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Policy Brief on Anti-discrimination

The project aims	EMILIE PROJECT OVERVIEW <p>EMILIE examines the migration and integration experiences of nine EU Member States and attempts to respond to the new challenges that multiculturalism is facing in Europe in the early 21st century. EMILIE studies three important areas: Education; Discrimination in the workplace; Voting rights and civic participation, in Belgium, Denmark, France, Germany, Greece, Latvia, Poland, Spain and the UK. EMILIE aims to:</p> <ul style="list-style-type: none">• track the relationship between migration-related diversity and citizenship, i.e. multicultural citizenship, across these EU countries; and• identify whether multicultural citizenship is emerging in Europe, and if so what distinctive patterns and types can distinguished.
Case studies	EMILIE conducted three policy-related case studies in each country. The first set of case studies focused on education policy and the measures and practices adopted in dealing with cultural diversity in secondary education. The second set of case studies assessed the implementation of the EU 2000 Anti-Discrimination Directives in the different national contexts. And the third set of case studies investigated voting rights and overall issues of political participation and representation of migrant communities and ethnic minorities in the countries studied.
Definitions	(Multicultural) Citizenship: The notion of citizenship requires a self-governing political community in which individuals have rights and correlative duties enforced by law but are likely to also have a sense of shaping and being shaped by a public space that goes beyond law and politics. Multicultural citizenship debates ask how citizenship can be fully enacted for and by individuals that are culturally diverse.
Methods, data and period of reference	Each case study focuses in the last twenty year period (from 1989 till today). Data collected include policy documents, media coverage, scholarly studies, statistical data, qualitative interviews with key informants, and where it has been possible discussion groups with civil society actors and policy makers.
Focus	The project is concerned with migration-related cultural diversity and not with historical, native ethnic minorities. Special attention is paid to religious diversity and issues concerning Muslim migrants as their integration in European societies has been approached as increasingly challenging in these EU Member States.

Main findings **Discrimination in the labour market is a widespread reality in Europe.** Migrants and ethnic, national or racial minorities are exposed to unequal treatment in their access to employment. They are concentrated in unstable and low skill jobs for which they are often over-qualified; they receive lower wages and have poorer career prospects in comparison with their native counterparts. OECD data and national surveys report on this reality consistently, and our own research in the context of the EMILIE project confirms this further.

The 2000 Racial Equality directive (2000/43/EC of 29/06/2000) and **the Employment Equality directive** (2000/78/EC of 27/11/2000), constitute a turning point in Europe for the development of equality policies and for raising awareness on discrimination matters. Some EU member states, such as the UK, already had a coherent and comprehensive anti-discrimination legal and institutional framework in place; others had slightly anticipated the racial equality and employment directives [RED] by enacting anti-discrimination laws. However, for most of the EU countries, the rhetoric and the tools that the directives put forward were novel. Through their transposition into national legislation, a new repertoire for public action has been exported to countries that had different traditions of dealing with equality.

It is interesting to note that there exists a sharp contrast in the terminology used in the various European countries to describe the **groups most vulnerable to discrimination**. A few as in the case of Britain and Denmark, refer to ethnic or racial minorities, or citizens with a migrant background, but most relate discrimination to migrants, focusing on their legal status (foreigners, asylum seekers, undocumented migrants). The scope of anti-discrimination provisions differs greatly according to the victim's profile and the processes involved.

Although the RED directives have been transposed into all EU member states' domestic legislation, **their implementation remains incomplete** when it comes to positive action and effective equality. The move from anti-racist litigation –which was more or less the main legal equipment through which to tackle ethnic and racial discrimination until recently- to a broader anti-discrimination strategy has not yet been fully acknowledged by most EU countries. Thus, the potential opportunities offered by the concept of “indirect discrimination” and other tools stipulated in the EU directives to engage in a more holistic approach to equality and anti-discrimination remain underdeveloped.

The major **shortcomings** in the implementation of anti-discrimination law and policies in the nine EU countries studied include the following:

- There is a widespread **lack of awareness about this legislation** among the general public, and also among politicians and employers. Discrimination is not perceived as a significant explanation for unequal opportunity of more vulnerable groups on the labour market. Rather, lack of skills, problems of integration, linguistic difficulties and other characteristics attached to minorities are perceived to be primarily responsible.
- **A very small number of complaints and cases in courts** have been registered in most countries. The lack of institutional support, the complexity of litigation and an underlying resistance to the new legal scheme created by the transposition of the RED directives can explain this poor situation.
- **The equality bodies** created by the relevant laws have very limited, if any, binding powers and their institutional set-up does not offer an adequate level of independence from the state authorities. Their strategies are mainly aimed at processing individual complaints rather than developing collective positive action measures. As a consequence, limited efforts are underway in most countries studied to move closer towards effective equality of all.

The path to anti-discrimination: scripts of a diffusion of a common framing

The anti-discrimination paradigm has been disseminated in a very prominent manner in the nine EU countries, but varies greatly according to national idiosyncrasies. There was lack of a public debate around the issues of discrimination in Greece, Spain, Poland and Latvia. Conversely, the transposition of the EU directives generated a lively debate in Britain, France, Belgium and Germany. Three different anti-discrimination frameworks can be discerned in the nine EU countries studied:

Type 1: Interaction between the country's previous anti-discrimination law and the EU impetus

Britain has developed an anti-discrimination framework since the 1970s which can be considered as a precursor to the European context (although it is characterized by a piecemeal approach and does not protect all groups in the same way). The 2000 amendment to the 1976 Race Relations Act imposes the duty of care on public authorities to promote racial equality; thus, it goes beyond the EU provisions. The EU directives' have encouraged the merge between specialized bodies into one single human rights commission with overall responsibilities in the area of equality and anti-discrimination.

Until the end of the 1990s, **France's** model of integration was structured on the grounds of formal equality and the voluntary cultural assimilation of immigrants. Non-discrimination on the ground of race was constitutionally protected, racism was criminalized and discrimination in the labour market was partly tackled by existing legislation. The issue of anti-discrimination was put on the agenda at the end of the 1990s in a rushed manner but ensured a quick, comprehensive and extensive transposition of the EU directives. This new paradigm for public action on racial equality clashes with the traditional French colour-blind strategy.

In Belgium, the issue of ethnic discrimination appeared on the agenda at the end of the 1990s after a 1997 ILO report raised awareness and provoked wide media coverage of discrimination in the Belgian labour market. Following this 'wake-up call', social and political actors mobilized to transform the legal framework and move beyond the criminalization of racist acts which had been put in place in the 1980s. At the same time, the EU directives set the legal agenda and the standards that had to be transposed. The political debates on the legal role of situational tests were rather heated, and the resistance of far right wing parties meant that two rounds (in 2003 and in 2007) were needed for the directives to be fully transposed.

Type 2: Top-Down transposition met with resistance

The EU directives were finally transposed in **German** law with the AGG act in August 2008 after Germany had to face two infringement procedures from the European Commission in 2003 and 2006 (one for each directive). This time lag can be explained by the fact that anti-discrimination was a new issue on the public debate that was imported in a top-down manner due to the need to transpose the EU directives into federal legislation, and also by the resistance of many stakeholders, including employers and the centre-right and right wing parties. The transposition of the directives was not pursued in a maximalistic approach; for example, there is no adequate data collection or monitoring system, there is no access to data for plaintiffs, and religious accommodation is refused.

Denmark did not have a constitutional principle of equality, however, there is a strong egalitarian national culture that leads to a perception of immunity to ethnic discrimination (or discrimination in general). The anti-discrimination debate began before the EC directives were transposed with the creation of an equality body. Since the transposition of the RED directives into Danish national legislation, only very few cases have been judged on the grounds of discrimination. There is a widespread lack of awareness and knowledge about the anti-discrimination legislation in society in general, and in the private sector in particular. In addition, managers are not legally equipped to address wider discrimination issues and trade unions are trained only in dealing with discrimination cases on the grounds of gender. Finally, Denmark's egalitarian culture sits uncomfortably with the idea of differential treatment which is implied in anti-discrimination laws.

Type 3: Top Down transposition with no debate and poor implementation

Greece did not have an anti-discrimination law before the transposition, which happened in 2005 after an infringement procedure in 2004. There is a gap between the new legal framework and the awareness of discrimination and its salience as a political issue. Indeed, given that Greece is a "newer immigration" country, the focus of the political agenda is on immigrants' illegal exploitation and labour conditions in the large informal sector of the economy, not on potential ethnic discrimination issues. Moreover, the institutional framework needs to be improved as four different institutions are in charge of discrimination issues, there is lack of coordination between them, they are under resourced and the fact that they are not set up as fully independent authorities restricts their effectiveness.

Spain, similarly to Greece, is considered a "newer immigration" country where the main issue of concern in the migrant population is their economic exploitation as well as the persisting legal barriers that hinder their integration in the job market (employment visa regulations, access to social benefits, etc.). Hence, the focus so far has been on the language of equal rights rather than equal treatment. There has been a legal principle of equal treatment since 1978 in criminal, labour and civil law. The transposition of the EC directives was not undertaken in a comprehensive manner but through piecemeal amendments (32 in total) and an extra bill. The transposition also led to the creation of a Council for the promotion of equal treatment which started to function as late as 2009. Overall, anti-discrimination is perceived as a future objective, one that will be pursued once integration of migrants will be achieved.

Latvia is yet another case in which there is an obvious gap between the public awareness on the issue of discrimination and the legal framework transposed from the EU directives. The transposition of EU directives has mainly affected labour law (in 2002) and in 2004 additional legal changes were undertaken to transpose the RED directives in order to fulfill the country's requirement to adopt the *acquis communautaire* before EU accession. The transposition has been minimal and has been pursued in eight separate amendments. In 2008, the directives were still not fully adopted even after a relevant notification by the European Commission in 2007. The transposition of the directives into national legislation has extended the powers of the Ombudsman who can represent victims of discrimination. This legislation may be particularly instrumental in addressing challenges relating to the treatment of the Roma minority and Latvia's national minorities.

The **Polish** situation represents the most minimal case of transposition of the EU directives. When the bill transposing the RED directive was discussed, the dialogue with the European Commission was very sensitive and in fact, no equality body has been created in spite of the EC reminder in 2007. Moreover, there is a problem of institutional fragmentation and lack of coordination between relevant institutions in charge of various aspects of discrimination and equality policies on the ground. The issue of ethnic discrimination itself is lacking from the political agenda. Illegal immigration and the ethnic segregation of the labour market are the only topics of the current political debate on ethnicity and equality.

Key issues in anti-discrimination policy implementation

Although all EU countries have complied with the transposition of the RED directives into their national or federal legislation and have thus embedded anti-discrimination provisions in their institutional and legal framework, the implementation of this formal anti-discrimination framework is not yet adequately effective and efficient. The national EMILIE reports provide detailed analysis and feedbacks on the shortcomings of the implementation of anti-discrimination policies and laws in each case. Here, we aim at highlighting some of the key issues challenging anti-discrimination policies in practice across various EU countries.

Equality bodies have been created in all countries, but with contrasting powers and legacies. In most countries, a number of different institutions have competences on issues pertaining to “discrimination” and it seems difficult to disentangle their overlapping prerogatives. This institutional imbroglio has not been solved by the transposition of the EC directives and the incentive to create a unique “anti-discrimination” body covering all grounds under article 13 of the Amsterdam Treaty. In Denmark or Britain, the equality body replaced previously existing institutions that were generally dedicated to a more restricted area (such as ethnic and racial discrimination matters, gender discrimination, disability, etc.). In Denmark, the *Danish Institute for Human Rights* has been given the task of processing individual cases with a specific body called *Complaints Committee for Ethnic Equal Treatment (CCEET)*. In the UK, the former specialized bodies (such as CRE, the Disability Rights Commission, etc.) have been merged in a new wide ranging equality body called *Equality and Human Rights Commission (EHRC)*, under The Equality Act (2006). In France and Belgium, the new equality bodies –the *High Authority Against Discrimination and For Equality (HALDE)* and the *Centre for Equal Opportunities and Fight against Racism (CEOOR)* respectively - have received extended competences but still face difficulties to find their place in the institutional framework. In Germany, Greece and Poland, the equality body is under the umbrella of a ministry and its independence is questionable. In Spain, the *Council of Equal Treatment and Non Discrimination* has not yet commenced its work and is considered a consultative organ. These equality bodies generally suffer from a lack of resources and administrative power.

Court cases are rare and, for those that go through, are unevenly successful. There are diverse explanations for this apparent inefficiency of legal prosecution. Knowledge about what discrimination actually entails, about rights and the possibilities to fill in complaints by judges, prosecutors, lawyers and NGOs is still in its infancy stages. The lack of political consensus on the meaning and the scope of discrimination is responsible for a certain hesitation, if not a degree of hostility and resistance, to engage in anti-discrimination litigation. Mediation is the preferred legal action. Awareness and mobilization against discrimination by stakeholders has been reported as relatively low in all countries. The shift from traditional anti-racist advocacy to an anti-discrimination strategy is not achieved by most social partners and NGOs. Moreover, victims of discrimination have a scarce knowledge of their rights and do not find adequate support to claim for sanctions and correction. As a consequence, the number of complaints is critically low.

Anti-discrimination provisions are not limited to litigation, but offer also a large range of **proactive measures**. This dimension of equality policies seems to be totally neglected in most of the countries under study, the UK being an outlier in this respect. Positive action (UK) and Affirmative action (US), have a long history and provide useful benchmarks for new initiatives in other European countries. Equal opportunities in the labour market is one of the most advanced areas in this field, while diversity management is now coming to the core of EU anti-discrimination strategy and receiving significant attention not only in Britain but also in France (*Charter for diversity, diversity trademark*) and Belgium (*diversity plans*). Employers' organisations and human resources executives have incorporated the promotion of diversity in their objectives. However, employers' organisations are strongly resisting to any coercive measures that would be imposed by equality bodies or by the law. Paradoxically, trade unions seem to be lagging behind and have difficulty in accommodating anti-discrimination strategies beyond the traditional anti-racist paradigm.

One crucial condition for the implementation of positive action is to be able to monitor processes and practices through up-to-date and accurate data and statistics. Data collection on migrants, ethnic, national and racial minorities is a blind spot of anti-discrimination strategy in all countries, possibly with the exception of the UK. The lack of **ethnic monitoring** explains why action is focusing on complaints and explicit acts of discrimination. Without reliable data, most unfair treatments are perceived as merely problems that emanate from the victims individual characteristics and shortcomings: i.e. lack of language proficiency, of skills, or behavioural and adaptation difficulties. There is thus an urgent need for data in order to assess the wider group dimensions of these challenges. A public debate on the need for such statistics has taken place only in France and Belgium, and the issue is now emerging in Germany.

A mismatch between ethno-racial and religious discrimination is also reported. Religious discrimination is generally a blind spot in policies and public debates, since it is mainly framed through the ethnicity of the victim. In the UK, discrimination on religious ground is tackled less than ethnic and racial discrimination. The same applies in Denmark, France or Belgium. Controversies on the relevancy to use the concept of "islamophobia" are sprawling, especially when it comes to dealing with the headscarf.

Recommendations for promoting anti-discrimination policy and equality

Many stakeholders can and should contribute to the effectiveness of anti-discrimination policy. These recommendations are, therefore, relevant for all responsible actors, (i.e. the equality bodies, the judiciary, the social partners, NGOs and other civil society representatives) and particularly for national and local level government.

- Mandatory implementation of anti-discrimination policies and regular, annual reporting on the state of affairs on behalf of public institutions and private companies would improve the transformation of anti-discrimination legislation into practice. It would result in a more constant focus on the problem and serve as a basis for practical guidelines and procedures to be followed. Without such mandatory policies and reporting, anti-discrimination efforts compete with a number of other 'progressive' agendas and risk being pushed to the background even among well-meaning actors.
- A systematic approach to anti-discrimination, based on data collection and policy analysis should be developed; a government body should be identified as responsible for coordination of these efforts; and, an explicit legal basis along with clear procedures for data collection respectful of personal data protection should be defined.
- Government's understanding of its positive obligation and responsibility to monitor and adopt policies to remedy existing inequalities, where necessary through positive action measures must be encouraged. This includes the establishment of specific and mandatory procedures for monitoring and reporting.
- It is necessary to review in each national context, the Equality body's institutional set-up, its resources and working procedures, as well as the degree of transparency with which it fulfils its obligations with a view to strengthen its capacity, further encourage cooperation with civil society and experts, and where relevant include a consultative body.
- Research on discrimination faced by various groups, including the role of indirect, institutional and structural factors, and conditions leading to multiple and intersectional discrimination should be conducted. Specific projects should include detailed analysis of the role of language in discrimination and situation testing of discrimination in employment.
- The effectiveness of sanctions applied by courts should be reviewed to assess the degree to which these are effective, proportional and dissuasive. Procedures through which to follow-up on court decision execution and clear responsibilities to monitor the case outcomes even after the final court decision (including for risk of victimisation) should also be developed.
- In-depth and targeted training of specific actors, including the judiciary, should be pursued. In addition, the engagement of trade unions and employers' associations with discrimination issues should be encouraged, possibly through tripartite discussions.
- Equality audits and equality plans for government institutions should be piloted. For example, the independent Ombudsperson institution could promote good practice by starting with itself.
- NGO capacity to provide support, including legal support and litigation needs to be increased, including cross-national trainings and cooperation projects, and the development of a NGO victim support network.
- Information campaigns should target members of trade unions and other NGOs on what constitutes discrimination as well as what rights individuals have and which counter measures can be used. Information needs to address not only groups vulnerable to discrimination but also groups of persons who are likely to be violators of rights.

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