation containing precise definitions of discrimination and other relevant legal categories; specific elements of process to amend domestic procedures for adversarial judicial redress; and provisions for the establishment of public entities entrusted with the promotion of race equality (the so-called ‘equality bodies’).

Alongside the regulatory framework embodied by the RED, the Council supported the new policy through distributive measures. An Action Programme against Discrimination (Council of Ministers, 2000a) was adopted already in 2000 and provided 98 million euros for actions in the field of equal treatment on all grounds. Other funding targeting race discrimination was channelled through the European Social Fund in the framework of the Equal Initiative (European Commission, 2000). Together with the Action Programme, the Council adopted another, albeit less ambitious, equal treatment directive. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Council of Ministers, 2000c: hereinafter, the Framework Employment Directive, FED) established protection from discrimination on ground of age, religion or belief, sexual orientation and disability, but – among other elements – its scope was confined to the domain of employment and occupation.

In 2006, the PROGRESS programme became the successor to the distributive measures established in 2000, granting increased resources (75% more than in 2000, up to 178 million euro) to actions such as collecting data and developing studies on discrimination, awareness-raising campaigns and mainstreaming, and establishing specialised networks of non-discrimination actors, made up of judges, lawyers, NGOs or academics (European Parliament and Council, 2006).

The adoption of such a policy ‘framework’ — directives need to be transposed and detailed through national legislation —, ambitious in terms of both scope and instruments, took place against a backdrop of domestic policies on race equality in the then member states that could not have been more heterogeneous. Yet, a high degree of variation among countries within a specific policy domain is a common phenomenon in the European

\(^7\) Although the RED grants this indeed expansive scope, it provides, at the same time, for significant exceptions. See infra.
Union. Thus, in the field of European Union’s studies, this kind of variation pushed the elaboration of new theories as to the extent to which variation shaped EU policy making, justifying the delegation of competences to a supranational level of regulation.

The main question on which this work focuses, however, does not concern the adoption of the RED by the European Union, but rather its implementation in the European Union’s member states. Surprisingly little attention has yet been paid, in the literature, to the domestic effects of the 2000 equality directives in general, and to the RED in particular. This is particularly striking in view of the quite large number of political scientists and legal scholars who have looked sceptically or enthusiastically at the determined engagement of the European Union in this novel domain of policy more than 10 years ago.

Yet, 10 years after the adoption of the race equality measures, to what extent is the RED enforced at the domestic level? Did the directive develop its much-praised innovative potential and to what extent? Has it been implemented to the same extent in all member states and, if not, what would explain different degrees of enforcement across states?

This study begins from an empirical puzzle regarding the fact that, 10 years after its adoption, the “usual” signs of an extensive implementation of an equal treatment directive at the domestic level are still scarce for the RED. This empirical puzzle is outlined in the first section of this chapter drawing on an analogy with EU gender equality policy.

After clarifying the research puzzle, the reminder of this first chapter is concerned with showing the surprising absence of race equality policy in most of continental Europe until very recently, and the considerable variation among the few existing national policy models. The chapter goes on to sketch the main theories explaining this absence of race equality policy and show why and how race equality became an object of policy in Europe and in Brussels.

**Race Equality as a Research Puzzle**

The quotation from Sonia Mazey that opens this chapter has nothing to do with the RED and race equality policy. It is about EU gender equality policy. Nonetheless, the quotation outlines the puzzle that generated this study. A preliminary version of the research
question in which this puzzle may be translated reads as follows: will the implementation of EU race equality policy also create a shock for the member states and a new policy area at the national level, in a similar way as it did for gender? And how? In the remainder of this section I will elaborate on this puzzle further on, starting from recalling the main dynamics characterising the implementation of EU gender equality policy in some member states. Secondly, I will describe why the enforcement of the RED may be expected to produce dynamics similar to those typical of EU gender equality policy. Last, I will formulate a research question and show how answering this question would fill a relevant gap in the literature, which has focused on the RED’s adoption, but not on its actual implementation. In this way, this section will then provide the link to an historical overview of race equality policy and the RED and to the theoretical and empirical parts of this study, which occupy the second and subsequent chapters.

*Implementing EU equality policy: an analogy between gender and race?*

The impact of EU policy measures in the domain of gender equality on the Member States has been the object of a large number of studies in political science. The reasons for this attention are several. First and foremost, a majority of the existing studies have highlighted how, starting from a minor provision of the Treaties, EU policy created a new policy area in a number of member states whose policies on gender equality were either inexistent or very different from one another before the adoption of EU rules (Stetson Mc Bride and Mazur, 1995). As Mazey (1998) puts it, the story of EU gender equality policy ‘highlights the capacity of European institutions to force policy change at the national level’, or, in the words of Jupille and Caporaso ‘to determine structural change’ (2001). This does not mean that EU gender equality policy has directly and measurably improved the employment conditions of many European women, an affirmation that would be immediately objected by most European gender advocates. However, EU policy has arguably caused a change at least in national policy styles in the domain of gender equality, creating gender equality institutions that are similar or converging to a harmonised model across the EU. This model ensures that most EU member states have at least established a system of judicial redress for unequal treatment grounded on gender, have equal pay provisions, and a minimal common regulatory framework on pregnancy and motherhood.
The relative absence or incongruence of national policy measures in these two areas of equality policy prior to the adoption of regulatory measures at the level of the EU certainly constitutes a first important analogy between gender and race.

What is most relevant to our puzzle, nonetheless, is the way domestic policy/structural change came through in the domain of gender equality. The latter, in fact, has been the main point of interest for scholarship, which has generally agreed in underlining the crucial role exercised by supranational institutions with enforcement powers — in particular the Court of Justice of the European Union (CJEU) — as the first relevant actor to explain the dynamics of domestic change. Several authors concentrated on the relevance of the procedure for preliminary ruling in the context of equal pay and gender equality (Alter and Vargas, 2000, Cichowski, 2007, Tesoka, 1999). This procedure — outlined in current Article 267 TFEU (ex Article 234 TEC) — establishes a form of cooperation between national courts, the second actor relevant for the implementation process, and the Court of Justice. This cooperation is designed to verify the correct interpretation of EU treaty articles or secondary legislation in the context of domestic litigation.

In the domain of gender, the fruitful interaction between national courts and the Court of Justice not only highlighted domestic implementation gaps — on which the Commission could follow up with infringement proceedings. Also, an extensive interpretation by the ECJ contributed to expanding the substantive rights and the procedural rules already enshrined in secondary legislation. These dynamics have gone under the label of EU ‘judicial politics’ (Volcansek, 1986) or ‘judicial rulemaking’ (Cichowski, 2007) and have to a great extent highlighted the key role of a third core actor in the EU policy implementation architecture: individual litigants claiming their rights. Less political science literature has been so far dedicated to the effects in terms of domestic litigation.

Cichowski and Mazey highlight furthermore how the implementation of EU gender equality policy depended not only on individual litigants, but especially on the existence of a fourth actor in the policy implementation process: an organised civil society able to activate judicial proceedings, viz. women lobbies, NGOs, trade unions. These actors had in most cases been the first recipients of the EU funds established to accompany the
regulatory gender equality framework and build up the capacities of civil society as a conscientious recipient and user of EU policy measures.

Many of the same authors highlighted the fundamental contribution of a fifth actor of the implementation process: public enforcement agencies, such as equal treatment commissions, also known as “equality bodies” (Alter, 2006, Alter and Vargas, 2000, Caporaso and Jupille, 2001, Conant, 2001).

One recent example of this policy implementation scheme can be found in a 2011 decision of the CJEU, where the court decided to strike down an exception to the principle of equal access to services that was left by the last gender equality directive (Council of Ministers, 2004b) in the domain of private insurances. The ruling was pushed by a referral issued by a Belgian court, to which a third sector organization, the Association Belge des Consommateurs, had filed an EU-law based complaint. With its 2011 ruling, the Court struck down the exception and established an obligation for domestic insurance providers to respect gender equality in the calculation of the premium, forcing the member states to change their legislation in this regard before December 2012. 9

To summarize, a consistent scholarly literature identified a sort of ‘success story’ of EU gender equality policy in determining structural institutional change at the domestic level. This change was identified and mainly understood as a chain of repeated events, e.g. copycat lawsuits, like the one described in Figure 1.1. and crucially involving 1) supranational institutions CJEU and Commission), 2) domestic courts, 3) individual litigants, 4) civil society organizations and 5) domestic public bodies with law-enforcement powers, such as the equal treatment commissions, also named equality bodies.

Such an implementation chain is certainly relevant to other domains of EU policy characterised by diffused interests, e.g. environment (Slepcevic, 2009, Cichowski, 2007), or EU policy banning discrimination among nationals of EU member states in the domain of access to employment and social benefits (Conant, 2001). That chain is also the outpost of a tendency of the EU integration to foster adversarial legalism and public interest litigation, at least in some policy domains (Kelemen, 2006, Micklitz and Norbert, 1996). As the next section will show in more detail, the main analogy between gender and race

9 Association Belge des Consommateurs v. Conseil des Ministres, 2010, C-236/09 [ECR ]. The ruling probably benefitted more male costumers of insurance committees than women, as higher premiums are generally charged on the first. However, the ruling certainly contributed to a more equal access to such services across gender groups.
equality policy is that the provisions of the RED were clearly devised in a way so as to make possible the replication of this implementation scheme.

![Figure 1.1 Assumed Dynamics of judicial rulemaking in EU gender equality policy]

*The RED as an enriched individual judicial redress model*

An individual redress model is a model of equal treatment policy that is centred upon setting equal treatment rights and providing the unequally treated individual with an easy access to the redress system, be this judicial—involving domestic courts, or administrative—involving specialised agencies, or other administrative authorities, like ombudsmen, equality bodies, i.e. public enforcement bodies. In the literature, this model of antidiscrimination policy has been singled out as common of market liberalizing countries, where individuals need more safeguards from being excluded from the market (Schiek et al., 2007: 15-16), the state has fewer powers to directly intervene with social protection measures, and equality policy is thus founded upon a rights-based model, instead of on strong public intervention (Kelemen, 2011).

Legal scholars have so far described the RED as a policy instrument fundamentally inspired by this model (Bell, 2002, De Búrca, 2006), and thus apt to be implemented through court enforcement. The reason for this is that the directive focuses especially on setting forth procedures for the judicial enforcement of equal treatment rights, for instance
by defining legally enforceable concepts of discrimination (Article 2), the subject areas in which discrimination may be detected (Article 3) and naming the cases which are exempted from equal treatment law as exceptions (Article 3.2 and 4). More importantly, the core articles of the directive (7 to 8) impose on member states the duty to make judicial redress procedures easily accessible to victims, establishing particular procedural criteria, such as the shift of the burden of proof or the possibility for third sector organizations (NGOs or trade unions) to stand in litigation in order to support victims.\textsuperscript{10} This latter provision is of considerable relevance in view of the cited gender literature that identifies in organised civil society one of the main end-users of EU policies and a EU “ally” in domestic implementation. The RED leaves nonetheless to the member states the task of defining the exact conditions under which civil society can intervene in judicial complaints, e.g. what requirements NGOs and trade unions have to satisfy in order to be admitted to stand in litigation and whether they can bring collective complaints (i.e. cases on behalf of more complainants, such as class actions) or not.

Finally, the directive mandates the creation of equal treatment bodies (Article 13), a kind of state agencies that, in the countries where they were established before 2000, had either competences to file legal suits, or to support claimants, or to act as adjudicatory bodies. The final text of the directive avoids to require that member states endow the bodies with investigative powers or competences to pursue complaints as did the Commission’s original proposal (European Commission, 1999a). Nonetheless, it does not prevent the member states from attributing such competences to the equality bodies.

Among the above ‘core elements’, which are shown in Figure 1.2, the RED clearly derived certain legal definitions from the Court of Justice’s equal treatment jurisprudence relating both to gender and free movement. The procedural shift of the burden of proof and the legal definitions of some other concepts recalled in the directive —

\textsuperscript{10} The shift in the burden of proof is the evidentiary method developed by the Court of Justice with reference to equal pay. Article 8 of the RED on the burden of proof reads: ‘...When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’
HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3

Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, regardless of both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retaining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;

(e) social protection, including social security and healthcare;

(f) social advantages;

(g) education;

(h) access to and supply of goods and services which are available to the public, including housing.

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

Article 4

Genuine and determining occupational requirements

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Article 5

Positive action

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.

Article 6

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.
CHAPTER II

REMEDIES AND ENFORCEMENT

Article 7

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 8

Burden of proof

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

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 9

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 10

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

Article 11

Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.

2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

Article 12

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

CHAPTER III

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13

1. 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.

2. Member States shall ensure that the competences of these bodies include:
   — without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
   — conducting independent surveys concerning discrimination,
   — publishing independent reports and making recommendations on any issue relating to such discrimination.

Figure 1.2 Core articles of the Racial Equality Directives
as positive action and indirect discrimination (and its exceptions) — are the best example of this import. In summary, in addition to affirming new individual rights, such as those to be free from direct and indirect race discrimination and harassment, the directive sets up an individual judicial redress model and enriches this model with some elements of process so as to make it more easily enforceable from disadvantaged claimants, as visible minorities or people of colour are likely to be.

In seeking to ‘ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them’ (RED, Article 1), the drafters of the Directive clearly drew on two main policy templates as sources of inspiration. The first one is undoubtedly the established EU equal treatment policies. The second main point of reference is an Anglo-Saxon or Anglo-Dutch ‘civil law template’ that redresses race discrimination through adversarial litigation and the help of a public enforcement body.¹¹ The explicit reference to this model is further testified by the insertion in the RED of notions such as that of victimisation, indirect race discrimination, and positive action which are typical of Anglo-Saxon race antidiscrimination policies since the 1970s, and that the Court of Justice had already imported, but limitedly to gender and, to a lesser extent, free movement.¹²

What implementation for race equality policy?

The analogy portrayed above suggests a picture wherein a new EU policy measure, the RED, is fundamentally inspired by a model of policy adopted in another sector of equal treatment as well as in one or more relevant model-countries. Looking at this phenomenon from a theoretical point of view, we could name it as a ‘mimetic process’ of policy-making. In the context of the EU, public policy analysis has shown that resorting to mimesis and policy transfer to devise new supranational policies is a common phenomenon (Radaelli, 1971 the US Supreme Court decision in Griggs v Duke Power Co. introduced the notion of disparate impact for cases of employment discrimination, a notion generally considered as equivalent to the European terminology ‘indirect discrimination’ (01 U.S. 424 S. Ct. 849). The 1976 British RRA defines indirect race discrimination as when ‘a person...applies to that other a requirement or condition which he applies or would apply equally to persons not of the same race group as that other but which is such that the proportion of persons of the same race group as that other who can comply with it is considerably smaller than the proportion of persons not of that race groups who can comply with it...’

¹¹ Both these references and models are further argued and demonstrated below.
¹² In 1971 the US Supreme Court decided in Griggs v Duke Power Co. introduced the notion of disparate impact for cases of employment discrimination, a notion generally considered as equivalent to the European terminology ‘indirect discrimination’ (01 U.S. 424 S. Ct. 849). The 1976 British RRA defines indirect race discrimination as when ‘a person...applies to that other a requirement or condition which he applies or would apply equally to persons not of the same race group as that other but which is such that the proportion of persons of the same race group as that other who can comply with it is considerably smaller than the proportion of persons not of that race groups who can comply with it...’
Radaelli, in particular, argues that institutional isomorphism – an expression coined by institutionalist theory to describe the homogenisation of organisations which face similar environmental conditions (DiMaggio and Powell, 1983) – is frequently employed as a source of legitimacy for EU policy-making. If a policy worked in a specific domain or country, in fact, policymakers have a legitimate expectation to believe that it would also work in a neighbouring sector or in an enlarged polity. This reasoning is pretty straightforward, but thus far EU studies have mainly concentrated on institutional mimesis to explain why certain policy measures are adopted, i.e. in the policy-making process.

But what about the implementation phase? Is institutional isomorphism effective to replicate policy outcomes from one domain, or country, to another? And, if not, why? In the area of European Union studies, literature on Europeanization – here provisionally defined as the process through which the EU influences domestic change – has not yet addressed this specific theoretical question with empirical analyses. From these considerations, I sketch a theoretical puzzle on the domestic implementation of the RED, or, to put it into European Studies jargon, on the Europeanization of race antidiscrimination policy.


Outside the field of purely academic literature, the European Commission, through the funding programmes associated with the RED, has promoted a vast amount of research and publications aimed at assessing different aspects connected to the FED and the RED. A great part of this work has been carried out by governmental experts or academics,
frequently coordinated by the Migration Policy Group, an advocacy group based in Brussels.\textsuperscript{13} None of these works, however, addresses a causal question aimed at explaining the determinants of the policy implementation process. Their main focus is generally descriptive.

10 years after the adoption of the RED there are therefore some good reasons to address the theoretical puzzle sketched above. Talking about isomorphism with reference to EU race antidiscrimination policy means expecting that implementing race equality policy will replicate, at least to a certain degree, the dynamics identified in the context of the domestic enforcement of EU gender equality policy: an interaction between supranational institutions, individual litigants, civil society and equality bodies based on adversarial litigation, references for preliminary ruling, and enforcement actions by public equality bodies.

A preliminary overview on the national implementation of the RED, however, seems to counter that anticipation. In the past ten years, in fact, EU judicial rulemaking in the field of race equality has been fairly limited. At the end of 2010, the Court of Justice of the European Union had issued one sole decision based on a referral for preliminary ruling concerning the RED, in the Feryn case.\textsuperscript{14} Regarding infringement proceedings, the Commission was at first very active on the side of policy enforcement, launching a series of proceedings against nine member states already in 2004. Luxemburg rulings resulting from these proceedings, nonetheless, have only concerned the timeliness of the transposition of the RED, and not the degree of conformity of national measures to the RED’s requirements.\textsuperscript{15} All 14 proceedings launched in 2007 and 2008 for non-conformity were withdrawn after the stage of reasoned opinion.

In comparison, 10 years after the adoption of the 1975 Gender Equal Pay and 1976 Equal Treatment Directives (Council of Ministers, 1975, Council of Ministers, 1976) - not to talk about provisions on discrimination on ground of EU nationality - references to

\textsuperscript{13} The reports, which I am not going to quote one by one due to their large number, can be found at http://ec.europa.eu/social/main.jsp?catId=423&langId=en&furtherPubs=yes on the Migration Policy Group website http://www.migpolgroup.eu/publications.php?category=programme&kid=2 and the EU Fundamental Rights Agency (FRA) website: http://www.fra.europa.eu/fraWebsite/products/publications_reports/publications_reports_en.htm

\textsuperscript{14} Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn, 2008, C-54/07 [ECR I-5187]

\textsuperscript{15} For the ECJ rulings on non-trasposition of the RED see Commission v Luxembourg, 2005, C-320/04, Commission v Austria, 2005, C-335/04, Commission v Germany 2005, C-329/04, Commission v Finland, 2005, C-327/04, Commission v Greece, 2005, C-326/04.
preliminary rulings had been decidedly more frequent, amounting to 12 on equal pay and seven on equal treatment for a significantly lower number of member states. Legal proceedings ex Article 234 derived from infringement actions by the Commission had amounted to four for equal pay and three for equal treatment (Caporaso and Jupille, 2001).

This quick overview is puzzling for a number of reasons. First, such complex of innovating, common-law inspired, race-conscious, and wide-ranging (in terms of scope of application) policy measures contained in the RED seemed likely to cause a number of judicial interpretation problems to be solved at the level of domestic and European courts, or at least implementation gridlocks on which the Commission would have to intervene. For instance, the RED crucially avoided providing a definition of race and ethnic origin, an omission that could have caused interpretation requests. It also explicitly allowed member states to ‘maintain or adopt specific measures to prevent or compensate for disadvantages linked to race or ethnic origin’, permitting the adoption of positive actions. Measures of this type caused important jurisprudential disputes in the field of gender.16

Second, the scope of action given to the RED was much wider and “unusual” for EU equal treatment law than that given to the gender equality which used to be limited to employment. Finally, the facilitated access to legal standing and to the provision of evidence within the RED could have easily galvanized civil society activists as well as anti-racist movements to engage in litigation. Why does this seem to have happened to such a limited extent? Intuitively, we can postulate two macro-explanations for the non-reproduction of the same implementation processes in spite of the apparently similar policy framework: first, the policy measure could have been framed badly, and thus not be able to generate isomorphic implementation processes; second, macro “environmental conditions” could have changed since the time of the adoption of the RED.

None of these explanations seems satisfactory with a quick test. In spite of its uniqueness, in fact, the Feryn case testified to the potential for judicial rulemaking and court enforcement set up by the RED. In this case, in fact, a state equal treatment body, the Belgian one, made use of the discriminatory declarations of an entrepreneur in order to

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16 See the famous (contrasting) decisions on positive action in favour of women: Kalanke v Freie Hansestadt Bremen, 1995, C-450/93 [ECR 3051] and Helmut Marshall v Land Nordrhein Westfalen, C-409/95, 1997 [ECR 865].
check whether the provisions of Belgian law matched the requirements set by the RED, asking the Court of Justice to deliver an interpretation of the latter’s provisions.

More specifically, in Feryn, the Belgian court asked the CJEU to interpret the RED in order to determine whether the declaration of an employer that he would not recruit immigrant employees could amount to direct race discrimination. Other questions from the domestic court concerned whether proceedings for race discrimination in recruitment could be brought in the absence of an identified victim, what proof would be necessary in order to shift to the employer the burden to demonstrate that her recruitment policy was not discriminatory, and what would be an effective, proportionate and dissuasive sanction in a case with no victim. Following the opinion of advocate general Poiares Maduro, the court confirmed an (extensive) interpretation of the directive, in a decision which overall expanded the possibilities to apply the RED in the area of access to employment. Referring to Article 2(2)(a) of the RED - defining direct discrimination as a situation in which one person “is treated” less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin - the CJEU argued that, according to recital 8 of its preamble, the RED aims to foster conditions for a socially inclusive labour market. For this purpose, the RED’s Article 3(1)(a) covers, inter alia, selection criteria and recruitment conditions. As a consequence, the objective of the directive would be hard to achieve if its scope were limited to those cases in which an unsuccessful candidate for a post, considering herself as victim of direct discrimination, brought legal proceedings against the employer (para 24). The Court therefore held that the public statement of an employer that he would not recruit employees of a certain ethnic or racial origin, something clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, was direct discrimination within the meaning of the Directive (para 25). The CJEU also expressed the opinion that the Directive permitted, but did not require Member States to provide the means for associations to bring legal proceedings to ensure compliance with the Directive even in the absence of an identifiable complainant (para 27). As regards the burden of proof, the Court explained that the public statement of an employer about his recruitment policy not to hire persons of a certain racial or ethnic origin would establish the assumption of a directly discriminating recruitment policy and that it would be up to the employer to prove that he had not breached the principle of equal employment, because his real recruitment policy differed from his public declarations (para 29 et seq.). Last, the court required that that such sanctions should be effective, proportional and dissuasive where a public association was empowered by national law to enforce the
prohibition of discrimination (Krause, 2010, 922). As a consequence, the applicant’s request was to a large extent matched by the Luxembourg judges (Henrard, 2009, Krause, 2010). As a consequence, the case law created by this unique ruling was certainly not likely to discourage the prosecution of an EU-law litigation strategy.

On the side of environmental conditions, European monitoring bodies have not ceased underlining a growing concern towards the spread of racism and discrimination in Europe in the decade starting in 2000. Taking an indicator plausibly reliable in a diachronic perspective, i.e. successive Eurobarometer surveys, race and ethnic origin constantly remain the most common motive of witnessed discrimination between 2003 and 2009 across the European Union, surpassing all other suspected grounds listed in the FED. Moreover, in the spring of 2009, the EU Agency for Fundamental Rights (FRA, former EUMC) published the results of the first comparative survey on the experiences of discrimination and racism within communities of immigrants and ethnic minorities residing in the 27 EU member states European Union (FRA, 2009). The results of this investigation — the first conducted with a methodology that allows for a rigorous comparison among different EU countries — are interesting from many points of view, but one is of particular relevance here. The EU MEDIS survey shows that 55% of migrant and minority respondents believe that racial discrimination is widespread in their country, and that 37% of them, in particular individuals of Roma ethnicity and North African ancestry, also claim to have themselves been personally subjected to racial discrimination during the past year. A further piece of data, however, is of particular relevance here, namely the fact that 80% of those who claim they were victims of racial discrimination did not report the incident to anyone, some declaring that they were unaware of the existence of redress mechanisms and some others because they thought that a complaint would not have yielded any concrete results.

This last survey data is especially telling in the framework of our puzzle built upon an apparently rare judicial enforcement of the racial equality directive.

This work proposes to “zoom in” from a macro to a meso and micro level, and analyse the characteristics of the domestic enforcement of the Directive within the member states. Comparing across a selected number of member states, this inquiry will attempt to

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17 See Eurobarometers 57.0 (2003), 65.4 - Special Eurobarometer 263 (2007) and Special Eurobarometer 317 (2009) all available at [http://ec.europa.eu/public_opinion](http://ec.europa.eu/public_opinion)
determine whether domestic factors are likely to condition the judicial enforcement of the directive in a way likely to influence the macro policy-implementation cycle. Thus, the research question that this study will attempt to answer in the next chapters deals with the conditions under which EU race equal treatment policy may be expected to produce (or not) outcomes that, as in the case of gender, will induce EU-law litigation and a macro policy-implementation cycle likely to affect domestic change. In other words, under what conditions can we expect Europeanization in the field of equality policy? What are the conditions that, instead, hinder Europeanization-through-judicial-enforcement?

I develop the theoretical and analytical framework to answer this question in the second chapter of the study. Before moving to that section, however, I first concentrate on the reasons why, in 2000, the European Union decided to engage in race equality policy. I do so by first surveying European race equality policies existing before 2000, pointing to some of the theories that explain variation and the relative absence of race equality policy in continental Europe and, last, I trace the European Union’s engagement with equal treatment policy and race antidiscrimination.

**Race Equality Policies in Europe**

*1948-1965: From Fundamental Right to Policy*

In the first decade of the 21st century, most readers will be aware that Brussels’ competences are no longer confined to the sphere of trade, and that the scope of the acts adopted by the EU institutions has expanded to most of the policy domains that are also regulated at the domestic level, such as the environment, consumer protection, transport, and energy. In the last two decades of the 20th century, the gap between domestic legislative competences and European Union competences shrank significantly thanks to the successive treaty revisions that expanded the outreach of European Union policies to areas traditionally reserved to national sovereignty, such as immigration, justice, home affairs, etc. However, there is an innate difference in delegated competences on more traditional fields of state action, and provisions on race equality. In most member states of the European Union, in fact, the principle of equality before the law in spite of one’s race is generally listed among the norms and values considered of constitutional-level importance.
In the historical context recalled in the introduction to this chapter, that of the adoption of political sanctions against a Schlüssel-Haider-led Austria, the right to be free from discrimination and from racism was considered inherent in the set of fundamental rights referred to in former Article 6 TEU. The resolution of the European Parliament, in calling

‘on the Commission and the Council, together with the Parliament, to monitor developments especially regarding racism and xenophobia in Austria and throughout Europe’ (European Parliament, 2000)

clearly set the connection between the causes of the EU14-Austria crisis and Article 6. In general terms, in fact,

race discrimination is understood in human rights law as a violation of human rights. The right to be free from discrimination on the basis of race (including ethnicity) is characterised by the universality, inalienability, and democratic nature of fundamental rights’ (Petrova, 2001: 61).

In the following section I will explore the historical and political context in which race equality became and remained enlisted as (only) a fundamental right in most continental Europe, without becoming the object of specific policies, or in other words, without becoming explicitly enforceable against private persons (De Witte, 2009), as opposed to other states in the world.

The inscription of race equality in the list of fundamental rights occurred in the aftermath of World War II and, in particular, of the Holocaust. At a time when racial segregation and racial subjugation were still legal in many countries of the world, and in particular in the United States and in the territories of European colonies respectively, Article 1.3 of the United Nations Charter became the first provision envisaging race equality in the enjoyment of human rights and fundamental freedoms at the global level. In the following years, the international human rights regime linked to the organization of the United Nations evolved rapidly especially on the topic of race equality and protection from discrimination. This was due, in particular, to the initiative of African and Soviet sponsors who used the UN forum to attack the US and the European colonial powers on
that sensitive topic. Such a campaign ensured the inscription, in 1948, of the principle of equality and protection from discrimination in spite of one’s race in the Universal Declaration of Human Rights (Articles 2 and 7) and the almost contemporary adoption of a series of declarations by the UNESCO that aimed at refuting any scientific foundation for theories of race superiority (UNESCO, 1950, UNESCO, 1951, UNESCO, 1964, UNESCO, 1967). The studies promoted by UNESCO and its declarations contributed to the banning not only morally, but also scientifically, of theories of racial hierarchy promoted by supporters of biologic racism in the 19th and early 20th centuries (Möschel 2011a).

Arguably, the international attention brought to the matter of enduring race segregation in the West, against the backdrop of the Cold War, was also a deciding factor for the adoption of the landmark decision of the United States Supreme Court, Brown, that declared segregation of blacks as contrary to the principle of equality in 1954 (Dudziak, 2004). As Boyle and Baldaccini put it ‘it was largely the search for an international response to racism which produced the main components of the international human rights regime’ (1997: 150). And indeed, in 1958 the International Labour Organization also adopted its Convention No 111 on Race Discrimination in Employment and Occupation and in 1960 the UNESCO followed up with a Convention against Discrimination in Education.

In 1966, both the International Covenant on Social Economic and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR) reaffirmed the principle of race equality. The ICCPR also provided for a free standing equality clause (Article 26) mentioning, among others, race, colour, national origin and birth as unlawful grounds of unequal treatment. Almost at the same time, the International Convention on the Elimination of All Forms of Race Discrimination (ICERD) introduced a detailed and finally comprehensive definition of race discrimination together with provisions requiring State parties to enact domestic legislation to prevent and punish unequal treatment. Following the ICERD, race discrimination consists of

| any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (Article 1) |

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19 The emphasis underlines the fact that such framing of the ICERD covered both direct and indirect discrimination.
The ICERD was adopted a few months after the United States enacted the 1964 Civil Rights Act, a piece of legislation that protected individuals from race discrimination in employment, education, and all services provided by federally funded agencies, introducing the first example of a comprehensive (yet to be proved effective) race equality policy in the Western world.

1950–2000 Race Equality Policy in Western Europe

It was in this political and historical context that also some Western European countries adopted policies on race relations, antiracism, and race discrimination. In many states, post-war constitutions inscribed race equality among the fundamental principles of their domestic polities (Borella, 1992), but in most cases without supporting the principle of equality before the law with elaborated policies ensuring its application. As shown by De Witte, this meant that for a long time the principle of non-discrimination was considered as binding only on state entities and public bodies because, with exception made for few outliers, most European states did not consider that fundamental rights established binding obligations on private persons (2009).

Also, when the European governments agreed to a European Convention on Human Rights in the context of the Council of Europe, in 1950, non-discrimination on the grounds of race was inserted among the articles of the Convention, but not endowed with a self-standing value. Until the recent adoption of Protocol 12 (in 2000), Article 14 on non-discrimination was conceived to operate only in connection with the other rights set forth by the Convention, and not autonomously. It has therefore a more limited scope of action.

Back in the 1960s, among Western European countries, some states ratified the ICERD by introducing criminal legislation punishing direct (viz. purposeful) race discrimination and race hatred, some considered constitutional provisions enough to guarantee racial equality before the law, and some adhered to ILO convention No. 111 by introducing minor amendments to national codes or laws in the domain of employment.

The United Kingdom was the only Western European country to enact a full policy of race relations in parallel with the adoption of the ICERD, and shortly after the adoption of the 1964 US Civil Rights Act. The first UK Race Relations Act (RRA) dated from 1965. A more comprehensive, and long-lasting, race equality framework, including provisions
establishing a rather powerful administrative body overseeing the enforcement of the RRA — the Commission for Race Equality (CRE) — was adopted in 1976.

While the UK decided to address discrimination through policies employing means of civil law, other countries such as Belgium, France and Denmark adopted criminal legislation with a varying scope of action. Among them, France established wide ranging criminal provisions empowering associations to autonomously pursue race discrimination complaints, Italy enacted criminal provisions further strengthened in 1993, while Denmark restricted the antidiscrimination provisions to the domain of employment. Belgium established — but only at the beginning of the 1990s — a body dealing with equal treatment and discrimination (Centre pour l’égalité des chances et la lutte contre le racisme, CECLR, Centre for Equal Opportunities and Fight against Racism).

The remaining western European countries that displayed some sort of race equality policy before the adoption of the RED only adopted these measures much later. The Netherlands enforced a comprehensive equal treatment act only in 1994, attributing competences to enforce equality law to a Commissie Gelijke Behandeling (CGB, Equal Treatment Commission). Some legislation and an entity charged with handling race discrimination complaints, the National Bureau against Racism (LBR, Landelijk Bureau Racismebestrijding) had existed before, but only since 1985 (Forbes and Mead, 1993).

In spite of an entrenched Nordic tradition of ombudsmen overseeing individual rights, including, since 1984, the Ombudsmannen mot etnisk diskriminering (DO, race discrimination ombudsman), Sweden established specialised legislation on equal treatment on grounds of race only in 1999. Ireland adopted employment equality law and set up its Equality Authority and Tribunal in 1998. Italy inserted civil antidiscrimination provisions in its Immigration Act in the same year, but without establishing an enforcement body. As demonstrated by Table 1.1, most European Union’s member states waited a long time before transforming their principled engagements in race equality into an actual policy assorted with some form of redress mechanism or enforcement institution. Choices that were made some time earlier, as in France, were directed towards a policy model different from that adopted by the forerunner Anglo-Saxon countries.

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20 The table does not account for code amendments, but only for the adoption of specific race antidiscrimination policy measures, such as specialized laws (source: Forbes and Mead, 1995: integrated by the author).
The European Union as a polity took, instead, only a very short time if one considers that the principle of non-discrimination on the grounds of race was only inserted into the founding treaties in 1997 (ex Article 13 TEC, current Article 19 TFEU), as a result of the Amsterdam intergovernmental conference.

Why is it then that, in spite of the existence of a shared international commitment towards the elimination of race discrimination and constitutional equality clauses including race as an illegitimate discrimination motive, Western European states lacked or diverged so prominently in their policies on race equality before the RED?

The introduction of the RED sparked academic interest in this policy domain dominated by the evident national differences among European race equality traditions. Most authors have dedicated their inquiries to explaining those that were considered as opposite policy models, the Anglo-Saxon model, on the one hand, and the French model, on the other hand (Bleich, 2003, Lieberman, 2005, Suk, 2007, Strazzari, 2008, Geddes and Guiraudon, 2004). Only very few scholars (Casadei and Re, 2007, Solanke, 2009, Ferree, 2007) have devoted a wider reflection to explaining why other Western European countries had for a long time little, if any, antidiscrimination policy prescriptions focusing on race, colour, or ethnicity. In the next section, I address the issue of the variation and absence of race equality policies in Europe in order to clarify the extent of the disturbance brought about by the RED in this context. This discussion will, at the same time, highlight
some of the varying challenges that the implementation of the RED may raise in the domestic arenas, and that this study attempts to point out.

**Explaining the (Under) Development of Race Equality Policies in Europe**

*Ideational and historical institutionalist insights*

In order to explain national variation in race equality policies, some authors have focused on how the ideational concepts of race and racism have been used and interpreted on both sides of the Atlantic, and of the Channel (Bleich, 2002, Bleich, 2003). Other scholars have highlighted the legacy of recent history and path dependency from opposite legal models (Suk, 2008, Suk, 2007).

After World War Two and the Holocaust, in fact, the word race has long been, and to a large extent still is, considered a taboo in most continental European languages, and so are the terms that designate racial minorities. No later than in 2004 and 2010, respectively, proposals for amendments seeking the deletion of the word race were made with reference to the equality clauses of both the French and the German constitutions (Cremer, 2010, Baer, 2010, Lurel, 2004). On the contrary, the term itself, as well as terms designating specific race minorities such as Black, Latino, Asian, etc. were and are regularly employed in public discourse as well as in policy documents in the Anglo-Saxon world, even after World War Two and the Civil Rights Movement in the US.

According to Bleich and Suk, the overcautious use of the notion of race in public speech and documents in continental Europe had its first motivation in such a strong refusal of the theories of biologic racism that had underpinned both the Holocaust and (with much less reluctance) the legal subjugation of colonial subjects that their denial is likely to have been extended to the concept of race itself. In the wake of this, in most of continental Europe, politicians as well as legal and political science scholars do not talk about race, but about race-between-inverted-commas, “race”. Similarly, a number of regional and national European statutes that employ the notion of race have clear disclaimers that explain that that term is only used because there is no alternative word that comes at hand. Two contemporary examples of European policy drafting related to the term race are telling in this respect: the first (a) concerns precisely the RED; the second (b) a document of the Council of Europe:
(a) The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply an acceptance of such theories. (RED, Recital 6)

(b) Since all human beings belong to the same species, ECRI rejects theories based on the existence of different “races.” However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to “another race” are not excluded from the protection provided for by the legislation (European Commission against Racism and Intolerance [ECRI], 2002: fn. 1).

No similar notes are to be found in Anglo-Saxon legal texts related to race discrimination, nor in the ICERD.

The examples outlined above can best be referred to what have been defined as two different normative approaches to race. The first has been labelled “racial scepticism” and supports the view that races do not biologically exist and thus that all terms related to races should be discontinued. The second is “racial constructionism” and holds that race does not naturally exist but is in some ways socially constructed and, precisely because race is a social construct and therefore part of the real world, its use should be continued as a strategy to combat racism (Mallon, 2006). Although the ECRI declaration here above moves timidly in the territory of racial constructionism, racial skepticism has been the dominant paradigm in continental Europe until now.

The endurance of caution regarding the word race and of the racial scepticism approach implied policy choices made to ‘fight racism without races’ (Grigolo et al. 2011) in the post-war years. As Bleich (2002) shows well, the US, from which the UK derived the fundamental inspiration for its own race relation legislation (Parekh, 1998), took at least in part the view that ‘in order to get beyond racism, we must first take account of race’, as expressed in the famous quote of the US Supreme Court Justice Harry Blackmun.²¹ More concretely, legislative acts, jurisprudential interpretation, and measures adopted in the US and UK since the 1970s did employ the terms race, colour, descent and devised or allowed — albeit under ‘strict scrutiny’ — measures that would make use of racial classifications to

undue the effects of racism, sometimes even as entrenched societal problems. This is demonstrated, for instance, by the fact that both the American and the British established state agencies (the Equal Employment Opportunity Commission in the US and the Race Relation Board, then Commission for Race Equality, in the UK) which, in spite of different competences and resources, were both statutorily in charge of overseeing the enforcement of race antidiscrimination law, monitoring discrimination and providing support to those claiming to be victims of unequal treatment. In addition to the agencies, in both cases ‘positive policies’ of different nature were established in favour of race minorities. These ranged from active measures of desegregation in education and in the domain of voting rights, to affirmative action in employment, education and public procurement in the US, to policies of employment monitoring or active outreach toward minorities in the UK aiming to increment minorities’ chances to get a job, admission in schools, or visibility in the media. In a nutshell, in spite of an official US constitutional doctrine focused on the 14th amendment and a ‘colour-blindness’ in principle comparable to the European ‘antiracism without races’, the American approach was much more theoretical and teleological than it was practical, at least until the late 1970s (Sabbagh, 2007: talks about the ‘judicial use of subterfuge’ to uphold affirmative action). Certain policy measures enforced in the US – e.g. affirmative action in employment and higher education - and in Britain ended up displaying, at least for a few decades, some degree of ‘race-consciousness’ (Lieberman, 2002).

On the contrary, continental European states — and especially France — linked their less far-going antiracism policies strongly with the memory of the Holocaust and the violent acts of prejudiced individuals, rather than with the systemic social consequences of imperialism, decolonization and migration. Thus, the fight against racism was devised mainly as a fight against the resurgence of Nazism and anti-Semitism and of explicit prejudiced conceptions of the other leading to intentional acts of racism and to overt Anti-Semitism (Suk, 2007, Bleich, 2002, Lentin, 2004). Therefore, in these contexts, antiracism was mainly entrusted to state prosecutors who had to act by means of criminal law against the prejudiced individuals, instead of creating agencies attempting to regulate more entrenched or systematic phenomena, or individuals challenging other individuals’ behaviour or firms and states’ practices by horizontal, adversarial means of civil law. Being

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22 Strict scrutiny is the legal procedure applied by the US Supreme Court in matters implying distinctions of race, or provisions involving ‘discrete and insular minorities’, United States v. Carolene Products, 304 U.S. 144 (1938). On recognizing racism as an entrenched societal problem the US Supreme Court has been much more reluctant than US policy makers, see e.g. Washington et al v. Davis, 426 U.S. 229 (1976).
conceived only as an intentional, invidious act, directed against a specific minority (the Jews) on the basis of biologic racism, race discrimination had to be sanctioned morally and symbolically by the state through the criminal conviction. I refer to these policies as “anti-racism policies,” as their main object is to fight purposeful racism, rather than promote equal treatment of race minorities more generally.

This latter approach had of course some consequences that the Anglo-Saxon approach did not have, for instance that of completely banning expressions of anti-Semitism (which may be allowed in the US in compliance with the First Amendment on freedom of expression) (Neier, 2003), or minimizing the overt use of race categorizations. However, it also has many limits. The first is that it singles out racism and discrimination as individual deviance, and not as a widespread phenomenon systematically affecting certain groups. The second limit is that it crucially circumscribes to the police and public prosecutors alone the task of monitoring and counteracting racial discrimination, in a context in which traditionally racially homogenous societies were becoming increasingly multiracial due to migration pressures.

Sociological approaches: social movements and expert lobbying

Another perspective on the development of equality policies focuses on the forms of action and the discursive frames mobilized by ethnic/race minority movements claiming different forms of recognition, equal rights and redistribution of national resources to their polities of residence. In a cross-continental comparison, this type of literature, employing a social movement and sometimes socio-legal approach to the development of equality institutions, bridges the gender equality and race equality policy arenas.

In fact, in a similar way as many feminist scholars have imputed the adoption of gender antidiscrimination policies on the European continent to the pressure exerted by the women’s movements and specialised women lobbies associated with power, many scholars have focused on the pressures exerted by ethnic minority groups, civil rights movements as well as expert in-house lobbying on their behalf (Burstein, 1991, Skrentny, 2002, Tarrow, 1994) to explain the progress of race antidiscrimination/civil rights policy in the US.

In this framework, the gender European literature touched the question of the underdevelopment of race equality policies in comparison to sex equality policies in
Europe. This reflection stresses the contemporary development of gender and race equality policies in the Anglo-Saxon countries since the 1960/1970s, and their alternate development in continental Europe. Indeed, while in the US discrimination on grounds of gender in employment was first outlawed in the 1964 Civil Rights Act and in the UK a Sex Discrimination Act was enacted in 1975, i.e. just one year before the second RRA, many European countries engaged in gender equality policy – frequently under EU pressure – way before they started considering race. Looking at the US and Germany, Myra Marx Ferree (2007) explains this gap as follows:

Rather than a nation state built on the imagined homogeneity of its people and the defense of its borders against the “other”, as typical of Europe, the racial order of the US has relied on the inclusion but also the subordination of multiple “others”... Since discourses that justify and challenge differences in status in terms of the prevailing liberal discourse of rights form the master frames for American politics, thinking about race has always offered American feminists an analogy for understanding their own inclusion and subordination...


Race in Germany was defined as being about who could belong to the nation and enjoy rights of citizenship...since for Germans “race” means the Holocaust, not subordination within the nation, the ability to see gender as in any way “like race” is limited (Ferree, 2007: 241-243).

As a consequence, being longer perceived as exogenous to the national imagined community, in Europe race equality claims took more than gender claims to develop and undergo any form of social mobilization, first, and, second, of institutionalization. In particular, recognition and race equality claims took longer to develop because those belonging to visible ethno-race minorities were (are?) not perceived and did (do?) not perceive themselves as member of the European polities. In most European member states most visible minorities have long remained ‘foreign migrants’ or ‘denizens’ (Hammar, 1994) also from a legal point of view. This implies that in most countries, enacting measures on race equality would not win any vote to the proponents. For this reason, it is harder to identify a minority social movement behind the development of race equality policy on the European soil than it is for gender.23

23 A different discourse applies to ethnic minorities whose presence in Europe was not due to recent migration from former colonies. In fact, most of these populations could rely on a European citizenship, voting rights, and frame their recognition/equality claims in ethnic, cultural or linguistic terms. This study does not address this type of movements, their claims, and policies adopted in response to them.
Taking a European-centred perspective, Iyiola Solanke (2009) accounts for national variation and (under)development of antidiscrimination policy focusing on social movements, but under a different point of view. Solanke, in fact, identifies as key to the development of antidiscrimination policy in Europe right-wing anti-social racist movements. She argues that in European countries, the adoption of comprehensive antidiscrimination policies is determined by government responses to right-wing anti-social movements, and happens when government response is supported by research and (in-house) lobbying campaigns. Thus, continues Solanke, states like Germany, where after the Holocaust parliamentary right wing movements and parties have been more moderate on race and ethnic issues, did not engage in antidiscrimination policy from the outset. Conversely, in the United Kingdom, where some representatives of the conservative establishment, like the author of the notorious ‘Rivers of Blood’ speech, Enoch Powell, openly supported an anti-immigrant and anti-multicultural discourse since the 1960s (Parekh, 1998) and many race minorities enjoyed Commonwealth status, the government’s reaction was to commission research, listen to race equality lobbies, and adopt comprehensive measures on race relations already in the 1960-1970s.

From this perspective, the move of some continental European governments towards adopting antidiscrimination policy measures in the last two decades of the 20th century can be interpreted as a response to what many authors have described as an insurgent conservative movement predicating a new form of racism (Taguieff, 1987, Balibar, 1991, Modood, 1997). Authors talking about a “new racism” movement maintain that in the late 20th century, while biologic racism remains taboo, right wing movements have inclined towards propagating the idea that separate cultures cannot live together without experiencing major conflicts, and that the preservation of the respective cultural identities requires a spatial separation between different ethnic groups. More specifically, the new right reasoning applies to the presence of culturally diverse groups of migrant origin within the boundaries of old European nation states. Its discourse is apt to spread intolerance and fear of cultural diversity, devising a new form of racism, ‘new racism’ or ‘cultural racism’ (Barker, 1981). Combining inquiries into new racism with Solanke’s perspective would enable us to explain the differential development of race equal treatment laws in some EU member states, in response to parliamentary ‘cultural-racist’

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24 The ‘Rivers of Blood’ speech of 20 April 1968 by conservative MP Enoch Powell criticized Commonwealth immigration policy and warned about the risks linked to welcoming ethnic minority population in the UK.
right wing movements that formed later in some parts of the continent (e.g. Germany) rather than others (e.g. France) and on the continent in general, in comparison to the UK. Reading comparative analyses of the influence gained in various European countries by parties employing xenophobic frames (Thränhardt, 1997) in parallel with Table 1.1 can support this thesis. Moving the focus of the analysis from the national to the supranational level, the coincidence of the ‘Haider Affaire’ with the adoption of the RED by the EU, further reinforces this reading.

Rationalist approaches and immigration policy

The final perspective that needs to be cited before proceeding to the study of the actual adoption of the RED is the rationalist one, which looks at race antidiscrimination as the flip side of immigration policy.

Some authors, in fact, explain the adoption of race equality policies in certain national contexts as a way to counterbalance the tightening of immigration rules applied at the borders (Crowley, 1995, Parekh, 1998, Skrentny, 2001). According to these authors, the moments in which states raise barriers to foreign migration, for example in periods of inner economic downturn or of expanding international migration inflows, correspond to when the need to control xenophobic sentiments and smooth race relations “inside” increases. Thus, members of the same migrant and minority groups who are targets of restrictive choices at the borders of European states may benefit from improved equality measures within those states, in cases in which they are already legally resident. Stephen Small summarizes this policy dynamic in the maxim:

‘Love thy neighbour who should not be there in the first place’ (Small, 1994).

It is much more difficult to perform a summary test of this last perspective than it was for the approaches cited above, and it would be outside the scope of this study to provide a detailed test of all the above-mentioned theories on the development of race antidiscrimination policy in Europe.

However, the insights provided by these three approaches will be used to organize the next section and the attempt to explain the adoption of the RED by the European Union from different angles of observation: first, a historical recapitulation on the appearance of the concepts of discrimination and race in the European political spectrum,
together with an overview of the policy paths which opened the way for a European Union’s competence on equality policies in general, and race equality more specifically; second, an account centred on the reaction to extreme right-wing movements at the European level, and on movements and lobbies framing race equality claims in the European political sphere and providing expertise to policy makers; and finally the stocktaking of the immigration policy context at the supranational level in the years surrounding the adoption of the RED.

This short account will demonstrate how the adoption of the RED may to some extent fit all the three different perspectives outlined above, but mostly fits with a sociological approach centred on expert lobbying.

**Race Equality as a European Union Competence**

*The European Forerunner Paths to Non-Discrimination*

In approaching the development of policy measures to fight discrimination of, and enhance equality for visible minorities, European decision-makers could choose among several options from their policy toolbox. One option was that of relying on the legislation of some of the founding EU member states and adopt a criminal approach to the fight of racism. Second, the Union could rely on other models present in some other of its member states, as the UK and the Netherlands, and focus on discrimination and equal treatment in civil law. Last, and in view of the vast portion of visible minorities who are not (yet) EU citizens, their discrimination could have been tackled through the means of extending the equal rights of third country nationals. In the years between 1990 and 2000 the Union explored all three options, to finally converge on the RED.

Historically, ‘non-discrimination’ has been an important catchword in the sphere of European Union policy, but interestingly it has been long disconnected from race. In fact, neither the word ‘race’, nor ‘racism’ make a significant appearance in European ‘soft law’ documents until 1986, and in truly legislative acts until 1996/1997. For this reason, I will look at the evolution of EU competences in matters of racism and equal treatment on ground of race after having explored the involvement of the European Community/Union in other discrimination and equal treatment issues. The Community, in fact, developed
policy-making competence in the domain of equal treatment as early as the funding treaties of 1957. For 40 years, however, these competences have concerned only two specific policy sub-fields: first, that of non-discrimination on grounds of nationality, and second, that of gender equality.

Nationality

A policy of non-discrimination on the grounds of nationality found its justification in Article 7 of the Treaty of Rome (current Article 18 TFEU), establishing a principle which can perhaps be best described as ‘instrumental’ to the objective of realizing a common market characterised by freedom of movement for goods, capitals, services and labour. In the case of labour, the achievement of an efficient single market without interior borders implied that workers had to have the possibility to compete for jobs in all the countries of the Community; in order to freely move and establish themselves in all these countries, workers had to have the guarantee that they would not suffer from less advantageous conditions based on their nationality. Workers’ freedom of movement was thus sanctioned in former Article 48 of the Treaty of Rome (now Article 45 TFEU). This ‘interplay between the economic and social rationale for equality’ (Craig 2006) proved to be a fertile ground. In the years after the funding treaties, these articles concretised a vast number of policy measures which ensured freedom of movement and non-discrimination on ground of nationality for community workers, access to social security schemes for employed and self-employed persons in spite of their passport, etc. (e.g. Council of Ministers, 1968, Council of Ministers, 1971).

Non-discrimination on the grounds of nationality is applied among citizens of the EU member states — and their third country national family members — but not to other third country nationals. Thus, the number of beneficiaries of the principle and policy of equal treatment progressively expanded due to the successive EU enlargements. The policy also widened its scope of application over the years to all those policy areas that could be considered as falling ‘within the scope of the treaty’. This expansion was due, in particular, to an extensive interpretation of the concept of worker by the CJEU and to further

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25 In the original formulation of the Treaty of Rome: ‘Within the scope of application of this treaty and without prejudice to any special provision contained therein, any distinction on ground of nationality shall be prohibited. The Council may, on a proposal of the Commission and after consulting the Assembly, adopt, by a qualified majority, rules designed to prohibit such a discrimination’.

26 Ibidem, ‘Freedom of movement for workers shall be secured within the Community...Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.’

27 With the exceptions of those covered by association agreements, see below.
secondary legislation (Davies, 2003). The nationals of the EU member states were progressively granted freedom of movement and equal treatment in all but a very circumscribed number of domains – namely the access to certain public functions where the objective of safeguarding a State’s general interest implies the existence of a particular relation of loyalty with the State (Beenen, 2001). With the Maastricht treaty, the creation of an EU citizenship, and the entry into force of the Schengen agreements on free circulation, distinctions among European nationals were further reduced, while those regarding non-EU nationals increased.

As a cornerstone of the European Union’s architecture, the principle of non-discrimination of persons on grounds of nationality can come under review only in very few individual cases, for instance for specific reasons of public policy, public security or public health. New policy measures adopted after the Eastern enlargement of the EU (European Parliament and Council, 2004), which caused a sudden extension of the principle of non-discrimination to almost 100 million more people, confirmed census requirements in order to exercise free movement rights, highlighting the endurance of an economic rationale on the exercise of free movement and non-discrimination rights (Carrera, 2005).28

Gender

While it may be straightforward for an international organization aiming to eliminate internal barriers to have the competence to ensure the equal treatment of the nationals of its state parties, understanding why the Community/Union became also a promoter of gender non-discrimination is less intuitive. Similarly to nationality, the foundation of a EU competence in matters of gender equality was somehow instrumentally linked to the establishment of a common market and the double economic-social rationale outlined above. The extent to which gender equality policy developed at the EU level against a backdrop of very scarce measures in other domains of social policy is noticeable nonetheless (van der Vleuten, 2007).

28 With the accession of the 12 Central and Eastern new member states in 2004 some exceptions to freedom of movement and non-discrimination on ground of nationality were introduced, mainly for the phase following the EU enlargement. In this context, Directive 2004/38/EC has consolidated revenue criteria to exercise freedom of movement for a period longer than three months, and nuanced the equal treatment rule applying to EU nationals resident in another EU member state during those first three months.
### Table 1.2 The EU Equal Treatment Path

<table>
<thead>
<tr>
<th>Year</th>
<th>Equal treatment path (nationality &amp; gender)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1957</td>
<td>Art. 7 TEEC on non-discrimination of EC nationals in matters related to employment and occupation</td>
</tr>
<tr>
<td>1957</td>
<td>Art. 119 TEEC on the equal pay of men and women</td>
</tr>
<tr>
<td>1968</td>
<td>Council Regulation 1612/68/EC on the freedom of movement for workers within the Community</td>
</tr>
<tr>
<td>1971</td>
<td>Regulation 1408/71/EEC on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community</td>
</tr>
<tr>
<td>1976</td>
<td>Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment</td>
</tr>
<tr>
<td>1992</td>
<td>Maastricht Treaty; Article on 8 TEU on EU citizenship (Article 20 TFEU)</td>
</tr>
<tr>
<td>1995</td>
<td>Schengen Agreement comes into force</td>
</tr>
<tr>
<td>1997</td>
<td>Amsterdam Treaty: Article 13 TEC on non-discrimination on grounds of sex, race, ethnic origin, religion, sexual orientation, disability, age</td>
</tr>
<tr>
<td>2000</td>
<td>Action Programme against Discrimination</td>
</tr>
<tr>
<td>2002</td>
<td>Nice Proclamation of the Charter on Fundamental Rights of the EU: Article 21.1 on non-discrimination</td>
</tr>
<tr>
<td>2002</td>
<td>Directive 2002/73/CE on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working condition</td>
</tr>
<tr>
<td>2004</td>
<td>Directive 2004/38/CE on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States</td>
</tr>
<tr>
<td>2004</td>
<td>Directive 2004/113/EC on the equal treatment of men and women in the access to goods and services</td>
</tr>
<tr>
<td>2007</td>
<td>Lisbon Treaty, enforceability of Article 21.1 on non-discrimination</td>
</tr>
</tbody>
</table>

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The table does not include all of the free movement legislation including references to the principle on non-discrimination of persons on ground of nationality.
A European competence in sex equality policy rested for a long time on Article 119 of the Rome Treaty (now Article 157 TFEU) which, in the tiny chapter on social policy, provided that men and women should receive equal pay for equal work.\footnote{Ibidem, ‗Each Member State shall during the first stage ensure and in the subsequent stages maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this article “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or kind, which the workers receives, directly or indirectly, in respect oh his employment for his employee‘.} Strongly advocated by France, the article translated a concern for unfair labour competition from countries where women would have had the possibility to work at a lower wage once that the single market and freedom of movement among member states would be fully established (Ellis, 1998: 59-60). As in the case of nationality, the scope of this rather embryonic gender equality provision expanded over the years. First of all, judicial interpretation – i.e. the landmark ruling Defrenne II\footnote{Defrenne v. Société Anonyme Belge de Navigation Aérienne (Defrenne II), 1976, C-43/75 [ECR 455].} – established its direct horizontal applicability between private parties. Other judgments widely expanded its scope of action, for instance in the area of social provisions. As mentioned, judicial activism in the field of gender equality, as well as its impact in terms of secondary legislation was such a peculiar phenomenon to become the object of a wide number of studies (Cichowski, 2007, Mazey, 1998, Ellis, 1998, Hoskyns, 1996, Prechal and Burrows, 1990, van der Vleuten, 2007: just to cite some).

The directives adopted as a consequence of this judicial and social activism went far beyond the initial legal basis, venturing also into the domains of general equal treatment, pregnancy and maternity rights (Council of Ministers, 1971, Council of Ministers, 1975, Council of Ministers, 1976, Council of Ministers, 1978, Council of Ministers, 1986a, Council of Ministers, 1986b, Council of Ministers, 1992).\footnote{Notice that, until 1997, most of these acts were not based on article 119 TEEC/141 TEC, but on the general provision of article 100 TEEC (current article 352 TFEU) establishing a lawmaking procedure for policy domains where no explicit lawmaking procedure is established by the treaty, and on article 118a TEEC on the protection of the health and safety of workers.} Even though the equal treatment policy was for a long time limited to the domain of employment, the regulatory framework established through the directives and the distributive measures channelled through the European Social Fund (Mazey, 1998) spread significant policy adaptation in some member states, at least in the long term (Caporaso and Jupille, 2001, Hermanin and Squires, 2012, Tesoka, 1999).

In Brussels, interest in gender equality policy re-emerged after the 1995 enlargement to the Nordic countries, leading to the adoption of a further Directive (Council of Ministers, 1997a), the insertion of sex among the suspect motives covered by a
new provision on discrimination of the Amsterdam Treaty (then Article 13 TEC, current Article 19 TFEU), and the parallel engagement in soft policy measures. The 1997 Burden of Proof Directive established an evidentiary method to claim discrimination based on sex in courts — based on CJEU jurisprudence — which was destined to become one of the characterizing features of more recent measures of antidiscrimination policy. The Directive also institutionalised the concept of indirect discrimination, another product of the European Court’s judicial rulemaking activity. On the soft policy side, the EU engaged in a gender mainstreaming strategy.

The sudden adoption of the RED in 2000 had consequences also for the domain of gender equality. How could it be that race equality policy would become all at once more encompassing than gender equality policy, for instance in terms of scope of application and concepts of discrimination (Bell, 2004, Bell and Waddington, 2003)? The years from 2000 were characterised by gender antidiscrimination regulation “catching up” with the level set by the RED. In 2002, harassment became a feature of discrimination also in the domain of sex discrimination (Council of Ministers and Parliament, 2002). In 2004, the scope of gender equality provisions was finally extended to the access to goods and services (Council of Ministers, 2004b).

Antidiscrimination and anti-racism

First steps in the fight against racism

With a significant delay in comparison to nationality and gender antidiscrimination, the European Community engaged in soft policy measures on race relations only in the mid-1980s. The policy would gain legislative teeth in the first decade of the new century, with

33 See e.g. Commission v. France, 1988, C-318/86, [ECR 3559].
34 Before this Directive the concept was only present in some provisions of the TEC (art. 184) on association agreements and, more importantly, was referred to by the ECJ first in a ruling on free movement, Südmilch v Ugliola, 1969, C-15/69 [ECR 363] and, second, in a case of sex discrimination Sabbatini v European Parliament, 1972, C-32/71 [ECR 345]. Cf.
35 Following the definition of the United Nations Economic and Social Council (ECOSOC): ‘Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres, so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal of mainstreaming is to achieve gender equality.’ The concept was enounced in the Platform for Action adopted at the United Nations Fourth World Conference on Women, held in Beijing (China) in 1995.
the RED on the side of antidiscrimination policy, and a later Framework Decision on Combating Certain Forms of Racism and Xenophobia by means of criminal law (Council of Ministers, 2008) on the side of antiracism. This latter Decision was the product of a seven-year-long discussion in the Council, testifying that, even though the RED had opened up the black box of race relation policies at the EU level, this domain was not as consensual as it seemed in 2000.

The adjective ‘race’ and the word ‘racism’ made their way for the first time into EU policy documents in a 1986 declaration jointly adopted by the three European institutions (Council of Ministers et al., 1986). The Declaration was pushed by a 1984 European Parliament election that delivered worryingly positive results for extreme right-wing xenophobic parties in several member states, leading to the arrival of several such MEPs in Strasbourg. This episode led the EP to call for a specific Report into the Rise of Fascism and Racism in Europe (European Parliament, 1985: the Evrigenis Report’). The 1986 Declaration, adopted in view of the report, denounced the ‘growth of xenophobic attitudes, movements and acts of violence ... directed against immigrants’ and rejected any form of ‘segregation of foreigners’, mindful of the ‘positive contribution which workers who have their origins in the Member States or in third countries have made, and continue to make to the development of the Member State in which they legally reside’. It highlighted ‘the need to ensure that all acts or forms of discrimination are prevented or curbed’.

Similarly to other policy documents adopted in the 1980s and early 1990s, the Joint Declaration mainly addressed the more traditional issues of concern related to racism in continental European countries, such as verbal racism and, overwhelmingly, violent racism and anti-Semitism propagated by post-fascist ‘new racist’ movements burgeoning in the 1980s. The Joint Declaration only marginally ventured into the domain of ‘access racism’/discrimination, naming ‘foreign workers’, e.g. the third country nationals then excluded from EU equal treatment policies, as the would-be recipients of possible future antiracism and antidiscrimination measures.

This first joint stance on the fight against racism did not generate much follow up in its immediate aftermaths (Cunningham, 1992). During the late 1980s and early 1990s the EP and the Commission were active promoters of further soft policy measures, e.g. inquiries, resolutions and reports (see Table 1.3). 36 However, while the expert reports called for legislation, the states represented in the Council took over only few proposals, and reluctantly. The proposals were consequently purposefully watered down and


<table>
<thead>
<tr>
<th>Year</th>
<th>Anti-racism and Race Discrimination paths</th>
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<tbody>
<tr>
<td>1984/5</td>
<td>Committee of Inquiry into the Rise of Racism and Fascism in Europe established by the EP/ “Evrigenis Report”</td>
</tr>
<tr>
<td>1986</td>
<td>Joint declaration by the EP, the Council and the Commission against Racism and Xenophobia</td>
</tr>
<tr>
<td>1988</td>
<td>Proposal for a Council Resolution on Racism</td>
</tr>
<tr>
<td>1989</td>
<td>Community Charter of the Fundamental Social Rights of Workers (preamble)</td>
</tr>
<tr>
<td>1993</td>
<td>Starting Line Proposal</td>
</tr>
<tr>
<td>1994</td>
<td>Corfu European Council establishes a Consultative Commission on Racism and Xenophobia</td>
</tr>
<tr>
<td>1995</td>
<td>Communication on Racism, Xenophobia and Anti-Semitism by the EP and the Commission</td>
</tr>
<tr>
<td>1996</td>
<td>“Khan Report” and Florence European Council’s Presidency Conclusion on the Union’s determination to combat Racism and Xenophobia Joint action 96/443/JHA concerning action to combat racism and xenophobia</td>
</tr>
<tr>
<td>1997</td>
<td>Council Regulation establishing a European Monitoring centre for Racism and Xenophobia (EUMC) European Year against Racism Amsterdam Treaty: Article K.1, then 29 TEU on racism and xenophobia</td>
</tr>
<tr>
<td>1997</td>
<td>Amsterdam Treaty: Article 6a, then 13 TEC on non-discrimination on grounds of race and ethnic origin (among other grounds)</td>
</tr>
<tr>
<td>1998</td>
<td>Commission proposes an Action Plan Against Racism</td>
</tr>
<tr>
<td>2000</td>
<td>RED, Action Programme against Discrimination</td>
</tr>
<tr>
<td>2001</td>
<td>Proposal for a Council Framework Decision on Combating Racism and Xenophobia</td>
</tr>
<tr>
<td>2007</td>
<td>PROGRESS Programme</td>
</tr>
<tr>
<td>2008</td>
<td>Adoption of the Council’s Framework Decision on Combating Certain Forms of Racism and Xenophobia by means of criminal law</td>
</tr>
</tbody>
</table>

Table 1.3 The Anti-Racism and Race Discrimination Paths
Indeed, race discrimination was to be only very briefly mentioned in the preamble of one of the main (declaratory) documents adopted in the realm of social policy at the end of the 1908s, the European Charter of Fundamental Social Rights.

After a further EP report into Racism and Xenophobia (European Parliament, 1990) and more EP resolutions, in the early 1990s the most powerful legislative institution of the Communities, the Council, relied on the absence of a specific named competence in the treaties to oppose any legal measure on racism and race discrimination. An attitude that was more likely to mask a lack of political will (Bell, 2002: 62-63), rather than a scrupulous observation of the subsidiarity rule, which had easily been circumvented in other domains.

*Moving to a policy: the role of the ‘advocacy coalition’*

The destiny of antiracism and antidiscrimination in Brussels started to change at the beginning of the 1980s thanks to what proved to be an efficient ‘advocacy coalition’ (Sabatier, 1998) reuniting like-minded EU institutions (and especially a unit in Commission’s Directorate General Five and the EP Civil Liberties Committee), on the one hand, and a lobby organised by both QUANGOs specialised in antidiscrimination, and various types of NGOs, on the other hand (Ruzza, 2000). The network of quangos and NGOs, in particular a group formed in 1991 and called the Starting Line Group (SL), had a decisive influence on solving the main obstacles that antiracism advocates faced in the 1980s. The SL was coordinated by the Brussels-based Churches’ Commission for Migrants in Europe, the Dutch bureau against racism (LBR) and the British Commission for Race equality (CRE, the official English equality body). It engaged in liaising with the EP and the Commission, providing technical expertise, on the one hand, and gaining detailed knowledge of the institutional bottlenecks affecting the desired EU policies, on the other. Their specific aim was to make the EC adopt hard policy measures against discrimination based on race, ethnicity, religion and national origin. In 1993, the SL came up with a proper text of a draft directive on discrimination, initially to be based on then article 235 TEC (Dummet, 1994).

By providing a ‘Starting Line’ text, the coalition introduced a new lobbying strategy: that of directly proposing draft legislative texts to the Commission.  

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37 Interview EU MPG 1.
importantly, it overtook an approach unsuccessfully employed by the then principal representative of the antiracist movement in Brussels, the *Forum des Migrants* (Migrants’ Forum, FM). The FM, in fact, had insisted on protecting migrant workers from discrimination by explicitly extending equal treatment to migrants resident in Europe at the time of introducing EU citizenship within the Maastricht treaty. Faced with the refusal of the Council to address explicitly discrimination using a migration/nationality lens, the SL decided to talk about race, ethnic origin, religion and national origin, and leave the legal status of resident migrants to separate proposals.

In fact, in order to convince their institutional interlocutors that race relations were a matter of EU competence, the SL and the network around them framed antiracist and antidiscrimination claims so as to demonstrate that they were in line with the primary objectives of the first pillar of the EU, i.e. a smooth functioning of the internal market based on the freedom of movement for all workers. Freedom of movement, in the then end-of-the-20th-century migration context, required measures that would guarantee that people with a visible migration background would not fear becoming the object of race, ethnic or religious discrimination while moving in the EU. As explained by Virginie Guiraudon, ‘Racism was a sort of enemy of the market, an argument at which antiracist militants with a Marxist education had certainly never thought before’ (2000). Put briefly, the same economic and social rationale justifying the adoption of non-discrimination policy measures on ground of nationality and gender back in the 1950s, was actualized in the 1990s within the struggle over antiracist and race antidiscrimination measures at the EU level, without making a direct reference to the more contentious topic of the equality of third country nationals as such.

Faced nonetheless with the reluctance of the Council to act in the absence of an explicit legal basis, the antiracist campaign turned towards the insertion of a ‘Starting Point’, namely an article on race, ethnic, national origin, and religious discrimination in the funding treaties at the next intergovernmental conference, that of Amsterdam.38

The advocacy coalition framed the interest of fighting racism and discrimination in these terms and was at least partly successful, as the Treaty on the European Community was amended in 1997 with an article on non-discrimination on ground of race, ethnic origin, and religion or belief among other discrimination motives that the coalition as well as the institutional negotiators embraced in the wake of the campaign: age, disability, and

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38 Interview EU MPG 1.
sexual orientation. National origin was dropped. Moreover, while the antiracist movement had strived for the insertion of a self-standing clause with direct effect, or with an article foreseeing legislation to be passed by codecision under a majority rule, it obtained a provision that required unanimity in the Council for binding policy measures to be adopted.39 In 1996, thus, the success of the antidiscrimination campaign was only partial. Rather, on the side of the fight against racism and xenophobia, the intergovernmental conference foreshadowed competences under Title VI on judicial cooperation in criminal matters. This happened shortly after the Council had independently adopted a Joint Action on antiracism (Council of Ministers, 1996).

On the wave of the treaty amendment, the Council also embraced the recommendations of the Khan Consultative Commission and established a Monitoring Centre on Racism and Xenophobia (EUMC), a research centre with consultative functions, tasked with providing the Community and the Member States with ‘objective, reliable, and comparable data ... on the phenomena of racism, xenophobia and anti-Semitism (Council of Ministers, 1997b). It also agreed on proclaiming 1997 the ‘European Year against Racism.’ Thus, in 1998 the Commission was sufficiently emboldened to propose an Action Plan Against Racism that foresaw the encouragement of legislative measures.

At the end of the 1990s, in sum, the anti-racism and antidiscrimination agendas had been significantly advanced, even though in terms of the number of policy initiatives the antiracism/xenophobia perspective still seemed to be privileged over the antidiscrimination one within the Union policy arena. In the worlds of one sociologist, the EU did not seem to have yet properly solved

[t]he division between an assimilationist and a multiculturalist approach that characterizes European anti-racism...There is uncertainty whether to address racism with the assimilative Jacobin French tradition, or the more multicultural Dutch conception (Ruzza, 2000: 159)

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39 Until the Treaty of Lisbon introduced an ‘ordinary legislative procedure’ in 2009, the funding treaties of the Communities/Union foresaw a specific legislative decision-making procedure for each of the competences enlisted in the treaties. It is significant to note that although the adoption of measures on freedom of movement of persons (involving nationality non-discrimination aspects) and equal pay between men and women were and are subject to the codecision/ordinary legislative procedure (involving the EP as co-legislator) and a majority rule, new antidiscrimination policy measures based on ex Article 13 TEC and current Article 19 TFEU are still to be adopted by a unanimous decision of the Council. Thus, it is no surprise that the latest gender equality measures, e.g. Directive 2006/54/EC recasting provisions on gender equality in occupation (Council of Ministers and Parliament, 2006), was adopted on the basis of the Article 141 TEC (current Article 157 TFEU) on equal pay, and not on the basis of then Article 13 TEC.
The adoption of the RED

The division summarised by Ruzza seemed to be overcome when the Commission, in November 1999, largely drawing on a renewed proposal for a directive of the SL, decided to present two proposals based on then Article 13 TEC. One of the two proposals was expressly dedicated to discrimination on grounds of race and ethnic origin (European Commission, 1999a), while the other addressed the remaining motives of discrimination named in article 13 TEC, including religion and belief.

Apart the separation of religion, the Commission’s proposal contained the bulk of the second SL text, in particular in terms of a scope of action covering race and ethnic origin discrimination beyond the sphere of employment. Thus, the proposal was also able to gain a wider civil society’s support (Niessen and Chopin, 2004). Thanks to this backing, and even more so to the momentum generated by the ‘EU14-Austria crisis’ recalled in the introduction to this chapter, the process of adoption of the race proposal was quick and even shorter than that of the framework proposal on age, sexual orientation, religion or belief, and disability which had a much narrower scope of action (it only covered employment). The hurdles that were met during the negotiation of the RED led mainly to leaving to the member states the regulation of some aspects which had been harmonised in the original proposal (Tyson, 2001, Bell, 2001).

This notwithstanding, the text of the Directive that was finally adopted betrayed an ‘Anglo-Dutch flavour’ (Geddes and Guiraudon, 2004) easily understandable in view of the national origin of some of the main promoter organizations within the SL, in particular the English Commission for Race Equality (CRE). Moreover, in the view of Charles Liebermann

The Directive basically adopted a race-conscious, Anglo-American approach based on presumption of race and ethnic diversity rather than integration.’

(Lieberman, 2005: 218)

This would have meant taking a determined approach within the dichotomy between European integrationist and multiculturalist approaches to antidiscrimination outlined by Carlo Ruzza here above. But even though a race-conscious and multicultural flavour is certainly predominant in the directive, a few elements of a French or continental racial skepticist approach also found their place in its final draft. The caution on the notion of
‘racial origin’ as outlined in the recitals cited above is a small but clear sign of the difficult cultural synthesis that the RED represented.⁴⁰

Immigration Policy and The Equal Treatment of Third Country Nationals

According to the latter theoretical perspective above, immigration policy dynamics are also relevant when attempting to explain the adoption of racial equality norms in a specific polity. And indeed, at the level of the European Union, it is possible to detect a perfect coincidence between the institutionalization of competences on race discrimination and the ‘communitarization’ (viz. the passage from an intergovernmental mode of cooperation to a supranational legislative decision-making mode) of certain elements related to the control of external migration. In the case of the EU, they were both granted through the Treaty of Amsterdam of 1997. Can the RED thus be conceived as a way to counterbalance a tightening of immigration rules in the EU?

According to Mark Bell,

the restrictive trend of EU immigration policies acted as a catalyst for EU policy on combating racism. The perception of ‘Fortress Europe’ galvanised national and European civil society into transnational action for anti-racism measures at the EU level, so as to ameliorate the effects of immigration policies. Moreover, the EU institutions, in particular the Council, came under pressure to ‘legitimise’ immigration policies through greater attention to promoting integration’ (Bell, 2002: 67)

Indeed, the adoption of race antidiscrimination measures followed closely the establishment of the Schengen system in 1995. The Schengen convention finally opened up borders inside Europe for the free circulation of persons, but also established a system of coordinated border control among most EU member states. Since 1995, and in particular after the switch of immigration and asylum policy to a supranational decision-making mode decided in 1997, the Commission and the EU as a whole gained an increasingly wide policy competence in matters related to immigration, even more so in the specific domains

⁴⁰ See above. The provisions that enable civil society organizations with legal standing in antidiscrimination lawsuits are also an import from the French criminal model.
of border management, short term visa, asylum, family reunion, long-term resident status, and third country national (TCN) students and high-skilled workers’ status.

Nonetheless, it is not in this broad area of policy that equal treatment measures have gained force. Rather, it is exactly because equal treatment and non-discrimination clauses have not found a significant role in the domain of immigration policy that the RED can be conceived and is generally framed as a counterpoint to immigration policy. As a consequence, although existing EU antidiscrimination norms are officially considered as a strand of EU social policy, they have constantly been quoted as a sub-set of immigrant integration measures, for instance in the Tampere conclusions of 1999 (European Council, 1999), the Common Basic Principles for the Integration of Immigrants (Council of Ministers, 2004a), and the Hague programme (European Commission, 2005).

So far, EU immigration and asylum-related policy measures that extend the principle of equal treatment to visible minorities at risk of discrimination in their vest as foreign, immigrated workers are rare, but in particular they have been made weak. Among the dozen international bilateral agreements concluded by the former European Economic Community and the then EU with labour-sending countries, the agreements with Turkey - in particular, after Decision 1/80 of the Association Council (Association Council EEC-Turkey, 1980) - Algeria, Morocco and Tunisia provided for some farther-reaching equal treatment rights. These equal treatment clauses went beyond ensuring equal pay and working conditions, but in the case of Turkey, they covered access to the labour market and children’s education, whereas with Algeria, Morocco and Tunisia they extended to access to social security. As shown by Conant the provisions in these associations agreements responded to actual needs of the migrant population in Europe and were able to generate a small amount of EU-law litigation resulting in rulings by the Court of Justice, that went insofar as to recognize a direct effect to some of the equal treatment provisions enshrined in the association agreements. In spite of this clearly rights expansive case law, on the one side, member states decided not to enforce the Court of Justice’s judgments beyond individual cases, i.e. not removing generally discriminatory provisions contained in national statutes and regulations. On the other side, the Commission did not pursue these infringements through formal proceedings. As a consequence, member states were able to contain compliance with the Luxembourg jurisprudence and, even more importantly, refrained from inserting similar equal treatment clauses in the next association agreements. As Conant puts it: ‘The negative policy responses that followed ongoing legal
Challenges is ... consistent with the constellation of interests in this field, where Member States have actively resisted ECJ decisions through legislative overrule and pre-emption to avoid the additional financial burdens associated with migrant entitlement to social benefits' (Conant, 2002: 211).

In more recent times, other types of agreements – in particular the agreement on the European Economic Area – have extended equal treatment rights in the domain of free movement (Peers, 1996), especially to other, co-ethnic, resourceful Europeans.

As regards the directives in the field of asylum, family reunion and legal immigration adopted in the first decade of the 21st century, Jesse (2009) highlights that while most of them have set out precise and demanding integration requirements in order to allow legal migration to the EU, none of these pieces of legislation provided for wide-ranging equal treatment clauses. Wherever the non-discrimination principle is present — as in Article 13 of the Long Term Residents Directive (Council of Ministers, 2003) –, it is watered down by numerous exceptions.

While, according to Christian Joppke, antidiscrimination could well form ‘a liberal counterpoint to increasingly illiberal civic integration policies’ (2007: 5), the scope of EU race antidiscrimination policy has, however, been circumscribed strongly so as to leave this domain unattained by the RED. In fact, according to its Article 3.2

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

As a consequence, in spite of the above-mentioned references to antidiscrimination policy found in immigration-related EU policy documents, by agreeing on such an exception on the scope of the RED, EU policy makers took a decided step away from the possibility of fighting discrimination of visible minorities by enhancing the equal treatment of third country nationals resident in Europe.

To state the truth of the matter, the abandonment of this other main policy option for fighting discrimination in Europe had been clear as early as the mid-1980s. At that time one proposal introduced in a Commission communication of 1985 (European Commission, 1985), aimed at equalizing rights for third country national workers, brought
to the immediate referral of the Commission to the Court of Justice by five member states.\footnote{Federal Republic of Germany and others v Commission of the European Communities, 1987, C-281, 2835 287/85 [ECR 3203].} 10 years later, the two proposals drafted by the Starting Line group in the same spirit, i.e. complementing the second SL proposal on race discrimination with two more proposals on the rights of third country nationals resident in Europe (Bell, 2001, Bell, 2002), were never seriously taken into account.

From a wider perspective, none of the EU member states ratified the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990, which includes a similar nationality non-discrimination principle.

The exception inserted into Article 3.2 of the RED may well threaten the Directive’s power to counterbalance also to a minimum extent the effects of tight immigration rules on visible minorities who live in the Union. In brief, while the push for the adoption of the directive may well have come from the contemporary development of an EU competence on immigration, as Mark Bell argues, its potential in terms of enhancing the conditions of minorities who have not only an immigration background but also an immigration legal status remains seriously hampered.

The analysis of the domestic implementation of the Directive, which is proposed in the next chapters, attempts to also address this problem.
2 Europeanizing Race Equality?

Introduction

This second chapter presents the analytical framework employed to understand the conditions under which the implementation of the Race Equality Directive is likely to deliver policy outcomes converging toward the pattern identified for gender equality. In other words, it inquires as to why, so far, the typical judicial enforcement dynamics detected for other strands of EU equal treatment policy seem to surface for the RED to a much more limited extent.

To do so, the chapter begins by offering an overview of the main theoretical frameworks that could be employed to address this research question. Showing the merits and limits of the existing approaches to EU policy implementation, I select some analytical tools developed in the European studies literature and apply them to the case of race equality. This framework details a strategy of analysis that combines numerous strands of EU studies scholarship: the Europeanization and compliance literature, on the one hand, and studies on judicial politics, on the other. Both analytically and empirically, I propose to go one step further than most of this literature does in general in the analysis of national implementation. I therefore argue that, in the case of detailed regulation establishing new rights to be asserted in adversarial proceedings, as in the case of the RED, the extent of domestic change brought about by Europeanization should be assessed by looking at domestic litigation and jurisprudence, rather than at other standard dependent variables commonly used in EU studies, such as preliminary rulings or infringement proceedings. This leads me to concentrate on the RED as a single case study. The analytical framework has a three-step focus: it takes into account the status quo ante of the relevant policy in the member states, the phase of transposition into domestic legislation, and that of enforcement through domestic courts.

I use the case of race equality policy to demonstrate that varying litigation and jurisprudential outcomes in the implementation of such EU policies crucially depend on choices made at the stage of transposition concerning the ‘directive elements’ of a policy, i.e. those elements whose definition is left to the discretion of domestic policy makers.
In the third section of the chapter, I concentrate on methodology and present the research design. Finally, I spell out the indicators employed in my analysis and the methods adopted for each phase of the empirical investigation.

**Europeanization, Judicial Politics, and Compliance**

*Differential Europeanization as penetration*

It is necessary to acknowledge from the outset that nowadays any inquiry into the domestic implementation of EU policy can hardly avoid making reference to the notion of Europeanization and its main conceptual by-products, which I call the “Europeanization toolbox”. As the main scope of a strand of Europeanization research is to inquire about under what conditions the EU causes institutional change in the member states, this is a forced reference for the empirical puzzle addressed in this research.

Europeanization has become a catchphrase in the field of EU studies since when, around the middle of the 1990s, the attention of many scholars switched from explaining upward EU integration dynamics to understanding the impact of EU institutions and policies in the member states. In particular, the ‘differential Europe’ (Héritier, 2001) research agenda, aiming to explain why EU member states react differently to the same type of EU-influences, emerged since the turn of the century.

Among the many definitions used over the years for the popular concept of Europeanization, the one that I employ in this study is that proposed by Peter Mair in an article from 2004. Mair describes Europeanization as a dimension with two faces, an ‘institutional’ face and a ‘penetration’ face (2004). The institutional face corresponds to what other authors have referred to as ‘the emergence and the development at the European level of...political, legal, and social institutions associated with political problem-solving that formalize interactions among the actors, and of policy networks specializing in the creation of authoritative European rules’ (Cowles et al., 2001: 3, my emphasis).

The other face of Europeanization, according to Peter Mair is

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42 For a comprehensive presentation of Europeanization research and definitions, see Radaelli (2003) and Bulmer and Lequesne (2005: 12)
the penetration of European rules, directives and norms into the otherwise differentiated domestic spheres.' (Mair, 2004: 341, emphasis in the original)

In view of the empirical and theoretical puzzle outlined in the first chapter, the concept of Europeanization is valuable for two reasons. First, Europeanization as a neologism gives an immediate sense of the question addressed by this work: a precise policy approach has been mimetically uploaded at the EU level and is now subject to a process of top-down implementation targeting diversified national contexts, through a mechanism of policy diffusion mediated by European Union institutions. Second, one of the contributions of the Europeanization literature to the study of the determinants of domestic change is the notion of ‘policy misfit,’ which describes incongruence between pre-existing domestic institutions and new EU requirements. This notion, in fact, perfectly applies to the case of race equality policy in Western Europe.

While the first chapter of this work was in part dedicated to the upward/institutional process of Europeanization, the rest of the study concerns the incorporation of specific measures of race equality policy in the domestic arenas of the member states. Thus, the Janus-like notion of Europeanization is mainly limited in the remainder of this work to its downward/penetration faces.

Policy incongruence and adaptation

As mentioned, one of the main contributions of Europeanization scholarship to explaining variation caused by EU-derived influence is the notion of “goodness of fit” or “policy misfit.” As pointed out by Pasquier and Radaelli, the more recent strand of Europeanization research is characterised by

[A] standard model [...] based on a chain where EU “pressure” is mediated by intervening variables; leads to reactions and change at the domestic level, including resistance and inertial responses. Pressure is classified in terms of “goodness of fit”, which is not just the fit or lack of between EU and domestic policies, but covers structural-institutionalist fit as well. In addition, the intervening variables are made explicit and, instead of being generated by ad hoc explanations based on the peculiarity of the political systems of the member states, are grounded in either social constructivism or rational choice institutionalist frameworks.’ (Radaelli and Pasquier, 2007: 40-1)
The ‘goodness of fit’ perspective has permeated a significant part of the work that has tried to shed light on the differential implementation of EU policies across member states. Some scholars have considered a high level of pre-existing policy misfit/incongruence as a predictor of domestic resistance (Knill and Lehmkuhl, 2002). Others consider a certain degree of policy misfit/incongruence as a necessary condition for the development of a pressure for the adaptation of member states’ policies (or institutions) to European-driven change. The two hypotheses are not incompatible. If a larger incongruence between the national policy model and EU policy necessarily implies more resistance to policy change in a first stage - i.e. before the transposition of a directive, once adaptation is on its way policy change is likely to be wider than in the case of member states where incongruence is smaller. I name this refined argument as ‘policy incongruence argument’.

Concerning change, according to Schimmelfenning and Sedelmeier the main mechanisms of change are conditionality (“external incentives”) and social learning, where the leverage of conditionality depends on the clarity of EU norms, their credibility, the magnitude of the reward for compliance and the number of domestic veto players (Schimmelfennig and Sedelmeier, 2005). To measure change, in their 2001 study on the Europeanization of gender equality policy Caporaso and Jupille took as prima facie evidence of a higher degree of domestic change induced by EU policy, the higher number of references for preliminary rulings and infringement actions found for the UK than France in the domain of equal treatment and equal pay. Seeking to explain this variation, the authors argued that a higher level of misfit between EU prescriptions and domestic reality, and the presence of facilitating institutions at the domestic level, led to a higher degree of Europeanization of the domestic sphere in the case of the UK. In more concrete terms, the two authors showed that in the UK, where the gender-pay gap was higher before the transposition of the Equal Pay and Equal Treatment Directives, the higher pressure to adapt to EU requirements – and the presence of a specialised public agency and pressure groups facilitating the enforcement of EU-derived law – determined more rights-expanding preliminary rulings for the UK rather than for France. Analysing those rulings,

43 As mentioned in the quotation, the goodness of fit perspective has either stressed the importance of institutional fit or misfit between European policies and national administrative structures (Knill and Lenschow, 2001, Knill and Lenschow, 1998), or that of sectorial policy fit or misfit (Börzel, 2000, Börzel and Risse, 2003), or both dimensions together.
Jupille and Caporaso concluded that, in terms of legislation, individual rights, and domestic institutional balance (but not in terms of gender-pay gap!), EU policy had brought a larger domestic change in the UK than in France.\footnote{Jupille and Caporaso use the national gender-pay gap as a measure of policy fit with EU requirements in the UK and France. However, they do not consider the respective reduction of the gender-pay gap when they define and assess their indicator of domestic change.}

According to this approach, the quasi-absence of references from preliminary rulings on the RED could be interpreted either as a sign of a higher degree of congruence between EU policy and domestic policies (and little EU-induced change), or as a function of the lack of facilitating institutions in most of the member states. From Chapter One, however, we know that race equal treatment policy was largely under-developed in most continental member states of the EU before the adoption of the RED and that, wherever race antidiscrimination policy existed, it was modelled on an antiracist approach different from that portrayed in the RED. On the other hand, we also know that the RED itself mandates the creation of procedural devices facilitating its enforcement in the forms of facilitating organizations (equality bodies) and facilitating rules for judicial evidence and legal standing.

Thus, the analytical model proposed by Jupille and Caporaso needs to be modified or at least complemented so as to explain the case of race equal treatment policy. I do so by altering it in two ways. On the one hand, I choose to look at a different type of \textit{prima facie evidence} of domestic change, focusing on national court decisions and expansion of rights in terms of domestic jurisprudence, instead of references from preliminary rulings. On the other hand, I integrate the toolbox offered from the Europeanization literature (policy misfit hypothesis and mediating factors) with more insights from the judicial politics literature, and an actor-centred approach derived from the compliance scholarship.

\textit{The argument: the relevance of domestic judicial politics}

In this study, I use the term implementation, following Raustiala and Slaughter, as the ‘process of putting international commitments into practice’ (Raustiala and Slaughter, 2002: 538). Implementation covers two distinct aspects, or stages: legal transposition (T1) and the practical enforcement of EU law (T2). Transposition means the establishment of the necessary institutional requirements to apply European policy in practice.
Enforcement means the faithful practical application of European law by domestic courts or other domestic actors capable of enforcing EU-derived law. If a European provision is correctly transposed and enforced, then it has been fully implemented and may cause domestic change, in the form of policy outcomes converging to a similar, EU-induced, template across member states. I argue that to understand the varying extent to which race antidiscrimination policy provisions are enforced at the domestic level and establish their potential for domestic change it is necessary to take into account: a) a varying level of policy incongruence with EU policy (at $T_0$); and b) the level of compliance of the transposed EU measures.

As a consequence, one of my main criticisms of the use of the Europeanization model proposed by Jupille and Caporaso – as well as of other research that focuses on references for preliminary rulings as indicators of Europeanization – is that preliminary rulings are not a sufficient predictor of the extent of EU-induced change, and even less so, of EU policy implementation.

On the one hand, as Conant (2002) shows, whenever preliminary rulings are not accompanied by enforcement actions that generalize the impact of the jurisprudence of the Court of Justice of the European Union, the extent of change imposed through the CJEU’s judicial rule-making can be successfully ‘contained’, i.e. curtailed, by domestic actors. Thus, even in the presence of a prolonged EU-law litigation strategy – as in the case analysed by Conant of litigation against discrimination on grounds of third country nationality in the access to social benefits – the real extent of domestic change can be little even when Luxembourg rulings expand the nominal outreach of EU law or EU’s association agreements in terms of individual rights. The rulings of the CJEU set principles for the interpretation of EU law, but the extent to which such principles are followed by national actors at the domestic level, e.g. by national judges and policymakers, varies according to domestic factors that are subtracted from the influence of EU policy. In the four cases described by Conant in her 2002 book – the liberalization of European telecommunications, the intergovernmental reform of electricity, access to public-sector employment for EU nationals, and the access to social benefits for non nationals – the volume of litigation before the Court of Justice and national courts was paradoxically higher in the field of non-nationals’ access to social benefits than in the other cases (2002: 207). Nonetheless, TCNs’ demand for reform did not match with the EU- and member states-perceived ‘need for reform’ as indicated by the fact that infringements related to
equal treatment provisions adopted in the association agreements of the 1960/70s and case law developed in the 1980s have never been pursued by the EC, and that national legislation has never be amended according to the case law.

On the other hand, the absence of Luxembourg rulings does not necessarily imply the absence of domestic change. The less frequent use of EU-law strategies in the domain of environment detected by some authors (Cichowski, 2007, Golub, 1996, Slepcevic, 2009) was not automatically connected with a lower degree of domestic change, evidence of which has been shown by other Europeanization research (Börzel, 2002, Börzel, 2003, Knill and Lenschow, 1998, Knill and Lenschow, 2001). In explaining cross-national variation in the inclination of domestic courts to collaborate with the Court of Justice of the European Union, for instance, Golub stresses the influence of domestic politics on decisions concerning referrals, and argues in favour of a ‘reconsideration of the significance that preliminary references ... occupy ... in future research on the role of national courts.’ Criticizing the tendency to forge an unproblematic linkage between judicial stimulus and affirmative political responses (the “myth of rights”), Lisa Conant also criticizes approaches that attribute to CJEU rulings a direct potential for domestic policy change.

Most accounts implicitly or explicitly assume that ECJ [CJEU] rulings are automatic catalysis for policy change and that innovative legal interpretation prompts wide-ranging reforms (Conant, 2002: 15).

In her 2002 book, in particular, Conant shows how a broad mobilization of legal and political pressure is necessary to expand the practical application of controversial interpretations by the Court of Justice, and that, in the absence of that mobilization at the member state level, CJEU jurisprudence and its innovative right-expansive potential can effectively be ‘contained.’

Conant, Alter and Vargas (2000) and the other authors cited above derive their conclusions from a more in-depth exploration of domestic litigation in the domains affected by EU policy, showing that variation in the number of preliminary rulings depends on factors that are either country-specific (Börzel and Cichowski, 2003) or policy-specific (Cichowski, 2007, Conant, 2002, Golub, 1996). These analyses make clear that the presence of preliminary rulings is not an effective predictor of domestic change, and they

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45 I provide more detail on the mobilization argument in Chapter Five, which focuses on domestic enforcement.
all evoke a more attentive consideration of the interests for legal mobilization of domestic actors or of institutions facilitating access to judicial redress in order to explain the extent of change induced by EU policy.


Criticizing the value attributed to preliminary rulings in the context of some Europeanization research, nonetheless, I do not intend to dismiss the overall value of judicial politics research and, more specifically, of court decisions as indicator of policy enforcement and of Europeanization. Rather, I agree with those authors that identify in some recent EU policy measures the persistence of a preference for detailed regulation whose domestic effects can push towards increasing recourse to adversarial litigation at the level of member states. This is, in particular, the thesis of Daniel Kelemen and other scholars who argue that EU integration pushes member states into a more adversarial, American-inspired, policy-style, because the fragmentation of power at EU level encourages the production of detailed laws with strict goals, deadlines and procedural requirements that encourage a “judicialized” approach to implementation (Franchino, 2005; Kelemen 2004; Prechal 1995)

[...] By presenting policy goals as individual rights that private actors are obliged to respect the EU can readily shift the costs of compliance to private sector and member state governments. (Kelemen, 2006: 105)

Although I refrain from embracing this claim for the whole spectrum of policy domains covered by EU policy-making – for which I do not underestimate the importance that new modes of governance have come to recover – I certainly do so with reference to equal treatment and social policy. As argued in Chapter One, in fact, the core regulatory prescriptions within the RED and the FED set up new substantive rights, as well as procedural rights for the individual judicial redress of unequal treatment grounded on or amounting to race discrimination. As a consequence, I maintain that it is appropriate to look at domestic litigation and jurisprudence to account for the effective implementation of
the RED and to evaluate its potential for domestic change. Critical to the development of domestic change, thus, is the extent to which procedural rights in terms of access to judicial redress are set out at member state level. These features depend on how EU member states transpose directives.

**Transposition and Compliance**

In domestic courts adversarial litigation and jurisprudential decisions are only very rarely based on EU law. Plaintiffs and judges who operate in the member states file and adjudicate first on the basis of domestic law, in particular in the absence of major jurisprudential precedents at the EU level. When a new rule or piece of legislation is introduced, for instance to transpose a directive, domestic actors are not necessarily aware of the EU-derivation of that rule. A national government, in fact, may claim the paternity of a new innovative policy that was, instead, adopted under pressure from Brussels. Conversely, national governments may attempt to “hide” new legislation, the adoption of which was urged by EU membership, but that domestic actors did not necessarily support, for instance by scattering the new provisions in several pieces of legislation or concentrating them in a side-law. Lastly, governments may openly oppose the national transposition of EU policy through what has been defined as ‘opposition through the backdoor’ (Falkner et al., 2002), for instance when an EU policy measure is adopted without the full consent of their government. In this last case, national governments may purposefully delay the transposition of a EU rule or adopt laws that are non-compliant with EU requirements.

In addition, as policy measures, directives leave to the member state a margin of discretion regarding how to implement specific requirements. Traditionally, a directive will contain some “regulatory elements”— e.g. new rights that member states shall grant or recognize, or procedures and institutions that they shall establish — as well as other, non-regulatory elements. For instance, member states will be left with a series of admissible options concerning the attainment of certain regulatory goals: I call these ‘directive’ elements of a policy. Last, ‘soft’ elements are framed in the form of permission: member states may implement them or not. Usually, an EU directive is a cocktail of these types of elements with a varying concentration of elements of each type.

I suggest that in order to understand how policies enshrined in EU directives are implemented domestically it is crucial to go beyond understanding whether directives have
been duly transposed. Looking at what policy options member states adopt where they are left with a large amount of discretion is paramount for identifying more or less successful implementation dynamics.

This leads me to have recourse to another analytical toolbox, that of compliance studies. In the field of European Union studies, scholarship on compliance has mainly addressed the question of the varying performances of EU member states in transposing directives. More specifically, authors have paid attention either to explaining timely compliance with EU requirements – i.e. whether directives are transposed according to the deadline defined by Brussels – or to the quality of domestic compliance – i.e. whether the provisions of national law correctly transpose the regulatory elements of directives. In general, whereas the Europeanization literature is interested in explaining institutional change, the compliance literature is more interested in a normative assessment of whether EU prescriptions are implemented in a timely and correct manner.

The debate on the determinants of domestic compliance has evolved since the first studies that attributed a decisive explanatory value to a country’s administrative capacity to transpose (Siedentopf and Ziller, 1988, Ciavarini Azzi, 2000, Pappas, 1995). Nowadays, the principal voices in the debate assert either that compliance is country-specific, or that is sector-specific or, even, directive-specific. Sociological-institutionalist explanations of compliance are frequently contrasted with actor-centred approaches (Börzel, 2003, Falkner et al., 2005, Treib, 2003). Large-N compliance studies rely on databases containing information on infringement proceedings launched by the European Commission in its role as guardian of the treaties, or on information communicated by the member states and collected on CELEX (Berglund et al., 2006, Kaeding, 2006, König et al., 2005). Qualitative research combines official information derived from infringement proceedings with in-depth case-specific analyses (Falkner et al., 2005, Falkner et al., 2008).

As briefly anticipated above, in this study I join the perspective that domestic policy-makers have a deciding role in determining compliance. In particular, in addition to defining the contents of the transposition measures, domestic policy makers choose the instrument through which directives are transposed and can determine the degree of salience attributed to the new policy-measures (Steunenberg, 2006). Their role as ‘veto players’ extends beyond attaining the formal level of compliance enshrined in national law.
and sanctioned by the Commission’s approval, or targeted by its infringements proceedings. Their choices in terms of discretionary elements within directives (what I call ‘directive elements’) can directly affect the process of domestic policy implementation. In particular, the less detailed the directives, the more the domestic veto players will be able to affect the policy-implementation cycle with the choices they make at the moment of transposition.

The discretion of domestic policy makers and their reluctance to translate EU engagements in domestic law can be contrasted and remedied through the infringement proceedings engaged in by the European Commission. However, responses to infringement proceedings can vary according to the determination of the Commission in pursuing certain proceedings and the way in which domestic policy makers decide to reply to infringements (Conant, 2002). As mentioned in Chapter One, in the case of the RED, the EC did not pursue any infringement for incorrect transposition beyond the stage of reasoned opinion.

**Analytical model and main assumptions**

Following on from the considerations made above, I present an analytical model for the study of the domestic implementation of race antidiscrimination policy that applies to the case of the RED analytical tools from the three fields of EU studies discussed above (see Figure 2.1). I develop an analysis in two stages with the purpose of explaining under what conditions – or combination of factors – domestic implementation is more likely to occur.

*Policy incongruence, transposition, institutional adaptation and compliance*

The first analytical stage looks at the transposition of the directive in the member states focusing on the influence that domestic actors exert at the central level during the process of transposition. The outcome of the transposition process, the legislative output adopted to comply with the RED, is defined as ‘institutional adaptation’ and is evaluated on a scale of quality of compliance. At this stage the incongruence-hypothesis is confronted with the actor-centred approach in order to ascertain which perspective is better able to explain the level of compliance attained by single countries, or to what extent the two perspectives complement each other.
Figure 2.1 Mechanisms of Europeanization for race equality policy

I expect that, at this stage, a higher degree of policy incongruence will make institutional adaptation and the attainment of a less likely. I also hypothesize that the level of compliance attained through the domestic process of transposition is fundamentally influenced by the political orientation of ruling majorities. Whereas centre-left majorities will in general appropriate the theme of race discrimination and support a compliant transposition of the directive, centre-right majorities will engage in minimal forms of transposition, at the limit of compliance. Reluctance to transpose new EU rules will be generally affected by the ‘directive elements’ of EU policy, or more generally, those elements of process that EU regulation leaves up to member states to decide.
The hypothesis is based on the larger political reward that left and centre-left parties generally gain from pursuing social policies. It is also based on the assumption that race equality policy is usually politically linked to the theme of immigration. Broadly speaking, centre left parties in Europe have been more openly engaged with multicultural policies or policies that subsidise enhanced integration schemes (Ette and Faist, 2007, Koopmans and Statham, 2000). In 2000, centre-left ministerial representatives in the EU Council of Ministers were able to adopt the RED in the space of few months, whereas the Framework Decision on Racism and Xenophobia was stuck in the Council for seven years after its political composition changed in 2001.  

*Enforcement, litigation, and domestic mobilization*

The second phase of the analysis focuses on how the new statutory/institutional framework is applied at the domestic level, paying particular attention to the judicial enforcement of the new provisions. I account for the level of litigation and the type of jurisprudence found for each member state and take into account the domestic legal mobilization. According to the findings of literature on gender equality policy, I look at the role in promoting litigation of both specialised civil society organizations and independent organizations tasked with the promotion of specific rights (equality bodies). Comparing the findings for the three member states I assess whether the differential evolution in domestic litigation and jurisprudence is better explained by policy incongruence, or the level of compliance reached through the national transposition process, the degree of domestic legal mobilization, or of more these factors taken together.  

I expect that the level of domestic mobilization in each member state will be influenced by the options adopted at the moment of transposition in terms of elements of process opening up or restricting access to the legal arena. A country’s level of policy incongruence is also expected to have an influence in this second phase. More specifically, a larger policy incongruence is expected to galvanize those domestic actors for whom the new EU policy opens up new opportunities for action. Thus, I finally expect the impact of policy incongruence to be different following the phases of implementation analysed and the domestic actors that are confronted with the new, EU-derived, policy measures. I

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46 For a more detailed discussion of these hypotheses see Chapter 4.
47 For a more detailed discussion of these hypotheses see Chapter Five.
assume that domestic actors will interact according to pre-defined preferences, which are summarized in Table 2.1.

<table>
<thead>
<tr>
<th>Domestic Actors</th>
<th>Interest constellation – Assumed preferences over race equality policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Policy-makers</td>
<td>Dependent on the ruling majority; right wing and centre-right policymakers keen on maintaining domestic policy; centre-left majorities open to new equality model embodied by the RED</td>
</tr>
<tr>
<td>Equality bodies</td>
<td>Dependent on their degree of independence from political power. The more autonomous, the more prone to enforce the equality model embodied in the RED, pursue judicial strategies or lobby to acquire powers to litigate, when they are not entrusted with them</td>
</tr>
<tr>
<td>Judiciary</td>
<td>Dependent on the domestic receptiveness toward EU and international law. Open/receptive courts more keen to discard domestic legislation in favour of the new equality model embodied in the RED</td>
</tr>
<tr>
<td>NGOs</td>
<td>The more technically specialised, internationalized and open to EU funding the more prone to the new equality model embodied in the RED and to litigation strategies</td>
</tr>
<tr>
<td>Experts’ networks</td>
<td>If EU-socialised, able to lobby the decision-making centres in favour of adapting to the new model of equality policy and to work for further development and full compliance</td>
</tr>
<tr>
<td>Employers/Service providers and their associations</td>
<td>Hostile to new equality model portrayed by the RED, and in particular to antidiscrimination litigation seen as potential cost. Keener to implement self-regulation initiatives such as ‘diversity plans’</td>
</tr>
<tr>
<td>Trade Unions</td>
<td>Sympathetic to new equality model portrayed by the RED, supporting legal mobilization whenever they have a legal mobilization tradition</td>
</tr>
</tbody>
</table>

Table 2.1 Interest Definition and Preferences of Main Domestic Actors over Race Equality Policy

Comparative Research Design and Case Selection

In order to single out what domestic factor, or combination of factors, is more likely to determine a limited implementation of EU race equality policy, this study adopts a comparative research design and proposes an in-depth inquiry into a small number of countries. The countries selected for this purpose are France, Germany and Italy and the selection is based on a “most different system” research design (Przeworski and Teune, 1970). This approach requires selecting cases that differ as much as possible with regard to potential causal factors, except that all cases are exposed to one causal factor, or a combination thereof, that the researcher assumes to be significant. By showing that the
result of being exposed to varying factors is that outcomes do not differ in a significant way, the researcher is able to identify the variables that count to explain the outcome. Before identifying variation, however, it is necessary to identify the common characteristics that make the cases comparable, by controlling for other possible sources of convergence in the apparently limited outcomes of race equal treatment policy.

Setting common ground

The first three criteria establishing a comparability of the countries selected for the study are directly connected to the empirical puzzle that I sketched out in Chapter One, and aim to establish a certain common ground providing for a meaningful comparison among the three countries.

First, the selected countries had to be subject to the same obligations in terms of their timing of implementation. This led me to exclude all the newer Eastern and Central EU member states from the process of case-selection, because their transposition deadline did not correspond with that of the countries that participated in the process of adoption of the RED. Further, given the interconnectedness between the adoption of the RED and the political priority to tackle unequal treatment of communities of migrant origin settled in Europe, it was appropriate to focus this study on Western countries of immigration.

Second, in the concluding section of Chapter One, I noticed that a fundamental expectation about the domestic enforcement of the RED as a policy measure focused on judicial redress, and introducing radically innovative legislation in most EU countries, would mean that domestic courts would immediately send references for preliminary rulings to the Court of Justice of the European Union so as to clarify possible legal contradictions with the new provisions. As we saw, this expectation was not matched so far, except for one case coming from Belgium. While I challenge the idea that preliminary rulings can be a predictor of domestic change, I make sure to control for other factors hindering judicial cooperation, so as to better understand why the RED did not lead to the expected judicial dialogue. Thus, I select the three countries that usually refer the highest total and per year number of preliminary rulings to Luxemburg. Germany, France and Italy have constantly been the main contributors to the Luxembourg court’s activity

A final reason that led me to concentrate in this pool of countries was the need to have a broadly comparable number of possible end-users of the individual redress measures that the RED required member states to adopt. In other words, I needed to select countries that presented a certain, comparable, degree of ethnic difference within the resident population and close levels of perceived race discrimination.

Most Western European countries, however, do not collect data on the ethno-racial make-up of their population because the general caution or, as I earlier defined it, “scepticism” concerning the notion of race permits not only equal treatment policies, but has also led many EU members to refrain from using race categorization in public statistics (Simon, 2007). Most of the other countries in the world (and many in Eastern Europe) do collect data on colour, ethnicity and membership in a national minority, for instance through the census, for various purposes, such as measuring the comparative disadvantage faced by specific ethnic groups in specific sectors or life, or actually evaluating the effect of race antidiscrimination policies (Morning, 2008, Simon, 2004). This said, only 15% of the 141 countries in Anne Morning’s 2008 sample collect explicit information on race.

The numerical invisibility of the continental European communities of colour has increasingly become a topic of discussion among scientists and political stakeholders, in particular after the adoption of the RED and the consequent need to measure the phenomenon that the new EU policy intended to tackle (De Schutter, 2006, Makkonen, 2007, Ringelheim and de Schutter, 2006, Sabbagh and Peer, 2008). However, whereas some have started speaking in favour of the collection of carefully collected ethnic data – i.e. anonymous, and derived from self-identification – (Wrench, 2011, Grigolo et al., 2011, Simon, 2008), no such data were available at the moment of selecting the countries for this study.

France, Germany and Italy were thus picked on the basis of the fact that they all have a rather vast, even though not equal, proportion of individuals who belong to visible minorities. Exact numbers on that population are, however, impossible to claim, and the

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48 According to Cichowski’s (2007) data, France, Germany and Italy are not the three member states that send the most references in the field of social provisions/gender equality. Nonetheless, I prefer to rely on more comprehensive data on preliminary rulings, insofar as the provisions of the RED go beyond the domain of social policy and cover private/contract law as well.
comparison had to be based on relevant proxies, such as the population of third country nationals and that of second generations with national citizenship but a migration background. Most comparative projects involving an impact analysis of antidiscrimination policy (e.g. the Migrant Integration Policy Index, MIPEX) refer to similar “proxy data.”

In 2008, data on non-EU foreign residents in the three countries showed a population of third country nationals of 2,498 million in France (3.8% of the population), 2,391 in Italy (4.2%), and 4,740 in Germany (5.8%) (Eurostat, 2009). These data are of course superficial for precisely describing the percentage of non-autochthonous or non-co-ethnics living in the three countries, in particular because they do not account for people of colour who are citizens of the respective countries. Given the lack of ethnic data, thus, the closest measure of ethnic minorities with migrant backgrounds that one can gain for the three countries is frequently represented by the statistics including information on the country of origin of the parents of the naturalized “second-generation citizens.” Not all the countries, however, collect this type of data.

In France the figures about third country nationals completely ignore the vast portion of second generation immigrants who, thanks to an expansive citizenship policy, have to a large extent acquired French citizenship after being born in France. In 2008, the National Institute of Statistical Studies counted around 3.2 million second-generation individuals, half of whom had a non-European (mainly African) ancestry (Borrel and Lhommeau, 2008).

In Italy, on the one hand, official data on the foreign residents does not account for a vast number of undocumented migrants (estimated at more than 1 million) of which more than half are supposed to be third country nationals (Caritas/Migrantes, 2009). The figure also does not include around 1 million Romanian immigrants, who, although intuitively co-ethnics, have increasingly been racialized and identified as a security threat (Sigona, 2008, Hanretty and Hermanin, 2010). Roma are another visible minority whose numerical consistence is uncertain – it is generally but cautiously estimated at around 170,000 individuals in Italy and 12 million in the entire EU. However, most Roma do not figure in official statistics because some Roma are Italian citizens, whereas many are de facto stateless descendants of former Yugoslavian citizens.

On the other hand, the Italian figure on third country nationals is likely to include most second-generation migrants who may be part of communities of colour. This is due to
the higher restrictiveness of Italian citizenship policy, the extremely low naturalization rates in the years 1990 and 2000, and the recentness of the migration phenomenon in Italy (Zincone, 2006, Zincone and Basili, 2011). Data on Italian citizens with an immigration background are to date not yet available.49

Finally, Germany’s higher proportion of foreigners is to a large extent due to its longer history as a country of immigration, like France, and its tendency not to grant citizenship to its non-co-ethnic foreign residents, like Italy. In spite of a major reform of citizenship policy adopted at the turn of the century, which opened naturalization to around 1 million people, most recent statistics show that, in 2008, naturalization numbers dropped to their lowest level in a decade, because the law still requires one to relinquish one’s own second citizenship to become a German citizen (Hailbronner, 2010). The German Institute for Statistics, through the Mikrozensus, counted around 3.3 million second generation Germans (i.e. citizens born in Germany with a migration background) as of 2008, of which half are German co-ethnics (Spätaussiedler) or descendants of EU citizens (Statistisches Bundesamt, 2009).

In brief, given the lack of precise data, it is impossible to achieve a perfect comparison among the three countries in terms of potential policy recipients. However, the discussion above provides a background idea of why the three countries can be used in a comparative study like the present one.

<table>
<thead>
<tr>
<th>Population data (in million, 2008)</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Third country nationals TCN</td>
<td>2,498</td>
<td>4,740</td>
<td>2,391</td>
</tr>
<tr>
<td>Second generation citizen from TCN ancestry</td>
<td>1,6</td>
<td>1,6</td>
<td>N/A</td>
</tr>
<tr>
<td>Undocumented TCN</td>
<td>N/A</td>
<td>N/A</td>
<td>1</td>
</tr>
<tr>
<td>Total population</td>
<td>63,753</td>
<td>82,218</td>
<td>59,619</td>
</tr>
</tbody>
</table>

Table 2.2 Potential beneficiaries of race antidiscrimination measures (rough estimation)

From another point of view, the lack of data on ethnic minorities also hinders any static measure of the “level of race inequality,” for instance in terms of pay-gap in a specific

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49 Interview IT ISTAT.
country, another intuitively important factor on which a case selection aiming to measure the outcomes of antidiscrimination policy could be based.

Given this limit, a substitute indicator that we can refer to is a standard survey of public opinion. Race discrimination is considered as widespread in France and Italy (80/79% and 70/71% of Eurobarometer respondents in 2007/2009 around 87-88 and between 77 and 94% of minority respondents in 2009 respectively,), whereas the percentage is significantly lower for Germany (48/54% of Eurobarometer respondents and between 46 and 52% of minority respondents). In all the three countries, however, the percentages of those who declare having witnessed episodes of race discrimination are closer (15% in France, 12% in Germany and 9% in Italy in 2009). Surveys of the kind of the Eurobarometer, although in some ways significant, are likely to provide an underestimation of indirect discrimination, given the fuzziness of the notion for non-specialists.

<table>
<thead>
<tr>
<th></th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thinks race discrimination widespread (2007)</td>
<td>80</td>
<td>48</td>
<td>71</td>
</tr>
<tr>
<td>Thinks race discrimination widespread (2009)</td>
<td>79</td>
<td>54</td>
<td>70</td>
</tr>
<tr>
<td>Thinks race discrimination widespread (2009 – minority population only)</td>
<td>North Africans 88</td>
<td>Turkish 52</td>
<td>North Africans 94</td>
</tr>
<tr>
<td></td>
<td>Sub Saharan 87</td>
<td>Ex-Yugoslav 46</td>
<td>Albanian 94</td>
</tr>
<tr>
<td>Witnessed race discrimination (2009)</td>
<td>15</td>
<td>12</td>
<td>9</td>
</tr>
</tbody>
</table>

Table 2.3 Perceptions of race discrimination in France, Germany and Italy (% of Special Eurobarometer 263 and 317 respondents, and EU MEDIS survey minority respondents)

Based on these data, or rather the lack of precise data, the study will be based on a strong initial assumption, namely that in the three countries the level of race inequality is comparable and constant for the period that I study.

50 Special Eurobarometer 263 (2007), Special Eurobarometer 317 (2009), EU MEDIS Survey (FRA 2009).
Other criteria of case selection

The other motives that guided the case selection are connected to the theoretical and analytical framework outlined above. Here, I basically aim to find a certain degree of variation in those domestic variables that were identified as significant for explaining the outcomes of domestic implementation.

Policy incongruence

First, I directed my case selection towards those countries where a certain degree of policy incongruence would be expected in consideration of their not being a model-country (or “pace-setter”) for the legislative framework portrayed in the RED. This requirement excluded the UK and the Netherlands from the selection of cases.

France, Germany and Italy are non-model countries where, however, a certain degree of variation in their respective level of policy fit with the RED was expected given the anecdotal evidence already recalled in Chapter One (see Figure 1.1).

Until 2000, France’s race antidiscrimination policy was mainly contained in specialised statutes establishing a criminal approach to discrimination. Comparative legal and political science literature has frequently underlined the distance between this model of policy and the Anglo-Saxon policies, on the one hand, and the RED, on the other. Germany, instead, is a country with no specialised legislation on race equality or antiracism, whereas Italy has both criminal and civil statutes on race discrimination.

Domestic politics of transposition

A second criterion considered for the case selection is related to the countries’ transposition performances and their records in terms of compliance. In this domain, the recent study by Falkner on compliance with EU social policy directives (Falkner and Treib, 2008) assigns the three states to different ideal-typical clusters of EU member states in relation to compliance. The clusters – or ‘worlds of compliance’ – are designed as a result of Falkner et. al.’s study focusing on compliance with 90 social policy directives and represent different ideal-typical results of the interaction of domestic players with regard to compliance.51 Falkner uses an extended notion of compliance, which comprehends
legislative transposition but also domestic court enforcement of EU social policy. According to Falkner et. al.'s typology, Germany is placed in the world of domestic politics, characterised by political “picking and choosing” during the process of transposition and respectful enforcement of the new rules during the phase of enforcement. France is placed in the world of transposition neglect, substantially affected by domestic actors’ neglect for EU policy in the phase of domestic transposition and a later correct enforcement. Italy pertains to the world of dead letters, where provisions picked and chosen by decision-makers during the phase of transposition are then neglected at the moment of enforcement.

<table>
<thead>
<tr>
<th>Policy incongruence (anecdotal)</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Large</td>
<td>Medium</td>
<td>Small</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Compliance record in EU social policy</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforcement</td>
<td>Neglect transposition</td>
<td>Partial transposition</td>
<td>Partial transposition</td>
</tr>
<tr>
<td></td>
<td>Enforcement</td>
<td>Enforcement</td>
<td>No enforcement</td>
</tr>
</tbody>
</table>

Table 2.4 Case selection matrix

In conclusion, these three countries present a combination of similar and different characteristics that make them three compelling cases for the issue under study here.

**Operationalization and strategies of data collection**

The empirical part of this study is organised in three comparative chapters each of which provides for a detailed operationalization of the main concepts evoked at every stage of the research. The three chapters also present in detail the different strategies of inquiry and the sources of empirical data used for each phase of the analysis.

Chapter Three operationalizes the concept of policy incongruence with reference to the RED and provides an overview of policy incongruence in France, Germany and Italy for the period preceding the transposition of the RED. Because of the lack of precise comparable data on ethnic inequality discussed above, the chapter operationalizes the concept of policy incongruence in institutional-organizational terms, looking at the relevant statutes and organizational arrangements in force within the member states.
before the RED. Data have mainly been compiled from national legislation archives, expert interviews, and relevant secondary sources.

Chapter Four, on the transposition of the RED, operationalizes the concepts of compliance. It details the way in which the domestic stakeholders have influenced the transposition of the RED and offers an overview of the level of legal compliance attained in each member state through the transposition process. This chapter is also based on expert interviews, but data from interviews have been integrated with the relevant records of national parliamentary debates.

Chapter Five, finally, operationalizes and assesses the outcomes of enforcing race equality policy. To do so, it provides a detailed account of the judicial enforcement of the RED, both in terms of increasing frequency of race antidiscrimination litigation within each member state, and evolution of domestic jurisprudence towards sanctioning the new substantive and procedural rights introduced by the RED. The data source here is approximately 15 expert interviews with legal practitioners (judges, lawyers, NGO paralegals, equality bodies’ personnel) in every state and national case law databases. The chapter discusses the influence of the different factors likely to affect judicial enforcement: policy incongruence and level of compliance (as assessed in Chapters Three and Four) and domestic mobilization.

As a consequence, the remainder of this section is limited to analysing and operationalizing the Race Equality Directive as an independent variable likely to influence domestic change in terms of individual judicial redress.

**Race equality policy as hybrid policy**

Discussing the adoption of the RED and the Action Programme in 2000, Gráinne De Búrca describes the RED as a hybrid model in the context of policy measures inspired by ‘new governance instruments:’

the model of a EU framework directive with broadly defined objectives, premised on the need for the involvement of intermediate institutions, backed up by a network of relevant institutions and stakeholders, and supported by a set of programmes intended to mobilise and resource civil society actors and to generate a body of cross-national data and research, successfully combines
significant elements of the experimental governance approach while retaining some of the incentive structure and compliance back-up of the rights model with its legal framework, judicial interpretative role and formal sanctions (De Búrca, 2006: 99).

According to De Búrca, in fact, the RED contemplates, on the one hand, a classical regulatory framework typical of most EU directives. On the other, instead, the RED proposes a series of measures highly typical of a new governance approach. These elements encourage member states to promote ‘positive actions’ to prevent or compensate for disadvantages linked to racial or ethnic origin, to engage in the diffusion of information, in the dialogue with social partners and with non-governmental organizations. Equality bodies, insofar as they can be considered as close to independent regulatory agencies, are also new governance instruments.

In the table below, I classify the measures contained in the RED as regulatory, directive of soft. I base this typology on the kind of adaptation that each measure requires from member states. Regulatory elements are binding, directive elements are only binding as to the regulatory result to which they are linked, but leave a margin of discretion to the national policy-makers, and soft elements are optional.

As the table shows, although the RED certainly contains a few soft elements encouraging member states to consider a series of policy options without binding them to implement it, most elements of the directive pertain to the type of command-and-control instruments typical of regulatory policy.

**Regulatory elements**

In particular, Table 2.4 clearly shows that most regulatory elements of the RED set out substantive rights in the domain of equal treatment, i.e. protection from direct as well as indirect discrimination and harassment in a vast area of social life relations, as well as what I call ‘procedural rights’ i.e. measures concerning the enforcement of those substantive rights (mainly judicial enforcement). These procedural rights are the facilitations provided to the victims of discrimination in order to have an easy and immediate access to the system of redress. They concern what in a lawsuit are usually defined ‘elements of process’ and include, among others, the right to have the burden of
proof reversed to the defendant when pursuing civil judicial redress for discrimination, the possibility to prove *prima facie* discrimination by statistical evidence, protection from victimization for discrimination plaintiffs, a right to proportionate and dissuasive sanctions, the possibility to be supported by interested third organization in a complaint, and that of getting assistance (non necessarily judicial) from an equality body.

In a nutshell, most of the regulatory prescriptions of the RED concern the judicial redress of discrimination, or some other mechanisms of redress (i.e. through assistance by equality bodies), and only a minor portion deals with the complementary statutory or organizational adaptations that member states will have to engage to comply with the directive. Among these adaptations, however, we find the establishment of equality bodies and the mandatory delegation to them of three basic competences that need to be exercised autonomously: assistance to victims, reporting, and advisory activity. The general focus on judicial redress justifies the choice of taking litigation and jurisprudence as the main policy outcome of the RED.

**Directive elements**

Directive elements within the RED are those measures that member states may decide how to implement in order to attain the results prescribed by the regulatory objectives. In many cases, these elements cover criteria and requirements that the original proposal of the European Commission set out as regulatory elements (European Commission, 1999b) and that were made discretionary as an outcome of the inter-state negotiation within the Council of Ministers (Tyson, 2001).

Many directive elements concern aspects of the process for the individual redress of discrimination. For instance, the type of assistance that national equality bodies need to provide to victims of discrimination is not detailed within the directive. Thus, member states may decide to empower equality bodies with competences for legal assistance, psychological assistance, or administrative assistance and be in compliance with the directive.

Whereas the original directive proposal of the Commission stressed the necessity of setting up independent institutions, the RED only provides that equality bodies should pursue their mandates independently. Nowadays, member states have complete discretion concerning the organizational setting of equality bodies insofar as they are entrusted with the three basic competences mandated as regulatory elements.
<table>
<thead>
<tr>
<th>Regulatory elements</th>
<th>Directive elements</th>
<th>Soft elements</th>
</tr>
</thead>
</table>
| 1. Discrimination definitions:  
- direct discrimination, (art.2.2.a)  
- indirect discrimination (art. 2.2.b)  
- harassment (art. 2.3)  
- instruction to discriminate (art. 2.4) | 1. Protected discrimination grounds:  
- other grounds linked to ethnic, racial or national origin (art.1) | 1. Permission of positive action on racial-ethnic grounds (art.5 and recit. 17) |
| 2. Protected discrimination grounds and their definition:  
- race, ethnic origin | 2. Nature of the means of redress provided:  
- administrative and/or judicial | 2. Measures for social partners  
- fostering social dialogue on equal opportunities (art.11.1) among the two sides of the industry (monitoring of industrial practices);  
- encourage inserting anti-discrimination clauses in collective bargaining (art. 11.2) |
| 3. Scope of a-d provisions:  
- conditions for access to employment, self-employment and occupation; promotion (3.1.a)  
- harassment (art. 2.3) | 3. Organisation/powers of the equality bodies (13.1):  
- bodies may form part of other agencies or be autonomous;  
- type of assistance offered to victims; litigation/judicial competences; | 3. Dissemination of information (art.10) |
| 4. Legal adaptation:  
- abolishment of laws, regulations/administrative provisions contrary to the principle of r & e equality (art.14.1)  
- non-reduction of terms of protection under national law during the implementation of the directive (Art. 6.2) | 4. Procedural adaptations  
- form of support that civil society organizations can provide to complainants (support or behalf);  
- rules for allowing organizations to provide support;  
- type of remedies for discrimination convictions  
- type of protection from victimisation (art. 9) | 4. Dialogue with nongovernmental organizations with a relevant interest (art. 12) |
| 5. Adaptation of judicial or administrative litigation procedures:  
- right of legal organization with legitimate interest to engage in procedures to support complainants (with their approval) (art. 7.2)  
- shift in the burden of proof (art.8.1 and recit. 21)  
- protection from victimization (art.9)  
- type of protection from victimisation (art. 9) | 5. Extent of the exceptions foreseen in domestic law  
- indirect discrimination (art.2.2.b)  
- genuine and determining occupational requirement (art. 4 and recit. 18)  
- differences of treatment based on third country nationality or immigration status (art. 3.2) | 5. Adaptation of judicial or administrative litigation procedures  
- proof of indirect discrimination by statistical evidence (recit. 15) |

| Table 2.5 Regulatory, directive and soft elements within the RED |  |  |
The concession of legal standing for third party organizations in judicial proceedings for the redress of discrimination is also a directive element: member states may regulate the way in which civil society organizations gain legal standing and the type of support they can offer to a victim (acting on behalf of a victim or in support of a victim), and whether a victim is needed to initiate antidiscrimination proceedings.

The named exceptions to the general principle of equal treatment on grounds of race are another directive element that member states may decide to what extent they want to implement and how.

*The domestic implementation process*

The two stages of the analysis performed in this study will reveal how the above-mentioned elements of EU race equality policy are, first, transposed into domestic law and, second, how they are applied. Thus, both the indicator elaborated in Chapter Four to assess compliance with the RED and the measure of policy outcomes performed in Chapter Five will show how these policy prescriptions are put into the statute books, and then into practice.

My main claim in this study is that national variation in how directive/process elements are defined is likely to influence the general implementation process, to the extent of determining non-implementation insofar as process elements give access to a specific policy when the latter is centred upon individual judicial redress. The elements of process described here as ‘directive elements’ are those that are most subject to influence and containment by domestic stakeholders. Thus, depending on how these elements are framed and enforced across member states, race equal treatment policy will be more or less likely open up the box of adversarial litigation and influence policy change in the member states, or rather remain substantially under-enforced.

Referring once again to a terminology derived from Europeanization research (Radaelli, 2003), our analysis of implementation and enforcement will help determining whether the enforcement process was characterized by domestic ‘inertia’ — no transformation of the domestic policy domain; absorption — when EU prescriptions are easily and straightforwardly integrated into the domestic policy field; transformation — EU policy causes a major change in the domestic policy field; or retrenchment — in case the implementation of EU policy causes a counter-evolution of domestic race equality policy.
3 Race Equality before the RED

‘The cultural tendency towards race consciousness, then, does not by itself determine patterns of group-state relations; rather, institutional structures help translating those tendencies into actual outcomes’ (Lieberman, 2005)

Introduction

In this chapter I review in depth the organization of race equality policy in France, Germany and Italy prior to the transposition of the EU Race Equality Directive (RED). The purpose of this review is to establish a measure of the “goodness of fit” between the policies existing in the three countries before 2000 and the set of measures enshrined in RED or, in other words, to assess the extent of the mismatch between existing policy arrangements and the European policy mandate specified in the RED.

The aim of this conceptual and historico-institutional discussion is to clarify, at last, the type of influence that a larger incongruence between pre-existing domestic policy and new EU policy measures may have on the process of policy transposition and implementation for the case of the RED. So far, in fact, the studies that have addressed the sense of this causal relation have provided inconsistent findings. In the sole domain of social policy, for some, like Jupille and Caporaso (2001), a higher policy incongruence is a predictor of stronger adaptation pressures and wider domestic change. Others, like Falkner et al. (2005) and Knill and Lemkuhl (2002), claim an inverse relation between the degree of policy misfit and the possibility of full compliance at the domestic level, but struggle to find a definitive confirmation of this relation from their empirical analyses. Different conceptions of the role played by goodness of fit in these empirical studies are frequently due to differences in the operationalization of policy (mis)fit. In this chapter, thus, I attempt to provide a clear operationalization of the concept of policy (mis)fit that is based on the prior definition of the core aspects of the RED as a model of equal treatment policy.

Based on this operationalization, I present the organization of race equality policy in France, Germany and Italy focusing on a set of elements that reveal these countries’ policy congruence, or lack thereof, with the RED. Last, I compare the information collected in the
three cases before moving to the analysis of the first phase of policy implementation, that of the transposition of the RED.

**Equality Policies: Dimensions and Typologies**

Legal scholars have dedicated much more attention than political scientists to national variation in European equality legislation after and before the adoption of the RED and the FED. As a consequence, in order to single out the most relevant aspects of the RED, those that define its peculiar characteristics as a type of equal treatment policy, I rely on the typology of equality policies established by Olivier De Schutter in an article of 2006. Other lawyers who have proposed classifications of antidiscrimination policy models, in fact, have mainly drawn the line between common law and civil law countries of the EU (Schiek et al., 2007) a distinction which is of little relevance for France, Germany and Italy – all civil law countries.

De Schutter identifies three models of equality policy resulting from a matrix in which he combines two basic dimensions shaping the definition of the goals of equality policy and the instruments to attain those goals. The first dimension explored by De Schutter is that of the type of equality targeted by the policy under consideration. There can be two types of objectives, in terms of equality: formal equality and substantial equality. The first type of equality objective, formal equality, is limited to protecting individuals from being discriminated on prohibited grounds (such as race or ethnic origin in the case of the RED). Substantial equality, instead, has also a collective and a positive dimension. It aims to ensure a proportional representation of the diverse social groups composing society in a specific sector and a roughly equal distribution of social goods among these groups. In other words, in the framework of substantial equality, the aim of ensuring equality is not only to compensate for the effect of past discrimination (according to a “corrective justice model” of antidiscrimination policy) but also to make progress towards a fairer distribution of social goods among the different components of a population. Substantive equality is frequently also defined with reference to the classic Aristotelian motto ‘[...] Justice requires that things which are alike should be treated alike,
while things that are unalike should be treated unalike *in proportion to their unlikeness,* or as distributive justice (Rawls, 1971, Suk, 2006).52

The second dimension of equality policy identified by De Schutter concerns the way in which the suspect motives that are prohibited as illegitimate basis for distinction (in our case: race or ethnic origin) are employed in the decision of the rule-maker or in the formulation of public policies. If there is a “negative” approach to the categories of discrimination, i.e. if the prohibition on the use of such categories is absolute, they are made completely invisible. With reference to race and ethic origin, this is what I identified, in Chapter One, as a race-scepticist or completely colour-blind approach. If, on the contrary, the categories can be used in public policy, e.g. to impose an obligation to affirmatively promote equality of a certain group of individuals identified on the basis of the otherwise prohibited categorization (i.e. in a race-conscious or race-constructivist approach), the suspect category is made visible.

<table>
<thead>
<tr>
<th>Combination of principle of equality and categorization</th>
<th>Aim of equality policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invisibility of suspect characteristics (colour-blindness)</td>
<td>Formal equality</td>
</tr>
<tr>
<td>Visibility of suspect characteristics (race-consciousness)</td>
<td>Prohibition of discrimination</td>
</tr>
</tbody>
</table>

Table 3.1. Matrix for the three models of (race) equality policy
Adapted from De Schutter (2006: 3)

From the combination of these two dimensions of equality, continues De Schutter, three models of equality policy can be identified (see Table 3.1.).

The first model combines a formal approach to equality with the complete invisibility of the suspect grounds and focuses on the individual prohibition of discrimination. In this framework, discrimination is outlawed but there is no duty to work towards a proportional representation of the groups whose members are identified on the basis of a suspect motive of discrimination. There is also no possibility to monitor the condition of the groups at risk of discrimination with respect to the proportional allocation

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of social goods because any use of the suspect category is prohibited. Rather, imbalances in the distribution of public goods are not considered as a target of public action, if no individual has been individually and purposefully discriminated against.

The second model combines a formal approach to equality with an explicit consideration of the suspect grounds. In this model, indirect discrimination is outlawed alongside direct discrimination. Thus, any measure which impacts negatively on a higher proportion of individuals from a certain group identified on the basis of a suspect motive is prohibited. Only in cases in which it can be shown that a measure with a potential for disparate impact pursues a legitimate aim through proportionate and necessary means is the measure admissible.

Finally, a third model of “affirmative equality” targets substantive equality and proposes to go even beyond the prohibition of direct and indirect discrimination, and to take explicit consideration of the suspect categorization as a basis for positive policies targeting groups identified on the basis of the suspect motives, e.g. through positive or affirmative action policies.53

A fourth model is not offered, because the attainment of substantive equality in the absence of the explicit consideration of the motive(s) of discrimination is considered impossible.

With which of the three equality models does the RED fit best? Answering this question helps situate the RED within these types of equality policy, and aids in the identification of indicators for comparing it with the race equality policies that existed in the three member states before its transposition.

The existing literature fails to agree as to what model of equality policy the RED best embodies. For most political scientists, as Robert Lieberman (2005) (see the statement cited above), Christian Joppke (2007) and Geddes and Guiradon (2004), the RED represent a race-conscious policy instrument, insofar as it outlaws indirect discrimination (Article 2.2b), foresees the possibility of using explicit statistical evidence from the prohibited categories to prove discrimination (Recital 15), and positive actions “beyond” the principle of equal treatment to prevent or compensate for disadvantages linked to racial or ethnic origin (Article 5). According to these analyses, thus, the RED would fall

within the range of affirmative equality policies and within the range of policies that prohibit direct and indirect discrimination.

Many legal scholars (Bell, 2001, Bell, 2002, Chalmers, 2001, De Búrca, 2006, De Schutter, 2006, Howard, 2005), however, point to the fact that the directive only requires the establishment of means for the individual redress of discrimination, which are more typical of a corrective justice paradigm. In fact, the possibility to admit collective judicial actions to remedy group discrimination and to establish positive action policies where an open consideration is given to suspect motives of discrimination are left optional. Moreover, the admissibility of statistics as proof of discrimination was moved from the body of the directive to its preamble during the negotiation process at the Council of Ministers (Tyson, 2001). For De Schutter, abstaining from making statistical evidence based on the suspect motives a precise requirement may confine the RED to the prohibition of only one type of indirect discrimination: that which prohibits instances of direct discrimination where the illegitimate criterion is disguised under an “apparently neutral, but suspect, criterion” (e.g. submitting recruitment to the requirement of being a native speaker of the local language).

According to De Schutter, as well as to other commentators (Calvès, 2002, Simon, 2004), instead, outlawing indirect discrimination as true disparate impact, i.e. a process by which the negative impact of a measure or decision on a certain group is completely detached from any intention to discriminate, necessarily requires the use of the statistical tool and the open consideration of the suspect categories. Thus, by not requiring statistical evidence, making positive actions only optional, and still providing a race-sceptical definition of race and ethnic origin (‘The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term “racial origin” in this Directive does not imply an acceptance of such theories’ Recital 6), the RED would have little potential for group remedies, which are typical of the affirmative equality model.

For the purpose of this study I will classify the RED within the typologies of race equality policies that require an explicit consideration of the suspect’s motive (thus, as a race-conscious piece of legislation). The chapters on the domestic implementation of the RED will show how this characteristic of the directive will be implemented at the member state level, providing more substance for this claim or disconfirming it.

Of course, insofar as the RED only allows and does not require positive action in favour of groups identified on the basis of the prohibited characteristics, as well as accepting statistical evidence as proof of indirect discrimination, it is not possible to fully
inscribe it in the range of affirmative equality models. Like most political scientists, I will thus consider it as crossing between the last two models identified by De Schutter: the one which prohibits discrimination, including indirect discrimination, and which foresees an overt use of suspect categorization, and the affirmative equality model.

Based on the dimension identified for this typology we can now build precise indicators of congruence with the RED.

Congruence: defining the indicators

In the remainder of this chapter, I consider four main indicators to evaluate the level of policy fit between pre-existing race equality policies in the three countries, on the one side, and the RED, on the other side. The indicators comprise the dimensions identified above for the classification of equality policies, in addition to some other defining characteristics of the RED.

A first indicator details whether domestic equality policies, in France, Germany and Italy, are based on:

- a formal or substantial equality framework;
- the possibility or the prohibition on the use of ethno-race categorization in law and policy.

As seen in Chapter One, in most countries these features are defined among other fundamental rights and principles in the text of the national constitutions, frequently in relation to national minorities, and are furthermore confirmed by the ratification or non-ratification of international treaties. The analysis will account for this type of primary legislation at the domestic level.

Second, I look at whether member states have specialised statutes that target race antidiscrimination, or whether antidiscrimination clauses are only contained in constitutional texts and codes affirming general principles of the law. Since the RED only applies to the domain of civil law (including employment, administrative and contract law) and extends its scope to a wide range of sectors, I attempt to establish:

- whether pre-existing domestic antidiscrimination statutory law pertains to the criminal or civil domain, or both;
the scope of the relevant pre-existing statutory provisions in the civil domain: e.g. employment, contract, administrative law.

Third, I highlight another defining element of the RED, namely the requirement to establish an equality body with specific competences for race antidiscrimination. The third indicator, therefore specifies:

- the presence or absence of a domestic equality body, at whatever level of government (centralised or decentralised);
- the competences and powers of the existing equality body/bodies, and whether their mandate(s) conform or not to the requirements of the RED (i.e. providing independent assistance to victims of discrimination, conducting independent surveys, issuing independent reports and recommendations).

Lastly, I look at whether there are any existing positive policies targeting ethnic or race minorities, to ascertain whether any national policy goes even beyond the RED and can be classified as an “affirmative equality model”. I define as:

- traditional ‘positive policies’ those policy measures which provide a specific service to people belonging to a racial, ethnic or national minority groups without breaching the principle of equal treatment and whatever the categorization used for the identification of the recipients (citizenship, race or ethnic origin, language, religion). A practical example of this type of policy is an advertisement campaign targeted at reaching out in neighbourhoods populated by ethnic minorities;

- ‘affirmative/positive actions’ those policies reserving parts of common benefits or goods to particular groups identified on the basis of the suspect categories of race and ethnic origin, or national origin, and thus susceptible to establishing a preferential treatment that engenders a reverse discrimination against the majority population. The classical example of this type of policy is setting aside a quota for university admissions for one or more specific minorities identified on the basis of their ethnic background.

For the analysis of the three cases I consider the legal framework and policies applying both to racial and ethnic (non-autochthonous) minorities as well as those conceived for national minorities. In fact, the treatment of national minorities may be relevant for understanding whether suspect cultural or racial characteristics can be used overtly or not
by public policy measures.\textsuperscript{54} Moreover, I briefly sketch the legislative and institutional framework designed for gender equality so as to provide an idea of the domestic measures designed in relation to this other, well-established, domain of equality policy.

Table 3.2 summarizes the indicators of policy fit and the values that these take in the case of the RED.

<table>
<thead>
<tr>
<th>Indicators of policy congruence</th>
<th>RED</th>
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<tbody>
<tr>
<td><strong>Equality model</strong></td>
<td></td>
</tr>
<tr>
<td>formal or substantial equality framework</td>
<td>Art. 2.2b on indirect discrimination; Art. 5: positive action (no requirement): towards substantial equality?</td>
</tr>
<tr>
<td>possibility to use ethno-race categorization in law and policy</td>
<td>Allowed: Recital 15: use of statistical evidence</td>
</tr>
<tr>
<td><strong>Specialised legislation</strong></td>
<td></td>
</tr>
<tr>
<td>Domain</td>
<td>Civil</td>
</tr>
<tr>
<td>Areas of law covered</td>
<td>Labour law, Contract law, Administrative law</td>
</tr>
<tr>
<td><strong>Equality bodies</strong></td>
<td></td>
</tr>
<tr>
<td>Presence and organization</td>
<td>Art. 13 national equality body</td>
</tr>
<tr>
<td>Competences and powers</td>
<td>Independent assistance to victims, surveying, issuing reports and recommendations</td>
</tr>
<tr>
<td><strong>Positive policies</strong></td>
<td></td>
</tr>
<tr>
<td>Traditional positive policies</td>
<td>(see relevant EU programmes)</td>
</tr>
<tr>
<td>Affirmative/positive actions</td>
<td>Allowed, Art. 5</td>
</tr>
</tbody>
</table>

\textsuperscript{54} In some cases I also take into account policies targeted at religious minorities, but only wherever religion is used as a proxy to identify an ethnic group (e.g. the Jewish community is sometimes identified as an ethnic minority, as well as Muslims).
The aggregation of the four indicators determines whether there is a large, medium, or small amount of policy congruence, depending on how close the value of the indicators identified for each country are to the values of the RED.

**France**

*Equality model*

As we saw in Chapter One, in their article from 2004 Geddes and Guiraudon have drawn attention to the fact that France approached the transposition of the RED from a “policy paradigm” that seemed to be at odds with the RED. This is consistent with the findings of other legal and political science literature that has compared the French race equality model with those of the US and the UK (Bleich, 2003, Lieberman, 2005, Simon, 2004, Suk, 2007, Strazzari, 2008). Although a mismatch between French and Anglo-Saxon-inspired race equality policies is identified in the literature, few have gone beyond studying the French statutory framework on race equality to provide a more comprehensive picture of its degree of adaptability to the RED (with the exception of Calvès, 2002). This section responds to this gap in the literature.

With regard to our first indicator – the equality model – the first article of the French Constitution affirms the principle of equality in such a way that all distinctions based on the grounds named in that article are clearly banned.\(^{55}\) The fact that racial (and religious) differentiations are outlawed by the first article of the constitution is a common feature for many European countries. Nonetheless, in the French case, Constitutional provisions have had a particular impact on the determination of equality policies. In particular, Article 1 has been used in two ways, which seem to be in contrast with the provisions set out in EU race equality policy.

First, the Constitution’s equality clause has consistently been interpreted in a very formalistic way. Translated in terms of public policy, this means that it is not possible for the State to treat citizens differently in those cases where the criterion of distinction is not recognised as legitimate by the law. This is exactly the case of race and ethnic origin, with

\(^{55}\)*La France est une République indivisible, laïque, démocratique et sociale. Elle assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion. [...] (France is an indivisible, democratic and social Republic. It ensures equality for all citizens before the law, without distinction of origin, race, or religion). Own translation.*
the consequence that it is not possible to explicitly aim any policy measure at groups defined on the basis of their ethnic background. The question has long been contentious with reference to autochthonous groups, such as Corses, Brittons, and Basques. "Constitutional jurisprudence has refused to allow any recognition as national minorities of autochthonous ethnic minorities, a recognition that could pave the way to traditional positive policy measures (such as public support for education in a minority language, land rights, self-government) in relation to such groups (Marko, 2003, Möschel, 2009)."

The same kind of approach has been applied to minorities with an immigration background. No specific positive measures, and even less so any kind of positive action, can be addressed to groups based on their racial or ethnic background. This approach reflects both a formalistic legal interpretation as well as the Republican tradition that no distinction can be made among the body of the French citizens, who are all equal before the law. The same universalistic and unitary approach to citizenship was at the origin of the assimilation policy targeted to immigrants: given that no differences are recognized and recognizable by the law, everyone has to be treated like French citizens and, thus, assimilate French norms (Brubaker, 1992).

To breach this formalistic conception of equality, supported by the consistent jurisprudence of the Constitutional Council, and allow positive action measures in favour of women, the first article of the Constitution had to be formally amended at the last turn of the century. The passage of the amendment permitted the adoption of what is known today as “parity policy,” a form of positive action for women extending to both electoral mandates (since 2000) and, since more recently, to the women’s presence in the board of large public and stock-rated enterprises. The second implication of the constitutional ban on distinctions based on race and ethnic identity has to do with the acceptability of ethno-racial categories, which, although mentioned in the Constitution, are not recognised as objective nor construed legal categories.

To sum up, in the French case the constitutional framing of the principle of equality has long exerted a direct influence on the determination of statutory equal treatment policy.

Indeed, the constitutional jurisprudence on ethnic minorities has gone so far as to influence the participation of France in international conventions. While the country is party to the main international treaties in the fight against discrimination, in particular the UN 1965 ICERD Convention, it did not ratify the European Charter for Regional or Minority Language (ECRML), or the Framework Convention on the Protection of National
Minorities (FCPNM). The latter two, in fact, require the recognition of historical communities as national minorities. This is why some commentators have been surprised that France could agree to the RED at the moment of its adoption, and some have clearly argued that ‘they [the French negotiators] did not understand the implications of what they were agreeing to.’

Specialised legislation

From international law and, more precisely, the UN Convention on the elimination of all forms of race discrimination, originates also the statute which, until the transposition of the RED, formed the bulk of French anti-racism policy. The 1972 ‘Pleven Law’ (Law 72-546) on the fight against racism amended the 1881 statute on the freedom of the press and the criminal code article criminalising incitement to hatred and race defamation. Until 1982 this statute and the Constitution have been the only provisions of French Law mentioning race. The statute pertains to the domain of criminal law and does not provide explicit definitions of discrimination. Rather, it mainly addresses what is usually known as expressive or physical racism. Only its final provision inserted in the criminal code an article detailing the punishment for public officers who would intentionally (‘sciemment’) refuse a service to somebody on the grounds of ‘l’origine ou de l’appartenance ou non appartenance à une ethnie, une nation, une race, ou une religion déterminée’ (her origin or her belonging or not belonging to a specific ethnicity, nation, race or religion). This clause, thus, dealt with direct discrimination only and had a limited scope. Given that the adoption of the law was supported by antiracist NGOs, such as the LICA (International League against Anti-Semitism), the text incorporated a rather innovating jurisprudential enforcement method, i.e. the possibility for antiracist NGOs to stand in litigation on behalf of a victim of racism – with the victims’ consent – and even to bring collective complaints in the absence of identified victims.

A more encompassing notion of discrimination, because not explicitly limited to intentional discrimination only, was introduced by the ‘Auroux Law’ of 1982 (Art. 1 of Law 82-689), which includes a provision against race-based sanctions and dismissal in the Labour Code (Art. 122-45). In 1983, a similarly wide scope was attributed to a clause that prohibits discriminations among civil servants on the ground of ethnic origin (Art. 6 of

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56 Interview FR HALDE2.
57 Interview FR LICRA.
Law 83-634). Even though present in the codebooks, these last two provisions applying to labour and administrative law were admittedly little known or used in courts.58

After a series of amendments to the criminal provisions detailed above, in 1990 the ‘Gayssot Law’ (Law 90-615) consolidated the statutes, confirming most of the provisions of the Pleven Law and extending the prohibition of race discrimination to a general scope: ‘Toute discrimination fondée sur l’appartenance ou la non-appartenance à une ethnie, une nation, une race ou une religion est interdite’.59 The new law raised punishments linked to the conviction for race discrimination, made race discrimination an aggravating circumstance for a certain number of crimes, and inserted the possibility for a judge to order the publication of relevant convictions on official journals as well as newspapers. However, it failed to introduce any mention of indirect race discrimination, which was thus a notion absent from the French codebooks before the transposition of the RED. The ‘Gayssot law’, in fact, was the last relevant policy change before the transposition of EU law. However, it provided the basis for the first systematic lawsuits against race discrimination which, in France, have been mainly based on criminal law.

Starting from the 1990s, in fact, a number of NGOs and, especially, SOS Racisme, started making an increased use of the Gayssot Law in order to take actions against some blatant forms of direct discrimination. More than strategic actions, the NGO engaged in highly symbolic and political campaigns, organizing situation testing in front of discotheques and other awareness raising initiatives. Over the years, nonetheless, “SOS” and, to a lesser extent, other antiracist NGOs such as the MRAP (Movement against racism and for friendship among peoples) and the LICRA (International league against racism and anti-Semitism), relied on criminal courts and on the vast scope of the ‘Gayssot law’ to begin prosecutions for race discrimination in a vast number of domains, from access to services to housing. This helped develop an emergent body of criminal jurisprudence, at least insofar as expectable immaterial damages and proof requirements were concerned. In fact, French antiracist NGOs and the plaintiffs they supported seemed to value greatly the moral value of the criminal sanctions that they were able to obtain over the years, aside from the moral damages that could be recovered (for the plaintiff and the supporters) through some of the judgments.60

58 Interviews: FR CGT1, FRCGT2, FR EMPLAWER1, FR CASSSOC.
59 ‘All discriminations based on the belonging to or not belonging to an ethnicity, a nation, a race are prohibited.’
60 Interviews: FR SOSRACISME, FR LICRA, FR MRAP.
**Equality bodies**

It is no surprise that in the absence of a comprehensive body of specialised legislation, no race equality institution was operating in France until very recently. It is, however, necessary to highlight that a brainstorming on the possibility to establish such institutions started before the transposition and even the adoption of the RED. Indeed, consultations for combining the fight with racism with antidiscrimination institutions began toward the end of the 1990s, in a context in which the awareness of problems faced by communities with an immigration background in employment was rising, and housing segregation of ethnic minorities to the *banlieues* of the main industrial districts was becoming increasingly contentious. According to Fassin and Fassin (2006), the concept of race discrimination did re-enter the public debate at this time and began being explicitly addressed at the academic (in particular in the work of Michel Wieviorka and Philippe Bataille) and governmental level. In this context, the influence of the electoral success of the Front National (an extreme right, xenophobic political movement) at the beginning of the 1990s ought not to be forgotten.

In 1997, contemporary to the European year against racism, the socialist minister of social affairs, Martine Aubry, brought attention to the issue of race discrimination. One year later, the then prime minister requested a report on race discrimination to the High Council for Integration, a consultative body established back in 1989. Following this, Aubry commanded a specific report outlining perspectives on the possible establishment of an antidiscrimination body in France. The report was commissioned to Jean-Michel Belorgey, a member of *Conseil d’Etat* (French supreme administrative court) and in its final version backed the creation of an independent authority on the fight against race discrimination (Belorgey, 1999). Thereafter, the government adopted an action plan to fight discrimination, which included the setting up of embryonic race equality institutions. First, in 1999, a Group for the Study of Discrimination (*Groupement d’études sur la discrimination*, GED, from 2000 *Group of Study and Fight against Discrimination*, GELD) was set up. The group was charged with analysing and possibly providing an answer to the complaints collected through a hotline, the so-called ‘114’ number, and with providing recommendations on how to better address discrimination complaints. Together with the GELD, the action plan conferred new competences to the 115 Departmental Commissions.

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61 Apart from their prolific academic writing, both Bataille and Wieviorka took part in a study project lead by the CFDT (French democratic Confederation of Workers) on race discrimination in employment. See Wieviorka (1998). Significantly, the prosecution of the project was founded under the EU Equal initiative (2002).
for Access to Citizenship (Commissions départementales d’accès à la citoyenneté, CODAC). Such commissions used to exist since the beginning of the 1990s under the name Cellules départementales de coordination de la lutte contre le racisme, la xenophobie et l’antisémitisme and reunite actors such as unions, associations and local authorities at the level of the departments (provinces). Among other tasks, the CODACs were also conferred the promotion of equal opportunities and the fight against discrimination. Furthermore, they had to take over complaints concerning their territory if asked so by the GELD.

Twice a year, reports on the complaints collected had to be submitted to the GELD and other public authorities for an assessment of the cases treated. In concrete terms, the number operated from 1999 until 2003, but apparently with poor results. Jane Freedman (2004: 184) reports that in the years between 2000 and 2002 ‘114’ received around 40,000 calls and that about 10,000 of them were reported to the CODAC. However, the act which established the two services was vague about effective competences of the two bodies and the loose institutional framework provided little guidance on how to effectively treat the complaints which were received. Thus, the main result of the setting up of such bodies was to promote a reflection on better ways to address race discrimination problems among the members of the GELD, who were experts picked from different backgrounds: judges, civil servants, lawyers, and scholars (the director being Philippe Bataille).

Contemporaneously with the establishment of the GELD and the attribution of antidiscrimination competences to the CODACS, the implementing agency managing national funds for social action (FAS) was renamed and also attributed special competences for the fight against discrimination. It became the Funds for social action, integration and the fight against discriminations (Fonds d’action et de soutien pour l’intégration et la lutte contre les discriminations, FASILD).

In addition to these events occurring the end of the 1990s, the French Advisory Human Rights institution established back in 1984 and restructured in 1994 according to the United Nations’ General Assembly resolution 48/134 of 20 December 1993 –the National Advisory Commission on Human Rights (CNCDH, Commission Nationale Consultative des Droits de l’Homme) – has issued since 1990 a report on racism and xenophobic attacks in France. This work, which initially was limited to the provisions set

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out in article 2 of the Gayssot Law, in recent years has also come to cover issues of race
discrimination covered by EU policy (thus, not only racist crimes, but also access to
employment, goods and services).64

Up until the mid-2000s, however, the same consideration that Mazur makes for the
French gender equality machinery — that ‘...women’s policy machinery in France has
consisted of highly politicised and marginalised state structures’ (1995) — held for race
too, with the difference that the state machinery was not as extensive as that conceived for
gender in the 1970s and 1990s. Importantly, nonetheless, the gender machinery did not
include an antidiscrimination agency either.

Positive policies

In spite of the normative approach described above, minorities with an immigration
background have been a specific subject of public policy in France. The French peculiarity
resides in that policy measures have not been specifically conceived or targeted to ethnic
minorities but to migrant workers or to territorial districts which are considered as
particularly difficult, and where such minorities are concentrated. Two examples are
sufficient to understand this approach.

The first concerns housing. Beginning in 1959 the Fund of Social Action for
Immigrant Workers (FAS, Fonds d’action sociale) and their Families was responsible for
providing public support for housing of immigrant workers.65 As argued by Guiraudon
(2002), funds for these policies were not substantial in this first period since the official
policy of the government was based on the “guest-workers paradigm.” Thus, few concrete
efforts and investments were made to accommodate the situation of immigrant workers on
a long-term basis. Only in the mid-1970s, after the government realised that migrants
where there to stay, did public investment into welfare for foreign communities become
more substantial. From the mid-1970s until the end of 1980s, a new policy was introduced,
which consisted of allocating subsidies to those building enterprises which would then
reserve a certain percentage (1/9th) of the housing offer to migrant workers. This form of
indirect positive action in the sector of housing was based upon citizenship criteria, and
had to be reformed when the government realised that it contributed to segregation of
minority communities in ghetto neighbourhoods.

64 Interview FR CNCDH, FR RAXEN. The reports are available online at:
65 Interview FR ACSE.
In the domain of education, the first measures of the 1960s only foresaw, on the one hand, special classes of language (classes d'accueil) to help the insertion of migrants’ children in French school, and on the other, the establishment of parallel classes aimed at helping those children maintain their language of origin. The non-veiled objective of these courses was that of facilitating the children’s future return to the country of origin. Similar programmes were maintained also throughout the 1970s (Programme LCO, Langues et cultures d’origine) but with very little success since there were few who actually envisaged a quick return ‘au pays’ (Schnapper, 2003).

As above, only from the mid-1970s did educational policy take a different approach, with the establishment of Centres of vocational training and information for the education of migrants (CEFISEM, Centres de formation et d’information pour la scolarisation des enfants des migrants) then renamed CESNAV (Centres Académiques pour la scolarisation des nouveaux arrivants et des enfants du voyage).

In addition to these policies typical of migrant-receiving countries, from 1981 positive policy measures in the field of education took on a territorial focus, with the identification of zones of priority education (ZEP, Zones d’éducation prioritaire) relying, among other criteria, on the basis of the average income of the resident people. Most of these zones, however, comprise neighbourhoods with high concentrations of ethnic minorities with an immigration background; furthermore, an additional criteria for being allocated extra public funding was that the school had a certain percentage of foreign pupils. The ZEP policy has been complemented, from 1992, with the identification of ‘sensitive schools’ (Etablissements sensibles), which may also benefit from extra staff and funds.

Interestingly, in the decade 2000-2010, a few highly ranked universities started developing positive action programmes on the basis of the territorial districts designed for the ZEP policy, providing for special procedures for the selection of, or special training programmes for potential applicants based in the ZEPs (Sabbagh, 2002).

It is worthwhile mentioning, finally, that even though ethnic groups cannot be officially recognised as such, in 2000 the French Parliament adopted a law on the reception and housing of traveller communities (Law 2000-614). The law mainly regulates the spaces and funding that municipalities have to reserve to ‘personnes dites gens du voyage et dont l’habitat traditionnel est constitué de résidences mobiles’ (‘so-called traveller persons whose traditional housing is made of mobile residences’). In this particular case, the indirect beneficiary of the policy is a distinctly identifiable minority,
that of the Roma residing in France. Once again, the official addressees of the policy are the municipalities and not the communities themselves.

As noted by Schiek et al. (2007), these kind of positive policies, typical of the continental model, have used traditional social policy criteria (such as income) to target situations mainly faced by immigrant communities, immigrant offspring and other ‘coloured’ minorities such as the Roma. Targeting additional funds to non-citizens, enterprises offering them housing, or territories where low-revenue communities were concentrated, have been solutions which have made up for the absence – and the unconstitutionality – of policy measures devised upon other criteria. Nonetheless, traditional policy criteria such as citizenship and level of income become more difficult to apply as long as migrant communities settle and continue to face social insertion or entrenched discrimination problems. At the moment in which citizenship is not anymore a valid criterion for identification of immigrant offspring, due to increased naturalization rates or ius soli acquisition of French citizens, or in de-segregated territories, race and ethnicity may have to acquire legitimacy as criteria for public policy.

**Summary**

This review of the indicators confirms that France used to be in a situation of low policy congruence with respect to the RED: first, because of its formal equality approach; second, because of its refusal to recognize race and ethnicity as legitimate criteria for any type of categorization; third, for its tradition of addressing discrimination through criminal justice; fourth, for the long absence of race equality institutions; and last, for having made preferential use of other criteria to address positive action measures to ethnic minorities with a migration background.

In spite of this, the paragraphs above highlight that a process of domestic brainstorming concerning the reform of such policy instruments, in particular of equality bodies, was already in place at the time of the adoption of the RED. Any assessment of the impact of EU policy in the domain of race discrimination in France ought to consider this purely domestic process.
<table>
<thead>
<tr>
<th>Equality model formal or substantial equality framework possibility to use ethno-race categorization in law and policy</th>
<th>RED</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 2.2b on indirect discrimination; Art. 5 on positive actions (no requirement): substantive?</td>
<td>Art. 1 Constitution: Formal and strictly formal interpretation; Non-recognition of ethno-national minorities; race as non-objective criteria; no ratification of relevant international conventions (FCPNM, ECRML)</td>
<td></td>
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<tr>
<td>No, Recital 15: use of statistical evidence</td>
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<tr>
<th>Specialised legislation</th>
<th>Domain</th>
<th>Areas of law covered</th>
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</thead>
<tbody>
<tr>
<td>Civil</td>
<td>Labour law, Contract law, Administrative law</td>
<td>Criminal; Civil (limited scope)</td>
</tr>
<tr>
<td>Criminal provisions apply to contract law, administrative law, Labour law; Civil provisions only to Labour Law (sanctions and dismissal) and public employment</td>
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<tr>
<td>Art. 13 national equality body</td>
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<td>Independent assistance to victims, surveying, issuing reports and recommendations</td>
</tr>
<tr>
<td>only incipient domestic set-up; Commissions at decentralised level; other HR institutions present only from 2000 collection of complaints; CNCDH monitoring and policy advice</td>
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<tr>
<th>Equality bodies</th>
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<tr>
<td>Yes, for migrants, religious minorities and travellers</td>
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<tr>
<td>Affirmative/positive actions</td>
</tr>
<tr>
<td>Allowed, Art. 5</td>
</tr>
<tr>
<td>Only trough other criteria: citizenship, territorial</td>
</tr>
</tbody>
</table>

| Policy congruence | Low |

Table 3.3 Policy congruence in France
Germany

Equality model

As in France, race discrimination was outlawed in Germany by the federal Constitution, and in particular, through the specific principle of equal treatment asserted into Article 3.3,1 of the Basic Law (Grundgesetz, GG). Mahlman (2007) and other authors also point to the GG articles prohibiting the reconstitution of the Nazi Party or of associations propagating Nazi ideals as relevant to the race anti-discrimination domain (Nickel, 2003b). Only Art. 3.3, however, explicitly mentions race. Of importance is the direct applicability of the German constitution upon public institutions and public officers, as well as its possible indirect applicability to other private individuals through the principle of Drittwirkung. The latter, developed by German courts, posits that an individual can rely on a federal or national bill of rights to sue another individual if the state has failed to enforce a basic principle of the Constitution. This peculiarity of German constitutional law, together with the provision allowing individuals to address claims directly to the Federal Constitutional Court (through the Verfassungsbeschwerde procedure) could, some have argued, have made up for the absence of other, more specific, statutory provisions on discrimination (Nickel, 2003a). Nonetheless, none of these possibilities was consistently or frequently used as basis for antidiscrimination complaints in German courts.

Similarly to the French case, Art. 3.3,1 of the German Basic Law also takes a formalistic approach to equality, stating that neither less nor more favourable treatment should be granted according to the outlawed discrimination criteria. In 1994, however, a modification of the Basic Law introduced a Federal commitment to the elimination of gender inequality and a Second Federal Equal Treatment Act (2. GleiBG, Second Equality Act) allowed positive actions at the federal level to equalize the number of female candidates for public employment.

66 Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt warden (None ought to be discriminated or preferred in reason of her gender, lineage, race, language, homeland or origin, belief, religious or political opinions). Own translation.
These similarities to France notwithstanding, distinctions based on ethnic origin, culture, and descent do not seem considered as unconstitutional in Germany. And indeed, the idea of a German nation is fundamentally based on a conception of distinctiveness of the Germans from other “nations”, and German citizenship (and immigration) policies have traditionally been based on descent (Brubaker, Kymlicka 1995). This is exemplified by policies (mainly regional) targeting some national minorities, such as the Danish, the Frisians, the Sorbian, the Sinti and Roma and the community of the Spätaussiedler —so called “ethnic Germans”— who repatriated to Germany after World War Two, and also the Jews (MacEwen, 1995). The first four among these groups are now officially recognized by the federal government and by specific provisions in the law of several Länder, without major jurisprudential struggle over the acceptability of ethnic or national origin as a criterion for distinction or for positive actions (Cerrina Feroni, 2007). Marko (2003), as well as others (Palermo and Woelk, 2008), point to the legacy of the well-known diverging traditions of citizenship and nationality between France and Germany to explain such a different application of similar constitutional provisions. In particular, the German attachment to the philosophic idea of the nation as a homogenous entity defined, among other characteristics, by its language, common cultural heritage and descent would explain differences about the legal treatment of ethnic and national minorities in comparative perspective.

As concerns international norms, Germany is also part of the ICERD, but has never adopted a specific statute in order to introduce its main provisions in the domestic legal order. The articles of the criminal code concerning racial hatred were considered sufficient to comply with the obligation of the UN convention (MacEwen, 1995).

The Danish, the Frisians, the Sorbian, the Sinti and Roma were officially recognised as national minorities under the FCPNM, which Germany ratified in 1997. Their languages are promoted by the relevant Länder under the terms of the ECRML, which was ratified one year later.

**Specialised legislation**

No specialised law existed in Germany on discrimination (*Diskriminierung* or *Benachteiligung*) at the federal level, but a general antidiscrimination clause, Article 75, was inserted in 1989 into the Works Constitution Act (BetrVG,
The scope of this provision was circumscribed to the – all-encompassing – employment domain. Article 75, in fact, did not refer to dismissal or sanctions alone, but to the general treatment of the employees. Furthermore, the provisions directly involved the works councils, were trade unions are represented, in the procedures for denouncing and settling discriminatory practices. This notwithstanding, the provision remained largely unknown and, thus, virtually unused. The general clauses of the Civil Code (BGB, Bürgerliches Gesetzbuch) are also considered to provide protection against race discrimination according to the “common sense of the law” (herrschende Meinung).

In the domain of criminal law, race discrimination was and still is not defined for itself as a crime, but is generally classed among the set of ‘extreme right-wing politically motivated crimes’. The only article of the criminal code (StGB, Strafgesetzbuch) that mentions the world race is Article 130 on the incitement to hatred. The article applies, apart from direct incitement, to the production of materials inciting to hatred.

In a nutshell, discrimination was not addressed by specialised Federal law before the transposition of the RED, nor were there any signs of enforcement of the only code article concerning race discrimination at work. Indeed, the absence of specific antidiscrimination provisions before the transposition of the RED made litigation in the domain of race discrimination absolutely rare. Experts mention a few examples of court cases in which discrimination in employment or access to services was argued on the basis of the indirect effect between privates of the Constitutional equality clause and on the General provisions of the Civil Code and the Law on the Protection of Unlawful Dismissal (Kündigungsschutzgesetz). These cases, however, amount to less than 10 in the space of two decades (Halisch and Peucker, 2007) and they are thus closer to be the exception rather than the rule (Barskanmaz, 2007).

Equality bodies

As concerns national race equality institutions, the closest body that existed already before the transposition the RED was the Federal Delegate for Migration, Refugees and Integration (Bundesbeauftragter für Migration, Flüchtlinge und Integration). The office of the Federal Commissioner was established back in 1978 as part of the temporary

67 Interviews: DE DGB1 and DE DGB2.
68 Interview DE DGB2; DE RAXEN.
accommodation policy for guest workers. It was then known as the Foreigners’ delegate (Ausländerbeauftragter or Beauftragter für Ausländerfragen) and did not have special competences for antidiscrimination or equality policies. This institution resembled closely the main gender equality institution established in Germany in the 1980s and 1990s. These institutions, the Frauenbeautragten, saw a significant expansion over the years, with 1,100 offices for women’s affairs around the country in 1995 (Lang, 2007, Ferree, 1995). Migration delegates were not as successful. State delegates, with similar competences, were progressively established in several Länder even though most are indeed quite recent.69

Rather, the Federal Delegate’s office was first located in and funded by the Ministry of Labour and Social Affairs, then moved through the new Immigration Act (AufenthG, Aufenthaltsgestetz) of 2004 to the office to the Ministry for Family Affairs, Senior Citizens, Women and Youth. The Delegate’s tasks were also redefined in some terms that are relevant to race equal treatment policy. Section 93 of the AufenthG, in fact, delegates to the Federal Delegate a general duty to ‘counter unlawful discrimination of foreigners’ and ‘to help eradication[e] xenophobia (Fremdenfeindlichkeit)’, among more general tasks relating mainly to advisory powers concerning integration policy at the federal level. Section 94.3 of the AufenthG, further details powers in the equality field, but only in relation to discriminatory acts committed by the public administration. In particular, the Delegate may act on her own initiative when she finds that public authorities are committing breaches of the principle of equal treatment or are failing to protect the rights of foreigners in any other way. In these cases, she can send official opinions and ask for information from the relevant bodies. A civil servant working in the federal office confirmed that, in 2008/2009, the Commissioner received an average of 1,000 discrimination complaints per year. Apart from the power of investigation on state discrimination, however, there is no formal procedure that the 40 staff of the federal office may follow when they receive discrimination complaints, nor any legal competence they may exercise. According to the interviewee, the fact that in 2005 Chancellor Merkel relocated the office within the premises of the Chancellor Office has brought higher consideration to the letters and opinions that the Delegate can issue.70 So far, however, the office does not systematically collect or process the complaints that it receives. Officially, the Delegate has to report to

70 Interview DE BEAUFTR.
the Parliament every second year but no relevant information upon its activity in the antidiscrimination field has yet been reported.

Whereas there are not specific statutes to be cited in the domain of race equality at the decentralised level, it is essential to point that some German Länder engaged in autonomously setting up administrative structures close to equality bodies specialised in migration and discrimination issues. These institutions are much closer to the model of an equality body put forward in the RED than the federal level structures which have been mentioned above, because they are all set up specifically to collect complaints and provide out-of-court settlements for victims of discrimination. Second, most of these offices are – or were at the time of their establishment – specifically focused on race and ethnic discrimination, or discrimination grounds relevant for minorities with an immigration background (religion, nationality or personal beliefs - Weltanschaung, for instance).

This is the case, notably, for the Office for multicultural affairs (AmkA, *Amt für multikulturelle Angelegenheiten*) of the city of Frankfurt am Main, which was set up back in 1989, and took up competences to collect discrimination complaints and provide mediation already in 1993. Two other public offices dealing with antidiscrimination complaints at the decentralised level saw the light in 1999, one in the state of Brandenburg (*Antidiskriminierungsstelle Brandenburg im Büro der Integrationsbeauftragten des Landes Brandenburg*), 71 and the other in Hannover (*Antidiskriminierungsstelle im Referat für Integration und Agenda 21*). 72 Finally, in 2001, the city of Munich decided to set up its Office for discrimination complaints (*BfD, Beschwerdestelle für Diskriminierungsfälle*). 73

Whereas most of these institutions appeared in the years immediately preceding the transposition of the RED, their establishment was not always prompted by policy developments at the EU level. The reports from the Munich and Frankfurt antidiscrimination, for instance, justify the establishment of the body respectively with the growing rate of extreme right-wing politically motivated crimes (*Diskriminierungsfälle*, 2007), and with reference to the recommendations enshrined in the European Charter for the Safeguarding of Human Rights in the City. 74

Positive policies

As mentioned above, international agreements on the protection of national minorities, first, and then the ratification of international treaties providing for their protection and promotion, have built a sound legal basis to policy measures in favour of the recognised ethno-national minorities. These policies have mainly been adopted by the relevant Länder.

The development of specific positive policies for minorities with an immigration background, instead, has largely been influenced by what Heckmann (2003) defines as the ‘political and societal definitions of the immigration situation’. Up to the end of the 1990s, the motto ‘Deutschland ist kein Einwanderungsland’ (Germany is not a country of immigration) continued – surprisingly in view of the high rate of migrant workers permanently residing in the country already from the 1970s – to be the official position of the federal government. In terms of policy, this meant that after the mass recruitment of migrant workers started back in the 1950s and the effective permanence of most migrants at the end of the Gastarbeiter policy in 1973, German authorities have long pursued only partial accommodation measures.

The latter were developed from the perspective of a labour-rotation system, not in that of integration and, similarly to the French situation of the 1960s, mainly concerned the insertion of migrants’ pupils in German schools. In concrete terms, these measures consisted of pre-training or parallel training in German language (through Übergangsklassen), or in the creation of special native language classes where pupils could learn or maintain the idioms of their motherlands. Since competences for education are delegated to the Länder, the system varied slightly among the different States. Bavaria, for instance, established proper bilingual schools where migrants’ children could learn in their own language, but frequently ended up separated from Germans.

Other traditional positive measures directly subsidised by the federal government concerned the language training of adults, which from the 1970 was organised through the German Language Association for Foreign Workers (Sprachverband Deutsch für ausländische Arbeitnehmer e.V.).

Language training for foreign workers or their children, however, is a very poor example of specific measure in favour of ethnic minorities, in particular because these
initiatives did not constitute part of a deliberate promotional scheme of a publicly sponsored integration strategy, but, as mentioned, were developed as temporary accommodation measures based on the assumption that immigrants would return home within a short time-frame.

The same can be said, at least in part, for the origin of other measures in the field of religious education for Muslim children, which have long been discussed and experimented in Germany. Religious instruction for minority groups with an immigration background in public schools started as an experiment in the mid-1980s in the state of North-Rhine Westphalia, and has been continued and extended always in an experimental form up to the present day. Since the end of the 1990s, state-sponsored religious instruction for Muslims has been a hot political and constitutional topic in Germany, which has prompted the establishment of federal and state commissions for the training of instructors and the agreement of curricula. While discussions were going on, experiments in public schools have been adopted also in other regions, and justified upon the constitutional obligation of Article 7.3 to provide religious instruction for all religious communities. Protestants, Catholics, and Jews had already benefited from this provision long before Muslim communities. A general agreement for extending and making official this policy in all Germany was only reached in the spring of 2008.

That said, and even if religious education for minority population is of course a measure which tends to accommodate religious difference, rather than race or ethnic inequality, it is relevant to know that, alongside national minorities and autochthonous religious groups, public measures for religious minorities with an immigration background have started being discussed and tested. The entrenchment of race, ethnic and religious categories all of which might help define and isolate a minority group as a recipient of public policy, is of course relevant when talking about equality policies.

Summary

Part of what has been discussed above pertains to the long period in which Germany had not officially recognised itself as a country of immigration. As this perceived status persisted for a long time after World War Two, only a few measures and limited institutionalization were implemented in the domain of ethno-race equality. An analysis of the state of development of antidiscrimination policy prior to EU influence cannot therefore disregard the fact that in parallel with the adoption of Article 13 TEC and the
RED at the EU level, internal German political dynamics have brought a major reconfiguration in policies affecting minorities with an immigration background settled in Germany.

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<tr>
<th>Equality model</th>
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<td>Art. 2:2b on indirect discrimination; Art. 5 on positive actions (no requirement): substantive? No, Recital 15: use of statistical evidence</td>
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<td>Traditional positive policies</td>
<td>(see relevant EU programmes)</td>
<td>non-systematic and at the decentralised level, for foreigners and religious minorities</td>
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<td>Affirmative/positive actions</td>
<td>Allowed, Art. 5</td>
<td>no</td>
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| Policy congruence | Medium |

Table 3.4 Policy congruence in Germany
The red-green coalition, which took office in 1998, was the first to disavow the *Kein Einwanderungsland* rhetoric. Consequently, major policy change took place regarding citizenship, immigration and integration policy, with wide reforms introduced in federal laws and reflected at the level of the Federated States. This internal shift of German policy needs to be accounted for when trying to assess the impact of Europe on the evolution on antidiscrimination policy.

Overall, thus, the degree of congruence of race equality policy with the model portrayed in the RED can be classified as medium. The analysis highlighted little conflict with EU requirements, but rather a general lack of policy developments up to the end of the 1990s.

In the case of constitutional and statutory provisions, there is a potential divergence between GG prescriptions and legal categories needed for the development of race equality measures. However, the — although few — traditional positive policies developed towards national and ethnic minorities have highlighted that the interpretation and use of the constitutional principles have been more flexible than in the French case. Ethnic or religious groups can be considered legitimate subjects of public policy and, in particular, no subsidiary categorization has ever been put in place to address public policy measures to them (apart from the citizenship status). Specialised antidiscrimination statutes were particularly under-developed, in both the criminal and civil domain. An incipient institutional development concerning race equality institutions is instead to be remarked upon, at both the central and decentralised level, although very recently. Minority policies, on the contrary, do not seem to have developed further than experimental experiences (religious minorities). If one disregards recent evolutions, Germany seems characterised by an institutional vacuum, rather than a conflicting model of race equal treatment policy. Its policy congruence with the RED is thus classified as medium.

**Italy**

*Equality model*

From a statutory point of view, the state of development of race equality policy before the transposition of the RED, in Italy, was probably more advanced than what might have been expected from a country of much recent immigration.
As in the other two country-cases, protection from race discrimination in Italy is provided first and generally by the equality principle enshrined in the republican Constitution. The Italian equality clause (Art. 3) contemplates *per se* the possibility of treating differently different situations, thanks to what commentators have described as a substantial equality approach, an approach which is more an exception than the rule in the European continental context (Bell, 2002, Del Punta, 2002). Adding up a paragraph to the formal equality clause (Article 3.1), indeed Article 3.2 of the Italian Constitution foresees that

It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.\(^75\)

In addition to Art. 3.2, Art. 6 of the Constitution states that ‘The Republic safeguards linguistic minorities by means of appropriate [better translated ‘specific’- *apposite*] measures.’ In the first drafts of the Constitution, the text explicitly mentioned ‘ethnic minorities’, a characterisation which was subsequently deleted because it was not considered appropriate in a post-fascist era which was furthermore pervaded by proactive secessionist movements (Palici di Suni Prat, 1998).

Both articles of the Constitution, thus, explicitly foresee that the State may intervene to improve the status of disadvantaged groups or minorities, also identifiable on ethnic or ethno-linguistic criteria. This implies not only granting their equal treatment and preventing discrimination, but also developing positive measures.

The application of such Constitutional provisions has nonetheless been sporadic. Paradoxically, in the domain of gender, no state-sponsored positive action programme exists for electoral mandates or public employment to date. In the case of national minorities, the adoption of positive measures was at first dependent upon international agreements with kin-states. Reference to Article 3.2 was used in the immediate post-war period to adopt measures for the reintegration of Jewish workers with the aim of

\(^{75}\) (Own translation): È compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l'eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese.
compensating for violence and deprivations suffered under the Fascist regime (Bonetti, 1994, Chiarelli, 1996).

The situation of national minorities was, instead, regulated for a long time by the above-mentioned agreements with kin-states, which were then translated into some of the Statutes of the Nordic Italian regions from the mid-1970s onwards. A comprehensive law recognizing and protecting national minorities was only adopted as late as 1999 (Law 482-1999). As in the German case, the ratification of the two main international conventions in this domain (the FCPNM and the ECRML) helped push the process of statutory recognition at the central level.

Specialised legislation

Criminal provisions on race discrimination date from the 1970s and, like in France, were prompted by the ratification of the ICERD (Law 654-1975). In the Italian case, they added up to other provisions inserted in laws on public security (such as Law 152-1975) that only concerned associations promoting fascist and racist ideals and did not criminalise race discrimination as such. The scope of Law 654-1975, in any case, was limited to punishing the incitement to racial discrimination, either direct or through publications and advertising. More comprehensive antiracist provisions were issued in the beginning of the 1990s through Law 205-1993, the ‘Mancino Law’, adopted as an emergency decree in a moment of recrudescence of racist crimes against immigrants (Colombo and Sciortino, 2003, Dal Lago, 1999). In addition to generalising the ban on race discrimination, the ‘Mancino Law’ made race discrimination a general aggravating circumstance within the criminal code and foresaw a special criminal procedure for the crime of race discrimination (‘giudizio direttissimo’ –criminal procedure code, Article 233).

Considering civil law, race discrimination was banned in the sphere of employment, among other discrimination grounds, thanks to an amendment introduced in 1977 to the Works Constitution Act (Law 903-1977, Art. 13). In the Italian doctrine there is however no evidence that this provision had ever been used consistently in professional collective bargaining agreements or referred to in lawsuits.

Compared to the other two countries, the peculiarity of the Italian case resides in the fact that specific articles on race, ethnic, religious and nationality discrimination were introduced into the civil law in 1998, through a new Immigration Act (Art. 43 and 44,
Legislative Decree 286-1998, hereinafter the Comprehensive Immigration Act, CIA 1998). The CIA 1998 established a regime of protection against both direct and indirect discrimination defined with a wording similar to that of the RED. Such equality regime is especially conceived for foreigners legally residing in the country and the scope of the anti-discrimination clause is as extensive as that provided by EU law, in that it applies also beyond the sphere of employment. Moreover, the articles of the CIA comprise motives beyond race and ethnic origin, including both religion and discrimination on grounds of nationality. Furthermore, the act establishes a special, cautionary, judicial procedure for the enforcement of these provisions (by linking them to Art. 700 of the code of civil procedure), which seeks to grant a rapid anti-discrimination lawsuit and allows trade unions to bring suits for collective discrimination. In short, the CIA 1998 established a highly protective regime for race discrimination, as compared to what was in force before and also to the other countries considered so far. Nonetheless, until very recently, the existence of specialised civil legislation had not given rise to a consistent amount of antidiscrimination litigation. Rather, until 2003 civil courts’ rulings based on the CIA 1998 have been sporadic; a specialised collection of rulings established by the Italian Association for the Juridical Studies on Immigration (ASGI) numbers 14 judicial decisions on discrimination on ground of nationality between 1998 and 2002. Most of these lawsuits challenged barriers to the access to public employment or social provisions by third country nationals on the basis of the provision of the CIA, which grants a right to equality in spite of one’s own nationality.  

Equality bodies

The antidiscrimination clauses of the CIA 1998 foresaw that every Italian region, in collaboration with other levels of local government, representative of migrant minorities and local NGOs, establish ‘centres for the monitoring, information, and legal support of the foreign victims of discrimination’. Italian regions have, however, failed to implement

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76 In several interviews with Italian antidiscrimination experts I tried to understand why such advanced antidiscrimination provisions were inserted into the 1998 Comprehensive Immigration Act. Replies, however, have been inconsistent. It was therefore not possible to confirm the nonetheless fascinating thesis put forward by an expert (Interview IT COSPE) who suggested that a former member of the British Commission for Race Equality would have provided consultancy work for the then Minister of Equal Opportunities - Anna Finocchiaro - who drafted the two relevant articles.  
this part of the act envisaging what could be defined as proper decentralized equality bodies. The first regional equality body was only established in November 2007 in Emilia Romagna, after a nine-year delay and consistent pressures from academics well aware of new EU legislation created in the meantime. Beforehand, the Immigration Law of 1990 (Law 39-1990, ‘Martelli Law’), had established consultative committees for immigration at the level of regions, with no specific competence for discrimination.

Nothing comparable to an antidiscrimination body at the central or decentralised level was present before the transposition of the RED, also because Italy has so far failed to comply with Resolution 48/134 of the UN General Assembly requiring the establishment of a national independent human rights institution. Also gender equality institutions have been traditionally underdeveloped in Italy. For a long time, the institutional gender machinery was limited to a network of regional gender equality counsellors, with competences on non-discrimination coordinated by a national counsellor.

**Positive policies**

In relation to positive policies, it is intriguing to begin the analysis of the Italian situation from the special provisions foreseen for some of the national ethno-linguistic minorities. As in the case of official recognition by the central state, promotional measures in favour of autochthonous minorities are also a relevant indicator for understanding how far public policies can go when they attribute a differential treatment on the ground of ethnicity. This is particularly relevant for the Italian case, where, unlike in France and Germany, positive measures have gone so far as to establish forms of positive action in favour of specific ethno-linguistic groups through quotas. Such measures, however, have mainly been adopted at the decentralised level, that of the regions.

The most interesting measure in this field is usually known as ‘ethnic proportionality’ (*Proporz* or *Proporzionale etnica*), and is a form of positive action which has been in force in the border province of Bolzano since the 1950s. Originally introduced on the basis an international agreement with Austria (the De Gasperi-Gruber Agreement of 1946), the policy then found its place in the regional Statute of Trentino Alto Adige (Constitutional Law 1-1972) and was sanctioned as legitimate by the supreme Italian
jurisdictions. It applies to the German majority and Italian minority living in the province, providing for proportional representation in regional institutions, a proportionate share in the Region’s resources – for school and other kind of public services – as well as proportionate posts in the regional bureaucracy. For the numerical assessment of the proportion, residents have to identify themselves in special census forms declaring that they belong to one ethnic community or the other, through an individual ‘declaration of ethnic belonging’ (dichiarazione d’appartenenza etnica).

The existence of the ethnic proportionality and of other – more traditional – positive measures in favour of recognised ethno-linguistic minorities at the level of the regions, has led many lawyers to classify Italy as a ‘promotional regime’ in the field of minority policies (Palermo and Woelk, 2008).

Positive measures in favour of new, or simply non-autochthonous minority groups are more difficult to assess. The Roma and Sinti minorities – present in Italy since the 15th century, for instance, had originally been included alongside other national minorities to be recognised by means of Law 482-1999, but reference to them was deleted from the approved version of the bill. Since 2000, a number of specific bills have been presented to the Parliament in order to include Roma and Sinti among the beneficiaries of the promotional framework (and funds) established through Law 482-1999, but none of these bills has ever reached the final stage of parliamentary discussion.

In spite of this, most Italian regions have adopted specific statutes concerning “nomad populations,” as well as other minority communities present in their territories at specific moments – for instance Albanians and Armenian refugees who fled because of conflicts or natural disasters (Zincone, 2000: 525 ). The regional legislation on nomadic communities that mushroomed since the 1980s, however, was limited towards establishing criteria for the setting up of camping areas, mainly in downgraded and segregated areas, which contributed to Italy being named the internationally criticised ‘Country of the camps’ (ERRC, 2000, ECRI, 2006).

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78 Last by a Constitutional Court sentence, No 289/1987.
79 The declaration of ‘ethnic affiliation’ has been the object of overt criticism in the past because it allowed people to choose only among two options and did not provide for the possibility of self-determination. It has finally been reformed in 2005 according to criteria set forth in the FCPNM. For more details see Palermo and Woelk (2008).
80 Minorities eligible for promotional measures are: the Albanian, Catalan, German, Greek, Slovene, Croatian, French, Franco-occitan, Friulan, Ladino, Occitan and Sardinian.
Following the immigration law of 1990, most Italian regions have also adopted specific laws establishing measures for third country nationals (cittadini extracomunitari). The Martelli law, in addition to the Comprehensive Immigration Act of 1998, delegated to the regions most competences for the management of reception and integration policies. An assessment of what specific measures have been put in place at the decentralised level is however very difficult and beyond the scope of this work. The summary provided by the two existing official reports on the integration of immigrants (Zincone, 2001, Zincone, 2000) do not indicate relevant examples of promotional ethnic- or minority-focused measures, apart from those mentioned in the paragraph above.

What is instead worth mentioning is the paucity of measures for immigrated minorities adopted at the central level. In the field of education, for instance, which in Italy is to be regulated centrally, there has never been an agreement made concerning the establishment of Italian preparatory or parallel classes for immigrants’ children, nor on the teaching of the language of origin, even though school integration measures were already foreseen in the Immigration law of 1986 (Law 943-1986). Interestingly, Zincone (2000: 247) points at the segregation experienced by the children of Italian emigrants in other European states – such as France and Germany – to explain the reticence to work in this direction.

The same law of 1986 established funding for Italian education of adult workers, but there is no comprehensive information on the way this was implemented from the central level.

The wide temporal gap of the first provisions in this sense, as compared to the timing of such measures in the other two country cases, betrays both the delay of the immigration phenomenon in Italy (the emigration over immigration ratio started being positive only in 1973) and the lateness of its appraisal (Pugliese, 2003).

In 2000 and 2001, the first official reports on the integration of immigrants in Italy were the first attempts at an assessment of these policies. In some cases, however, the reports were incapable of providing comprehensive information on the effective application of such measures. In most cases, reference was made to best practices adopted by local governments, or NGOs.
## Summary

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</tbody>
</table>

**Table 3.5 Policy congruence in Italy**
Italy presents a substantive and promotional equality framework as concerns ethnic minorities, which can legitimately be identified and targeted upon their ethnic or ethno-linguistic characteristics by public policy measures. This is particularly evident in provisions for historic linguistic communities and in relation to measures developed from the decentralised levels of the State, which also comprise genuine forms of affirmative action based on ethnic criteria.

In addition, in the years immediately preceding the adoption of the RED, enhanced legislation applying to the civil domain was adopted in a comprehensive act regulating immigration.

Even though there is no proof that the antidiscrimination legal framework has been applied consistently, on paper, from a comparative point of view, and considering the antecedent of autochthonous minorities, the degree of policy congruence can be classified as large.

This is of particular interest given the different timing of Italy’s becoming a country of immigration. The promotional framework conceived for autochthonous minorities and the absence of clear guidelines as concerns policies for the integration of immigrants might have enabled a wider opening to adopting ethno-race equality legislation. It is, however, difficult, and beyond the scope of the analysis, to demonstrate the causes or influences having determined the adoption of the antidiscrimination statutes in force already before the implementation of the RED.

The total lack of race equality institutions, even if formally foreseen by law, is to be remarked upon and determines the significant but incomplete degree of congruence with EU policy.

**Comparative overview**

The paragraphs above highlight a number of major differences among the policies on race equality existing before 2000 in the three countries. This confirms the interest of an in-depth qualitative analysis of policy congruence. All indicators show also significant
variation in comparison to the values assumed for the RED, pointing to the fact that no country had a perfect match with it before 2000.

A comparative overview of the variance of policy congruence among the three countries leads to a number of observations. By looking at constitutional norms and adherence to international conventions across the cases, it becomes evident that the way in which constitutional bans on race discrimination, but in particular the way in which they are interpreted is relevant to determining the formulation of race equality policy measures in a specific country. This is particularly true when comparing the French and the German case — with almost identical formulations of the equality principle — and considering how the basic law of each country has influenced or not positive policies targeting (autochthonous) ethnic minorities.

<table>
<thead>
<tr>
<th></th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
<th>EU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equality model</td>
<td>✗</td>
<td>✓</td>
<td>✓</td>
<td>(Substantial)</td>
</tr>
<tr>
<td>Specialised legislation</td>
<td>✗</td>
<td>✗</td>
<td>✓</td>
<td>Civil</td>
</tr>
<tr>
<td>Equality bodies</td>
<td>✓ ✓</td>
<td>✓ ✓</td>
<td>✓</td>
<td>Yes</td>
</tr>
<tr>
<td>Positive/Policies</td>
<td>✗ ✓</td>
<td>✓ ✓</td>
<td>✓</td>
<td>Allowed</td>
</tr>
<tr>
<td>Actions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Policy Congruence</td>
<td>Small</td>
<td>Medium</td>
<td>Large</td>
<td></td>
</tr>
</tbody>
</table>

Table 3.6 Indicators of policy congruence: a comparative overview

✗=incongruent with EU policy; ✓=congruent with EU policy; ✓✗=partially congruent

In addition, policies targeting autochthonous groups in Italy and Germany provide an added value in seeking to understand what is at least legally conceivable for minorities of immigrant origin from the point of view of public policy, even though the actual examples of positive policies are few, and even less so of positive actions.

Another finding worthy of consideration is that international conventional norms in the field of minority protection in the late 1990s seem to have contributed towards a clarification of the framework of protection and promotion of (autochthonous) minorities,
pushing formal statutory recognition at the central level of government in Germany and Italy. Such formal recognition took place rapidly, but only where minorities were already safeguarded by international treaties. It is intriguing to ascertain whether EU race equality policy will engender similar or different dynamics at the domestic level for minorities with an immigration background, at least in these three countries.

Also, the comparative analysis of domestic statutes shows a noticeable variation. The most evident common feature is the underdevelopment of specialised statutory provisions in civil law, or their very restricted focus, with the sole exception of recent Italian law. This underdevelopment not only concerns the pure existence of legal provisions within specialised or generalist statutes, but in particular their actual enforcement in courts.

Criminal provisions are also dissimilar from country to country. Their extensiveness in France, for instance, confirms that this country had engaged in a different antidiscrimination ‘policy paradigm’ as compared to the civil law approach undertaken in EU law. In Italy, criminal law provisions date from the same years as those of France, but they are less extensive, have never been used by civil society activists in courts, and have subsequently been complemented by civil law. In Germany, finally, the scope of criminal law used to be – and still is – surprisingly limited, not providing for a proper crime of race discrimination.

A feature almost common to all three countries is easily identifiable in the shortage of race equality institutions. No country previously had a specialised national equality body, or an agency dealing with other complaints together with race discrimination ones. This shortage in independent institutions for the protection of fundamental rights or equality rights does not concern only race and ethnic origin as grounds for antidiscrimination, but even, and for a long time, gender (Hermanin and Squires, 2012).

Wherever embryonic equality institutions were present they were either of very recent establishment (France, Germany), and/or lacking some of the competences suggested by the RED. Another common characteristic is the incipient establishment of such institutions also at the decentralised level, still with varying records, competences and formal powers. The absence or lack of a precise mandate of race equality institutions is perhaps the most patent element of incongruence in the three countries as compared to the EU policy model. Only Germany has been attributed a positive score in the field of race equality institutions, since this is the only country in which some formal
antidiscrimination powers were attributed to the foreigners’ commissioners through either federal or state law.

The field of positive policies is the widest and the most difficult to assess comparatively. On the one hand, it is easy to differentiate Italy and Germany from France as concerns positive policies that allocate special benefits or services to groups identified on their ethnic characteristics. In the French case, the constitutional ban on race and ethnic categorization leads one to assess policy measures concerning minority groups identified upon other characteristics, such as citizenship status and territorial concentration, which have acted as proxies for the prohibited ethno-racial identification criteria. On the other hand, France is the sole country in which embryonic forms of positive policies for new minorities (in the housing and educational sector), have been introduced thanks to these proxies, while in Italy affirmative action measures have only targeted autochthonous minorities.

Reform stage

Finally, the study of policy (in)congruence in the three country-cases highlighted that it is almost impossible to describe the level of policy congruence of each country without taking into account the timing of policy reforms in the antidiscrimination domain (e.g. France, Italy) or in policy fields which are relevant to determining the recipients of antidiscrimination measures (immigration and citizenship policy, as in the German and Italian cases). In other words, it seems almost impossible to isolate the dynamics of domestic policy reform from the moment in which EU antidiscrimination policy is transposed into the domestic arena. This limit of the concept of policy incongruence was already highlighted by Héritier (2001), who underlined the necessity of considering the domestic ‘reform stage’ to assess the impact of EU policy. This will become even more evident in the following chapter, where the study of transposition and implementation of EU policy will have to be severed from domestic policy change in order to grasp the ‘net impact of Europe’ (Haverland, 2000). Apart from process-tracing domestic evolutions in the relevant policy fields, the question of whether reforms were pushed by EU policy or domestic reform has been addressed to all the experts interviewed in the framework of this
Part of results of this inquiry will be summarised in the following chapter, which details the process of domestic transposition in the three countries.

\[82\] In particular, the interview strategy consisted of asking whether the experts attributed to EU policy changes identified as relevant in the domain of antidiscrimination policy (adoption of new legislation or changes in the implementation of antidiscrimination policy, depending on the type of expert interviewed) as a last question. Of course, if EU influence was singled out autonomously before the question this was recorded as a positive answer.
4 Complying with Race Equality

Introduction

As seen in Chapter Two, even when they are detailed as the RED, directives always leave some room for discretion to the national policy makers who have to transpose them. In the process of assessing the domestic impact of EU policy, therefore, it is necessary to understand how national policy makers take advantage of the room for manoeuvre they are left with when they need to translate EU obligations in national regulation. Secondly, but perhaps even more importantly, national policy-makers may, purposefully or not, abstain from translating all their EU commitments into practice. Thus, determining the extent to which national statutes are in compliance with EU prescriptions is a fundamental step in the analysis of policy implementation.

This chapter offers a detailed review of the transposition of the Race Equality Directive (RED) in France, Germany and Italy. The aim of this analysis is to explain the determinants of the quality of compliance attained in the three countries, before passing to the analysis of judicial enforcement.

This chapter mainly invokes analytical tools drawn from studies on compliance with EU law. When defining compliance in the EU context, reference is generally made to the notion developed in international relations. Here, a prominent definition is that ‘[c]ompliance can be said to occur when the actual behavior of a given subject conforms to prescribed behavior, and non-compliance or violation occurs when actual behavior departs significantly from prescribed behavior’ (Young, 1979: 104; similarly Raustiala and Slaughter, 2001).

In this chapter I present a second type of explanation of compliance alongside the incongruence hypothesis. In particular, I look at the constellation of domestic actors that intervene in the process of defining the domestic statutes that transpose EU policy (Héritier, 2001, Haverland, 2000, Dimitrova and Steunenberg, 2000). In so doing, I take particular care in highlighting two factors recently identified by Steunenberg (2006) as relevant variables for the assessment of transposition success: the type of instrument...
adopted to transpose EU law, and the preferences of the actors whose agreement is required for the definition of the instrument of transposition, and of its contents. By retaining an actor-centred approach, it is also possible to discuss another hypothesis put forward by several recent qualitative studies on compliance: namely that transposition results mainly depend on domestic party politics, and on domestic partisan preferences concerning a certain policy area (Treib, 2003, Falkner et al., 2005).

In a 2006 article Bernard Steunenberg theorizes the importance of considering the modes of transposition and their consequences in terms of players taking part to the domestic transposition process, in order to assess compliance with EU directives (Steunenberg, 2006). More specifically, Steunenberg highlights the importance of the type of domestic regulation required by the adoption of a directive.

The mechanisms of single-player and multi-player coordination are [thus] linked to the extent to which the transposition of a directive requires changes in the national legal system. If the contents of a directive require the adoption of only one or more “lower-level” instruments (such as ministerial orders or governmental decrees), transposition could take place within the framework of a single-player coordination. [...] However, if a directive requires the introduction of a new law, multi-player coordination seems to be inevitable, especially if the government is based on a coalition. Consequently, deadlock and delay are possible. (ibid.: 314)

Depending on the choice made on the transposition instrument, the number and types of actors possibly involved in the transposition process varies.

Whereas Steuneneberg is mainly interested in explaining deadlock and delays in the domestic transposition, I apply a similar analytical approach to assess the quality of compliance.83

In the case of the RED, different transposition instruments have been adopted in the three member states. Thus, an assessment of the type of instrument, the actors that have access to defining its contents, and their preferences are used for understanding the level of compliance reached in each of the selected countries. The results of this section will be the point of departure for the assessment of domestic enforcement, to which I dedicate the fifth chapter.

83 The expressions level and quality of compliance are used interchangeably.
The purpose of assessing domestic transposition at this stage is to discover the level of compliance attained through the transposition process conducted at the central level by the three national governments. For this purpose, I will also account for domestic responses to infringement proceedings launched by the European Commission in view of the non-transposition or incorrect transposition of the RED.

I expect two possible situations as concerns transposition methods, domestic players, and transposition results.

In the first case, the instrument chosen for transposition is either a new law, or a law amending existing acts, in any case one or more acts which have to be passed by the national parliament. In such cases, a number of domestic veto players – I take the definition of *de facto* veto players from Héritier (2001: 12) – have a formal or informal influence on the arena where the contents of the act(s) are determined. I hypothesise, with Steunenberg, that these multiple veto players have diverging preferences as concerns the contents of the act and expect delayed transposition and a low level of compliance, which may take the form of a mere literal transposition.

The preferences of the domestic actors, which were detailed in Chapter Two, are measured on an imaginary straight line between, on the one hand, a preference for the introduction in the domestic arena of EU policy prescriptions as they are set in the directive and, thus, supporting the establishment of an advanced antidiscrimination model including protection from indirect discrimination and an affirmative equality approach. At the other end, preferences value the maintenance of the domestic policy and of mechanisms of enforcement for equality policy with a lower coercive potential (e.g. mediations and out-of-court settlements instead of judicial redress). Thus, for every actor, the assessment of preferences concerns whether they are supportive or not of the model of equality policy embodied by the RED. The assumed preferences are those that have been detailed in Chapter Two (Table 2.1), which, for the sake of readability, is included again here below.

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Note that this is always possible since in no case have we detected a perfect policy congruence between pre-existing domestic antidiscrimination policy and EU policy.
Domestic Actors | Interest constellation – Assumed preferences over race equality policy
---|---
Policy-makers | Depends on the ruling majority: right wing and centre-right policymakers keen on maintaining domestic policy; centre-left majorities open to new equality model embodied by the RED
Equality bodies | Depends on their degree of independence from political power: the more autonomous, the more prone to enforce the equality model embodied in the RED, pursue judicial strategies or lobby to acquire powers to litigate, when they are not entrusted with them
Judiciary | Depends on the domestic receptiveness toward EU and international law: open/receptive courts more keen to discard domestic legislation in favour of the new equality model embodied in the RED
NGOs | The more technically specialised, internationalized and open to EU funding the more prone to the new equality model embodied in the RED and to litigation strategies
Experts’ networks | If EU-socialised, able to lobby the decision-making centres in favour of adapting to the new model of equality policy and to work for further development and full compliance
Employers/Service providers and their associations | Hostile to new equality model portrayed by the RED, and in particular to antidiscrimination litigation seen as potential cost. Keener to implement self-regulation initiatives such as ‘diversity plans’
Trade Unions | Sympathetic to new equality model portrayed by the RED, supporting legal mobilization whenever they have a legal mobilization tradition

Table 2.1 Interest Definition and Preferences of Main Domestic Actors over Race Equality Policy

In the second possible case, transposition is performed by the government only – through, for instance, a governmental decree or administrative measures. In this case, the priority is assessing what the preferences of the government are, as compared to the equality model embodied by the RED. The domestic arena is then treated as a unitary actor, and preferences will only be compared to the contents of EU policy (whether the domestic arena is supportive of EU policy prescriptions or not).

For each country the assessment is performed describing first, the general method used to transpose EU directives and the instrument adopted in the case of the RED. Second, I review the constellation of domestic actors who has formal or informal access to the definition of the contents of transposition, in light of the instrument adopted. Third, I focus on the preferences of the relevant actors on the main issues at stake in the process of domestic transposition, and in particular on those issues that are treated as indicators of
compliance. Last, I provide an assessment of the level and quality of compliance reached through the process of domestic transposition, where appropriate in successive stages, and in view of the Commission’s infringement actions.

After studying the process of transposition through the instrument/actor-based perspective, I contrast this perspective with the more traditional hypothesis about the influence of policy incongruence on compliance, i.e. that the smaller the degree of policy congruence, the lower the quality of compliance that will be reached at the issue of transposition. By juxtaposing the findings of Chapter Three with those of Chapter Four, the concluding section of this chapter discusses the merits and the explanatory power of both perspectives.

**Assessing the Quality of Domestic Compliance**

*Locating the explanandum*

Methodologically, Falkner et al. (2005) and Hartlapp and Falkner (2009) maintain that a fully-fledged analysis of compliance with EU directives needs to go into greater depth than do most formal assessments provided by official sources, such as the Commission’s reports on the application of EU law, or studies based upon these.\(^85\) I completely share these concerns. The Commission’s official reports summarise information derived, on the one hand, from the communications that member states’ civil servants provide directly to Brussels.\(^86\) On the other hand, information depends on the capacity of the single EU civil servants to collect relevant data for the member states, or on information provided by other sources, such as networks of experts (frequently funded by the Commission for this

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\(^85\) The Commission’s assessments are available at: [http://ec.europa.eu/community_law/index_en.htm](http://ec.europa.eu/community_law/index_en.htm);

\(^86\) The Annual Reports on Monitoring the Application of Community Law provide various data of interest when studying compliance with EU norms: data on notifications, infringement proceedings, and judgments by the European Court of Justice. These reports have been published since 1984 (COM(84)181). Over time, the collection of the information presented became more systematic and the presentation of the data in the report more sophisticated, but these changes also entail problems in terms of extracting the data. A mechanistic use of the reports therefore seems problematic (see Börzel, 2001, for a similar argument). Since 2000, progress on the notification of implementation measures has also been published six times a year on the homepage of the Secretariat-General of the European Commission. The most important difference from the data in the Annual Reports concerns those cases that change of status during the year. More recently, EUR-Lex (formerly CELEX) has made it possible for scholars to trace the information on national notification measures case by case – but even here the problem of missing cases (‘No Reference Available’) remains an issue.
purpose) or interested stakeholders. As shown by Falkner and Hartlapp, this data is more reliable for studying the timeliness of compliance than it is for assessing the correctness of transposition (2009).

Since the principal aim of this work is to understand the entire cycle of domestic implementation and the quality of compliance, the analysis of domestic transposition needs to go further than most of these reports. Therefore, I mainly rely on qualitative studies developed so far on compliance with EU directives, and more generally, on the implementation of EU policy, in order to narrow down the analytical lenses of my account and focus on some of the variables which have been singled out as affecting the results of transposition of EU directives, and more generally, EU policies, in the member states.

The final object of analysis within this chapter is the level of compliance with the detailed provisions of the RED reached in each country with the transposition process. Thus, this chapter deals with the specific statutory provisions introduced in the national arena through the domestic transposition of the RED. Furthermore, while Chapter Three gave a picture of the situation of race and ethnic antidiscrimination policy before the transposition of the RED (at a moment of time defined as T₀ in the analytical model), Chapter 4 attempts to assess the changes introduced through the transposition, thus providing an analysis of provisions in force at T₁. According to the deadline set for transposition, the 19 July 2003, I consider as T₁ all the period following that date. In fact, according to the Van Duyn and Ratti case law of the Court of Justice, directives whose provisions are unconditional and sufficiently clear and precise have vertical direct effect (can be enforced by individuals against the public administration) starting from the date set for transposition when national transpositions laws have not yet been adopted.

The reason I do not concentrate on a specific moment of time, but rather on a time period, is that I am not especially interested in transposition delays or deadlock, but rather in compliance, which can also be achieved through successive stages, for instance by the adoption of multiple statutes.

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87 Interview EU EMPL 1.
88 Van Duyn v Home Office, 1974, C-41/74 [ECR 358], Pubblico Ministero v Ratti, 1979, C-148/78, [ECR 1629].
Indicators and sources

In order to evaluate the accuracy of transposition, it is necessary to develop a set of ‘indicators of compliance.’ The latter are based on the provisions of the RED and have been compiled following a selection of provisions that define the equality model described in Chapter Three and double-checked against the criteria used by the Commission itself to evaluate the correctness of domestic transposition.

Further, I have taken into consideration the reports of the Network of Legal Experts in the Non-Discrimination field, a network founded by the Commission and entrusted with the task of reporting on the national implementation of the RED and the FED at regular intervals of time.\(^89\) The network is mainly constituted of lawyers, academics and, in some cases, public servants (e.g. officers from the equality bodies, as in the French case). It was constituted in 2001 and its management – as well as the selection of the experts – was outsourced to the Migration Policy Group (MPG), a Brussels-based group acting both as lobbying cabinet and consultancy cabinet for the Commission.

In their reports, the experts have to reply on a number of detailed questions on the implementation of the directives, questions that are drafted by the staff of the MPG with a supervision of former DG Employment G2, since 2011 DG Justice D1, the unit of the Commission charged with the legal issues relevant for the field of antidiscrimination policy.\(^90\) The reports are used by the Commission to monitor compliance with the directives and eventually ask questions to the national governments on the state of transposition, send letters of formal notice, or launch infringement proceedings for either non-transposition or incorrect transposition.

Finally, the level of compliance has been checked against the contents of the infringement proceedings eventually launched by the Commission for incorrect transposition, while checking compliance through what Börzel (2006) defines as its ‘sanctioning strategy’.

Most of the criteria retained as ‘indicators of compliance’ are similar to those used in the reports of the Network. The reports, however, focus on both the RED and the FED, as well as on implementation issues (e.g. the application of transposed laws and specific

\(^{89}\) The relevant project was funded through the Action Programme Against Discrimination and is now funded under Progress. A disclaimer notes that the reports are not to be considered as produced by the Commission, even though they are available on the Commission’s website.

\(^{90}\) Note that until 2004 the network was only dealing with discrimination on the basis of religion and ethno-racial characteristics, while afterwards its mandate has been extended also to discrimination grounds covered in the FED. Interview EU MPG 1; EU EMPL1.
proof evidence). Therefore, the list of criteria has been revised according to the most restricted focus of this analysis and the equality model described in Chapter 3, while other indicators have been inserted and highlighted, in particular when so suggested by a consistent number of domestic experts of non-discrimination law during the interviews.91

**Regulatory, directive and soft elements within the RED**

As already clarified in Chapter Two, the RED is a complex policy instrument, which reunites ‘regulatory’, ‘directive’ and ‘soft’ elements (cf. Table 2.4 above). Compliance takes different forms depending on the nature of the provision that has to be transposed. Regulatory elements have only one compliant form of transposition, i.e. they have to be inserted in domestic law or administrative practice as they are detailed in the directive. For ‘directive elements’ there is, instead, a range of possible options of policy among which national government may choose, while other options violate compliance requirements. Soft elements do not have compliant or non-compliant forms. The directive encourages their adoption (‘member states ‘may’’) but does not provide guidelines as to possible forms of compliance. Furthermore, from the infringement proceedings issued thus far, inaction from member states as concerns soft elements is not considered as incorrect transposition of the RED.

For the analysis of the quality of compliance, a restricted number of indicators have been selected among these three categories in view of the criteria set out (cf. Table 4.1). The indicators of transposition of the regulatory elements can only have a positive or negative value and are considered as compliant with EU policy prescription only in the case they are correctly, i.e. fully, transposed.

In the case of the indicators of transposition of directive elements, on the contrary, a specific range of policy options is available. The option considered as closer to the model of affirmative equality policy (characterised by a substantial equality approach, explicit recognition of category and existence of group remedies and positive actions) are considered as ‘more compliant’, as specified below:

91 This is the case, for instance, for the indicator measuring the extent of exceptions to the antidiscrimination/equality principle. Interviews FR HALDE 2 and DE RAXEN1.
### Table 4.1 Indicators of compliance

<table>
<thead>
<tr>
<th>Regulatory elements</th>
<th>Definition of indirect discrimination</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Scope beyond employment</td>
</tr>
<tr>
<td></td>
<td>Shift in the burden of proof</td>
</tr>
<tr>
<td>Directive elements</td>
<td>CSOs legal standing</td>
</tr>
<tr>
<td></td>
<td>Equality body</td>
</tr>
<tr>
<td></td>
<td>Exceptions from non-discrimination principle</td>
</tr>
<tr>
<td>Soft elements</td>
<td>Positive actions allowed</td>
</tr>
<tr>
<td></td>
<td>Additional discrimination grounds (categorization)</td>
</tr>
<tr>
<td></td>
<td>Admissibility of statistical evidence based on discrimination grounds</td>
</tr>
</tbody>
</table>

- Rules for the concession of legal standing to civil society organizations (trade unions and associations) wishing to support or represent claimants in non-discrimination suits and type of support that civil society organizations (trade unions and associations) may provide by legal standing (whether they have to represent a victim or can act in the absence of an identified victim): *the wider the range of options for support and the access to legal standing for groups, the more compliant*;

- Organizational set-up of the equality body: *the more independent and resourceful the equality body, the more the enforcement powers delegated to it, the more compliant*;

- Type and extent of the exceptions from the principle of non-discrimination foreseen in domestic law: *the fewer the exceptions foreseen, the more compliant*
Given that soft elements are not mandatory, the sole assessment made is whether they are present in any form in the domestic transposition statutes. If they are, the results of transposition are considered more compliant with the RED. 92

The nine indicators defined above are used both to analyse the transposition process by looking in particular at the positioning of domestic veto players upon them, and to assess the quality of domestic compliance.

The final values attributed to compliance with the RED range from full compliance to low compliance, according to how many of the regulatory elements have been implemented and to the options adopted for the directive and soft elements.

The transposition process has been studied through three different kinds of sources: parliamentary debates, the analysis of bills and acts transposing the directive, and secondary literature (including both academic literature and the expert reports mentioned previously).

France

Overview

Before approaching the analysis of transposition in France, it is necessary to remind the reader of the two most important findings derived from the study of policy congruence conducted in Chapter Three. On the one hand, before the transposition of the RED France used to be in a situation of low policy congruence with EU race equal treatment policy. On the other hand, since the end of the 1990s the evolution of domestic antidiscrimination policy resulted in the establishment of pilot bodies in the field of race discrimination (the GED, then GELD), as well as the enactment of wide-ranging criminal statutory protection relying mainly on antiracist NGOs and state prosecutors for the redress of discrimination. Thus, the main elements of policy incongruence consisted in the formal approach to equality policy mandated by the Constitution, the refusal to employ the notions of race and

92 Note that the non-transposition of Recital 15 of the RED mentioning the admissibility of statistical evidence to prove discrimination has never been targeted by the Commission in infringement actions. This is why this element is considered soft.
ethnicity and their consequences in terms of positive policies, as well as a preference for fighting discrimination through criminal justice.

**Transposition instrument(s) and method**

Either laws passed by the Parliament, governmental decrees, or ministerial orders usually carry out the transposition of EU directives in France. Steunenberg and Voermans (2006: 112) report that around 40% EU directives are transposed through laws and the rest by acts of the executive. The choice of the transposition instrument depends on the policy field at stake, since some policy competences are reserved to the executive, while others – among which public liberties, the determination of serious crimes, social security, and labour law – are matters for the legislative. The Council of State (Conseil d’Etat) determines which institution is competent for the transposition of each directive and in all cases a draft transposition text is prepared by two government departments and then forwarded either to the legislative (as a law project) or to the relevant minister and his/her cabinet.

Transposition in France consists of extensively re-writing the text of a directive in order to introduce it as closely as possible to existing French law, an exercise leading frequently to a complete overhaul of the directive. Furthermore, the new rules are usually located where similar French national rules are found, e.g. in the relevant legal codes. This process generally demands the adoption of a series of legal instruments, leading to a ‘snowball’ effect, defined in French as a “cascade”. In addition to generating a vast number of implementing acts, sometimes the transposition of directives is made difficult by the fact that French legislation frequently avoids defining core legal concepts. This is a source of confusion, in particular when directives include precise and detailed definitions of the main new concepts to be transposed (Steunenberg and Voermans, 2006: 112)

The consequence of this transposition method is that France generally classifies among those member states with a medium transposition backlog; Germany and Italy have comparably worse scores in all official assessments. Whether or not domestic transposition is timely, nonetheless, does not help to determine the quality of transposition, which is the point of interest here. It suggests, nonetheless, that a number of different domestic actors may be involved in a transposition process consisting in the adoption of a number of acts over a possibly long time period.
In the case of the RED, transposition involved the adoption of three laws and a series of accompanying decrees. The three laws transposing the RED are summarised in the table below, together with information on the origin of the proposal, the length of the adoption process, and their main contents. The table provides the same kind of information for two more laws, which are also relevant in the framework of the RED. Implementing decrees are not included in the table.

<table>
<thead>
<tr>
<th>Act</th>
<th>Nature/origin</th>
<th>Negotiation/adoption</th>
<th>Final contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law 2001-1066 relative à la lutte contre les discriminations</td>
<td>Law proposal (MP)</td>
<td>14 months – 16/11/01</td>
<td>Limited to the employment sector; inserts notions (but no new definitions) of direct/indirect discrimination and victimisation, shift in the burden of proof; legal standing for associations and trade unions; establishes hotline collecting complaints; modifies articles in existing codes (criminal, labour)</td>
</tr>
<tr>
<td>Law 2002-73 de modernisation sociale</td>
<td>Law project (government)</td>
<td>20 months – 17/01/02</td>
<td>Direct and indirect discrimination in the housing domain. Shift in the burden of proof (amends pre-existing law)</td>
</tr>
<tr>
<td>Law 2004-1486 (HALDE) portant création de la haute autorité de lutte contre les discriminations et pour l'égalité</td>
<td>Law project (government), upon proposal of a specialised commission (Stasi Commission)</td>
<td>6 months – 30/12/04</td>
<td>Establishment of the French equality body (HALDE); extension of the scope of race antidiscrimination provisions outside the field of employment; shift in the burden of proof; new law</td>
</tr>
<tr>
<td>Law 2006-396 pour l'égalité des chances</td>
<td>Law project (government)</td>
<td>4 months – 2/04/06</td>
<td>Positive policies in favour of young people leaving in poor neighbourhoods (territorial criterion); new territorial focus (ZUS); reinforcement of HALDE’s powers; new competences to Fastild/ACSE; criminal testing.</td>
</tr>
<tr>
<td>Law 2008-496 portant diverses dispositions d’adaptation au droit communautaire dans le domaine de la lutte contre les discriminations</td>
<td>Law project (government) in response to EC reasoned opinion</td>
<td>5 months (urgency procedure) – 27/05/2008</td>
<td>Introduces definitions of direct/indirect discrimination; clarifies the scope of the provisions; completes the reversal in the burden of proof, clarifies applicability to public and private persons; introduces exceptions new legislative notions + amendments of pre-existing laws/codes</td>
</tr>
</tbody>
</table>

Table 4.2 Transposition instruments for the RED in France

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94 http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000268539&fastPos=1&fastReqId=1678797899&categorieLien=id&oldAction=rechTexte
The first three acts have transposed different parts of the RED. In particular, Law 2001-1066 transposes the RED only as concerns the domain of employment, by amending the relevant articles of the labour and criminal code. Law 2002-73 introduced the notion of discrimination in housing. Law 2004-1486 established the French equality body, the High Authority for the Fight against Discrimination and Promotion of Equality (HALDE, Haute autorité de lutte aux discriminations et promotion de l'égalité), an independent agency entrusted with powers to act on all grounds of discrimination present in the RED and FED, plus twelve more other grounds, specific of French legislation. The so-called ‘Law HALDE’ also completed the transposition of those provisions of the RED outlawing race discrimination outside the field of employment. Law 2004-1486 was the last act completing the (delayed) domestic transposition of the RED.

Law 2006-396 established new positive policies grounded on territorial criteria (targeting sensitive urban districts) and a series of other measures in the field of equal opportunities and non-discrimination. It importantly reinforced the powers of the HALDE to stand in litigation and operate plea-bargaining. Law 2008-496, finally, was adopted in the wake of the infringement proceedings opened by the European Commission against France, determining the closure of the infringement action at the stage of reasoned opinion.

The statutes cited above originated from law projects, i.e. governmental proposals submitted to the Parliament apart from the first act, Law 2001-1066, which stemmed from the proposal of a MP from the then socialist majority, but closely linked to the Minister of Social Affairs, Martine Aubry. Thus, even if the proposal was not formally submitted by the government, preferences condensed in the proposal can be treated as those of the government. This is further justified by the fact that the initial proposal for Law 2001-1066 consisted of four articles that were scratched and amended from the initial proposal for law 2002-73 on social modernisation, which was a governmental law project.

Law 2002-73, adopted a few months later, contained a large package of reforms in the domain of social policy and was not directly meant to transpose the RED, in fact only one article of the law concerns discrimination. Finally, the law then adopted as Law 2004-1486, the ‘Law HALDE’, was based on a report by a specialised consultative body headed by former minister and mediator Bernard Stasi. Stasi was entrusted by the new Prime Minister of the centre-right majority, installed in May 2002, with the institutional design

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95 http://www.assemblee-nationale.fr/11/dossiers/modernisation.asp
96 Non-conformity procedure 2005/2355 FR.
of the new equality body. The report by Bernard Stasi drew in part on the 1999 Belorgey report (see Chapter Three); however, differently from the Belorgey report—which was commissioned by the socialist government and concentrated only on race and ethnic origin—Stasi’s work responded to a request by the centre-right Prime Minister Jean-Pierre Raffarin and concerned all discrimination grounds recognised in French law. The work by Stasi implied an impressive consultation process involving political and administrative actors, civil society organizations, legal experts, enterprises and even foreign experts and equality bodies for a total of about 150 interviews.

Apart from the articles of the ‘Law HALDE’ establishing the new equality body, the new laws mainly introduced amendments to existing laws and codes, without introducing new definitions.

The main distinction as concerns the process of transposition described by Steunenberg and Voermans concerns the origin of the law projects, which highlights the salience of the policy field for the then French governments. Up to 2002, with the socialist government, race discrimination was on the government’s agenda, a fact that had prompted a governmental plan in 1999. The domestic process setting up equality institutions was ongoing and was brought forward by the following government which set up a second advisory mission to study the institutional configuration of the French equality body (Stasi report). The adoption of the law on equal opportunity early in 2006 followed the révolte de banlieues of the autumn 2005, which involved mainly young people of colour and of immigrant descent.

Finally, the argument that the acts that performed the domestic transposition of the RED were in part inspired by French internal political dynamics is proven by the fact that the bills transposing the RED did not originate in the two governmental departments generally charged with submitting draft transposition texts to the parliament. Thus, a number of national actors were involved in the consultation which led to the proposal of the bills transposing the directive.

Players, Issues and Preferences

As mentioned, the number of domestic actors consulted during the transposition process is particularly high given the use of the French executive to delegate studies to personalities or commissions with consultative tasks, and the presence of a number of consultative
bodies in the French political system. Furthermore, the academic and wider societal debate stoked by the on-going adoption of antidiscrimination legislation should not be underestimated. On the one hand, in the legal academy, the introduction of such notions as ‘indirect ethnic discrimination’ or the potential introduction of positive action for ethnic groups opened up space for scholarly debate. The specific mention of statistical proof of race discrimination in the directive, furthermore, contributed to the re-opening of a debate that had begun at the end of the 1990s on the usefulness and legitimacy of conducting ethnic monitoring for anti-discrimination purposes (Sabbagh and Peer, 2008, Calvès, 2002).

Regarding industry, fear of a massive recourse to new legal means to redress discrimination in employment was probably among the factors behind an original self-regulation initiatives led by French enterprises, the so-called ‘Charte de la diversité’ (Charter of diversity). The Charter is basically a deontological code for firms that was launched at the beginning of 2004 and first signed by a restricted number of multinational firms, then opened up for signature to other – also small and medium sized – enterprises.

Thus, focusing on parliamentary debates only in order to assess domestic veto players’ preferences is indeed a simplification of the real extent of the domestic debate. As in the French political system, external lobbying pressures and preferences are generally mediated through the main political parties, I consider preferences in terms of race antidiscrimination law to be manifest as the position of the parties in government (e.g. in the law projects) and in the two houses of the Parliament. The analysis concentrates on law 2001-1066 and on the ‘Law HALDE’.

According to the criteria set out above, I isolate four main actors intervening in the transposition process: 1) the socialist government in charge until May 2002 (Socialist Party) and its parliamentary majority in the National Assembly; 2) the centre-right opposition until May 2002 (RPR, UMP) and its centre-right majority in the Senate; 3) the centre-right government in charge since May 2002 (UMP) and its parliamentary majority

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97 In the case of the RED, the sole formal consultation has been with the National Advisory Commission on Human Rights (CNCDH), which was heard for the Loi HALDE, but we have seen that the STASI inquiry involved consultation of around 150 stakeholders.
98 Interviews FR AC1, FR RAXEN, FR INED1.
99 The Chartre de la diversité was drafted by Claude Bébéar (the funder of the insurance company AXA and of the industry think-thank known as Institut Montaigne) and Yazid Sabeg (a business man, active in the sector of high technology and since 2008 commisionaire for equal opportunities). Both personalities are considered close to the centre-right government and have participated to the debate on the equal opportunities of French with an immigration background with a number of recent publications.
in the National Assembly and Senate; 4) the centre-left opposition since May 2002 (Socialist Party, Greens, various communist formations).100

The first time domestic actors were confronted with transposing some provisions of the RED was pending the adoption of Law 2001-1066.101 While the law transposed both the RED and the FED in the field of employment, there was no reference to the two directives in the parliamentary debates, even though Law 2001-1066 was thereafter communicated to the European Commission as a national measure implementing EU law.102

<table>
<thead>
<tr>
<th>Year</th>
<th>Prime Minister</th>
<th>General Assembly</th>
<th>Senate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997-2002</td>
<td>L. Jospin, Socialist Party</td>
<td>Socialist majority (11th legislature)</td>
<td></td>
</tr>
<tr>
<td>2002-2005</td>
<td>J-P. Raffarin UMP (centre-right)</td>
<td>Centre-right majority (12th and 13th legislatures)</td>
<td>Centre-right majority (until Oct. 2011)</td>
</tr>
<tr>
<td>2005-2007</td>
<td>D. de Villepin UMP (centre-right)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2007-</td>
<td>F. Fillon (centre-right)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 4.3 Policy-makers in France during the transposition of the RED

The sole mention of EU law in the debates concerns Directive 97/80 on the burden of proof in cases of discrimination based on sex, which was also transposed through Law 2001-1006. This absence of any reference to the need to implement European Union measures underpins the thesis that the law is mainly conceived or presented as a domestic policy priority.103

In the case of Law 2001-1066 it is possible to distinguish three main subjects of parliamentary discussions:

- the shift in the burden of proof for employment discrimination suits;
- the right of trade unions to bring complaints with or without the written approval of a victim (directive element as concerns the need for approval of the victims for the

100 There has been cohabitation (government and president of the Republic of different political factions) during the period of study only between 2000 and 2002.
101 Information on the original text, parliamentary debates, final adoption and successive modifications has been retrieved on the National Assembly website: http://www.assemblee-nationale.fr/11/dossiers/discriminations.asp#pion2566
103 This is also testified by the fact that sexual orientation as a discrimination ground is only inserted during the first debate in the Cultural, social and family affairs committee, whereas Sexual orientation is originally part of the grounds covered by the FED.
union’s action, regulatory as concerns the right of interested legal entities to engage litigation in support/behalf of a victim);

- the scope and title of the proposal, whether it should be clear that this is limited to the employment sector, whether the proposal should also extend to the public administration as a public employer (scope is a regulatory element; the scope has to include the public sector).

On the three issues there was a clear division between the government and the left-wing majority in the Assembly, on the one hand, and the right-wing Assembly opposition and the Senate (led by conservative forces) on the other.

Plotting these positions on a continuum of compliance with EU requirements, in two cases out of three (burden of proof and some form of legal standing for trade unions) the governmental position and that of the parties in the majority were more compliant with the requirement of EU policy, i.e. appear to be in the range of admissible policies. On the contrary, the centre-right and right-wing opposition’s alternative position was not in the range of possible policies in two out of three cases, while it is more in line with EU policy when they advocate the extension of anti-discrimination norms to the public sector domain. Debates show very well that parties in the centre-right opposition, both in the National Assembly and in the Senate, where they have a majority, supported a line of arguments frequently invoked by the French industry. This line of argument stressed that legal redress should not be seen as the only means to fight discrimination, because the diffusion of best practices such as diversity management is more effective than legal redress. Second, any shift in the burden of proof was likely to foster a high number of claims to the detriment of employers, which would have had to prove in all cases that they did not discriminate. Third, allowing trade unions to stand in litigation, without, moreover, the written consent of the victim, would further foster litigation to the detriment of employers. Lastly, the same rules would have to apply to the private and public sectors.

In the case of the ‘Law HALDE’ of 2004, the proposal was directly presented by the centre-right government and refers both to the text suggested by the Stasi report and to the RED. Thus, the aim was explicitly that of transposing EU law into the French domestic system. That said, parliamentary debates did not concentrate on how to achieve a correct transposition, but rather on four main issues:

\[\text{See http://www.assemblee-nationale.fr/12/dossiers/haute_autorite_discriminations.asp#041732}\]
• the extent of the powers devolved to the equality body, with the centre-left opposition demanding that more legal competences are conferred to the equality body, according to the Stasi report, while the draft law highlights mediation powers (directive element, the body has to provide independent assistance to victims of whatever type);
• extension of the shift in the burden of proof to the domain of administrative law (regulatory element);
• access to the equality body: the draft law foresees to abolish the decentralised antidiscrimination commissions (the CODACS described in Chapter Three) and circumscribe application methods to written applications (directive element);
• direct involvement of civil society organisations in the organizational scheme of the equality body (soft element).

In this case, on all the four issues at stake the positions of the centre-left opposition were closer to the requirements of EU policy. The Socialist Party, in fact, advocated for stronger powers for the equality body and increased accessibility to it, an extension of the shift in the burden of proof for all domains of law, and the involvement of civil society organizations in the advisory council of the equality body. The options favoured by the government draft were, however, compliant with EU policy as they were in the range of admissible policies in the case of the directive elements. They were not compliant in the case of the shift in the burden of proof for the administrative domain, which is required by the RED.

The fact that the support of the right-wing parliamentary majority and government for an extensive antidiscrimination legislation was half-hearted was confirmed two years later, when the right wing government reacted to a reasoned opinion of the European Commission through a new draft law. In the draft, the government inserted a provision that would have drastically limited the statute of limitation for antidiscrimination suits reducing the time of prescription from 30 to five years in the framework of Law 2008-496. After a coalition of lawyer-activists took a stand to oppose the amendment, the provisions were rationalised (time of prescription is now five years since the discrimination becomes known) and inserted into the general law reforming prescription in civil law (new article L 1134-5 of the Labour Code, article L 2224 Civil Code).\textsuperscript{105}

\textsuperscript{105} The French Labour code was consolidated in 2008 and a new numeration entered into force since the 1st of May.
To summarise, since the government majority changes during the time of transposition of the directive and transposition was performed by two laws adopted by different governments, the easiest way to identify domestic actors preferences’ is by distinguishing two party coalitions. In general, preferences of right-wing parties (RPR, first and UMP and UDF then), whether in the opposition or government, favoured a moderate transposition of the directive elements of the RED and mid-range solutions, more than domestic persistence. Frequently, they have voiced the interests of French industry, which fears strong legal means of redress, participation of civil society organizations in litigation, and extended powers for the national equality body.

The position taken by the left-wing parties – again, whether in government or in the opposition – have been closer to the orientation of EU policy in most of the cases. This is also due to the fact that most civil society organizations active in the antiracist domain (e.g. SOS Racisme, the Ligue des droits de l’homme, the MRAP) are closer to this part of the parliament.

Last, for both parties in government, the suggestions of specialised advisory bodies as concerns the framework for antidiscrimination policy (‘Belorgey report’ for the socialist government; ‘Stasi report’ for the UMP centre-right government) have been adapted and mitigated in view of their political preferences.

**Quality of domestic transposition**

Transposition in France has taken place in successive phases, *en cascade*. In the first phase, the act adopted by the government was not explicitly intended to transpose the RED and actually transferred into French law only a minimal part of the directive (non-defined notions of direct and indirect discrimination limitedly to the domains of employment and vocational training). At the moment of the transposition deadline set by the Commission in 2003, therefore, the quality of compliance with the RED was low, even though the scope of race antidiscrimination policy was extended to the domain of housing in 2002. In the second stage, the 2004 ‘Law HALDE’ was explicitly intended to transpose the RED and set up the national equality body. The quality of compliance was thus significantly enhanced by this act.

The table below summarises these successive stages with reference to the set of nine indicators identified for the analysis of compliance. Further, it compares the values obtained from the domestic process of transposition with those assumed after the entry
into force of the law adopted in response to the infringement action opened by the European Commission in June 2007. The EC highlighted four points on which France failed to comply with the RED: 1) the absence of a definition for indirect discrimination; 2) the incorrect definition of harassment; 3) the fact that none of the laws fully protected against victimisation; 4) a limitation of the right of interested parties to initiate proceedings to defend victims of discrimination. Among these, 1) and 4) are relevant for our set of indicators.

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<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulatory</td>
<td>Def. of indirect discrimination</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Scope beyond employment</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Shift in the burden of proof</td>
<td>No</td>
<td>Partial (only employment and housing)</td>
<td>Partial (shift) Complete</td>
</tr>
<tr>
<td>Directive</td>
<td>CSOs legal standing</td>
<td>No (criminal proceedings only)</td>
<td>Employment domain, with conditions Only employment domain</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Equality body</td>
<td>Embryonic since 1999</td>
<td>Ratified existing body by law –not identified as equality body Yes HALDE</td>
<td>Yes HALDE</td>
</tr>
<tr>
<td></td>
<td>Exceptions from non-</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>discrimination principle</td>
<td></td>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Positive actions allowed</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>Additional discrimination</td>
<td>In criminal law and (limited) in the employment domain Yes (origin, nation, patronymic, physical appearance)</td>
<td>Yes (nation) No</td>
<td></td>
</tr>
<tr>
<td></td>
<td>grounds</td>
<td></td>
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<tr>
<td></td>
<td>Admissibility of statistical</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>evidence</td>
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Table 4.4 Indicators of compliance for France: successive stages

In France, only one out of three regulatory elements identified for the assessment of compliance was correctly transposed through the laws adopted before the European Commission launched infringement proceedings in 2007. None of the laws adopted by the
parliament in 2001 and 2004, in fact, introduced a definition of indirect discrimination as requested by the RED, even though both laws mentioned the notion. France can only be considered compliant as concerns scope after the second transposition law, which extends the scope of legislative provisions to access to the goods and services as required by the directive. Finally, the divergent preferences about the shift (aménagement) in the burden of proof in judicial proceedings are reflected in the different formulations adopted by the first and second laws. In fact, while in the first law (Article 1 Law 2001-1066 original version) a claimant only has to ‘present factual elements’ in order to shift to the defendant the burden to prove that she has not discriminated against the claimant, in the second law – drafted by the centre-right government – the wording is more demanding, viz. a claimant has to ‘establish the facts’ (Article 19 Law 2004-1648). After the adoption of law 2008-496 the wording of the two laws has been harmonised towards that of law 2001-1066 (i.e. ‘the claimant has to present the facts’) and applies to all competent jurisdictions (labour, civil and administrative).

As concerns directive elements, legal standing for civil society organizations was initially only mentioned in Law 2001-1066 and, thus, limited to litigation before employment courts. Civil and administrative courts were not concerned.\(^{106}\) This provision was not changed by the ‘Law HALDE’ (2004-1468), reflecting the preferences of the right-wing majority against opening up opportunities for increased litigation. Thus, domestic transposition provided legal standing to civil society organizations (associations and trade unions) only in employment courts and conditioned it upon different requirements: trade unions may stand in litigation simply by notifying the victim and also in cases of collective discrimination. NGOs may only file a lawsuit with the written approval of the victim, and are therefore not entitled to bring collective complaints or complaints when there is no identified victim. Furthermore, associations have to be constituted for at least five years before they can formally support claimants. After the specific recommendation made by the Commission in its reasoned opinion concerning a release of the conditions to stand in litigation, a decree accompanying Law 2008-496 granted legal standing to NGOs also in civil and administrative courts.\(^{107}\)

\(^{106}\) Notice that, in view of pre-existing legislation described in Chapter Three, legal standing for associations is, however, permitted in criminal proceedings, also for collective complaints.

The second directive element, concerning the equality body, was only partially addressed by the law of 2001, whose Article 9 sets up a national call centre collecting discrimination complaints and decentralised centres for the treatment of the complaints. This article ratifies *ex post* the administrative acts adopted in 1999 and 2000 that created an embryonic form of equality body, the GELD, and the competent territorial commissions, the CODACS. Law 2004-1066, instead, is mainly dedicated to the establishment of the equality body based on the recommendations of the Stasi Report. Even though the competences of the equality body were further expanded two years later by the law on equal opportunities (Law 2006-396), the institutional set-up provided by the ‘Law HALDE’ is already in the range of the admissible policies. Specifically, by creating a new independent administrative agency with legal support and monitoring competences, charged with the promotion of equality, and with a well-defined organizational charter and autonomous budget, French transposition goes well beyond the minimum standards set by the directive.

Exceptions from the non-discrimination principle are not mentioned by the laws of 2001 and 2004. Such a gap is not outside the range of admissible options, since no exception means that the non-discrimination principle cannot be derogated in any case. Law 2008-496 has, however, literally inserted one of the exceptions mentioned in the RED, which justifies differential treatment in view of genuine and determining occupational requirements.

Finally, only one out of three of the elements identified as ‘soft’ (i.e. recommendations whose absence from the transposition act do not constitute an infringement of the RED) are provided through the domestic transposition. The missing elements are explicit clauses allowing for positive actions based on race and ethnic origin as well as for the provision of evidence by way of statistics. As described in Chapter Three, the ban on race categorization and the formalistic equality approach typical of the French Constitution have always prevented any acknowledgment of the legality of positive action and categorization based on ethnic or racial criteria. Thus, it is little surprise that domestic transposition laws did not tackle these aspects.

As late as December 2007, the *Conseil Constitutionnel* reaffirmed, in the margins of a ruling, that race and ethnic origin are not grounds on which any form of differentiation or grouping ought to be drawn, given that race and ethnic origin are ‘not objective
categories. This principle was stated also for cases such as the one heard by the Conseil, in which an amendment facilitating ethnic monitoring was proposed for research policy purposes. The ruling of the Conseil, in fact, followed several years of debate among French demographers and statisticians on the opportunity to use information on the race background of the French population in order to collect social science data (Sabbagh and Peer, 2008). In the case at hand — a provision inserted into a bill on immigration law — the referral to the Constitutional Council was requested by a majority of Socialist MPs. This suggests that, whereas the French Socialist party may have been more open to transposing other provisions of the RED, this was not the case as concerns an explicit use of the notion of race in public policy. In the years during which the RED was transposed, this position extended beyond the Party, characterizing also the attitude of anti-racist associations close to the party, such as Sos-Racisme.

Law 2006-396 on equal opportunities, however, strengthened national positive policies in favour of disadvantaged neighbourhoods but kept the territorial rationale typical of positive actions developed so far, avoiding any reference to the race or ethnic referent or to EU race antidiscrimination policy.

The last indicator takes account of additional discrimination grounds that are “proxies” for race and ethnicity introduced into domestic law during the transposition process. This is particularly relevant for the French case, where the grounds for discrimination set out in domestic law are a total of 18 for the field of employment (age, sex, origin, family situation, sexual orientation, mores, genetic characteristics, real or assumed belonging to an ethnic group, a nation, a race, physical appearance, handicap, health status, pregnancy, family name, political opinions, religious opinions, and trade unionist activities). Law 2001-1066 introduced a partially new definition to designate ethno-racial characteristics, i.e.

\[
\text{origin} [...] \text{and real or assumed belonging (or non-belonging) to a nation, an ethnic group, a race.}^{110}
\]

where the formula ‘real or assumed belonging’ is a new caution introduced in 2001, as compared to pre-existing antiracist laws.\(^{111}\) In this formula, EU antidiscrimination criteria

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109 Interview FR SOSRACISM.

110 ‘origine et appartenence ou non appartenence, vrai ou supposée, à une nation, une ethnie une race’ my translation.
were enlarged to a more general characteristic –origin – and a more detailed one ‘belonging or non-belonging to a nation’. Furthermore, Law 2001-1066 establishes physical appearance and family name (which are relevant proxies for race) as non-discrimination criteria.

Outside the field of employment, however, the latter additional grounds are not covered. Nor is origin. Law 2004-1486 only mentions real or assumed belonging (or non-belonging) to a nation, an ethnic group, or a race as protected grounds for non-discrimination in access to goods and services. Thus, while the mention of ‘belonging to a nation’ extends the protected grounds beyond what is required in the RED, the two laws set out an imbalance between the field of employment and the rest of the areas covered by the RED. That imbalance has been further confirmed through the adoption of Law 2008-496, which has substituted the three notions introduced in 2004 and restricted the outlawed discrimination grounds to race and ethnic origin only. To summarise, the holistic approach to discrimination grounds which had been taken in the first law, adopted by the socialist government, has been progressively restricted by following laws, which ended up providing for a minimal (even though compliant) transposition of the RED as concerns discrimination grounds. This can easily be interpreted in light of the cautious approach of the centre-right government and parliamentary majority that adopted the laws of 2004 and 2008.

The last column of Table 4.4 summarises information on Law 2008-496 adopted in response to the Commission’s reasoned opinion. In short, the law literally transposes the provisions of the RED that had not been included in the domestic statutes adopted previously, in particular as concerns the regulatory elements: the definition of discrimination and reversal in the burden of proof. Apart from these two amendments, the law does not introduce more favourable conditions for antidiscrimination litigation, as might have been expected given its title (‘Provisions supporting adaptation to EC law in the antidiscrimination domain’). As mentioned, directive elements have not converged towards extensive policy objectives, rather, the number of discrimination grounds has been restricted and criteria for exception provided wherever they were absent before.

111 The Gayssot law (Law 90-615 of 1990) formula includes belonging or non-belonging to an ethnic group, a race, a nation or a religious group.
Summary

Looking at the values of the indicators for the quality of domestic compliance, the non-EC imposed antidiscrimination laws of 2001 and 2004 produced an incorrect transposition of two regulatory elements and one directive element. According to our criteria, the quality of transposition reached through the domestic process can be classified as low, since more than one regulatorydirective element is not transposed in a correct form.

After the response to the infringement procedure, the transposition failures were corrected, while one of the softer elements (extension to other discrimination grounds), was watered down. Quality of compliance becomes higher only after 2008.

According to what we had hypothesised at the outset, in France multi-player coordination has impacted negatively on the quality of compliance reached through the domestic transposition process. That said, the type of transposition provided was not literal. Rather, transposition took the form of successive acts amending existing French provisions in the non-discrimination domain and creating a new powerful equality agency, the HALDE. Furthermore, transposition received a certain level of visibility thanks to the socialist government commitment to the policy and the involvement of expert commissions to draft new legislation and shape the HALDE’s organization. When the centre-right majority took power, the saliency of the discrimination problem was further inflated by domestic events. In a nutshell, even if the results of the transposition process are in line with the expectations set out in the hypotheses, the low quality of transposition reached in the end is not fully imputable to gridlock due to contrasting preferences. Rather, it is the issue of a thorough and relatively rapid transposition process, in which, however, the preferences of some domestic actors have prevailed on EU policy prescriptions, until EC action obliged France to fill in the gaps with the regulatory elements of the RED.

Germany

Overview

Chapter Three highlighted that Germany lacked any specialised antidiscrimination legislation, a race equality clause being enshrined within the Basic law and the Works
Constitution Act but very rarely applied or referred to concretely in courts. Thus, the level of policy (in)congruence with the RED of German race antidiscrimination policy was classified as ‘medium’, because of the absence of an alternative policy approach to race and ethnic equality, which was instead characteristic of the French incongruence. The transposition of the RED into German law took basically place from a tabula rasa, meaning that legislation came to regulate a field which was hardly the object of any provision previously.

Transposition instrument and methods

Within official statistics and the literature analysing compliance records with EU directives, Germany is well known for being at the bottom of the list of timely compliers (European Commission, 2007). This is partly due to the process adopted for transposing EU directives. According to Steunenberg and Voermans, around 75% of EU directives concern policy areas that are among the competences of the federal government; most directives are therefore either transposed through federal laws or ministerial orders (Rechtsverordnung). The RED fell in the first category, and was therefore subject to the relevant parliamentary procedure, which involves the formulation of a proposal by the competent ministry, the scrutiny of the other competent ministries (in all cases of the ministry of justice and of the interior) and the submission of a bill to the two chambers of the parliament, first to the Bundestag (which proposes amendments to which the government has to respond) and then to the Bundesrat, which examines the proposal in three sessions. For around 50% of the bills the policy matter is relevant also for competences of the federated states; in these cases, the Bundesrat has a veto power and a conciliation procedure is foreseen to find a compromise between the two chambers in case they have strongly diverging views on the draft.

Furthermore, political scientists have frequently described the German policy implementation system as a neo-corporatist system, in the sense that interest groups are closely associated with policy-making institutions and actually have a direct influence on the drafting of legislation, besides directly exerting regulatory functions on their members or associates (Héritier et al., 1996: 59).

This also applied to the German transposition of the RED and determined, along other factors, a long delay in the adoption of the German transposition law.

A wide number of domestic actors took part in the process of transposing the EU antidiscrimination directives of the early 2000 in German law, a process performed
through a single act. Draft law projects, first named as ‘Act to Prevent Discriminations in Private Law’ and last ‘General Equal Treatment Act’ were introduced three times during the time in office of the green-red coalition (First and Second Schröder governments): in December 2001, February 2002, and December 2004. The drafts provided for a transposition of the RED, the FED and Directive 97/80 on the burden of proof in cases of discrimination based on sex for the first two drafts. The later draft (of 2004) also concerned Directive 2002/73 and 2004/113 on the equal treatment of men and women in occupation and access to goods and services. However, it was not until the CDU-SPD came to power in November 2005, that a law project was finally adopted, in August 2006, with a three-year delay on the date set for transposition. In the meantime Germany was referred by the Commission to the Court of Justice for the non-transposition of the RED and the FED and found to be in violation of its EU commitments.\footnote{Commission v Germany, 2005, C-329/04 (judgment of 4.05.2005 on the RED) and Commission v Germany, 2006, C-43/05 (judgment of 23.02.2006 on the FED).}

The two first law projects were drafted by the then Minister of Justice Herta Däubler-Gmelin (SPD) and both generated widespread debate even outside the parliamentary arena. They aimed to reform the German Civil Code (which was simultaneously undergoing a major overhaul) by inserting specific antidiscrimination norms in private/contract law, without addressing the sector of employment as in Germany the two domains of civil law are commonly regulated through different acts and codes.

The process took a good deal of time as the coalition was already engaged in the reform of citizenship law and in the creation of life-partnership legislation (Picker, 2003: 775). After the failure of the first two proposals due to serious opposition from specific interest groups (see below) and then to the end of the legislature, a new law project was submitted by the second Schröder cabinet (by the Ministry for Family, Senior Citizens, Women and Youths) in December 2004 after a round of consultation with interest groups. This time, the project did not aim to reform the civil code, but rather to introduce a new law, an Act transposing the European Antidiscrimination Provisions (ADG, Gesetz zur Umsetzung europäischer Antidiskriminierungsvorschriften) extending also to employment relations. The main provisions that had raised opposition to the first two projects were not changed in the new draft, thus, the societal debate revamped. The opposition of the Bundesrat to the project adopted in June by the Bundestag, and then the call for new elections led to the abandonment of the project.
When the *Grosse Koalition* took over power in autumn 2005 transposition became a priority, also given the same year ruling of the Court of Justice condemning Germany for its failure to transpose the RED. The new draft, named General Act on Equal Treatment (AGG, *Allgemeines Gleichbehandlungsgesetz*), was drafted by the Ministry of Justice in May 2006 with few changes from the precedent ADG draft. The draft AGG was finally adopted in the space of two months, in August 2006. The urgency prompted by the second Luxemburg ruling on the FED even led the Chancellor Angela Merkel to declare that she full-heartedly (*Ich vertrete das aus vollem Herzen*, 18 May 2006) supported the law project.

Table 4.5 Transposition instruments for the RED in Germany

<table>
<thead>
<tr>
<th>Acts</th>
<th>Nature/origin</th>
<th>Negotiation /adoption</th>
<th>Final contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Draft of an Act to prevent discrimination in Private Law’ (<em>Entwurf eines Gesetz zur Verhinderung von Diskriminierungen in Zivilrecht</em>)</td>
<td>Government proposal, Ministry of Justice</td>
<td>10/12/2001 – NON ADOPTED</td>
<td>Amendment to the civil code (<em>BGB, Bürgerliches Gesetzbuch</em>), same scope for all RED and FED discrimination grounds in termination of contracts, reversal in the burden of proof (no employment)</td>
</tr>
<tr>
<td>Act transposing the European Antidiscrimination Provisions (<em>ADG, Gesetz zur Umsetzung europäischer Antidiskriminierungsvorschriften</em>)</td>
<td>Government proposal, Ministry for Family, Senior Citizens, Women and Youths</td>
<td>15/12/2004 - NON ADOPTED (discussion 21 January 2005)</td>
<td>Specific antidiscrimination act, different scope for race, ethnic origin, sex and the other grounds (limited to employment)</td>
</tr>
<tr>
<td>Commission v. Germany C-329/04 (on the RED) Commission v. Germany C-43/05 (on the FED)</td>
<td>Declaration of infringement (non-transposition) by the EU CJ</td>
<td>4/5/2005 - 23/02/2006</td>
<td>Failure to transpose the RED and the FED</td>
</tr>
</tbody>
</table>
Players, issues and preferences

The process leading to the adoption of the law transposing the RED in Germany was the second longest of all EU-15 countries. Only Luxemburg took more time than Germany and transposed the RED in October 2006. As mentioned, a series of four slightly different projects had to pass through the parliament. Since their substance did not fundamentally change from one draft to the other, apart from enlarging the scope of the provisions to the employment sector in the last two drafts, the main contentious issues and the positioning of the domestic actors are analysed without reference to the specific draft and parliamentary debates. 113

The choice of the parliamentary avenue and the length of the adoption process made the arena of decision open to a wide number of domestic actors; first, the political parties which took part in the parliamentary debate: the Greens (Bündnis 90/Die Grünen) and the Social Democrats (SPD), on the one side and the Christian and Social Democrats (CDU/CSU) and the German Freedom Party (FDP), on the other side. Apart from the formal decision-makers, however, the influence of the debate on-going in the legal academia and among interest groups is not to be underestimated. In particular, the Catholic and Protestant churches, the associations of insurers, housing agencies and employers widely voiced their concern about the likely effects of the law projects. Last, antiracist NGOs and trade unions also demanded to be consulted by the parliament.

The red-green coalition that agreed to the directive in the EU Council of Ministers had inserted the adoption of an antidiscrimination statute in their electoral agreement of 1998. 114 Nonetheless, the position of the two parties (Greens and SPD) was in part different regarding the most contentious issue in the antidiscrimination bill. This concerned the extension of the antidiscrimination ban outside the field of employment, i.e. in contract law, for all discrimination grounds other than those for which such scope is required by EU legislation (race and ethnic origin, and sex). Such an extensive transposition of the FED was supported especially by the Greens, for whom the adoption of an extensive antidiscrimination statute was and remained a political priority, while part of the SPD was ready to implement a word-by-word transposition of the two directives. The issue of the

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113 All draft law projects are available in the website of the Genderkompetenz Zentrum directed by Prof. Dr. Suzanne Baer at the Humboldt University of Berlin. See http://baer.rewi.hu-berlin.de/wissen/antidiskriminierungsrecht/allgemeinesgleichbehandlungsgesetz/

scope of antidiscrimination provisions other than race, ethnic origin and sex was the highest point of concern for all domestic actors taking part in the transposition debate.

As it has been well summarised by Jacqueline Gehring, most domestic actors had a reason to oppose such an extension, and therefore delay the adoption of the law:

Members of the legal community, business associations, churches, and other NGOs joined the conservative parties in their opposition to the law. On the other side, unions, anti-racism NGOs, academics, and public officials often spoke out in favor of the directive, but failed to garner it much support. [...]. Their fear was that this law threatened to shrink the constitutional protected area of private liberty which includes the freedom to choose who to associate with, who to live with, who to conduct transactions with, and that the law would also in the end create a duty to contract, thus forcing people into relationships they would not freely choose (Gehring, 2005: 130).

Apart from the Greens – who held a position “more European than that of Europe” – the Federal trade unions’ association (DGB) and the antiracist NGOs reunited around the Forum Gegen Rassismus,\textsuperscript{115} most of the domestic actors that took part in the debate had reasons to contrast the expansive transposition provided by the draft. Representatives of the insurance and housing sector – particularly concerned by the focus on contract law – were among the first and fiercest opponents to the draft. They were joined by employers’ associations when the scope of the project was expanded to the employment domain.

Also the reversal in the burden of proof in antidiscrimination lawsuits became a topic of confrontation, with employers and service providers strongly opposing the complete reversal requested by EU legislation. The concerns of these parts of society were taken over by the CDU/CSU and FPD representatives in the parliament, whose opposition, coupled with that of the Bundesrat, was among the causes of the successive failures of the various law projects.\textsuperscript{116}

Opinion within legal academia was split in two, where the opponents to the law project (Ladeur, 2002, Picker, 2003, Stork, 2005, Winkler, 2002) were probably more numerous than its supporters (Baer et al., 2003, Engert, 2003).

\textsuperscript{115} Interview DE DGB 2.

\textsuperscript{116} Most of the positions of parties, academics and interest groups are traceable thanks to the statements and press releases (\textit{Stellungnahmen und Press Erklärungen}) collected in the portal of the Genderkompetenz Zentrum (same address as above).
Interestingly, the article providing the set up of the federal equality body was never the object of major concern, since from the initial draft the body (ADS, Antidiskriminierungsstelle des Bundes) was conceived as a weak ministerial entity.

At the final stage, under the Grosse Koalition, a new bill with extensive scope was first reintroduced by the Greens in the Bundestag. However, the act that was finally, and in the end also rapidly adopted was the draft law project of the SPD Ministry of Justice, Brigitte Zypries. The text clearly reflected the opposing preferences of the domestic actors who had fought for or against the extension of the antidiscrimination provisions on religion or belief, disability, and sexual orientation also outside the field of employment. In fact, the new law project upheld that extensive scope in civil law, but provided for detailed and considerable exceptions from the non-discrimination principle in private law (see below) including, importantly, exceptions applying to race discrimination. Other features of the RED (and the FED) were transposed in an almost literal way, but the scope of the AGG ended up being over-detailed by the many exceptions. In spite of various declarations in the Bundesrat supporting again a “one to one” (literal) transposition of the two directives, the Bundesrat finally gave up the idea of requesting a new conciliation procedure and the project could finally be approved at the beginning of August 2006, after a brief parliamentary debate that did not introduce major amendments.

Quality of compliance

By checking the quality of compliance through the indicators set out for this purpose, it becomes clear that the AGG is the result of a compromise among definitely opposite views on the emphasis to be placed on equal treatment in German law. As for regulatory elements, the definition of indirect discrimination (unmittelbare Benachteiligung) is transposed in a literal way. Direct and indirect discrimination are correctly banned in relation to access to goods and services supplied by private individuals but not victimization. The AGG also does not cover administrative law, thus there are no explicit provisions that apply specifically to goods and services supplied by public administration, such as social services or education. In addition, for the latter domains, there is no comprehensive transposition of the prohibition of harassment and the instruction to discriminate.
<table>
<thead>
<tr>
<th>Compliance indicators</th>
<th>Before transposition of the RED</th>
<th>After the AGG</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Regulatory</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Def. of indirect discrimination</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Scope beyond employment</td>
<td>No</td>
<td>Not for services supplied by the public administration, harassment and instruction to discriminate</td>
</tr>
<tr>
<td>Shift in the burden of proof</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Directive</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CSOs legal standing</td>
<td>No</td>
<td>Yes with conditions (ADV)</td>
</tr>
<tr>
<td>Equality body</td>
<td>Incipient (Beauftragte, decentralised level)</td>
<td>ADS, ministerial office</td>
</tr>
<tr>
<td>Exceptions from non-discrimination principle</td>
<td>No</td>
<td>Family/trust relations, exceptions for housing</td>
</tr>
<tr>
<td><strong>Soft</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Positive actions allowed</td>
<td>In practice, for national ethnic minorities</td>
<td>Yes</td>
</tr>
<tr>
<td>Additional discrimination grounds</td>
<td>In Art 3.3. GG (parentage and homeland)</td>
<td>No (same as before)</td>
</tr>
<tr>
<td>Statistical proof allowed</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

**Table 4.6 Indicators of domestic compliance for Germany**

Public services and goods are considered to be covered by the constitutional equality clause and other state-level laws, but the total lack of a specific mention of public/administrative law in the text of the AGG is highly contentious in terms of compliance. Also, legal relations in the domain of family and heritage are excluded from the antidiscrimination norms.\(^{117}\)

For the other motives of discrimination – which were the object of the more critical debates – protection was finally extended outside the employment domain, but limitedly to

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\(^{117}\) Notice that the AGG does not apply specifically to dismissal, as dismissal conditions are left to the *Kündigungsschutzgesetz*. This was singled out for being not fully compliant with the Directive, but is outside the scope of our indicator.
bulk business (Massengeschäfte) and insurances under private law.\textsuperscript{118} The shift in the burden of proof (Beweislast) is subject to the proof, by the victim, of signs (Indizien) of discrimination, a requirement in line with the \textit{prima facie} evidence suggested by the RED.

In the area of directive elements it is possible to distinguish a minimal level of transposition of the directive, and in some cases breaches of its provisions. Legal standing of civil society organizations is conditional upon the fulfilment of several demanding conditions: NGOs, in fact, must first qualify as \textit{Antidiskriminierungsverbände} (antidiscrimination associations). To qualify as such, NGOs have to satisfy detailed requirements — introduced by the \textit{Grosse Koalition}'s law project —, e.g. they have to be comprised of at least seven associations or 75 members, be non-profit and constituted on a continual basis. Such NGOs are allowed to act on behalf of victims, but not in the absence of an individual plaintiff. Norms for trade unions are less restrictive as they refer directly to the provisions of the Works Constitution Act, which allows the filing of collective complaints on behalf of workers.

The equality body (ADS, \textit{Antidiskriminierungsstelle des Bundes}) is designed as a mere office within the Federal Ministry for Family, Senior Citizens, Women and Youths. Its director is named by the government, and its term of office linked to the legislature. The law does not give any direction as to the organization of the office in terms of staff and resources, apart from mentioning that components of its advisory board can be representatives of civil society. The competences are outlined by quoting almost literally the norms of the directive, and mentioning that they have to be carried out autonomously — \textit{auf unabhängiger Weise}. No specific judicial or legal standing power is conferred to the office, apart from the duty to provide legal counselling. Altogether, the articles on the ADS are rather vague and do not paint a clear picture of what the office should look like. Nonetheless, by placing the office within a ministry, linking the presidency to the government and majority in office, and without providing an autonomous budget, the AGG constrains the independent functioning of the body. Thus, this element highlights a minimal transposition of the RED, even though the specific provisions are not in contradiction with the minimal criteria set out in the directive.

\textsuperscript{118} Bulk businesses are defined as all contractual obligations which are typically concluded in many cases under comparable conditions irrespective of the person concerned, or in which the special characteristics of a person are of inferior importance with regard to the nature of the contractual obligation.
Exceptions, however, are the element which best signal the restrictions introduced, in particular, with the last governmental draft. In fact, the AGG takes over – quite literally – the exceptions permissible under the RED for genuine and determining occupational requirements and for the justification of indirect discrimination. It does not include the exemption allowing discrimination on grounds of nationality for matters regulated by immigration law; however, it adds more clauses that are arguably in line with EU policy prescriptions. First, the prohibition of race and ethnic discrimination – as well as for the other grounds of discrimination – does not apply to legal relations of a personal kind or in the case that there is a special relation of confidence between the parties concerned or their relatives (besonderes Nähe- oder Vertrauensverhältnis, § 19.5 AGG). Second, the last governmental draft made permissible unequal treatment on the basis of race and ethnic origin if it serves to create and maintain stable social relations among inhabitants, and balanced patterns of settlement and economic, social and cultural relations (§ 19.3 AGG). Last, § 19 (5) AGG provides that: ‘The rental of housing for not only temporary use shall generally not constitute business within the meaning of Subsection (1) No 1 where the lessor does not let out more than 40 apartments in total.’ Even though the explanatory notes to the draft law project justify this provision with a number of arguments, it arguably represents an exception outside the set of admissible policies. More exceptions were introduced to grounds of discrimination other than race.

Finally, only one soft element is mentioned under a specific section of the AGG, namely permission for positive actions, which does not concern race and ethnic origin only, but all grounds. The provision translates almost verbatim the wording of the RED. No additional grounds related to race and ethnic origin are mentioned in the AGG. Nevertheless, the fact that the law extends outside the field of employment also for religion (with, once again, specific exemptions) and does not exclude discrimination on grounds of nationality, may leave room for extensive judicial interpretations concerning indirect discrimination, for instance by using religion and nationality as proxies for race. The law does mention the possibility to use statistics as means of proof of indirect discrimination.

Considering that this transposition was incorrect in relation to several aspects of the RED, the Commission opened a new infringement action against Germany in January 2008, followed by a reasoned opinion in November 2009.\textsuperscript{119} The opinion highlighted the

lack of explicit protection for discriminatory dismissals, within the AGG, the incorrect scope given to the protection of victimization, the fact that the statute of limitations applying to the AGG foresees a very short, two-month time to file a suit, and the high burden placed on NGOs wishing to support legal proceeding against discrimination on behalf of a claimant. Two new laws adopted in 2008 and 2009 introduced some amendments to the AGG, which replied to the Commission’s observation by adjusting the rules on the support that NGOs can give to victims (introducing a new section §23,2) and clarifying the relation between the ADS and the government (new section §26 3 S 1 Nr 2).

The infringement procedure was classified one year later.

Summary

From the analysis it is clear that the quality of compliance reached in the German case is middling, since one regulatory and one directive element are clearly in conflict with minimum standards set by the RED. Also the other indicators show a tendency towards a minimal transposition of the directive, a transposition which in some cases has been literal, and in others has inserted wide exceptions to the general principles set out in the RED. The long-lasting process of transposition, departing from a more-than-compliant draft wishing to apply enhanced protection to all discrimination grounds, has been watered down in the series of successive draft proposals. The most relevant exceptions and limitations for the race and ethnic equality field were, however, inserted by the last project presented by the Grosse Koalition. This is not surprising since the government had then to mediate among opposing views inside the cabinet of the ministers and wide concerns among interest groups. In the end, the multi-player coordination that took place in the German case not only caused delayed adoption but also a low level of compliance. This is in contrast with the expectation that ‘multiplayer coordination’ at domestic level would mainly end up with literal transposition (Steunenberg 2006). In the German case, therefore, much still need to be done to give full and correct implementation to the RED. The fact that adoption was delayed for so long had an impact on the enforcement strategies of the Commission too. It remains to be seen whether the EC will start a new infringement given the persistence of significant transposition gaps.

\[120\] Gesetz zur Neuregelung des Rechtsberatungsrechts (RBerNG), 12.12.2007.
Italy

Overview

Italy approached the transposition of the RED from a context of considerable policy congruence. A number of provisions close to those of the RED, and importantly including the notion of indirect discrimination, were in fact introduced in statutory immigration law in 1998 (the Consolidated Immigration Act of 1998, CIA), even though they did not lead to much litigation. Thus, the main element of incongruence concerned the absence of race equality bodies, which had not yet been established at the moment of transposing the RED in spite of the fact that they had been foreseen by the CIA 1998.

Transposition instrument(s) and methods

Since the late 1980s, Italy introduced a system that transposes most EU directives through omnibus acts known as legge comunitaria (community act). These acts are proposed once a year by the government and foresee, in some cases, that the parliament will delegate competences back to the government in order to fulfil the detailed transposition of EU directives. In the latter case, the government details the contents of the transposition through legislative decrees. Legislative decrees, together with ordinary laws, are the two instruments most frequently used for transposition (60%); alternatively, transposition is performed through ministerial orders (40% of the cases following Steunenberg and Voermans 2005: 188). In the case of legislative decrees, the Parliament gives a framework mandate (delega) to the government within an article of the legge comunitaria. When the government comes up with the draft legislative decree, it usually forwards it to the competent parliamentary committees. The latter can give their opinion on the draft, with the government keeping anyways the final word on its contents.

The legislative decree (LD) is the instrument used in the case of the RED. The transposition process was initiated through the legge comunitaria of 2001 (adopted in 2002 under the name: Law 39-2002), whose Article 29 established the framework for delegating to the government the finalisation of a unique domestic transposition act. The
latter was adopted as a legislative decree one year later, in August 2003 (LD 215-2003), with a month of delay on the official transposition deadline set for the RED. LD 215-2003 was a new act providing an almost literal transposition of the directive and making no reference to nor amending the pre-existing – and similar in content – domestic antidiscrimination provisions.

The legislative decree itself foresaw more implementing decrees to complete some aspects of the transposition. The first decree set up the Italian equality body, the National Office against Race Discrimination (UNAR, *Ufficio nazionale anti-discriminazioni razziali*). The second one officially adopted the list of associations entitled to bring complaints on behalf or in support of victims of race discrimination and was only issued in December 2005.

<table>
<thead>
<tr>
<th>Acts</th>
<th>Nature/origin</th>
<th>Negotiation/adoption</th>
<th>Final contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law 39-2002 <em>Legge comunitaria 2001</em></td>
<td>Law project (government)</td>
<td>6 months-1/3/02</td>
<td>Art. 29 details the powers delegated to the government to transpose the RED</td>
</tr>
<tr>
<td>Legislative decree 215-2003 <em>Attuazione della direttiva 2000/43/CE per la parità di trattamento tra le persone indipendentemente dalla razza e dall’origine etnica</em></td>
<td>Legislative decree (government)</td>
<td>9/07/03</td>
<td>Almost literal transposition of the wording of the directive; does not amend existing acts; foresees further act to establish the equality body</td>
</tr>
<tr>
<td>Prime Minister decree 13763-2003 <em>Costituzione e organizzazione interna dell’Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni</em></td>
<td>Decree (prime minister)</td>
<td>11/12/2003</td>
<td>Establishes the Italian equality body (UNAR) and details its organization</td>
</tr>
<tr>
<td>Ministerial decree <em>Istituzione dell’elenco delle associazioni legittimate ad agire in giudizio in nome, per conto o a sostegno del soggetto passivo di discriminazione basata su motivi razziali o etnici</em></td>
<td>Decree (Ministry of Labour and Social Policy, Ministry of Equal Opportunity)</td>
<td>16/12/2005</td>
<td>Establishes the list of associations with legal standing in antidiscrimination lawsuits</td>
</tr>
<tr>
<td>Law 101-2008 of 6 June 2008 <em>Disposizioni urgenti per l’attuazione di obblighi comunitari, (art. 8-sexies)</em></td>
<td>Converts in law a government-decree in response to the Commission’s reasoned opinion</td>
<td>Urgency procedure</td>
<td>Corrects the definitions of victimization and harassment and completes the shift in the burden of proof</td>
</tr>
</tbody>
</table>

Table 4.7 Transposition instruments for the RED in Italy
The final statute listed in the summary table below was adopted in response to the Commission’s infringement procedure and corrected failures detected in the domestic transposition process.

*Domestic players, issues and preferences*

The method adopted for transposing the RED considerably restricted the range of domestic actors that had a chance to intervene in the transposition process. After the delegation to the government, in fact, transposition became a purely governmental affair, in which the parliamentary committees could only act to provide an advisory opinion. No other advisory bodies were involved in the process of transposing the RED. Furthermore, during the parliamentary discussion of the law delegating to the government, formal powers to detail the transposition act (the law was itself a government proposal), the sole – and short – debate which took place only concerned the ministerial affiliation of the prospected equality body and its budget, on which the Senate (higher chamber) proposed some amendments that were then refused by the Chamber of Deputies.¹²¹

Given the limited role played by parliament in the transposition process and the absence of any awareness of the transposition of the RED outside from the legislative arena, one sole actor, the government, can be considered as having influenced the outcomes of the transposition process. During this process, however, two colleges of different colour took the lead of the Italian executive. The government in office during most of the transposition process (2002 to April 2006) was a centre-right coalition led by Silvio Berlusconi with the fundamental support of the Northern-League, a party commonly described as anti-immigrant and even xenophobic. Only the law-decree aiming to correct transposition failures and stop infringement procedures for a number of incorrectly transposed and non-transposed EU directives was adopted by the centre-left Prodi government, which was in office from May 2006 until April 2008. The decree was given permanent force by its conversion into Law 101-2008 under the new centre-right cabinet, which did not alter the content of the original law decree.

In the absence of a debate that could highlight issues of relevance for the domestic players, governmental preferences can be considered as crystallised in the series of

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¹²¹ See records at: http://legxiv.camera.it/_dati/leg14/lavori/bollet/200305/0514/html/01/frame.htm

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domestic acts adopted in view of the transposition. Therefore, the analysis of domestic issues and preferences is coupled together with that of compliance.

Before moving to the contents of transposition, however, it is worth highlighting the governmental choice of transposing the RED through an entirely new act, instead of amending existing and very similar national provisions: Article 43 and 44 of the Consolidated Immigration Act of 1998 (CIA). In particular, other directives relevant to the CIA were transposed as legislative decrees amending the CIA (e.g. Directive 2003/86/CE on family reunion). The difference is especially noticeable since the CIA was in the process of being amended by the government at the time in which the transposition took place, because Law 189-2002, the so-called ‘Bossi-Fini law’ amending the CIA was published just one month after the adoption of the Legge comunitaria 2001 (Law 39-2002).

As concerns the government programme and its preferences in matters related to racism, at the EU level the veto raised by the minister of Justice of the Second Berlusconi Government (2002 to 2006) – Roberto Castelli – on behalf of the Italian government caused gridlock on the Framework Decision on Racism and Xenophobia in the 2003 EU Justice and Home Affairs Council. Castelli also planned to water-down Law 205-1993 ‘Legge Martino’ (the criminal law providing sanctions against racism and xenophobia) as, in his view, it harmed the right to freedom of expression (Vassallo Paleologo, 2004). Sanctions against racist acts and speech were consequently reduced by an amendment to that law approved in 2006.

Thus, even if it is impossible to recover specific declarations of the ministries about the transposition of the RED, the Northern League’s influence on the process should not be downplayed. In particular, the decree establishing the list of NGOs entitled to stand in antidiscrimination lawsuits was a joint decree signed by the Northern League Minister of Labour, Roberto Maroni, and the Minister of Equal Opportunities, Stefania Prestigiacomo (Forza Italia, Silvio Berlusconi’s centre-right party). Most of the 320 associations included on that list at the first round were directly contacted by the government because of their presence on a former list of migrants’ rights NGOs established in compliance with Article 42 of the 1998 CIA.

122 Interview EU DGJUSTICE.
123 Interview IT UNAR1. Pursuant to Art 42 (1) of the 1998 CIA a register of the associations and entities whose activity is aimed at favouring the social integration of foreigners was established in 1999.
Quality of transposition

The ministerial decrees concerning the equality body and the official list of associations entitled with legal standing are substantially implementing acts. Therefore, the quality of the Italian transposition should be assessed with reference to the unique transposition act – Legislative decree 215-2003 – adopted in July 2003. As mentioned, the latter provides for an almost literal translation of the RED. That said, some details can certainly be singled out in order to analyse domestic preferences and the quality of compliance attained through the domestic transposition process preceding the adoption of Law 101-2008 in response to the EC’s infringement procedures.

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<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulatory</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Def. of indirect</td>
<td>Notion present but not defined</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>discrimination</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Scope beyond</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>employment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shift in the burden of</td>
<td>Partial</td>
<td>Partial</td>
<td>Complete</td>
</tr>
<tr>
<td>proof</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Directive</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CSOs legal standing</td>
<td>Only trade unions for collective cases</td>
<td>Yes with conditions</td>
<td>Yes (as before)</td>
</tr>
<tr>
<td>Equality body</td>
<td>Foreseen but not implemented</td>
<td>Yes UNAR</td>
<td>Yes</td>
</tr>
<tr>
<td>Exceptions from</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>non-discrimination</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>principle</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Positive actions allowed</td>
<td>Yes (Constitution)</td>
<td>Yes (in the equality body's competences)</td>
<td>Yes</td>
</tr>
<tr>
<td>Additional discrimination grounds</td>
<td>Yes (nationality and religion)</td>
<td>Not in the transposition law</td>
<td>Yes (not in the transposition law)</td>
</tr>
<tr>
<td>Statistical proof allowed</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Table 4.8 Indicators of compliance for Italy: successive stages

The definition of indirect discrimination was correctly introduced by the decree, together with provisions regarding the scope of antidiscrimination legislation. Both regulatory elements did not introduce a main change from pre-existing antidiscrimination norms contained in the CIA of 1998, which already covered indirect discrimination (even though it did not provide a definition for it) and had the same scope as the provisions of the RED.
The same cannot be said, however, concerning the reversal in the burden of proof. Provisions on the reversal in the burden of proof are the only ones for which Decree 215-2003 makes a direct reference to the CIA 1998, by linking the evidentiary procedure to the one already in place and detailed in Article 44 of the CIA. Such a procedure requires that a claimant presents ‘elements of fact that the judge appreciates with regard to Article 2729 of the Civil Code,’ an article on ‘simple presumptions’ which leaves up to the judge the appreciation of the presumptions. Thus, the shift in the burden of proof is not provided by the transposition act, which only softens the conditions for evidence but does not shift the burden to the defender. In total, one out of three regulatory elements among those selected as indicators was not entirely transposed by the decree.

As regards directive elements, civil society organizations (associations and ‘other entities’) are given full right to support victims in courts only if they are registered on a list detained by the ministry of equal opportunities and updated by decree on an annual basis. In order to register, NGOs have to respect certain criteria concerning the official scope of the association (which has to be in the range of race equality policies or immigration), the timing of its establishment, and other formal requirements concerning the statute of its associates and chair. Thus, even though provisions for the support are expansive insofar as associations can act both on behalf and in support of a victim, and also autonomously (without victim) in cases of collective discrimination, the process of adopting the register by ministerial decree establishes a thorough central scrutiny over the associations which may be given legal standing. Trade unions are not explicitly legitimated to legal standing by the transposition decrees. However, trade unions may be considered among the ‘other entities’ mentioned by the decrees, and they were allowed to support collective discrimination complaints according to the 1998 CIA. Given that the decree adopting the first official list of associations entitled with legal standing was only adopted at the end of 2005, and was only renewed once five years later, this element has certainly suffered from a delayed transposition. The policy, even if restrictive, is nonetheless in the range of admissible policies.

Article 7 of legislative decree 215-2003 establishes the Italian equality body as an office within the Ministry of Equal Opportunities, which is itself a sub-entity of the Italian Prime Minister Office. The decree translates literally the articles of the RED concerning the competences and the tasks of the office, included the requirement to conduct its activities in an autonomous way. Interestingly, the office is delegated also with the promotion of
positive actions in the field of race equality. The decree details the annual budget of the equality body, which amounts to around 2 million euro. The implementing decree of December 2005 basically repeats the tasks outlined above and provides for the organizational charter of the office, including a staff of 21 full employees and possible external collaborators.

In view of these elements, the decree only gives a minimal transposition as concerns the equality body. Particularly contentious is its location within the premises of the government office, which may not grant the autonomy required by the directive as concerns its mandated competences.

Concerning exceptions, the decree translated the notion of ‘genuine and determining occupational requirements’ provided by the RED and –differently from the other country cases – also added the specific exception provided for ‘differences of treatment which, having indirect discrimination effects, are objectively justified in view of legitimate aims pursued through appropriate and necessary means.’ Moreover, the decree mentions the exception for nationality provided for immigration law and conditions for entry and stay in Article 3 of the RED, even though the CIA of 1998 explicitly lists nationality among the outlawed discrimination grounds. The range of exceptions is therefore particularly controversial given the parallel survival of the clauses of the CIA 1998, an immigration law that prohibits discrimination on the grounds of nationality. However, they are again within the range of the admissible policies.

Two of the soft elements identified in the directive are effectively transposed in the decree. They are the explicit permission of positive actions based on race and ethnic grounds, the promotion of which is listed among the tasks of the equality body. As mentioned in Chapter 3, Italian legislation does not seem to establish any impediment to the development of promotional actions based on race and ethnic grounds. And indeed the Italian legislative decree is the sole transposition law among our three cases where also the possibility to show proof of indirect discrimination through statistical evidence is mentioned.124 This confirms that the approach identified in Chapter 3, closer to an

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124 The article on the shift of the burden of proof is so framed after the modification introduced by the law 101-2008 (Art. 4,3): ‘Quando il ricorrente fornisce elementi di fatto, desunti anche da dati di carattere statistico, idonei a fondare, in termini precisi e concordanti, la presunzione dell’esistenza di atti, patti o comportamenti discriminatori, spetta al convenuto l’onere di provare l’insussistenza della discriminazione’ (When a claimant provides fact elements, also derived from statistical data, capable to support, in precise and concurrent terms, the presumption of acts, pacts or discriminatory behaviours, then the burden to rebut discrimination falls on the defendant.) My translation. Also the original article of LD 215 2003 mentioned statistical evidence.
affirmative equality model than in the other countries, is also reflected in the transposition of the RED.


In sum, LD 215-2003 essentially transposes the contents of the directive word-by-word. This problem, as well as the special accuracy given to the exceptions to the non-discrimination principle, is noticeable elsewhere in the decree. In its review of national country measures transposing the RED, the Commission highlighted in particular the failure to completely reverse the burden of proof. Other EC recommendations concerned elements not covered by our indicators, in particular the limited protection against victimisation and the incorrect definition of racial harassment.

Article 8-sexies of Law 101-2008 replied to the Commission’s remarked by correcting the two definitions and completing the reversal in the burden of proof as provided by the RED.

Summary

Italy transposed the Race Equality Directive without significant debate and, surprisingly, almost within the required deadline. This process produced an act which transposed the RED literally, apart from the clause on the shift in the burden of proof. The latter, however, was corrected following the opening of an infringement procedure by the Commission. The quality of domestic transposition can therefore be evaluated as formally compliant, in the presence of most soft elements, significantly the mention of positive action and statistical proof of discrimination.

After the correction introduced through Law 101-2008, the quality of formal compliance has even increased, but the requirements of the RED have merely been transposed word-by-word.

Referring to our initial hypothesis, it is confirmed that within a single-actor scenario compliance is attained domestically in a more or less timely manner. The domestic government’s preferences regarding the contents of EU policy have influenced compliance results in a limited way, resulting mainly in one relevant implementation failure as concerns regulatory elements. This contrasts with Steunenberg’s (2006: 314) argument that a single-player coordination is more likely to adapt transposition to domestic
preferences. Moreover, it contrasts with the hypothesis that a literal transposition is to be expected in the case of multi-player coordination where it is impossible to find a consensus among the domestic actors. As we have seen, in fact, the option adopted by the Italian government has been that of a literal transposition of the RED.

Quality of compliance: Lessons from the Three Cases

The final section of the chapter assesses the comparative analysis conducted so far in two moments. First, I discuss in comparative terms the transposition process for France, Germany and Italy to summarise the lessons learned from the instrument/actor based perspective adopted in this chapter. I do so by looking at the quality of compliance in the three cases and evaluating the explanatory power of the hypotheses formulated at the beginning of the chapter. In the second and conclusive section, I add to the instrument/actor-based scenario the findings of the policy congruence chapter and attempt to highlight whether the two perspectives are similar or markedly diverge in their attempts to explain the quality of domestic compliance with reference to the RED.

The instrument/actor based perspective and the quality of compliance

At the beginning of the Chapter I formulated expectations – drawing on Steunenberg’s analysis – about the quality of compliance that could be reached at the domestic stage depending on the instrument adopted for transposition, and on the kind of coordination this would result in among the domestic actors involved in the transposition process. I hypothesized that if the instrument adopted for transposition of EU directives is subject to the influence of only one domestic veto player, then full compliance is likely only if the domestic arena is supportive of the contents of EU policy. I also hypothesized that in cases in which the preferences of domestic actors diverged profoundly, then full compliance is unlikely and deadlock occurs.

From the single sections dedicated to the country-cases a number of conclusions can be drawn, which only partially confirm the analysis of Steunenberg. First, in the case of the RED, we see that the transposition instruments adopted at the domestic level were
mainly determined by national practices applied to all EU directives. In the French and German case, the particular engagement of the government on office to the field of antidiscrimination policy had an impact on the type of instrument that was adopted for transposition. In the French case, this was reflected in the fact that the draft law project providing the first and second wave of transposition was actually formulated outside the government departments commonly entrusted with transposition. For the first law (Law 2001-1044), the government was directly involved with the formulation of the policy contents and the act eventually adopted reflected both the engagement of the socialist government against race discrimination – without directly mentioning the need to transpose a EU directive, and policy measures adopted thus far to establish the very first equality bodies. For the second law (Law 2004-1486) a commission of experts was charged with the task of devising national measures regarding the equality body.

The case of Germany was similar for the first draft law projects, which manifested the commitment by one part of the government coalition to adopt an enhanced antidiscrimination legislation. The drafts therefore did not provide for comprehensive transposition, but rather for amendments of the code of civil procedure which were not directly connected to the need to comply with the RED nor satisfactory in this respect.

In the case of Italy, instead, the non-engagement of the government against race discrimination led to the adoption of a low-profile act, which was not concerned with amending existing antidiscrimination provisions but only about providing a word-by-word transposition.

The choice of the instrument has the expected outcome in terms of length of the transposition process and need for coordination of the domestic actors. Wherever the RED was transposed through the parliamentary path (France and Germany) discussion over the innovating features of EU policy caused, on the one hand, intensive parliamentary debate, and on the other, parliamentary deadlock as well as vast public discussion.

In France the diverging preferences of the domestic actors concretized in the adoption of a series of successive acts which in the end, and after the responses to an infringement procedure, resulted in a non-satisfactory level of compliance.

In Germany, instead, the conflict over the draft law projects resulted in deadlock, considerably delaying the adoption of any transposition act. The text that was finally adopted attempted a compromise among the opposing positions of the governmental forces and interest groups, which eventually resulted in a medium level of compliance with the RED. Furthermore, enforcement strategies by the Commission have not yet yielded to
any effect on the level of German transposition given the lateness in the adoption of the AGG. Finally, in Italy, the fact that only the government was involved in – and also ‘aware of’ – the transposition of the directive supported a timely and word-by-word transposition.

The consideration of directive and soft elements in this analysis has provided significant added value to the final assessment of compliance. In fact, the French and German cases highlighted that the choice of exploiting the range of possibilities provided by directive elements, or to include or not soft elements, reflects the preferences of those actors who were at key points the veto players in the transposition process.

<table>
<thead>
<tr>
<th>Transposition instrument</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic actors involved</td>
<td>multi-player coordination</td>
<td>multi-player coordination</td>
<td>Single-player coordination</td>
</tr>
<tr>
<td>Domestic transposition failures</td>
<td>regulatory and directive elements (definition, burden of proof, CSO's legal standing)</td>
<td>regulatory and directive elements (scope and exceptions)</td>
<td>regulatory element (burden of proof)</td>
</tr>
<tr>
<td>Directive and soft elements</td>
<td>non-minimalist approach, some soft elements present</td>
<td>minimalist approach</td>
<td>word by word approach</td>
</tr>
<tr>
<td>Quality of domestic compliance</td>
<td>low</td>
<td>medium</td>
<td>word-by-word</td>
</tr>
<tr>
<td>Final level of compliance (after infringement procedures)</td>
<td>medium</td>
<td>N/A</td>
<td>Full</td>
</tr>
</tbody>
</table>

Table 4.9 Comparative overview of transposition

In a nutshell, while my initial hypotheses are generally confirmed, the difference as compared to Steunenberg’s analysis resides in that fact that multiplayer coordination did not yield to a literal transposition of the RED in those cases in which it took place. On the contrary, the only case of word-by-word transposition was Italy, where the government alone was charged with drafting the transposition act. In the other two cases, diverging preferences were reflected either in the series of different acts and variations among them (France) or in a complex texts providing on the one hand, an – apparently – extensive
scope not required by EU policy, on the other, a series of exceptions which in some cases are possibly incompatible with the directive.

Another issue that must be highlighted in this comparative analysis is the partisan dimension that emerges in the three cases from the transposition of RED. The domestic debates and processes highlight that EU antidiscrimination policy, and domestic autonomous progress in the policy field, was mainly championed by centre-left parties or interest groups positioned in that political area. In the three cases, left-wing political forces were either the supporters of domestic antidiscrimination projects – France from 1997, Italy for the reform of the 1998 CIA and the Greens in Germany from 1998 – or the advocates of a compliant or over-compliant transposition. In the three cases, those centre-left / socialist governments were represented in the EU Council of Ministers for employment and social affairs which adopted the RED in 2000. At the domestic level, the clauses which mis-transposed some of the regulatory elements of the RED or chose minimal forms of compliance regarding directive and soft elements were mainly inserted by the centre-right or coalition governments which took power in the following years, reflecting concerns from interest groups representative of the industry and employers’ associations over the effects of enforcing wide-ranging race antidiscrimination provisions. These findings support the claim of the qualitative literature which tends to underline the crucial role of domestic partisan politics in the determination of compliance at the domestic level (Falkner et al., 2008, Treib, 2003).

Adding up the policy congruence dimension

What does the congruence or incongruence dimension add up to in this account of domestic transposition? Going back to the conclusions of Chapter Three it is now possible to address our initial set of hypotheses concerning compliance and policy congruence. In Chapter Three I argued, on the one hand, that if there is high level of policy incongruence, full compliance with the EU template is unlikely but strong pressures for adaptation may develop. If there is high level of policy incongruence, full compliance with the EU template is unlikely and depends on the preferences of domestic veto players. Only if preferences are aligned with the requirements of EU policy will pressures for adaptation develop and make compliance likely.

The results of Chapter Three are now inserted in the table below:
<table>
<thead>
<tr>
<th></th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Policy congruence</strong></td>
<td>low</td>
<td>Medium</td>
<td>High</td>
</tr>
<tr>
<td><strong>Transposition instrument</strong></td>
<td>series of parliamentary acts - specialised commission’s draft</td>
<td>single parliamentary act</td>
<td>governmental act</td>
</tr>
<tr>
<td><strong>Domestic actors involved</strong></td>
<td>multi-player coordination</td>
<td>multi-player coordination</td>
<td>single-player coordination</td>
</tr>
<tr>
<td><strong>Actors’ preferences</strong></td>
<td>partisan split and little interest groups influence</td>
<td>partisan split + strong interest groups’ influence</td>
<td>unified preference against EU policy prescriptions</td>
</tr>
<tr>
<td><strong>Domestic transposition failures</strong></td>
<td>regulatory and directive elements (definition, burden of proof, CSO’s legal standing)</td>
<td>regulatory and directive elements (scope and exceptions)</td>
<td>regulatory element (burden of proof)</td>
</tr>
<tr>
<td><strong>Directive and soft elements</strong></td>
<td>non-minimalist approach</td>
<td>minimalist approach</td>
<td>word-by-word</td>
</tr>
<tr>
<td><strong>Quality of domestic compliance</strong></td>
<td>low</td>
<td>medium</td>
<td>incomplete, word-by-word</td>
</tr>
<tr>
<td><strong>Final level of compliance (after infringement procedures)</strong></td>
<td>Medium</td>
<td>N/A</td>
<td>word-by-word</td>
</tr>
</tbody>
</table>

**Table 4.10 Comparative overview of policy congruence and compliance**

At first glance, the hypotheses are not disconfirmed: the quality of transposition is comparatively higher in Italy, where domestic antidiscrimination policy was more in line with EU prescriptions. It is lower in Germany, where we had found a substantial absence of an alternative policy orientation regarding antidiscrimination, in particular as concerned statutory law. Also in France, where statutory law and policy congruence were further distanced from EU policy prescriptions, the final level of domestic compliance was medium-low and only the pressure of the Commission’s infringement strategy brought national statutes more in line with the requirements of EU race antidiscrimination policy. Furthermore, in spite of domestic preferences that diverged from EU policy prescriptions, pressures for adaptation in Italy were low, as the directive only added certain elements to existing domestic regime.

In summary, the two hypotheses do not contradict each other but were actually complementary for explaining the level of compliance attained in the three domestic transposition processes.
That said, it is worth discussing the explanatory power of the incongruence hypothesis with reference to the domestic reform stage and its influence on the transposition process. In both France and Germany, where policy incongruence was higher, domestic reforms in the field of antidiscrimination policy were ongoing. In Italy, the domestic reform process was just concluded and a higher level of policy congruence was mainly due to an act adopted two years before the RED. On the one hand, this makes it difficult to disentangle domestic policy reform from EU pressure for adaptation. This circumscribes the explanatory value of the incongruence hypothesis for the analysis of domestic compliance, as policy congruence is generally assessed on a static dimension.

Thus, as concerns transposition, it is probably more interesting to consider the domestic policy congruence, insofar as it seems to structure the preferences of the domestic actors along specific lines, which generate different kinds of contentious issues regarding transposition. The French and German cases highlight exactly this dynamic. While in the first case transposition debates, and failures, concerned the burden of proof in antidiscrimination lawsuits, in the latter they had to do with the scope of the discrimination ban. The French case stressed the resonance of a policy preference for combating racism in the criminal arena, where no burden of proof lies with the parties. The fact of avoiding to explicitly mention positive actions in the transposition law is another sign of strong domestic persistence. Similarly, reluctance to define indirect discrimination can be considered as a strategy to downplay the fact that in order to prove indirect discrimination legally some form of ethnic monitoring is necessary.

In Germany, the transposition debate turned mainly around questions that had little to do with race discrimination, which, as Gehring (2005) argues, was not perceived as a widespread public problem, in particular once Germany adopted the reform of citizenship legislation. The value attributed to freedom of contract, and the possible impact on antidiscrimination policy thereof, was instead the structuring line of the domestic conflict.

Finally, Italy – a country already characterized by a model of equality policy close to the affirmative equality model – explicitly allowed for positive action and statistical evidence based on the new categories of discrimination provided by the RED.

As mentioned in the theoretical chapter, however, I expect the policy congruence to be more relevant for explaining implementation outcomes, which will be analysed in the next chapter.
Domestic transposition: conclusions

Chapter Three and Four aimed to provide a preliminary answer to the main research question of this study: under what conditions does the implementation of EU policy produce converging policy outcomes in the member states?

The assessment was here limited to transposition results, i.e. to a study of the process of domestic adaptation of formal institutions, in particular statutory law, to the requirements of the RED, be they regulatory, directive or soft. I have shown that the pre-existing level of policy congruence and the transposition process have both yielded variation in the level of domestic compliance attained by the single member states, none of which was able to reach full compliance before enforcement strategies were developed by the Commission. Transposition is, however, just the first step in implementing EU policy in the member states.

The next chapter therefore analyses how the quality of compliance attained in each member state, associated with other domestic variables, influences variation in the implementation outcomes of EU race antidiscrimination policy.
Enforcing Race Equality

‘my argument suggests that we should actually observe EU involvement pushing national policy styles in a more formal, adversarial direction... other scholars have suggested that impediments to litigation entrenched in national institutions and legal cultures across the EU will block the spread of adversarial legalism in general ... and of EU rights litigation specifically ...

Nevertheless, these authors have overestimated the strengths of these barriers, many of which are already crumbling. (Kelemen, 2006: 106)

Introduction

The final chapter of this study deals with the domestic enforcement of the Race Equality Directive (RED). Given the characterisation of the RED as a policy instrument mainly focused on individual judicial redress, the chapter analyses the usage of domestic courts to claim race discrimination or harassment in France, Germany and Italy as the main measurable outcome of its implementation. Assuming that the RED expanded substantive rights in the member states, where antidiscrimination legislation was not as protective, and was designed to improve the availability of the means for individual redress, i.e. what I define as plaintiffs’ “procedural rights,” I argue that from the domestic enforcement of the RED we can reasonably expect an increased recourse to adversarial forms of litigation. Thus, this chapter will consider domestic courts’ decisions on the theme of race discrimination as the main outcome of the national implementation of the RED.

It is for this reason that the chapter is introduced by a quotation from R. Daniel Kelemen, who argues, more broadly, that EU policy-making is pushing member states towards an adversarial, American-inspired legal culture. Is the implementation of an Anglo-Saxon-inspired piece of legislation, such as the RED, encouraging domestic plaintiffs towards an increased use of the courts to enforce their rights? By concentrating on domestic litigation and jurisprudence since the transposition of the RED, this chapter inquires about the national enforcement of the directive while attempting to provide a test ground for Kelemen’s argument about the domestic impact of EU law.

Methodologically, the idea of examining domestic litigation generated by the application of a specific EU directive is original within the panorama of EU studies. In fact,
whereas a large body of political science literature has looked at judicial politics in the EU, most of it has studied exclusively the cooperation established between national courts and the Court of Justice in the process of enforcing EU-derived law (Alter, 1998, Burley and Mattli, 1993, Carrubba and Murrah, 2005, Mattli and Slaughter, 1998a, Mattli and Slaughter, 1998b, Stone Sweet, 1998, Stone Sweet, 2004, Weiler, 1994). These studies were first conducted in a neo-functionalist framework, with the aim of clarifying judicial integration dynamics as a mechanism for a European integration process led principally or at least to a significant extent by supranational institutions, such as the Court of Justice.

Another wave of more recent literature has studied the activity of national courts as decentralized enforcers capable of initiating dynamics effectively remedying member states’ failure to comply with EU regulation in the absence of an extended enforcement mechanism at the central European level (Alter and Vargas, 2000, Börzel, 2006, Chalmers, 2000, Conant, 2002, Kelemen, 2006, Kilpatrick, 2001, Slepcevic, 2009). As we have seen in Chapter Two, some of this literature dealt specifically with EU gender equality policy, inquiring into relations between the number of references for preliminary rulings issued by member states and either progress in the institutionalization of gender equality policy (Cichowski, 2007), or the extent of domestic change brought about by EU law (Caporaso and Jupille, 2001), or attempting to explain cross-national variation in the use of judicial redress (Alter and Vargas, 2000, Tesoka, 1999).

Other studies considering national jurisprudence have highlighted the necessity of infringement procedures by the European Commission and additional mechanisms of law enforcement — beyond the cooperation of domestic courts — for positively expanding the quality of compliance and the extent of domestic change brought about by EU law (Conant, 2002, Slepcevic, 2009).

From a methodological point of view, few scholars have gone beyond studying references for preliminary rulings to evaluate the enforcement activity of domestic courts with reference to EU law. Those who have, have mainly concentrated on so-called ‘national courts’ decisions on points of EU law,’ namely those cases where national courts directly enforce EU law citing the relevant provisions, but without requiring the intervention of the Luxembourg judges (Conant, 2002, Ramos Romeu, 2003, Ramos Romeu, 2006, Slepcevic, 2009). Attempts to consider domestic jurisprudence produced by the national transposition of a EU directive more widely have been even more rare (Blom et al., 1995, Fitzpatrick et al., 1993, Kelemen, 2011).
The reasons why studies of national court decisions are so few are twofold. First, scholars have mainly been interested in studying litigation generated by domestic referrals to assess member states’ compliance with EU requirements, rather than to assess the domestic implementation of a specific policy. Second, reliable data on domestic litigation in civil law countries — the filing of lawsuits in a specific domain and correspondent national courts’ decisions — is particularly difficult to gather and use in comparative studies. Third, the impact of policies that are not as focused on individual redress as the RED can be assessed through different types of indicators.

In spite of these difficulties, this chapter provides an in-depth quali-quantitative analysis of national courts’ decisions based on the statutes that transposed the RED in France, Germany and Italy. These rulings are considered the main indicator for assessing the domestic implementation of the RED. The main reason for this choice is that the RED puts a special emphasis on regulating national judicial procedures with the aim of ensuring effective legal protection against discrimination. Making sure ‘that [member states’] systems for redress of victims...are effective on the ground’ (European Commission, 2008a) can be considered the main general objective of most recent EU equal treatment legislation in general, and of the RED in particular. Moreover, as we have seen in Chapter Two, the unavailability of data on ethnic inequality in Western Europe makes any other kind of impact analysis virtually impossible. Given that positive actions are a ‘soft element’ within the RED, whereas most of its provision are centred upon individual redress, analysing the extent to which this latter aim is matched though domestic jurisprudence is the most direct way to look at its actual implementation, besides being a means to ascertain whether national policy styles are pushed in a more adversarial mode by EU policy. As the RED does not cover criminal procedures for the redress of discrimination, the study is focused on civil law jurisprudence and on both procedural and substantive aspects of the civil courts’ rulings.

Formal litigation is of course not the only way to enforce new substantive rights. Article 8 of the RED itself mentions conciliation procedures among the methods to ensure individual redress. However, private out-of-courts settlements are not traceable and are thus difficult to study. A glimpse of the domestic use of out-of-court settlement procedures can, however, be gained wherever equality bodies have competences to assist victims and support settlements. Thus, wherever equality bodies publish data on their activity, the relevance of out-of-court settlements for the domestic enforcement of the RED will be discussed in the relevant country-sections.
Some caveats should be emphasized from the outset while approaching a study of national courts’ activity in continental Europe. The first is related to comparing litigation and jurisprudence across countries in the absence of any reliable measurements about the level of race inequality of a specific country. Given the lack of data on race inequality in continental Europe and the results of the discrimination surveys recalled in Chapter Two, in this study I assume, first, that “levels” of race inequality are constant and comparable over the selected period of study in the three countries. Second, it is necessary to always remain aware of the fact that national court activity is taken into account here as an indicator of the national implementation of the RED, and not as a measure of race inequality in a specific country. Rather, an increasing recourse to the means of redress provided by the RED is considered a sign of progress in the fight against discrimination in a given context.

**Analytical Framework and Argument**

In Chapter Two, I argued that, on the one hand, a country’s ‘policy incongruence’ and, on the other hand, the quality of domestic compliance reached through the transposition process, may have a direct effect on the domestic enforcement of detailed directives such as the RED. In addition to these macro-variables, an in-depth analysis of the domestic jurisprudential arena requires taking a second set of domestic elements into account. In particular, on the basis of the more specialised insights of the comparative literature on judicial politics in the domain of equal treatment, in this chapter I look at the role that domestic factors such as the mobilization of domestic groups and organizations may play in the spread of litigation.

In relation to policy incongruence, I suggest that in those countries in which the RED introduced a mode of judicial redress different from the one already existing domestically, there will be a higher pressure to adapt and, consequently, a larger increase in the recourse to judicial redress. This expectation is contrary to the one that I formulated regarding the process of transposition, where I expected lower compliance in the presence of a large policy incongruence. I explain this difference with reference to the different type of actors who operate in the two phases. In the transposition phase, I expected that policy makers who determine the result of the legal transposition would have an interest —
mainly determined by their political affiliation — in maintaining the status quo ante of
domestic policy. In the phase of implementation, enforcement is mainly up to different
actors who have a different interest in accessing a new type of protective legislation. The
more innovative legislation is — compared to the pre-existing domestic policy — the more
enthusiastically domestic actors will turn to it, determining higher pressures for domestic
adaptation and change.

In addition, I argue that increased litigation will lead national courts to develop a
jurisprudence evolving more rapidly towards what is required by EU law. The assumption
that explains this expectation is that faced with an increased number of a new type of
complaints national judges will have to receive training in order to update their modus
operandi. As courts become more prepared to assess the new substantive and procedural
equal treatment rights transposed into national law, and rules become more binding and
precise, we might expect a greater likelihood of subsequent legal claims (Cichowski, 2007:
22). Conversely, wherever the RED fits with the existing redress model, there will be less
pressure to adapt. Thus, the incentives to bring more litigation will be fewer, and there will
be less need for the judiciary to train and implement the comparatively fewer innovations
brought about by the RED. Thus the evolution in the number of complaints and in the type
of jurisprudence obtained will be less relevant. I base my measure of policy congruence on
the analysis proposed in Chapter Three, which showed how France had the largest policy
incongruence with the RED and Italy the smallest. 125

Secondly, according to a formal legal model, the quality of compliance attained
through the domestic transposition process should be a necessary but also a sufficient
condition for compelling domestic enforcement. According to this hypothesis, the expected
effect of a compliant transposition of the RED is the establishment of new substantive and
procedural rights and a consequent increase in the incentives to access the judicial system
to redress discrimination. Confronted with frequent complaints and a compliant
legislation, domestic courts should deliver a jurisprudence that correctly applies the norms
contained in the RED.

To assess this hypothesis, I rely on the findings presented in Chapter Four that
analysed the quality of compliance in light of the options adopted to transpose the

125 Cichowski (2007: 82) analyses the relation between national policy fit and the number of domestic court
references to the ECJ in the domains of social provisions and the environment. In her study, she uses as a
measure of EU/national policy fit the average transposition rate for each country. In my case not only is the
explanandum different (increase in the number of national court decisions) but also the appreciation of
policy fit, which is based on the qualitative assessment conducted in Chapter Three.
regulatory, directive and soft elements of the RED. Directive elements are particularly important for explaining judicial redress dynamics, as some of them contribute to the definition of the extent of the new procedural rights introduced by the directive. These include, in particular, the conditions to authorize legal standing of civil society organizations to support individual claimants or collective lawsuits, the organization, competences and powers of national equality bodies, and the type of racial categorizations outlawed.

In this chapter I do not address a further argument mentioned in the literature, namely that infringement actions brought by the Commission may determine a better enforcement of EU law. In fact, in the area of racial antidiscrimination the Commission initiated the same number of infringement proceedings for incorrect transposition against the three member states, leading up to similar results, as outlined in Chapter Four. None of the infringement proceedings led to a ruling by the Court of Justice of the European Union, except for the one against the non-transposition of the Directive in Germany. All other infringements for incorrect compliance were withdrawn after the member states adopted new legislation that, at least in the German case, did not remedy all transposition failures.

In addition to this first strand of arguments, I formulate expectations following some of the main findings of the literature that dealt with the judicial enforcement of EU equal treatment policies in the member states. According to this literature, in a large amount of cases individuals are not standing in front of courts alone. Both studies on the enforcement of EU law and on civil rights litigation in domestic contexts tend to highlight the importance of aggregated interests representation behind individual litigants, especially in the case of disadvantaged groups. The support from civil society organizations (NGOs and trade unions) is particularly determining for all those cases in which a public interest dimension is involved in the application of the law. This is traditionally the case of racial antidiscrimination law, for a multiplicity of reasons.

On the one side, individuals belonging to ethnic minorities, such as migrant or migrant offspring, are in all likelihood more reluctant to go to court than other sets of a country’s population (Conant, 2002: 162). This depends from a series of reasons ranging from the availability of financial resources to file a formal complaint to the actual knowledge of the means of judicial redress or acquaintance with lawyers with an expertise in antidiscrimination law. The status of undocumented migrant can also be a very strong
disincentive to approach judicial institutions in case of discrimination. Thus, the effective access to justice of those who are traditionally defined as ‘vulnerable groups’ crucially depends on the support of civil society organizations, such as NGOs or trade unions.

On the other side, the need for third party support for litigation is particularly important for the enforcement of legislation introducing new ways to enforce fundamental rights, and in particular equality rights, as demonstrated in the American context by the experience of civil rights litigation (Epp, 1998, Harlow and Rawlings, 1992) and, in the European context, by the enforcement of EU gender equality policy. In most cases, in fact, it is thanks to the specialised focus of these organizations, their exposure to international experiences — as well as to EU-funded training — and their mobilization that both complainants and lawyers learn about new equal treatment legislation and start supporting antidiscrimination complaints —whether working pro bono or not. The RED introduces procedural rights that are directly aimed at easing the possibility for civil society organizations to support individual claimants in courts (Article 7.2).

According to this, I argue that the increase in the recourse to judicial redress in the domain of racial antidiscrimination law and the evolution of national jurisprudence toward a compliant interpretation of the RED crucially depends on the presence and the organizational capacities of specialised civil society organizations, and on their keenness and capacity to engage in legal strategies.

Recent scholarly work analysing the role of civil society organizations in the activation of domestic litigation has stressed finance and expertise as relevant organizational resources which determine the engagement or non-engagement in legal actions of these groups, on the one hand (Slepcevic, 2009). On the other, Alter and Vargas found that domestic organizations (NGOs or equality bodies) would engage in litigation as a last resort strategy whenever they had a strong specialization but lacked direct political influence on policy makers (2000). Other authors have looked at the number of domestic NGOs specialised in a certain field in each member state, and which are susceptible to turning to litigation strategies. Cichowski and Conant’s studies, for instance, were both based on data retrieved from the official European Union directory of interest representatives, where civil society organizations are registered and searchable per country and policy domain (see e.g. Cichowski 2007: 33). For the field of race discrimination, however, queries performed on the EU register of interest groups provided results that are not at all representative of the domestic civil society actors with interest in racial antidiscrimination policy and judicial strategies. From a quantitative point of view,
membership in the European Network against Racism, an umbrella NGO established and
funded by the EU, is more significant for identifying specialised NGOs at the level of the
member states. In the remainder of this chapter the characteristics of domestic CSOs are
also assessed qualitatively, through fieldwork and expert interviews, with a view to
determining their level of specialisation, their organizational and financial resources, and
their potential in terms of direct political influence.

In general terms, I hypothesize that the more specialised and organized the
domestic NGOs, the more they will be likely to pursue legal strategies. In those cases when
domestic NGOs are resourceful but also have direct political influence, they will use
litigation as a last resort. I expect domestic litigation and jurisprudence to be influenced by
NGO or trade union mobilization.

Finally, in addition to civil society organizations, Alter and Vargas, Jupille and
Caporaso, and Micklitz (1996)’s studies on EU gender equality policy highlighted the
impact of equal treatment bodies on the development of EU-rights litigation. These studies
found a direct relation between the evolution of equality jurisprudence, on the one hand,
and the presence of equal treatment bodies specialised in the domain of gender, and with
powers to assist claimants to file complaints, on the other. The establishment of equality
bodies and their endowment with competences to assist victims of discrimination is
mandated by the RED, even though member states may choose whether or not to provide
these bodies with powers to support litigation or stand in courts. The formal support of an
equality body to minority claimants can in fact play a similar role to that outlined for civil
society organizations, easing the process of recovering knowledge and resources to file an
antidiscrimination lawsuit. In addition, the more an equality body is perceived as a
specialised, totally independent institution, disconnected from political or economic
power, the more claimants will be willing to turn to it. Thus, the chapter analyses the
organizational configuration and the powers bestowed on equality bodies in each country
to assess their role in promoting litigation and determining an evolution of domestic
jurisprudence in the domain of equal treatment. The more independent and powerful the
domestic equality body set up in adherence with the RED, the more domestic litigation and
jurisprudence are expected to evolve.

A further factor that determines cross-country variations in the volume of litigation
is commonly emphasized by the comparative literature on judicial enforcement. This is the
variable extent to which courts are accessible across countries. There are multiple elements
of what is sometimes defined as the ‘structure of judicial opportunities’ or ‘the level of accessibility of the justice system’ (Slepečević, 2009, Tesoka, 1999). These range from the costs of filing a complaint, the requirement to be represented by a lawyer, the amount of costs that can be ordered when a lawsuit is lost, the sanctions and damages which are expected, to differences in attorney fees, etc.

The RED explicitly aims to harmonize some of these elements (the shift in the burden of proof is a regulatory element) and to establish common guidelines for some others (legal standing and effective sanctions are directive elements). The structure of judicial opportunities, however, is only partly influenced by the results of the national transposition of the RED. The overall domestic structure of judicial opportunities is mainly determined by the rules of civil law procedure, as demonstrated by the comparative literature on longitudinal studies of court activity (Clark, 1990, Ietswaart, 1990). Thus, I refrain from establishing a specific variable and directly comparing the accessibility of courts among the three cases. I only point out the elements defining the structure of judicial opportunities when they are relevant for understanding variation in the judicial enforcement of the RED. This leads me to take a peculiar approach to the comparison of the results found in terms of number of court decisions for each country, which I outline in the next section.

Assessing Domestic Jurisprudence: A Quali-Quantitative Analysis

Intensity of litigation and characteristics of the rulings

Considering national court decisions enforcing racial antidiscrimination law as the main measurable output of EU race equal treatment policy, I try to understand whether the implementation of the RED produces an increasing number of court decisions in the domain of civil and employment law, i.e. those expressly covered by the application of the RED. Scholars who looked at preliminary references as an indicator for the domestic enforcement of EU law compared levels of litigation across countries. In my analysis, instead, I refrain from a direct comparison of the number of rulings in France, Germany and Italy. Rather, I compare the extent to which civil and employment litigation intensifies over the years from the date national antidiscrimination law transposing the RED is set into force, up to July 2010. The results are discussed with reference to the frequency of the
same kind of litigation for every country before the transposition of the RED, as assessed in Chapter Three.

I avoid a direct quantitative comparison among the three countries because of the large number of variables that impact upon a cross-country study of the volume of litigation performed over just a few years. These variables range from the varying dates of transposition of the directive in the three countries, a largely incomparable length of civil or employment proceedings, different systems of legal aid, etc. Such factors, which in part define the accessibility of a domestic judicial system and shape a country’s litigation culture, determine overall volumes of litigation independently from the specific legal provision at stake, making a direct comparison across countries of limited relevance.

If determining whether there is an intensification of civil litigation in the three countries is a first step towards understanding whether the RED is enforced domestically, assessing the qualitative characteristics of the domestic complaints/rulings is a second important step. What type of claim is brought to national courts? Who files them? And what decisions do domestic courts take in cases of race discrimination? In order to assess how substantive and procedural rights set out in the RED are enforced by domestic courts, this chapter looks at specific characteristics of the lawsuits that produce domestic jurisprudence, constructing a qualitative indicator of judicial enforcement.

In relation to substantive rights, attention is paid to the following set of elements:

- the type of discrimination claimed (direct, indirect, harassment, instruction to discriminate);
- the categorization of such discrimination (as racial, ethnic, or based on other proxies for race, such as nationality or language);
- the nature of the defendant (a private individual/company or a state body);
- the domain of social relations and law to which the claimed discrimination pertains (employment law: access to employment dismissal, etc. or civil law: access to services, housing, etc.);
- and, most importantly, the type of assessment provided by the domestic courts (upheld or rejected).

I expect domestic enforcement to converge toward the implementation outcome set by the directive wherever national jurisprudence covers more of the substantive aspects tackled
by the RED. For instance, the RED is better enforced wherever national jurisprudence covers both direct and indirect discrimination, or where lawsuits are adjudicated that concern both the domain of employment as well as that of access to goods and services. Moreover, given the characteristics of the individual rulings, I also pay attention to whether a complaint is successful (the court finds discrimination) or not. Of course, not all complaints are meritorious, i.e. based on real discrimination. Nonetheless, court assessments, success rates and extent of remedies awarded are generally employed in the empirical legal literature assessing law enforcement (Burstein and Monaghan, 1986, Farhang, 2009, Oppenheimer, 2003, Sternlight, 2004). These elements, in fact, may well predict the likelihood that a claimant turns to a litigation strategy and are, thus, undoubtedly a macro indicator of law enforcement.

Secondly, I consider the aspects of procedure that ease access to the judicial system of redress for antidiscrimination law claimants. Above, I have defined these as “procedural rights”. They include:

- what type of evidence is required by the court to shift to the defendant the burden of proving that there was no discrimination (level of *prima facie* required, statistical proofs, situation testing, etc.);
- whether the claim is filed by an individual victim or as a collective complaint brought on behalf of non-identified victims by an organization which has a legitimate interest in the enforcement of antidiscrimination law, viz. an antidiscrimination NGO, a union, or an equality body;
- whether the claim is filed by an individual alone or with the formal support of an organization which has a legitimate interest in the enforcement of antidiscrimination law (NGO, union, equality body);
- what remedies and sanctions are ordered in case of a finding of discrimination.

The wider the options for accessing judicial redress that courts’ jurisprudence sanction, the more domestic enforcement will converge towards the expected implementation outcomes. Higher sanctions and damages are considered also as indicators of more effective enforcement, under the same reasoning used above for the complaints’ success rate.
Table 5.1 Qualitative indicators of domestic enforcement

Together with the quantitative assessment, a qualitative assessment of this set of characteristics helps understand the extent to which national antidiscrimination law is implemented in accordance with the RED. In addition, attention is brought to the venue of litigation, including not only the type of court that adjudicates the complaints, but also the level of jurisdiction. The decisions of national courts, in particular higher courts, can influence the decision of groups and individuals to bring complaints and also that of other judges to admit further complaints. Higher courts, for instance, may take important decisions on substantive and procedural aspects setting jurisprudential precedents that are to be observed by lower courts. The observance of precedents by members of the judiciary varies greatly from country to country, following the importance attributed to the principle of *stare decisis* and the kind of authority recognised to higher courts in civil law regimes. However, in civil law regimes decisions by high courts are sometimes subsumed into policy-making and transferred into legislation at a later stage. Thus, the evolution of national jurisprudence may well influence the decision to sue of potential complainants, and help explain the observed increase or decrease in the amount of litigation.
Research method

Analysing national courts’ jurisprudence is an uneven task. Systems of digital filing for jurisprudence vary greatly from country to country. While in Germany the justice system is highly digitalised, in Italy the minutes of first instance judgments are hand-drafted by the lawyers representing the parties to the suit, and a long time may elapse before court clerks type up the minutes and judgements reach any form of archive, in particular digital ones. Thus, any attempt to inquire into national jurisprudence needs to overcome many practical constraints and should probably refrain from aiming at being completely exhaustive. Precisely in view of such pitfalls, establishing a reliable methodology to study how EU law is implemented in member states through domestic jurisprudence is both necessary and innovative.

From a practical point of view, the scholars who have analysed litigation generated in relation to preliminary references relied on ECJ statistics, while those who have gone so far as to consider domestic case law by making reference to points of EU law have generally relied on ready-made comparative databases. Searches on both of such databases, however, have proved unsatisfactory as concerns my queries on jurisprudence involving the RED or the statutes that have transposed it for France, Germany and Italy. The European Union’s Fundamental Rights Agency is also currently implementing a database on national antidiscrimination jurisprudence, but to date its extent is very limited.

Thus, this study relied on two different types of sources. The first one is databases of national jurisprudence, respectively:

<table>
<thead>
<tr>
<th>FRANCE</th>
<th>Lexis Nexis Juriclasseur and Legifrance</th>
</tr>
</thead>
<tbody>
<tr>
<td>GERMANY</td>
<td>Juris.de</td>
</tr>
<tr>
<td>ITALY</td>
<td>DeJure</td>
</tr>
</tbody>
</table>

Table 5.2 National case law databases

126 I.e. the Court of Justice and the EUR LEX databases.
As pointed out by Lisa Conant (2002), who has made use of the same sources, there are important variations in the coverage of the three databases, with Italian databases covering mainly last instance decisions, the French one containing last instance and many appeal court rulings, and the German Juris.de being undoubtedly the more reliable and up to date of the three. The coverage of the three databases does not only vary according to the type of court, but also from one year to another.

In an attempt to crosscheck how much of the relevant national case law was effectively covered by the different databases chosen, I compared the results of my database queries with a second type of sources. These are the collections of antidiscrimination jurisprudence compiled by specialised NGOs or national equality bodies. Specific rulings flagged during expert interviews or found otherwise through fieldwork were also considered. The specialised case law collections are listed in Table 5.3.

<table>
<thead>
<tr>
<th>Country</th>
<th>Case Law Collections</th>
</tr>
</thead>
<tbody>
<tr>
<td>FRANCE</td>
<td>case law collections by SOS-Racisme (NGO), ATGAT(NGO) and HALDE (equality body)</td>
</tr>
<tr>
<td>GERMANY</td>
<td>case law collections by the German RAXEN focal point, University of Bamberg and the Genderkompetenz Zentrum of the Free University of Berlin</td>
</tr>
<tr>
<td>ITALY</td>
<td>case law collections by Associazione Studi Giuridici sull'Immigrazione (ASGI) and Avvocati per Niente (APN)</td>
</tr>
</tbody>
</table>

Table 5.3 Specialised case law collections

The analysis provided in this chapter is based on the author's compilation of three country datasets of domestic antidiscrimination jurisprudence which can be found in an annex, combined with an average of 15 expert interviews per member state with judges, lawyers and specialised NGO staff, all selected on the basis of their involvement with non-

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129 For the analysis of the case law databases the type of query performed was different following the requirements of the database. The queries were based:
- on keyword searches involving the terms ‘race’/ ‘origin’ and ‘discrimination’ / ‘equal treatment’ declined in wildcards for the different languages;
- on keyword searches based on the reference number of national anti-discrimination legislation (either laws or articles of the relevant codes);
- on legal basis searches based on the relevant domestic legislative act or code article.
130 On file with the author.
132 On file with the author.
discrimination lawsuits, or their positions as chairpersons of relevant courts, NGOs, or law firms.

What court decisions?

What national court decisions have to be taken into account to assess the implementation of the RED? The answer to this question is not straightforward. An analysis of the national practice shows well that episodes of direct or indirect race discrimination and harassment may well involve many motives for discrimination at the same time (e.g. gender and race, race and disability, or race, gender and religion). This confirms the findings of recent literature which points at the increasing relevance of multidimensional and intersectional discrimination, respectively discrimination grounded on more than one motive, and discrimination affecting individuals at the intersection of groups defined on the basis of different suspect motives (Schiek and Chege, 2009, Hermanin and Squires, 2012). To define the cases taken into account in this analysis, two notes of caution have to be introduced *ex ante*.

First, race discrimination or indirect discrimination based on ethnic origin is frequently invoked in cases brought in the first place against discrimination on grounds of religion. This is typically the case of the various court decisions that, across the three countries, have addressed the issue of the wearing of religious symbols – in particular Muslim headscarves. These cases are excluded from my analysis whenever they are clearly grounded in legislation protecting from discrimination on religious grounds, rather than race discrimination. The main reason for this is that although national legislation may be framed in similar terms, EU law on religious discrimination (i.e. the FED) has a different scope and contemplates specific exceptions (e.g. for employment by religious organizations), which differentiates it from the RED. Conversely, court decisions involving religious minorities are taken into account whenever they are adjudicated primarily on the basis of race antidiscrimination law.133

Second, race discrimination — in particular indirect racial discrimination — is sometimes pleaded in cases brought by claimants who also allege a discrimination grounded on their third country nationality. Since Article 3.2 of the RED explicitly excludes distinctions based on nationality from its scope of action, cases of legal

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133 In the three countries, for instance, discrimination against Jews is mainly framed under the label of race discrimination.
discrimination against third country nationals are only considered whenever race or ethnic categorization is clearly at stake in the lawsuit. This second caution leads me to leave out of the country datasets most rulings issued by administrative courts and concerning formal barriers in access to public employment and social provisions for third country nationals.

**France**

*Domestic jurisprudence on race discrimination*

In the course of over eight and a half years since the adoption of the first equal treatment law transposing the RED (Law 2001-1066), the development of French civil jurisprudence on race discrimination shows very distinctive characteristics. The searches performed in the French legal databases – which have no coverage of first instance rulings – completed with cases singled out by experts, identify approximately 30 rulings by higher civil courts (Courts of Appeal and Court of Cassation) on cases of discrimination, or harassment, grounded on racial categories.

Provided that like in a pyramid, in a state judicial system only few complaints reach the higher degrees of jurisdiction, we can reasonably argue that there have been many more complaints filed with and adjudicated by first instance courts within the eight-year time period covered by the dataset. This hypothesis is corroborated by a sample search of first instance rulings performed in the jurisprudence archive of the French equality body, HALDE.\(^{134}\) In addition to that it must be considered that, in France, first instance labour courts, the *Conseils de Prud'hommes* (CPH), are particularly accessible due to their nature as courts composed mainly of lay judges, where no attorney representation is required.

The dataset shows a clear, even if discontinuous, intensification of civil law litigation in the higher jurisdictions throughout the years.

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\(^{134}\) Search conducted by the author on 17 July 2009 in the archive of the French equality body (HALDE) on 24 lawsuits where HALDE intervened. For the years 2007-2009 the search showed a consistent number of CPH decisions – frequently mentioning a HALDE intervention, see below.
<table>
<thead>
<tr>
<th>Year</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>J2010*</th>
<th>2002~J 10</th>
</tr>
</thead>
<tbody>
<tr>
<td>Courts of Appeal</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>5</td>
<td>0</td>
<td>5*</td>
<td>20</td>
</tr>
<tr>
<td>Court of Cassation</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>4</td>
<td>0*</td>
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<td>1</td>
<td>2</td>
<td>4</td>
<td>3</td>
<td>8</td>
<td>4</td>
<td>5*</td>
<td>29</td>
</tr>
</tbody>
</table>

Table 5.4 Rulings by French Higher Labour Courts on race discrimination 2002-June 2010

Source: combined keyword searches on LexisNexis Juriclasseur and Legifrance

* For 2010 the search is limited to the first six months

This result of the digital archive search is interesting to compare with the findings of expert interviews, which, in 2008 and 2009, unanimously supported the view that employment/civil law litigation on race discrimination was as rare in France as before the transposition of the RED, with the exception of few cases.135 My data contrasts with these affirmations, even though it shows a first French peculiarity as regards the enforcement of civil antidiscrimination law: there are almost no cases adjudicated by civil courts outside the domain of employment.136

Substantive rights

The French jurisprudence mainly employs the legal categories of discrimination/harcèlement racial(e) (race discrimination/harassment) and, to a lesser extent that of discrimination fondée sur l’origine (ethnic origin discrimination) (cf. Annex 2 for the list of French rulings included in the dataset). Interestingly, the French judges never state clearly whether they found direct or indirect discrimination. This testifies to the fuzziness that the two concepts still have in French law, corroborated by the long absence of any clear definition of indirect discrimination and the fact that statistics based on racial categories, which may provide proof of indirect discrimination, are not allowed under French law.

The rulings under consideration mainly concern discriminatory dismissals and unequal treatment in the progression of an employee’s career. The Court of Cassation sanctioned the competence of the Conseils des Prud’Hommes to adjudicate discrimination

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135 Interviews FR CASSSOC, FR AC1, FR CGT1, FR CFDT1.
136 Table 5.1 does not include two rulings by administrative courts and one by a first instance labour court which are also part of the dataset. The three type of keyword queries performed involved the terms “discrimination AND race”, “discrimination AND origin”, “122-45 AND origin”. LexisNexis and Legifrance Archives, search dates: 20 February 2010. Last update: 4 August 2011.
complaints also in cases of alleged discrimination in access to employment, but claims in this domain are extremely rare. Most suits are filed against private employers. In these cases, plaintiffs claim harassment and discrimination, even though rulings avoid defining explicitly what type of discrimination is at stake. The phrase ‘indirect discrimination’ is never found in the dataset.

In general, claims alleging race discrimination yield few favourable court decisions where the court found race discrimination - for the rulings released in the years 2002-2007 (only three on 12 were upheld). The success rate becomes higher after 2008 (nine of 17).

**Procedural rights**

In most of the cases included in the database, claims were dismissed on the grounds that the plaintiffs did not bring sufficient evidence to shift to the defendant the burden of proving that no consideration of race or ethnic criteria was involved in their employment-related decisions. The situation evolved slowly through the years also thanks to the involvement of trade unions and specialized NGOs in a few major strategic cases against large companies, as the French automaker Renault and the multinational Bosch. These cases helped developing a quasi-statistical method for proving discrimination *prima facie* that was admitted by the judiciary as sufficient to shift the burden to rebut a proof to the employer. This method, called *méthode des panels* (comparable panels method), consists of establishing a comparison within sets of employees with similar functions and qualifications but different career paths, and showing that surnames or places of birth suggesting a foreign origin are the only characteristics distinguishing the two sets.

After 2008, complaints show a percentage of success higher than those of the early years 2000, as well as the adoption of a range of different remedies: from the allocation of moral damages (up to some thousand euros), the shifting of attorney fees, the publication of the ruling, apart orders aiming to either reintegrate in employment or promote the plaintiffs, or pay the corresponding damages. These range from up to 250,000 Euros in

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138 An important ruling of 2002 condemned the public transport company of Paris, RATP to pay 12,000 euros in moral damages to a woman employee for race discrimination. CA Paris (Appeal Labour Court), 29.01.2002, 01/32582.
139 (Bosch) CPH Lyon (Labour Court), 20.06.2008, F071/01754 and (Renault), CA Versailles, 2 April 2008.
140 La “*méthode des panels*” or “*méthode Clerc*” was first elaborated by the CGT (the main French Trade Union) in order to prove indirect discrimination against trade unions members. Cf. Cass. Soc. (Court of Cassation, labour), 9.04.1996, 1727 P. Interview FR CGT 2.
141 According to Article 700 of the New Code of Civil Procedure.
the 2008 case involving Renault, with 3,000 Euros fees each for the supporting NGOs and trade unions, but were in general closer to an average of a few thousand euros.\textsuperscript{142}

In parallel with acknowledging the interesting quantitative development of labour law litigation, however, it is important to stress the total absence of civil law jurisprudence outside the domain of employment. The latter is not only to be imputed to the later extension of civil antidiscrimination provisions to this domain (2004) or to the long absence of legal standing for civil society organizations outside labour and criminal courts (up to 2008).

Rather, such absence parallels the persistence of criminal litigation in the domains of discrimination in access to goods and services and access to employment. This kind of litigation is based on a longer tradition (since the 1972 ‘Pleven law’) and, especially after the 1990 ‘Gaysso law’, also on a rather established corpus of jurisprudence. According to NGO members and criminal lawyers, in spite of the innovations introduced thanks to the transposition of the RED, filing a criminal complaint in cases of race discrimination in access to services or employment presents more advantages than choosing the EU-suggested civil law domain.\textsuperscript{143} First, a criminal complaint immediately gives powers of inquiry to the public prosecutor, making up for the difficulties of disclosing relevant information for the suit, a difficulty that is typical of the adversarial process and justifies the introduction of procedural rights such as the shift in the burden of proof. Second, in France the criminal lawsuit is subject to a regime of free proof, which has made acceptable even for the higher jurisdictions the use of situation testing and wiretapping to demonstrate race discrimination.\textsuperscript{144} Third, differently from the domain of civil law, NGOs can bring collective complaints, also in the absence of an identified victim. Fourth, the jurisprudence developed over the years (late 1990s and early 2000) in criminal courts has established a range of expected moral damages for the plaintiffs and also for the NGOs that are parties to the suit, establishing a further incentive to choose the criminal route. Finally, experts and antiracist NGOs highlight that, in general, plaintiffs prefer filing with criminal courts for the symbolic moral value of a criminal conviction.\textsuperscript{145}

\textsuperscript{143} Interview FR CGT1, FR LICRA, FR CRIMLAWYER1.
\textsuperscript{144} Cass. Crim. (Supreme Court of Cassation, Criminal Section), (Les Pym’s), 12.09.2000, G99/87.251 D, and (SOS Racisme c/ Dhaisne), Cass. Crim. (Supreme Court of Cassation, Criminal Section), 11.06.2002, 01/85.560 F-D. In the latter case the Court clarified that those who perform the testing should not be members of the NGO bringing or supporting the lawsuit.
\textsuperscript{145} FR SOS RACISME.
For this set of reasons, important strategic cases were litigated in criminal courts, in parallel with the development of the labour law litigation mentioned above. A diachronic analysis of the legal databases shows that, throughout the 2000s, while the number of rulings by higher labour jurisdiction increases, the number of criminal court decisions assessing cases without criminal relevance under EU law (e.g. access to goods and services and employment) remained more or less constant.146

Many of these criminal rulings concern access to employment or access to services such as credit or housing. The criminal conviction of the world’s largest cosmetics and beauty company Garnier/L’Oréal-Adecco and the famous Moulin Rouge nightclub are the most well known among the recent criminal convictions for race discrimination in access to employment. 147

### Race equality policy enforcement for France

<table>
<thead>
<tr>
<th>Substantive rights</th>
<th>Procedural rights</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of discrimination claimed</strong></td>
<td><strong>Proof requirement</strong></td>
</tr>
<tr>
<td>Direct, harassment</td>
<td><strong>Level of prima facie</strong> lowered progressively, comparative panels based on proxies admitted but no ethnic statistics</td>
</tr>
<tr>
<td><strong>Categorization of the type of discrimination</strong></td>
<td><strong>Support for the complaint</strong></td>
</tr>
<tr>
<td>Racial, (Ethnic) origin</td>
<td>NGOs and trade unions: rare</td>
</tr>
<tr>
<td><strong>Defendant</strong></td>
<td>Equality body: increasingly frequent after 2006</td>
</tr>
<tr>
<td>Private individuals</td>
<td><strong>Individual or collective complaint</strong></td>
</tr>
<tr>
<td><strong>Domain of law</strong></td>
<td>Individual only (and eventual third party interventions)</td>
</tr>
<tr>
<td>Employment</td>
<td><strong>Remedies and sanctions</strong></td>
</tr>
<tr>
<td><strong>Type of relation affected</strong></td>
<td>Moral damages and high damages awarded in few cases</td>
</tr>
<tr>
<td>Career progression, dismissal</td>
<td><strong>Assessment provided by the court</strong></td>
</tr>
<tr>
<td>Race discrimination claims mainly rejected before 2008, increasingly upheld thereafter</td>
<td></td>
</tr>
</tbody>
</table>

**Table 5.5 Race Equality Policy Enforcement in France**

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146 Keyword queries performed on LexisNexis and Legifrance for the years 2000-2010
147 CA Paris (Appeal Court, Criminal Section), (Garnier/L’Oréal-Adecco), 16.07.2007, 06/7900, Cass. crim. (Supreme Court of Cassation, Criminal Section), (Moulin Rouge), 7.06.2005, 04/87.354.
Aside from the persistence of criminal law litigation, however, it should be noted that the recourse to public prosecutors for race discrimination was deliberately further institutionalised in recent years. Between 2006 and 2007, in fact, the right-wing justice minister Rachida Dati inserted in the Equal Opportunities Act of 2006 an article sanctioning the use of situation testing as a legitimate means of proof in criminal proceedings and, one year later, ordered the creation of antidiscrimination units within the offices of the public prosecutors.

*Domestic legal mobilization*

*Antiracist NGOs*

Although a quantitative search of French organizations among the affiliates of the European Network against Racism (ENAR) displays the lowest number of specialised NGOs in France, French NGOs are perhaps fewer, but comparatively much larger and resourceful than the antidiscrimination NGOs found in other countries. Some of them also have organised legal services providing support to claimants, a characteristic probably owing to the early recognition of the role of antiracist NGOs in supporting criminal complaints against racism and race discrimination. According to this tradition, French NGOs continue to define themselves as *antiracist* NGOs and not as antidiscrimination NGOs.148

Not only have NGOs long been part of a French organizational and ideational model for fighting racism and discrimination (Bleich, 2003), the main antiracist NGOs have also been very well connected to the political world over the years, establishing precise party affiliations. The LICRA (International League Against Racism and Anti-Semitism) is close to the centre-right parties, the MRAP (Movement against racism and for the friendship among peoples) to the communist party, and *SOS Racisme* and the LDH (Human Rights League) to the Socialist Party. All these NGOs can rely on a large national membership.

As concerns legal expertise, while most among the above-mentioned NGOs have not used courts to fight discrimination very often and in parallel with other strategies, two NGOs have adopted litigation as a recurrent ‘repertoire of action’. The GISTI (Group for the information and support of immigrants) has contributed, since the 1970s, to the

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148 Interview FR SOSRACISM, FR LICRA.
development of immigrants’ rights challenging nationality requirements in access to public employment and social provisions before administrative courts (Israël, 2003).149

Among the purely antiracist organizations, SOS-Racisme was the first NGO to use situation testing as a means to prove discrimination before criminal courts. The organization has long remained mainly faithful to its original criminal law strategy, even though its scope of action expanded over the years from access to services (night clubs), to private and public housing and, more recently, employment discrimination. Other NGOs that have from time to time engaged in criminal judicial redress are the LICRA and the CRIF (Representative Council of French Jews), but mainly for complaints against racial hatred. The LDH and the MRAP also have professional legal services, even though they both have a wider scope of action, the second one focusing mainly on immigrants’ rights and administrative courts.

French antiracist organizations, and in particular SOS Racisme, have increased their visibility over the years, in particular thanks to some initiatives prominently advertised in the media, like situation testing exercises taking place simultaneously across the country, some widely publicised legal victories and their strong political connections.150 Thus, they have become a point of reference not only for claimants, but also for central institutions in the shaping of the national antidiscrimination strategy. They receive public funding and some of them are represented in the advisory council of the French equality body as well as in other governmental bodies. Thus, they have some direct political influence besides what they can achieve through strategic litigation.

The French case-law database shows that, in recent years, SOS Racisme and the MRAP have started cooperating with trade unions in a few cases of discrimination in career progression, testing the new territory of employment law litigation. However, many of the French antiracist organizations and in particular SOS Racisme openly oppose the use of race categorization, ethnic monitoring and ethnic statistics.151 This is one further reason why they mainly continue to support criminal redress rather than direct more complaints towards civil or employment courts.

149 Interview FR GISTI; FR HALDE5.
150 Situation testing is a method according to which pairs (of applicants for accommodation or a job vacancy or clients of a restaurant, a nightclub, etc.) are established in such a way that they differ solely on the basis of a single characteristic reflecting the discriminatory ground (gender, ethnicity, age, disability, religion or belief, sexual orientation) under scrutiny. If one of the members of the pair faces different treatment, the distinction points to discriminatory behaviour. Cf. Migration Policy Group, Situation testing, available at http://www.migpolgroup.com/projects_detail.php?id=25
151 Interviews FR SOSRACISM, FR LICRA.
Trade unions

The evolution of civil jurisprudence on discrimination in France owes some enhancements to the action of trade unions, the sole organizations entitled to bring collective discrimination complaints in labour courts under French law.\textsuperscript{152} In particular, the Confédération general du travail (CGT, General Works Confederation) was the main supporter of the earliest type of antidiscrimination litigation developed in France, that against discrimination grounded upon trade union activity (discrimination syndicale). The CGT specialised in demonstrating that in certain cases the non-promotion of workers or their dismissals were not linked to a lack of proficiency or due to a ‘real and serious motive’ (cause réelle et sérieuse), but rather to their being trade union activists. To do so, the CGT developed a strategy based on comparative panels, a method of proof subsequently validated by courts. Although useful also in the case of race discrimination in career advancement and dismissal, the method of the comparative panels faces several limits. On the one hand, its usage for race discrimination cases is hindered by the fact that data on the ethnic composition of the workforce are not collectable in France. Thus, the method was so far employed through relying upon proxies such as family names or place of birth.\textsuperscript{153} Such proxies, however, may prove useless in the case of individuals from visible minorities who are born in France and have a French name. Second, trade unions usually do not act in the domain of access to employment, one of the principal moments at which discrimination may occur. In fact, job applicants are frequently not (yet or any longer) trade union members. This explains why the complaint database shows only one case of discrimination in access to employment litigated in an employment, rather than a criminal, court, and an overall low number of cases brought by trade unions.

However, while the CGT engaged to some extent in strategic antidiscrimination litigation, supporting some of the most publicized civil lawsuits of the years 2000 (e.g. the Renault and Bosch cases), the second main French trade union, the CFDT (French Democratic Works Confederation) concentrated more on training its conseillers

\textsuperscript{152} A victim of discrimination needs only to be notified in case the trade union intends to bring a collective complaint on his behalf, whereas NGOs need the explicit agreement of a plaintiff in order to sue and cannot bring collective complaints.

\textsuperscript{153} Interview FR CGT2.
prud’homaux — the union’s employee representatives who sit on the board of the first instance employment courts — in antidiscrimination law.¹⁵⁴

French trade unions have a long tradition of strong protests and collective general strikes. Litigation is, thus, a repertoire of action perhaps more moderate and individual-centred than those more traditionally employed. The experience with defending trade union activists in court, however, is certainly exercising a degree of influence also on how they have engaged in race antidiscrimination litigation thus far.

**Equality body**

The presence of a comparatively powerful, resourceful and proactive equality body in France is unique among the three countries selected for this study. In particular, the French body is the only one endowed with a certain degree of autonomy, a professional legal service and competences to intervene in litigation.

![HALDE’s homepage](image)

*Figure 5.1 HALDE’s homepage*

¹⁵⁴ Interviews FR CFDT1, FR PRUDHOMM 1.
Organization

The Haute Autorité de lutte contre les discriminations et pour l'égalité (HALDE, High Authority for the fight against discrimination and for equality), created in 2004, is an independent administrative authority funded by the Ministry of Social Affairs at around 11 million euros per year. It is directed by a board of 11 members elected on a non-renewable five-year term, who are appointed by different authorities (Parliament, Presidency of the Republic, Prime Minister, various jurisdictions, the Economic and Social Committee), and meets between 25 and 30 times a year to take resolutions (délibérations). The French President nominates the chair of HALDE’s board, which is assisted by an advisory council composed of representatives of civil society, businesses, and unions.

Such organization used to enjoy a certain degree of independence from direct political influence, because the presidential nomination of the HALDE’s chair was balanced by the greater independence of the board and the budgetary autonomy. At the time of the last revision of this work, however, the HALDE was merged, together with three other bodies (the Médiateur de la République, the Défenseur des enfants and the Commission nationale de déontologie de la sécurité) to form a new authority headed by a figure called the Défenseur des Droits (Rights Defender or Ombudsman). Since the reorganization only took place at the beginning of 2011 (Organic Act 2011-333 and Act 2011-334 of 29 March 2011), it is difficult to evaluate its impact on the activity of HALDE. Altogether, by being merged into a larger institutional setting, the expectation is that the authority will lose at least part of its independence and specialization.

Over its first five years of activity HALDE was presided over by an ex-CEO of Renault, a representative of the French industrial world who had feared the costs of antidiscrimination litigation at the moment of the transposition of the RED. Nonetheless, in parallel with soft measures implemented with the collaboration of French companies, the HALDE was able to develop independent actions and successfully lobbied the legislative branch to see its legal intervention capacity empowered through the Equal Opportunities Act of 2006.155

155 Interview FR CONSETAT.
HALDE has various internal departments: a legal service, a department for the active promotion of equality, a research department, and a department of territorial affairs. At the end of 2010, its staff numbered about 70 full-time staff, half of which was assigned to the legal department. The staff is recruited and employed directly by HALDE itself.156

**Competences**

HALDE is responsible for all the 18 suspect motives found in French law—including but not limitedly to race, ethnicity and national origin, physical appearance and family name. It is thus configured as a “multi-ground” equality body, i.e. a body not specialising on a specific equality motive. Besides having considerable financial and organizational resources, in terms of actual powers HALDE is located halfway between equality bodies devoted to supporting individual litigation (on the Anglo-Saxon model), quasi-adjudicatory bodies (on the Dutch and Irish example), and mediating bodies (as in the case of the Scandinavian Ombudsmen) (Hermanin, 2009).

According to the ‘Law HALDE’ of 2004 the authority has the power to perform most of these functions. It collects and processes complaints of discrimination, advises and assists victims who decide to file court cases and those wishing to engage in mediation or out-of-court settlements. However, HALDE can also autonomously adjudicate claims of discrimination through the resolutions taken by its board. If it thinks fit, the board may decide to transfer the complaint to the criminal prosecutor or support the filing of a complaint with a third party intervention before the competent criminal, civil or administrative jurisdictions. HALDE can require institutions and private individuals to provide data needed for evidence and may decide to investigate beyond the complaints received, therefore on its own initiative. After assessing a complaint through its board’s deliberation, it can issue recommendations to private individuals as well as to other public bodies in view of adopting specific measures or amending existing laws, regulations and behaviours. Since 2006, HALDE has gained further powers that have allowed it to

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156 Interview FR HALDE2.
perform plea bargaining (transaction pénale) and to independently act in civil and criminal suits.\textsuperscript{157}

\textit{Operation}

Between 2005 and 2010 HALDE gained visibility through communication campaigns, acquiring a certain popularity in the Paris area, where it has its seat and from where it receives the vast majority of claims. Local correspondents were only established in 2008, so a claimant’s knowledge of HALDE’s existence may vary a great deal depending on a territorial basis.

This notwithstanding, the number of discrimination claims filed with HALDE grew at a rate of 20\% every year (from 1,400 in 2005 to about 13,000 in 2010) in parallel with the body’s capacity to respond to such claims through various type of actions. Most claims are closed before a resolution of the board – \textit{délibérations} count between 300 and 400 per year – through calls to order (rappels à la loi) or mediations (règlement amiables).

Since the beginning of HALDE’s activity a constant 30\% of complaints have alleged discrimination grounded on ‘origin’ (discrimination liée à l’origine), as defined in the body’s institutional jargon, which cautiously avoids explicit mention of race (HALDE, 2006, HALDE, 2009, HALDE, 2011). Over the years, approximately half of the claims brought to HALDE have concerned the domain of employment. Following the last annual report by HALDE, around 30\% of ethnic discrimination claims were related to private employment matters and 20\% to public employment (HALDE, 2011).

Unfortunately, HALDE does not break down data on the kind of remedies it provides to these claims according to the alleged ground of discrimination. Thus, it is hard to say how many of the resolutions taken by its board directly concern race discrimination complaints. This notwithstanding, institutional data are useful for understanding the kind of impact that the activity of the French equality body may have in terms of own enforcement of antidiscrimination policy (e.g. though out-of-court settlements), and support or intervention before domestic courts.

\textsuperscript{157}Beforehand the decision to hear the French equality body depended on the court, therefore its actual involvement could have an impact on the result of the case but not directly on the number of complaints brought to courts. Appeals against HALDE’s interventions and recommendations are assessed by the Council of State.
As concerns the own enforcement of antidiscrimination law, most resolutions taken by HALDE’s board over the first years of activity contained recommendations directly addressed to public and private bodies. The second more frequent kind of resolution, however, ordered interventions before jurisdictions, civil and criminal. This is important data, insofar as HALDE’s intervention in support of a complainant or as amicus curiae is certainly relevant in view of assessing a change in the domestic usage of judicial proceedings to redress discrimination. Thanks to new powers conferred in 2006, HALDE has to be heard by courts and can intervene autonomously, an innovation accepted with a high degree of scepticism by the French judiciary, who fear competition from this newborn institution.158 HALDE’s investigative powers, however, are paramount in a system where many judges have long hesitated to lower the threshold of what might be considered as prima facie evidence of discrimination. HALDE’s data show that in 80% of the cases, its court briefings are followed up by the relevant jurisdictions. This type of intervention (for all discrimination motives) numbers between 48 and 212 cases a year, of which about a third can be reasonably expected to pertain to race discrimination cases.159

HALDE also performs a certain number of mediations, the portion of which in relation to the institutions’ overall activity, however, is declining (HALDE, 2011: 29).

As concerns HALDE’s legal activity, it should not be assumed, however, that having been established in the framework of the transposition of the RED and the FED leads HALDE to operate only through civil law and with civil, administrative and employment courts. Rather, HALDE’s board decided from the outset to maintain a strong emphasis on the criminal fight against race and ethnic origin discrimination.160 Thus, since 2005, board deliberations have decided to forward a certain number of discrimination claims to public prosecutors.161 In 2007, the body intervened in the criminal complaint against L’Oréal-Adecco for race discrimination in access to employment. Moreover, the competence to perform plea bargaining (transaction pénale), taking decisions that are validated ex post by criminal courts, is more likely to be exercised concerning cases of race discrimination – where there is a longer tradition of criminal adjudication – rather than for other grounds of discrimination. In brief, also in the case of the public enforcement of antidiscrimination

158 Interview FR CASSSOC.
159 The sample search made in HALDE’s database on 17 July 2009 showed that most interventions in 2008/9 were filed before first instance employment courts (CPH).
160 Interview FR HALDE 1; Interview FR CONSETAT.
161 Also in the case of deliberations involving criminal law, HALDE’s data are not broken down by discrimination motive. It seems legitimate, however, to expect that most of these deliberations concern race discrimination, given that this is the suspect motive that has been the longest regulated through criminal law.
policy, the usage of criminal redress remains strongly institutionalized in France and recent measures have institutionalised it further.

Overall, HALDE certainly had an impact on the judicial enforcement of race antidiscrimination law. Even though the number of its courts interventions remains modest, they have been increasing over the years and the possibility to have HALDE as an ally in court certainly may support a claimant or her lawyer's decision to file an antidiscrimination lawsuit. The availability of alternative means of redress directly provided by HALDE is also important in the framework of the RED’s implementation. The recent establishment of decentralised structures is a significant development as regards raising awareness about the existence of such an option. Although the critics of HALDE’s work are numerous, and the criticisms raised against it are of various types, its action has had certainly a positive impact on the domestic enforcement of the RED, in particular as regards the frequency of antidiscrimination litigation.

**Summary**

The review of French civil court rulings on race discrimination since the transposition of the RED reveals a progressive intensification of civil litigation, which was virtually absent before 2000, even though litigation is limited to employment courts. Criminal courts, in fact, keep receiving and adjudicating a significant number of complaints of race discrimination related to the domains of access to goods and services and access to employment. On the quality of French jurisprudence, however, the dataset shows a certain evolution as regards a few process elements typical of the antidiscrimination lawsuit, even though other aspects, as well as the substantive notions of discrimination, remain critically underused and under-defined. More specifically, the dataset shows a complete absence of complaints and rulings evoking the concept of indirect discrimination. This was expected given the late definition of the notion in French law and the reluctance to engage in any form of race categorization, typically needed to prove indirect discrimination, which is traditional of the French antiracist model. Also on the side of procedural rights, the limitations long imposed upon NGOs in supporting claimants outside employment courts, as well as the impossibility for NGOs to bring collective complaints, led to partial enforcement. Antiracist NGOs, although resourceful, have stood in litigation before employment courts only rarely. This is in part compensated for by the proactive role of
HALDE and its growing litigating activity, which has granted an incentive to litigate against race discrimination, also in higher employment courts. Demanding requirements in terms of first evidence to shift the burden of proof to the defendant have been lowered progressively.

The omission in the enforcement of the concept of indirect discrimination as well as the limits in terms of legal standing of NGOs determine an only partial implementation of the RED. In fact, the latter seems to be used only as a policy that complements the domestic “corrective justice criminal model.”

The policy incongruence hypothesis, according to which the large incongruence detected in France would cause pressures for institutional adaptation, explains the increasing number of complaints adjudicated by employment courts, but not the slow evolution detected on the qualitative side. The permanence of criminal litigation and a criminal “preference” as regards the individual redress of race discrimination and the reluctance to employ the word “race” are certainly remarkable and more difficult to explain. Domestic civil society actors seem to prefer to stick to the traditional criminal enforcement model, rather than seize the new opportunities opened up by the RED. Only the HALDE has more decidedly opened up so as to engage (also) in civil litigation.

Recent laws and government measures have reinforced the institutionalization of the criminal treatment of race discrimination in France. In short, a partial Europeanization of a policy domain seems to coexist with a certain degree of domestic persistence, at least in the first years of implementation.

As regards the formal legal argument that a more compliant transposition yields better enforcement, Chapter Four showed that the quality of domestic compliance in France was low, and only improved after the response to the infringement action of the EC. In particular, the evolution in the jurisprudence in terms of French courts being keener to uphold discrimination parallels with the passing of the 2008 new law rectifying the transposition of the RED. Law 2008-496 eased the requirements for prima facie evidence. It also granted standing to NGOs in civil courts and defined the concept of direct and indirect discrimination. These latter two statutory evolutions, however, did not find any immediate echo in the jurisprudence of the dataset.

Looking at the role of domestic mobilization in the spread of antidiscrimination litigation, civil society organizations have supported antidiscrimination lawsuits only in a
small number of cases. Thus, the action of antiracist NGOs, which remains mainly focused on criminal litigation, was not the central factor behind the intensification of employment litigation, however resourceful the French NGOs are. A different discourse applies to trade unions, whose action was certainly relevant to the qualitative development of certain process element, such as the method to prove \textit{prima facie} discrimination, but was far less important in terms of number of lawsuits supported. Thus, the evolution of race antidiscrimination litigation seems to have been crucially facilitated by the presence of an autonomous and comparatively powerful equality body endowed with competences to litigate. Even though the interventions of HALDE in employment courts took place in particular after the 2006 review of its competence to stand in lawsuits, the reputation acquired by the body — at least at a centralised institutional and territorial level — and its increasing number of interventions certainly exercise an influence also on individual decisions to engage in judicial proceedings against race discrimination.Whether HALDE’s own mediation activity has slightly declined in the last few years, and the extent to which this subtracts work to domestic courts, is a more difficult hypothesis to address in view of the available data.

Overall, whereas there has certainly been some change in the domain of equal treatment policy following the transposition of the RED in France, specific features of the French domestic antiracist model not only persist but have been further institutionalised over the past few years. This raises some uncertainty as to the extent to which Europeanization can be used as the only explanation for the recent policy changes detected above. In fact, any account of the evolution of the domain of equal treatment policy should not overlook the fact that race equality was already on the domestic political agenda before the transposition of the RED, and that the response to purely domestic events, such as the 2005 race riots in the outskirts of Paris (révolte des banlieues), have been more immediate than EU influence for creating policy change, e.g. the law of 2006 on equal opportunities. Upon a deeper look, the way the RED was enforced in France over the past few years reflects more a purposeful cherry-picking of those policy measures that could usefully complete the gaps of the French antiracist system, rather than a diligent EU-policy implementation exercise.

In spite of the good reasons justifying to a certain extent the persistence of criminal litigation, the non-adherence to the passage to civil litigation pushed by the RED outside the domain of employment certainly has also some drawbacks in terms of policy implementation.
## Summary

<table>
<thead>
<tr>
<th>Domestic enforcement</th>
<th>Increasing civil litigation</th>
<th>Remarkable increase, also in higher jurisdictions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Qualitative evolution of jurisprudence/Substantive rights</td>
<td>Partial, no implementation of the concept of indirect discrimination</td>
</tr>
<tr>
<td></td>
<td>Qualitative evolution of jurisprudence/Procedural rights</td>
<td>Partial, after 2008</td>
</tr>
<tr>
<td>Domestic legal mobilization</td>
<td>NGOs and Trade Unions</td>
<td>Small mobilization</td>
</tr>
<tr>
<td></td>
<td>Equality body</td>
<td>Consistent mobilization</td>
</tr>
<tr>
<td>Policy congruence</td>
<td></td>
<td>Low</td>
</tr>
<tr>
<td>Quality of domestic compliance</td>
<td></td>
<td>Low</td>
</tr>
</tbody>
</table>

### Table 5.6 Summary of the empirical findings on France

The main one is that cases of indirect discrimination are almost impossible to litigate in criminal courts, given that the criminal code only sanctions intentional discrimination. This specific French problem, already flagged by some French scholars (Calvès, 2004) is reinforced by the prohibition of ‘ethnic statistics’, i.e. the collection of ethnic data that could serve to prove race discrimination in cases where ‘an apparent neutral provision’ has the effect of producing unequal treatment. In the field of access to employment, for instance, the tests performed by the equality body or by specialised antidiscrimination consultancies and consisting of sending CVs with comparable professional qualifications but names of different national/ethnic origin, could only with difficulty be used in criminal courts to prove intent.\(^\text{162}\)

The recourse to employment litigation and the introduction of the ‘comparative panels method,’ where family names or countries of origin are used to display the comparative disadvantage of certain employees as compared to their French/white colleagues have partially overcome this limit. However, this method is of little use in cases outside the domain of career progression, which continue to be brought before criminal courts.

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\(^\text{162}\) Such as the Observatoire des discriminations (Discriminations observatory), a consultancy cabinet that organizes discrimination tests for enterprises and public bodies based on large sets of CVs. Discrimination on grounds of origin is singled out by submitting the same CVs under two different names, a French one and a foreign one. Interview FR OBSDISCRIM.
courts and where indirect discrimination may certainly impact upon ethnic minorities, e.g. in the area of access to employment. Moreover, panels built upon proxies for race, instead of racial or ethnic categories, may make those visible minorities at risk of discrimination who are born in France and have French names disappear from the comparison.

**Germany**

*Domestic jurisprudence on race discrimination*

There are a number of peculiarities to German litigation in the domain of race discrimination after the late transposition of the RED in 2006 through the AGG, an act covering to an almost similar extent all the motives of discrimination protected in EU law. First of all, according to both the German database Juris.de — the most complete among those used for the three countries — and the specialised case-law collections, the overall number of court decisions assessing complaints for race discrimination or harassment is very low: 14 rulings in the space of nearly three years for the three levels of jurisdiction, including first instance courts (cf. Annex 2 for the dataset of German court decisions). An increasing trend in the number of cases adjudicated every year is detectable, but is discontinuous (see Table 5.5).

<table>
<thead>
<tr>
<th>Year</th>
<th>A2006*</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>J2010*</th>
<th>2006-J 10</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Instance Courts</td>
<td>0*</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>3*</td>
<td>8</td>
</tr>
<tr>
<td>Courts of Appeal</td>
<td>0*</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>1*</td>
<td>4</td>
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<tr>
<td>Federal Courts</td>
<td>0*</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1*</td>
<td>2</td>
</tr>
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<td>Total</td>
<td>0*</td>
<td>3</td>
<td>4</td>
<td>2</td>
<td>5</td>
<td>14</td>
</tr>
</tbody>
</table>

**Table 5.7 Rulings by German Courts on race discrimination August 2006-June 2010**

Source: queries based on the reference of the Antidiscrimination Act (AGG) on Juris.de

* For 2006 the search is limited to the last 5 months, for 2010 to the first six months
Substantive rights

In all these rulings, German judges use the term ethnic origin discrimination (Diskriminierung auf Grund ethnischer Herkunft), thereby avoiding explicit mention of race. A second interesting characteristic of the jurisprudence in the domain of racial discrimination is that in most cases German courts were asked to decide whether a language requirement in employment was to be considered as a form of indirect ethnic origin discrimination, making language proficiency an “apparently neutral but suspect motive.” The question is certainly of interest given that, on the one hand, an enhanced knowledge of the national language can certainly be considered as a genuine occupational requirement in certain professions. On the other hand, the level of language required, e.g. being a native speaker, can also affect jobseekers from ethnic minorities disproportionately and without plausible justification. Interestingly, among the three countries, language is unique to Germany as a categorization issue in race discrimination cases.

As concerns the domain of court decisions, most rulings on race discrimination were taken by employment tribunals and concerned both access to employment, employment conditions, and dismissal. In one of the two cases adjudicated by the Federal Employment Court, a complaint for an allegedly discriminatory dismissal was rejected on the grounds that there was an objective justification for firing an employee who had not achieved a satisfactory level of German. German proficiency was thus deemed a genuine and objective occupational requirement. In a more recent ruling, however, the dismissal of a non-native German speaker was upheld as discrimination and punished under the AGG. This decision confirmed that redundancies may fall within the scope of the AGG, even though the Act does not yet cover dismissals explicitly. The combined reading of the two rulings also clarified that a certain level of language can be used as an occupational requirement, whereas limiting a job to native speakers implies establishing an unlawful ethnic criterion.

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163 In this sense see ArbG (Employment Court) Berlin, 26.09.2007, 14Ca10356/07.
164 ArbG (Employment Court) Berlin, 11.02.2009, 55 Ca 16952/08.
165 BArbG (Federal Employment Court), 28.01.2010, 2 AZR 764/08.
166 LArbG (Regional Employment Appeal Court) Bremen, 29.06.2010, 1 SA 29/10.
Except for one, all the other rulings contained in the German dataset concern discrimination by private individuals or companies. In the outlier case, indirect race discrimination was evoked against a nationality requirement to compete for a scholarship. The complaint was, however, dismissed by the administrative tribunal, which refuted the conflation between nationality and race or ethnic origin discrimination.\textsuperscript{167}

A case of alleged reverse discrimination, i.e. a selection unlawfully privileging a member of a group at risk of discrimination to the detriment of a majority applicant, also needs to be cited. Required to assess whether a job advertisement explicitly seeking a woman of migrant origin could be considered reverse discrimination on the grounds of ethnic origin and gender, the Labour Court of Cologne decided that the characteristics so advertised could be considered as a genuine occupational requirement for the post as cultural mediator in a project on sexual violence against migrant women.\textsuperscript{168}

On the 14 cases adjudicated by German courts, only five complaints were minority claimants sought redress for race discrimination were upheld.

\textit{Procedural rights}

A few more decisions are interesting to discuss as concerns the interpretation of the process facilitations provided by the RED and transposed by the AGG. In the sole known German case where situation testing was used to shift to the defendant the requirement to prove that her methods of selection to access a night club were not discriminatory, the judge found discrimination but halved the damages and made the plaintiff pay for a certain percentage of her costs because situation testing was deemed as a sort of “disloyal” proof.\textsuperscript{169} In two cases, the Labour Appeal Court of Hamburg and that of Schleswig-Holstein established that being part of intersectional groups at risk of discrimination — an elderly non-German woman, in the first case, and a disabled black men, in the second — was not sufficient to reverse the employers the burden to rebut an allegation that their job selection processes were discriminatory.\textsuperscript{170} In another case, the Federal Employment Court relied on the expiration of the short delay set by the statute of limitations (two months) in order to reject a complaint of racial harassment by four Turkish employees

\textsuperscript{167} Bayerische VG (Administrative Court) Bayern, 14.08.2008, 7 CE 08.1059.
\textsuperscript{168} ArbG (Employment Court) Köln, 6.8.2008, 9 Ca 7687/07.
\textsuperscript{169} AG (Civil Court) Oldenburg, 23.07.2008, E2C2126/07.
\textsuperscript{170} LArbG (Regional Employment Appeal Court) Hamburg, 9.11.07, H3 Sa 102/07 and LArbg Schleswig-Holstein, 26.06.2008, 1Sa129/08.
whose employer refused to delete a racially offensive graffiti drawn in the toilets of the company.\textsuperscript{171}

All the cited complaints were presented as individual complaints, with no formal intervention by antidiscrimination NGOs, trade unions, or equality bodies.

As concerns damages, moral damages ordered for the refusal to access a service were halved in the case of the Oldenburg nightclub where situation testing was used as proof (500 Euros) and were only slightly higher in the case of discrimination in access to housing (2500 Euros). In the two cases in which courts found discrimination in access to employment and in the case of discriminatory dismissal, all based on language proficiency, the compensation ordered ranged between 3900 and 5400 Euros plus interest (see Annex 2).

<table>
<thead>
<tr>
<th>Race equality policy enforcement for Germany</th>
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<tbody>
<tr>
<td><strong>Substantive rights</strong></td>
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<tr>
<td>Type of discrimination claimed</td>
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<td>Categorization of the type of discrimination</td>
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<td>Defendant</td>
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<tr>
<td>Domain of law</td>
</tr>
<tr>
<td>Type of relation affected</td>
</tr>
<tr>
<td>Assessment provided by the court</td>
</tr>
</tbody>
</table>

| **Procedural rights** | |
| Proof requirement | Situational testing admitted with reserve, no statistical proof |
| Support for the complaint | NGOs: informal only |
| | Trade Union, Equality body: no |
| Individual or collective complaint | Individual only |
| Remedies and sanctions | Low moral damages awarded in two cases, average compensation 4,900 Eur |

\textsuperscript{171}BArbG (Federal Employment Court), 24.09.2009, 8 AZR 705/08.
Domestic legal mobilization

Antidiscrimination NGOs

Among the three countries, Germany is the one with the largest number of NGOs affiliated to the European Network against Racism. This is at first sight surprising given the low level of institutionalization detected for equal treatment on ground of race and antiracism in Germany before the adoption of the AGG (cf. Chapter Three). And indeed, the number of NGOs working in the field of racial discrimination rapidly increased in the years immediately following the entry into force of the AGG. In particular, many small NGOs working with immigrants, assisting with foreigners’ integration, and doing pro bono legal counselling on a local basis, rapidly turned to antidiscrimination when the AGG and availability of EU funds for civil society opened up a new terrain for activity.\textsuperscript{172} In May 2007, thanks to EU funding channelled in the European Year for Equal Opportunities, 10 local German NGOs formed an Antidiskriminierungsverband Deutschland (ADVD, German Antidiscrimination Federation), an umbrella organization mainly composed of many small NGOs distributed in several, mostly Northern, German Länder. These organizations are the AntiDiskriminierungsBüro Köln-Öffentlichkeit gegen Gewalt e.V. (Antidiscrimination Office of Cologne-Non Profit Civil Society against Violence); the Antidiskriminierungsbüro Sachsen e.V. (Antidiscrimination Office Sachsen); the Antidiskriminierungsbüro Aachen-Pädagogisches Zentrum Aachen e.V. (Antidiscrimination office and pedagogical centre Aachen); the Anti-Rassismus Informations-Centrum ARIC-NRW e.V (Anti-Racism Information Centre, North-Rein Westphalia); basis & woge e.V. (Hamburg Legal Counselling NGO), the Bund gegen ethnische Diskriminierung in der Bundesrepublik Deutschland e.V. (Union Against Ethnic Discrimination in the Federal Republic of Germany); IBIS-interkulturelle Arbeitsstelle e.V./Antidiskriminierungsstelle (Intercultural Employment Office-Antidiscrimination Office, Oldenburg); Initiative Schwarze Menschen in Deutschland ISD-Bund e.V., (Initiative Blacks in Germany), iMiR - Institut für Migrations- und Rassismusforschung e.V. (Institute for Migration and Research on Racism, Hamburg); and Antidiskriminierungsnetwork Berlin (ADNB) des Türkischen Bund in Berlin-Brandenburg (Antidiscrimination Network Berlin of the Turkish Union of Berlin-Brandenburg).\textsuperscript{173} The ADVD has its headquarters at the Turkish Bund Berlin.

\textsuperscript{172} Interview DE ADVDTBB.
\textsuperscript{173} See http://www.antidiskriminierung.org/
This large federation complies with the criteria set by the AGG to permit NGO legal standing on behalf of victims, i.e. including at least seven associations or 75 members, and working on a non-profit and non-occasional basis. In spite of the existence of an ADVD, the fuzziness of the AGG in this respect together with German judges’ reticence to allow legal standing for third parties hindered the formalization of NGOs participation in antidiscrimination lawsuits. As a consequence, even though a number of complaints were de facto supported by member organizations of the ADVD acting as ‘legal advisors,’ and frequently filed by the same specialised lawyer, in no case was that support formalised in the legal proceedings and acknowledged in the rulings by the German courts. In response to the latest infringement proceedings by the European Commission, which touched upon associations’ legal standing, the AGG was only lightly amended to permit advisers from antidiscrimination NGOs to be present at court hearings.

In view of these hurdles, most of the antidiscrimination NGOs define themselves as antidiscrimination offices and provide directly alternative means of resolution for victims of discrimination, such as direct counselling, informal mediation, and conciliation. Some of these NGOs also perform an important monitoring role by collecting statistics on the claims they receive and process. These NGOs also engage in political lobbying, and in the course of the past few years have continuously required changes to the AGG targeting, in particular, the lifting of the restrictions to their legal standing and the possibility to bring collective claims, the inclusion of public education and social provisions under the scope of the AGG, the narrow statute of limitations for antidiscrimination complaints, and the proof requirements outlined in the AGG.

Even though the German antidiscrimination NGOs are numerous and some are specialised in AGG matters, they are still small and scattered around the Federal republic. Thus, NGOs have little leverage with which to lobby the central political institutions, as well scarce means to generate significant levels of litigation.

174 Interview DE APPEALLABOURJ.
175 Interviews DE EMPLLAWYER, DE ADVDTBB.
Trade Unions

The German dataset does not suggest any involvement of German trade unions in any racial antidiscrimination lawsuit, although most of the German rulings concern the domain of employment. In fact, although the Federal branch of the Deutscher Gewerkschaftsbund (DGB, Trade Union Federation) has an Integration and Antidiscrimination Department organised in a lobbying and a research unit, its involvement in antidiscrimination litigation was virtually absent. This is particularly regrettable because the DGB has been involved in antidiscrimination networks since 1997 and is part of the advisory council of the German equality body. German trade unions are, moreover, the only entities able to bring collective complaints in the absence of an identified victim through the Works Council (Betriebsrat). Apart from a few cases of collective gender discrimination, however, German unions have never seized the opportunity of collective complaints so far.\textsuperscript{177} According to the German corporatist tradition, the activity of trade unions is more focused on direct political lobbying at the federal level, rather than on litigation.

Equality body

In Germany, the Federal Anti-Discrimination Office (Antidiskriminierungsstelle des Bundes, ADS) is the equality body created by the AGG in 2006. In spite of the federal organization of Germany, the ADS was conceived as a unique and centralised office. The ADS has no competence to intervene in legal proceedings or stand in domestic courts, nor powers to adjudicate claims. ADS’s statutory mission covers multiple grounds of discrimination and extends to all the motives covered by the AGG. Its competences are limited exactly to the minimum required by the RED: providing autonomous assistance to victims of discrimination, conducting independent surveys, publishing independent reports as well as making recommendations. Together with these essential powers, the strong political control exercised by the government on the ADS through the selection of its chairman — whose term of office is linked to the legislature, and the lack of budgetary autonomy and own staff — the 22 ADS employees are civil servants from the Ministry of Family, Elderly, Women and Young — yield the result that under its first chairwoman the office kept an extremely low profile.

\textsuperscript{177} Interview DE DGB2.
Until the change of chair in January 2010, the ADS did not release any data on its own activity, and especially on the treatment of individual complaints. According to its staff, during the first years, the legal counselling work of the office (Beratung) was mainly devoted to collecting complaints through a hotline to either provide directly an out-of-court settlement, or to refer cases to the specialised commissioners (Beauftragten) for immigration and refugees, re-settlers (Aussiedler) and national minorities, and the disabled. The ADS also puts claimants in touch with specialised NGOs. After a referral, specialised commissioners or NGOs may be able to provide specific legal support, including mediation and conciliation. There are no official records of recommendations issued by the ADS in the years 2006-2010. During this time, its main visible activity consisted of funding a limited number of academic reports on specific aspects of antidiscrimination law.

The 2010 appointment of a new director, Christine Lüders, certainly gave a new impulse to the ADS, which started releasing information on its future working plans (ADS, 2010a) and its current activities (ADS, 2010b), increasing its visibility and engaging in communication campaigns. This development notwithstanding, the ADS never claimed nor gained more powers to assist victims of discrimination in court.

The ADS does not have local offices and whereas from the federal structure of Germany it could be expected that German Länder would engage in the creation of state equality agencies, only two public bodies were established in addition to the four state

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178 Interviews DE ADS2, DE BEAUFTR.
offices pre-existing the adoption of the AGG, and mainly specialise on migration issues (see Chapter Three). The two new offices are the Landesstelle für Gleichbehandlung gegen Diskriminierung, (State office for equal treatment against discrimination), established by the State of Berlin, and the Arbeitsstelle Vielfalt (Office for workplace diversity), set up by the Regional administration of Hamburg. Neither of these bodies has powers to support or intervene in litigation, nor to adjudicate claims.

**Summary**

<table>
<thead>
<tr>
<th>Domestic enforcement</th>
<th>Summary</th>
<th>Findings</th>
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<tbody>
<tr>
<td>Increasing civil litigation</td>
<td>Medium increase, also in higher jurisdictions</td>
<td></td>
</tr>
<tr>
<td>Qualitative evolution of jurisprudence/Substantive rights</td>
<td>Extensive</td>
<td></td>
</tr>
<tr>
<td>Qualitative evolution of jurisprudence/Procedural rights</td>
<td>Partial, level of prima facie kept high, restrictive statute of limitations and NGO legal standing conditions</td>
<td></td>
</tr>
</tbody>
</table>

| Domestic legal mobilization          | NGOs and Trade Unions                        | Small degree of mobilization (NGOs) mainly towards mediation and informal legal counselling |
| Equality body                        | No mobilization                              |
| Policy congruence                   | Medium                                       |

| Quality of domestic compliance      | Medium                                       |

Table 5.9 Summary of the empirical findings on Germany

Even though German jurisprudence in the domain of racial discrimination is scarce, since the transposition of the RED in 2006 the frequency of rulings on race discrimination has increased, though slowly and unevenly. Most importantly, on the qualitative side, courts and litigants touched upon some of the most contentious substantive and procedural issues characteristic of the enforcement of race equal treatment policy. In terms of substantive issues, rulings that have addressed the definition of race, and what can be considered as a proxy for race categorization: a disproportional language requirement
(such as being native German speakers) but not requirements expressed in terms of nationality, or belonging to a specific area of Germany (see the East German Ossi case) have produced a jurisprudence characterised by a restrictive approach to the definition of race. Courts have also issued decisions on the issue of reverse discrimination v. genuine occupational requirements, the latter being interpreted extensively in the case of a job related with ethnic minority issues and in some of the cases on language proficiency requirements. Finally, German judges have found indirect discrimination, even though limited to cases where an “apparently neutral, but suspect, criterion” (language proficiency) masked an illegitimate requirement. Cases of proper disparate impact, to be assessed with the help of comparative or statistical data, have not yet been brought to German courts as concerns ethnic origin discrimination.

On questions of process, German judges have so far been more conservative than EU antidiscrimination law would at first sight seem to allow. The threshold of evidence sufficient to shift the burden of proof to the defendant was not applied to the two cases brought by “intersectional plaintiffs” as well as when situation testing was used to generate prima facie evidence of discrimination. The Federal Employment Court dismissed a race harassment complaint relying on the two-month delay set as maximum limitation by the AGG.

This reluctance of German employment courts to accept process rules of antidiscrimination law may be an explanation for the scarce number of successful complaints detected so far. The adaptation pressures expected according to the incongruence hypothesis (Germany presented a medium policy incongruence with the RED) have so far generated a high level of litigation for some motives of discrimination (age and sexual orientation), but not for others, especially race and religion. More specifically, between 2007 and 2010 German courts were able to refer a dozen cases on discrimination to the Court of Justice of the European Union, asking for a preliminary interpretation of EU antidiscrimination law on cases of age (in 12 cases) and sexual orientation discrimination (in one case). Considering that referrals for preliminary ruling can plausibly represent ‘the tip of the iceberg’ of domestic litigation in a specific domain, age and sexual orientation discrimination are likely to have been litigated much more frequently than race in the three years of operation of the AGG. The different levels of

180 A different discourse applies to the other grounds of discrimination covered by the AGG. On religion, authoritative decisions of last instance courts had upheld legislative bans on the wearing of the headscarf in
litigation identified for race and some other suspect grounds are not easy to explain through the incongruence hypothesis, also in view of the intense domestic litigation that the EU equal pay and gender equal treatment directives has led to in Germany over the years. Indeed, German courts took the lead in referring preliminary questions to Luxemburg on gender equal treatment issues (Cichowski, 2007: 93).

In terms of formal compliance, even though the AGG was adopted later than other domestic laws transposing the RED (August 2006), it provided for a statute whose compliance with the RED was doubtful in some aspects. With reference to equal treatment in spite of one's race, the wide exceptions foreseen in the domain of housing, family law and succession law, and the lack of an explicit extension of the AGG to the provision of public services, such as education, have been maintained in spite of a new infringement procedure launched by the European Commission in 2008. The effects of these loopholes are not directly visible from the litigation dataset, but German antidiscrimination NGOs allege that they have seriously hindered litigation.\footnote{DE ADNBTBB.}

Looking at domestic mobilization, on the one hand, the infrequent court activity is certainly explicable through the weak role to which the AGG confines civil society organizations and the federal (and state) equality bodies in terms of powers to assist in litigation. Deprived of external assistance, claimants from ethnic minorities may be far more reluctant to engage in litigation than German employees concerned about age requirements or compulsory retirement age. On the other hand, German antidiscrimination NGOs have compensated their own and the federal equality body’s lack of powers to support litigation by establishing private \textit{pro bono} antidiscrimination offices. Around 10 of these offices were created during the 2000s, and most of them have specialised in assisting with discrimination claims through mediation and conciliation. Following the data on complaints published by some of the “informal” equality bodies, hundreds of race discrimination claims are now directed to this type of organization, which mobilize more on offering mediation rather than on filing formal court applications.\footnote{Interview DE RAXEN. See also the Report by the Antidiscrimination Office of Cologne, (ADB, 2010).}

\footnotetext[181]{employment back in 2003/2004, i.e. before the entry into force of the AGG (Möschel, 2011), setting an unpromising ground for litigation. Thus, as in the case of race, few rulings on religious discrimination based on the AGG are known to date. In the first case to reach the Federal Employment Court, a claim of religious discrimination in the access to a job position advertised by a religious organization, the \textit{Diakonisches Werk Hamburg}, was upheld in first instance, but then dismissed upon appeal and last instance. The claimant, a Muslim Turkish woman, also alleged ethnic discrimination. Cf. BArbG (Federal Employment Court), 19.08.2010, 8 AZR 466/09.}

\footnotetext[182]{DE ADNBTBB.}
Italy

Domestic jurisprudence on race discrimination

Since the entry into force of the RED, Italian court decisions on race discrimination have been few and their increase has been particularly slow. Moreover, antidiscrimination litigation showed very peculiar characteristics from the point of view of the type of discrimination attacked, the domain concerned, the nature of the defendants, the jurisprudence obtained from these legal challenges and, not least, the external support to litigation. This makes Italy an outlier in comparison to the two other countries.

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<tbody>
<tr>
<td>First Instance Courts</td>
<td>0*</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>11</td>
</tr>
<tr>
<td>Other degrees</td>
<td>0*</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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</tr>
<tr>
<td>Total</td>
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<td>0</td>
<td>0</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>11</td>
</tr>
</tbody>
</table>

Table 5.10 Rulings by Italian Courts on race discrimination
July 2003-June 2010

Sources: act-based and keyword-based queries on DeJure.it and specialised collections
*only 6 months considered

Some characteristics of Italian litigation have implied a restrictive choice concerning the selection of rulings to be analysed in this study. Taking into account that Article 3.2 of the RED excludes ‘difference of treatment based on nationality and ... provisions and conditions relating to the entry into and residence of third country nationals ... and ... any treatment which arises from the legal status of the third-country nationals,’ only complaints and rulings centred upon race or ethnic categories were selected as representative of the RED’s implementation.

Thus, the Italy dataset does not include a significant number of rulings on discrimination on grounds of (third country) nationality or length of residence requirements where domestic civil courts also found a discriminazione razziale (race discrimination) but according to pre-existing domestic law that entitled civil courts to
adjudicate discrimination on grounds of nationality, race and ethnic origin, and religion. \textsuperscript{183} The cases that have been excluded concern unequal treatment in access to public services or social allocations (e.g. baby cheques, posts in the public crèche, public housing, other social allowances), or public employment, where the service or allocation was exclusively conditioned upon a nationality or length-of-residence requirement set by a local regulation. \textsuperscript{184} The specialised case-law collections of Italian antidiscrimination NGOs show about fifteen rulings on discrimination on ground of nationality only for the year 2009. The dataset on race discrimination, instead, accounts for those cases where local statutes have established nationality requirements that masked an implicit ethnic element – e.g. that both parents have Italian citizenship to allocate a baby bonus, or that recipients of certain social allocations are Italians \textit{from birth}.

Relying on these principles, in Italy the dataset of race discrimination cases — built upon the most inaccurate of the three national legal databases, \textit{De Jure}, and on the collections of complaints by specialised NGOs — comprises a very small set of 11 cases.

\textit{Substantive rights}

The main characteristics of the Italy dataset identify a usage of antidiscrimination litigation against race discrimination mainly directed at redressing unequal treatment established by state measures. The largest subset of cases (see Annex 2 for the details), for instance, concerns rulings on actions brought against the so-called Nomad Emergency Decree (NED) of 2008, a piece of emergency legislation targeting directly so-called “nomads,” i.e. Roma, and providing derogatory powers to local authorities to perform profiling, identifications and evictions, whatever the nationality or immigration status of the “nomads” concerned (President of the Council of Ministers, 2008). As of July 2010, three of the antidiscrimination complaints brought against the Ministry of the Interior and the NED were dismissed on either formal grounds or on substance. \textsuperscript{185} Two more lawsuits

\textsuperscript{183} Disentangling the rulings based on the CIA 1998 (outlawing both race discrimination and discrimination on grounds of nationality) from those based on LD 215/2003 transposing the RED is particularly cumbersome because both acts refer to the same procedure before civil courts.

\textsuperscript{184} Since a ‘federalist’ constitutional reform in 2001, regions and local authorities have gained significant regulatory powers in Italy. In addition to that, in 2008 a new “Security law” increased the competences of the mayors in matters of security. This opened the floor to many anti-immigrant initiatives voted by municipalities governed by coalitions including extreme-right wing parties.

\textsuperscript{185} Tribunale di Roma (Civil Court), 8.02.2009, r.g. 4766/08; Tribunale di Mantova (Civil Court), 21.04.2009, r.g. 458/09; Tribunale di Milano (Civil Court), 8.02.2010, r.g. 49050/2008.
were still pending in spite of the cautionary procedure on which antidiscrimination lawsuits frequently rely, which would require an expedited treatment of the complaint.\footnote{\textit{Tribunale Amministrativo Regionale del Lazio (Administrative Court), r.g. 6400/2009, Tribunale di Milano (Civil Court), r.g. 59283/2008. Only the first case is listed in the database, because a first instance ruling was issued on 1.07.2008, even though it was immediately appealed to the higher jurisdiction, the Council of the State, which is yet to make a final decision on the claim. The second lawsuit was rejected on 2 March 2011.}}

More court decisions on state discrimination need to be cited among the set of race antidiscrimination rulings. In fact, of the many examples of Northern city councils or regions which, in the years 2000, adopted statutes and regulations which excluded third country nationals or short term residents from specific social services or social allocations, certain cities directly touched upon ethnic categories. The Municipality of Morazzone, for instance, established a baby cheque for babies born from either two Italian parents who were Italian \textit{by birth}, or an Italian by birth and a EU citizen, or a Swiss. The municipal regulation was challenged in court, but repealed before the ruling, which therefore did not punish the city council for race discrimination.\footnote{\textit{Tribunale di Roma (Civil Court), 8.12.2008.}} In another case, the municipality of Trenzano issued a regulation forbidding the use of foreign languages in public meetings. Challenged by a collective complaint brought by a union, CGIL, and two NGOs, the regulation was first suspended by cautionary measures ordered by the administrative tribunal, and then struck down as discriminatory by the civil court.\footnote{\textit{TAR Brescia (Administrative Tribunal), 15.01.2010, No 19; Tribunale di Brescia, 29.01.2010, r.g. 71/2009.}}

At the central level, the National Institute for Social Security adopted annual guidelines for 2009 inviting its inspectors to target in particular ‘ethnic enterprises’ (\textit{aziende etniche}), viz. enterprises managed by ethnic minorities or employing work force from ethnic minorities.\footnote{INPS (National Institute of Social Security) Circolare 25 gennaio 2009, No 27. Available at \url{http://www.stranieriinizitalia.it/news/circo9mar2009.pdf} (last access 10.05.2010).} The lawsuit was brought as a collective action by an NGO whose legal standing was (wrongly) rejected by the court, a fact that determined the dismissal of the complaint.\footnote{\textit{Tribunale di Roma (Civil Court), 12.01.2009, r.g. 38831/2009. The civil judge refused legal standing to the NGO that had brought the collective complaint in spite of the fact that the latter was correctly inscribed in the register of NGOs with standing to bring collective antidiscrimination complaints.}}

Rulings on typologies of cases found also in other countries have been much more rare than court decisions on state discrimination. In two cases, bar managers were punished for refusing to serve \textit{extracomunitari}, a term employed in these cases to indicate black custumers, or for making them pay a price higher than that requested from locals.\footnote{\textit{Tribunale di Roma (Civil Court), 16.07.2008.}}
One of the two cases was proved through situation testing and was successful, but the NGOs supporting the claim were denied legal standing.\textsuperscript{192}

Another failed collective complaint was brought by an antidiscrimination NGO against the director of a magazine publishing job and housing advertisements. The NGO sought the condemnation of the director because the magazine allowed the publication of discriminatory advertisements, e.g. job or housing offers discouraging \textit{extracomunitari} applicants. The complaint was rejected and the NGO ordered to pay 5,000 Euros in costs.\textsuperscript{193}

In the domain of employment only one case of discriminatory dismissal was successfully challenged by four \textit{extracomunitari} supported jointly by an NGO and a trade union.\textsuperscript{194} Overall, the usage of antidiscrimination law to sue discriminatory behaviour established by private individuals remains, however, extremely rare.

From a substantive point of view, it is also interesting to note that whereas most antidiscrimination complaints challenging state discrimination grounded on nationality requirements have been successful in the past, the opposite is true of many race antidiscrimination lawsuits. The case of the nomad emergency decree, where courts have constantly refused to recognize the word \textit{nomadi} (nomads) as an ethnic category is exemplary. In short, nationality seems better protected than race as a suspect category in Italian jurisprudence. As of July 2010, no lawsuit based on race or ethnic categories had reached the higher degrees of jurisdiction and only four were upheld.

\textit{Procedural rights}

The paucity of civil court decisions on discrimination based on race or ethnic categories in Italy had as a consequence that some aspects of process proper to the kind of equal treatment jurisprudence developed elsewhere under the impulse of the RED, have not (yet) been addressed in the Italian context, leading to a limited implementation of the RED’s provisions. Litigating against local statutes or regulations which explicitly exclude third country nationals or short term residents implies that there is no need to shift the burden

\textsuperscript{192} Tribunale di Padova (Civil Court), 19.05. 2005, r.g. 20556/05. Legal standing was denied because the official list of antidiscrimination NGO had not yet been adopted by the Ministries.

\textsuperscript{193} Tribunale di Roma (Civil Court), 28.05.2010, r.g. 2916/2008.

\textsuperscript{194} Tribunale di Roma (Civil Court) 28.05.2010, r.g. 2916/2008.
of proving discrimination to the defendant, nor to use statistical evidence or situation testing in courts.

Nonetheless, Italy is the only country in which antidiscrimination NGOs have consistently sought acknowledgement from the judiciary for the formal support brought to plaintiffs. In addition, Italy is also the sole case where collective cases of discrimination have been filed by NGOs. However, legal standing of antidiscrimination NGOs was generally granted without major opposition in cases involving requirements in term of nationality, whereas it was denied in some cases of race discrimination.

<table>
<thead>
<tr>
<th>Substantive rights</th>
<th>Racial equality policy enforcement for Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of discrimination claimed</td>
<td>Direct and Indirect</td>
</tr>
<tr>
<td>Categorization of the type of discrimination</td>
<td>Race discrimination (nationality)</td>
</tr>
<tr>
<td>Defendant</td>
<td>State, Private individuals (less frequent)</td>
</tr>
<tr>
<td>Domain of law</td>
<td>Civil law, Administrative law</td>
</tr>
<tr>
<td>Type of relation affected</td>
<td>Access to goods and services, profiling</td>
</tr>
<tr>
<td>Assessment provided by the court</td>
<td>Race discrimination found in 5 out of 11 cases</td>
</tr>
</tbody>
</table>

| Procedural rights                  |                                               |
|------------------------------------|                                               |
| Proof requirement                  | Situational testing admitted in one case, no statistical proof |
| Support for the complaint          | NGOs, Trade Union: formal                     |
|                                    | Equality body: no                             |
| Individual or collective complaint | Individual and collective                     |
| Remedies and sanctions             | Moral damages awarded (500 to 2000 Eur), no compensations, repeal of regulations |

Table 5.11 Race Equality Policy Enforcement in Italy

From another point of view, the remedies and damages that can be obtained from an antidiscrimination lawsuit, for instance in the domain of employment, were also little explored in the Italian context. When courts acknowledge state discrimination, the remedy ordered by the judge is frequently the simple repeal of the ordinance and/or the payment
of the social benefit that had been denied. In a small number of cases judges have also ordered the publication of their courts’ ruling on local papers, so as to make the remedy more effective. However, there have been no damages awarded as a result of a state discrimination complaint, and only very symbolic damages (100 to 2000 Euros per complainant) have been awarded in the few cases of race discrimination in access to private services.

*Domestic legal mobilization*

*Antidiscrimination NGOs*

The small group of NGOs that has progressively specialised in the strategic usage of antidiscrimination complaints does not correspond with the traditional members of the Italian antiracist movement and of ENAR. Rather, they are generally loose networks of a few immigration or human rights lawyers who act on a *pro-bono* basis in reaction to discriminatory measures adopted by public administrations – especially in Northern Italy – or, but more rarely, on behalf of claimants affected by blatant private discriminatory decisions. The organizational strength of such NGOs resides in their deep legal expertise and not, as in the French case, in their vast membership, visibility or political affiliation. Thus, they are mainly oriented towards organizing certain strategic actions, rather than providing individual legal assistance through local counselling and mediation. Since the adoption of DL 215/2003 transposing the RED, the main strategic antidiscrimination litigator was the *Associazione Italiana Studi Giuridici sull'Immigrazione* (ASGI, the Italian Association of Juridical Studies on Immigration) a network of immigration lawyers which began litigating after the adoption of the first antidiscrimination provisions on race, religion, nationality and ethnicity through the Comprehensive Immigration Act (CIA) of 1998. Over the years, and thanks to EU funding channelled through the EQUAL fund, first, and the Action Programme against Discrimination, later, ASGI went further in specialising in antidiscrimination litigation.\(^{195}\) However, similarly to a smaller but very active partner-NGO, *Avvocati per Niente* (APN, Pro Bono Lawyers), ASGI’s lawyers maintained the specialization acquired at the time of the adoption of the domestic antidiscrimination

\(^{195}\) Interview, ASGI.
provisions: they mainly target discrimination on grounds of nationality and against requirements in terms of length of residence. For ASGI and APN, thus, the recourse to DL 215/2003 transposing the RED was functional to the recognition of their NGOs’ autonomous legal standing, so that ASGI could be entitled to bring cases also in the absence of identified victims.\textsuperscript{196} While ASGI and APN mainly work in Northern Italy, other associations of lawyers, such as Progetto Diritti (Rights project) and the Unione Forense per la Tutela dei Diritti Umani (UFTDU, Forensic Union for the Protection of Human Rights) are Rome-based and have acted mainly in a small number of more traditional race discrimination cases.

It is apparent, thus, that the conditions set by DL 215/2003 to allow legal standing for NGOs – implying a formal registration with the Ministry of Equal Opportunities on a special list which was only updated twice since 2004 – did not definitively hinder NGOs’ engagement in strategic actions. The latter, however, are few and concentrated in a small geographical area (North and Central Italy). Recently, the action of domestic antidiscrimination NGOs was paired by international human rights NGOs for specific cases of discriminatory state measures. The involvement of ‘professional litigators’ as the Budapest-based ERRC (European Roma Rights Centre) and the New York-based OSJI (Open Society Justice Initiative) in strategic lawsuits against the Nomad Emergency Decree testifies to the worrisome character of some recent measures adopted by Italian public authorities towards ethnic minorities (Goldston and Hermanin, 2011).

\textit{Trade unions}

The support of trade unions to antidiscrimination lawsuits has so far been sporadic. Only the CGIL (the Italian General Works Confederation) has engaged in antidiscrimination litigation but, also in this case, mainly against nationality requirements. Locally, CGIL established strategic partnerships with ASGI. Both CGIL and CISL (Italian Confederation of Workers Union) were involved in EQUAL-funded projects, and have integration-anti-discrimination specialised units. The CGIL, in particular, funded a series of studies on immigrants’ discrimination at work, which were not, however, followed by legal actions.\textsuperscript{197}

\textsuperscript{196} Interviews ASGI\textsubscript{1}, ASGI\textsubscript{2}.
\textsuperscript{197} Interview IT IRES.
Equality body

Italy’s equality body is the *Ufficio Nazionale Antidiscriminazioni Razziali* (UNAR, National Office Against Race Discrimination): the only case of single-ground state equality body specialized on racial discrimination among those encountered so far. In spite of its specialization, nonetheless, UNAR’s overall activity and its specific action in support of victims has varied over the years. Its impact on the nature and the number of domestic court decisions is thus minor.

The office was established in the fall of 2003 within the Department for Equal Opportunities of the Prime Minister’s Office. Thus UNAR is organizationally and physically located in the same building as the Italian government. Its director is appointed by the government and oversees a staff of 15 to 25 people (depending on the years), mainly civil servants and judges on secondment from other ministries or experts on temporary contracts. According to the law, UNAR has an autonomous and constant operational budget of approximately 2 million Euros a year.

UNAR’s statutory tasks do not extend beyond what is foreseen in Article 13 of the RED. In particular, the office does not have any power to assist victims beyond the

\[198\] Interview IT UNAR 2.
counselling phase and meditation attempts. In order to collect complaints, UNAR uses a hotline and a contact centre, which are outsourced to an NGO, the Italian Christian Association of Workers (ACLI). Paralegals from ACLI perform an initial selection of claims, forwarding to UNAR only those that seem to be founded. According to its annual reports, in 2006, UNAR received around 440 claims of race/nationality discrimination (up from 282 in 2005) mainly filed by foreigners (UNAR, 2006, UNAR, 2007b). In 2010, claims rose to about 800 (UNAR, 2011). The reports released by the office confirm that 60% to 75% of the claims concern episodes of actual discrimination or harassment. Those defined as “pertinent claims” are either treated directly by UNAR’s internal legal experts, for instance through mediation, or forwarded to specialised NGOs entitled with legal standing. UNAR’s 2010 report affirms that about 7% of the claims received through its contact centre underwent some form of judicial instruction, whose development, however, is outside the scope of the body’s authority.

UNAR’s activity has varied a lot over the years, alongside changes in government. In 2006 and 2007—with the centre-left in power — the office worked rather intensively, sending formal recommendation (pareri) to public administrations and privates that engaged in discriminatory measures. As this activity was frequently initiated in response to alerts forwarded by NGOs as ASGI, it mainly concerned discriminations grounded on nationality or length-of-residence requirements. In fact, the office considers that its competence extends also to the grounds of discrimination outlawed by the CIA 1998. Describing its recommendations, UNAR’s officials maintained that the fact of being part of the Prime Minister’s Office gave the equality body an air of enhanced authority, useful for making other public administrations cease their discriminatory measures. In 2007 UNAR began lobbying the parliament with a view to acquiring the power to be heard in courts as well as to extend its mandate to the grounds of discrimination protected by the FED (UNAR, 2007a). With the return to power of the centre-right government in 2008, however, UNAR’s directorship remained vacant for a long time and the office lost some of its already exiguous staff. As a consequence, the organization assumed a low profile, highlighting that closeness to government and the lack of an independent staff may also imply disadvantages for the equality body.

Since the appointment of a new director in 2009, the office worked towards filling one of the main gaps of centralised equality bodies: their lack of contacts with local communities. Thus, UNAR started collaborative projects with local NGOs and lawyers at

199 Interview IT UNAR 1, IT ACLI.
200 Interview IT UNAR2.
the decentralised level, in some regional capital cities. At the same time, the body started to work informally on grounds of discrimination other than race, such as age and disability.\textsuperscript{201}

**Summary**

<table>
<thead>
<tr>
<th></th>
<th>Summary</th>
<th>Findings</th>
</tr>
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<tbody>
<tr>
<td><strong>Domestic enforcement</strong></td>
<td>Increasing civil litigation</td>
<td>Slow increase, first instance courts only</td>
</tr>
<tr>
<td></td>
<td>Qualitative evolution of jurisprudence /Substantive rights</td>
<td>Extensive, insofar as race and nationality discrimination conflated. Poor enforcement against private individuals</td>
</tr>
<tr>
<td></td>
<td>Qualitative evolution of jurisprudence /Procedural rights</td>
<td>Poor, situation testing admitted</td>
</tr>
<tr>
<td><strong>Domestic legal mobilization</strong></td>
<td>NGOs and Trade Unions</td>
<td>Mobilization present</td>
</tr>
<tr>
<td></td>
<td>Equality body</td>
<td>No mobilization</td>
</tr>
<tr>
<td><strong>Policy congruence</strong></td>
<td></td>
<td>Large</td>
</tr>
<tr>
<td><strong>Quality of domestic compliance</strong></td>
<td></td>
<td>Word-by-word</td>
</tr>
</tbody>
</table>

Table 5.12 Summary of the empirical findings on Italy

To understand the peculiar type of enforcement found in Italy, it must be born in mind that the domestic provisions on discrimination (Article 43 and 44 of CIA 1998) remained in force in parallel with the new LD 215/2003. These provisions were more comprehensive than the LD transposing the RED, as they banned direct and indirect discrimination on grounds of nationality to the same extent as the RED does for direct and indirect unequal treatment based on racial or ethnic categories. The CIA 1998 was characterised by a very low level of policy incongruence with EU law, which would explain the low adaptation pressure witnessed in Italy, the small number of rulings, and the endurance of litigation strategies mainly based on the category of nationality, not as a legitimate but suspect motive causing indirect racial discrimination, but as an illicit ground of selection as such.

\textsuperscript{201} IT UNAR3.
In relation to indirect discrimination, it is worthwhile mentioning that whereas the Italian ‘promotional framework’ applying to ethnic minorities allows for ethnic monitoring and the use of ethnic statistics, no such data was ever used in court to prove indirect race discrimination. Rather, the possibility to single out minorities for promotional actions was at times invoked by the government as a justification to maintain in force the Nomad Emergency Decree. This happened, in particular, when the European Commission raised concerns over the census performed in the framework of that initiative, which the government defined as a preliminary step to the implementation of positive actions (Hermanin, 2011, Ministry of the Interior, 2008).

As regards the formal legal argument, LD 215/2003, adopted by a centre-right coalition provided for a word-by-word transposition of the RED, which was, however, the most compliant of the three countries considered in this study as regards one specific aspect, that of the collective legal standing of civil society organizations. NGOs duly registered in the special list established by the Ministries of Equal Opportunities and Labour, in fact, are entitled to bring complaints also in the absence of an identified claimant. This led some NGOs to use this provision to fight state discrimination on ground of nationality by invoking LD 215/2003 and the CIA 1998 at the same time.202 After this method was tested successfully in a series of pilot cases, it became one of the most characteristic features of recent antidiscrimination lawsuits challenging mainly discrimination on grounds of nationality and evoking racial discrimination as an obiter dictum. The admission of civil society organizations to legal standing in many cases of alleged discrimination grounded on nationality and race can be considered one of the main explanations for the (light) intensification of antidiscrimination litigation since 2003.

The persistence of a reference to nationality rather than racial categories in Italian jurisprudence is also explained by other considerations, firstly by the status as foreigners of most visible minorities residing in Italy due to the hardships of acquiring Italian citizenship and the relative recentness of migratory influxes. On the one hand, litigating NGOs that had to choose legal strategies took a ‘political’ decision in challenging nationality requirements so as to highlight the anti-foreign/minority sentiments of many public administrations and of the political leadership—in May 2009, the Prime Minister

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202 Interview IT ASGI 1.
declared that Italy ought not become a multi-ethnic country. On the other hand, it is much easier for foreign complainants (and their lawyers) to allege an unlawful discrimination based on nationality and residence requirements, rather than providing *prima facie* evidence of a direct or, even more so, indirect discrimination based on ascriptive categories such as race and ethnicity.

In this regard, the case of Italy, where the scope of the RED has been artificially expanded – thanks to existing domestic law – to cover discrimination on ground of nationality and length of residence, shows well the potential that the inclusion of these type of categories would have to empower race antidiscrimination policy against state discrimination. Wherever nationality or length of residence requirements can be struck down as indirect race discrimination (e.g. in the Trenzano case), the discretion of public authorities to concede local services, allocations, and public jobs to co-ethnic ‘nationals’ may be more effectively curtailed by the operation of EU antidiscrimination law.

To summarize, the net impact of the new statute transposing the RED on the amount and type of litigation pursued in Italy has been small, because litigants have continued to focus their few strategic cases mainly on nationality discrimination rather than race. However, the new provisions introduced by DL 215/2003 in terms of NGO legal standing (together with the funds received through EU distributive programmes) have certainly been crucial in expanding the litigation activity of the few specialised NGOs present in the country. The absence of an autonomous and powerful equality body in the field of race discrimination determined a lack of pressure to enforce new antidiscrimination provisions instead of pre-existing national laws.

**Comparative Findings**

The concluding section of this chapter points out the results obtained from the analysis of the second phase of the RED’s implementation, that of its domestic judicial enforcement. The data collected in this chapter confirm that Europeanization through judicial enforcement happened everywhere to a very limited extent, as levels of litigation are still very low for the three countries if compared, for instance, to the levels of domestic
litigation on gender discrimination, as well as on discrimination on ground of EU and associated countries’ nationality recalled in Chapter One and Two. In Radaelli’s terms, we could certainly talk about a variable degree of inertia towards Europeanization for all the three cases. In fact, the three countries show some variation among them both in the rate of increase of civil antidiscrimination litigation as well as, and especially, in the qualitative characteristics of antidiscrimination litigation and jurisprudence. By putting these results in relation with the values established earlier on for the relevant domestic variables, this section looks at the combination of factors that is more likely to explain the implementation dynamics observed in this study. It also confirms that the spread of adversarial legalism pushed by the RED is mitigated by the low volume of litigation.

Among the three countries, the one in which the RED is enforced with the highest increasing frequency is France. In terms of antidiscrimination complaints in the domain of employment, thus, the RED certainly supported domestic change. Litigation has significantly developed where it was almost absent before, namely in the domain of employment law. However, this quantitative evolution on the side of law enforcement is not matched by a significant innovation in French jurisprudence. Indeed, some of the most innovative elements of the RED, inspired by an Anglo-Saxon, race conscious, affirmative-equality prone model of policy, have not been implemented. French claimants and courts have refrained from litigating and adjudicating indirect discrimination, a fact certainly linked to the difficulty of proving such discrimination in the absence of available data. Moreover, the possibility to seek for collective judicial remedies through the assistance of specialised NGOs or trade unions has long been limited both by restrictive statutory provisions on legal standing and the reluctance of the antiracist movement to evolve into an antidiscrimination movement. In this framework, the French equality body developed a significant power to enforce the directive, also judicially, but its action contributed mainly to the quantitative development of complaints, rather than to a change in the way discrimination is proved, adjudicated and equality law is implemented. In short, the judicial enforcement of the RED in France certainly testifies to a ‘penetration’ of European Union policy within the country, but not of an implementation dynamic which has, as of the time of writing, produced a transformation of this policy domain.

Such implementation dynamics are related to the contemporary presence of a large degree of domestic policy incongruence with the RED, a low quality of compliance compensated by an early transposition and a new corrective law adopted in 2008 under
the auspices of the European Commission, and an uneven domestic mobilization, mainly supported by the multi-ground state equality body, HALDE. The policy incongruence argument, as formulated at the beginning of this chapter, explains the resilience – less so the further institutionalization - of the domestic model of judicial redress centred upon criminal law. However, the pressures for adaptation leading to the more frequent recourse to employment courts are also supported by the incongruence argument.

Significant gaps in the domestic transposition of the directive (according to the formal legal hypothesis) explain the non-implementation of the specific aspects that are missing in judicial enforcement: litigation against indirect discrimination; an easier recognition of prima facie discrimination; and NGOs’ support for collective (and individual) civil complaints. The mobilization perspective, finally, helps clarify the uneven distribution of litigation, with some incentives to litigate coming from the HALDE and the methods developed by trade unions, far fewer from NGOs.

While some domestic change is certainly detectable at this stage in France, only a temporal extension of the study of domestic court rulings will be able to tell whether the judicial enforcement of the RED will determine a change of the French model for judicial redress or, rather, the contemporary co-existence of two different policy approaches to judicial redress. Certainly, a lot depends on the extent to which race categorization and monitoring will become accepted in France also by those policy actors (among whom are some of the main antiracist NGOs and centre-left leaning politicians) who contest the introduction of any race-conscious policy measures, such as ethnic statistics.

In Germany, a smaller degree of incongruence between domestic legislation and the RED, and a level of compliance still presenting many gaps in comparison to what was contested by the Commission’s 2008 infringement proceedings, combine with the legal weakness of both antidiscrimination NGOs and the national equality bodies. Furthermore, due to the late transposition, the RED was enforced in Germany for a much shorter period of time than in the other two countries. This situation determined so far a smaller diachronic increase in the usage of civil redress in the area of race discrimination, and developments in the jurisprudence that pointed towards a restrictive approach to equality law. These developments touched upon some contentious aspects of race antidiscrimination law: the extent of the exceptions to the principle of antidiscrimination, reverse discrimination, and the categories used as proxies for race. As Germany presented a medium level of incongruence with the RED this progressive, but slower, development of race antidiscrimination law was expected. The current gaps in the transposition of the
directive – in particular those exempting publicly provided services as well as some private relations from the scope of German equal treatment law – have not been touched upon by litigation thus far, even though they would certainly make interesting cases for preliminary rulings by the CJEU.

Finally, the mobilization perspective helps understand the underdevelopment of race antidiscrimination litigation in comparison to other motives protected by EU equal treatment policy (such as age). Claimants from race minorities who cannot officially benefit from the legal support of an NGO or equality bodies are certainly less ready to engage in legal proceeding than an employee forced to retire because of age limits or a women dismissed during pregnancy. This perspective is reinforced by the observation that in most cases where ethnic discrimination was claimed, the issue at stake was language requirements – that also co-ethnic non-native German may have evoked — rather than more direct proxies for race, such as physical appearance or family name.

Italy is the country in which progress in the enforcement of judicial redress for cases of race and ethnic discrimination is the most numerically uneven and qualitatively uncertain. A smaller degree of policy incongruence and a word-by-word transposition, a small number of active NGOs, and a weak equality body, produced few rulings on race discrimination and a national jurisprudence focused mainly on state and nationality-grounded discrimination. So far, most of these rulings have shown a very low level of enforcement of the new substantive and procedural rights set out by the RED. Overall, the national measures transposing the RED were caught in the same enforcement process used for pre-existing antidiscrimination provisions on unequal treatment grounded on third country nationality. The lack of an autonomous equality body lowered pressures for change and contributed to a limited development of the RED’s own potential, including a certain misuse of race and ethnic categorization by domestic courts. In fact, contrary to what was suggested by the RED, Italian courts were more prone to find race discrimination in cases of unequal treatment grounded on nationality or requirements expressed in terms of length-of-residence, than in claims involving racial categories.
## Comparative Findings

<table>
<thead>
<tr>
<th>Indicators</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Domestic enforcement</strong></td>
<td>Low level of litigation but decided increase, also in higher jurisdictions</td>
<td>Low level of litigation and medium increase, also in higher jurisdictions</td>
<td>Low level of litigation and low increase, first instance courts only</td>
</tr>
<tr>
<td>Qualitative evolution of jurisprudence /Substantive rights</td>
<td>Partial, no implementation of the concept of indirect discrimination</td>
<td>Restrictive evolution</td>
<td>Restrictive on race. Extensive only insofar as race and nationality discrimination conflated. Poor enforcement against private individuals</td>
</tr>
<tr>
<td>Qualitative evolution of jurisprudence /Procedural rights</td>
<td>Partial, after 2008</td>
<td>Partial, level of prima facie kept high, restrictive statute of limitations and NGO legal standing conditions</td>
<td>Poor, situation testing admitted</td>
</tr>
<tr>
<td><strong>Domestic legal mobilization</strong></td>
<td>NGOs and Trade Unions</td>
<td>Small mobilization</td>
<td>Mobilization present</td>
</tr>
<tr>
<td>Equality body</td>
<td>Consistent mobilization</td>
<td>No mobilization</td>
<td>No mobilization</td>
</tr>
<tr>
<td><strong>Policy congruence</strong></td>
<td>Low</td>
<td>Medium</td>
<td>Large</td>
</tr>
<tr>
<td><strong>Quality of domestic compliance</strong></td>
<td>Low (late)</td>
<td>Medium (exceptions)</td>
<td>Word-by-word</td>
</tr>
</tbody>
</table>

Table 5.13 Comparative findings on enforcement

Significantly, none of the three countries has made a transformative step forwards as regards two of the most innovative aspects of the RED. On the one hand, race as a constructed but objective legal category has not yet been fully accepted either by claimants or by the courts. In the three cases, in fact, complaints have mainly been successful when they were framed as proxies for race, such as family name (in the French case), language proficiency (in Germany) and nationality (in Italy). On the other hand, nowhere has the
concept of indirect discrimination been fully enforced. Even where claimants and courts have started talking about indirect discrimination, as in Germany and Italy, the concept is only evoked to indicate an ‘apparently neutral, but discriminatory criterion,’ not to detect proper disparate impact on a group of individuals at risk. A clear qualitative evolution of domestic jurisprudence on these two concepts has yet to take place.

Given the general low level of judicial enforcement found in the three countries, a direct comparison among them is useful for understanding the combination of domestic conditions that are more likely not to prompt an increasing number of civil court decisions enforcing both the procedural and substantive rights set out in the RED. First, the French and German cases show that, whereas the incongruence argument has a certain explanatory power in terms of a small variable intensity of litigation among the three countries, that argument alone does not help explaining why race antidiscrimination law is so seldom applied in France, Germany and Italy. Second, the French and Italian cases show that the presence of domestic mobilization (of the equality body, in one case, and civil society, in the other) is not alone a sufficient condition to determine enforcement. Third, the analysis shows that both patently incompliant legislative frameworks and word-by-word transposition are likely to affect the capacity of domestic actors to mobilize on adversarial legal strategies. Comparing the Italian and German cases, the timing of the transposition does not seem to have any strong explanatory power, even though it should be kept in mind that the volume of litigation observed in Germany is referred to a shorter timeframe.

<table>
<thead>
<tr>
<th></th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Policy congruence</strong></td>
<td>✗</td>
<td>✗</td>
<td>✓</td>
</tr>
<tr>
<td><strong>Substantively compliant transposition</strong></td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td><strong>Mobilization/Equality bodies</strong></td>
<td>✓</td>
<td>✗</td>
<td>✓</td>
</tr>
<tr>
<td><strong>Mobilization/CSOs</strong></td>
<td>✓✗</td>
<td>✗</td>
<td>✓</td>
</tr>
<tr>
<td><strong>Outcome (quantitative/qualitative)</strong></td>
<td>✓✗</td>
<td>✗✓</td>
<td>✗✗</td>
</tr>
</tbody>
</table>

Table 5.14 Synthetic findings on enforcement

✗=absent; ✓=present; ✓✗=partial
In the conclusion, thus, I focus on the interaction between the two latter elements – compliance and mobilization – and on why their interaction is crucial to explain the overall limited implementation of the RED that this study has shown.
Conclusion

This study was prompted by the observation that a highly innovative and indeed overall far-reaching piece of equal treatment legislation such as the Racial Equality Directive still did not seem to be fully enforced at the level of European and domestic courts 10 years after its enthusiastic adoption in 2000. This finding was particularly puzzling given not only the more rapid policy implementation dynamics that had characterized EU gender equality policy some decades earlier, but especially in view of the significant amount of European litigation generated at the same time by EU-imposed equal treatment policies concerning other motives of discrimination, such as age.

Considering that the scarce signs of an extensive judicial enforcement could not easily be explained by a sudden retrenchment of race discrimination in Europe, or by the inability of the policy to generate EU-law litigation, this work decided to employ an innovative research method and zoom in on the issue of domestic judicial enforcement to inquire into the domestic factors determining a limited implementation and national variations in the enforcement of the RED. To do so, I selected three Western European countries that took part in the adoption of the RED but that, as of 2010, did not show any signs of having decidedly enforced the directive at the level of domestic and European courts: France, Germany and Italy. These countries provided at the same time for a series of common characteristics granting an enhanced potential for comparability (e.g. a similar tendency to resort to EU law litigation strategies, and a comparable number of potential beneficiaries of EU race antidiscrimination policy, as well as similar levels of perceived race discrimination), together with some variation in two of the main factors likely to impinge on domestic implementation dynamics: the degree of congruence within domestic policy structures and EU-imposed requirements (‘policy (in)congruence’), and their record in terms of compliance with social policy directives.

Relying on tools from three branches of EU studies scholarship — Europeanization, compliance, and judicial politics literature — I engaged in an exploratory research on the case of race antidiscrimination policy and the analysis of, first, its legal transposition and, second, its enforcement by domestic courts.
Borrowing the concept of ‘policy (mis)fit’ from Europeanization studies, I proposed a new branding ((in)congruence) and operationalization of this notion able to be employed for the study of race equal treatment policy. After locating the RED among a typology of models of equality policies, I proposed, in Chapter Three, an accurate empirical measurement of policy fit for France, Germany and Italy. This analysis confirmed the existence of different levels of congruence with the RED: low for France, medium for Germany and high for Italy. The main differences among the three countries resided in their respective approaches to equality (formal or substantial), in their acceptance of race and ethnic origin as legitimate criteria for public policies, as well as in varying pre-existence of specialised legislation and enforcement agencies dealing with race discrimination.

The consideration of the respective levels of incongruence in the analysis of transposition and enforcement confirmed that the influence of this domestic variable was of a different type according to the two steps of the process of EU-policy implementation taken into account. Before transposition occurs, a higher degree of policy incongruence determines difficulties in the institutional adaptation of domestic statutes to EU requirements and a lower level of compliance in the short term. Conversely, states such as Italy, where domestic statutes were generally congruent with EU-imposed rules, could adapt more easily and quickly to EU requirements. In particular, the analysis of transposition showed that, besides direct EU conditionality, the policy reforms already under way in the different countries explained also some of the results obtained in terms of quality of compliance with the requirements set out in the RED. At the level of enforcement, I expected that a larger degree of policy incongruence may galvanize domestic mobilization towards a brand new policy and make domestic actors develop new strategies to seize the enhanced opportunities offered by the opening of a new policy arena. Thus, greater policy incongruence would, perhaps counter-intuitively, predict more pressure for domestic change during the national enforcement process. On the contrary, where EU policy does not add much novelty to the framework already in place, domestic mobilization will continue to display the usual patterns, and the level of change toward the expected policy outcomes will necessarily be lower than in the case of incongruence.

The findings of Chapter Five partially substantiated this claim. In France, where the greatest mismatch with EU policy was present, claimants increasingly engaged in civil judicial redress more than in the other countries in the study. However, the qualitative development of race antidiscrimination jurisprudence was much more uncertain. In Italy,
a slow development characterized both the quantitative and qualitative evolution of race equality jurisprudence. Germany was the country where substantive aspects of antidiscrimination law developed more restrictively, and also rules of process did not evolve much.

In view of these findings, I concluded that although policy congruence and incongruence certainly do matter for understanding the implementation dynamics in the three countries, they are not alone sufficient to explain why the review of litigation and jurisprudence offered in this study identified such a low level of enforcement across the three states. I argue that this rare application of EU law is mainly due to the process of ‘containment’ exercised by national policy-makers during the transposition of the directive, and reflected in a formal legal hypothesis about how the quality of compliance plays out in the enforcement process. The actor-centered analysis of the transposition process presented in Chapter 4 showed that everywhere national transposition yield gaps in the compliance with both or either the substantive and procedural requirements set out in the RED. In all cases, in fact, right-wing governing majorities decided to engage in a sometimes incompliant, sometimes minimalist (word-by-word) transposition. This affected some of those that I defined as ‘regulatory elements’ (e.g. an only partial shift of the judicial burden of proof), but especially other mechanism that would facilitate access to judicial or other forms of individual redress. In the three countries, for instance, the process of national transposition of the RED strictly conditioned the possibility for civil society organizations to gain legal standing in court in support or on behalf of plaintiffs. This does not only mean that NGOs wishing to mobilize around race equality issues did not see their symbolic formal role as defenders of victims of discrimination recognized, but also that they have not been able to benefit from the recognition of eventual moral damages or provisions envisaging a shift of attorney fees to the losing party. The fact that these forms of incentives are available to antiracist NGOs bringing claims under criminal law in France (together with the long lack of provisions for civil legal standing in non-employment related complaints) explains the endurance of criminal antidiscrimination litigation in the country. In Germany, reluctance to recognize a facilitated access to legal standing for civil society organizations was not bypassed even after the opening of an infringement procedure by the Commission that targeted exactly this transposition gap. In Italy, NGOs have paradoxically been recognized as having standing more frequently in cases of discrimination on grounds of nationality rather than in cases of race discrimination proper.
In addition, the recalcitrance towards opening up facilitated procedures for judicial redress is also exemplified in the widespread lack of provisions explicitly recognizing statistical evidence as admissible evidence, situation testing as legitimate proof, or substantive moral damages as an essential part of the remedies for ascertained race discrimination. In many cases, these elements were only ‘directive elements’ within the RED, and non-sympathetic decision-makers within the member states could choose to transpose such provisions minimizing costs for companies, employers, nationalist public administrations, service providers’ associations, in short, the range of potential discriminators more susceptible to providing, willingly or indirectly, unequal treatment for minorities of colour.

Moreover, the factor which played the most important role in the uneven and rare enforcement of race equal treatment policy in the three countries was the fact that the organization and competences of the national equality bodies mandated by the RED were left completely in the hands of the national ruling majorities. As seen in Chapter 5 of this study, in two out of three cases the equality bodies set up to comply with the directive were endowed with few powers and limited political autonomy. This is particularly regrettable since all the literature on gender equality — and some literature on the late empowerment of the US Equal Employment Opportunity Commission (Pedriana and Stryker, 2004, Selmi, 1996) — singled out the role of independent, specialised bodies as catalyst for the judicial redress of unequal treatment. The case of the French equality body between 2006 and 2010 testifies to the strength of this argument. In 2011, however, the French body, the only one that displayed a higher degree of autonomy and effectively engaged in judicial strategies, was itself also reconfigured by the French centre-right majority — an action that made many observers suspect the existence of an ex-post containment strategy.

Beyond the countries which constituted the object of our empirical analysis, in the European Union of 27 member states, most equality bodies established to transpose the RED have no litigation competences and are multi-ground bodies dedicated to the promotion, rather than the enforcement, of equality with reference to several different suspect grounds (Holtmaat, 2006). Also in the UK and at the supranational level, formerly specialized bodies, such as the Commission for Racial Equality and the European Monitoring Centre for Racism and Xenophobia (EUMC), recently evolved into multi-ground agencies, entrusted with competences to monitor several suspect motives. Whereas
the enlargement of the scope of action of these entities is *per se* an enhancement for the protection against every form of discrimination, including intersectional and multi-ground discrimination, the loss of a more thorough specialization on race and ethnic minorities may also have some drawbacks for minorities of colour. In the end, the sole race antidiscrimination complaint to ever reach the Court of Justice of the European Union was filed and pursued by a single-ground specialized equality body working on race and racism.

To summarize, the limited implementation of race antidiscrimination policy not only across the three states but in comparison to other strands of EU equal treatment policy confirms the thesis that those EU policies that rely on adversarial litigation for their enforcement empower, in the first place, those who are already powerful. As pointed out by Conant (2002) and Börzel (2006) in relation to EU policy, and by Marc Galanter well before them, claimants with information, ability to surmount cost barriers, and skills to navigate restrictive procedural requirements, are more likely to succeed in judicial enforcement (Galanter, 1974). According to Börzel:

The EU legal institutions only increase opportunities for participation for those individuals and groups who possess court access and sufficient resources to use it. In other words, it is mostly the “haves” who benefit—those actors that already command considerable resources that enable them to broadly participate in political and legal processes...or that are supported by domestic institutions, such as the Equal Opportunities Commissions in Britain and Northern Ireland, which assist working women and women rights groups in litigating for their EU rights (Caporaso & Jupille, 2001). Actors poor in organizational capacities and resources, by contrast, such as ... third country nationals seeking to obtain social rights in the Single Market (Givens & Luedtke, 2003), so far stand little chance to benefit from the increased opportunities for participation through EU law enforcement.

Citizens and groups should not be treated as if they were equally endowed with the resources necessary to exploit the opportunities offered by the expansion of judicial power in international and domestic politics. As a result, the transformative effects of courts on democracy and participation may be less pervasive than expected. They are at least mitigated by domestic opportunity structures that determine to a large degree the extent to which citizens and
groups benefit from increased opportunities for participation through law enforcement, rights claiming, and expanded protection (Börzel, 2006: 148-149).

Contant’s 2002 study on the enforcement of EU equal treatment rights for third country nationals in access to social benefits, and Daniel Kelemen’s 2011 contribution on the domestic application of EU equal treatment law on grounds of disability, confirm this thesis.

The most revolutionary aspect of the RED, which was acclaimed in 2000 as a major step forward for the equal treatment of European minorities of colour by many European legal scholars, resided in its containing new substantive rights (such as the right to be free from indirect discrimination) as well as process elements making up for a policy explicitly aimed at facilitating access to these new rights, especially through individual judicial redress.

The replies to the FRA EU-MEDIS survey cited in Chapter One, where the 80 % of the surveyed individuals from racial and ethnic minorities declared that they would not engage in judicial redress, testifies not only of a lack of awareness, but also of a certain mistrust towards the policy provisions contained in the RED. These means have in fact been conceived and then enthusiastically acclaimed not as a consequence of a social movement, but rather due to the engagement of an elite of majority population who took advantage of a political window of opportunity created at the supranational, European, level in 2000. Potential beneficiaries had little influence on the process of lobbying and adoption and they are frequently underrepresented in the national NGOs that, nowadays, attempt to make a ‘strategic’ or recurrent judicial use of the RED.

Notwithstanding this, the demand for equal treatment of minorities, especially those with a more or less recent immigration background, does not seem to have decreased. The Italian case where discrimination on ground of nationality is litigated more frequently than race discrimination, and the example of the large recourse to judicial proceedings to enforce the equal treatment clauses of certain association agreements with third countries testify of such a demand. Should we then conclude that the demand for equal treatment in spite of one’s nationality is greater than that for equal treatment on grounds of race and ethnic origin in today’s Europe? The reply to this question constitute the basis for future scholarship. However, it may well be that part of the reason why the
RED is so rarely evoked in national courts is that existing minorities in Europe do not primarily identify themselves in racial and ethnic terms, but rather in terms of their nationality of origin or of their acquired nationality. Apart from the Roma, who do have a diffused ethno-linguistic conscience, individuals behind the claims registered in the dataset are, used to be, or descend from Turks, Moroccans, Algerians, Senegalese, Ivoirians, Romanians, Ex-Yugoslavians, etc. It is legitimate to expect that, in a race-sceptical European context, these identities are more fully resented than the fact of being black, Arab, East-European and that they are primarily categorised as national, rather than ethnic, identities. The colour-blindness that characterizes current domestic case law in Europe is paralleled by a reduced race-consciousness on the side of the claimants. This is one more reason why nationality should be considered as a meaningful racial category if one wants to ensure the enforcement of European equality law. In light of the above, the exception for nationality-based discrimination provided by the RED is even more harmful.

The process of domestic implementation of the RED downplayed those special features that allow a facilitated access to the mechanisms of redress conceived in Brussels, as it did with another important provision of the RED, that which allowed positive actions. Thus, a certain degree of perplexity towards the way in which this recent policy has been ‘Europeanized’ is perhaps justified. National policymakers certainly bear a responsibility for the limited and patchy enforcement witnessed thus far. Nonetheless, during these first 10 years also the supposed guardian of this legislation, the European Commission, failed to intervene even in blatant cases of incorrect transposition — such as those outlined in this study — and when national measures in potential breach of the RED, such as in the episodes of 2010 that involved state measures clearly targeted at Roma in France and Italy, produced unfavourable treatment towards an ethnic minority so used to being negatively stereotyped.

How can this situation be improved? The study of the implementation of the RED suggests that a more thorough supranational scrutiny is required for a policy whose beneficiaries have restricted access to justice, weak lobbying capacities, and fewer channels for making their voices heard.

First, the detailed analysis of transposition conducted for the RED suggests that the Commission should take a bolder approach towards checking compliance, in particular for those elements of the directive that are directed towards facilitating redress and opening up access to justice. So far, the competences attributed to national equality bodies have
never been made the object of a letter of formal notice, and even less so of a reasoned opinion. Whereas the Commission has concentrated on checking compliance with some ‘process elements’ of the RED — such as the shift in the burden of proof — the review process has completely overlooked other elements (correct scope, NGO legal standing, etc.) or proceedings have been dropped even in the absence of significant legislative change at the domestic level.

Second, in order to perform a better review of transposition, the EC should diversify the sources it uses to verify compliance. Nowadays, it is up to governments to communicate their national implementing measures, and a network of ‘antidiscrimination legal experts’ externally certifies the quality of national transposition. However, these networks are frequently composed of equality bodies’ civil servants or legal researchers who do not have a specific interest in developing a critical view on national implementation. Encouraging more shadow reporting from NGOs on the RED could be a way forward.

Third, and in connection with the above, race and ethnic minorities should make the object of a special effort (a ‘positive action’) of consultation on and involvement in the implementation of the RED. The interviews conducted for this thesis demonstrate that those who are considered national experts in EU race equality policy are 90% white French, German and Italian citizens. Their representativeness for bringing the claims of others is limited and, in spite of the creation of an umbrella European Network against Racism (ENAR) in 1997, these ‘others’ still have a very little voice and lobbying capacity in Brussels.

Fourth, the innovative methodology employed in this study highlights the usefulness of reviewing national jurisprudence enforcing EU law. From the analysis of domestic case law, in fact, we could appreciate how little use has so far been made of the more innovative features of the RED, as the introduction of the legal category of race and the concept of indirect discrimination. This review should go well beyond what is nowadays encouraged by the EC, and which involves the singling out of a few national rulings in specialised reviews. A systematic analysis, like the one pursued in this study, would in fact help identify what transposition gaps are most significant for the correct enforcement of EU policy.

Lastly, EU law training within national judiciaries, in particular for the first instance courts that have to adjudicate most race discrimination complaints, is still too limited. In many member states (even founding members), EU law education became a required topic in the legal curriculum only very recently, and professional development for lawyers and
judges does not require training or updating in EU law. At the end of 2008, eight years after the adoption of the RED, the European Law Academy (ERA) had trained a total of 618 European judges on the RED and the FED, including 20 French judges, 98 Germans (ERA is in Germany) and 14 Italians. If EU-law training cannot be improved as a matter of cost, the Commission’s supervision over national transposition should certainly go a step further.

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204 Interview, EU ERA. Data on participation to antidiscrimination seminars by ERA on file with the author.
Cited jurisprudence

**US Supreme Court**

*United States v. Carolene products*, 304 U.S. 144 (1938)

**Court of Justice of the European Union**

*Südmilch v Ugliola*, 1969, C-15/69 [ECR 363]
*Sabbatini v European Parliament*, 1972, C-32/71 [ECR 345].
*Van Duyn v Home Office* 1974, C-41/74 [ECR 358]
*Pubblico Ministero v Ratti*, 1979, C-148/78, [ECR 1629]
*Commission v. France*, 1988, C-318/86 [ECR 3559]
*Kalanke v Freie Hansestadt Bremen*, 1995, C-450/93 [ECR 3051]
*Hellmut Marshall v Land Nordrhein Westfalen*, C-409/95, 1997 [ECR 865]
*Commission v Austria*, 2005, C-335/04
*Commission v Finland*, 2005, C-327/04
*Commission v Germany*, 2005, C-329/04
*Commission v Greece*, 2005, C-326/04
*Commission v Luxembourg*, 2005, C-320/04
*Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn*, 2008, C-54/07 [ECR I-5187]

**France**

*(Les Pym’s) Cass. Crim. (Supreme Court of Cassation, Criminal Section)*, 12.09.2000, G99/87.251 D
*CA Paris (Appeal Labour Court)*, 29.01.2002, 01/32582
(SOS racisme c/ Dhaisne), Cass. Crim. (Supreme Court of Cassation, Criminal Section), 11.06.2002, 01/85.560 F-D

(Moulin Rouge), Cass. Crim. (Supreme Court of Cassation, Criminal Section), 7.06.2005, 04/87.354.

Cass. Soc. (Court of Cassation, Labour Division), 20.12.2006, 06-40864

(Garnier/l'Oréal-Adecco), CA Paris (Appeal Court, Criminal Section), 16.07.2007, 06/7900

Conseil Constitutionnel, CC 2007-557 DC, 15.11.2007

(Renault), CA Versailles (Appeal Labour Court), 2.4.2008

(Bosch) CPH Lyon (Labour Court), 20.06.2008, F071/01754

Germany

ArbG (Employment Court) Berlin, 26.09.2007, 14Ca10356/07

LArbg (Regional Employment Appeal Court) Hamburg, 9.11.07, H3 Sa 102/07

LArbg Schleswig-Holstein, 26.06.2008, 1Sa129/08

AG (Civil Court) Oldenburg, 23.07.2008, E2C2126/07

ArbG (Employment Court) Köln, 6.08.2008, 9 Ca 7687/07

Bayerische VG (Administrative Court) Bayern, 14.08.2008, 7 CE 08.1059

BArbG (Federal Employment Court), 24.09.2009, 8 AZR 705/08.

BArbG (Federal Employment Court), 19.08.2010, 8 AZR 466/09

ArbG (Employment Court) Berlin, 11.02.2009, 55 Ca 16952/08

BArbG (Federal Employment Court), 28.01.2010, 2 AZR 764/08

LArbG (Regional Employment Appeal Court) Bremen, 29.06.2010, 1 SA 29/10

Italy

Tribunale di Padova (Civil Court), 19.05. 2005, r.g. 20556/05

Tribunale di Roma (Civil Court), 16.07.2008

Tribunale di Roma (Civil Court), 8.12.2008

Tribunale di Roma (Civil Court), 12.01.2009, r.g. 38831/09

Tribunale di Roma (Civil Court), 8.02.2009, r.g. 4766/08

Tribunale di Mantova (Civil Court), 21.04.2009 r.g. 458/09

TAR Lazio (Administrative Court), 1.07.2009, r.g. 6400/2009

TAR Brescia (Administrative Tribunal), 15.01.2010, No 19/09

Tribunale di Brescia Civil Court), 29.01.2010, r.g. 71/2009

Tribunale di Milano (Civil Court), 8.02.2010, r.g. 49050/2008

Tribunale di Roma (Civil Court) 28.05.2010, r.g. 2916/2008

Tribunale di Milano (Civil Court), 02.03.2011, r.g. 59283/08
Annex 1 List of semi-structured interviews

European Union institutions and lobbies

European Commission
- EU DGEMPL1: Directorate G, anti-discrimination law unit (G2)\textsuperscript{205}, 20-10-2008
- EU DGEMPL2: Directorate G, anti-discrimination policy unit (G2), 24-11-2008
- EU DGJUSTICE: Directorate F, fight against organised crime unit, 21-10-2008

European Network Against Racism, ENAR
- EU ENAR: ENAR Direction, 4-3-2009

Migration Policy Group, MPG
- EU MPG: Deputy direction, 5-3-2009

European Network of Equality Bodies, EQUINET
- EU EQUINET: Policy coordination, 5-3-2009

European Legal Academy, ERA
- EU ERA: Antidiscrimination responsible officer, 9-12-2008

France

High Authority for the Fight Against Discrimination and the Promotion of Equality
- FR HALDE1: service promotion de l’égalité, 19-04-2008
- FR HALDE2: service juridique, 18-03-2008
- FR HALDE3: service études, 02-04-2008
- FR HALDE4: affaires internationales, 12-03-2008
- FR HALDE5 : service juridique: 07-07-2008

Ministry of Immigration, Integration, National Identity and Joint Development
- FR MINIMM: direction de l’accueil, de l’intégration et de la prévention des discriminations, 20-3-2008

Agency for cohesion, solidarity and equality, ACSE
- FR ACSE, direction pour la non-discrimination, 17-03-2008

National advisory commission on human rights, CNCDH
- FR CNCDH, secretariat for the racism annual report on racism, 27-03-2008

Trade Unions
- FR CFDT1, general secretariat, 14-03-2008
- FR CFDT2, immigration-non discrimination unit, 14-03-2008
- FR CGT1, specialised lawyer, 15-07-2009

\textsuperscript{205} Since 2011 the unit has been passed to DG JUSTICE, JUSTICE D1.
- FR CGT2, antidiscrimination unit, 26-07-2009

NGOs
- FR CRAN, Conseil représentatif des associatons noires de France, Président 3 3-7-2008
- FR SOSRACISM, Direction, 26-03-2008
- FR MRAP, Mouvement pour un ressemblement pour l’amiti des peuples, Legal service 27-03-2008
- FR GISTI, Groupe d'intervention pour le soutien des travailleurs immigrés, 27-06-2008
- FR LICRA, Ligue contre le racisme et l’antisemitisme, General secretary, 20-03-2008

Research institutions
- FR INED, *Institut national d'études démographiques*, migration unit, 14-02-2008
- FR RAXEN, French expert, 29-02-2008
- FR AC1, academic expert, University of Cergy-Pontoise 21-02-3008

Justice system professionals
Lawyers
- FR EMPLLAWYER1, employment lawyer, Paris, 02-07-2008
- FR EMPLLAWYER2, employment lawyer, Paris, 04-07-2008

Judges
- FR PROUDHOMM, Juge Prud’hommale de la CFDT Paris, 25-02-2008
- FR CONSEILST, Conseil d’Etat, studies department, 26-02-2008
- FR CASSSOC, Chambre sociale, Cour de Cassation, 02-07-2008
- FR CONSEILCONS, Constitutional Court Judge, 16-07-2009

Others
- FR OBSDISCRIM: anti-discrimination testing private agency, 30-06-2008
- FR CHARTDIVERSITE: organisation of enterprises responsible for Diversity Charter 04-04-2008

Germany

Federal equality body, ADS, Berlin
- DE ADB1: research and recommendations department, 28.11.2008
- DE ADB2: legal department, 28.11.2008

State equality body Berlin (Antidiskriminierungstelle des Lands Berlin)
- DE ADLB, direction, 9-01-2009

Federal delegate for Migration and Integration
- DE BEAUFTR: Legal support division, 8-01-20098

Trade Unions
- DE DGB1: immigration department, 20-01-2009
- DE DGB2: legal service, 20-01-2009
NGOs
- DE ADNBTBB, Antidiskriminierung Bund Deutschlands, Türkisches Bund Berlin, legal service, 20-11-2008
- DE ADB: Anti-Diskriminierungsbüro Berlin, legal service, 13-01-2009

Research institutions/centres
- DE RAXEN1: national focal point, Universität Bamberg, 19-11-2008
- DE HUMBOLDT: EU antidiscrimination law expert, Humboldt Universität, Berlin, 6-11-2008

Justice system professionals
Lawyers
- DE EMPLLAWYER: employment lawyer, Hamburg, 5-12-2008
Judges
- DE LABOURJUDG: First instance judge, Labour Court Berlin, 10-01-2009
- DE APPEALLABOURJ: Appeal Labour Judge, Hamburg 31-10-2008

Other
- DE EMPLDISCRVICTIM, discrimination: court applicant, Hamburg, 17-11-2008

Italy

Equality body: National Office against Race Discrimination, UNAR
- IT UNAR1: policy officer, 1-2-2008
- IT UNAR2: legal expert, 20-9-2008
- IT UNAR3: director office, 24-6-2009
- IT UNAR4: complaints collection unit (ACLI), 22-09-2008

Ministry of social solidarity (ex labour)
- IT MINIMM: Directorate general for immigration, 23-09-2008

Ministry of Interior
- IT MININT1: cabinet of the minister 15-10-2008
- IT MININT2: civil rights and immigration dept., 17-10-2008

Trade Unions
- IT CGIL: CGIL immigration department, 24-09-2008
- IT CISL: CISL immigration department (ANOLF), 29-09-2008

NGOs
- IT RAXEN: COSPE Italian RAXEN expert, 21-04-2008
- IT ASGI1: ASGI legal service coordinaton, 06-02-2008
- IT ASGI2: ASGI direction, 13-10-2008
- IT ARCI: ARCI immigration department, 25-09-2008

Research institutions
-IT CARITAS: Caritas/Migrantes, Immigration Report research team, 20-12-2007
-IT ISTAT: National institute for statistics, census department, 20-12-2007
Justice system professionals
Lawyers
- IT CIVILLAWYER1: civil lawyer (ASGI), Florence, 16-09-2008
- IT EMPLLAWYER: employment lawyer (Progetto Diritti), Rome, 22-09-2008, 26-09-2008
- IT IMMLAWYER: immigration lawyer (Progetto Diritti), Rome, 18-10-2008
- IT CIVILLAWYER2: civil lawyer, working for CGIL, Milan, 17.10.2008

Judges
- IT SUPREMECOURT: Supreme Court of Cassation, civil section, 23-09-2008
- IT CIVILCOURT: First instance tribunal, civil section, Rome 26-09-2008
- IT APPEALCOURT: Rome’s appeal court, civil section, 24-09-2008

Other
- IT LEADER: direction of EQUAL II antidiscrimination project, 26-09-2008
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<th>Type of discrimination claimed</th>
<th>Categorization</th>
<th>Defendant</th>
<th>Domain</th>
<th>Litigation support</th>
<th>Remedies and eventual sanctions</th>
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<td>Race &amp; ethic origin</td>
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France

Anexo 2 Datasets of national court decisions
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<td>Discrimination</td>
<td>Race &amp; Ethnic</td>
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<td>26/11/07</td>
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<td>Discrimination</td>
<td>Race &amp; Ethnic</td>
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<td>Race &amp; Ethnic (language)</td>
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<td>Employment (dismissal)</td>
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<td>05-43.304</td>
<td>05/12/07</td>
<td>Cassation sociale (Court of Cassation, Labour Division)</td>
<td>Discrimination</td>
<td>Race &amp; Ethnic</td>
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<td>Date</td>
<td>Court</td>
<td>Type of discrimination claimed</td>
<td>Categorization</td>
<td>Defendant</td>
<td>Domain</td>
<td>Assessment and eventual Sanctions</td>
<td>Remedy and eventual Sanctions</td>
<td>Type of Court</td>
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<td>265</td>
<td>06-43-86</td>
<td>Cassation completion of pari passu (Appeal Labour Court)</td>
<td>Discrimination due to status as a member of a racial or ethnic minority</td>
<td>Discrimination</td>
<td>Radio France</td>
<td>France</td>
<td>Remedy</td>
<td>Bail</td>
<td>Kei</td>
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<td>Discrimination by firm, individual or private person, including in the area of employment</td>
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<td>Renault</td>
<td>France</td>
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<td>Nissan France, MG, ACM, M6</td>
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<td>Hire &amp; Ethnicity</td>
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<td>Court 3</td>
<td>Type of discrimination claimed 4</td>
<td>Categorization 5</td>
<td>Defendant 6</td>
<td>Domain 7</td>
<td>Court Assessment and eventual Proof Requirement 8</td>
<td>Remedies and Sanctions 9</td>
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<td>Discrimination by private individual or firm</td>
<td>Employment (career progression)</td>
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<td>Demande de l'assurance-emplacement</td>
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<td>(burden of proof, term of comparison)</td>
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<td>Demande de l'assurance-emplacement</td>
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<td>Demande de l'assurance-emplacement</td>
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<td>(burden of proof, term of comparison)</td>
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<td>Date</td>
<td>Court</td>
<td>Type of discrimination claimed</td>
<td>Categorization</td>
<td>Defendant</td>
<td>Domain</td>
<td>Court Assessment and eventual Proof</td>
<td>Remedies and Sanctions</td>
<td>Litigation support</td>
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<td>Ref</td>
<td>08-04395</td>
<td>22/06/10 CA Lyon, sociale (Appeal Labour Court)</td>
<td>Harassment</td>
<td>Race &amp; ethnic origin</td>
<td>Private individual or firm</td>
<td>Employment (dismissal)</td>
<td>Upheld</td>
<td>Dismissed</td>
<td>15,000 € (damages and compensation)</td>
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<td>Ref</td>
<td>07-04395</td>
<td>21/05/10 CA Lyon, sociale (Appeal Labour Court)</td>
<td>Harassment</td>
<td>Race &amp; ethnic origin</td>
<td>Private individual or firm</td>
<td>Employment (dismissal)</td>
<td>Upheld</td>
<td>Dismissed</td>
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Note: The table contains information about discrimination cases, including the date, court, type of discrimination, categorization, defendant, domain, court assessment and eventual proof, remedies and sanctions, and litigation support.
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<tr>
<th>Case</th>
<th>Date</th>
<th>Court</th>
<th>Defendant</th>
<th>Claimed Discrimination</th>
<th>Domain</th>
<th>Rejected?</th>
<th>Reason</th>
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<tbody>
<tr>
<td>14Ca10356/07</td>
<td>26/09/07</td>
<td>ArbG Berlin</td>
<td></td>
<td>Indirect discrimination</td>
<td>Race/ethnic origin</td>
<td>Language requirement is not discriminatory, no discriminatory intent - genuine and determining occupational requirement is not replaced.</td>
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<tr>
<td>7Ta1977/07</td>
<td>16/10/07</td>
<td>LArbG Berlin-Brandenburg</td>
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<td>Indirect discrimination</td>
<td>Race/ethnic origin</td>
<td>Forbidding use of foreign language at work is discriminatory.</td>
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<td>H3Sa102/07</td>
<td>09/11/07</td>
<td>LArbG Hamburg</td>
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<td>Direct discrimination</td>
<td>Race/ethnic origin &amp; age/gender (intersectional)</td>
<td>Rejected - being part of intersectional group no sufficient condition to reverse the burden of proof.</td>
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<tr>
<td>Case</td>
<td>Date</td>
<td>Court</td>
<td>Type of discrimination</td>
<td>Domain</td>
<td>Defendant</td>
<td>Damages</td>
<td>Remedies and Sanctions</td>
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<tr>
<td>270</td>
<td>26/06/08</td>
<td>LArbG Schleswig-Holstein</td>
<td>Direct discrimination - Race/ethnic origin &amp; disability</td>
<td>Employment (access to)</td>
<td>Defendant</td>
<td>Rejected</td>
<td>Being member of an intersectional group at risk of discrimination is no sufficient condition to reverse the burden of proof</td>
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<tr>
<td>270</td>
<td>23/07/08</td>
<td>AG Oldenburg</td>
<td>Direct discrimination - Race/ethnic origin</td>
<td>Civil Law (access to goods &amp; services)</td>
<td>Defendant</td>
<td>Upheld</td>
<td>Situation testing admitted as means of proof</td>
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<tr>
<td>270</td>
<td>06/08/08</td>
<td>ArbG Köln</td>
<td>Direct discrimination / Reverse discrimination - Race/ethnic origin &amp; gender</td>
<td>Employment (access to)</td>
<td>Defendant</td>
<td>Rejected</td>
<td>Genuine and determining occupational requirement</td>
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<tr>
<td>270</td>
<td>14/08/08</td>
<td>Bayerische VG</td>
<td>Indirect discrimination - Race/ethnic origin (nationality)</td>
<td>Civil Law (access to goods &amp; services)</td>
<td>Defendant</td>
<td>Rejected</td>
<td>No discrimination if selection for access to student locations is based on nationality</td>
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<tr>
<td>Case No.</td>
<td>Date</td>
<td>Court</td>
<td>Type of Discrimination</td>
<td>Categorization</td>
<td>Domain</td>
<td>Defendant</td>
<td>Court Assessment and eventual Proof</td>
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<td>271/09</td>
<td>06/06/10</td>
<td>ArbG Hamburg</td>
<td>Direct discrimination / Harassment</td>
<td>Race/ethnic</td>
<td>Employment</td>
<td>Private individual or firm</td>
<td>Rejected: failure to act to delete offensive racial message is no harassment, limitations statute barred</td>
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<td>255/09</td>
<td>19/01/10</td>
<td>OLG Köln</td>
<td>Direct discrimination</td>
<td>Race/ethnic</td>
<td>Civil law</td>
<td>Private individual or firm</td>
<td>Upheld, discrimination in housing, recognition of moral damages and responsibility of the housing agency director</td>
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<tr>
<td>271/09</td>
<td>06/06/10</td>
<td>ArbG Hamburg</td>
<td>Indirect discrimination</td>
<td>Race/ethnic</td>
<td>Employment</td>
<td>Private individual or firm</td>
<td>Upheld, language requirement restricting employment to native speakers as indirect discrimination</td>
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<td>235/09</td>
<td>13/05/10</td>
<td>BVGH Berlin</td>
<td>Direct discrimination</td>
<td>Race/ethnic</td>
<td>Employment</td>
<td>Private individual or firm</td>
<td>Upheld, discrimination in employment restrictions based on language proficiency in housing</td>
</tr>
</tbody>
</table>

**Defendant**

- **Race/ethnic**: Discrimination by private individual or firm
- **Race/ethnic (hiring)**: Discrimination by private individual or firm
- **Race/ethnic (working conditions)**: Discrimination by private individual or firm
- **Civil law (housing)**: Discrimination by private individual or firm
- **Employment (access to)**: Discrimination by private individual or firm
- **Employment (language)**: Discrimination by private individual or firm

**Categorization**

- **Direct discrimination**: Direct discrimination
- **Indirect discrimination**: Indirect discrimination
<table>
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<tr>
<th>Ref</th>
<th>Date</th>
<th>Court</th>
<th>Type of discrimination claimed</th>
<th>Categorization</th>
<th>Domain</th>
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<th>Remedies and Sanctions</th>
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<tr>
<td>2AZR764/08</td>
<td>28/01/10</td>
<td>BArbG</td>
<td>Indirect discrimination (language)</td>
<td>Race/ethnic origin</td>
<td>Employment (dismissal)</td>
<td>Discarded by private individual or firm</td>
<td>Rejected, employer had provided enough language training before dismissal</td>
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<td>17Ca8907/09</td>
<td>15/04/10</td>
<td>ArbG Stuttgart</td>
<td>Indirect discrimination (language)</td>
<td>Race/ethnic origin</td>
<td>Employment (access to)</td>
<td>Discrimination by private individual or firm</td>
<td>Dismissed: Ossi is not an ethnic category</td>
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<td>1SA29/10</td>
<td>29/06/10</td>
<td>LArbG Bremen</td>
<td>Indirect discrimination</td>
<td>Race/ethnic origin</td>
<td>Employment (dismissal)</td>
<td>Discrimination by private individual or firm</td>
<td>Upheld, discriminatory dismissal and damages Compensation 5400 € plus interests</td>
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**Support** | Litigation Support and Remedies
---|---
**Key** | Court Date Ref
<table>
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<th>Reference</th>
<th>Date</th>
<th>Court</th>
<th>Type of discrimination</th>
<th>Domain</th>
<th>Detriment</th>
<th>Categorization of discrimination</th>
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<th>Evidence and assessment</th>
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<td>19/05/05</td>
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<td>Race/ethnic origin</td>
<td>(extracomunitario)</td>
<td>Discrimination by private individual or firm</td>
<td>Access to services (bar)</td>
<td>Upheld, NGO legal standing denied</td>
<td>100 € damages, publication of ruling</td>
<td>ASGI, Razzismo STOP</td>
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<td>r.g. 4766/08</td>
<td>08/12/08</td>
<td>Tribunale di Roma (civil court)</td>
<td>Direct discrimination</td>
<td>Race/ethnic origin</td>
<td>(extracomunitario)</td>
<td>Discrimination by private individual or firm</td>
<td>Access to public services</td>
<td>Upheld, NGO and trade union legal standing granted</td>
<td>2000 € damages, no reintegration</td>
<td>ASGI, CGI</td>
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<td>08/02/09</td>
<td>Tribunale di Roma (civil court)</td>
<td>Direct discrimination</td>
<td>Race/ethnic origin</td>
<td>(nomads)</td>
<td>Discrimination by private individual or firm</td>
<td>Access to public services</td>
<td>Upheld, NGO and trade union legal standing granted</td>
<td>5000 € damages, publication of ruling</td>
<td>Progetto Diritti (collective complaint)</td>
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<td>08/02/09</td>
<td>Tribunale del Lavoro Varese</td>
<td>State discrimination</td>
<td>Race/ethnic origin</td>
<td>(non-Italian by birth)</td>
<td>Discrimination by private individual or firm</td>
<td>Provision of public services (employment)</td>
<td>Dismissed, regulation repealed pending judgment</td>
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<td>19/05/05</td>
<td>Tribunale del Lavoro Varese</td>
<td>State discrimination</td>
<td>Race/ethnic origin</td>
<td>(nomads)</td>
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<td>Provision of public services (employment)</td>
<td>Dismissed, NGO and trade union legal standing granted</td>
<td>0 € damages, publication of ruling</td>
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<td>19/05/05</td>
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<td>State discrimination</td>
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<td>(nomads)</td>
<td>Discrimination by private individual or firm</td>
<td>Provision of public services (employment)</td>
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<td>100 € damages, publication of ruling</td>
<td>Progetto Diritti (collective complaint)</td>
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Italy
<table>
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<td>TAR Lazio (Administrative Tribunal)</td>
<td>Direct discrimination</td>
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<td>38831/2009</td>
<td>12/01/10</td>
<td>Tribunale di Roma (Civil Court)</td>
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<td>r.g. 71/2010</td>
<td>29/01/10</td>
<td>Tribunale di Brescia (civil court)</td>
<td>Indirect discrimination</td>
<td>Race/ethnic origin</td>
<td>(language)</td>
<td></td>
<td>Progetto Diritti</td>
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<td>r.g. 49050/2008</td>
<td>08/02/10</td>
<td>Tribunale di Milano (civil court)</td>
<td>Direct discrimination</td>
<td>Race/ethnic origin</td>
<td>(nomads)</td>
<td></td>
<td>Bezzecchi</td>
<td></td>
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<tr>
<td>Ref</td>
<td>Date</td>
<td>Court</td>
<td>Type of discrimination claimed</td>
<td>Categorization</td>
<td>Defendant</td>
<td>Domain</td>
<td>Court Assessment and eventual Proof</td>
<td>Remedies and Sanctions</td>
<td></td>
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<td>2916/2008 Porta Portese</td>
<td>28/05/10</td>
<td>Tribunale di Roma (civil court)</td>
<td>Direct discrimination/instruction to discriminate</td>
<td>Race/ethnic origin (nomads)</td>
<td>Discrimination by private individual or firm</td>
<td>Discriminatory advertising/access to housing and employment</td>
<td>Dismissed, NGO legal standing granted</td>
<td>NGO-condemned to costs</td>
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</table>
Bibliography


Council of Ministers (1968) Regulation No. 1612/68 on the freedom of movement of workers within the Community 15 October 1968.

Council of Ministers (1971) Regulation 1408/71/EEC on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. 14 June 1971.


Council of Ministers (1990) Resolution on the Fight against Racism and Xenophobia. 29 May.


Initiative EQUAL concerning transnational co-operation to promote new means of combating all forms of discrimination and inequalities in connection with the labour market. 14 April 2000.


(Austrian Freedom Party).


New York, Palgrave Macmillan.


289


UNAR (2007b) Un anno di attività contro la discriminazione razziale. Roma, Presidenza del consiglio dei ministri - Dipartimento per le pari opportunità.


UNESCO (1951) Statement on the Nature of Race and RAce Differences.

UNESCO (1964) Proposition on the Biological Aspects of Race.


