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## On-line papers



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### **Untangling the application of the EU Equality Directives at national level: a bottom-up approach**

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## Untangling the application of the EU Equality Directives at national level: a bottom-up approach

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### Abstract

Several EU-wide reports have identified obstacles for the effective application of the Race Equality Directive ('RED') and the Framework Equality Directive ('FED') at national level, but they do not explain why these obstacles arise. This paper seeks to provide additional tools to understand what may be the causes for the limited application of those directives at national level. On the basis of the theory of the 'social working of law', developed by Griffiths, I present an analytical framework to explain why people follow anti-discrimination law -or not- and which choices they make when they suffer discrimination. I argue that the RED and the FED are mainly based on individual enforcement. Therefore, the proposed framework analyses the decision-making procedure of individual victims of discrimination, from the moment they suffer discrimination till they decide to bring a claim. It identifies the main factors playing a role in victims' decisions, the barriers they may encounter in accessing the legal system and the role played by advice-providers, like equality bodies or NGOs. The paper also considers the limitations of such a framework for tackling the problem of institutional discrimination.

### 1. Introduction

Several reports show that discrimination continues to be very widespread in the European Union ('EU'). In a survey of the Fundamental Rights Agency ('FRA') focusing on the Roma, 47% of respondents had suffered racial discrimination in the previous year<sup>2</sup>. In a survey concerning Muslims, 43% of respondents felt discriminated against on the basis of their ethnicity or migrant origin and their religion<sup>3</sup>. In another report on lesbian, gay, bisexual and transgender population, half of the respondents had felt discriminated against in the previous year, on average.<sup>4</sup>

Further research reveals that discrimination is not only sensed by victims, but also by their social environment. According to a 2012 special Eurobarometer, 34% of citizens living the EU had witnessed discrimination or harassment or had heard of it happening to someone in the previous year.<sup>5</sup> 56% of

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<sup>2</sup> FRA, *EU-Midis. Data in Focus Report I. The Roma* (EUPO 2009) 4. Note that the respondents' sample was limited to seven Member States ('MS') (Bulgaria, the Czech Republic, Greece, Hungary, Poland, Romania and Slovakia).

<sup>3</sup> FRA, *EU-Midis. Data in Focus Report II. Muslims* (EUPO 2009) 5. The sample was composed of Muslims from 14 MS (Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Malta, the Netherlands, Slovenia, Spain and Sweden).

<sup>4</sup> FRA, *European Union Lesbian, Gay, Bisexual and Transgender Survey. Results at a Glance* (EUPO 2013).

<sup>5</sup> TNS Opinion & Social, *Special Eurobarometer 393. Discrimination in the EU in 2012* (European Commission 2012) 66.

respondents considered that racial discrimination was 'widespread' and 45% that discrimination on grounds of sexual orientation, gender identity, disability and age was also 'widespread'.<sup>6</sup>

These data indicate the persistence of discrimination and its wide social perception, but in some MS this is not reflected in the number of discriminatory incidents reported.<sup>7</sup> In fact, underreporting is one of the typical reactions among victims.<sup>8</sup> For instance, if we compare the 2010 figures of racist crimes<sup>9</sup> of the three most populated MS which collect data, there were 31,486 incidents reported in the UK,<sup>10</sup> 16,375 in Germany and only 1,352 in France.<sup>11</sup> These three MS have probably different social dynamics, different 'levels' of racism, different proportions of ethnic groups and different procedures for dispute resolution, which can explain differences in figures. But even taking into account these aspects, it is striking that the UK, with a population of 62.99 million inhabitants,<sup>12</sup> registered 31,486 incidents of racist crime, whilst France, with a population of 65.33 million,<sup>13</sup> registered only 1,352. Can this mean that French society is more tolerant? Is it a consequence of using different registration systems for racist crime? Or can it also mean that only few racist crimes are registered?

According to some reports, the scarcity of complaints is related to procedural, time and financial barriers to access justice,<sup>14</sup> but it also reflects a lack of awareness as regards anti-discrimination legislation, which is one of the main causes for underreporting.<sup>15</sup> In a survey conducted by the FRA, about 70% of respondents did not know that discrimination was prohibited when entering a restaurant or when renting or buying a flat.<sup>16</sup> Similarly, in some MS up to 60% of respondents had not heard from equality bodies and up to 80% had not heard from other support organisations.<sup>17</sup> In another report, the lack of awareness was mentioned as the main reason for underreporting by 36% of respondents, but the main reason was the lack of confidence in the legal system (63%).<sup>18</sup> Other causes were vic-

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<sup>6</sup> *ibid* 16.

<sup>7</sup> See eg FRA, *EU-Midis. Data in Focus Report III. Rights Awareness and Equality Bodies* (EUPO 2010) 11-12; Equinet, *Tackling the "Known Unknown" How Equality Bodies Can Address Under-Reporting of Discrimination through Communications* (Equinet 2012) 8-13.

<sup>8</sup> *ibid*. See also text to n 72-75.

<sup>9</sup> Whilst not all discriminatory incidents amount to a crime, due to the very limited availability of data on racist incidents for all MS, the data on racist crimes are used as an illustration.

<sup>10</sup> This figure refers only to England and Wales.

<sup>11</sup> FRA, *Fundamental Rights: Challenges and Achievements in 2011* (EUPO 2012) 161. Whilst these data are in principle not comparable between different MS, they give a flavour of the different ways in which anti-discrimination law operates in different MS.

<sup>12</sup> Eurostat, *Basic Figures on the EU. Summer 2013 Edition* (EUPO 2013) 4.

<sup>13</sup> *ibid*.

<sup>14</sup> I Chopin and E M Gounari, *Developing Anti-discrimination Law in Europe. The 27 EU Member States Compared* (European Human Consultancy and MPG 2009) 61; FRA, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (EUPO 2011) 38, 42.

<sup>15</sup> FRA, *The Racial Equality Directive. Application and Challenges* (EUPO 2012) 19-21,

<sup>16</sup> FRA, *EU-Midis. Data in Focus Report III* (n 7) 6.

<sup>17</sup> *ibid* 9.

<sup>18</sup> *ibid* 12.

tims' resignation to suffer discrimination as part of their daily lives (40%),<sup>19</sup> the fear to suffer retaliation (26%) and time costs (21%).<sup>20</sup>

These reports indicate that there are obstacles for the use of national laws implementing the Race Equality Directive ('RED')<sup>21</sup> and the Framework Equality Directive ('FED')<sup>22</sup> but they do not explain why these obstacles arise. This paper seeks to provide an analytical framework ascertaining what may be the causes for the limited application at national level of the RED and the FED. Whilst it is certainly very difficult to completely eradicate discrimination, analysing the practical use of the anti-discrimination directives is a necessary first step to draw paths for improvement.

In this article I suggest that the use of the RED and the FED at national level can largely be explained from a bottom-up perspective<sup>23</sup> based on individual enforcement (section 2). After recognising the limits of this model (section 3), I analyse the main factors playing a role in the use of the RED and the FED (section 4), before drawing some concluding remarks (section 5). The paper takes an analytical, rather than a normative approach, aiming to provide a basis for potential socio-legal research which could draw normative conclusions.

## 2. Inverting the approach of anti-discrimination law

As many other types of legislation, anti-discrimination law has often been designed from an instrumentalist perspective, whereby the legislator, imposes 'commands' on social actors to influence their behaviour and achieve certain aims.<sup>24</sup> The legislator assumes that rules have 'direct effects' on citizens, who will follow them, thereby bringing indirectly the desired results.<sup>25</sup> Applying this logic to the

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<sup>19</sup> *ibid.* In another report, two thirds of the interviewees considered that it is not socially expected that victims of discrimination 'take action', see FRA, *Access to Justice in Cases of Discrimination in the EU. Steps to further Equality* (EUPO 2012) 55.

<sup>20</sup> FRA, *EU-Midis. Data in Focus Report III* (n 7) 12.

<sup>21</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

<sup>22</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

<sup>23</sup> The 'bottom-up perspective' refers to analysing the use of anti-discrimination law starting from a grass-root level instead of looking directly at litigation rates. This implies understanding why people follow anti-discrimination law -or not- and which choices they make when they suffer discrimination. The idea of 'bottom-up' does not relate to the concept of 'bottom-up policy making', which is outside the scope of this paper.

<sup>24</sup> See generally J Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law* (first published 1879, R Campbell ed, 4th edn rev, John Murray 2002); L M Friedman, *Law and Society: An Introduction* (Prentice-Hall 1977) 53; D J Galligan, *Law in Modern Society* (OUP 2007) 331. This approach has also been applied to anti-discrimination law, see C McCrudden, 'Regulating Discrimination: Advice to a Legislator on Problems Regarding the Enforcement of Anti-Discrimination Law and Strategies to Overcome them' in T Loenen and P R Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (Kluwer 1999) and a critic in J Griffiths, 'The Social Working of Anti-Discrimination Law', in T Loenen and P R Rodrigues (eds), *Non Discrimination Law: Comparative Perspectives* (Kluwer 1999) 314.

<sup>25</sup> J Griffiths, 'An introduction in eight propositions to the social working approach to legislation' in N. Zeegers, W. Witteveen and B. van Klink (eds), *Social and Symbolic Effects of Legislation Under the Rule of Law* (The Edwin Mellen Press 2005) 7, 10.

specific case of anti-discrimination law, the legislator presumes that after enacting equality legislation employers will not discriminate minorities in access to employment, so they will employ more ethnic minorities workers (direct effect), and as result, companies will have a more diverse workforce (indirect effect).

However, this top-down approach relies on several assumptions which are not necessarily true. Firstly, the legislator presumes that individuals will change their behaviour once the law is enacted. But to do so individuals need to be aware of the law and understand it,<sup>26</sup> and they need to be able to tell when it applies.<sup>27</sup> As Griffiths points, there are 'two critical prerequisites for rule-following: *knowledge and interpretation of the applicable facts* and *knowledge and interpretation of the applicable rules*'.<sup>28</sup> Not least important, individuals need also to be *willing* to abide by the law.<sup>29</sup>

Secondly, the fact that individuals follow the law does not directly entail that the pursued objectives will be met. If we take the same example, even if employers follow the RED and do not discriminate ethnic minorities in access to employment, it can be that only few members of ethnic minorities apply for jobs in a specific sector because they assume that they will be discriminated anyway or because they consider that their qualifications do not match the position requirements. Hence, the workforce will not become more diverse and the indirect goal will not be met.

This shows that societies are complex and often intertwined with many different factors which have an impact on the use and effects of rules. Probably, not every individual will act following the rational pattern of the 'carrot' and the 'stick'<sup>30</sup> because they may be influenced by their moral beliefs,<sup>31</sup> social environment, economic resources, or customs.<sup>32</sup> Besides the contents of the law, the social reception of the law is indeed a crucial factor for its mobilization.<sup>33</sup>

To take account of the factors which may influence rule-following, I build on Griffiths' work in the field of legal anthropology, particularly on his 'social working of law'<sup>34</sup> theory. Griffiths adopts a bottom-up perspective for the analysis of rule-following on the basis of the concept of the 'shop floor of social life'.<sup>35</sup> The shop-floor is composed by a set of communities with their own internal organisa-

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<sup>26</sup> See eg T Havinga, 'The effects and limits of anti-discrimination law in The Netherlands' (2002) 30 *International Journal of the Sociology of Law* 75, 84;

<sup>27</sup> cf FRA, *The Racial Equality Directive* (n 15) 20.

<sup>28</sup> J Griffiths, 'An introduction in eight propositions' (n25) 14.

<sup>29</sup> T R Tyler, *Why People Obey the Law* (Yale University Press 1990) 2-4.

<sup>30</sup> Friedman, *Law and Society: An Introduction* (n 24) 119-120.

<sup>31</sup> At this respect, see Tyler (n 29) 3-5.

<sup>32</sup> See some examples of the prevalence of informal over formal rules in Moore 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Soc' Rev* 719, 719; Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Harvard University Press 1991) 207.

<sup>33</sup> Galligan, *Law in Modern Society* (n 24) 333.

<sup>34</sup> See in general J Griffiths, 'The Social Working of Legal Rules' (2003) 48 *Journal of Legal Pluralism* 1; J Griffiths, 'An introduction in eight propositions' (n25); Griffiths, 'The Social Working of Anti-Discrimination Law' (n 24) 313.

<sup>35</sup> He defines it as 'the place where the activities which the legislator would regulate are taking place', Griffiths, 'Legal Pluralism and the Theory of Legislation – With Special Reference to the Regulation of Euthanasia' in H Petersen and H Zahle, *Legal Polycentricity: Consequences of Pluralism in Law* (Darmouth 1995) 201, 208.

tion and rules, but it can also be influenced by other communities' rules.<sup>36</sup> These communities are called 'semi-autonomous social fields'<sup>37</sup> ('SASFs'). A SASF can be a football team, a company, a gardening association or simply a family or a group of friends. By focusing on the shop-floor, the social working of law studies to which extent anonymous individuals choose to make use of the law in their daily decisions<sup>38</sup> or to face legal conflicts,<sup>39</sup> if any.

The analysis of rule-following from a bottom-up perspective led Griffiths to distinguish between three different types of uses of rules,<sup>40</sup> which will be the starting point of our analysis. Right at the bottom he identified *informal uses* of rules, which take place when individuals apply rules spontaneously in their everyday relationships. They apply rules because they match their social and moral values or because they have 'internalised' them, even if they do not match their 'inner convictions'.<sup>41</sup> Once they know about the existence of a rule, it will affect social actors' behaviour, who will also build expectations about their counterparts' actions.<sup>42</sup> If a conflict arises, individuals may use a rule to solve it internally through negotiation, according to their respective bargaining powers.<sup>43</sup>

A second category are *organisational uses*, which take place within private and public organisations, that is, SASFs which take the form of a legal person. All companies need to incorporate legal developments to their internal policies, for instance, by adjusting their recruitment procedures to anti-discrimination law.<sup>44</sup> However, it is usually easier to do it for large or publicly-owned companies than for SMEs because they tend to have human resources and/or compliance departments, which follow legal developments and implement them internally.<sup>45</sup> Organisational uses of rules can either refer to the implementation of rules within an organisation or to the resolution of disputes internally within the SASF, by bringing the matter before the relevant authority within that organisation.

Finally, the last category consists of uses of rules before administrative or judicial authorities, through *complaints and litigation*. This is usually the only use which is considered in statistics and official reports. It refers both to *ex officio* enforcement (ie claims which are brought at the initiative of

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<sup>36</sup> Moore (n 32) 720.

<sup>37</sup> Griffiths borrowed the concept of SASF from another legal anthropologist, Moore. See, respectively, Griffiths, 'Legal Pluralism and the Theory of Legislation' (n 35) 208; Moore, *ibid* 720.

<sup>38</sup> *ibid* 214.

<sup>39</sup> Griffiths, 'The Social Working of Anti-Discrimination Law' (n 24) 319.

<sup>40</sup> *ibid*.

<sup>41</sup> M Galanter, 'The perplexities of legal effectiveness' in N Zeegers, W Witteveen and B van Klink, *Social and Symbolic Effects of Legislation Under the Rule of Law* (Edwin Mellen Press 2005) XVII.

<sup>42</sup> *ibid* 320.

<sup>43</sup> At this respect, see also R Banakar, *The Doorkeepers of the Law: A Socio-Legal Study of Ethnic Discrimination in Sweden* (Darmouth 1998) 128.

<sup>44</sup> Griffiths, 'The Social Working of Anti-Discrimination Law' (n 34) 320.

<sup>45</sup> FRA, *The Race Equality Directive. Application and Challenges* (EUPO 2012) 20. An empirical study conducted in the Netherlands confirmed that public organisations incorporate equal treatment legislation better than private ones, and large organisations better than smaller ones, see Havinga (n 26) 86.

legal officials) or private enforcement, by individuals who are directly or indirectly affected by the norm.<sup>46</sup>

Among these three types of uses of rules, informal uses are the ones which are quantitatively more important because they can take place at any moment, sometimes even in an unconscious way. Organisational uses are also quantitatively relevant but not as much as informal uses, as they require implementation procedures which may involve the participation of different persons and departments and may raise organisational costs. Finally, complaints and litigation have a relatively low relevance because they imply high costs in terms of time, money and social relations, which often detract individuals from starting legal actions.<sup>47</sup>

Even if the social working of law brings attention to informal and organisational uses of rules, formal uses of rules should not be disregarded. Complaints and litigation are necessary *ex post* mechanisms to ensure that when the application of anti-discrimination law at informal and organisational levels fails, victims have legal devices to seek reparation and perpetrators can be sanctioned.

### 3. Building a rule-following model for the analysis of EU anti-discrimination law

#### 3.1. EU anti-discrimination law as an individual enforcement model

The RED and the FED contain features which can help promote informal and organisational uses of anti-discrimination law, like the provision allowing positive action<sup>48</sup> or the obligation to disseminate information,<sup>49</sup> but both directives lean more clearly towards formal enforcement. The RED and the FED also comprise some group justice features, like the obligation to create a body 'for the *promotion* of equal treatment',<sup>50</sup> the duty to promote social dialogue<sup>51</sup> or the possibility for legal entities to support individual claims,<sup>52</sup> but the provisions on types of complaint procedures,<sup>53</sup> legal standing,<sup>54</sup> protection against victimisation,<sup>55</sup> etc show that both directives rely principally on individual enforcement.<sup>56</sup>

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<sup>46</sup> In some countries, collective claims and active legal standing for legal entities may also be allowed.

<sup>47</sup> Griffiths, 'The Social Working of Anti-Discrimination Law' (n 24) 325.

<sup>48</sup> Art 5 RED and art 7 FED.

<sup>49</sup> Article 10 RED and art 12 FED.

<sup>50</sup> Art 13 RED. Note that this is only a requirement of the RED.

<sup>51</sup> Art 11 RED and art 13 FED.

<sup>52</sup> Art 7(2) RED and art 9(2) FED.

<sup>53</sup> Art 7(1) RED and art 9(1) FED.

<sup>54</sup> Art 7(2) RED and 9(2) FED.

<sup>55</sup> Art 9 RED and art 11 FED.

<sup>56</sup> See eg C McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality', in S Fredman (ed) *Discrimination and Human Rights. The Case of Racism* (OUP 2001) 252, 294-295; B Hepple, 'Race and Law in Fortress Europe' (2004) 67 *Modern Law Review* 1; M Bell, *Racism and Equality in the European Union* (OUP 2008) 67.

This approach was confirmed by the *Firma Feryn*<sup>57</sup> judgment, which concerned an employer's public statement that he did not want to hire immigrants, without any specific person being identified as a victim of such policy.<sup>58</sup> Following a teleological interpretation, the ECJ established that 'victimless discrimination'<sup>59</sup> is included in the concept of direct discrimination of article 2(2)(a) of the RED.<sup>60</sup> It nevertheless considered that MS are not obliged to provide redress mechanisms if there is no identifiable victim. Under article 7(2) of the RED, MS are only bound to allow legal entities with a legitimate interest to act 'on behalf or in support' of the victim, with her consent. Following AG Maduro<sup>61</sup>, the ECJ distinguished between the *substantive* contents of the RED and the *enforcement* provisions and pointed that the fact that 'victimless discrimination' was prohibited under the RED did not imply that the directive obliged to provide enforcement mechanisms to address it.<sup>62</sup> The ECJ reminded that the RED sets only minimum requirements, meaning that MS *can* allow legal entities, like associations or equality bodies, to bring *actio popularis* without the existence of any identifiable victim, *but they are not obliged* to do it.<sup>63</sup>

This reasoning poses problems because it entails the recognition of substantive rights for which enforcement mechanisms cannot be derived from EU law,<sup>64</sup> but it confirms that the RED's approach is mainly based on individual litigation. The ECJ seems not willing to push for an interpretation of article 7 which could easily be considered contrary to the EU legislator's will,<sup>65</sup> and a similar conclusion can be drawn for the FED from the ruling in *Asociația*.<sup>66</sup>

Against this background, whilst acknowledging that discrimination has a collective dimension,<sup>67</sup> this paper focuses mainly on the decision-making processes and uses of rules by *the individual* who suffers discrimination.

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<sup>57</sup> Case 54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

<sup>58</sup> *ibid*, para 16.

<sup>59</sup> H Tissandier, 'Une discrimination condamnable même sans victime' (2008) *Revue de jurisprudence sociale* 885; R Krause, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187 (2010) 47 *Common Market Law Review* 917, 923.

<sup>60</sup> In para 25 the ECJ stated that '[t]he existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim'.

<sup>61</sup> Case 54/07, *Firma Feryn* (n 57) Opinion of AG Poaires Maduro, delivered on 12 March 2008, paras 12-14.

<sup>62</sup> *Firma Feryn* (n 57) para 26.

<sup>63</sup> *ibid*, paras 26-27.

<sup>64</sup> See comments in Krause, Case C-54/07 (n 59) 927-928; M Ambrus, M Busstra and K Henrard, 'The Racial Equality Directive and Effective Protection against Discrimination: Mismatches between the Substantive Law and its Application' (2010) 3 *Erasmus Law Review* 165, 168.

<sup>65</sup> The scope of that article was consciously limited by MS. A Tyson, 'The Negotiation of the European Community Directive on Racial Discrimination' (2001) 3 *European Journal on Migration and Law*, 199-229.

<sup>66</sup> Case C-81/12, *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, judgment of 25 April 2013, nyr.

<sup>67</sup> Individual discrimination can be a manifestation of underlying group disadvantages and institutional discrimination, see F Brennan, 'The Race Directive, Institutional Racism and Third Country Nationals' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century* (Hart 2004) 371, 377; T Makkonen, 'Equal in Law, Unequal in Fact. Racial and Ethnic Discrimination and the Legal Response thereto in

### 3.2. The bottom-up analytical model: from informal to formal effectiveness

The starting point of the proposed theoretical approach will be an individual example. Consider the situation of two shopkeepers of a retail store, A and B. A is a Roma and was selected for the job among other equally qualified candidates thanks to a corporate programme to promote the integration of underrepresented ethnic minorities. Initially, A and B have a good relationship, but after some time a conflict arises because B starts harassing A.

At the outset, anti-discrimination law was voluntarily followed by the retail store director, who hired A (organisational use), and it was also followed by A's colleagues, who –unconsciously or not– treated him just as another employee (informal use). These types of uses of rules are what I have labelled as '*informal effectiveness*'.<sup>68</sup> This concept refers to situations where individuals, consciously or unconsciously, abide the law in their private relationships, or when organisations take the necessary steps to enforce the law internally, without having recourse to third parties external to their SASF.

After A is harassed by B, A has several 'choices'. A first possibility would be trying to deal with the problem internally 'negotiating' with B, for instance by reminding B that harassment is unlawful and threatening B by reporting his conduct to the director. Depending on the relative bargaining power of A and B, A will be able to persuade B to cease his conduct and they will reach an 'amicable adjustment'. However, if the conflict remains, A may choose either to avoid the problem or just cope with it or seek the intervention of a third party within their SASF. In that case, A could report the problem to the director of the retail store. It is at this point that a 'dispute' arises. The director may either avoid the problem, or deal directly with it by applying the company's internal code of conduct. Alternatively, he can bring the matter to the human resources department, which may then apply the internal code of conduct to sanction B.

This example illustrates that victims of discrimination can choose between taking action or what Felstiner calls 'lumping', that is, the choice to avoid and/or ignore the legal problem.<sup>69</sup> As Griffiths explains, victims often 'prefer the options of "lumping it" (living with the injury, whatever it is), "avoidance" (reducing the chance of future contact with the offending person) or "exit" from an existing relationship'.<sup>70</sup> I will refer all these avoidance strategies as 'social lumping'.

At an empirical level, several studies indicate the existence of social lumping in the field of discrimination. The most comprehensive survey conducted EU-wide points that 'not reporting discrimination is the norm'.<sup>71</sup> Studies focusing in individual MS also flag the tendency to follow lumping strategies. In a study conducted in the UK, 35% of respondents confronted with discrimination would follow a lumping strategy.<sup>72</sup> In a similar study conducted in the Netherlands, 51.3% of victims of discrimination (or related behaviours) did not take action against it or decided to 'put up with it'.<sup>73</sup> A Spanish

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Europe' (PhD thesis, University of Helsinki 2010) 28. See also section 4.1.

<sup>68</sup> See Annex 1.

<sup>69</sup> W L F Felstiner, 'Influences of Social Organization on Dispute Processing' (1974) 9 *Law & Soc' Rev* 63, 81.

<sup>70</sup> Griffiths, 'The Social Working of Anti-Discrimination Law' (n 34) 325.

<sup>71</sup> The report also points that the higher underreporting rates are found in Portugal, Spain, Slovenia, Austria, Bulgaria and Latvia. See FRA, *EU-Midis. Main Results Report* (EUPO 2009) 50.

<sup>72</sup> See H Glenn, *Paths to Justice. What People Do and Think about Going to Law* (OUP 1999) 12.

<sup>73</sup> B C J Van Velthoven and M Ter Voert, 'Paths to justice in the Netherlands: looking for signs of social exclusion' (2004) MPRA Paper 21296/2010, 16 <<http://mpra.ub.uni-muenchen.de/21296/>> accessed 20 January

2010 survey reveals that 94.3% of respondents who experienced discrimination did not report it.<sup>74</sup> In Belgium, a report on discrimination among pregnant women at the workplace also identified lumping strategies.<sup>75</sup>

Victims who decide not to take action may be influenced by their inner beliefs<sup>76</sup>, but also by external social factors arising within or outside the SASF, such as fear to victimisation, lack of confidence in the legal system, language barriers, etc.<sup>77</sup> Victims may also be influenced by the feeling that it is not socially expected that they take action against discrimination.<sup>78</sup>

If instead of lumping the victim tries to solve the problem internally with the aggressor or brings the matter before a SASF authority, we can still consider that we are within the remit of informal effectiveness. However, if the internal claim within the company is not successful, the victim may choose again between social lumping or seeking the intervention of an external third party. Depending on the information available to the victim, she may choose to go for advice to a 'filter', that is, legal professionals, NGOs, trade unions, equality bodies or other actors providing advice.<sup>79</sup> The role of filters will be crucial because their advice may influence the victim's decision to report discrimination (or not) and the type of action she takes. She may choose non-judicial procedures, like alternative dispute resolution or administrative complaints, or judicial procedures. If the victim starts an administrative complaint before an equality body, she may decide not to take further legal actions, or if she is unsatisfied, she may decide to go on to the next stage and bring a claim before the employment tribunals.

This second stage illustrates what I call '*formal effectiveness*',<sup>80</sup> which comes into play when the victim takes action through a structured legal procedure, be it going before a court or before an administrative authority. However, it also refers to the victim's decision to seek advice from a third party (external to the SASF where discrimination occurred) to gather information about what to do next. If the victim goes to a filter first, the contents and timing of the advice will be determinant for the victim's decision to start a formal legal procedure or not.<sup>81</sup> The role and influence of filters is self-evident if we consider that in a recent FRA survey one third of the respondents sought advice from

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2013. Note however that the study was replicated in 2009 and the percentage of lumpers decreased, see B C J Van Velthoven and C M Klein Haarhuis, *Geschilbeslechtingdelta 2009. Over verloop en afloop van (potentieel) juridische problemen van burgers* (WODC-publicaties 2010) 84, 223.

<sup>74</sup> RED2RED, *Panel sobre discriminación por origen racial o étnico (2010): la percepción de las potenciales víctimas* (Ministerio de Sanidad, Política Social e Igualdad 2011) 94.

<sup>75</sup> Quantitative data are not provided. L Lembrechts and E Valgaeren, *Grossesse au travail. Le vécu et les obstacles rencontrés para les travailleuses en Belgique* (P Zanoni dir, Institut pour l'Égalité des Hommes et de Femmes 2010) 99-100.

<sup>76</sup> Some victims believe that they do not need help, they do not want it; others perceive the incident as too trivial to be reported. See eg Equinet, *Tackling the "Known Unknown"* (n 7) 9-11.

<sup>77</sup> For more details see FRA, *EU-Midis. Main Results Report* (n 71) 54-56.

<sup>78</sup> FRA, *Access to Justice in Cases of Discrimination in the EU* (n 19) 55.

<sup>79</sup> For a similar approach and examples on the role of filters in discrimination disputes in several MS, see FRA, *Access to Justice in Cases of Discrimination in the EU* (n 19).

<sup>80</sup> See Annex 1.

<sup>81</sup> Glenn (n 72) 77.

legal experts *before* taking formal action and among them, 'two thirds had received legal advice *by the time* they lodged their complaints'.<sup>82</sup>

Even if victims eventually decide to take formal legal action, they may encounter institutional and systemic barriers to effectively pursue their actions. In fact, lumping can be a product of the legal system itself due to two main reasons. Firstly, by deciding if a case is legally relevant or not, filters play a 'screening' role.<sup>83</sup> The most obvious example is lawyers' discretion in deciding whether they take a case or not,<sup>84</sup> but there are other examples. For instance, the procedure followed by Swedish Ombudsmen to decide which cases are admissible<sup>85</sup> and the UK Equality and Human Rights Commission (EHRC) policy to pick up the cases in which it exercises its litigation powers according to its strategic priorities.<sup>86</sup> Accordingly, Ombudsmen, equality bodies and other legal actors often act as 'doorkeepers' of the legal system when they select the cases which may enter the legal system.<sup>87</sup>

Secondly, some forms of discrimination are more subtle or complex and may not fit into the tests developed by administrative and judicial authorities to apply the law to the facts of a case. Sperino points that the 'multipart tests' (or 'frameworks') used for evaluating the facts of a discrimination claim 'are overly influenced by [...] the specific cases through which they were developed and are resistant to change'.<sup>88</sup> If we bear in mind that forms of discrimination have evolved over time from overt actions, like direct discrimination, to more subtle actions,<sup>89</sup> like harassment, 'the inflexibility of the framework model makes it unable to account for the full manifestations of discrimination'.<sup>90</sup> For this reason, claimants may struggle to subsume the facts of their cases into a recognised structure, which may lead 'courts to dismiss claims that straddle more than one framework or that do not fit neatly within recognized structures'.<sup>91</sup> Consequently, these formal structures may impede victims' access to formal procedures if they are not successful in reframing their cases following the patterns and the language of discrimination tests.<sup>92</sup> I will refer to this phenomenon and to the 'screening role' of filters as '*institutional lumping*' because, in contrast with social lumping, it does not arise from the social environment, but from the institutional framework itself.

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<sup>82</sup> FRA, *Access to Justice in Cases of Discrimination in the EU* (n 19) 50.

<sup>83</sup> R L Sandefur, 'The Fulcrum Point of Equal Access to Justice: Legal and Non-Legal Institutions of Remedy' (2009) *Loyola of Los Angeles Law Review* 949,957.

<sup>84</sup> *ibid.*

<sup>85</sup> Banakar (n 43) 30-31.

<sup>86</sup> EHRC, Strategic litigation policy 2012-13. Appendix 2 <<http://www.equalityhumanrights.com/legal-and-policy/legal-strategy/>> accessed 20 April 2013.

<sup>87</sup> Banakar (n 43) 30.

<sup>88</sup> S. F Sperino, 'Rethinking Discrimination Law' (2011-2012) 110 *Michigan Law Review* 69, 70.

<sup>89</sup> *ibid.*, 125; S Sturm, 'Second Generation Employment Discrimination: A structural Approach' (2001) 101 *Columbia Law Review* 458.

<sup>90</sup> Sperino (n 88) 125.

<sup>91</sup> *ibid.* 71; cf with Banakar's concept of 're-labelling', Banakar, (n 43) 85-86, 100. Both Sperino and Banakar seem to suggest that these processes are 'doorkeeping techniques' which end up framing how formal action against discrimination works and condition which cases enter the legal system.

<sup>92</sup> *ibid.*

A key difference between formal and informal effectiveness is that formal effectiveness is always *ex post* because the formal machinery only starts working if there has been a discrimination incident, and in most cases, only if the victim is brave enough 'to push the start button' to initiate some type of legal procedure. On the contrary, *informal effectiveness* can either be *ex ante*, when the law is respected and there is no discrimination, or *ex post*, when the law has not been respected but the conflict is solved before it is externalised.

## 4. Shortcomings of the bottom-up model based on individual enforcement

### 4.1. Institutional discrimination

As stated earlier, this theoretical model is mainly based on the use of anti-discrimination rules at an individual level. The model describes the decision-making processes and the legal structures that a victim of discrimination is confronted with when facing a particular incident. However, discrimination can be a diffuse phenomenon affecting a whole group, which may be difficult to associate with a specific action and a concrete person. It is thus not always possible to pinpoint a specific incident.

This type of discrimination has been called institutional discrimination,<sup>93</sup> discrimination by omission<sup>94</sup> or third-generation discrimination.<sup>95</sup> It has been described as 'an attitude on the part of the State which consists in not taking the necessary measures to prevent situations of discrimination',<sup>96</sup> especially as regards certain areas of life, like education, housing or access to healthcare. It can be the result from 'a lack or shortage of adequate resources', or from 'ill will' and 'selective attitudes'<sup>97</sup> based on stereotypes and prejudices, which in the long run can lead to social exclusion, victimisation and group disadvantages.<sup>98</sup>

In Europe, and more precisely in the UK, institutional discrimination came to the public attention with the murder of Stephen Lawrence in London in 1993. Lawrence's family campaigned to show that the police did not properly investigate the murder due to the victim's ethnic background. This case showed the underlying tensions between police forces and black people in the UK of the 1980s and 1990s<sup>99</sup> and fed public debate about institutional discrimination. The McPherson Inquiry, which

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<sup>93</sup> This term is commonly used in the UK. See Sir W Macpherson, *The Stephen Lawrence Inquiry: report of an inquiry* (Home Office 1999); C McCrudden, 'Institutional Discrimination' (1982) 2 *Oxford Journal of Legal Studies*; M Bell, 'British Developments in Non-Discrimination Law: the Equality Act', in R Schulze (ed), *Non-Discrimination in European Private Law* (Mohr Siebelk 2011) 209, 211.303. <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.6625&rep=rep1&type=pdf>> accessed 10 June 2012;

<sup>94</sup> A Amor, *Racial discrimination, religious intolerance and education*, 3 May 2001, UN doc. A/CONF.189/PC.2/22, paras 93-100.

<sup>95</sup> This is the term used by some American scholars. See G de Búrca, 'Stumbling into Experimentalism: The EU Anti-Discrimination Regime' in C. F Sabel and J. Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010) 218, citing S Sturm, 'Second Generation Employment Discrimination: A structural Approach' (2001) 101 *Columbia Law Review* 458.

<sup>96</sup> Amor (n 94) paras 93-100.

<sup>97</sup> *ibid.*

<sup>98</sup> See eg C McCrudden, 'Institutional Discrimination' (n 93).

<sup>99</sup> J Foster, T Newburn and A Souhami, *Assessing the impact of the Stephen Lawrence Inquiry*, Study 294 (Home

focused on this specific murder but also on a more general appraisal of relations between police forces and ethnic minorities, concluded that the police investigation was faulty due to 'professional incompetence, institutional racism and a failure of leadership by senior officers'.<sup>100</sup> Thanks to the Lawrence case both public authorities and the public opinion became aware of the problem of institutional discrimination in the UK.<sup>101</sup>

More recently, the European Court of Human Rights (ECtHR) accepted as evidence of discrimination the fact that a disproportionate number of Roma pupils were placed in special primary schools the Czech Republic.<sup>102</sup> Whilst these schools were meant to be –in theory- for any children with special needs, Roma children were more likely to end up in special schools –in practice.<sup>103</sup> The so called '*Ostrava case*' was mainly based on statistical evidence collected by the European Roma Rights Centre ('ERRC')<sup>104</sup> but it could only be brought before the ECtHR thanks to the joint application of 18 individuals.<sup>105</sup> Thus, if it had not been for those individuals' readiness to bring an application *together* and for the statistics collected by the ERRC, the underlying situation of institutional discrimination would probably not have reached the tribunals. The *Ostrava case* can thus be considered a successful example of *individuals* being able to bring issues of institutional discrimination before the judicature, but it was in fact part of a wider *collective* strategy supported by NGOs, like the ERRC.<sup>106</sup> The ECtHR actually acknowledged this collective element by stating that national legislation 'had a disproportionately prejudicial effect *on the Roma community*' and not considering it necessary to examine the applicants' individual cases.<sup>107</sup>

Office 2005) 1.

<sup>100</sup> See *The Stephen Lawrence Inquiry: report of an inquiry* (Home Office 1999) para 45.24. <<http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs05/hors294.pdf>> accessed 28 May 2013.

<sup>101</sup> See eg H Khaleeli, 'Twenty years after Stephen Lawrence's murder, what's changed?', *The Guardian* (London, 21 April 2013) <<http://www.guardian.co.uk/uk/2013/apr/21/twenty-years-stephen-lawrence-murder-whats-changed>> accessed 28 May 2013.

<sup>102</sup> *D.H. v. the Czech Republic* App no 57325/00 (ECtHR, 13 November 2007).

<sup>103</sup> In the city of Ostrava, only 1.8 % of non-Roma pupils were placed in special schools, whilst 50.3 % of Roma pupils were, *ibid*, para 18.

<sup>104</sup> D Strupek, 'Before and after the Ostrava case: Lessons for Anti-Discrimination Law and Litigation in the Czech Republic' [2008] *Roma Rights Journal* 42.

<sup>105</sup> Under article 34 of the European Convention of Human Rights, applicants need to be the victims of the breach of at least one of its articles, see *Scordino v. Italy (no. 1)* App no 36813/97 (ECtHR, 29 March 2006) para 179. Furthermore, *actio popularis* are not permitted, see *Klass and Others v. Germany* App no 5029/71 (ECtHR, 6 September 1978) para 33.

<sup>106</sup> cf J A Goldston, 'The role of European anti-discrimination law in combating school segregation: the path forward after Ostrava', speech delivered at the conference *Roma and equal access to education: from segregation to integrated schooling*, Brussels, 28 - 29 April 2006 <<http://www.enar.eu/Page.asp?docid=16034&langue=EN>> accessed 28 May 2013. See also *Sampanis and Others v Greece* App no 32526/05 (ECtHR, 5 June 2008); *Orsus and Others v Croatia* App no 15766/03 (ECtHR, 16 March 2010); *Horváth and Kiss v. Hungary* App no 11146/11 (ECtHR, 29 January 2013) and *Lavida and Others v Greece* App no 7973/10 (ECtHR, 30 May 2013).

<sup>107</sup> *D.H. and Others* (n 102) para 209. Farkas considers that this ruling 'virtually transformed *D.H. and Others* from an application brought by eighteen individual applicants [...] into an *actio popularis* or collective complaint', L Farkas, 'Limited Enforcement Possibilities under European Anti-Discrimination Legislation – A Case

Institutional discrimination is a 'collective failure' which can be perceived 'in processes, attitudes and behaviour[s]',<sup>108</sup> and may –or may not- emerge as a specific discriminatory incident. Due to this collective aspect, individual justice models tend to offer limited possibilities to address it effectively. Makkonen, for instance, criticizes individual enforcement because it 'hides from sight structural and institutional problems that cannot be seen by looking at individual events alone. [T]he episodic view, just like the law, is only concerned with specific events [...] and is unconcerned with the more general mechanisms, patterns, causes and consequences that underlie or contribute to the specific events'.<sup>109</sup>

However, whilst acknowledging that individual complaints cannot successfully combat institutional discrimination on their own, they can play a role as part of a broader strategy, together with other measures.<sup>110</sup> Individual complaints are not completely useless in tackling institutional discrimination and can trigger other type of more effective policies. As the above mentioned examples suggest, if discrimination materialises in a concrete case, individual complaints can raise awareness and can push states to take measures to address the problem, beyond the individual case.<sup>111</sup> This can be true, even if the final ruling is unfavourable to the victim, especially if civil society organisations are strong and well organised.<sup>112</sup> Civil society can try to 'activate the courts'<sup>113</sup> and feed discussion and public debate about the public authorities' failure to address group disadvantages ('shaming')<sup>114</sup> and they may be able to push for policy and legal change ('reframing').<sup>115</sup> The *Ostrava case* can be seen as an example of activating the ECtHR, which has led the Czech Government to take steps to tackle Roma segregation in education.<sup>116</sup>

The proposed model only partially addresses institutional discrimination. Policies which target this type of discrimination can lead to informal and organisational uses of anti-discrimination law, and strategic litigation can fall within the remit of formal uses. However, if institutional discrimination does not materialise in specific cases, it would fall outside of the scope of the model.

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Study of Procedural Novelties: *Actio Popularis* Action in Hungary' (2010) 3 Erasmus Law Review 181, 188.

<sup>108</sup> *The Stephen Lawrence Inquiry: report of an inquiry* (n 100) para 6.34.

<sup>109</sup> T Makkonen, 'Equal in Law, Unequal in Fact. Racial and Ethnic Discrimination and the Legal Response thereto in Europe' (n 67) 28.

<sup>110</sup> N Bamfroth, M Malik and C O'Conneide, *Discrimination Law: Theory and Context* (Thomson 2008) 336-337.

<sup>111</sup> That was the case after the Stephen Lawrence Inquiry.

<sup>112</sup> Goldston (n 106).

<sup>113</sup> A S Sweet, 'The European Court of Justice' in P Craig and G De Burca, *The Evolution of EU Law* (2<sup>nd</sup> edn, OUP 2011) 121, 145.

<sup>114</sup> D Panke, 'The European Court of Justice as an Agent of Europeanization? Restoring Compliance with EU Law' (2006) 14 Journal of European Public Policy 847, 852.

<sup>115</sup> *ibid* 853.

<sup>116</sup> However, the results of these measures are still limited, see OSCE, *Equal Access to Quality Education for Roma Children. Field Assessment Visit to the Czech Republic* (OSCE 2012) <<http://www.osce.org/odihr/96661>> accessed 10 June 2013.

#### 4.2. Filters may play an active rather than a passive role

Another limitation of the theoretical model lies in the fact that it is not always victims who take the initiative of contacting filters; filters can also play an active role.<sup>117</sup> In some cases NGOs may contact discrimination victims after learning about their case through the media. Filters may also identify a specific situation where discrimination is patent and set up a strategy to produce evidence which would allow bringing the matter to courts. They may try to gather statistical evidence<sup>118</sup> or set up testing strategies. For instance, following a testing strategy an NGO managed to demonstrate discrimination suffered by migrants in access to housing in the city of Bilbao (Spain).<sup>119</sup> Filters can also play an active role in helping victims to recognise situations of discrimination or persuading them to bring a claim.

The presented framework assumes that it is *the victim* who will contact filters, so formal uses of rules triggered by filters' active search for complainants fall outside the scope of the model. However, when filters take the initiative to organise awareness raising campaigns, they can fall within the remit of informal uses of rules.

### 5. Factors playing a role in the use of EU anti-discrimination law

The analytical model presented explains how individuals use anti-discrimination law, either by respecting it at an informal level, or by having recourse to enforcement mechanisms when the law is breached. The model highlights not only how the rules are used, but also what are the obstacles to the use of anti-discrimination law. This section adds some flesh to the bones of the model by briefly analysing the factors which may play a role in the use of EU anti-discrimination law.<sup>120</sup>

Firstly, the use of anti-discrimination law depends on *individuals' awareness of rules*.<sup>121</sup> Citizens need to know about the existence of norms, their contents and how they can be relevant to their particular situation to adjust their 'legal behaviour'.<sup>122</sup> Legal knowledge depends largely on the particular circumstances of each individual, ie its profession, age, social sphere, civil status, etc.<sup>123</sup> Mass media can play a role in informing individuals about the contents of legislation, but research shows that most victims who were aware of the existence of anti-discrimination law learned about it at school or university (50%) and to a lesser extent, from friends, family, the internet or 'common cul-

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<sup>117</sup> A FRA report suggests that filters, especially NGOs, counselling institutions and equality bodies, are relatively active, whilst lawyers are less active in seeking complainants. See FRA, *Access to Justice in Cases of Discrimination in the EU* (n 19) 54.

<sup>118</sup> For example, the *Ostrava case* was started on the initiative of the ERRC and other organisations. See ERRC, Interrights and MPG (n 146) 80.

<sup>119</sup> Sos Racismo Vizcaya, *Discriminación y acceso a la vivienda de las personas inmigrantes en Bilbao* (n p; 2011).

<sup>120</sup> This is not intended to be an exhaustive enumeration.

<sup>121</sup> See eg Moore (n 32) 744; Griffiths, 'The Social-Working of Anti-discrimination Law' (n 24) 316-317; Havinga (n 26) 83-84; FRA, *The Race Equality Directive* (n 45) 19-20.

<sup>122</sup> Friedman (n 24) 111-115.

<sup>123</sup> *ibid* 114-115.

ture'.<sup>124</sup> Some were also aware about anti-discrimination law because it is linked to their work or they had been active in trade unions and NGOs.<sup>125</sup>

Secondly, besides knowing the law, *potential users must be able to recognise when they can make use of it.* <sup>126</sup> This requires having the relevant information, ie that they were not accepted for a job on the ground of their ethnicity. As the ECJ judgments in *Meister*<sup>127</sup> and *Kelly*<sup>128</sup> suggest, this information may not be easily accessible because the alleged perpetrator may not be willing to disclose it. In addition, victims must be able to interpret the factual information as falling within the scope of the relevant rule. Empirical research shows that individuals often have difficulties in labelling a set of facts as being discriminatory, and in some cases it is thanks to family members and friends that they are able to do it.<sup>129</sup> Indeed, the same way that consumers may 'fail to recognize that the product they receive is defective',<sup>130</sup> discrimination victims may fail to realise that they were not accepted as a tenant of a flat for their foreign accent or their skin colour.<sup>131</sup>

Thirdly, the use of anti-discrimination law is influenced by *the internal values and rules of SASFs.* At an informal level, the more anti-discrimination law is in line with SASFs' values and inner beliefs of individuals, the more it will be spontaneously applied.<sup>132</sup> This does not necessarily imply that anti-discrimination law should have the 'pedagogical' role of shaping people's minds,<sup>133</sup> but rather that the use of rules may be different in each MS,<sup>134</sup> depending on whether 'otherness' is more easily accepted or not.<sup>135</sup> The use of anti-discrimination law will also vary according to SASFs' capacity to integrate norms, or on the contrary, to create resistance to them if they are in conflict with other SASFs' internal norms.<sup>136</sup> For instance, anti-discrimination law can easily clash with public security rules, if we think of Muslim women wearing burkas,<sup>137</sup> or with the freedom of contract,<sup>138</sup> if we

<sup>124</sup> FRA, *Access to Justice in Cases of Discrimination in the EU. Steps to further Equality* (n 19) 53.

<sup>125</sup> *ibid.*

<sup>126</sup> See *inter alia* Moore (n 32)744; Griffiths, 'The Social-Working of Anti-discrimination Law'(n 24) 316-317; Havinga (n 26) 83-84; FRA, *The Race Equality Directive* (n 45) 19-20.

<sup>127</sup> C-415/10 *Meister*, judgment of 19 April 2012, nyr,

<sup>128</sup> C- 104/10 , *Patrick Kelly v National University of Ireland (University College, Dublin)*, judgment of , 21 July 2010, nyr.

<sup>129</sup> FRA, *Access to Justice in Cases of Discrimination in the EU* (n 19) 51.

<sup>130</sup> S Macaulay, 'Lawyers and Consumer Protection Law' (1979-1980) 14 *Law & Soc' Rev* 115,121.

<sup>131</sup> FRA, *The Race Equality Directive* (n 45) 20.

<sup>132</sup> See text to n 41.

<sup>133</sup> A Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (OUP 2011) 13-15.

<sup>134</sup> It will also be vary between different SASFs located in the same country, ie between different companies, associations, etc.

<sup>135</sup> This is one of the reasons why levels of complaints and litigation should not be compared between MS.

<sup>136</sup> See eg Havinga (n 26) 85-86 building on Moore (n 36).

<sup>137</sup> See eg J Heider, 'Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights' (2012) 22 *Indiana International & Comparative Law Review* 93.

<sup>138</sup> See a discussion in D Schiek, 'Freedom of Contract and a Non-Discrimination Principle – Irreconcilable An-

think of a landlord not willing to rent his flat to migrants. These clashes are likely to create resistance for rule-following.

Fourthly, the *relative bargaining power of social actors within SASFs* is also relevant, both at the informal and the formal level. To take action victims need not only to recognise the situation and be aware of the law, but also to feel 'empowered' to do something about it.<sup>139</sup> Empowerment can arise from the victim's self-belief that she has 'sufficient power to achieve a solution'<sup>140</sup> or from external support provided by family, friends, colleagues or filters.<sup>141</sup> The relative bargaining power of individuals inside the relevant SASF will thus be determinant for the victim's decision to address discrimination informally or to take formal action, and it may also affect the result of the dispute.<sup>142</sup> Victims are likely to have a low subjective power if they belong to a vulnerable community or when discrimination takes place in fields like employment or education, where the perpetrator can be a superior or a teacher.<sup>143</sup> When the subjective power of victims is low, external support can be crucial to overcome fear to victimisation and the stress derived from complaint procedures.<sup>144</sup>

Fifthly, *filters* are crucial actors for rule-following. As stated above, they can play a role at the informal level by conveying information and raising awareness. This can be achieved not only through information campaigns, but also by feeding public debate,<sup>145</sup> for instance by catching the press attention through strategic litigation.<sup>146</sup> At a formal level, filters can play a 'screening role' by selecting which discrimination cases are legally relevant, and leaving others outside the legal system.<sup>147</sup> Conversely, they can also have a 'push effect', by supporting morally and financially victims to take legal action,<sup>148</sup> thus preventing social lumping. However, the role of filters can vary depending on their human and material resources and to their geographical presence.<sup>149</sup>

onyms?', in T Loenen and P R Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (Kluwer 1999) 77.

<sup>139</sup> Moore (n 36) 744.

<sup>140</sup> M Gramatikov and R B Porter, 'Yes, I can: Subjective Legal Empowerment', Tisco Working Paper Series on Civil Law and Conflict Resolution Systems, Tilburg University, October 2010, 4-5 <[http://works.bepress.com/martin\\_gramatikov/3](http://works.bepress.com/martin_gramatikov/3)> accessed 10 January 2012.

<sup>141</sup> FRA, *Access to Justice in Cases of Discrimination in the EU* (n 19) 51.

<sup>142</sup> As Gramatikov and Porter point: 'Power is the currency of disputes. [...] There are people who have more power than others and this had an effect in the resolution of legal problems' (n 140) 5.

<sup>143</sup> Workers from ethnic minorities are unlikely to take action against discrimination because they are thankful for having a job or do not want to lose it. See FRA, *The impact of the Racial Equality Directive: Views of Trade Unions and Employers in the European Union* (EUPO 2010) 95-98.

<sup>144</sup> FRA, *Access to Justice in Cases of Discrimination in the EU* (n 19) 51.

<sup>145</sup> *ibid* 54.

<sup>146</sup> ERRC, Interrights and MPG (n 146).

<sup>147</sup> See *supra* section 3.2.

<sup>148</sup> FRA, *Access to Justice in Cases of Discrimination in the EU* (n 19) 49.

<sup>149</sup> An Equinet report suggests that having regional and local presence increases the impact of filters. Equinet, *Providing Independent Assistance to Victims of Discrimination* (Equinet Secretariat 2011) <[http://www.equineteurope.org/IMG/pdf/Independent\\_Assistance\\_merged\\_.pdf](http://www.equineteurope.org/IMG/pdf/Independent_Assistance_merged_.pdf)> accessed 15 May 2013, 33-37.

Sixthly, the use of rules at an organisational level can also depend on the existence of *promotion programmes*. Public policies can be launched to grant financial or material advantages to companies who hire a certain percentage of employees from a specific vulnerable community.<sup>150</sup> However, they can also be implemented at the initiative of companies themselves, as part of their internal policies, or to improve their public image.

Finally, *time and financial costs*<sup>151</sup> and *formalistic legal frameworks* can also have an influence in formal uses of rules. As discussed earlier, legal frameworks can hinder individuals' access to the legal system, especially as regards subtle and covert forms of discrimination, which may be difficult to subsume in anti-discrimination tests.<sup>152</sup>

## 6. Conclusion

This paper proposes an analytical model to decode how the RED and the FED are effectively used at national level. Without seeking to explain comprehensively the use of rules as regards a phenomenon as complex as discrimination, it brings the attention to a number of elements which can at least partially explain the application and effects of both directives at national level.

Following the RED and the FED approach to enforcement, which is largely based on individual litigation, the proposed model takes a bottom-up approach by focusing on how individuals apply anti-discrimination law spontaneously in their daily lives or within a given organisation (*informal effectiveness*). It also considers the decision-making processes that victims of discrimination follow to decide whether to seek advice and bring a complaint (*formal effectiveness*).

As regards informal effectiveness, the use of the directives is influenced by the social values and the internal rules of relevant communities. Differences in the application of the RED and the FED between MS can thus partly be explained by the existence of favourable or unfavourable social conditions at national level. For instance, the fact that some national legal orders enshrine more strongly than others legal principles which can clash with anti-discrimination law, may reduce its use at an informal level.

As regards formal effectiveness, victims may be confronted with a number of obstacles which may dissuade them to seek for advice from filters and from bringing legal actions (*social lumping*). Victims may be influenced by their inferior position as regards the perpetrator, especially if they belong to socially excluded groups or the perpetrator is a superior. They can also fail to have the necessary economic and moral support to bear the psychological and economic cost of lengthy legal procedures. Even if the victim takes action, the screening role of filters and the legal system's selective procedures may still leave their cases out of the legal system (*institutional lumping*).

This analysis suggests that the evaluation of the effects of the RED and the FED needs to be based not only on formal procedures and litigation rates, but also on socio-legal analysis of the extent to which the directives are used at all social levels. The use of the directives at informal and organisational levels can be crucial to understand how they work in practice and why litigation rates are so low in some MS. The fact that litigation rates are low can be due to social and institutional lumping,

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<sup>150</sup> C McCrudden, 'Regulating Discrimination' (n 24) 308-309.

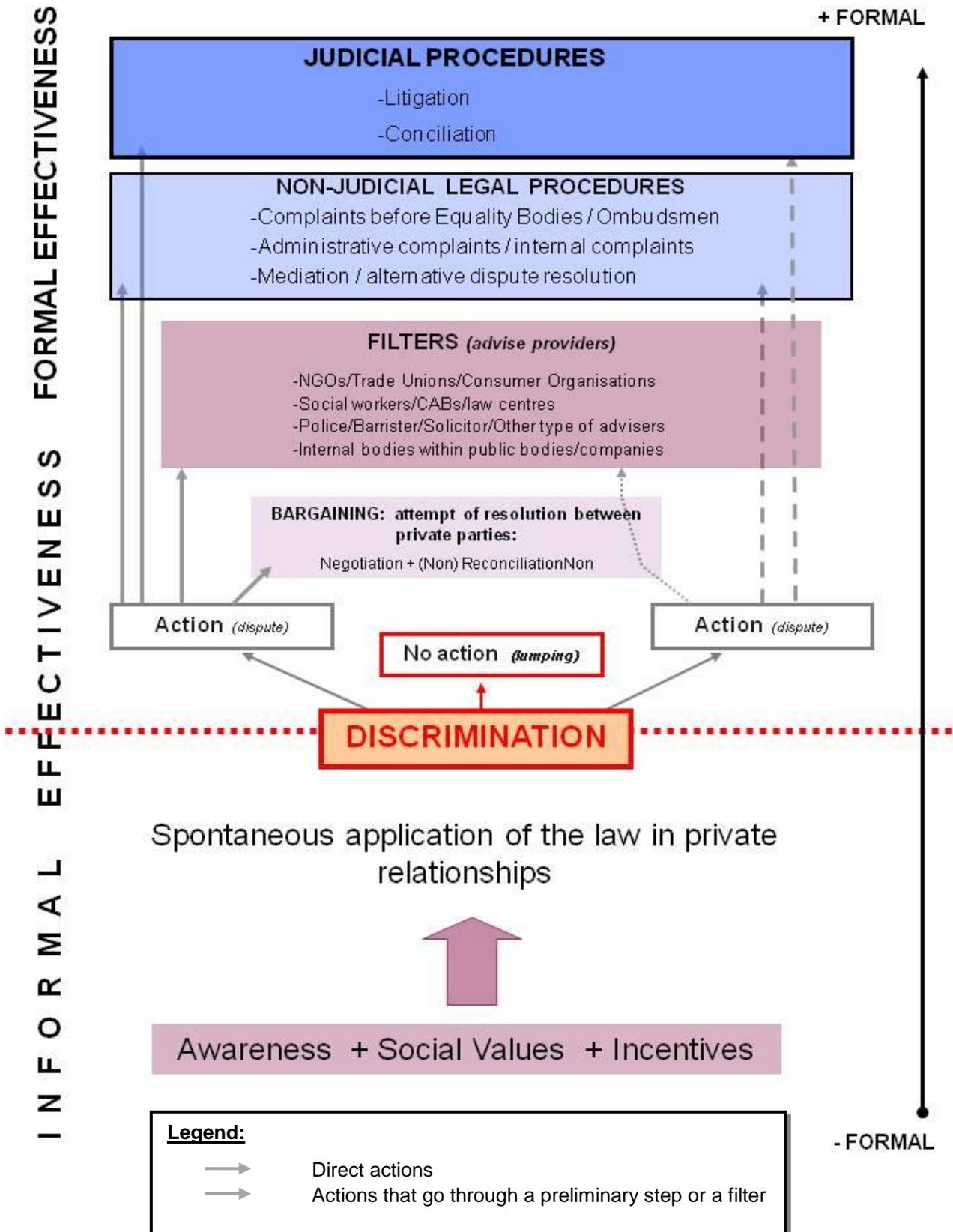
<sup>151</sup> See text to n 20 and 47.

<sup>152</sup> See text to n 88-92.

but it can also be a sign that they are being used successfully at informal and organisational levels. A broader consideration to the diversity of MS legal systems would be needed to develop further this analytical model and comprehend better how the RED and the FED work in practice.

ANNEX 1.

FORMAL AND INFORMAL EFFECTIVENESS IN EQUALITY LAW



Source: author's own elaboration