Europeanization through Judicial Enforcement? The Case of Race Equality

Costanza Hermanin, PhD
OSI-Brussels/Open Society Justice Initiative

Introduction
In the spring of 2009, the European Union Agency for Fundamental Rights (EU-FRA, former Monitoring Centre on Racism and Xenophobia) published the results of the first comparative survey on the experiences of discrimination and racism within communities of immigrants and ethnic minorities residing in the 27 member states of the EU (FRA, 2009). The results of this investigation — the first conducted with a methodology that allows for a rigorous comparison among different EU countries — are interesting from many points of view. The EU MEDIS survey shows for instance, that on average, 55% of migrant and minority respondents in the EU believe that racial discrimination is widespread in their country, and that 37% of them, in particular individuals of Roma ethnicity and North African ancestry, also claim to have themselves been personally subjected to racial discrimination during the previous year. A further piece of data, however, is of particular relevance, namely the fact that 80% of those who claim they were victims of racial discrimination did not report the incident to anyone, some declaring that they were unaware of the existence of redress mechanisms and some others because they thought that a complaint would not have yielded any concrete results. These replies testify not only of a lack of awareness, but also of a certain mistrust towards judicial means of redress, i.e. those means that the European Union seemed to have privileged when the Race Equality Directive (RED) was adopted back in June 2000. And in fact, more than ten years after the RED was adopted, there are no signs of an extensive usage of it to claim discrimination in domestic and European courts across EU member states.

This observation is puzzling given that the RED expanded substantive rights in the majority of the EU member states, where antidiscrimination legislation was not as protective, and was designed to improve the availability of the means for individual judicial redress, i.e. what I define as plaintiffs’ “procedural rights.” In fact, in a context where perceived racial discrimination remains constant or, at times, is slightly increasing (Special Eurobarometer 263, 2007, Special Eurobarometer 317, 2009; FRA, 2009) one of the main expectable outcomes deriving from the implementation of the RED could well have been an increased recourse to means of judicial redress, i.e. adversarial forms of litigation. Indeed, the other instruments set forth by the directive - assistance by equality bodies, social dialogue, mediation, etc.- or the actions supported by the successive EU programmes that have tackled racial discrimination (the Action Programme to Fight Discrimination, first, and the PROGRESS programme from 2007) lacked any strong obligation in terms of domestic implementation. Thus, they cannot possibly be conceived as effective substitutes for judicial redress.

This paper attempts to ascertain whether there is truly a very scarce usage of the means of redress provided by the Race Equality Directive and, if so, to explain why. To do so, it looks at the domestic enforcement of the directive in a selected number of EU member states (France, Germany and Italy) and puts in relation the findings obtained for the RED with trends concerning other areas of antidiscrimination policy (gender and age)

1 I wish to thank Lisa Conant, Daniel Sabbagh, Adrienne Héritier and Bruno De Witte for insightful comments on an earlier draft.
showing that the main variation that we find in antidiscrimination policy implementation is cross-sectional rather than cross-national.

The idea of examining domestic litigation generated by the application of a specific EU directive is original within the panorama of EU studies. In fact, whereas a large body of political science literature has looked at judicial politics in the EU, most of it has studied exclusively the cooperation established between national courts and the Court of Justice through the procedure of referral for preliminary ruling, frequently in a neo-functionalist perspective (Alter, 1998, Burley and Mattli, 1993, Carrubba and Murrah, 2005, Mattli and Slaughter, 1998a, Mattli and Slaughter, 1998b, Stone Sweet, 1998, Stone Sweet, 2004, Weiler, 1994). Another wave of more recent literature, has studied the activity of national courts as decentralized enforcers capable of initiating dynamics effectively remedying member states’ failure to comply with EU regulation in the absence of an extended enforcement mechanism at the central European level (Alter and Vargas, 2000, Börzel, 2006, Conant, 2006, Kelemen, 2006, Kilpatrick, 2001, Slepcevic, 2009). Some of this literature dealt specifically with EU gender equality policy, inquiring into relations between soaring litigation and the number of references for preliminary rulings issued by member states and either progress in the institutionalization of gender equality policy (Cichowski, 2007), or the extent of domestic change brought about by EU law through domestic and European courts (Caporaso and Jupille, 2001), or attempting to explain cross-national variation in the use of judicial redress (Alter and Vargas, 2000, Tesoka, 1999). No study has as of yet dealt with the domestic enforcement of the two equality directives of 2000, the RED and the Framework Employment Directive (2000/78/EC). This paper, thus, provides the first attempts at so doing and attempts to answer the questions: under what condition does Europeanization through judicial enforcement occur in the domain of race equality? What are the factors that hinder the domestic enforcement of EU race equal treatment law?

In the first section of the paper I explain the theoretical framework provided for my analysis. I look at the domestic enforcement of the RED relying on a set of different analytical tools found in Europeanization, compliance as well as judicial politics literature. The research design, focusing on a most different system comparison of three EU member states, is detailed in the second section. This section explains the relevance of the domestic judicial arena for the analysis of the national implementation of some specific EU policies. The fourth section presents the empirical evidence found in France, Germany and Italy and summarizes the main aspects of the comparison. In the conclusion I show the relevance to race equality policy of the interaction between a substantively complaint transposition and domestic mobilization in the judicial arena.

**Explaining Differential Europeanization**

As it is necessary to acknowledge from the outset that nowadays any inquiry into the domestic implementation of EU policy cannot escape from the obligation to pay reference to the notion of Europeanization. I use this term to indicate the ‘penetration of European rules, directives and norms into the otherwise differentiated domestic spheres’ (Mair, 2004: 341) and ‘differential’ Europeanization to indicate the variable extent to which this penetration process may occur and lead to dissimilar policy outcomes (Héritier, 2001).

In recent political science literature, two main hypotheses have been formulated regarding the factors explaining variation or delay in EU policy implementation. On the one side, a country’s ‘policy misfit’ i.e. the degree of incongruence between pre-existing domestic institutions and new EU requirements (Héritier, 2001), and, on the other side, the quality of domestic compliance reached through the transposition process (Falkner et al.
2005), have been held as having a direct effect on the domestic implementation of directives such as the RED. In addition to these macro-variables, however, a directive so much focused on individual judicial redress, as the RED requires taking a second set of domestic elements into account to explain variations in implementation. In particular, on the basis of the more specialised insights of the comparative literature on judicial politics in the domain of equal treatment, in this paper I look at the role that domestic factors such as the mobilization of domestic groups and organizations within the legal arena may play to determine implementation.

Policy incongruence

The ‘goodness of fit’ perspective has permeated a significant part of the work that has tried to shed light on the differential implementation of EU policies. Some scholars have considered a high level of pre-existing policy incongruence as a predictor of domestic resistance (Knill and Lehmkuhl, 2002). Others consider a certain degree of policy incongruence as a necessary condition for the development of a pressure for the adaptation of member states’ policies (or institutions) to European-driven change. The two hypotheses are not incompatible. If a larger incongruence between the national policy model and EU policy necessarily implies more resistance to policy change in a first stage – e.g. before the transposition of a directive - once adaptation is on its way policy change is likely to be wider in the case of member states where incongruence is larger. I name this argument as ‘policy incongruence argument’.

In relation to the RED, I expect that wherever the directive introduced a model of judicial redress substantially different to the one already existing, the country will be under a higher pressure to adapt, in comparison to those countries that had no redress at all. The more different legislation is, compared to the pre-existing domestic policy, the more reluctantly domestic actors will turn to changing the pre-existing model, determining resistance to domestic adaptation. However, once new EU law is transposed, domestic actors will more readily seize the newly opened opportunities. In a context where discrimination is constant, but new means of redress are open, I expect a larger increase in the recourse to judicial redress. In addition, increased litigation is likely to lead national courts to develop a jurisprudence evolving more rapidly towards what is required by EU law. Faced with an increased number of a new type of complaints, national judges will have to receive training in order to update their modus operandi. As courts become more prepared to assess the new substantive and procedural equal treatment rights transposed into national law, and rules become more binding and precise, we might expect a greater likelihood of subsequent legal claims (Cichowski, 2007: 22). This chain of events may well bring about a larger domestic change.

Conversely, wherever the RED fits with the existing redress model, countries are subject to a lesser pressure to adapt. Thus, the incentives to bring more litigation are fewer and there is no need for the judiciary to train and implement the comparatively fewer innovations brought about by the RED. I expect that in this case, the evolution in the number of complaints and in the type of jurisprudence obtained will be less relevant. I base my measure of policy incongruence on a set of indicators summarizing each country’s constitutional and legal framework for equality, as well as on policies adopted to enforce those legal requirements.

Compliance

On the other side, focusing on a formal definition of compliance as the ‘process of putting international commitments into practice’ (Raustiala and Slaughter, 2002: 538), the quality of compliance attained through the process of domestic transposition directives could be
seen as a necessary but also sufficient condition for compelling domestic implementation. According to that, the expected effect of a substantially compliant transposition of the RED is the establishment of new substantive and procedural rights and a consequent increase in the incentives to access the judicial system to redress discrimination. For ‘substantively compliant transposition’ I refer to a process of national incorporation of EU policy that goes beyond transposing the requirements of the directive literally, and also ensures those mechanisms that are necessary to make the required ‘regulatory’ elements of the directive work, e.g. amendments to national codes, budgetary commitments to set up equality bodies, etc.). Confronted with a substantively compliant legislation and subsequent complaints, domestic courts should be able to deliver a jurisprudence that correctly applies the norms contained in the RED. This said, a growing branch of ‘compliance literature’ has pointed at factors that may impinge on the quality and timeliness of compliance at the domestic level.

Nowadays, the principal voices in the debate on compliance assert either that compliance is country-specific, or that is sector-specific or, even, directive-specific. Sociological-institutionalist explanations of compliance are frequently contrasted with actor-centred approaches (Börzel, 2003, Falkner et al., 2005, Treib, 2003). I join the perspective that domestic policy-makers have a deciding role in determining substantive compliance. In particular, in addition to defining the contents of the transposition measures, domestic policy makers choose the instrument through which directives are transposed and can determine the degree of salience attributed to the new policy measures (Steunenberg, 2006). Their role as ‘veto players’ extends beyond attaining the formal level of compliance enshrined in national law and sanctioned by the Commission’s approval, or targeted by its infringements proceedings. Their choices in terms of provisions within EU directives for which different policy choices are equally compliant (what I call ‘framework’ or ‘directive elements’), can directly affect the process of domestic policy implementation. In particular, the less precisely binding the directives, the more domestic veto players will be able to affect the policy-implementation cycle with the choices they make at the moment of transposition and that influence the degree of substantial compliance.²

**Domestic Mobilization**

In addition to this first strand of arguments, I formulate expectations following some of the main findings of the literature that dealt with the judicial enforcement of other strands of EU equal treatment policy in the member states, such as gender equality and non-discrimination on ground of nationality. According to this literature, in a large amount of cases individuals are not standing in front of domestic courts alone, especially in the case of disadvantaged groups. The support from civil society organizations (NGOs and trade unions) is particularly determining for all those cases in which a public interest dimension is involved in the application of the law. This is traditionally the case of racial antidiscrimination law, for a multiplicity of reasons. On the one hand, individuals belonging to ethnic minorities, such as migrant or migrant offspring, are in all likelihood more reluctant to go to court than other sets of a country’s population (Conant, 2002: 162). This depends from a series of reasons ranging from the availability of financial resources to file a formal complaint to the actual knowledge of the means of judicial redress or acquaintance with lawyers with an expertise in antidiscrimination law. The status of

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² The discretion of domestic policy makers and their reluctance to translate EU engagements in domestic law can be contrasted and remedied through the infringement proceedings engaged in by the European Commission (EC). However, responses to infringement proceedings can vary according to the determination of the Commission in pursuing certain proceedings and the way in which domestic policy makers decide to reply to infringements (Conant, 2002). In the case of the RED, the EC did not pursue any infringement for incorrect transposition beyond the stage of reasoned opinion.
undocumented migrant can also be a very strong disincentive to approach judicial institutions in case of racial discrimination.

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

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

Finally, in addition to civil society organizations, studies on EU gender equality policy highlighted the impact of equal treatment bodies on the development of EU-law litigation (Alter and Vargas, 2000; Jupille and Caporaso, 2001; and Micklitz, 1996). These studies found a direct relation between the evolution of equality jurisprudence, on the one hand, and the presence of equal treatment bodies specialised in the domain of gender, and with powers to assist claimants to file complaints, on the other hand. The establishment of equality bodies and their endowment with competences to assist victims of discrimination is mandated by the RED, even though member states may choose whether or not to provide these bodies with powers to support litigation or stand in courts. The formal support of an equality body to minority claimants can in fact play a similar role to that outlined for civil society organizations, easing the process of recovering knowledge and resources to file an antidiscrimination lawsuit. In addition, the more an equality body is perceived as a specialised, totally independent institution, disconnected from political or economic power, the more claimants will be willing to turn to it. Thus, the paper takes into account the organizational configuration and the powers bestowed on equality bodies in each country to assess their role in promoting litigation and determining an evolution of domestic jurisprudence in the domain of equal treatment. The more independent and powerful the domestic equality body set up in adherence with the RED, the more domestic litigation and jurisprudence are expected to evolve.

Why Europeanization through Domestic Judicial Politics?
Few scholars have gone beyond studying references for preliminary rulings to evaluate the enforcement activity of domestic courts with reference to EU law. Those who have, have mainly concentrated on so-called 'national courts' decisions on points of EU law,' namely those cases where national courts directly enforce EU law citing the relevant provisions, but without requiring the intervention of the Luxembourg judges (Conant, 2006, Ramos Romeu, 2003, Ramos Romeu, 2006, Slepecevic, 2009). Attempts to consider domestic jurisprudence produced by the national transposition of a EU directive more widely have been even more rare (Blom et al., 1995, Fitzpatrick et al., 1993, Kelemen, 2011).

The reasons why studies of national court decisions are so few are twofold. First, scholars have mainly been interested in studying EU-law litigation generated by domestic
referrals to assess member states’ compliance with EU requirements, rather than to assess the domestic implementation of a specific policy. Second, reliable data on domestic litigation in civil law countries—the filing of lawsuits in a specific domain and correspondent national courts’ decisions—is particularly difficult to gather and use in comparative studies. Third, the impact of policies that are not as focused on individual judicial redress as the RED can be assessed through different types of indicators.

In this paper I provide an in-depth quali-quantitative analysis of national courts’ decisions based on the statutes that transposed the RED in the EU member states. These rulings are considered as the main indicator for assessing the domestic implementation of the RED, besides being a means to ascertain whether national policy styles are pushed in a more adversarial mode by EU policy (Kelemen 2006).3

Some caveats should be emphasized from the outset while approaching a study of national courts’ activity in continental Europe. The first is related to comparing litigation and jurisprudence across countries in the absence of any accurate measurements about the level of race inequality of a specific country.4 Given the lack of data on race (in)equality in continental Europe I attempt to select countries cases where perceived “levels” of race discrimination are constant and comparable over the selected period of study based on the results of the recent discrimination surveys by Eurostat and FRA (Special Eurobarometer 263 and 317, FRA 2009). Second, it is necessary to always remain aware of the fact that national court activity is taken into account here as an indicator of the national implementation of the RED, and not as a measure of race inequality in a specific country.

Based on the analytical framework outlined above, I choose to look at three country-cases selected on the backdrop of a most different systems strategy. Germany, France and Italy are three countries were there is scarce anecdotal evidence of race equality litigation. Nonetheless, these three have constantly been the main contributors to the Luxembourg court’s activity derived from referrals for preliminary rulings (Conant, 2001, Stone Sweet, 1998, Wind et al., 2009). The three countries also have a rather vast, even though not perfectly equal, proportion of individuals who belong to visible minorities. Exact numbers on that population are, however, impossible to claim, and the comparison has to be based on relevant proxies, such as the population of third country nationals and that of second generations with national citizenship but an extra-European migration background.

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

Table 1 Potential beneficiaries of race antidiscrimination measures
Rough estimation based on Eurostat (2009) and national statistical sources

The three countries present, instead, a significant variation concerning elements singled out in the theoretical section as relevant to explain differential implementation. For

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3 Formal litigation is of course not the only way to enforce new substantive rights. Article 8 of the RED itself mentions conciliation procedures among the methods to ensure individual redress. However, private out-of-courts settlements are not traceable and are thus difficult to study. A glimpse of the domestic use of out-of-court settlement procedures can, however, be gained wherever equality bodies have competences to assist victims and support settlements. Thus, wherever equality bodies publish data on their activity, the relevance of out-of-court settlements for the domestic enforcement of the RED is discussed.

4 Most Western European countries do not collect data on the ethno-racial make-up of their population because the general caution concerning the notion of race has also led many EU members to refrain from using race categorization in public statistics (Simon, 2007).
instance, until 2000 the redress system for discrimination on ground of race, in France, was mainly contained in specialised criminal statutes. Germany, instead, was a country with no specialised legislation on race equality or antiracism, whereas Italy had both criminal and civil statutes for the redress of racial discrimination. In terms of performances in the transposition of EU policy and compliance, the three countries also differ widely. The recent study by Falkner on compliance with EU social policy directives (Falkner and Treib, 2008, where the authors use an extended notion of compliance including legislative transposition as well as domestic court enforcement of EU social policy) assigns the three states to different ideal-typical clusters of EU member states in relation to compliance. According to their conclusions, Germany is placed in the world of domestic politics, characterised by political “picking and choosing” during the process of transposition and respectful enforcement of the new rules during the phase of enforcement. France is placed in the world of transposition neglect, substantially affected by domestic actors’ neglect for EU policy in the phase of transposition and correct enforcement later on. Italy pertains to the world of dead letters, where provisions picked and chosen by decision-makers during the phase of transposition are then neglected at the moment of enforcement.

In conclusion, the three countries present a combination of similar (in terms of apparent low level of court enforcement, tendency to rely on EU law litigation, perceived race discrimination and number of possible end-users) and different characteristics (with reference to possible independent variables) that make them three compelling cases to answer the questioning proposed in this paper.

**Equality Jurisprudence: A Quali-Quantitative Analysis**

In my analysis, I compare the extent to which civil and employment litigation intensifies over the years from the date national antidiscrimination law transposing the RED is set into force, up to July 2010. If determining whether there is an intensification of civil litigation in the three countries is a first step towards understanding whether the RED is enforced domestically, assessing the qualitative characteristics of the domestic complaints/rulings is a second important step. What type of claim is brought to national courts? Who files them? And what decisions do domestic courts take in cases of race discrimination? In order to assess how substantive and procedural rights set out in the RED are enforced by domestic courts, this paper looks at specific characteristics of the lawsuits that produce domestic jurisprudence, constructing a qualitative indicator of judicial enforcement.

<table>
<thead>
<tr>
<th>Qualitative indicator of enforcement</th>
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<tbody>
<tr>
<td><strong>Substantive rights</strong></td>
</tr>
<tr>
<td>Type of discrimination claimed (direct, indirect, harassment, instruction to discriminate)</td>
</tr>
<tr>
<td>Categorization of the type of discrimination (racial, ethnic origin, based on proxies such as language or nationality)</td>
</tr>
<tr>
<td>Defendant (private, state)</td>
</tr>
<tr>
<td>Domain of law (civil, administrative, employment)</td>
</tr>
<tr>
<td>Type of relation affected (access to employment, career progression, dismissal, access to goods and services)</td>
</tr>
<tr>
<td>Assessment provided by the court (discrimination upheld or rejected)</td>
</tr>
<tr>
<td><strong>Procedural rights</strong></td>
</tr>
<tr>
<td>Proof requirement (level of prima facie, complete shift, statistical proof, situational testing)</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Support for the complaint (NGO or equality body support for individual complaint)</th>
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<tr>
<td>Individual or collective complaint</td>
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<td>Remedies and sanctions</td>
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</table>

Table 2 Qualitative indicators of domestic enforcement

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

Secondly, I consider the aspects of procedure that ease access to the judicial system of redress for antidiscrimination law claimants. Above, I have defined these as ‘procedural rights’. The wider the options for accessing judicial redress that courts’ jurisprudence sanction, the easier the enforcement of the law. Higher sanctions and damages are considered also as indicators of more effective enforcement, in the same logic used above for the complaints’ success rate.

Together with the quantitative assessment, a qualitative assessment of this set of characteristics helps understand the extent to which national antidiscrimination law is implemented in accordance with the RED.

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

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

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

Second, race discrimination — in particular indirect racial discrimination — is sometimes pleaded in cases brought by claimants who also allege a discrimination grounded on their third country nationality. Since Article 3.2 of the RED explicitly excludes distinctions based on nationality from its scope of action, cases of legal discrimination against third country nationals are only considered whenever race or ethnic categorization is clearly at stake in the lawsuit. This second caution leads me to leave out of the country datasets most rulings issued by administrative courts and concerning formal barriers in access to public employment and social provisions for third country nationals.

The analysis provided in the next section is the result of the analysis of national case law databases (Legifrance and Lexis-Nexis Juriclasseeur, Juris.de and De Jure), specialised antidiscrimination case law collections and 15 expert interviews with law practitioners for each country.

The Judicial Enforcement of the RED

France

The review of French civil court rulings on race discrimination from the transposition of the RED up to July 2000 reveals a progressive intensification of civil litigation, which was virtually absent before 2000, even at the highest levels of jurisdiction. In the course of over eight and a half years since the adoption of the first equal treatment law transposing the RED (Law 2001-1066), the development of French civil jurisprudence on race discrimination shows very distinctive characteristics. The searches performed in the French legal databases – which have no coverage of first instance rulings – completed with cases singled out by experts, identify approximately 30 rulings by higher civil courts (Courts of Appeal and Court of Cassation) on cases of discrimination, or harassment, grounded on racial categories.

Provided that like in a pyramid, in a state judicial system only few complaints reach the higher degrees of jurisdiction, we can reasonably expect that there have been many more complaints filed with and adjudicated by first instance courts within the eight-year time period covered by the dataset. This hypothesis is corroborated by a sample search of first instance rulings performed in the jurisprudence archive of the French equality body, HALDE. In addition to that it must be considered that, in France, first instance labour courts,

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6 In the three countries, for instance, discrimination against Jews is mainly framed under the label of race discrimination.
7 This hypothesis is corroborated by a sample search of first instance rulings performed in the jurisprudence archive of the French equality body, HALDE. In addition to that it must be considered that, in France, first instance labour courts,
The French jurisprudence mainly employs the legal categories of discrimination/harcellement racial(e) (race discrimination/harassment) and, to a lesser extent that of discrimination fondée sur l’origine (ethnic origin discrimination). Interestingly, the French judges never state clearly whether they found direct or indirect discrimination. This testifies to the fuzziness that the two concepts still have in French law, corroborated by the long absence of any clear definition of indirect discrimination (until 2008) and the fact that is widely believed that statistics based on racial categories, which may provide proof of indirect discrimination, are not allowed under French law.

The rulings under consideration mainly concern discriminatory dismissals and unequal treatment in the progression of an employee’s career. The Court of Cassation sanctioned the competence of the Conseils des Prud'Hommes to adjudicate discrimination complaints also in cases of alleged discrimination in access to employment, but claims in this domain are extremely rare. Most suits are filed against private employers. In these cases, plaintiffs claim harassment and discrimination, even though rulings avoid defining explicitly what type of discrimination is at stake. The phrase ‘indirect discrimination’ is never found in the dataset.

In general, claims alleging race discrimination yield few favourable court decisions for the rulings released in the years 2002-2007 (only three on 12 were upheld). The success rate becomes higher after 2008 (nine of 17). On the quality of French jurisprudence, however, the dataset shows a certain evolution as regards a few process elements typical of the antidiscrimination lawsuit, even though other aspects, as well as the substantive notions of discrimination, remain critically underused and under-defined. In most of the cases included in the dataset, claims were dismissed on the grounds that plaintiffs did not bring sufficient indices to shift to the defendant the burden of proving that no consideration of race or ethnic criteria were involved in their employment-related decisions. The situation evolved slowly through the years also thanks to the involvement of trade unions and specialized NGOs in a few major strategic cases against large companies, as the French automaker Renault and the multinational Bosch. These cases helped developing a quasi-statistical method for proving discrimination prima facie that was admitted by the judiciary as sufficient to shift the burden to rebut a proof to the employer.  

After 2008, complaints show a percentage of success higher than those of the early years 2000, as well as the adoption of a range of different remedies: from the allocation of moral damages (up to some thousand euros), the shifting of attorney fees, the publication of the Conseils de Prud’hommes (CPH), are particularly accessible due to their nature as courts composed mainly of lay judges, where no attorney representation is required.

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This method, called méthode des panels (comparable panels method), consists of establishing a comparison within sets of employees with similar functions and qualifications but different career paths, and showing that surnames or places of birth suggesting a foreign origin are the only characteristics distinguishing the two sets.
of the ruling, apart orders aiming to either reintegrate in employment or promote the plaintiffs, or pay the corresponding damages. These range from up to 250,000 Euros in pecuniary damages for the 2008 case involving Renault, with 3,000 Euros non pecuniary damages each for the supporting NGOs and trade unions, but were in general closer to an average of a few thousand euros for moral damages.

In parallel with acknowledging the interesting quantitative development of labour law litigation, however, it is important to stress the total absence of civil law jurisprudence outside the domain of employment. The latter is not only to be imputed to the later extension of civil antidiscrimination provisions to this domain (2004) or to the long absence of legal standing for civil society organizations outside labour and criminal courts (up to 2008). Rather, such absence parallels the persistence of criminal litigation in the domains of discrimination in access to goods and services and access to employment. This kind of litigation is based on a longer tradition (since the 1972 ‘Plevin law’) and, especially after the 1990 ‘Gayssaut law’, also on a rather established corpus of jurisprudence. According to NGO members and criminal lawyers, in spite of the innovations introduced thanks to the transposition of the RED, filing a criminal complaint in cases of race discrimination in access to services or employment presents more advantages than choosing the EU-suggested civil law domain.

Looking at the role of domestic mobilization in the spread of antidiscrimination litigation, civil society organizations have supported antidiscrimination lawsuits only in a small number of cases. Thus, the action of antiracist NGOs was not the central factor behind the intensification of employment litigation. French main antiracist NGOs are few but generally resourceful in terms of lobbying skills and political leverage. Litigation is a subsidiary repertoire of action and is mainly used for symbolic criminal prosecutions. A different discourse applies to trade unions, whose legal actions were sporadic but certainly relevant to the qualitative development of certain process element, such as the method to prove prima facie discrimination, but was far less important in terms of number of lawsuits supported.

Thus, it is legitimate to affirm that the evolution of race antidiscrimination litigation has been crucially facilitated by the presence of an autonomous and comparatively powerful equality body endowed with competences to litigate, the High Authority against Discrimination and for the Promotion of Equality (HALDE). Even though the interventions of HALDE in employment courts took place in particular after the 2006 review of its competence to stand in lawsuits, the reputation acquired by the body — at least at a centralised institutional and territorial level — and its increasing judicial activism certainly exercised an influence also on individual decisions to engage in judicial proceedings against race discrimination. HALDE’s own mediation activity has slightly declined in the last few years, but the extent to which this subtracts work to domestic courts, is a more difficult hypothesis to address in view of the available data.

First, a criminal complaint immediately gives powers of inquiry to the public prosecutor, making up for the difficulties of disclosing relevant information for the suit, a difficulty that is typical of the adversarial process and justifies the introduction of procedural rights such as the inversion in the burden of proof. Second, in France the criminal lawsuit is subject to a regime of free proof, which has made acceptable even for the higher jurisdictions the use of situational testing and wiretapping to demonstrate race discrimination. Third, differently from the domain of civil law, NGOs can bring collective complaints, also in the absence of an identified victim. Fourth, the jurisprudence developed over the years (late 1990s and early 2000) in criminal courts has established a range of expected moral damages for the plaintiffs and also for the NGOs that are parties to the suit, establishing a further incentive to choose the criminal route. Finally, experts and antiracist NGOs highlight that, in general, plaintiffs prefer filing with criminal courts for the symbolic moral value of a criminal conviction.
Germany

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

In an equal space of time German courts were able to refer a similar number of cases on discrimination to the Court of Justice of the European Union, asking for a preliminary interpretation of EU antidiscrimination law on cases of age (in 12 cases) and sexual orientation discrimination (in one case). Considering that referrals for preliminary ruling can plausibly represent ‘the tip of the iceberg’ of domestic litigation in a specific domain, age and sexual orientation discrimination are likely to have been litigated much more frequently than race in the three years of operation of the AGG.

In all these rulings, German judges use the term ethnic origin discrimination (Diskriminierung auf Grund ethnischer Herkunft), thereby avoiding explicit mention of race. A second interesting characteristic of the jurisprudence in the domain of racial discrimination is that in most cases German courts were asked to decide whether a language requirement in employment was to be considered as a form of indirect ethnic origin discrimination, making language proficiency an “apparently neutral but suspect motive.”

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

Table 4 Rulings by German Courts on race discrimination
August 2006-June 2010
Source: queries based on the reference of the Antidiscrimination Act (AGG) on Juris.de
* For 2006 the search is limited to the last 5 months, for 2010 to the first six months

The question is certainly of interest given that, on the one hand, an enhanced knowledge of the national language can certainly be considered as a genuine occupational requirement in certain professions. On the other hand, the level of language required, e.g. being a native speaker, can also affect jobseekers from ethnic minorities disproportionately and without plausible justification. Interestingly, among the three countries, language is unique to Germany as a categorization issue in race discrimination cases.

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

Except for one, all the other rulings contained in the German dataset concern discrimination by private individuals or companies. In the outlier case, indirect race discrimination was evoked against a nationality requirement to compete for a scholarship. The complaint was, however, dismissed by the administrative tribunal, which refuted the conflation between nationality and race or ethnic origin discrimination.

A case of alleged reverse discrimination, i.e. a selection unlawfully privileging a member of a group at risk of discrimination to the detriment of a majority applicant, also needs to be cited. Required to assess whether a job advertisement explicitly seeking a woman of migrant origin could be considered reverse discrimination on the grounds of ethnic origin and gender, the Labour Court of Cologne decided that the characteristics so advertised could be considered as a genuine occupational requirement for the post as cultural mediator in a project on sexual violence against migrant women. On the 14 cases adjudicated by German courts, only five were upheld.

A few more decisions exemplify the interpretation of the process facilitations provided by the RED and transposed by the AGG. In the sole known German case where situational testing was used to shift to the defendant the requirement to prove that her methods of selection to access a night club were not discriminatory, the judge found discrimination but halved the damages and made the plaintiff pay for a certain percentage of her costs because situational testing was deemed as a sort of “disloyal” proof. In two cases, the Labour Appeal Court of Hamburg and that of Schleswig-Holstein established that being part of intersectional groups at risk of discrimination — an elderly non-German woman, in the first case, and a disabled black men, in the second — was not sufficient to reverse to the employers the burden to rebut an allegation that their job selection processes were discriminatory. In another case, the Federal Employment Court relied on the expiration of the short delay set by the statute of limitations (two months) in order to reject a complaint of racial harassment by four Turkish employees whose employer refused to delete a racially offensive graffiti drawn in the toilets of the company. All the cited complaints were presented as individual complaints, with no formal intervention by antidiscrimination NGOs, trade unions, or equality bodies. As concerns damages, moral damages ordered for the refusal to access a service were halved in the case of the Oldenburg nightclub where situational testing was used as proof (500 Euros) and were only slightly higher in the case of discrimination in access to housing (2500 Euros). In the two cases in which courts found discrimination in access to employment and in the case of discriminatory dismissal, all based on language proficiency, the compensation ordered for non-pecuniary damages ranged between 3900 and 5400 Euros plus interest.

This reluctance of German employment courts to accept process rules of antidiscrimination law may be an explanation for the scarce number of successful complaints detected so far. The adaptation pressures expected according to the incongruence hypothesis (Germany presented a medium policy fit with the RED given the absence of an alternative equality policy model) have so far generated a high level of litigation for some motives of discrimination (age and sexual orientation), but not for others, especially race and religion. The different levels of litigation identified for race and some other suspect grounds are not easy to explain through the incongruence hypothesis, also in view of the intense domestic litigation that the EU equal pay and gender equal treatment directives has led to in Germany over the years. Indeed, German courts took the lead in referring preliminary questions to Luxemburg on gender equal treatment issues (Cichowski, 2007: 93). Comparable implementation dynamics did occur for the FED, but have been limited to age and sexual orientation.
In terms of formal compliance, even though the AGG was adopted later than other domestic laws transposing the RED (August 2006), it provided for a statute whose compliance with the RED was doubtful in some aspects. With reference to equal treatment in spite of one’s race, the wide exceptions foreseen in the domain of housing, family law and succession law, and the lack of an explicit extension of the AGG to the provision of public services such as education have been maintained in spite of a new infringement procedure launched by the European Commission in 2008. The effects of these loopholes are not directly visible from the litigation dataset, but German antidiscrimination NGOs allege that they have seriously hindered litigation.\(^{10}\)

Looking at domestic mobilization, on the one hand, the infrequent court activity is certainly explicable through the weak role to which the AGG confines civil society organizations in terms of powers to assist in litigation: only a federation of seven NGOs or 75 individuals constituted for a certain number of years can gain legal standing. The Federal Antidiscrimination Office (ASB) is a mere department within the Ministry of Family, Senior Citizens, Women and Youths that enjoys limited powers to process complaints and no legal standing. Deprived of external assistance, claimants from ethnic minorities may be far more reluctant to engage in litigation than German employees concerned about age requirements or compulsory retirement age. On the other hand, German antidiscrimination NGOs have compensated their own and the federal equality body’s lack of powers to support litigation by establishing private pro bono antidiscrimination offices. Around 10 of these offices were created during the 2000s, and most of them have specialised in assisting with discrimination claims through mediation and conciliation. Following the data on complaints published by some of the “informal” equality bodies, hundreds of race discrimination claims are now directed to this type of organization, which mobilize more on offering mediation rather than on filing formal court interventions.\(^{11}\)

**Italy**

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

In Italy the dataset of race discrimination cases — built upon the most inaccurate of the three national legal databases, De Jure, and on the collections of complaints by specialised NGOs — comprises a very small set of 11 cases.

<table>
<thead>
<tr>
<th>Year</th>
<th>2003*</th>
<th>2004</th>
<th>2005</th>
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<th>2009</th>
<th>2010*</th>
<th>2003-10</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Instance Courts</td>
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<td>0</td>
<td>3</td>
<td>3</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>0</td>
</tr>
<tr>
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<td>0*</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>11</td>
</tr>
</tbody>
</table>

*Table 5 Rulings by Italian Courts on race discrimination July 2003-June 2010*

\(^{10}\) DE ADNBTBB.

\(^{11}\) Interview DE RAXEN. See also the Report by the Antidiscrimination Office of Cologne, (ADB, 2010).
The main characteristics of the Italy dataset identify a usage of antidiscrimination litigation against race discrimination mainly directed at redressing unequal treatment established by state measures. The largest subset of cases, for instance, concerns rulings on actions brought against the so-called Nomad Emergency Decree (NED) of 2008, a piece of emergency legislation targeting directly so-called “nomads,” i.e. Roma, Travellers and Sinti, and providing derogatory powers to local authorities to perform identifications and evictions, whatever the nationality or immigration status of the “nomads” concerned (President of the Council of Ministers, 2008). As of July 2010, three of the antidiscrimination complaints brought against the Ministry of the Interior and the NED were dismissed on either formal grounds or on substance. Two more lawsuits were still pending in spite of the intermediary relief procedure on which antidiscrimination lawsuits frequently rely, which would require an expedited treatment of the complaint.

More court decisions deal with Northern Italy city councils or regions which, in the years 2000, adopted statutes and regulations that excluded third country nationals or short term residents from specific social services or social allocations, touching directly upon ethnic categories. The Municipality of Morazzone (Lombardy), for instance, established a baby cheque for babies born from either two Italian parents who were Italian by birth, or an Italian by birth and a EU citizen, or a Swiss. The municipal regulation was challenged in court, but repealed before the ruling, which therefore did not punish the city council for race discrimination. In another case, the municipality of Trenzano (Lombardy) issued a regulation forbidding the use of foreign languages in public meetings. Challenged by a collective complaint brought by a union, CGIL, and two NGOs, the regulation was first suspended through intermediary relief, and then struck down as discriminatory by the civil court. At the central level, the National Institute for Social Security adopted annual guidelines for 2009 inviting its inspectors to target in particular ‘ethnic enterprises’ (aziende etniche), viz. enterprises managed by ethnic minorities or employing work force from ethnic minorities. The lawsuit was brought as a collective action by an NGO whose legal standing was (wrongly) rejected by the court, a fact that determined the dismissal of the complaint. That NGO, in fact, was duly registered in the official list of antidiscrimination NGOs provided with legal standing that is set up and managed by the central government according to the Italian Act that transposed Article 7.2 of the RED, the Legislative Decree 215/2003.

Rulings on typologies of cases found also in other countries have been much rarer than court decisions on state discrimination. In two cases, bar managers were punished for refusing to serve extracomunitari (third country nationals), a term employed in these cases to indicate black costumers, or for making them pay a price higher than that requested from locals. One of the two cases was proved through situational testing and was successful, but the NGOs supporting the claim were denied legal standing because the official list of antidiscrimination NGOs had not yet been approved by the government. Another failed collective complaint was brought by an antidiscrimination NGO against the director of a magazine publishing job and housing advertisements. The NGO sought the condemnation of the director because the magazine allowed the publication of discriminatory advertisements, e.g. job or housing offers discouraging extracomunitari applicants. The complaint was rejected and the NGO ordered to pay 5,000 Euros in costs.

In the domain of employment only one case of discriminatory dismissal was successfully challenged by four third country nationals supported jointly by an NGO and a trade union. Overall, the usage of antidiscrimination law to sue discriminatory behaviour established by private individuals remains, however, extremely rare.

From a substantive point of view, it is also interesting to note that whereas most antidiscrimination complaints filed according to pre-existing Italian antidiscrimination
provisions banning unequal treatment on ground of nationality have been successful in the past (n.b. these are not included in this dataset), the opposite is true of many race antidiscrimination lawsuits. The case of the nomad emergency decree, where courts have constantly refused to recognize the word nomadi (nomads) as an ethnic category is exemplary. In short, nationality seems better protected than race as a suspect category in Italian jurisprudence. As of July 2010, no lawsuit based on race or ethnic categories had reached the higher degrees of jurisdiction and only four were upheld.

The paucity of civil court decisions on discrimination based on race or ethnic categories in Italy had as a consequence that some aspects of process proper to the kind of equal treatment jurisprudence developed elsewhere under the impulse of the RED, have not (yet) been addressed in the Italian context, leading to a limited implementation of the RED’s provisions. Litigating against local statutes or regulations which explicitly exclude non-native citizens or short term residents implies that there is neither need to shift the burden of proving discrimination to the defendant, nor to use statistical evidence or situational testing in courts.

Nonetheless, Italy is the only country in which antidiscrimination NGOs have consistently sought acknowledgement from the judiciary for the formal support brought to plaintiffs. These NGOs are frequently loose networks of specialised lawyers for which litigation is the main (and almost sole) repertoire of action. In addition, Italy is also the sole case where NGOs are explicitly allowed to bring collective complaints for race discrimination in the absence of identified claimants. However, whereas legal standing was generally granted to NGOs in cases challenging requirements expressed in terms of nationality, it was frequently denied whenever racial categories were at stake. The Italian equality body – the National Office against Racial Discrimination does not have competences to stand in litigation. As a department within the Prime Minister’s office, it provides mediation and referral to antidiscrimination NGOs.

<table>
<thead>
<tr>
<th>Qualitative indicators</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantive rights</td>
<td>• no indirect discrimination claims, • family name • claims against private individuals/firms, • employment, • career progression, • increasingly upheld</td>
<td>• indirect (limited) • language proficiency • claims against private individuals/firms, • employment, • access to employment/dismissal • rarely upheld</td>
<td>• direct &amp; indirect • TCNationality • claims against state • civil law/public law • access to g&amp;rs, profiling • rarely upheld</td>
</tr>
<tr>
<td>Procedural rights</td>
<td>• lowering proof standards • claims supported by EB • individual • high damages in few cases</td>
<td>• high proof standards • no external support for claims • Individual • low average 4,900 €</td>
<td>• high standards of proof • support by NGO • individual and collective claims • low 500 to 2,000 €</td>
</tr>
</tbody>
</table>

Table 6 Qualitative indicators of enforcement

**Comparing findings**

This section of the paper points out the results obtained from the analysis of the domestic judicial enforcement of the RED. The data confirm that Europeanization through judicial enforcement happened everywhere to a very limited extent, as levels of litigation are still very low for the three countries if compared, for instance, to the levels of domestic litigation
on gender discrimination, as well as on discrimination on ground of EU and associated countries’ nationality recalled in the first section. In Radaelli’s (2003) terms, we could certainly talk about a variable degree of inertia towards Europeanization for all the three cases. In fact, the three countries show some variation among them both in the rate of increase of civil antidiscrimination litigation as well as, and especially, in the qualitative characteristics of antidiscrimination litigation and jurisprudence. By putting these results in relation with the values established earlier on for the relevant domestic variables, this section looks at the combination of factors that is more likely to explain the implementation dynamics observed in this study. It also confirms that the spread of adversarial legalism pushed by the RED is mitigated by the low volume of litigation.

Among the three countries, the one in which the RED is enforced with the highest increasing frequency is France. In terms of antidiscrimination complaints in the domain of employment, thus, the RED certainly supported domestic change. Litigation has significantly developed where it was almost absent before, namely in the domain of employment law. However, this quantitative evolution on the side of law enforcement is not matched by a significant innovation in French jurisprudence. Indeed, some of the most innovative elements of the RED, inspired by an Anglo-Saxon, race conscious, affirmative-equality prone model of policy, have not been implemented. French claimants and courts have refrained from litigating and adjudicating indirect discrimination, a fact certainly linked to the difficulty of proving such discrimination in the absence of available data. Moreover, the possibility to seek for collective judicial remedies through the assistance of specialised NGOs or trade unions has long been limited both by restrictive statutory provisions on legal standing and the reluctance of the antiracist movement to evolve into an antidiscrimination movement. In this framework, the French equality body developed a significant power to enforce the directive, also judicially, but its action contributed mainly to the quantitative development of complaints, rather than to a change in the way discrimination is proved, adjudicated and equality law is implemented. In short, the judicial enforcement of the RED in France certainly testifies to a ‘penetration’ of European Union policy within the country, but not of an implementation dynamic which has, as of the time of writing, produced a transformation of this policy domain.

Such implementation dynamics are related to the contemporary presence of a large degree of domestic policy incongruence with the RED, a low quality of compliance compensated by an early transposition and a new corrective law adopted in 2008 under the auspices of the European Commission, and an uneven domestic mobilization, mainly supported by the multi-ground state equality body, HALDE. The policy incongruence argument, as formulated at the beginning of this paper, explains the resilience – less so the further institutionalization - of the domestic model of judicial redress centred upon criminal law. However, the pressures for adaptation leading to the more frequent recourse to employment courts are also supported by the incongruence argument. Significant gaps in the domestic transposition of the directive (according to the formal legal hypothesis) explain the non-implementation of the specific aspects that are missing in judicial enforcement: litigation against indirect discrimination; an easier recognition of prima facie discrimination; and NGOs’ support for collective (and individual) civil complaints. The mobilization perspective, finally, helps clarify the uneven distribution of litigation, with some incentives to litigate coming from the HALDE and the methods developed by trade unions, far fewer from NGOs.

While some domestic change is certainly detectable at this stage in France, only a temporal extension of the study of domestic court rulings will be able to tell whether the judicial enforcement of the RED will determine a change of the French model for judicial redress or, rather, the contemporary co-existence of two different policy approaches to
judicial redress. Certainly, a lot depends on the extent to which race categorization and monitoring will become accepted in France also by those policy actors (among whom are some of the main antiracist NGOs and centre-left leaning politicians) who contest the introduction of any race-conscious policy measures, such as ethnic statistics.

In Germany, a smaller degree of incongruence between domestic legislation and the RED, and a level of compliance still presenting many gaps in comparison to what was contested by the Commission’s 2008 infringement proceedings, combine with the legal weakness of both antidiscrimination NGOs and the national equality bodies. Furthermore, due to the late transposition, the RED was enforced in Germany for a much shorter period of time than in the other two countries. This situation determined so far a smaller diachronic increase in the usage of civil redress in the area of race discrimination, and developments in the jurisprudence that pointed towards a restrictive approach to equality law. These developments touched upon some contentious aspects of race antidiscrimination law: the extent of the exceptions to the principle of antidiscrimination, reverse discrimination, and the categories used as proxies for race. As Germany presented a medium level of incongruence with the RED this progressive, but slower, development of race antidiscrimination law was expected. The current gaps in the transposition of the directive – in particular those exempting publicly provided services as well as some private relations from the scope of German equal treatment law — have not been touched upon by litigation thus far, even though they would certainly make interesting cases for preliminary rulings by the CJEU.

Finally, the mobilization perspective helps understand the underdevelopment of race antidiscrimination litigation in comparison to other motives protected by EU equal treatment policy (such as age). Claimants from race minorities who cannot officially benefit from the legal support of an NGO or equality bodies are certainly less ready to engage in legal proceedings than an employee forced to retire because of age limits or a woman dismissed during pregnancy. This perspective is reinforced by the observation that in most cases where ethnic discrimination was claimed, the issue at stake was language requirements – that also co-ethnic non-native German may have evoked — rather than more direct proxies for race, such as physical appearance or family name.

Italy is the country in which progress in the enforcement of judicial redress for cases of race and ethnic discrimination is the most numerically uneven and qualitatively uncertain. A smaller degree of policy incongruence and a word-by-word transposition, a small number of active NGOs, and a weak equality body, produced few rulings on race discrimination and a national jurisprudence focused mainly on state and nationality-grounded discrimination. So far, most of these rulings have shown a very low level of enforcement of the new substantive and procedural rights set out by the RED. Overall, the national measures transposing the RED were caught in the same enforcement process used for pre-existing antidiscrimination provisions on unequal treatment grounded on third country nationality. The lack of an autonomous equality body lowered pressures for change and contributed to a limited development of the RED’s own potential, including a certain misuse of race and ethnic categorization by domestic courts. In fact, contrary to what was suggested by the RED, Italian courts were more prone to find race discrimination in cases of unequal treatment grounded on nationality or requirements expressed in terms of length-of-residence, than in claims involving racial categories.

Significantly, none of the three countries has made a transformative step forwards as regards two of the most innovative aspects of the RED. On the one hand, race as a constructed but objective legal category has not yet been fully accepted either by claimants or by the courts. In the three cases, in fact, complaints have mainly been
successful when they were framed as proxies for race, such as family name (in the French case), language proficiency (in Germany) and nationality (in Italy). On the other hand, nowhere has the concept of indirect discrimination been fully enforced. Even where claimants and courts have started talking about indirect discrimination, as in Germany and Italy, the concept is only evoked to indicate an ‘apparently neutral, but discriminatory criterion,’ not to detect proper disparate impact on a group of individuals at risk. A clear qualitative evolution of domestic jurisprudence on these two concepts has yet to take place.

Given the general low level of judicial enforcement found in the three countries, a direct comparison among them is useful for understanding the combination of domestic conditions that are more likely not to prompt an increasing number of civil court decisions enforcing both the procedural and substantive rights set out in the RED. First, the French and German cases show that, whereas the incongruence argument has a certain explanatory power in terms of a small variable intensity of litigation among the three countries, that argument alone does not help explaining why race antidiscrimination law is so seldom applied in France, Germany and Italy. Second, the French and Italian cases show that the presence of domestic mobilization (of the equality body, in one case, and civil society, in the other) is not alone a sufficient condition to determine enforcement. Third, the analysis shows that both patently incompliant legislative frameworks and word-by-word transposition are likely to affect the capacity of domestic actors to mobilize on adversarial legal strategies. Comparing the Italian and German cases, the timing of the transposition does not seem to have any strong explanatory power, even thought it should be kept in mind that the volume of litigation observed in Germany is referred to a shorter timeframe.

Table 8 Synthetic findings on enforcement

<table>
<thead>
<tr>
<th>Variables</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Policy incongruence</td>
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<td>✗</td>
<td>✔</td>
</tr>
<tr>
<td>Substantively compliant transposition</td>
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<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>Mobilization/Equality body</td>
<td>✔</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>Mobilization/CSOs</td>
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<td>✔</td>
</tr>
<tr>
<td>Outcome quantitative/qualitative</td>
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<td>✗✗</td>
<td>✗✗</td>
</tr>
</tbody>
</table>

In the conclusion, thus, I focus on the interaction between the two latter elements – compliance and mobilization – and on why their interaction is crucial to explain the overall limited implementation of the RED that this study has shown.

Conclusion

This study was prompted by the observation that a highly innovative and indeed overall far-reaching piece of equal treatment legislation such as the Racial Equality Directive still did not seem to be fully enforced at the level of European and domestic courts 10 years after its enthusiastic adoption in 2000. This finding was particularly puzzling given not only
the more rapid policy implementation dynamics that had characterized EU gender equality policy some decades earlier, but especially in view of the significant amount of European litigation generated at the same time by EU-imposed equal treatment policies concerning other motives of discrimination, such as age.

Considering that the scarce signs of an extensive judicial enforcement could not easily be explained by a sudden retrenchment of race discrimination in Europe, or by the inability of the policy to generate EU-law litigation, this work decided to employ an innovative research method and zoom in on the issue of domestic judicial enforcement to inquire into the domestic factors determining a limited implementation and national variations in the enforcement of the RED. To do so, I selected three Western European countries that took part in the adoption of the RED but that, as of 2010, did not show any signs of having decidedly enforced the directive at the level of domestic and European courts: France, Germany and Italy. These countries provided at the same time for a series of common characteristics granting an enhanced potential for comparability (e.g. a similar tendency to resort to EU law litigation strategies, and a comparable number of potential beneficiaries of EU race antidiscrimination policy, as well as similar levels of perceived race discrimination), together with some variation in two of the main factors likely to impinge on domestic implementation dynamics: the degree of congruence within domestic policy structures and EU-imposed requirements (‘policy (in)congruence’), and their record in terms of compliance with social policy directives.

Relying on tools from three branches of EU studies scholarship — Europeanization, compliance, and judicial politics literature — I engaged in an exploratory research on the case of race antidiscrimination policy and the analysis of, first, its legal transposition and, second, its enforcement by domestic courts.

Borrowing the concept of ‘policy (mis)fit’ from Europeanization studies, I proposed a new branding ((in)congruence) and operationalization of this notion able to be employed for the study of race equal treatment policy.

The consideration of the respective levels of incongruence in the analysis of transposition and enforcement confirmed that the influence of this domestic variable was of a different type according to the two steps of the process of EU-policy implementation taken into account. Before transposition occurs, a higher degree of policy incongruence determines difficulties in the institutional adaptation of domestic statutes to EU requirements and a lower level of compliance in the short term. Conversely, states such as Italy, where domestic statutes were generally congruent with EU-imposed rules, could adapt more easily and quickly to EU requirements. In particular, the analysis of transposition showed that, besides direct EU conditionality, the policy reforms already under way in the different countries explained also some of the results obtained in terms of quality of compliance with the requirements set out in the RED. At the level of enforcement, I expected that a larger degree of policy incongruence may galvanize domestic mobilization towards a brand new policy and make domestic actors develop new strategies to seize the enhanced opportunities offered by the opening of a new policy arena. Thus, greater policy incongruence would, perhaps counter-intuitively, predict more pressure for domestic change during the national enforcement process. On the contrary, where EU policy does not add much novelty to the framework already in place, domestic mobilization will continue to display the usual patterns, and the level of change toward the expected policy outcomes will necessarily be lower than in the case of incongruence.

The findings of the enforcement analysis partially substantiated this claim. In France, where the greatest mismatch with EU policy was present, claimants increasingly engaged in civil judicial redress more than in the other countries in the study. However, the
qualitative development of race antidiscrimination jurisprudence was much more uncertain. In Italy, a slow development characterized both the quantitative and qualitative evolution of race equality jurisprudence. Germany was the country where substantive aspects of antidiscrimination law developed more restrictively, and also rules of process did not evolve much.

In view of these findings, I concluded that although policy congruence and incongruence certainly do matter for understanding the implementation dynamics in the three countries, they are not alone sufficient to explain why the review of litigation and jurisprudence offered in this study identified such a low level of enforcement across the three states. I argue that this rare application of EU law is mainly due to the process of ‘containment’ exercised by national policy-makers during the transposition of the directive, and reflected in a formal legal hypothesis about how the quality of compliance plays out in the enforcement process. In all cases, in fact, right-wing governing majorities decided to engage in a sometimes incompliant, sometimes minimalist (word-by-word) transposition. This affected some of those that I defined as ‘regulatory elements’ (e.g. an only partial shift of the judicial burden of proof), but especially other mechanism that would facilitate access to judicial or other forms of individual redress. In the three countries, for instance, the process of national transposition of the RED strictly conditioned the possibility for civil society organizations to gain legal standing in court in support or on behalf of plaintiffs. This does not only mean that NGOs wishing to mobilize around race equality issues did not see their symbolic formal role as defenders of victims of discrimination recognized, but also that they have not been able to benefit from the recognition of eventual moral damages or provisions envisaging a shift of attorney fees to the losing party. The fact that these forms of incentives are available to antiracist NGOs bringing claims under criminal law in France (together with the long lack of provisions for civil legal standing in non-employment related complaints) explains the endurance of criminal antidiscrimination litigation in the country. In Germany, reluctance to recognize a facilitated access to legal standing for civil society organizations was not bypassed even after the opening of an infringement procedure by the Commission that targeted exactly this transposition gap. In Italy, NGOs have paradoxically been recognized as having standing more frequently in cases of discrimination on grounds of nationality rather than in cases of race discrimination proper.

In addition, the recalcitrance towards opening up facilitated procedures for judicial redress is also exemplified in the widespread lack of provisions explicitly recognizing statistical evidence as admissible evidence, situation testing as legitimate proof, or substantive moral damages as an essential part of the remedies for ascertained race discrimination. In many cases, these elements were only ‘directive elements’ within the RED, and non-sympathetic decision-makers within the member states could choose to transpose such provisions minimizing costs for companies, employers, nationalist public administrations, service providers’ associations, in short, the range of potential discriminators more susceptible to providing, willingly or indirectly, unequal treatment for minorities of colour.

Moreover, the factor which played the most important role in the uneven and rare enforcement of race equal treatment policy in the three countries was the fact that the organization and competences of the national equality bodies mandated by the RED were left completely in the hands of the national ruling majorities. In two out of three cases the equality bodies set up to comply with the directive were endowed with few powers and limited political autonomy. This is particularly regrettable since all the literature on gender equality — and some literature on the late empowerment of the US Equal Employment
Opportunity Commission (Pedriana and Stryker, 2004, Selmi, 1996) — singled out the role of independent, specialised bodies as catalyst for the judicial redress of unequal treatment. The case of the French equality body between 2006 and 2010 testifies to the strength of this argument. In 2011, however, the French body, the only one that displayed a higher degree of autonomy and effectively engaged in judicial strategies, was itself also reconfigured by the French centre-right majority — an action that made many observers suspect the existence of an ex-post containment strategy.

Beyond the countries which constituted the object of my empirical analysis, in the European Union of 27 member states, most equality bodies established to transpose the RED have no litigation competences and are multi-ground bodies dedicated to the promotion, rather than the enforcement, of equality with reference to several different suspect grounds (Holtmaat, 2006). Also in the UK and at the supranational level, formerly specialized bodies, such as the Commission for Racial Equality and the European Monitoring Centre for Racism and Xenophobia (EUMC), recently evolved into multi-ground agencies, entrusted with competences to monitor several suspect motives. Whereas the enlargement of the scope of action of these entities is per se an enhancement for the protection against every form of discrimination, including intersectional and multi-ground discrimination, the loss of a more thorough specialization on race and ethnic minorities may also have some drawbacks for minorities of colour. In the end, the sole race antidiscrimination complaint to ever reach the Court of Justice of the European Union was filed and pursued by a single-ground specialized equality body working on race and racism. To summarize, the limited implementation of race antidiscrimination policy not only across the three states but in comparison to other strands of EU equal treatment policy confirms the thesis that those EU policies that rely on adversarial litigation for their enforcement empower, in the first place, those who are already powerful. As pointed out by Conant (2002) and Börzel (2006) in relation to EU policy, and by Marc Galanter well before them, claimants with information, ability to surmount cost barriers, and skills to navigate restrictive procedural requirements, are more likely to succeed in judicial enforcement (Galanter, 1974). According to Börzel:

The EU legal institutions only increase opportunities for participation for those individuals and groups who possess court access and sufficient resources to use it. In other words, it is mostly the “haves” who benefit—those actors that already command considerable resources that enable them to broadly participate in political and legal processes...or that are supported by domestic institutions, such as the Equal Opportunities Commissions in Britain and Northern Ireland, which assist working women and women rights groups in litigating for their EU rights (Caporaso & Jupille, 2001). Actors poor in organizational capacities and resources, by contrast, such as ... third country nationals seeking to obtain social rights in the Single Market (Givens & Luedtke, 2003), so far stand little chance to benefit from the increased opportunities for participation through EU law enforcement.

Citizens and groups should not be treated as if they were equally endowed with the resources necessary to exploit the opportunities offered by the expansion of judicial power in international and domestic politics. As a result, the transformative effects of courts on democracy and participation may be less pervasive than expected. They are at least mitigated by domestic opportunity structures that determine to a large degree the extent to which citizens and groups benefit from increased opportunities for participation through law enforcement, rights claiming, and expanded protection (Börzel, 2006: 148-149).
Contant’s 2002 study on the enforcement of EU equal treatment rights for third country nationals in access to social benefits, and Daniel Kelemen’s 2011 contribution on the domestic application of EU equal treatment law on grounds of disability, confirm this thesis. The most revolutionary aspect of the RED, which was acclaimed in 2000 as a major step forward for the equal treatment of European minorities of colour by many European legal scholars, resided in its containing new substantive rights (such as the right to be free from indirect discrimination) as well as process elements making up for a policy explicitly aimed at facilitating access to these new rights, especially through individual judicial redress. The replies to the FRA EU-MEDIS survey cited in introduction, where the 80% of the surveyed individuals from racial and ethnic minorities declared that they would not engage in judicial redress, testifies not only of a lack of awareness, but also of a certain mistrust towards the policy provisions contained in the RED. These means have in fact been conceived and then enthusiastically acclaimed not as a consequence of a social movement, but rather due to the engagement of an elite of majority population who took advantage of a political window of opportunity created at the supranational, European, level in 2000. Potential beneficiaries had little influence on the process of lobbying and adoption and they are frequently underrepresented in the national NGOs that, nowadays, attempt to make a ‘strategic’ or recurrent judicial use of the RED.

Notwithstanding this, the demand for equal treatment of minorities, especially those with a more or less recent immigration background, does not seem to have decreased. The Italian case where discrimination on ground of nationality is litigated more frequently than race discrimination, and the example of the large recourse to judicial proceedings to enforce the equal treatment clauses of certain association agreements with third countries testify of such a demand. Should we then conclude that the demand for equal treatment in spite of one’s nationality is greater than that for equal treatment on grounds of race and ethnic origin in today’s Europe? The reply to this question constitute the basis for future scholarship. However, it may well be that part of the reason why the RED is so rarely evoked in national courts is that existing minorities in Europe do not primarily identify themselves in racial and ethnic terms, but rather in terms of their nationality of origin or of their acquired nationality. Apart from the Roma, who do have a diffused ethno-linguistic conscience, individuals behind the claims registered in the dataset are, used to be, or descend from Turks, Moroccans, Algerians, Senegalese, Ivorians, Romanians, Ex-Yugoslavians, etc. It is legitimate to expect that, in a race-sceptical European context, these identities are more fully resented than the fact of being black, Arab, East-European and that they are primarily categorised as national, rather than ethnic, identities. The colour-blindness that characterizes current domestic case law in Europe is paralleled by a reduced race-consciousness on the side of the claimants. This is one more reason why nationality should be considered as a meaningful racial category if one wants to ensure the enforcement of European equality law. In light of the above, the exception for nationality-based discrimination provided by the RED is even more harmful.

In conclusion, the process of domestic implementation of the RED downplayed those special features that allow a facilitated access to the mechanisms of redress conceived in Brussels, as it did with another important provision of the RED, that which allowed positive actions. Thus, a certain degree of perplexity towards the way in which this recent policy has been ‘Europeanized’ is perhaps justified. National policymakers certainly bear a responsibility for the limited and patchy enforcement witnessed thus far. Nonetheless, during these first 10 years also the supposed guardian of this legislation, the European Commission, failed to intervene even in blatant cases of incorrect transposition — such as those outlined in this study — and when national measures in potential breach of the RED, such as in the episodes of 2010 that involved state measures clearly targeted
at Roma in France and Italy, produced unfavourable treatment towards an ethnic minority so used to being negatively stereotyped.

References


