

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

To Helena Dalli
EU Commissioner for Equality
By email

Date 7 December 2020

Reference CM2017

Subject Meijers Committee Comments on the EU Anti-Racism Action Plan 2020-2025

Dear Helena Dalli,

On 18 September 2020, the European Commission published its EU Anti-Racism Action Plan 2020-2025. The Action Plan presents an overview of the situation of racism in the Union and, as a response to the occurrence of racism, presents the Commission's proposals for several activities. These activities are aimed at better enforcement of EU law, closer coordination within the Union by appointing an anti-racism coordinator, promoting fair policing and improving protection against discrimination and reinforcing action at the national level. Furthermore, the diversity of EU staff will be increased and awareness raising activities will be developed. The Action Plan contains a specific emphasis on tackling the underlying problem of structural racism through data collection and awareness raising. The Meijers Committee welcomes the Commission's activities in this precarious area. In relation to the plan, we wish to make the following remarks.

1. Better enforcement of EU law

The Commission refers to two legal instruments in particular: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive) and Council Framework Decision 2008/913 / JHA of 28 November 2008 (Framework Decision on combating racism and xenophobia by means of criminal law). The Action Plan includes the intention to undertake a comprehensive assessment of the existing legal framework and to publish a report on the application of the Directive, in order to determine how to improve implementation.

The Meijers Committee welcomes this initiative. We suggest to the Commission to include in the report an overview of the monitoring activities with regard to the transposition and implementation of the Directive that the Commission has undertaken over the past years.

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In 2000, the first legal instrument in this area was adopted (the Racial Equality Directive) and this created the opportunity for the EU Court of Justice to issue judgments in this field of law. However, the Court cannot rule out of its own motion and is thus dependent on the activities of private persons and public institutions. So far, the activities of the Commission in monitoring the full and correct application of Directive 2000/43 by Member States have been rather modest. Apart from actions against Member States for failing to timely implement the directive, not a single infringement procedure reached the Court. The Commission did start and close infringement procedures against two Member States for their national equality bodies not being in compliance with the Directive. In 2014 and 2015 the Commission issued reasoned opinion concerning the discrimination of Roma in education against the Czech Republic, Slovakia and Hungary. Those cases have neither reached the Court nor been closed. In the 17 years after the end of the implementation period no other infringement procedure concerning Directive 2000/43 advanced to the stage of a reasoned opinion. In light of these disappointing results, the Meijers Committee finds that the Commission should substantively increase efforts in starting infringement procedures. Furthermore, the number of preliminary questions on Directive 2000/43 submitted to the EU Court of Justice has been low.¹ This may be caused by a lack of information or knowledge among legal professionals in the Member States, including members of the judiciary. The Meijers Committee suggests to include in the Action Plan an examination of potential obstacles to the development of case law on the Racial Equality Directive.

Widen the scope of the Racial Equality Directive

The Racial Equality Directive has created the possibility for individuals to bring cases of racial discrimination to specialized agencies or courts. However, the Directive does not appear to have had an impact on structural or institutional racism. In view of the structural elements of racism, identified amongst others by the Black Lives Matter movement, better enforcement of the Racial Equality Directive requires additional measures. The Commission wants to counter structural and institutional aspects of racism with measures aimed at "combating stereotypes and raising awareness of history and the right data for informed policy choices".

The Meijers Committee supports these initiatives. However, the Committee is of the conviction that widening the scope of the Directive will yield additional results in terms of combating structural racism.

The Directive excludes differences of treatment based on nationality and does not comprise migration laws and policies.² Amongst other developments, the refugee crises of the past years have made it clear that migration status is often a basis for direct or indirect racial discrimination by Member States. The closure of borders and the appalling situation in refugee camps are indications that prejudice and

¹ To date, the CJEU has decided in only six cases based on the Racial Equality Directive: Feryn C-54/07, Vardyn C-391/09, Meister C-415/10, CHEZ C-83/14, Jyske Finans C-668/15 and Maniero C-457/17.

² Article 3(2) of the Racial Equality Directive.

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perceptions of migrants as threats to national security result in racial discrimination at a structural level.³ The Meijers Committee urges the Commission to include, in its research into racism, the treatment of migrants and refugees in law, policy and practice. We also ask the Commission to put forward legislative proposals aimed at extending the scope of the Directive to cover distinctions based on nationality and to the field of migration law. This will send a strong signal to Member States to abandon discriminatory motives in their migration policies. It will also allow national courts and the CJEU to consider racism and racial discrimination in that context. Secondly, the scope of Racial Equality Directive is limited to the private or semi-private sphere. It concerns employment and occupation, education, social protection including healthcare, social advantage, and access to and supply of goods and services available to the public, including housing. However, services in the public sphere are not covered by the Directive.⁴ The effect is that discrimination on the grounds of racial or ethnic origin by public authorities falls outside the scope of the Directive. For example, if racial discrimination occurs with regard to a person who applies for a document at a local administrative authority, that person is not protected by the Directive.⁵

The Meijers Committee therefore proposes to extend the scope of the Directive to government services. This can be achieved by adding a new paragraph to Article 3, of Directive 2000/43:

‘i) access to and supply of public services, provided by public authorities.’

Promote the implementation of the Framework Decision on racism and xenophobia

Another legal instrument, the Framework Decision on combating racism and xenophobia by means of criminal law of 2008, requires Member States to ensure that serious manifestations of racism and xenophobia are punishable by effective, proportionate and dissuasive criminal penalties. However, as the Commission recognizes in the Action Plan, implementation of the Framework Decision is flawed in many Member States. The Meijers Committee notes with satisfaction that the Commission announces a comprehensive effort to ensure a full and correct transposition and implementation of the Framework Decision in the EU. The Action Plan, however, does not include sufficient measures to reach that objective. The Meijers Committee urges the Commission to propose a concrete and measurable set of activities accompanied by a timeframe, similar to the activities for the Racial Equality Directive.

³ See also the 2018 Thematic Report of the UN Special Rapporteur on contemporary forms of racism on Racial discrimination in the context of laws, policies and practices concerning citizenship, nationality and immigration, A/HRC/38/52.

⁴ With the exception of social protection and social advantages.

⁵ E.g. With the transposition of the Directive in the Netherlands, the Dutch government decided to exclude ‘unilateral public acts’ (*‘eenzijdig overheidshandelen’*) from the scope of the equal treatment legislation.

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2. Appointment of a coordinator for anti-racism

Part of the Commission's Action Plan is the appointment of an anti-racism coordinator for the EU.

The Meijers Committee welcomes any specific action to combat racism in the European Union. In order to make a difference in the fight against racism in the Member States and at the Union level, however, the coordinator should be more than just a moral voice. The post of coordinator can only be meaningful and lead to changes if provided with an independent status. The Meijers Committee advises the Commission to:

- Grant the coordinator with sufficiently broad competence to act and to draft a clear description of its tasks;
- Provide the coordinator with adequate budget and sufficient staff;
- Ensure that the coordinator reports independently to the European Parliament and the Council.

3. Reinforced action at national level

National action plans

The Commission proposal includes the promotion of national action plans. In the Commission's Action Plan, a number of guiding principles for these national plans are included. At this moment, only half of the Member States have such plans, so in the view of the Meijers Committee, there is a lot to be gained if other Member States also draw up a solid plan. We urge the Commission to ensure that civil society organisations are part of the development of these plans.

Statutory duties

The Meijers Committee notes that governmental bodies at the national, regional and local level can play an important role, not only in the prevention of (institutional) racism and racial discrimination, but also in the promotion of equality. In order to give these bodies tools and allow them to take measures in the area of preventing discrimination and promoting equality, the Meijers Committee favours the development of *statutory duties*. Statutory duties are institutional obligations whereby public organizations must establish systems and processes to promote equality for employees and users of services. Public authorities must mainstream tasks and process this properly in a due regard process in legislation, budgeting, regulation and policy.⁶ The Meijers Committee asks the European Union to promote the development and application of these duties throughout the Union.

4. Conclusion

The Meijers Committee welcomes the efforts of the Commission to combat racism and racial discrimination, as set out in the Action Plan, but also observes a number

⁶ N. Crowley, *Making Europe more Equal: A Legal Duty?* Brussels (2017), Equinet.

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of caveats. To enable more effective action against racism and racial discrimination, the Committee makes the following recommendations:

- The scope of the Racial Equality Directive should be widened by a) extending the scope of the Directive to nationality and migration law and b) including access to and supply of public services.
- The incorrect transposition and implementation of the Framework Directive should be countered by enforcement measures, such as infringement procedures against Member States who fail to implement EU law properly.
- The proposed anti-racism coordinator should be equipped with enforcement powers, an adequate budget and sufficient staff.
- At the national level, the Union should a) promote the involvement of civil society organisations in the development of national action plans and b) promote the introduction of statutory duties.

As always, we are available for your questions and remarks.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'A.B. Terlouw'.

Prof. dr. A.B. Terlouw
Chairwoman