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Gender, Anti-discrimination and Diversity: The EU’s Role in Promoting Equality

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7.1 Introduction

The European Union has developed a substantial framework to promote equality, address discrimination, and manage diversity. Over the course of six decades of EU integration, the Union has integrated equality across the Union’s policies through multiple pillars combining ‘hard’ and ‘soft’ law; funding for positive action programmes; a set of policy instruments that contribute to social cohesion, anti-discrimination and equal opportunities; and by creating spaces for mobilisation, exchange of good practices, mutual learning and cooperation. What has driven the EU equality framework and its approach to gender mainstreaming? What
are its limitations? How have the concepts of discrimination, diversity and equity framed the EU’s framework?

This chapter first traces the development of the Union’s legal framework. It has evolved from the original common market driven basis to the current context, which aims to combat social exclusion and discrimination, and promote well-being, sustainable development, social progress and cohesion. It then presents an overview of the EU toolbox that has been developed to: (a) promote gender equality in the labour market and beyond, (b) address various forms of discriminations; (c) identify and tackle inter-related forms of inequality and social exclusion.

Beyond attempting to simply steer Member States towards a common approach to equality, the EU institutions have taken a prescriptive approach aimed at promoting fair treatment and non-discrimination, and have purposefully steered policies, funding and investment towards strengthening equality of opportunities.

### 7.2 The Legal Basis of Equality, Non-discrimination and Diversity

The concepts of equality and non-discrimination draw on the constitutional traditions of Member States, the fundamental international law principle of the equality of sovereign states, and human rights law, in particular the European Convention on Human Rights (ECHR). Over the past six decades, a range of equality and anti-discrimination legislation have put equality of treatment in economic and social contexts into practice. As the competences and scope of the European Economic Community/European Union widened and deepened, particularly since the Treaties of Amsterdam and Lisbon, the EU developed progressive equality and fundamental rights standards, and initiated new mechanisms for the protection of these standards.

Equality and the principle of non-discrimination are expressly mentioned in several EC Treaty provisions. Articles 2 and 3(3) of the Treaty on the European Union (TEU) promote equality between men and women, and prohibit discrimination based on any ground such as
sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. This is also duly enshrined in Article 21 of the Charter of Fundamental Rights.\(^4\) The principle of equality before the law (Article 20 of the Charter of Fundamental Rights) is included in all European constitutions and has been recognised by the Court of Justice of the European Union (CJEU, formerly ECJ) as a basic principle of Community law.\(^5\)

A considerable body of secondary legislation has further supplemented these provisions. Non-discrimination, or equal treatment, on grounds of nationality have served as a ‘market unifier’ for the single market, underpinning many aspects of the free movement of goods, services, persons and capital (Moore, 1999). It has been applied to address discrimination between producers and consumers in the context of the Common Agricultural Policy; between workers or self-employed who are nationals of the host state and those who are nationals of another Member State; and to ensure equal treatment for providers of services between nationals and non-nationals. While initially, equality and non-discrimination were primarily a means of securing market integration, they gradually became a method to deliver social policies (McCrudden & Prechal, 2009), particularly in the field of gender equality.

As regards the concept of diversity, it too sits at the very foundation of the EU, though it is defined largely as a counterpoint to uniformity, rather than as a complement to equality (Shaw, 2005). Expressed most widely in the motto ‘United in Diversity’ that was devised in 2000 to symbolise the value of diversity in terms of ‘richness’ of cultures, traditions and languages, it aims to ‘celebrate’, respect and promote the constituent diversity of the Union. In practical terms, the creation of the single market is essentially about managing the diversity across the Member States in relation to regulation, customs and habits of production and consumption, and establishing common standards for the operation of markets. Diversity is explicitly recognised in the TFEU, specifically with a view to its protection and preservation. Tellingly, Article 165 (ex Article 149 TEC) states that the Union shall contribute to the development of quality education, while fully respecting the responsibility of the Member States for the content of teaching and
the organisation of education systems and their cultural and linguistic diversity. And, Article 167 (ex Article 151 TEC) calls on the Union to contribute to the ‘flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore’.

Over the course of the past six decades of European integration, the EU equality legal framework has broadened widely, though it has developed unevenly, differentiating among axes of inequality as to the scope and the level of protection. Gender equality has been promoted in the EU mainly through the strategy of equal opportunities and through positive or affirmative actions and gender mainstreaming, as well as on the basis of prohibition of discrimination. Other fields of inequality, such as religion, belief, sexual orientation, race, disability and age, have been mostly addressed from an anti-discrimination approach. The recognition and identification of occurrences of multiple discriminations as well as the need to combat them as such has been underlined since 2007 (European Commission, 2007), though it has not resulted in an institutionalisation of an intersectional approach to inequalities (Kantola & Nousiainen, 2009; Lombardo & Verloo, 2009).

These EU legislative actions, policies and judicial decisions have created new political opportunity structures in the field of equality and non-discrimination. Social movement scholars have long argued that policy changes or new legislation can lead to the creation of new policy access points and mobilising opportunities for individuals or groups, including for those who are often disadvantaged in their own legal systems. They also provide an institutionalised public sphere, the necessary ‘social space’ to facilitate policy discussions that were not previously possible or available to a particular interest or group. They provide a common language and common narrative that contributes to shifting the needle on ambitions, expectations and mindsets. This has indeed been the case for organisations active in the promotion of women’s rights, as well as migrant or minority rights, who mobilised around the EU policy process and within the EU institutions since the 1970s to advance more progressive and socially inclusive agendas, both domestically and at EU level.

As the next sections argue, a dynamic process of litigation, legislation, mobilisation and social learning between the EU and national levels
and among Member States has shaped this reality. The landscape of EU legal and political opportunities, such as ECJ case law, legislation, Commission- and European Parliament-sponsored networks, equality and fundamental rights agencies, as well as networks of experts have increased formal access, and created new social spaces for groups and individuals mobilising around equality rights and anti-discrimination at the European level. This landscape has influenced the rules and procedures governing equality and non-discrimination, including in areas where national governments were hesitant.

7.3 A Strong Focus on Gender Equality

The EU’s gender equality policy has evolved along three dimensions: anti-discrimination law, positive action and gender mainstreaming. Anti-discrimination law aims to ensure equal treatment of women in relation to the male norm. Positive action measures aim to encourage state, public or private actors to correct the initial disadvantage of women and may mean the application of a compensatory measure to favour, in cases of equal merit, a woman over a man. As for gender mainstreaming, it goes further in that it focuses on systems and structures that give rise to group disadvantage. Though not very vigorously monitored, it looks to consider gender in all policy fields and legislation (Krizsan, Skjeie, & Squire, 2012).

Through these approaches, the EU has played a major role in putting gender equality on the policy-making agendas across Europe, and in normalising the inclusion of gender equality principles in policy discussions both within the EU and in relations with third countries. It has provided a catalyst to reform for countries applying for EU membership. Indeed, for the southern European countries and the Member States that joined from 2004 onwards, the EU’s gender equality framework has been part of the acquis communautaire they have had to meet (Fagan & Rubery, 2018). And, it has provided a space for transnational organisations in the social field to coalesce and coordinate so as to raise
awareness and fuel legal mobilisations aimed at furthering the equality and anti-discrimination agenda (Cichowski, 2013).

The 1957 Treaty establishing the European Economic Community (EEC), included only one provision to combat gender discrimination, namely the principle of equal pay between men and women for equal work (Article 119 EEC Treaty). The motivation behind this provision was economic as certain Member States (France in particular) had provisions on equal pay between men and women in their national legislation, and wanted to ensure that there would not be distortions in competition based on cheaper female labour from those Member States that had not yet put in place similar provisions.

Gradually, however, gender equality took the form of a more wide-ranging equal treatment principle applying to all aspects of employment and training, and most aspects of welfare (Shaw, 2005). In the mid-1970s, two directives on equal pay (Directive 75/117/EEC) and on equal treatment for men and women in employment, vocational training and promotion, and working conditions (Directive 76/207/EEC) provided the cornerstone of the subsequent EU gender equality policy.

In 1976, the Court of Justice ruled that Article 119 EEC did not only have an economic purpose, but also a social aim and contributed to social progress and the improvement of living and working conditions. Based on the landmark Defrenne decisions, women throughout Europe were able to bring discrimination claims before national courts (Cichowski, 2013). Since then, through a number of important decisions delivered by the CJEU which recognise gender equality as a ‘fundamental principle’ of the Union legal order, and a set of legislative provisions addressing gender inequality, a legal framework for women’s equality in employment and working conditions more generally, has been put in place. This includes pay, employment conditions such as hiring, promotions and dismissals, as well as rights of pregnant women and parental leave, sexual harassment and women’s representation. Through ECJ precedent and EU legislative action, the rules and procedures that served as opportunities for sex discrimination claims increased in both formality and magnitude.
Gender equality policy is probably the most developed dimension to the EU’s social dimension largely because relevant legislation—social security (Directive 79/7/EEC); pregnancy and motherhood (Directive 92/85/EEC); parental leave (Directive 96/34/EC)—was passed under mechanisms that permitted qualified majority voting or through the social chapter of the Maastricht treaty, to which the UK had an opt out. In addition, specific policy units dealing with women’s rights were gradually established within the European Commission, which in turn also began to provide greater inclusion of gender equality claims throughout the EU policy-making process.

During the 1980s, even though social issues did not occupy the front stage in the EEC/EU as attention was focused on the completion of the single market, the political landscape around the EU institutions changed with the establishment of grassroots women’s organisations whose objectives and claims moved far beyond formal equality. They began forging the path for substantive equality measures by focusing their claims on positive action programmes, such as vocational training and education opportunities for women (Cichowski, 2013).

The Treaty of Amsterdam (1999), gave an integrated constitutional basis to gender equality perspectives in EU policy-making through Article 3(2) EC (Shaw, 2005). It is expressed in Article 8 of the TFEU (ex Article 3(2) TEC), which states that in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women. It introduced a legal basis for the adoption of measures combating discrimination on grounds of sex, racial or ethnic origin, age, disability, religion and sexual orientation. Important directives have since been enacted on the basis of this provision to prohibit discrimination on grounds of racial and ethnic origin, age, disability, religion and sexual orientation, as well as gender in fields outside employment (Article 13 EC) (Shaw, 2005). The Charter of Fundamental Rights, agreed on a declaratory basis in 2000, also contains a range of equality principles, from a formal principle of (individual) equality before the law, to more pro-active principles seeking to promote substantive equality in areas such as gender and disability.
With the entry into force of the Treaty of Amsterdam, the promotion of equality between men and women throughout the European Community became one of the essential tasks of the Community (Burri, 2018). The Lisbon Treaty reinforced the status of the gender equality principle as a common value of the EU. Article 2 TEU states that ‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. According to Article 3(3) TEU, one of the aims of the EU is to ‘combat social exclusion and discrimination, and (…) promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child’. In addition, Article 8 TFEU stipulates that ‘in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women’. Thus, ‘positive action’ measures are allowed. As stated in Article 157(4) TFEU: ‘With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers’. These positive action provisions, allow measures designed to eliminate or counteract the prejudicial effects on women in employment or seeking employment, which arise from existing attitudes, behaviours and structures based on the idea of a traditional division of roles in society between men and women. The measures (such as targets or quotas) have aimed to encourage the participation of women in various occupations in those sectors of working life where they have been under-represented, for instance in company boardrooms or in science.

In the mid-1990s, two developments served as a tool for promoting gender equality; both driven by the positive contribution of Sweden and Finland that had strong equality traditions and which acceded to the EU in 1995. The first was the Commission’s commitment to gender mainstreaming in 1996; the second was the launch of the European Employment Strategy (EES) in 1997, which introduced the open
method of coordination (OMC). By including equal opportunities as one of four pillars of the EES rather than as a separate strategy, it received the necessary political support from the heads of state and government, and by 1998, a gender mainstreaming requirement was included for all EES policies (Rubery, 2002).

Mainstreaming is based on the principle that equality ought to be an integral part of all public policy-making and implementation, rather a separate policy or ‘institutional ghetto’ (McCruden, 2001; Shaw, 2005). The EU was both an active advocate of gender mainstreaming in the UN Platform for Action agreed at Beijing in 1995, and also an early adopter (Fagan & Rubery, 2018).

Mainstreaming was adopted by the EU to ‘promote equality between men and women in all activities and policies at all levels’ (COM 96, 67 final) aiming to (re)organise, improve, develop and evaluate policy processes, so that a gender equality perspective is incorporated into all policies at all levels and all stages, by the actors normally involved in policy-making. A gender equality focus was thus included in the evaluation criteria for the European social funds, thereby creating financial incentives to engage in promoting gender equality for those countries in receipt of these significant resources. Similarly, it is embedded in the assessment criteria for the competitive allocation of the EU research framework funding, in the design of research programmes and in the associated programme to promote gender balance in science. These legal and policy innovations expanded EU gender equality laws, thereby creating new opportunities for mobilization and litigation for women’s rights issues. This space was widened further through the strengthened role of the European Parliament (EP) in the policy processes (Cichowski, 2013).

A gender perspective has thus been applied to all Community policies irrespective of EU competence in a matter—whether exclusive, shared or complementary, whether in ‘hard’ legislation or ‘soft’ governance, or whether it is an internal or external policy, i.e. in trade agreements and international development cooperation (Shaw, 2005; SWD, 2015, p. 182). It has also led to a systematic collection, analysis and monitoring of gender disaggregated data which informs the policy process.
and debates in wider policy forums. The availability of gender disaggregated harmonised European datasets has fostered significant comparative research and opportunities to share good practices through observatories, mutual learning events and the processes of regular scrutiny and benchmarking of the OMC. In 2006, this was strengthened with the establishment of the European Institute for Gender Equality (EIGE) whose role has been to raise EU citizens’ awareness of gender equality by providing technical assistance to the Community institutions, in particular the Commission, and the authorities of the Member States. 10

The application of gender mainstreaming in the EES, has rendered the increase of women’s integration in the labour market into a standard employment policy objective, recognised to bring economic benefits to all economies, even more so to economies with an ageing population. Female unemployment rates are thus monitored and reported on by Eurostat, as are targets for women’s employment and representation. In addition, employment policy has widened to include care services, and there has been a drive towards more public provision of childcare across the EU member states (Fagan & Rubery, 2018). Just as importantly, it provided a new European social space to discuss the diversity of women’s rights and the very different sets of challenges that women face (from gender stereotypes, to domestic violence, or trafficking), as well as a space for women’s issues in EU politics (Cichowski, 2013).

There are concerns, nonetheless, that gender mainstreaming practices at the EU level, and their results at Member State level, have been incomplete, and have come at the expense of taking specific measures which focus on long-term, systemic and structural inequalities faced by women, particularly as regards their participation in the labour market (Chiva, 2009; Smith & Villa, 2010). Concerns have also been expressed as regards the meaning of ‘reconciliation of working and family life’ which has gradually shifted from an objective with feminist potential, i.e. ‘sharing family responsibilities between women and men’, to a market-oriented objective legitimising the promotion of flexible forms of employment, in line with the EU’s prevailing political and economic priorities (Stratigaki, 2004). Similarly, Directives on the prevention and fight against human trafficking and the protection of
victims (2011/36/EU), and on minimum rights, support and protection for victims of crime, including victims of human trafficking and networks of forced prostitution (2012/29/EU) are treated from the perspective of transnational organised crime and irregular immigration, without taking into consideration the angle of gender and male domination (Jacquot, 2017). Gender equality scholars have lamented that gender visibility had already waned before the financial crisis, and that it was absent in the austerity programmes that were drawn up in response to the crisis (Fagan & Rubery, 2018; Rubery, 2015). Indeed, over the past two decades, although gender equality is considered a major axis in all EU programmes and policies, the fact that budget lines specifically dedicated to gender equality have disappeared has led to a reduction of the gender equality-specific budget and of the visibility of public problems linked to gender inequalities. During the crisis, the budgetary instruments for gender equality were undermined further, the coordination instruments and gender mainstreaming were significantly weakened, and legislating was difficult due to the tensions resulting from austerity (Jacquot, 2017). In short, gender mainstreaming is considered to have had only limited impact on the transformation of gender relations and the nature and degree of inequalities between men and women, and was unable to counter-balance the diverse legislative and budgetary cutbacks that occurred since the mid-2000s.

However, the pursuit of the gender equality agenda has not been limited to mainstreaming (and its own limitations). Gender specific research has been pursued by the European Foundation for the Improvement of Living and Working Conditions (Eurofound) on pay transparency in Europe, women in management, funding of female entrepreneurship, and gender equality at work. And, EIGE’s work has led to a renewed focus on gender equality, notably through its database on women in decision-making, which has supported the push for more female representation on corporate boards.

During the Presidency of Jean-Claude Juncker (2015–2019), gender equality was restated as a fundamental principle of the European Pillar of Social Rights that was proclaimed by the European Parliament, the Council and the European Commission at the Social Summit for Fair
Jobs and Growth in Gothenburg in November 2017 aimed at creating more inclusive labour markets and reducing precarious work. Articulated in Principle 2 of the Pillar’s Chapter I on Equal opportunities and access to the labour market: ‘Equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression. Women and men have the right to equal pay for work of equal value.’ The Juncker Commission’s renewed emphasis on gender equality against a background of rapidly changing labour markets due to digitization and the EU’s intensifying demographic challenges provided the impetus to launch an initiative to support work–life balance. In June 2019, the Council adopted a new Directive on work–life balance for parents and carers aiming to increase women’s participation in the labour market and outlining a number of new or improved minimum standards for parental, paternity and carer’s leave, as well as flexible working arrangements, so as to also increase men’s take-up of these (Directive (EU) 2019/1158).

The renewed attention to gender was taken up in the political guidelines of Ursula von der Leyen. In her agenda for a ‘Union that Strives for More’, she declared a ‘Union of Equality’ to be one of her political priorities as President of the European Commission as a ‘prosperous and social Europe depends on us all. We need equality for all and equality in all of its senses’ (von der Leyen, 2019), and appointed a Commissioner for Equality. In March 2020, the Commission launched a new Gender Equality Strategy 2020–2025 guided by the vision of ‘a Europe where women and men are free to pursue their chosen path in life, where they have equal opportunities to thrive, and where they can equally participate in and lead our European society’. The main areas it addresses include pay transparency and the gender pay gap; gender balance on company boards; work–life balance; gender issues related to climate change and artificial intelligence; and violence against women (COM/2020/152). A Task-Force on Equality has also been set up within the Commission to renew gender mainstreaming in all EU initiatives, particularly in view of the climate and digital transformations, and with the aim to ensure that the Gender Equality Strategy objectives are also reflected in EU’s
actions around the world, promoting women empowerment and tackling gender-based violence.

7.4 Combatting Discrimination and Racism

EU anti-discrimination law is ‘status based’, in other words, it focuses on groups that are considered in need of specific protection. Discrimination is defined as detrimental treatment on a certain prohibited ground, compared with another person or group in a similar situation.

The EU’s equality and non-discrimination frameworks have developed organically through the mutual interaction between the national courts and the CJEU (and even the European Court of Human Rights, though it is not a court of the European Union), the European Parliament, the European Commission and the governments of the Member States. This mutual influence has contributed to the development of the legal concepts of direct and indirect discrimination and has pushed for a substantive interpretation of the core values of equality and fundamental rights to promote equality and justice in plural societies (de Schutter, 2006; Koppelman, 1996; Sabbagh, 2007). Legislative acts, mainly in the form of directives requiring transposition into the national laws of the member states, and funding programmes in support of initiatives and projects promoting equality, have affected and shaped national anti-discrimination policies—particularly in the case of southern and more recent EU Member States.

This legal apparatus has also shaped the way more vulnerable populations, represented by associations, interest groups or individuals, have been able to protest against discrimination; gain protection and recognition; and in some cases, obtain compensation because they have been the victims of unequal treatment based on their race, ethnic origin, gender, religion, sexual orientation or disability. Discrimination has been considered as one of the major policy paradigms that emerged throughout the Europeanisation process (Geddes & Guiraudon, 2004, 2007). Since the 1970s in particular, official policies in Europe have shifted towards a pluralist approach, in which the goal of integration is represented by the promotion of equal opportunity coupled with the recognition of cultural
diversity in an atmosphere of mutual tolerance between the majority societies and the minority communities (Dunnzlaff et al., 2010; Amiraux & Guiraudon, 2010).

As migration to all EU Member States by people from other parts of the world intensified after the end of the Cold War era, policy responses were required to meet the needs of immigrant minorities within their borders and clarify which economic, social, cultural or political rights were to be conferred upon them (Triandafylliou & Gropas, 2009). Together with the integration of the single market and the free movement of people, debates on measures needed to address racism, xenophobia, anti-Semitism as well as religious discrimination, moved to the EU level and intensified throughout the 1980s, particularly on the part of the European Parliament. In the following decade, advocacy efforts against discrimination on grounds such as disability, sexual orientation and age burgeoned.

As a result, the 1990s were a period of prominent anti-racism policies and a shift ‘from gender to diversity’ in EU equality policies (Krizsan et al., 2012). The wider background of the Stephen Lawrence inquiry in the UK and the entry of Jorg Haider’s far-right Freedom party into the Austrian governing coalition in 2000, provided the impetus for legislation to go beyond discrimination based on nationality or gender in the field of employment, which had been the main grounds covered hitherto (Farkas, 2017). The fight against racism and xenophobia featured consistently in the Presidency Conclusions issued at the end of each European Council meeting; and, the human rights and anti-discrimination legal provisions were strengthened. Article 13 EC of the Treaty of Amsterdam (1996) applied to six different grounds of discrimination—sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. The EU Charter of Fundamental Rights (2000), Article 21 (1) contained a list of seventeen grounds (sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation) of prohibited discrimination, while Article 14 of the European Convention on Human Rights, though open-ended, also included a wide list of grounds where discrimination is prohibited. In addition, 1997 was designated as European Year Against Racism
followed by the adoption of the 1998 Action Plan against Racism and a wider effort to mainstream anti-racism policy.

The EU’s anti-discrimination framework has addressed both direct and indirect forms of discrimination (see Table 7.1). For instance, a range of provisions have been put in place to protect against specific forms of discrimination such as age discrimination in employment and occupation, sexual orientation and gender identity, and measures aimed at fighting all forms of discrimination and stereotypes, racism and xenophobia, particularly against historic ethnic communities like the Roma population. In parallel, the concept of indirect discrimination has been developed by the CJEU as a step towards a more substantive approach to equality, because it focuses on the effect of a rule or a practice and takes into account everyday social realities. Indirect discrimination recognises that apparently neutral laws and practices disadvantage persons from specific groups, and introduces notions such as harassment and victimisation. Substantive equality requires that further steps are taken in order to realise genuine equality in social conditions. This involves procedural guarantees to be set up to make those rights effective (e.g., shifting the burden of proof in procedures), and the creation of national equality bodies to promote anti-discrimination initiatives and monitor implementation. Substantive conceptions of equality incorporate the need to (a) redress disadvantage; (b) address stigma, stereotyping, prejudice and violence; (c) facilitate voice and participation; and (d) accommodate difference and change structures of discrimination (Fredman, 2016), thereby opening the space for positive action measures.

Today, the main legal instruments dealing with discrimination at the EU level are the Racial Equality Directive, the Employment Equality Directive and the EU Charter on Fundamental Rights. As regards combating discrimination and giving effect to the principle of equal treatment, and on the basis of the former Article 13(1) EC, now Article 19 TFEU, the Racial Equality Directive (RED) (2000/43/EC), adopted in 2000, represents a key measure in prohibiting racial and ethnic origin discrimination in access to employment, vocational training, employment and working conditions, membership of and involvement in unions, and employer organisations, social protection,
|                | Employment and vocational training | Workers' and employers' organizations | Social protection including social security | Social protection including healthcare | Social advantages | Education | Public goods and services, including housing |
|----------------|-------------------------------------|---------------------------------------|---------------------------------------------|---------------------------------------|------------------|-----------|---------------------------------------------|
| Racial or ethnic origin | Dir. 2000/43 | Dir. 2000/43 | Dir. 2000/43 | Dir. 2000/43 | Dir. 2000/43 | Dir. 2000/43 | Dir. 2000/43 |
| Gender         | Dir. 2006/54 | Dir. 2006/54 | Dir. 79/7 (statutory social security only) | Dir. 2006/54 (occupational social security only) | Dir. 2006/54 | Dir. 2006/54 | Dir. 2004/113 |
| Sexual orientation | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 |
| Religion or belief | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 |
| Disability     | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 |
| Age            | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 | Dir. 2000/78 |

*Source* Fredman (2016)
including social security and healthcare, education, as well as goods and services, including housing. Together with the Employment Equality Directive (2000/78/EC)\(^{17}\)—which prohibits discrimination primarily in the employment context (access to employment, self-employment and occupations; vocational guidance and training; employment and working conditions, including dismissals and pay; membership of organisations)—these two Directives were particularly shaped by Anglo-Dutch intellectual thought and created a robust anti-discrimination framework. Together with the CJEU interpretation of all the directives and equal pay provision (now Article 157 TFEU), these directives have influenced the law of all EU Member States by improving and strengthening existing equality regimes.

Similarly to the role of EIGE in gender, the collection of ‘objective and comparable information and data’ on all bases of discrimination, and in particular race and ethnicity, was tasked to the EU Monitoring Centre on Racism and Xenophobia, which was replaced by the EU Fundamental Rights Agency (FRA) in 2007. As one of the EU’s decentralised agencies set up to provide expert advice to the institutions of the EU and the Member States, the FRA collects and analyses information and data; provides assistance and expertise; communicates and raises rights awareness through multi-disciplinary research and comparative analyses to improve human rights protection across the EU.

An important area that EU actions and funding have focused on involves combatting xenophobia, racism and all forms of intolerance and extremism on the one hand, while promoting respect for tolerance and understanding of cultural and ethnic diversity on the other. Funding has long been dedicated to research on managing different forms of diversity, to cultural projects aimed at promoting intercultural exchanges, and on Holocaust remembrance projects. At the same time, public perceptions towards migrants, minority groups or anti-Semitism, are monitored through regular data collection and EU wide surveys by Eurobarometer or the FRA. More recent initiatives (2015) involved the appointment of an EU Coordinator on Combating Anti-Semitism Hatred and a Coordinator on Anti-Muslim Hatred, to help coordinate efforts across services in the context of the Commission’s overarching policy on racism, xenophobia and other forms of intolerance. In response to the rise in online
hate speech, the wave of terrorist attacks across the EU particularly after 2015, and growing insights into the role of social media and the internet in disseminating violent extremism and radicalization, a number of measures have been initiated and coordinated at EU level. Cooperation has thus been stepped up to better prevent and combat hate crime and hate speech, and in 2016, a Code of Conduct was agreed with main IT-companies (Twitter, YouTube, Facebook and Microsoft) whereby all relevant illegal hate speech flagged to them is revised and removed where necessary within 24 hours. As additional social media platforms joined the Code of Conduct, this led to a removal rate of 70% of illegal content by 2019. In 2018, the Commission also proposed rules to remove terrorist content from the web within one hour of order by a competent authority, and an action plan was devised to protect public spaces, with a particular focus on religious premises.

As regards legislation aimed at promoting the fair treatment of third country nationals, the EU laid out common conditions of entry and residence and also minimum rights that third country nationals should enjoy, in particular equal treatment with nationals, and applicable across the Union. The Long-term Residence Directive created a single status for non-EU long-term residents. A Directive on family reunification establishes the rules and conditions under which non-EU nationals who are residing lawfully on EU territory may exercise the right to family reunification. The EU also harmonised national legislation concerning the entry of students and non-remunerated trainees and researchers. A Directive on seasonal work set important labour standards for third country nationals engaging in seasonal work in the EU (2014/36). These Directives provide the principle of equal treatment between third country nationals and Union nationals, particularly as regards the freedom of association and the right to strike, concerning terms of employment, working conditions and social security benefits.

The EU level has focused its work on addressing discrimination in its various or multiple dimensions in the labour market as this is the sector where they occur most frequently, and EU policies of non-discrimination have been largely positioned as measures contributing to economic growth notably through a rise in the labour market participation of women or marginalised groups. There have been mixed results in
the field of policy on combating different forms of discrimination, and mixed assessments.

The expansion of the EU equality and anti-discrimination framework has had top-down spill-over effects from the EU to the national levels in terms of reforming their equality bodies and law, and bringing anti-discrimination issues into public policy—particularly southern and more recent Member States (Gropas & Triandafyllidou, 2008). It has encouraged Member States that previously had equality legislation that addressed only particular forms of inequality, to address multiple forms of discrimination and consider the interaction between these strands, i.e. that gender discrimination and inequality are shaped by race, ethnicity, class, sexuality, disability and other dimensions (Krizsan et al., 2012). The recognition of the importance of intersectionality is also reflected in the Convention on the Rights of Persons with Disabilities (CRPD—which was ratified by the EU in 2010).

Feminist scholars, however, have criticised that the focus on the employment sector and labour market, has led to an overly narrow debate about equality and discrimination in the EU (see Kantola & Nousiainen, 2009). Furthermore, while the integration of equality laws, bodies and policies that the EU has encouraged in the Member States has enabled multiple or intersecting discriminations to be tackled more effectively than previously, opinions are split between equality activists and practitioners on what is gained or lost by uniting the equality bodies or keeping them separate (Kantola & Nousiainen, 2009). On the one hand, the EU legal framework has been criticised for merely juxtaposing considerations of different inequalities rather than incorporating an intersectional approach and giving equal importance to the treatment of different inequalities (Lombardo & Verloo, 2009). Enforcement of the EU anti-discrimination legislation has limited the ability to pursue claims of intersectional discrimination because the relevant directives have differing scopes and justification defences and exceptions are framed differently (Fredman, 2016). Moreover, the multiple approach results in an additive model of politics ‘leading to competition rather than coordination among marginal groups for fringe levels of resources rather than systemic reform that could transform the entire logic of distribution’ (Hancock, 2007, p. 70). On the other hand, there have been concerns that treating gender
as one among other inequalities has contributed to a backtracking of its salience (Stratigaki, 2008).

While addressing multiple discriminations may still be more a discourse than a legal or institutional reality at the European level (Krizsan et al., 2012; Lombardo & Verloo, 2009), its emergence has shifted the debate and mindsets in domestic, EU and international debates. Scholars, civil society organisations and practitioners have increasingly considered intersectional dimensions to discrimination, and notably the place of gender within these dimensions. Just as importantly, it has helped moved the needle in attempting to bridge the EU’s equality and anti-discrimination framework with social policies aimed at addressing poverty and widening socio-economic inequalities.

Since the latter half of the 1990s, a significant shift in the European discourse of equality has occurred around the concept of social exclusion which developed into a foundational part of EU social policy. This was the result of growing unemployment in most Member States and a renewed attention to poverty (notably by the inspirational work of Tony Atkinson).

The concept of equity also developed strongly in this period, associated with a pragmatic approach to the fact that individuals do not begin life with equal opportunities, thereby requiring public policies to redress the effects of inequality. The hidden costs of inequity began to be emphasised by EU analyses, along with the importance of education and lifelong learning in overcoming social exclusion so that individuals can take advantage of education and training, in terms of opportunities, access, treatment and outcomes (European Commission, 2006; Maiztegui-Oñate & Santibáñez-Gruber, 2008; Tuparevska et al., 2019).

### 7.5 A Multi-pronged Policy Framework: Key Tools and Their Challenges

As the legal framework of equality and non-discrimination have evolved, EU funding and initiatives have also been directed to fighting discrimination, promoting diversity and steering policies and investment towards ensuring equality of opportunities. EU institutions have enacted a
comprehensive, multi-pronged approach that combines hard and soft law (legally binding and non-binding instruments) and a range of tools to ensure compliance with EU objectives as regards social inclusion and cohesion.

Funding has been a core tool. A number of the EU funds, such as the European Social Fund (created in 1958) and the European Regional Development Fund (1975) reflected motivations among Member States to correct regional and social imbalances resulting from economic and industrial change and structural under-employment. The accession of Greece, Portugal and Spain in the 1980s brought a shift of focus in favour of reducing disparities and addressing divergences between richer and poorer areas, while the legal basis introduced by the Single European Act (1986) opened up the possibility of creating an integrated cohesion policy (through the Structural and Cohesion Funds) (EPRS, 2019). Overall, the ESF has invested in widening equality of opportunities particularly for people who find it difficult to get work either because they belong to disadvantaged groups, or because they live in extremely sparsely populated regions, or regions that have high levels of unemployment and low growth. It has served as a redistributive instrument, aiming to buffer social inequalities and ensure fairer job opportunities for all through training and re-skilling and supporting jobs.

For example, the EQUAL Community Initiative was a flagship initiative financed by the European Social Fund (ESF) and co-funded by the EU Member States within the 2000–2006 programming period to support innovative, transnational projects aimed at tackling discrimination and disadvantage in the labour market by increasing employability, encouraging inclusive entrepreneurship, facilitating adaptability, promoting gender equality and integrating asylum seekers. Similarly, the Rights, Equality and Citizenship Programme, through a €439.5 million budget over the period 2014–2020, offered funding opportunities for projects aimed at promoting non-discrimination, combating racism, xenophobia, homophobia and other forms of intolerance, promoting gender equality and gender mainstreaming, preventing violence against children, young people, women and other groups at risk, promoting the rights of the child, ensuring the protection of
personal data in the EU, promoting EU citizenship rights, and enforcing consumer rights.

In spite of these efforts, during the past two decades, the overarching concern to increase the efficiency and limit the fragmentation of the EU budget have resulted in a decrease of funding for gender equality, and an overall decrease of the visibility of public problems linked to gender inequalities (Jacquot, 2017). Even though it is significantly smaller in size compared to national budgets, the EU budget has the potential to contribute significantly to equality in the EU. A budgetary analysis of EU policies and budgetary items has shown varying commitment to the principle of gender equality, a reality which is disconnected with the EU’s high level political and legal commitment to the principles of gender equality and gender mainstreaming. It has also meant that even policies that include a strong commitment to gender equality would be unlikely to achieve their objectives, given the complex nature of many gender-related issues, such as poverty, gender-based violence or immigration, thereby requiring greater synergies and collective actions taken in various policies. These concerns have been voiced in the preparation of the EU’s next Multiannual Financial Framework for the period 2021–2027. The EU’s political commitment to gender mainstreaming should be reflected in the drafting and the implementation of the EU budget and all EU policies receiving funding from the EU budget should be subject to gender-sensitive budgeting (European Parliament, 2019). Incorporating a gender equality perspective to all decisions on revenue and expenditure could significantly influence gender equality at the local and national levels.

Networks with interest groups and civil society organisations as well as with and epistemic communities have been another fundamental dimension of the EU toolbox in addressing challenges to equality. The European Commission has supported a number of networks of experts in this field; some include experts or representatives from the public sector, others from independent bodies, and others still from academia and civil society thereby engaging stakeholders from different perspectives. A government expert group in the field of non-discrimination was set up in the period 2008–2013 to address common concerns and advance shared objectives between the EU Member States and the
European Commission and share good practice exchanges on public policies. In 2015, this led to the establishment of a high level group on non-discrimination, equality and diversity to ensure cooperation and coordination between EU countries, including representatives of each of the European Economic Area countries, and aimed at improving the development and implementation of policies and programmes and share experiences and good practices on diversity.\footnote{20} At the same time, the European Network of Equality Bodies (Equinet),\footnote{21} brings together national equality bodies, which are empowered to provide an independent assistance to victims of discrimination, conduct independent surveys concerning discrimination, conduct independent surveys concerning discrimination, publish independent reports and make recommendations on any issue relating to discrimination in their country, and overall act as catalysts for more equal societies. Just as importantly, the European network of legal experts in gender equality and non-discrimination\footnote{22} has been established to ensure that the European Commission is kept informed in relation to important legal developments in these fields at national level, and, bi-annual meetings are held with the Social Platform, the largest network of European rights- and value-based civil society organisations working in the social sector to discuss current policy issues with non-governmental organisations (NGOs).

Capacity building within civil society as well as information and awareness raising about fundamental rights has been another important tool. As mentioned above, the EU has created new political opportunity structures. Through financially supporting or engaging with NGOs, social partners and equality bodies to tackle discrimination in the workplace mainly, the EU has encouraged equality policies at national level, supported anti-discrimination training activities and pushed for diversity management in companies. This has in turn had a multiplier effect. It has contributed to actions, litigations or campaigns at national level focused on tackling common challenges, measuring disadvantage and discrimination in different forms, and advocating for further actions. At the same time, concerns have been highlighted that the professionalisation of the actors involved in the EU gender equality policy since the 2000s led to the marginalisation of activist and feminist involvement. This trend, together with the fact that expert networks were increasingly seen by
the EU institutions more as ‘service providers’ instead of ‘trailblazers, partners, support or contacts at the national level, as had been the case in the past’, is considered to have withered the dynamism and eroded the activism of equality networks that had played a core role in pushing the bar further in previous decades (Jacquot, 2017). Expectations have, however, grown again more recently. The sustainability agenda has reinvigorated these networks, and the political priority accorded to equality and anti-discrimination by the von der Leyen Commission have opened new opportunities in these areas.

A further significant instrument that the EU has contributed to involves data. The EU has invested substantial resources in developing statistical evidence, along with regular, comparative and inclusive monitoring and evaluation of inequalities, differences and discrimination. It has relied on expertise provided by dedicated agencies, notably EIGE and FRA as mentioned above. These institutions have been able to provide robust data and technical knowledge contributing to policy-making and implementation of policies, including in economic and budgetary policies, at national and EU levels aimed at furthering equality. Feminist scholars, however, have highlighted the downside of this move towards a more technocratic than activist role. From their perspective, the general trend towards depoliticisation and professionalisation of feminist or anti-discrimination organisations has channelled their outputs to the production of technical knowledge rather than the development of policy alternatives or political visions (Jacquot, 2017).

The global financial crisis and its scarring effects on the EU led to the issue of inequality rising in importance, and wide-ranging research to shed light on different dimensions of discrimination and exclusion, to measure (in)equalities in society, and to identify the relevant variables that explain them. With years of convergence in living standards reversed and considerable strain on social protection systems, inequality has risen in a majority of Member States, triggering concerns both for the sustainability of the EU’s growth and for social cohesion (European Commission, 2017). While much of the focus has been on economic inequality, usually measured through income, the EU has encouraged a broadening of the debate and efforts to measure—and address—inequality from the perspective of freedoms, opportunities, capabilities; to look at individual
but also inter-household and intra-household inequality; to understand the drivers of social mobility; as well as the spatial and territorial dimensions (see *inter alia* the work of DG REGIO, DG EMPL, DG RTD and the JRC). It has also encouraged the development of comparative indicators of discrimination among vulnerable groups and benchmarking exercises in order to assess how well the latter are doing over time, across sectors and across member states (Amiraux & Guiraudon, 2010). Lastly, as an employer, the Commission has identified diversity and inclusion as the cornerstones of its corporate culture. By aiming to ‘practice what it preaches’, in 2017, the Commission launched a diversity and inclusion strategy for Commission staff and a set of concrete and targeted actions (COM (2017) 5300). It set a target to reach 40% women in senior and middle management teams by 2019; it laid out guidelines and a Code of good practice for the employment of people with disabilities; it aimed to put measures in place for employees to be open about their LGBTI identity and fully participate in the social dimension in the workplace; it underlined the importance of offering older staff as interesting opportunities at work as younger staff. The ambition to be more representative of European society has meant seeking to foster diversity in selection and recruitment procedures, concrete efforts to create a more inclusive workplace, and a talent management programme. These are all of course dynamic objectives.

## 7.6 The Importance of Fairness in the Current Context

Decades of investment in education and social protection have empowered and improved the socio-economic conditions and opportunities for the majority of Europeans. There remain, however, significant inequalities that are transmitted between generations, or that run deeper in some regions and countries than others. And, in spite of one of the most elaborate and inclusive legal frameworks in the world, many Europeans continue to see their opportunities restricted due to various forms of discrimination, and certain population groups remain or are becoming more vulnerable to risks and exclusion than others. These
developments or entrenched divides have brought concerns for widening socio-economic inequality high on the political agenda across the EU.

Over the past two decades, however, rapid and volatile transformations in the world economy, the impact of the digital revolution on employment, and demographic trends associated with ageing and migration have posed new challenges and exacerbated existing inequalities and vulnerabilities. Socio-economic trends, regional disparities and political developments suggest that specific forms of inequality, prejudice and discrimination are taking disconcerting directions in many Member States (ESPAS, 2018; Joint Research Centre, 2017; Report of the IPSP, 2018). The global financial crisis has impacted deeply on the European economy and along with the rise of populism has contributed to the polarisation of European societies. The combination of the economic and financial crisis with longer-term structural shifts in European economies, appear to be linked to a sense of insecurity with regards to work, and a wider perception of disempowerment. So, while overall there has been remarkable economic progress at the global level in the last few decades, research and data shows that not everyone has enjoyed the same gains, or even the same opportunities. Some parts of Europe have been affected the most from the distributional tensions and this has been particularly the case for younger cohorts, routine-task intensive and low-wage workers, women, and inhabitants of so called economically lagging regions (Bussolo, Davalos, Peragine, & Sundaram, 2018). The COVID-19 pandemic which emerged in 2020, has laid bare different types of inter-related inequalities and has reinforced socio-economic disparities.

These trends together have impacted on civil liberties in some parts of the Union and social cohesion in others, with some population groups becoming increasingly vulnerable to discrimination. The challenge posed in the current EU context is how to effectively promote in parallel equality of opportunity (which related to rights) and pluralism (which relates to values), both of which are at the heart of the EU project, at a time when political polarisation, distrust and a wider sense of unfairness are on the rise.
Notes

1. These include *inter alia* the major human rights instruments concluded under the auspices of the United Nations and specifically the 1966 International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. Additional international treaties with specific focus on discrimination and equality include the Convention on the Political Rights of Women 1953, Convention on the Elimination of All Forms of Racial Discrimination 1966, Convention on the Elimination of All Forms of Discrimination Against Women 1979, and Convention on the Rights of the Child 1989. A number of International Labour Organization (ILO) instruments and Council of Europe conventions also deal with discrimination and are relevant, most notably the ILO Equal Remuneration Convention 1951 (No. 100) and the ILO Discrimination (Employment and Occupation) Convention 1958 (No. 111), the European Social Charter 1961/ revised 1996), the Framework Convention for the Protection of National Minorities 1995, and the European Charter for Regional or Minority Languages, 1992.

2. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Consolidated version of the Treaty on the Functioning of the European Union, Protocols—Annexes—Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=en.

3. EPRS (2018), Fact sheet: Equality between men and women, available at: http://www.europarl.europa.eu/factsheets/en/sheet/59/equality-between-men-and-women.

4. EU Charter of Fundamental Rights, available at: https://fra.europa.eu/en/charterpedia/article/21-non-discrimination.

5. Judgment of 13 November 1984, Case 283/83 Racke [1984] ECR 3791, judgment of 17 April 1997, Case 15/95 EARL [1997] ECR I1961, and judgment of 13 April 2000, Case 292/97 Karlsson [2000] ECR 2737; for further case law see https://fra.europa.eu/en/charterpedia/article/20-equality-law. The protection of fundamental rights is also one of the general principles of EC law and is binding on the EC institutions and on the Member States when they implement EC rules or act within the scope of Community law (McCrudden & Prechal, 2009).
6. See inter alia the work of Sidney Tarrow on the *New Transnational Activism* (2005, Cambridge University Press); Anne-Marie Slaughter on *A New World Order* (2004, Princeton University Press); Margaret Keck and Kathryn Sikkink on *Activists Beyond Borders* (1998, Cornell University Press), and the overall work of Sonia Mazey and Jeremy Richardson on interest groups and policy-making in the EU.

7. In an effort to consolidate and simplify the relevant legislation and case law of the CJEU, the 2006 Recast Directive (2006/54) brought together the Directive on equal pay for men and women (75/117), the Directive on equal treatment of men and women in employment (76/207 as amended by Directive 2002/73), the Directive on equal treatment of men and women in occupational social security schemes (86/378, as amended by Directive 96/97) and the Directive on the burden of proof (97/80) (see Burri, 2018).

8. OMC is a ‘soft law’ form of governance that requires member states to prepare action plans according to common principles and to receive and respond to recommendations in a regular cycle of policy scrutiny and benchmarking (Pollack & Hafner-Burton, 2000).

9. The turn to mainstreaming in the 1990s originated in the area of development assistance, and permeated the work of the World Bank, the United Nations Development Programme (UNDP) and was adopted as a strategic objective by the United Nations in the Platform for Action agreed at Beijing in 1995 (Beveridge & Shaw, 2002).

10. [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1435768861022&uri=CELEX:32006R1922](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1435768861022&uri=CELEX:32006R1922).

11. See EIGE’s database on: [https://eige.europa.eu/gender-statistics/dgs/browse/wmidm](https://eige.europa.eu/gender-statistics/dgs/browse/wmidm). Accessed 9 April 2020.

12. European Pillar of Social Rights (2017). [https://ec.europa.eu/commission/publications/european-pillar-social-rights-booklet_en](https://ec.europa.eu/commission/publications/european-pillar-social-rights-booklet_en). Accessed 9 April 2020.

13. See Directive (EU) 2019/1158 of the European Parliament and the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. 20 June 2019. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1158](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1158). Accessed 4 April 2020.

14. The racist murder of Stephen Lawrence led the UK Home office to order an inquiry which exposed ‘institutional racism’ and provoked an important shift in public attitudes towards race and racism. For more see the Independent report of The Stephen Lawrence Inquiry by Sir William Macpherson.
submitted to the British Parliament (1999) available at: https://www.gov.uk/government/publications/the-stephen-lawrence-inquiry.

15. European Commission, DG JUST, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination_en.

16. Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin, OJ 2000 L 180.

17. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303.

18. See https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_542.

19. See, for instance, the EC Press release IP/01/466 (2001) http://europa.eu/rapid/press-release_IP-01-466_en.htm.

20. See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/tackling-discrimination/network-experts-field-anti-discrimination_en.

21. http://www.equineteurope.org.

22. https://www.equalitylaw.eu.

23. See the Fundamental Rights Agency’s relevant website: https://fra.europa.eu/en/theme/racism-related-intolerances.

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