



**PRESERVERE**

Preventing Racism and Discrimination -  
Enabling the Effective Implementation of the  
EU Anti-Racist Legal Framework

# **COMPARING THE EU ANTI-RACISM LEGAL FRAMEWORK IN SIX EU MEMBER STATES**



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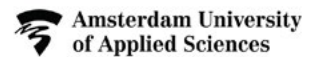


# PRESERVE

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EU Anti-Racist Legal Framework

PRESERVE is concerned with fighting intolerance, racism, xenophobia and discrimination against vulnerable ethnic and racial groups and, in particular, Roma, Jews, Muslims and people of African descent. Starting from the premise that any system tasked with protecting the vulnerable from discrimination must, first and foremost, rely on an effective legal framework, the project implements activities concerned with the better enforcement of the law.

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# COMPARING THE EU ANTI-RACISM LEGAL FRAMEWORK IN SIX EU MEMBER STATES

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## 1. Overview of PRESERVERE

The starting point of PRESERVERE, short for ‘Preventing Racism and Discrimination: Enabling the Effective Implementation of the EU Anti-Racism Legal Framework’, is that the EU already possesses a largely comprehensive anti-racism legal framework. In other words, the EU law on tackling racism, discrimination and xenophobia is already in place and, on paper, appears to be working well. At the same time, racist and discriminatory incidents, hate speech and hate crimes are on the rise in the EU, especially among the specific groups that PRESERVERE seeks to indirectly empower: Muslims, Jews, Roma and people of African descent. This raises the obvious question of why the implementation of this anti-racism legal framework has not brought about the expected results. There are three possible explanations, for this: first, the EU anti-racism legal framework is insufficiently protective of vulnerable groups. Second, the EU law is in itself sufficient, but it has not been adequately transposed or implemented in national legislation. Third, the EU and national laws are perfectly adequate, but they are not being properly applied in practice. Of course, a combination of these factors is also entirely possible. Thus, the objective of PRESERVERE is to identify the reasons for why the EU anti-racism legal framework has not had the anticipated results and propose actions, primarily in the form of training, to address this.

PRESERVERE involves eight partners from six countries: Bulgaria, Cyprus, Greece, Italy, Malta, and the Netherlands. The partners that participate from each country are a combination of academic and civil society organisations. Each of the partner countries has been selected either because it faces problems, or because of good practices it has adopted, in relation to one or more of the four racial/ethnic groups. Further, these countries were chosen because they each have large (relative to their size) populations of at least one of the four racial/ethnic groups that are most often victims of racist or discriminatory practices, and that the project aims to help.

The research conducted for this publication relates to six EU Member States. The main research question that the different chapters are concerned with is identifying the reasons why the EU legal framework has not proven to be more effective in practice. These reasons have been identified through desktop and empirical research. A detailed discussion of the methodology that was adopted in gathering the information is found in ‘Chapter 3 – A Comparative Analysis of the Different Case Studies’. The actions that will follow to address the needs identified by this research will mostly take the form of an online toolkit offering information for the better implementation of the EU anti-racism legal framework, and a series of training sessions in each partner country. The educational material and training activities will be designed to be used in existing continuous professional development schemes or professional induction/training days. This will make PRESERVE’s outputs complementary to activities already carried out by, or in, Member States, thus mainstreaming them and enhancing their potential.

Both the toolkit and training sessions will be targeting two types of professionals. These are (a) professionals in the field of law, or law enforcement, including lawyers, judges, prosecutors, police officers; and (b) legal officers or other relevant employees in institutions and public/social services and NGOs. Individuals in the second category are professionals who confront racist or discriminatory incidents on a regular, even daily, basis, and include for example, legal officers in social services, prisons, asylum seeker reception centres, and border control authorities. In short, PRESERVE targets people who, in their line of work, are expected to enforce the European legal framework and whose training is expected to have the greatest impact in the more effective implementation of the Law. Engaging with these professionals is likely to have two positive effects. On the one hand, it will help them become familiarised with, and therefore more keen to use, the relevant EU Directives. On the other hand, it will alert them to possible gaps in the transposed legislation, which will mobilise them to lobby for the amendments of the law.

## **2. Making the case for a better implementation of the EU anti-racism legal framework**

The EU anti-racism legal framework is extensive and largely robust. A detailed description and discussion of the relevant EU legal provisions is found in ‘Chapter 2 – An Overview and Critical Analysis of the EU Anti-Racism Legal Framework’, but in summary, there are anti-racism provisions in the Treaty on the Functioning of the European Union, the EU Charter of Fundamental Rights, and EU Directives. The most relevant Directives for the purposes of fighting racism and discrimination are Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing

minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA ('Victims' Rights Directive'). Combined, the two Directives lay down obligations for the combating of direct or indirect discrimination and other discriminatory practices on the grounds of racial or ethnic origin and empower victims of crime, including hate crimes, to receive appropriate information, support and protection, and participate in criminal proceedings throughout the EU. The Directives enjoy supremacy over other national laws, including Constitutions.<sup>1</sup>

Despite the existence of this framework, racism, discrimination and xenophobia in the EU are on the rise. In 2021, the European Commission acknowledged that 'little progress has been made in the fight against discrimination since 2014.'<sup>2</sup> The Commission continued to note that '[t]he general population recognises that discrimination is widespread in the EU and discrimination is also experienced frequently in most Member States',<sup>3</sup> with 59 percent of Europeans believing that discrimination based on ethnic origin is a common phenomenon in their country.<sup>4</sup> The problem, however, is not only one of perception. In 2017, 24 percent of people from ethnic minority groups within the EU reported they had felt discriminated against in the last year.<sup>5</sup> The need to fight racism is even more pressing for specific groups: in 2021, the European Commission noted that Roma people are particularly affected by discrimination and have been disproportionately impacted by COVID-19 in the areas of education, healthcare and employment.<sup>6</sup> 89 percent of Jewish people participating in a 2018 survey of the EU Agency for Fundamental Rights reported that antisemitism had increased in their country in the five years before the survey, with 85 percent considering it to be a serious problem.<sup>7</sup> According to the same survey, 39 percent of people of African descent

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<sup>1</sup> Judgment of 15 July 1964, *Flaminio Costa v ENEL*, C-6/64, EU:C:1964:66, [1964] ECR 585.

<sup>2</sup> European Commission, 'Report on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')', COM(2021) 139 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN>, p.2.

<sup>3</sup> *Ibid.*

<sup>4</sup> European Commission, 'Special Eurobarometer 493 on Discrimination in the EU' (October 2019), available at <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2251>.

<sup>5</sup> European Union Agency for Fundamental Rights, 'Second European Union Minorities and Discrimination Survey: Main results' (2017), available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-eu-midis-ii-main-results\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf), p. 13.

<sup>6</sup> European Commission, 'Report on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')', COM(2021) 139 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN>, p. 20.

<sup>7</sup> European Union Agency for Fundamental Rights, 'Experiences and perceptions of antisemitism; Second survey on discrimination and hate crime against Jews in the EU' (2018), available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-experiences-and-perceptions-of-antisemitism-survey\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-experiences-and-perceptions-of-antisemitism-survey_en.pdf), p. 11.

reported suffering racial discrimination in the five years before the survey had been conducted.<sup>8</sup> Finally, one in three Muslim persons indicated in 2017 that they suffered discrimination when looking for a job, with the number being even higher among Muslim women wearing a headscarf.<sup>9</sup>

The EU anti-racism legal framework is not perfect. Two ways in which it could be improved are worth raising here. The first is that the Court of Justice of the EU (CJEU) recently refused to find a practice that treated individuals differently on the basis of their nationality as discriminatory because ‘nationality’ is not a protected characteristic under the Racial Equality Directive and the different treatment for which the applicant complained was not necessarily a result of his ethnic origin.<sup>10</sup> Rejecting the significant overlap between ethnic origin and nationality, the CJEU held that ‘the country of birth cannot, in general and absolute terms, act as a substitute for all the criteria’ for what constitutes ‘ethnic origin’.<sup>11</sup> While strictly speaking the Court is right to make a distinction between nationality and ethnicity, this does raise concerns that the case will be used to justify indirect discrimination and behaviour that ethnic (and not just national groups) experience as discriminatory. The second limitation of the existing anti-racism legal framework concerns another refusal of the CJEU, this time in 2016, to recognise ‘intersectional discrimination’ as a protected ground, as this had no clear basis in the Race Equality Directive.<sup>12</sup> Intersectional discrimination takes place when an individual is discriminated against based on grounds that are intertwined in such a way that they produce a new type of discrimination. For instance, a Muslim woman being discriminated against in the workplace because she wears the headscarf is experiencing discrimination that is substantively different to the experiences of both a woman in the majority ethnic group and those of a Muslim man. The concept of intersectional discrimination is useful because it more accurately reflects the complex identities and real life experiences of those who are most likely to be victimised by discriminatory behaviour. The unwillingness of the Court to acknowledge this in relation to the most vulnerable members of ethnic and racial groups, namely women and girls, and victims of other grounds of discrimination, such as disability, is regrettable.

Limitations in the Law notwithstanding, they are not the main reason why racism, discrimination and xenophobia are on the rise in the EU. What is also not providing an (adequate) explanation for these worrying phenomena is the problematic implementation of the EU Directives in national laws. Admittedly, there are situations in which the

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<sup>8</sup> Ibid.

<sup>9</sup> European Union Agency for Fundamental Rights, ‘Second European Union Minorities and Discrimination Survey Muslims – Selected findings’ (2017) [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf).

<sup>10</sup> Judgment of 6 April 2017, *Jyske Finans*, C-668/15, ECLI:EU:C:2017:278, para. 19.

<sup>11</sup> Ibid.

<sup>12</sup> Judgment of 24 November 2016, *David L. Parris v Trinity College Dublin and Others*, C-443/15, ECLI:EU:C:2016:897



***Limitations in the Law notwithstanding, they are not the main reason why racism, discrimination and xenophobia are on the rise in the EU.***



Directives could have been implemented more broadly or where additional, or free-standing crimes, could have been introduced. For instance, the Italian legal framework criminalises racist defamation because of its defamatory, rather than because of its racist nature, a state of affairs that does not appear to be compatible with the objectives of the Racial Equality Directive.<sup>13</sup> Similarly, while the national law

in Malta mostly transposed the Racial Equality Directive, it did so by making amendments to, or passing, six different domestic laws, thus resulting in provisions that are difficult to navigate or that produce different procedures and remedies through which someone can be protected.<sup>14</sup>

Yet, the most important reason why the law fails to protect its intended beneficiaries is not so much because of its letter, but because it is not being applied in an effective manner. This has also been highlighted by the Agency for Fundamental Rights, which notes that of those who suffered racial or ethnic discrimination in 2017, only 12 percent reported the most recent discriminatory incident to anybody (with the number being as low as 4 percent for those who reported the incident to an equality body).<sup>15</sup> It is therefore unsurprising that the European Commission identified as ‘pressing’ the need to ensure that the existing legal framework truly protects victimised racial or ethnic groups.<sup>16</sup> Perhaps no state exemplifies this to a greater extent than Bulgaria, which scores the highest (100/100 points) in the field of anti-discrimination in the 2020 Migrant Integration Policy Index (MIPEX) from 2020.<sup>17</sup> Nevertheless, MIPEX only provides an indicator of just the legal framework and policies, and not their implementation only the legal framework and policies, and not their implementation. Thus, while Bulgaria, on paper at least, appears to have the perfect anti-discrimination legal framework, in practice, it continues discriminating against the different groups that PRESERVE seeks to empower.

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<sup>13</sup> See, Chapter 7 of this collection for more details.

<sup>14</sup> See Chapter 8 of this collection for more details.

<sup>15</sup> European Union Agency for Fundamental Rights, ‘Second European Union Minorities and Discrimination Survey: Main results’ (2017), available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-eu-midis-ii-main-results\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf), p. 15.

<sup>16</sup> European Commission, ‘EU Anti-racism Action plan 2020-2025’ (2020), available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en), p. 17.

<sup>17</sup> Bulgaria, Migrant Integration Policy Index MIPEX 2020, <https://www.mipex.eu/bulgaria> ‘Muslims – Selected findings’ (2017), available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf).



In a report from the Commission to the European Parliament, several factors were identified as contributing to the legal framework's inadequate implementation.<sup>18</sup> These translate in a series of specific needs addressed by PRESERVE. First, the need to ensure that there are no gaps to the letter of the law, both on the European and national levels. Important in this respect are the ongoing infringement proceedings in relation to the Racial Equality Directive (against the Czech Republic, Slovakia and Hungary); there are currently no ongoing infringement proceedings in relation to the Victims' Rights Directive.<sup>19</sup> Second, there is a need to bring legal protection to the attention of those concerned, including law enforcement personnel, legal professionals, equality bodies and civil society. This will be especially impactful in Member States that have transposed the law, but offer no formal training to key stakeholders. An example of this is Cyprus, where no training in relevant Directives or case law of the CJEU or the European Court of Human Rights is provided to judges, lawyers, prosecutors, the police or legal officers in social services, prisons, and asylum seeker reception centres. In fact, one can qualify as a lawyer in Cyprus without that person ever having been taught or examined in EU law. Third, there is a need to collect data that quantify discrimination and evaluate the implementation and application of equality legislation in different Member States. And finally, a need exists to encourage reporting from victims. The Commission suggests that reporting can be promoted by reducing the costs and risks to bringing a complaint or by making the complaints procedure and key actors within it more accessible to potential victims.<sup>20</sup> Both strategies can be enhanced if stakeholders become familiarised with the legal provisions they are called to implement, which is one of the key objectives of this project.

Combined, the needs that the Commission has identified above, and which PRESERVE endorses, suggest that we must urgently focus on and assist the effective implementation of the existing anti-racism legislative framework. This conclusion is shared by the EU Anti-Racism Action Plan 2020-25, which notes that a system that protects groups vulnerable to racial or ethnic discrimination must, first and foremost, rely on the effective enforcement of the legal framework.<sup>21</sup> The importance of focusing on the implementation and application of the law is practically reflected in the renewed

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<sup>18</sup> European Commission, 'Report on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')', COM(2021) 139 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN>.

<sup>19</sup> See Chapter 2 of this collection for more details.

<sup>20</sup> European Commission, 'Report on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')', COM(2021) 139 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN>.

<sup>21</sup> European Commission, 'EU Anti-racism Action plan 2020-2025' (2020), available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en).

attention the European Commission has paid to this need, shown, *inter alia*, through its stated commitment to fund projects promoting this objective through its ‘Citizens, Equality, Rights and Values’ and ‘Justice’ programmes.<sup>22</sup> The emphasis on research-informed training activities and educational material for those who are primarily responsible for the enforcement of the European legislative framework in respective Member States, speaks to this need.

Additionally, the implementation of the EU anti-racism legal framework is among the key priorities of the EU Anti-Racism Action Plan and the EU Roma Strategic Framework for Equality, Inclusion and Participation for 2020-2030.<sup>23</sup> Better transposition and implementation of the law is also included in the Agency for Fundamental Rights’ recommendations to combat both antisemitism<sup>24</sup> and anti-Muslim hatred.<sup>25</sup> Moreover, the European Commission has highlighted as a problem the fact that 83 percent of victims of racist violence of African descent expressed dissatisfaction over the way their most recently reported incident had been handled by the authorities.<sup>26</sup> Finally, better implementation of the law is directly relevant to several of the priorities of the Call that funded this project, such as (a) ‘addressing antigypsyism, including hate speech and hate crime and discrimination of Roma’, (b) ‘supporting victims of antisemitism [by ...] encouraging reporting of such incidents’, (c) supporting ‘the fight against Muslim hatred and discrimination’ through taking action ‘to raise awareness of public authorities [and] foster reporting by victims’ and (d) taking action ‘to respond to the structural forms of racism faced by people of colour and people of African descent’. Reporting of discriminatory incidents will be encouraged and a better-targeted response to structural forms of racism will follow if legal professionals, responsible for implementing the law, are familiarised with, and therefore more comfortable to use it. It is for this reason that research-informed trainings and educational material, tailored to the specific needs of each Member States, are central to the project.

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<sup>22</sup> European Commission, ‘Report on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘the Racial Equality Directive’) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (‘the Employment Equality Directive’), COM(2021) 139 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN>.

<sup>23</sup> European Commission, ‘A Union of Equality: EU Roma strategic framework for equality, inclusion and participation’, COM(2020) 620 final, available at [https://ec.europa.eu/info/sites/default/files/eu\\_roma\\_strategic\\_framework\\_for\\_equality\\_inclusion\\_and\\_participation\\_for\\_2020\\_-\\_2030\\_0.pdf](https://ec.europa.eu/info/sites/default/files/eu_roma_strategic_framework_for_equality_inclusion_and_participation_for_2020_-_2030_0.pdf).

<sup>24</sup> European Agency for Fundamental Rights, ‘Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU’ (2018), available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-experiences-and-perceptions-of-antisemitism-survey\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-experiences-and-perceptions-of-antisemitism-survey_en.pdf).

<sup>25</sup> European Union Agency for Fundamental Rights, ‘Second European Union Minorities and Discrimination Survey’.

<sup>26</sup> European Commission, ‘EU High Level Group on combating racism, xenophobia and other forms of intolerance; Afrophobia: Acknowledging and Understanding the Challenges to Ensure Effective Responses’ (November 2018), available at [https://ec.europa.eu/newsroom/just/document.cfm?doc\\_id=55651](https://ec.europa.eu/newsroom/just/document.cfm?doc_id=55651).

### 3. A short note on the terminology



**The Racial Equality Directive aims to implement the equal treatment between persons irrespective of racial or ethnic origin.**



The Racial Equality Directive, which is at the centre of this research, seeks to implement ‘the principle of equal treatment between persons irrespective of racial or ethnic origin’.<sup>27</sup> It does not define what is meant by ‘race’ or ‘ethnicity’, other than to make two peripheral, but practically important points. First, that ‘[t]he 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.’<sup>28</sup> Second, that the ‘prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality’.

The theoretical literature has debated extensively whether the term ‘ethnicity’ encapsulates within it the concept of ‘race’, or whether racial differences are somehow distinct from ethnic ones.<sup>29</sup> Cornell and Hartman, for instance, argue that ethnicity is concerned with certain *given* attributes that create a shared sense of belonging (such as a shared language, religion or culture), while race relates to physical characteristics (like skin colour).<sup>30</sup> As a result, racial identity (in contrast to, or more so than the ethnic one) is typically perceived as inherent, something that the individual is born with, rather than having the power to choose.<sup>31</sup> Conversely, Horowitz groups race among the characteristics encapsulated by ethnicity and argues that when compared to the more traditionally understood ethnic markers, skin colour differences are neither more likely to give rise to uniquely intense emotions, nor serve as unusually reliable signs of an individual’s group identity.<sup>32</sup> Ultimately, if one accepts Kymlicka’s argument that ethnicity plays a central role in most people’s lives because it provides a context in which individuals make decisions and in which these decisions acquire significance, to the extent that race also provides this context, it should be understood as falling within the definition of ethnicity.<sup>33</sup>

<sup>27</sup> Full title of Racial Equality Directive.

<sup>28</sup> Racial Equality Directive, Preamble, para. 6.

<sup>29</sup> Nasia Hadjigeorgiou, ‘Ethnicity’, in *The Max Planck Encyclopedia of Comparative Constitutional Law*, (Oxford University Press, 2022).

<sup>30</sup> Stephen Cornell and Douglas Hartman, *Ethnicity and Race: Making Identities in a Changing World* (Pine Forge Press, 2nd edn, 2007), p. 24-29

<sup>31</sup> See also Rogers Brubaker, ‘Ethnicity, Race and Nationalism’ (2009) 35(1) *Annual Review of Sociology* 21; Faye V. Harrison, ‘The Persistent Power of “Race” in the Cultural and Political Economy of Racism’ (1995) 24 *Annual Review of Anthropology* 47.

<sup>32</sup> Donald Horowitz, *Ethnic Groups in Conflict* (University of California Press, 1985), chapter 1.

<sup>33</sup> Kymlicka, W, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995), p. 108.

In light of these theoretical debates and the EU's clear rejection of any negative connotations relating to the concept of race, authors were given discretion to decide whether they would use the term 'race' or 'ethnicity'. Such decisions were shaped, not so much by personal preferences, but mostly by how the terms have been used in the national legislation of each Member State.

#### 4. Overview of national reports

Six national reports have been drafted for the purposes of PRESERVERE. These concern Bulgaria, Cyprus, Greece, Italy, Malta and the Netherlands. Each of the national reports addressed a series of research questions, that are summarised below:

- (i) How faithfully have the Racial Equality Directive and the Victims' Rights Directive been transposed into national legislation?<sup>34</sup>
- (ii) Does the legal framework, at European and national levels remain fit for purpose, or are there gaps to be filled? In other words, is the legal framework of practical use to potential victims? If no, how is it failing them and why?
- (iii) What are the gaps (and reasons these exist) in the implementation of the law in each Member State?
- (iv) What are the procedures for someone to bring a complaint or start a legal case for discrimination or hate speech/crimes on grounds of race or ethnicity in each Member State?
- (v) What are the available remedies to someone who initiates a procedure as described in (iv) above?
- (vi) What good practices have been adopted for the implementation of the EU Law framework in each Member State?
- (vii) What steps have been taken to ensure that key stakeholders in the country are familiar with, and can use, the EU Law framework?

The national reports being compared here examine the effectiveness the EU anti-racism legal framework in terms of offering protection to four vulnerable groups: Muslims, Jews, Roma and persons of African descent.<sup>35</sup>

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<sup>34</sup> The full names of the two Directives are: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA ('Victims' Rights Directive').

<sup>35</sup> PRESERVERE focuses on four protected groups: Muslims, Jews, Roma and persons of African descent.

This report reaches conclusions from, and compares, the six national reports in order to draw lessons that will be useful when preparing and delivering training to legal professionals and frontline workers working in the area of non-discrimination. Section 2 outlines the comparative methodology that was adopted in the PRESERVERE project as a whole. Section 3 identifies three common themes from the national reports. These concern (a) the implementation of the EU legal framework in the respective Member States; (b) structural problems that are hindering the application of the law in the different countries; (c) the lack of knowledge among legal professionals and frontline workers about the two Directives. Section 4 provides insights from the case analysis that was conducted for PRESERVERE and Section 5 outlines lessons learned about training needs in the different Member States.

## 5. The comparative methodology

In order to facilitate the comparison between the different Member States, the six reports were drafted using the same methodology, which consists of three components: (a) library-based research; (b) case analysis; and (c) empirical research. The library-based research focused on a literature review of relevant primary and secondary sources relating to the anti-racism legal framework in each of the six countries. In addition to the legislation that transposed the Directives themselves, this included a review of case law from the Court of Justice of the EU, guidance and research that has been issued by European bodies, such as the Commission, Parliament and the Fundamental Rights Agency and recent secondary literature.

The case analysis part of the methodology was an attempt to identify cases that relied on the EU anti-racism legal framework and gather relevant information about them that would provide an indication of how this is used in practice by the relevant authorities. ‘Cases’ in this instance related to two slightly different pieces of data: (a) discrimination cases that have reached national courts; and (b) discrimination cases that have been reported in national equality bodies. These related to complaints concerning different instances of discrimination against a member of one of the protected groups, such as hate crimes and hate speech, or instances of discrimination in different areas of life. Depending on the size of the country, partners could provide either a full list of cases that are dealing with these themes, or a selection of representative cases. The relevant information provided for each case included the date on which it was decided, the name of court or equality body that heard this, the type of discrimination that was raised (in other words, whether it related to hate speech, discrimination in the employment sphere, discrimination in the provision of social services etc), the outcome of the case and the remedies ordered. The case analysis took place

between 2016 and 2021. The reason 2016 was chosen as the starting point for this data collection and analysis is because the deadline for the implementation of the Victims' Rights Directive was 16 November 2015, while the deadline for the Racial Equality Directive was 19 July 2003. By 1 January 2016, both Directives should have been transposed to (or, in any case, under conditions, were directly applicable in) the Member States, thus making it possible for them to be used by legal professionals and frontline workers.

The empirical research consisted of two focus groups per country, with five participants in each focus group and six in-depth interviews with professional and frontline workers. Some countries were able to meet the empirical research guidelines, others exceeded them, while others were unable to hold the required number of focus groups and interviews. The numbers of focus group participants and interviewees that were engaged in each country are listed in the table below. More detailed information about the occupation and gender of each interviewee and focus group participant is found in the country reports.

Partners in almost all of the countries participating in this research reported that they had difficulties recruiting individuals to take part in the empirical part of the research, especially in the focus groups. Different reasons were given for this difficulty faced by the partners, with two being the most prominent. The first reason was that potential interviewees and focus group participants felt they did not have enough information about the Directives in order to meaningfully contribute to the discussion. This is despite the fact that these individuals had been hand-picked by the researchers precisely because their professional background meant that they should have a good understanding of anti-discrimination law. This is itself an interesting finding that lends support to the need to develop better, more comprehensive and more widely accessible training on the EU anti-racism legal framework.

The second reason concerns the fact that potential interviewees and focus group participants – and in particular, the lawyers among them – were extremely busy and did not have the time to participate in the empirical research (this appears to be a long-standing problem in different Member States, but was exacerbated in the case of Bulgaria because of the recent war in Ukraine). This is relevant to the findings of the research project in two ways. On the one hand, the fact that lawyers and frontline workers are so busy and overwhelmed points to the conclusion that those dealing with anti-discrimination cases are often overworked and underfunded. This provides an explanation for why they and most of their colleagues have been unable to keep up with developments in the law. If they barely have time to keep up with their day-to-day workload, training and continuous professional development is unlikely to be among their priorities. On the other hand, the fact that our intended audience is so busy must be taken into account for when we are developing the training that we will be delivering to them: what type of training, and modes of delivery must we

Table 1: Number of focus groups, focus groups participants and interviewees

	Number of focus groups	Number of focus group participants	Number of interviewees
Bulgaria	2	8	8
Cyprus	2	12	6
Greece	2	10	6
Italy	2	14	10
Malta	3	14	6
Netherlands	2	12	6
<b>Total</b>	<b>13</b>	<b>70</b>	<b>42</b>

adopt in order to ensure that the information we want to convey reaches out target audience in the most efficient way possible? What should be the duration and focus of these trainings? These are questions that we return to in the last section of the comparative report.

## 6. Common themes from the different national reports

The different national reports point to distinct challenges or good practices that exist in each of the countries that participated in the research. However, several common themes or conclusions arose from a comparison of the six reports. Three are discussed in more detail here.

### *(a) The implementation of the EU anti-racism legal framework*

The initial hypothesis before conducting in-depth research in the different countries was that the wording of the EU Directives provided sufficient protection to the victims and that these protections had been adequately implemented in national laws. If there were any problems with the protection of vulnerable groups therefore, this must have been the result of the problematic application of the law in the respective Member States. This hypothesis has been partly proven to be correct; at the same time however, the picture is also somewhat more nuanced. On the one hand, the provisions of the two Directives go a long way towards providing a comprehensive protection of victims' rights. While some criticism can be made of specific cases decided by the Court of Justice of the EU, by and large, the letter of the law is satisfactory. In fact, so extensive are the protections of the law that one interviewee described them as 'the ideal', something that lawyers can only aspire to

in real life situations.

At the same time, on paper and at a fairly superficial level, the six countries have taken steps to transpose the two Directives in their national legislation. They have all adopted or amended legislation that adds to the protection of these groups' rights and there are no infringement proceedings by the European Commission against any of them. Nevertheless, Cyprus, Malta and Greece faced delays – sometimes year-long delays – in the implementation of the Directives. In addition to these, the research revealed issues in the substantive transposition of the Directives. For example, while the two Directives have been implemented in Malta, this has been done in a fragmented way, with the relevant protections being scattered in a range of primary and secondary domestic laws. Most problematic in this respect is the fact that the scope of the Racial Equality Directive is being transposed through three Acts that are not equal in the protections they are offering. Italy and Cyprus also face problems in the implementation of the two Directives, although these are, admittedly smaller ones. For instance, in Italy, the EU anti-racism legal framework has been transposed in a manner that is, by and large, faithful to the intentions of the Directives and appropriate to the national regulatory context. However, issues remain, for example, the fact that racial discrimination itself is not criminalised under the Italian legal system. Similarly, while Cyprus has largely implemented the Victims' Rights Directive, domestic legislation makes no reference to restorative justice measures, which are a key part of the protections it provides.



***The research revealed issues in the substantive transposition of the Directives.***



These gaps in the implementation of the EU anti-racism legal framework are especially problematic in situations where the lawyers and judges tend to only look at the implementing national legislation, instead of also being familiar with the EU Directives that the national law gives effect to (this is, for instance, the case in both Greece and

Bulgaria). A final problem in the implementation of EU Law concerns the fact that research from some countries has reported that law-makers merely copy verbatim the provisions of the relevant Directive into domestic law, without ensuring that there is an institutional framework in place that will make possible the Law's application in practice. The Bulgarian case offers an example of this. While the law clearly states that victim support will be provided, the country lacks a generic victim support entity. Instead, it has come to rely on NGOs that provide this support, which creates several problems in practice, such as the fact that support is available for victims of certain crimes



but not others (it is available for victims of human trafficking and domestic violence, but not for victims of sexual violence more generally) and only in certain geographic regions of the country.<sup>36</sup> While the unavailability of institutions to implement provisions of domestic legislation, an issue that was also raised by participants in the Maltese focus groups, provides a good explanation for the disparity between the letter of the law and the situation on the ground, it has not been flagged up as a problem in many jurisdictions. For instance, participants in focus groups in Greece did acknowledge that this is the verbatim copying of the law ‘standard practice’ adopted in Greece but they did not perceive this to be a problem in any way.

### ***(b) Structural problems hindering the application of the EU anti-racism legal framework***

Even in situations where the Directives were properly implemented – which were the majority of cases – members of the groups that the law was intended to protect remained unlikely to make use of relevant provisions due to a number of structural problems. PRESERVERE and the emphasis it places on training of legal professionals will not be able to address these. After all, imparting information on judges, lawyers or frontline workers cannot be a substitute for structural or social reforms. Nevertheless, we must still be aware of these structural problems if we are to have a complete picture of why the EU anti-racism legal framework has been less effective in practice than anticipated. Four insights stand out and are worth discussing more fully.

The first insight concerns the fact that social perceptions and the legal culture of each country shape the extent to which a law is applied successfully in practice. Three examples – one from Malta and two from Cyprus – can be used to illustrate this point. The Maltese country report, in Chapter 8, uses recent statistics to show the prevalence of racist perceptions among society; such perceptions have undoubtedly partly been shaped by the high number of irregular migrants and asylum seekers that arrive on the island on a daily basis. Thus, it points out that four in 10 Maltese persons would feel uncomfortable, if their child’s partner was Roma and 35 percent would feel the same, if their child’s partner was Muslim.<sup>37</sup> It is not unlikely that at least some lawyers and judges share such racist perceptions. Thus, one possible explanation for the minimal use of the Directives in Maltese courts is that key stakeholders do not consider racism to be a problem that affects them personally, and therefore, they are not willing to prioritise taking actions against it.

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<sup>36</sup> Dilia Markova and Donka Petrova, ‘Review and Analysis of the Bulgarian National Legal Framework on the Rights and Protection of Victims of Crime and its Application: Contributing to an Effective Implementation of Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’ (17 May 2018, Animus Association Foundation, Bulgaria), available at [https://www.supportvoc.eu/wp-content/uploads/2019/03/National\\_Report-Bulgaria\\_EN.pdf](https://www.supportvoc.eu/wp-content/uploads/2019/03/National_Report-Bulgaria_EN.pdf).

<sup>37</sup> The Special Eurobarometer (2019) <Discrimination in the European Union - Malta> accessed 9 June 2022, p. 2.

Cyprus offers two examples of how the legal culture of a country can have an impact on the successful application of the law. Adopting a more historical methodological approach, the Cyprus country report in Chapter 5, notes that the Cypriot legal system has traditionally focused more on retribution, rather than prevention and protection. Therefore, the Victims' Rights Directive's emphasis on the latter often clashes with the prevailing legal culture and is, ultimately, ignored (this could provide an explanation, for instance, on why the Directive's provisions on restorative justice have not been transposed in national legislation). Similarly, the Cypriot legal system has prioritised international over EU law – this is reflected both in the fact that international law is supreme over domestic law, and that Chapter 2 of the Constitution ('The Bill of Rights') uses the same language as the European Convention on Human Rights. As a result, EU law tends to be used to a far lesser extent in court than its international counterpart.

The second insight concerns the victims, who are the intended beneficiaries of the EU anti-racism legal framework. Often, these individuals come from the most vulnerable communities within the country and/or are themselves irregular migrants. This creates problems in the effective application of the Directives because victims are unable to approach the authorities and report discriminatory conduct because they are afraid that this will result in problems for them, including their immediate deportation. While this concern is most acute among irregular migrants who are actively avoiding any contact with the authorities, it is a consideration shared even by those who are lawfully residing in the country. Thus, in the aftermath of the arrest of a serial killer who was targeting migrant women in Cyprus in 2019, a sample of 150 foreign domestic workers were asked whether they would contact the authorities if they were the victims of sexual or physical violence. Jarringly, three in four replied that they would not.<sup>38</sup>

Even if victims did not distrust the authorities, there are still significant hurdles that would discourage them from reporting and following through their complaint of discrimination. Key among these are the fact that they might not speak the language, are unaware of their rights, and remain uninformed about who they should contact in case they want to complain. Finally, since legal aid is often unavailable to the victims, at least in some of the countries under examination, their financially precarious situation makes it impossible for them to pursue their claims. This is despite the fact that Article 13 of the Victims' Rights Directive expressly provides that 'Member States shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings.'

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<sup>38</sup> Nasia Hadjigeorgiou and the Ombudsman of the Republic of Cyprus, *The Status of Foreign Domestic Workers in Cyprus* (December 2020), p. 24, available at [http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/2358C433C1A0F629C2258646002B79DA/\\$file/Domestic%20workers%20.pdf?OpenElement](http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/2358C433C1A0F629C2258646002B79DA/$file/Domestic%20workers%20.pdf?OpenElement)

The third insight concerns the impact of delays in court proceedings in countries like Italy, Malta and Cyprus. If the adjudication of a case is going to take several years, victims might reasonably think that it is best to forget about the injustice they suffered and move on, rather than become embroiled in a never-ending, potentially expensive legal dispute. The final insight relating to structural problems that undermine the effective application of the law concerns complaints from frontline workers in several countries that national bodies or non-government organisations dealing with anti-discrimination are underfunded. Such complaints have even been made in countries, like the Netherlands, that are generally believed to place a high priority on the protection of human rights and EU Law. The impact of underfunded anti-discrimination institutions is two-fold: on the one hand, it might lead to decisions to turn down victims they should have helped because they do not have the resources to take them on. On the other hand, the training needs of the staff in these bodies will be further deprioritised, as receiving training is costly, both financially (hiring trainers, developing the relevant courses etc) and in terms of the hours spent to learn something new.

***(c) Lack of knowledge among legal professionals and frontline workers about the EU anti-racism legal framework***

For the purposes of PRESERVE, the most relevant insight from the research is the widespread acknowledgement of those who are expected to make use of the two Directives that they are not adequately familiar with their provisions. This was clear across the board with lawyers, legal professionals and employees of equality bodies, all of whom noted the need for further training.

“ ***It was reported that lawyers only know about the EU anti-racism legal framework in extremely general terms, or not at all.*** ”

The different country reports show a clear recognition among legal professionals that they are not familiar with the two Directives, and especially the Victims' Rights Directive. Thus, it was reported that lawyers only know about the EU anti-racism legal framework in extremely

general terms, or not at all. Perhaps this was most striking in Cyprus, where one interviewee noted that they had interactions with legal officers who raised basic questions on the general applicability of EU Directives in national courts. The problem of lack of knowledge was even more prevalent among frontline workers (labour inspectors, police officers etc), who were sometimes not aware at all of the existence of such Directives. The most knowledgeable of the two Directives in all countries were those employed in equality bodies. Nevertheless, even they pointed to the need for further training, as this can provide relevant institutions with knowledge, and result in better quality publications and decisions. In turn, an improvement in the quality of such outputs can also have a positive effect on the decisions of the Courts, even if equality bodies do not have

standing to unilaterally intervene in individual cases. Relevant here is the fact that, according to Article 7(2) the Race Relations Directive, equality bodies should have standing in legal proceedings, even though this provision has not been implemented in all countries (e.g. Cyprus does not allow for this; the Dutch law does allow for it, but the provision is rarely used in practice).<sup>39</sup>

## 7. Case analysis

The preceding analysis provides a more complete explanation for why the EU anti-racism legal framework has not had the expected impact in fighting discrimination on the ground. It suggests that this is not due to a single factor; rather, three explanations stand out: (a) the Directives have not always been faithfully transposed in national legislation; (b) there are several structural problems that make it less likely that victims will resort to the law and that they will do so successfully; and (c) those who are expected to make use of the Directives, such as lawyers and frontline workers, often lack basic knowledge about their provisions, or even existence. The practical impact of these problems in each country is discussed in more detail in the chapters that follow, but this section provides a comparative overview of the extent to which the legal framework has actually been used by the courts in practice. The picture is a relatively bleak one.

The case analysis that took place in the six countries concerned the period between 2016 and 2021. In the years between 2016 and 2021, Maltese courts heard six relevant cases – all dealing with hate speech – yet, in none of these did the judiciary rely on either of the two Directives. In Greece, four relevant cases were identified: three had to do with hate speech and one concerned discrimination in the provision of social services. Two of the cases (both relating to hate speech) had been decided by the Areopagus, the Supreme Court of the country. None of the four cases mentioned either of the Directives, although in some, references had been made to the relevant national laws that transposed these. Italy and Cyprus show a somewhat more promising record. Thus, in Italy, eight representative leading cases dealing with discrimination in a range of different settings (hate speech, discrimination in the sphere of employment, and discrimination in the provision of public services) were identified. Applicants sought to rely on the Racial Equality Directive in five of them and the Court referred to the Directive in two of them. Applicants tried to rely on the Victims' Rights Directive in three cases; the Court did not refer to the Directive in any of these cases, but it did find that discrimination had taken place in all of them.

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<sup>39</sup> Article 7(2) of the Race Relations Directive provides that 'Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, *either on behalf or in support of the complainant*, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.' (emphasis added)

Finally, in Cyprus, nine cases in which lawyers and courts relied on one of the two Directives were identified; the finding was one of no discrimination in eight of them. Additionally, there were 11 relevant interventions from the Ombudsman, some of which were directly related to themes covered in the Directives (they concerned, for example, complaints relating to hate speech or to discrimination in the provision of social services). Yet, the Directives were not mentioned in 10 of the Ombudsman's interventions, which lends support to the conclusion that training those employed by national equality bodies, who are in principle the most knowledgeable of the Directives, is likely to have a positive impact on the practical application of the EU anti-racism legal framework.

## 8. Lessons about training needs in different Member States

The analysis so far suggests that while training legal professionals and frontline workers is unlikely to solve the poor application of the EU anti-racism legal framework on its own, it can have an important and positive impact. This is something that was clear to the drafters of the Victims' Rights Directive itself, which includes specific provisions on the training of practitioners. Thus, Article 25(1) of the Directive states that

Member States shall ensure that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.

A similar provision is included in Article 25(2) with regards to judges and prosecutors, in Article 25(3) in respect to lawyers, and in Article 25(4) in relation to those providing victim support and restorative services. Nevertheless, *how* this training is provided will have an impact on the number and type of individuals it is likely to attract and the amount and type of knowledge they will be able to gain from it.

“***The interviews and focus groups were useful in this respect because they provided us with a series of guidelines.***”

The interviews and focus groups implemented as part of the research methodology were useful in this respect because they provided us with a series of guidelines for the most efficient planning of the trainings. These guidelines are, of course, important for PRESERVE, but could serve as useful tools in other projects that are planning similar types of trainings. The research we conducted resulted in the following conclusions: First, bar associations and other relevant professional bodies must be

utilised in order to inform their members of the trainings that will be provided. This will not only help with the visibility and dissemination of the trainings, but also the organisations' endorsement will provide the trainings with additional credibility. If there is a way in each country to provide some professional acknowledgement that individuals have undertaken the training (for example, in the form of continuous professional development credits), this is something that partners should pursue.

Second, while *ad hoc* training sessions are valuable, what would add to the sustainability of the project and the impact of the training to a greater extent is their integration in existing training schemes offered by already established bodies. The two Cyprus-specific examples that follow could be amended to fit the needs of other partner countries (e.g. in Bulgaria, where similar problems have been identified). First, all law graduates who wish to qualify as Advocates in the Republic of Cyprus must attend state-mandated classes over a period of 12 months and sit 10 subject-specific exams to prove their satisfactory knowledge of Cyprus law. None of the 10 exams focuses on EU Law – which is in itself a problem and an indication of the weight the profession pays to the *acquis communautaire* – but one is concerned with the Constitution of the Republic of Cyprus. Since according to Article 1A of the Constitution, EU Law is supreme over all laws of the Republic of Cyprus, including all constitutional provisions, the training that will be developed could become part of this course. This will ensure that all new lawyers in the Republic will have at least some knowledge of the Directives. The second way in which training could be integrated in existing structures and training programmes in Cyprus is if it becomes part of the regular trainings provided to police officers by the Cyprus Police Academy. The Academy provides classes in 'Law' and 'Human Rights', thus allowing ample room in which (part of) this training could be incorporated.

The third insight from the empirical research concerns the fact that, in almost all of the countries where research was conducted, the intended audience of the trainings, and lawyers, in particular, stated that they were too busy to participate in the focus groups and interviews. This is a hurdle that we might be asked to overcome when delivering the trainings as well. While the intended audience might, in principle, be interested in finding out more about the EU anti-racism legal framework, in practice, they might be reluctant to participate because of their overloaded schedule. This is something that should be considered when planning the trainings. Possible solutions include offering the option of attending only parts of the training, or supplementing the training itself with continuous digital access to training materials that could be accessed at a time that is more convenient for each individual trainee.

Two other insights must be taken into account when planning for the trainings. On the one hand, training should be tailored to its recipients. Lawyers and frontline workers might be working on similar themes, but they are likely to be faced with different challenges and their respective trainings should reflect this. While, for instance, frontline workers would like to acquire a more all-rounded knowledge of the rights that are protected under the Directives, lawyers would be

more interested in greater analysis of case law and other documents they could use in court. On the other hand, it was a unanimous request of interviewees and focus group participants in the different countries that the trainings should provide specific, practical help in the form of real-life scenarios. General training on the legislation is welcome, it was often stated, but this should always be supplemented by case studies.