



<b>Title</b>	Equality Bodies in the EU: origins, challenges and future prospects
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<b>Publication date</b>	2022-01-01
<b>Publication information</b>	Benedí Lahuerta, Sara. "Equality Bodies in the EU: Origins, Challenges and Future Prospects." Edward Elgar, January 1, 2022.
<b>Publisher</b>	Edward Elgar
<b>Item record/more information</b>	<a href="http://hdl.handle.net/10197/24530">http://hdl.handle.net/10197/24530</a>

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## Equality Bodies in the EU: origins, challenges and future prospects

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### Abstract:

*In the last 20 years Equality Bodies (EBs) have quickly spread throughout Europe. EU law's influence on this expansion has been particularly significant in terms of their geographic presence: at least one EB exists in each Member State as well as in EFTA countries and most candidate countries. EU law has also prompted broader mandates in many national EBs. However, EU law's stimulus has not always resulted in the setting up of effective EBs. This chapter analyses the three key challenges that EU law has had to tackle since the duty to set up EBs was introduced at EU level through the Racial Equality Directive (RED, 2000/43/EC). The challenge of introducing this duty itself in EU law and the subsequent geographical expansion of EBs ('spreading challenge') was successfully overcome thanks to various driving forces, including the lobby efforts of the Starting Line Group and a series of legal transplants originating in the US. Yet, shortly after the adoption of the RED and the Employment Equality Directive (EED, 2000/78/EC), it became apparent that the incoherent EU requirements mandating the setting up of EBs for only some discrimination grounds ('hierarchy challenge') could be problematic in practice. This challenge has been progressively dealt with but is still not fully resolved. Currently, however, the most pressing challenge might be the limited effectiveness of some national EBs ('effectiveness challenge'), partly enabled by the vague EU requirements regarding the configuration and functions of EBs. The 2018 Commission Recommendation on Standards for Equality Bodies is a welcome development that seeks to address this challenge, but given its soft-law nature, it is unclear if it will make a difference in practice.*

### 1. Introduction

Equality Bodies (EBs) are 'independent statutory bodies established to promote the principle of equal treatment on various grounds'<sup>1</sup> and to tackle discrimination.<sup>2</sup> EU law mandates that EBs provide independent assistance to victims of discrimination ('support and litigation function'), and that they monitor and report on discrimination issues and promote equality ('promotion and prevention function').<sup>3</sup> In some cases, EBs also have a decision-making function allowing them to adjudicate in discrimination complaints, although this function is not expressly required by EU law.<sup>4</sup> Depending on their diverse powers, EBs may be able to, *inter alia*, alleviate the burden borne by

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<sup>1</sup> N Crowley, *Equality bodies making a difference* (POEU 2018) 7.

<sup>2</sup> Equinet, *Equality Brochure 2020*, <https://equineteurope.org/2019/equality-bodies-and-equinet-promoting-equality-in-europe/>.

<sup>3</sup> EU Commission, 'A Europe that protects: Commission calls for stronger national equality bodies to fight discrimination', Press Release, 22 June 2018.

<sup>4</sup> However, it is expressly mentioned in the European Commission Against Racism and Intolerance (ECRI), General Recommendation No. 2, Equality Bodies to Combat Racism and Intolerance at National Level, CRI(2018)06, para 10.

victims in pursuing their complaints through the individual enforcement system;<sup>5</sup> engage in strategic litigation in high profile cases<sup>6</sup> or when there are no identifiable discrimination victims;<sup>7</sup> support the clarification or a new interpretation of the law,<sup>8</sup> or conduct investigations, research and surveys to highlight areas in need of action.<sup>9</sup> In performing these and other functions, they can ‘play a key role in ensuring all citizens are given equal rights and equal opportunities’.<sup>10</sup> The impact of their work tends to be incremental and progressive rather than radical, but they can be valuable ‘tool for advancing social justice’.<sup>11</sup>

In the last 20 years EBs have quickly spread throughout Europe. This expansion, largely driven by EU law, has been so successful that EBs are now present in all EU Member States (MS), in all EFTA countries, as well as in the UK, Iceland and most EU candidate countries.<sup>12</sup> A recent study focusing on EU and EFTA countries found that 43 EBs are currently present in 31 countries.<sup>13</sup>

Their territorial expansion has been accompanied by a steady increase in the areas where the setting up of EBs is mandated by EU law (hereinafter, their ‘mandate’). These areas now include not only the initial one -racial or ethnic origin discrimination- but also gender discrimination, nationality discrimination for EU mobile workers and their families, and the protection of work-life balance.<sup>14</sup> It could be argued, however,

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<sup>5</sup> See e.g. E Barry, ‘Different Hierarchies – Enforcing Equality Law’ in C Costello and E Barry (eds), *Equality in Diversity. The New Equality Directives* (Irish Centre for European Law 2003) 411; on their role to address underreporting see T Kadar, ‘Equality bodies. A European phenomenon’ (2018) *IJDL* 144–162.

<sup>6</sup> Various EBs have played a key role in cases before the CJEU (see e.g. Cases C-157/15, *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* EU:C:2017:203 at 2; C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisija za zashtita ot diskriminatsia* EU:C:2015:480 at 23-29; C-673/16, *Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării* EU:C:2018:385, where the Romanian Council to Combat Discrimination intervened) and before the ECtHR (e.g. the British Equality and Human Rights Commission intervened in *Eweida and Others v. the United Kingdom*, Apps. Nos. 48420/10, 59842/10, 51671/10 and 36516/10)). See further C Barnard, ‘A European Litigation strategy: the Case of the Equal Opportunities Commission’ (LLM Theses, European University Institute 1990) retrieved from: <http://hdl.handle.net/1814/5586>); E Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (OUP2018) 172; Kadar, *ibid* 147-148.

<sup>7</sup> See e.g. Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* EU:C:2008:397.

<sup>8</sup> Barnard (n 6); O’Cinneide, ‘The catalytic potential of equality and human rights commissions’ (2016) 24 *JPSJ* 8, 17. On the EBs power to refer questions for preliminary rulings to the CJUE, T Kádár, ‘The Standing of National Equality Bodies before the European Union Court of Justice: the Implications of the Belov Judgment’ (2013) 11 *Equal Rights Review* 13.

<sup>9</sup> Crowley (n 1).

<sup>10</sup> *Ibid*.

<sup>11</sup> O’Cinneide (n 8) 17; see similarly Ammer et al, *Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC2 and 2006/54/EC. Synthesis report* (European Human Consultancy 2010); Council of Europe, Commissioner for Human Rights, ‘Opinion on national structures for promoting equality’. *CommDH*(2011)2.

<sup>12</sup> See the ECRI’s List on National Specialised Bodies (<https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/list-of-national-specialised-bodies>), Equinet’s Directory (<https://equineteurope.org/what-are-equality-bodies/european-directory-of-equality-bodies/>) and the country reports of the European Equality Law Network (<https://www.equalitylaw.eu/country>).

<sup>13</sup> Crowley (n 1).

<sup>14</sup> See below, Diagram 1.

that, at EU level, the road to the development of EBs' mandate has been far slower and bumpier than the road to their geographic expansion. In fact, EU legislation on EBs' mandate continues to evolve. Although most national EBs have now become multi-mandate bodies covering most -if not all- protected grounds,<sup>15</sup> EU institutions have still not managed to adopt the Directive proposal<sup>16</sup> that would formally introduce an EU law-based duty to set up EBs with powers in the field to religion or belief, sexual orientation, age and disability discrimination.<sup>17</sup>

On the whole, EU law's influence on the expansion of EBs in Europe has been particularly significant in terms of their geographic presence. It has also prompted broader mandates, although national legislation has now often become more wide-ranging than EU law in terms of mandate. However, EU law's stimulus in this field has not always resulted in the establishment of *effective* EBs.<sup>18</sup> Over the years, EBs have experienced various constraints linked to socio-political hostility and to the financial situation of MS<sup>19</sup> that have limited their ability to meaningfully perform all their functions. Additionally, several EBs are not fully independent in practice, even if they may seem independent on paper.<sup>20</sup> Some countries have combined promotion and support functions with decision-making functions in one single EB, which can create conflicts of interest given that deciding on complaints requires impartiality whereas supporting complainants often involves taking their side.<sup>21</sup> In some cases, EBs' functions have also been merged with those of National Human Rights' Institutions (NHRIs), leading to large bodies that may struggle to fully integrate the EB functions and the NHRI ones.<sup>22</sup>

Against this background, the aim of this work is to revisit the three key challenges that EU law has had to tackle since the duty to set up these bodies was introduced in the EU legal framework, more than 20 years ago.<sup>23</sup> The chapter is structured as follows. Section two analyses the factors that facilitated the initial *challenge of 'spreading'* EB's throughout the EU (i.e. their geographical expansion). Section three discusses the *'hierarchy challenge'*, that is, how EU law has progressively extended the mandate of EBs, without fully achieving a coherent mandate just yet. Section four argues that one of the causes of the limited effectiveness of some EBs (*'effectiveness challenge'*) are

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<sup>15</sup> Out of the 43 EBs analysed by Crowley (n 1, 48-54), 33 had a multi-ground mandate (among them, 10 had mandate covering an open-list of grounds) and 10 had a single-ground mandate.

<sup>16</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final.

<sup>17</sup> Interinstitutional File 2008/0140(COD) - 10740/19, Art. 12(3) and Recital 27.

<sup>18</sup> For our purposes, EBs are effective if they have powers (*on paper*) to at least perform independently the key three functions mandated by EU law and they are able to do so *in practice*; see similarly Ammer et al (n 11) 137.

<sup>19</sup> See further section 3.

<sup>20</sup> See further Ammer et al, *ibid*, 106-119.

<sup>21</sup> See further Crowley (n 1) 70-77.

<sup>22</sup> See e.g. C O'Conneide and N Crowther, 'Bridging the Divide: Integrating the Functions of National Equality Bodies and National Human Rights Institutions in the European Union' *Juridikum* [2019] 210-21; N Crowley and A Gaspard, 'Minding Equality Bodies' *Juridikum* [2018] 324-325.

<sup>23</sup> Through Directive 2000/43/EC (Racial Equality Directive, RED), Art. 13. It is beyond the scope of this paper to comprehensively or comparatively review all EBs that exist in the EU. That analysis can instead be found e.g. in Crowley (n 1) and in Equinet's website (<https://equineteurope.org/what-are-equality-bodies/european-directory-of-equality-bodies/>).

the vague EU provisions and it considers the potential of the EU Commission Recommendation on standards for equality bodies<sup>24</sup> (hereinafter, ‘the Recommendation’) to address this challenge. Section 5 concludes.

## **2. The challenge of ‘spreading’ EBs in the EU: introduction and geographical expansion**

Originally, EBs were not a European phenomenon. Their introduction in the EU is fairly recent and can be seen as the result of a chain of legal transplants that started in the US and was brought into Europe via the UK. However, it was only through the adoption of the 2000 Racial Equality Directive (RED) that it became compulsory for all MS to establish EBs in the field of racial or ethnic origin discrimination.<sup>25</sup> The inclusion of such duty in the RED did not happen by chance; it was driven by at least three different driving forces that were converging in the background for several decades.<sup>26</sup>

After the Second World War, the progressive development of NHRIs and international standards for those institutions laid the first seeds for the emergence of EBs. Following two early ECOSOC resolutions,<sup>27</sup> the ‘Principles relating to the status of national institutions’ (‘Paris Principles’) were adopted in the early 1990s.<sup>28</sup> In the European context, two 1997 separate recommendations from the Council of Europe<sup>29</sup> and the ECRI followed.<sup>30</sup> This increasing recognition of the role that NHRIs could play in the effective enforcement of human rights’ obligations had a clear influence on EU policymakers during the negotiation of the RED. Indeed, the European Commission’s initial proposal for a directive against racial or ethnic origin discrimination acknowledged that EBs could belong to new or existing NHRIs or could otherwise be set up as separate agencies.<sup>31</sup> Additionally, the Buitenweg Report, which formed the basis for the European Parliament debates on the Directive Proposal, recommended various amendments to bring the EBs’ set up requirements in line with the ECRI

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<sup>24</sup> Adopted on 22.6.2018, C(2018) 3850 final.

<sup>25</sup> Art. 13.

<sup>26</sup> See also B De Witte (‘New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance’ (2012) 60 AJCL 49-74); Kadar (n 5) 145-146.

<sup>27</sup> UN Economic and Social Council, Resolution 2/9, 21 June 1946, sect. 6; Resolution 772 B (XXX), 25 July 1960.

<sup>28</sup> Endorsed both by the UN Commission on Human Rights (RES/54/1992) and the UN General Assembly (RES/48/134, 20 December 1993). An early seminar on these institutions was also organised in 1978 in Geneva, where the first guidelines were developed, see ST/HR/SER.A/2 and Add.1.

<sup>29</sup> Council of Europe, Recommendation 97 (11) of 30 September 1997.

<sup>30</sup> ECRI General Policy Recommendation. No. 2 1997, CRI (97) 36.

<sup>31</sup> Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin /\* COM/99/0566 final - CNS 99/0253 \*/), Art. 12(1). Indeed, to some extent, EBs can be considered to be NHRIs which have specialised in one particular area, i.e. the promotion of equality and the fight of discrimination. In some jurisdictions, however, EBs’ mandate is integrated with that of the NHRI (e.g. in the UK, Ireland or the Netherlands). In those cases, creating appropriate linkages between the two distinct mandates is crucial to maximise synergies (e.g. ensuring good communication across mandates to identify areas for joint action) and minimise risks (e.g. putting too much weight in one area to the detriment of the other); see further Equinet, *Equality Bodies and National Human Rights Institutions: Making links to maximise impact* (Equinet 2011); Crowther and O’Cinneide (n 19).

General Policy Recommendation No. 2,<sup>32</sup> particularly regarding the requirement that EBs perform their functions independently.<sup>33</sup>

Secondly, from the 1960s various jurisdictions started establishing EBs. The prime mover was the US, where the Civil Rights movement led to the early creation of the Equal Employment Opportunity Commission (EEOC).<sup>34</sup> The US example was mirrored in the UK by the setting up of the Community Relations Commission (CCR, with promotion functions) and the Race Relations Board (RRB, with very limited enforcement functions).<sup>35</sup> Following the publication of the Street Report in Britain, the RRB's initially weak powers were somewhat strengthened in the Race Relations Act 1968<sup>36</sup> and the Race Relations Act 1976 turned the CCR and the RRB into the Commission for Racial Equality (CRE).<sup>37</sup> Almost at the same time, the Equal Opportunities Commission (EOC) was established with powers in the field of sex discrimination.<sup>38</sup>

These British experiences paved the way to introduce EBs in other European jurisdictions.<sup>39</sup> Ireland followed shortly thereafter (1977),<sup>40</sup> as did Sweden (1980),<sup>41</sup> and several civil-law jurisdictions, namely, Austria (1979),<sup>42</sup> Belgium (1993)<sup>43</sup> and the

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<sup>32</sup> See e.g. the reference in K M Buitenweg, *Report on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, European Parliament, A5-0136/2000, Amendment 47, pp. 64-65).12/16/21 2:23:00 PM

<sup>33</sup> Ibid. See also A Tyson, 'The Negotiation of the European Community Directive on Racial Discrimination' (2001) 3 EJML 199, 216-217.

<sup>34</sup> Established by the Civil Rights Act 1964, Title VII.

<sup>35</sup> These were introduced by the Race Relations Act 1965, but the powers were extended by the Race Relations Act 1968. See I. Solanke *Making Anti-Racial Discrimination Law* (Routledge, 2011)?

<sup>36</sup> See further C Boothman and M MacEwen, 'The British Commission for Racial Equality as an enforcement agency' in M MacEwen (ed), *Anti-Discrimination Law Enforcement. A Comparative Perspective* (Ashgate 1997), 155, 156.

<sup>37</sup> Ibid, 156-158.

<sup>38</sup> The EOC was established by the Sex Discrimination Act 1975. On the early development of EBs in the UK see e.g. G Apple and E Ellis, 'Formal Investigations: The Commissions for Racial Equality and the Equal Opportunities Commission as law enforcement agencies' (1984) Public Law 236-276; R Niven, 'The EHRC: Transformational, progressively incremental or a disappointment?' (2008) *The Political Quarterly* 79; C O'Connell, 'A single equality body: Lessons from aboard' (Equal Opportunities Commission 2002); B Hepple, *Equality: The new legal framework* (2<sup>nd</sup> ed, Hart 2014) 11-16, 177-178.

<sup>39</sup> Note, however, that in some Nordic countries the slightly different Ombudsmen tradition can be traced back to the 18<sup>th</sup> century, see M Remáč, *Coordinating Ombudsmen and the Judiciary* (Intersentia 2014) 3-4.

<sup>40</sup> The Employment Equality Act 1977 created the Employment Equality Agency (s 34) with powers in the field of sex discrimination only. Later, in 1999, the Equality Authority and Equality Tribunal (formerly Office of the Director of Equality Investigations) were set up, see Barry (n 5) 422, 425-430; I Rorive, 'A Comparative and European Examination of National Institutions in the Field of Racism and Discrimination', in K Boyle (ed), *New Institutions for Human Rights Protection* (2009) 137, 150-151.

<sup>41</sup> See e.g. Jämo – Resurs Arkiv, available at <http://www.jamombud.se/omjamo/historik/>.

<sup>42</sup> The Equal Treatment Commission was set up by the Federal Chancellery in 1979. Its role was later reinforced by the creation of the Equal Treatment Ombud in the early 1990s (ETC/OOEC Act, Federal Law Gazette No. 108/1979 as amended in Federal Law Gazette I No. 107/2013). See further A Sporrer, 'The Austrian Equal Treatment Commission as an Instrument of Equality Law Enforcement' in T Loenen and P R Rodrigues (ed), *Non-Discrimination Law: Comparative Perspectives* (Kluwer 1999) 331; Equinet, 'Austria: Celebrating 27 years of the Ombud for Equal Treatment' (21 February 2019), available at <https://equineteurope.org/2019/austria-celebrating-27-years-of-the-ombud-for-equal-treatment/>.

<sup>43</sup> Initially as the *Centre for Equal Opportunities and Opposition to Racism*, see UNIA, 'About Us', available at: [www.unia.be](http://www.unia.be).

Netherlands (1994),<sup>44</sup> where a multi-ground EB was established, the Dutch Equal Treatment Commission (*Commissie Gelijke Behandeling*).<sup>45</sup> The progressive emergence of EBs in various MS -particularly the ‘Anglo-Dutch’ experience- positively contributed to the acceptance of a duty to set up EBs in the final text of the RED.<sup>46</sup> Indeed, during its negotiation, the presentations given by MS where EBs already existed helped overcome some delegations’ resistances<sup>47</sup> and facilitated an agreement around EBs’ functions and independence requirements.<sup>48</sup>

Thirdly, the ‘Anglo-Dutch’ experience with EBs was also determinant in the emergence of the ‘The Starting Line Group’ (SLG) in the early 1990s. Indeed, the programme for tackling racial discrimination in the European Community published in 1991 by the UK-based CRE ‘was later endorsed by the Dutch National Bureau against Racism and the Belgian Royal Commission on Policy towards immigrants’ and later turned into the coalition known as the SLG.<sup>49</sup> In 1993, the latter published a model directive named as ‘The Starting Line’<sup>50</sup> and became a key driving force not only for the adoption of the RED, but also for the inclusion of a duty to set up EBs in that Directive. Indeed, the 1993 Starting Line proposal already referred to independent bodies which could hear and investigate discrimination complaints and reach conclusions thereon (Art. 3(4)(e)).<sup>51</sup> That draft, which was endorsed twice by the European Parliament<sup>52</sup> and slightly reconfigured as a new proposal called ‘The New Starting Line’,<sup>53</sup> might have played a role in the Commission’s decision to include a provision on ‘independent bodies’ in its own directive proposal.<sup>54</sup> Since 1993 and all the way through until the adoption of the RED, the SLG maintained close contacts not only with EU institutions, but also with MS.<sup>55</sup> It is thus likely that, whilst SLG did not ‘[sit] around the negotiating table’ during the RED legislative procedure,<sup>56</sup> the SLG model directive and its lobby

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<sup>44</sup> Rovire (n 40) 150.

<sup>45</sup> Equal Treatment Act 1994, Art. 11. See further E Howard, ‘Equality Bodies and Individual Victims: An Example of Good Practice from the Netherlands’ (2012) 1 E-Journal of International and Comparative Labour Studies 43, 44.

<sup>46</sup> De Witte (n 26) 51-52.

<sup>47</sup> See Chopin, ‘Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European and Non-Governmental Proposals’ (2000) 2 EJML 426; Tyson (n 33) 216-217.

<sup>48</sup> Tyson, *ibid*.

<sup>49</sup> See A Dummett, ‘The Starting Line: A proposal for a draft Council Directive concerning the elimination of racial discrimination’ (1994) 20 JEMS 530; I Chopin, ‘The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment’ (1999) 1 EJML 111; I Solanke, *Making anti-racial discrimination law: a comparative history of social action and anti-racial discrimination law* (Routledge 2009) 176-180.

<sup>50</sup> Dummett, *ibid* 530.

<sup>51</sup> *Ibid*.

<sup>52</sup> Parliament (EU), ‘Resolution on Racism and Xenophobia’, 2 December 1993, PE 117.105; Parliament (EU), ‘Resolution on Racism, Xenophobia and Anti-Semitism’, 27 October 1994, PE 184.353-43.

<sup>53</sup> The new version kept the reference to EBs - this time in Article 4(4)(e), with only minor differences, see I Chopin and J Niessen, *Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union* (SLG and CRE 1998) 29.

<sup>54</sup> COM/99/0566 final (n 31).

<sup>55</sup> Chopin (n 49) 117.

<sup>56</sup> Tyson (n 33) 199.

efforts had an influence on the drafting of the RED,<sup>57</sup> and specifically, on the insertion of a duty to set up EBs in Article 13 of the RED.

The RED's adoption in 2000 was a real-game changer for the development of EBs in the EU. It not only symbolized the general EU's commitment against racial discrimination in a socio-political context where xenophobia and extremist parties were rising in Europe,<sup>58</sup> but also contained novel substantive and enforcement provisions,<sup>59</sup> notably, Article 13, requiring the -at the time- 15 MS to set up EBs with powers to provide 'independent assistance' to discrimination victims, conduct 'independent surveys', publish 'independent reports' and make recommendations on issues relating to racial discrimination.<sup>60</sup> This duty immediately put pressure on MS -especially those that at the time did not have EBs- to set them up by the 19<sup>th</sup> of July 2003. Ultimately, following various accession procedures,<sup>61</sup> the duty was extended to up to 28 Member States. Therefore, the RED had the notable effect of exponentially widening the geographical presence of EBs in the EU.<sup>62</sup>

However, the adoption of the RED and the geographical expansion of EBs in the EU, was only the 'the end of the beginning'.<sup>63</sup> There were still various challenges ahead to ensure that there was some degree of consistency between national EBs' mandates, and that they performed their duties effectively. The next two sections delve deeper into these two challenges and discuss how the EU has addressed them or is planning to do so.

### **3. *The hierarchy challenge: towards a coherent material scope for EBs' powers?***

Following the adoption of the RED, various voices started to raise concerns about the lack of requirement to set up EBs to fight discrimination based on the other grounds protected by EU law.<sup>64</sup> Relying on this and other regulatory differences between EU protected grounds, a body of literature arguing that a 'hierarchy of discrimination grounds' existed in EU law quickly crystalized.<sup>65</sup> Partly addressing this issue, several

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<sup>57</sup> See e.g. M Bell, *EU Anti-Discrimination Law* (OUP 2000) 203-205; Solanke (n 49); Case and Givens, 'Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48 *JCMS* 22.

<sup>58</sup> See e.g. E Howard, 'The EU Race Directive: Its Symbolic Value—Its Only Value?' (2004) 6 *IJDL* 141-163.

<sup>59</sup> See e.g. M Bell, 'Meeting the Challenge? A comparison between the EU Racial Equality Directive and the Starting Line' in I Chopin and J Niessen (eds), *The Starting Line and the Incorporation of the Racial Equality Directive to National Laws of the EU MS and Accession States* (MPG & CRE 2001) 22, 40-46.

<sup>60</sup> Art. 13(2) RED.

<sup>61</sup> In particular, the Eastward enlargements whereby the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia (2004), Romania and Bulgaria (2007) and Croatia (2013) joined the EU.

<sup>62</sup> See De Witte (n 26) 51-52.

<sup>63</sup> P Yu and I Chopin, 'Introduction', in Chopin and Niessen (n 59) 5.

<sup>64</sup> See e.g. P Skydmore, 'European development. EC framework directive on equal treatment in employment: towards a comprehensive community anti-discrimination policy?' (2001) 30 *ILJ* 126, 129; Barry (n 5) 411, 418.

<sup>65</sup> See e.g. S Fredman, 'Equality: A New Generation?' (2001) 30 *ILJ* 145, 157-158; L Waddington and M Bell, 'More equal than others: distinguishing European Union equality directives' (2001) *CMLR* 38 (2001): 587; M Bell and L Waddington, 'Reflecting on inequalities in European equality law' (2003) 6 *ELRev* 349, 355-358; E Howard, 'The case for a considered hierarchy of discrimination grounds in EU

additional Directives adopted in the 2000s and 2010s incorporated the requirement to set up EBs with competence in the fields of gender discrimination<sup>66</sup> and nationality discrimination for mobile EU workers and their families<sup>67</sup> (Diagram 1).

**Diagram 1. Expansion of EU law requirements to set up EBs by protected ground and material scope.**

Adoption Year Directive		2000	2004	2006	2010	2014	?
		2000/43/EC Art. 13	2004/113/EC Art. 12	2006/54/EC Art. 20	2010/41/EU Art. 11	2014/54/EU Art. 4	Proposal COM/2008/0426 Art. 12
Ground & Material Scope							
Racial or ethnic origin	Goods & Services						
	Employment						
	Self-employment						
	Education						
	Social protection & social advantages						
Gender	Goods & Services						
	Employment (including work-life balance measures)*						
	Self-employment						
	Education**						
	Media & Advertising**						
Other Art. 19 TFEU grounds (religion or belief, age, sexual orientation, disability)	Goods & Services						
	Employment						
	Self-employment						
	Education						
	Social protection & social advantages						
Nationality	Employment						

law’ (2006) 13 MJEL 445-470; S Benedi Lahuerta, ‘Race equality and TCNs, or how to fight discrimination with a discriminatory law’ (2009) 15 ELJ 738-756.

<sup>66</sup> Namely, Directives 2004/113/EC (‘Goods and services Directive’), Art. 12; 2006/54/EC (‘Recast Equal Treatment Directive’), Art.20; 2010/41/EU (‘Gender equality for the self-employed’), Art. 11.

<sup>67</sup> 2014/54/EU (‘Enforcement of Mobile workers’ rights’), Art 4. This anti-discrimination right is linked to the internal market and free movement so it is inherently different from the (static) anti-discrimination rights covered by the other EU Directives mentioned in Diagram 1. Given the different requirements of anti-discrimination rights linked to mobility, it may be challenging for EBs to perform advisory and adjudicatory functions in the context of *both* Directive 2014/54/EU *and* the classic anti-discrimination Directives.


(for EU mobile workers and their families)							
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Source: Own elaboration.


**Notes:**

\*Work-life balance measures were included in EBs' mandate by Directive 2019/1158, Art. 15.

\*\*Expressly excluded from Directive 2004/113, Art. 3(3).

 Denotes that this area is covered by EU law and there is an obligation to set up EBs.

 Denotes that this area is covered by EU law but there is no obligation to set up EBs.

 Denotes that a Directive proposal containing an obligation to set up EBs with powers in this area is pending (namely COM/2008/0426 final).<sup>68</sup>

As can be seen in Diagram 1, this has led to a relatively inconsistent<sup>69</sup> legal framework at EU level whereby a duty to establish EBs exists *only* in relation to *some* protected grounds. This loophole is difficult to justify both for normative and practical reasons.

At *normative level*, there is no clear justification for this gap. EU anti-discrimination law is clearly rooted in the notion of human dignity,<sup>70</sup> which implies that the law should protect all individuals against discrimination despite their intrinsic characteristics. Hence, no '*arbitrary distinctions*'<sup>71</sup> should be made in the support and enforcement tools available for different discrimination grounds. Rather than being based on normative reasons, the lack of an explicit EU requirement for the setting up of EBs in the field of religion or belief, age, disability and sexual orientation discrimination<sup>72</sup> seems to be the consequence of political pragmatism -due to the more challenging

<sup>68</sup> In the latest available version of this Directive Proposal (Interinstitutional File 2008/0140(COD) - 10740/19), Article 12(3) requires that EBs' powers in the field of religion or belief, age, sexual orientation and disability discrimination also extend to areas falling within the material scope of Directive 2000/78/EC. Similarly, Recital 27 states that '[i]n accordance with the purpose of extending the degree and the form of protection against discrimination based on sex and racial or ethnic origin to the grounds covered by this Directive, the competences of this body or bodies should include also the areas covered by Directive 2000/78/EC.'

<sup>69</sup> On the meaning of this term in the context of EU anti-discrimination law see S Benedi Lahuerta, 'Has the EU Taken Comprehensive and Coherent Action to Combat Discrimination?' in T Giegerich (ed), *The European Union as Protector and Promoter of Equality* (Springer 2020) 165, 169-173.

<sup>70</sup> As can be observed cases such as *Case 13/94, P v S and Cornwall County Council*, para 22; *AG Opinion in Coleman* EU:C:2008:61, para. 8; *AG Opinion in Case C-447/09 Prigge v Lufthansa* EU:C:2011:321, para. 31. See also references to human dignity in legislation, e.g. Charter of Fundamental Rights, Arts. 20 and 30) and secondary legislation, the definition of harassment in the Equality Directives (e.g. RED, Art. 2(4)). See also G S Friedman and J Q Whitman, 'The European Transformation of Harassment Law: Discrimination versus Dignity' (2002) 9 CJEL 241; S Benedi Lahuerta, 'Taking EU Equality Law to the Next Level: In Search of Coherence' (2016) 7 ELLJ 348,

<sup>71</sup> It must be acknowledged, however, that different discrimination grounds may require different approaches to effectively address discrimination, which may justify the introduction of ground-specific substantive provisions and/or enforcement tools; see further M Bell and L Waddington, 'Reflecting on inequalities in European equality law' (2003) 6 ELRev 349, 355-358.

<sup>72</sup> Unlike the original Commission proposal for the RED (X), the Commission's proposal for a directive in this field did not include a provision on bodies for the promotion of equal treatment (COM/99/0565 final). The European Parliament introduced an amendment to mirror Article 13 of the RED (Report by Thomas Mann, Committee on Employment and Social Affairs, A-0264/2000, amendment 52), but it was not retained in the amended proposal (COM/2000/0652 final).

negotiations of the Employment Equality Directive (EED).<sup>73</sup> Indeed, various EU institutional statements indicate that ‘different forms of discrimination cannot be ranked: all are equally intolerable’<sup>74</sup> and refer to the ‘crucial contribution’ that EBs ‘can make for a more effective implementation and application’ of *both* the RED *and* the EED.<sup>75</sup>

Additionally, the lack of uniform EU requirements regarding the setting up of EBs for all protected grounds can be problematic *in practice*. For instance, in cases of multiple or intersectional discrimination<sup>76</sup> the unique combination of and synergies between some grounds in certain individuals may make it very difficult -if not impossible- to identify the actual ground/s behind a given discriminatory behaviour.<sup>77</sup> This can be the case with women professing certain religious faiths (e.g. Muslim women),<sup>78</sup> and with certain religious minorities who are often racialized, such as Muslims or Jews.<sup>79</sup> If EBs only have competences to deal with one of the discrimination grounds at stake (e.g. gender or race, but not religion) they may not be able to assist wronged individuals in a way that addresses the discrimination experienced in its full complexity.<sup>80</sup> Furthermore, complainants may be left without an effective way to challenge discrimination before tribunal-type EBs.<sup>81</sup>

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<sup>73</sup> Directive 2000/78/EC. See e.g. 2296th Council meeting EMPLOYMENT AND SOCIAL POLICY Luxembourg, 17 October 2000 (Press Release Conseil/00/378). Compared to the RED, the FED’s negotiation was more complex due to the inclusion of a range of discrimination grounds that raised various concerns among MS (e.g. the definition of age discrimination) and interest groups (e.g. churches and religious organisations), see Council Interinstitutional File 1999/0225 (CNS), 11352/00.

<sup>74</sup> Commission (EU), Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Employment Equality Directive’) COM(2014) 2 final, 16.

<sup>75</sup> Parliament (EU), Parliamentary questions. Answer given by Ms Jourová on behalf of the Commission, 13 July 2016, E-003797/2016(ASW).

<sup>76</sup> On the definitions of these terms and distinction between them see e.g. S Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law* (POEU 2016); T Makonnen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore* (Abo Akademi University and Institute for Human Rights 2002) pp. 9-16; I Solanke, ‘The EU approach to intersectional discrimination law’, in G Abels et al (eds), *The Routledge Handbook of Gender and EU Politics* (2021 Routledge).

<sup>77</sup> See e.g. K Crenshaw ‘Mapping the margins: Intersectionality, identity politics, and violence against women of color’ (1990) 43 *Stan. L. Rev.* 1241; I Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart 2017) 133-159.

<sup>78</sup> See e.g. A Vakulenko, ‘Islamic Headscarves’ and the European Convention on Human Rights: an Intersectional Perspective’ (2007) 16 *SLS* 2; D Schiek, ‘On Uses, Mis-Uses and Non-Uses of Intersectionality Before the European Court of Justice (ECJ): The ECJ Rulings Parris (C-433/15), Achbita (C-157/15) and Bougnaoui (C-188/15) as a Bermuda Triangle?’ (2018) 18 *IJDL* 82; C Donegan, ‘Thinly veiled discrimination: Muslim women, intersectionality and the hybrid solution of reasonable accommodation and proactive measures.’ (2020) 12 *EJLS* 143-179.

<sup>79</sup> N Meer, ‘Racialization and religion: race, culture and difference in the study of antisemitism and Islamophobia’ (2012) 36 *ERS* 385.

<sup>80</sup> Chopin and Niessen (n 53). On the connection between race and religion see also D Schiek, ‘Organising EU Equality Law Around the Nodes of ‘Race’, Gender and Disability’, in Schiek, D & Lawson, A (eds.) *European Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination* (2011 Ashgate) 11-27.

<sup>81</sup> On practical difficulties to handle multiple discrimination complaints see S Hannett, ‘Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination’ (2003) 23 *OJLS* 65-86; R Xenidis, ‘Multiple Discrimination in EU Anti-Discrimination Law. Towards Redressing

Whilst many MS have now voluntarily extended EBs' duties to most of the EU protected grounds,<sup>82</sup> recent experiences in various MS attest that regulatory approaches to enforcement systems may be volatile in certain political contexts. For instance, in the last few years, the Commission has started infringement procedures against Poland and Hungary for legal reforms undermining the independence of the judiciary and/or of other institutions whose independence is mandated by EU law,<sup>83</sup> and it has also issued warnings addressed at Romania.<sup>84</sup> Over the years it has become evident that both national debates on certain topics (e.g. migration, LGBTI rights) and the economic context can either undermine or reinforce the position of EBs. For example, Evans and Case show that, in the 2010s, 'both politics and the European fiscal crisis were having a negative impact on the equality bodies'.<sup>85</sup> Evident or limited hostility towards EBs (usually linked to populist political parties) has been identified in various countries, such as Belgium, Finland, Poland or Croatia.<sup>86</sup> Similarly, political reasons were (at least partly) behind the restructuring and leadership changes inflicted on the Irish and the French EBs in the late 2000s and early 2010s.<sup>87</sup> This suggests that it is desirable that the setting up of EBs with powers covering at least all EU protected grounds is required by *binding* EU instruments. This would ensure that citizens living in the EU are afforded a minimum level of support throughout the whole EU territory, no matter where they happen to live, thus avoiding 'undesirable inequalities in the application of EU law in different Member States'.<sup>88</sup> Additionally, requiring that EBs are competent as regards all EU protected grounds would ring-fence the minimum extension of their mandates against potential questionable changes to their powers.<sup>89</sup>

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Complex Inequality?' in U Belavusau and K Henrard (ed), *EU Anti-Discrimination Law Beyond Gender* (Hart 2019) 41.

<sup>82</sup> See I Chopin, C Conte, and E Chambrier, *A Comparative Analysis of Non-Discrimination Law in Europe* (POEU 2018); Crowley (n 1) 48-54. The majority of EBs based in EEA countries cover all or most grounds protected under EU law, see Equinet, 'Equality bodies and Equinet – Promoting equality in Europe', available at: <http://www.equineteurope.org/Equality-bodies-and-Equinet-promoting-equality-in-Europe>.

<sup>83</sup> See e.g. Commission (EU) Infringement Procedure (IP) No. 20202182 against Poland (Formal notice 29/04/2020, on legislative changes affecting the judiciary); IP No. 20140114 against Hungary (Formal notice 27/01/2014, on the violation of the independence of the data protection supervisory authority); Case C-286/12 *Commission v Hungary* EU:C:2012:687; Commission (EU) Press Release, 'European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary' (12 January 2012; IP/12/24).

<sup>84</sup> See e.g. D Eder, 'Brussels to Bucharest: We are running out of patience' Politico (13 May 2019), available at <https://www.politico.eu/article/frans-timmermans-letter-eu-warns-romania-it-will-act-without-delay-over-major-rule-of-law-concerns/>.

<sup>85</sup> T E Givens and R Evans Case (eds), *Legislating equality. The politics of antidiscrimination policy in Europe* (OUP 2014) 118; see also C Harvey and S Spencer, 'Context, institution or accountability? Exploring the factors that shape the performance of national human rights and equality bodies' (2014) 42 *Policy & Politics* 1-20.

<sup>86</sup> Crowley (n 1) 56-58.

<sup>87</sup> Givens and Case (n 85) 119-120. On the Irish case, see also N Crowley, *Empty Promises* (2010).

<sup>88</sup> S Benedi Lahuerta, 'Enforcing EU Equality Law...' (2018) *CMLRev* 808.

<sup>89</sup> For example, imagining attempts to deprive EBs of powers in the field of LGBTI discrimination in some MS where there is a clear political hostility towards the LGBTI minorities would not be farfetched, see e.g. Parliament (EU), 'Parliament strongly condemns "LGBTI-free zones" in Poland', Press Release 18/12/2019; FRA, *EU-LGBTI II. A Long Way to go for LGBTI equality* (POEU 2020).

Arguably, then, all discrimination grounds protected under EU law should be covered by EU legislation mandating the creation of EBs. To progress in that direction, the 2008 Directive proposal, which seeks to extend the EU scope of protection against discrimination beyond employment for all the EED protected grounds, includes a provision requiring the setting up of EBs with powers in the fields of access to goods and services. The adoption of the first iteration of this proposal would have led to an awkward legal framework whereby a requirement to set up EBs would have been introduced as regards *only* access to goods and services -and *not* in the field of employment/self-employment. After more than 10 years of negotiations and amendments, however, the most recent text of the Proposal includes a duty to set up EBs *not only* in the field of access to goods and services *but also* in the areas of employment/self-employment for all EED protected grounds.<sup>90</sup> Therefore, if the Commission's efforts to encourage the adoption of the 2008 Proposal are fruitful, the hierarchy challenge could largely be addressed, at least as regards EU requirements to set up EBs.

#### **4. *The effectiveness challenge: acknowledging the gaps and improving EU standards***

As noted in section 2, EU anti-discrimination Directives only introduced minimum requirements on EBs' functions and independence,<sup>91</sup> which has led to wide differences in their set up and effectiveness. Indeed, from the beginning it was clear that implementation was going to be crucial to ensure that the design of EBs went beyond the basic EU Directives' features.<sup>92</sup>

*So why are the minimum EU Directives' requirements not sufficient to encourage EBs' effectiveness?*<sup>93</sup> Firstly, the Directives establish that EBs must *function* independently, but do not demand that EBs are *formally independent* from government and/or from other sources of influence. Accordingly, national EBs whose leader is appointed by government,<sup>94</sup> whose budget needs to be approved by government<sup>95</sup> or who lack legal

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<sup>90</sup> Interinstitutional File 2008/0140(COD) - 10740/19, Article 12(3) and Recital 27.

<sup>91</sup> See e.g. Art. 6 RED. The final text of Art. 13 RED is less ambitious than the initial SLG and EU Commission proposals (partly due to Art. 19 TFEU's unanimity requirement), see Bell (n 59) 47-48.

<sup>92</sup> See e.g. Yu and Chopin (n 63) 6.

<sup>93</sup> This section only refers to the *key* requirements and their limits, see fn 23.

<sup>94</sup> This was the case in 20 out of 43 European EBs reviewed by Crowley (n 1) 91. Awkward appointments by Government might undermine the credibility of the relevant EB, see e.g. H Siddique 'Politicising the EHRC? Five controversial appointments' *The Guardian*, 20 November 2020.

<sup>95</sup> E.g. eight of the EBs surveyed by Crowley in 2018 were accountable to Government or ministers and only 13 were accountable to Parliament (ibid, 93). Unlike NGOs, most EBs are publicly funded and should thus be held accountable for how those funds are spent. Nevertheless, EBs and Government may have conflicting interests and difficult relationships (see e.g. K Yesil-Kagit and B Sniijders, *Between Impartiality and Responsiveness Equality Bodies and Practices of Independence* (Equinet 2008) 35; Commission (EU) *Targeted Consultation on equality bodies in the EU. Consultation Outcomes* (Commission 2018) Figure 2). For that reason, accountability before Parliament is generally considered more appropriate to ensure EBs' independence (see e.g. Paris Principles (n 28) at 1). However, Parliamentary accountability 'can also hold risks for independence' depending on '[s]hifting political balances'; accountability to the national audit authorities -still a minority practice among European EBs- might therefore be best to ensure full independence (see Crowley (n 1) 93-94).

personality<sup>96</sup> may be considered to be compliant with EU Directives, provided that the relevant EB is able to perform its tasks with a relatively large degree of autonomy. Nevertheless, it is questionable that such bodies will be fully independent in practice<sup>97</sup> due to their financial and/or organic ties with government.<sup>98</sup>

Secondly, EU provisions are also vague regarding the specific powers that EBs ought to be endowed with providing ‘assistance’, conducting ‘surveys’ and publishing ‘reports and recommendations’. None of these terms is defined in EU legislation, which has led to a wide range of interpretations.<sup>99</sup> For example, ‘assistance to victims of discrimination in pursuing their complaints’ has been implemented as meaning, for *decision-making bodies*, receiving and investigating discrimination complaints, issuing binding decisions and promoting dispute settlement,<sup>100</sup> and for *support bodies*, granting support, legal advice and/or representation and undertaking strategic litigation.<sup>101</sup> Most EBs provide only *some* of these services so notable differences exist in the ‘assistance’ offered to complainants throughout the EU. The vagueness of the Directives has also allowed for large disparities in the level of accessibility of assistance services,<sup>102</sup> which can compromise access to justice, especially considering the everlasting problem of underreporting.<sup>103</sup> Similarly, standards on conducting ‘surveys’ and publishing ‘reports and recommendations’ vary greatly between MS. For example, in some countries ‘surveys’ and ‘reports’ may be used to assess levels of discrimination whereas in others they are seen as tools to analyse the impact of EBs’ work.<sup>104</sup> Differences in the implementation of these terms may be particularly acute between bodies focusing on support/*promotion* and those focusing on *decision-making* functions. For instance, as Ammer et al noted, whilst ‘[a]ll the promotional bodies have a mandate to conduct surveys, publish research and recommendations, [and] some have an explicit mandate to conduct awareness-raising [...] [o]nly a few tribunal-type bodies have a legal mandate to do promotional work and even fewer to conduct awareness-raising.’<sup>105</sup>

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<sup>96</sup> This was the case in 11 out of 43 European EBs surveyed by Crowley (ibid) 90.

<sup>97</sup> For a discussion on how these and other factors may affect *de iure* and *de facto* independence of EBs see e.g.: R Holtmaat, *Catalysts for Change? Equality bodies according to Directive 2000/43/EC* (POEU 2007) 31-44; Ammer et al (n 11) 107-119. See also the independence standards considered best practice in ECRI, General Policy Recommendation No.2: Equality bodies to combat racism and intolerance at national level, CRI(2018) 06.

<sup>98</sup> 15 out of the 48 EBs surveyed by Ammer et al had ‘no independence at all’ (ibid, 107-108) and 20 out of the 43 institutions studied by Crowley had their leadership ‘appointed by Government or Government ministers’ (n 1, 91).

<sup>99</sup> See Holtmaat (n 97) 24-25.

<sup>100</sup> Dispute settlement and Alternative Dispute Resolution (ADR) is often also encouraged by promotion-type bodies, see e.g. Ammer et al (n 11) 154.

<sup>101</sup> For an in-depth discussion on the assistance functions, see Equinet, *Providing Independent Assistance to Victims of Discrimination* (Equinet 2011); Equinet, *Influencing the law through legal proceedings* (Equinet 2010); For an up-to-date review of EBs assistance functions, see Chopin, Conter and Chambrier (n 82) 119-133.

<sup>102</sup> For a comprehensive review see Crowley (n 1) 117-120;

<sup>103</sup> Good accessibility requires *inter alia* ensuring good visibility of the EB, good communication with and geographical proximity to potential victims, doing outreach work, having a diverse workforce, and simplifying assistance provision and/or complaint filing procedures, see e.g. FRA, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (EUPO 2011).

<sup>104</sup> Holtmaat (n 97) 24.

<sup>105</sup> Ammer et al (n 11) 70-71.

Finally, national disparities between EBs have also been exacerbated by the lack of EU requirements regarding the minimum level of resources that these bodies should enjoy.<sup>106</sup> It is evident that diverse national factors, such as public finances, the geographic extension, the breadth of EBs' powers and the size of vulnerable communities may have an impact on the resources allocated to EBs. However, the extremely low levels of resources that at times have been -or still are- available to some EBs appears largely insufficient to realistically cover all their duties effectively,<sup>107</sup> despite some bodies' efforts to partner with other stakeholders to more efficiently perform some functions.<sup>108</sup> Over the years, the lack of EU standards on EBs resources has also permitted drastic reductions in EBs budgets or disproportionate extensions of their functions that have not been paired with the corresponding extensions of resources. These measures have arguably compromised EBs' performance.<sup>109</sup> For instance, a 2010 study identified at least 11 EBs that were underfunded<sup>110</sup> and a 2012 report revealed that twelve EBs had suffered a 'significant reduction in their resources' following the 2008 financial crisis, five of which were considered 'disproportionate when compared to the wider public sector'.<sup>111</sup>

In recent years, these gaps, the consequent divergences between European EBs, and the limited effectiveness of some of them have become increasingly clear. This has led to various stakeholders, including the European Parliament and Equinet,<sup>112</sup> to claim that minimum standards for EBs are needed at EU level. Eventually, the Commission published the 2018 Recommendation on standards for EBs<sup>113</sup> which seeks to 'contribute to closing the gap in standards between equality bodies across Europe'<sup>114</sup> and explicitly acknowledges the limits of EU Directives and the substantial differences between MS implementation approaches 'in terms of the bodies' mandate, competences, structures, resources and operational functioning'.<sup>115</sup>

The adoption of this Recommendation could be seen as a crucial milestone to advance towards more effective EBs in the EU as it not only recognises the limits of the current framework but it also provides much more detailed guidance regarding the most

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<sup>106</sup> Having better financial resources is perceived as one of the key priorities to be addressed to improve the effectiveness of EBs, see Commission (EU) (n 95) Figure 4.

<sup>107</sup> See a recent review of EBs budgets in Crowley (n 1) 111-116.

<sup>108</sup> Examples of this type of efforts can be found in Belgium, Spain, the Netherlands or France; see Equinet, *Effective Strategies to Empower Civil Society* (Equinet 2010) 30-33.

<sup>109</sup> See e.g. Equinet, *Equality Bodies. Current Challenges* (Equinet 2012) 8-10, 17; M Farrell, 'Seminar with National Specialised Bodies to combat Racism and Racial Discrimination – Challenges faced in the current institutional and budgetary environment. Summary and Conclusions' (ECRI, Strasbourg, 30-31 May 2013).

<sup>110</sup> Slovakia, Finland, Cyprus, Estonia, Slovenia, Hungary, Bulgaria, Ireland, Austria, Denmark and Italy, see Ammer et al (n 11) 141-142.

<sup>111</sup> Equinet (n 109) 22.

<sup>112</sup> See Equinet, *Developing Standards for Equality Bodies* (Equinet Working Paper 2016).

<sup>113</sup> See n 24.

<sup>114</sup> *Ibid*, at 28.

<sup>115</sup> *Ibid*, at 18.

crucial aspects of EBs' institutional design.<sup>116</sup> For instance, the Recommendation explains the type of activities that fall within the concept of 'independence assistance', 'independent surveys', 'independent reports', as well as 'recommendations' and 'promotion' activities.<sup>117</sup> The Recommendation equally establishes all the structural features that should be considered to guarantee EBs' independence,<sup>118</sup> a much-needed benchmark considering that the requirement of independence is not even present in the Directives. The Recommendation also elaborates on the EBs' attributes that can contribute to improve their effectiveness, including the need to give EBs adequate resources to allow them 'to carry out their functions effectively' and to facilitate EBs' accessibility<sup>119</sup> -two notorious loopholes of the Directives.

On the other hand, however, the Recommendation may have a limited impact on the actual functioning of EBs due to its soft-law nature. Indeed, most of the benchmarks included in the Recommendation already existed in the form of recommendations issued by other bodies, such as the UN,<sup>120</sup> the ECRI,<sup>121</sup> or the Council of Europe Commissioner for Human Rights.<sup>122</sup> The main added value of the EU Recommendation might be listing all these benchmarks in one single EU instrument. This may facilitate their understanding and dissemination, but previous experiences with EU Recommendations in the field of anti-discrimination law<sup>123</sup> suggest that compliance at national level tends to be limited.<sup>124</sup>

Furthermore, the Recommendation leaves some key issues unresolved. Firstly, it does not specify whether, under EU law, EBs should focus on promotion/support or decision-making functions, or whether both types of functions are required. Whereas Equinet recommends that 'the national institutional architecture' includes 'both tribunal type and promotional type functions'<sup>125</sup> and the ECRI Recommendation suggests that a promotion-type body is the least that should exist in a given jurisdiction,<sup>126</sup> the EU Recommendation is ambiguous. The wording of the Recommendation suggests that promotion and support functions are *necessary*,

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<sup>116</sup> In doing so, this instrument builds on EBs' grey literature and international recommendations on standards for EBs, see the Recommendation at 27 referring to the Paris Principles (n 28), Equinet's working paper (n 112), and ECRI's 2018 General Recommendation (n 97).

<sup>117</sup> Recommendation (n 24) p.6-8.

<sup>118</sup> *ibid*, p.8.

<sup>119</sup> *Ibid*, p.8-9.

<sup>120</sup> Mainly, the Paris Principles (n 28). These principles were not initially intended for EBs as such but rather for NHRIs so they are not fully adapted to the functions of EBs (e.g. they do not expressly refer to providing assistance or support to alleged victims). However, they were the first benchmark for independent agencies in the field of human rights and are still largely relevant and a key reference for EBs standards (see also n 31).

<sup>121</sup> See n 97.

<sup>122</sup> See n 11.

<sup>123</sup> E.g. with Commission (EU), Recommendation 2014/124/EU on strengthening the principle of equal pay between men and women, 07.03.2014.

<sup>124</sup> Commission (EU), Equal Pay Recommendation Evaluation Report, COM(2017) 671 final, pp. 3, 10.

<sup>125</sup> Equinet (n 112) 5.

<sup>126</sup> ECRI's 2018 General Recommendation (n 97) signals that promotion and support functions 'should be assigned', whereas it conceives the decision-making functions as optional ('*may* also be assigned') (para 10).

whereas decision-making functions are *voluntary*.<sup>127</sup> Yet, the door might still be open for MS to choose whatever option suits them, i.e. establishing only either a promotion/support or a tribunal-type body, combining all functions in one single body, or having distinct bodies for different types of functions. Additionally, the Recommendations' approach as regards these different functions is sometimes confusing. Indeed, the heading 'independent assistance' refers not only to supporting and advising discrimination victims, but also to hearing and deciding on complaints.<sup>128</sup> Including these different support and decision-making functions under the same heading fails to recognise their different and conflicting nature.<sup>129</sup>

Secondly, despite the more detailed guidance that the Recommendation undeniably provides, there are still some noteworthy loose ends. For example, the minimum level of assistance that an EB should offer remains unclear. The Recommendation merely *lists* all the activities that the expression 'independent assistance' may include with rather unconvincing language compared to other areas.<sup>130</sup> Whilst in an ideal world EBs' might be able to perform all those tasks, in practice the limited availability of resources may force them to undertake only some of the listed assistance activities. Yet, what should be prioritised? For instance, given that no hierarchy is established in the Recommendation, would it be acceptable to engage in *amicus curiae* in discrimination claims without providing legal advice to alleged victims? Or to receive and handle collective complaints without handling individual complaints (or vice versa)? Additionally, the scope of some terms remains unclear. For example, is keeping a register of the complaints received enough to comply with the recommendation to 'handle complaints', or should EBs have powers to take further action such as adjudicating or providing legal advice? Or how far should 'legal advice' go? Should it simply include advice on the possible pathways to get redress, or is representing applicants in litigation also *necessary*? While it is understandable that the Recommendation gives flexibility to MS, in some sections its wording could have been clearer and more assertive.

## 5. Concluding remarks

As a steppingstone into the world of EBs, the minimalistic requirements of the RED and the other EU Directives were probably a wise option. The broad wording of these Directives gave flexibility to MS to either continue with their existing EBs as they were, or, for those with no EBs, to introduce them with moderate effort as it best suited

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<sup>127</sup> The Recommendation refers to decision-making functions with expressions such as: '*where so authorised under national law*', '*where equality bodies have the legal capacity to take binding decisions*', '*where they have the competence to take such decisions under national law*' (n 24, p.7).

<sup>128</sup> Pp.6-7.

<sup>129</sup> It also 'fails to address the difficulty for equality bodies with decision-making functions that require impartiality to ensure adequate support to complainants, which would require taking a side in the case', Crowley (n 1) 70.

<sup>130</sup> Compare the wording found in sections dealing with the independence and effectiveness requirements (e.g. 'MS should ensure that...') with the softer one used in the assistance section (e.g. 'MS should *take into consideration* the following aspects of providing assistance to victims...' which '*can include...*') (p.6).

prior experiences with close cousins (e.g. Ombudsmen or independent agencies).<sup>131</sup> Accordingly, the initial vagueness of the Directives had some value: it allowed MS unfamiliar with EBs to adapt existing institutions or shape new ones in accordance with their legal systems. Indeed, despite some transposition problems and infringement proceedings, the period between 2000 and 2007 could be seen as the ‘spreading’ period of EBs in the EU.

In a second stage, however, the need for more ‘depth’<sup>132</sup> in EU law mandating the setting up of EBs grew evident. As the 2008 financial crisis and unfavourable political climates led to questionable budget cuts and institutional reorganisations in some MS<sup>133</sup> it became increasingly clear that EU Directives lacked detail to entice MS to design effective EBs. The post-2008 ‘Age of Austerity’<sup>134</sup> shifted political attention towards other priorities and was often used to justify reductions in EBs’ resources. In this period, various bodies suffered budget cuts to a scale ‘that [could not] be explained by economic recession’.<sup>135</sup> Some EBs’ mandates were also reorganised or merged with other human rights institutions to -allegedly- achieve more efficiency without always carefully considering the practical implications.<sup>136</sup> It seems that, in many cases, the institutional and financial redesign of EBs over this period was a question of political and public choice<sup>137</sup> ‘rather than any imperative of the crisis’.<sup>138</sup> Yet, it was largely thanks to the elusive EU provisions that reforms targeting these bodies were possible, and ‘the atmosphere of large-scale crisis’ provided the perfect justification for those measures.<sup>139</sup>

Against this background, the 2018 EU Recommendation is a welcome development that may have kick started a third stage for EBs in the EU, where improved institutional designs and better effectiveness are actively encouraged at EU level. Whilst the Recommendation has its shortcomings, its real value is better understood in context. Its adoption followed the 2017 proclamation of the European Pillar of Social Rights.<sup>140</sup> Despite consisting largely of soft-law measures, the Pillar signals the EU’s willingness to relaunch and improve social policies after the 2008 crisis austerity years. It should be

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<sup>131</sup> De Witte (n 26) 54-57.

<sup>132</sup> Similar terminology was used more generally regarding the evolution of EU anti-discrimination law in M Bell, ‘The Principle of Equal Treatment: Widening and Deepening’ in P Craig and G de Burca (eds), *The Evolution of EU Law* (2<sup>nd</sup> ed, OUP 2011) 611.

<sup>133</sup> Givens and Evans (n 85).

<sup>134</sup> Expression borrowed from Blyth, who defines ‘austerity’ as ‘a form of voluntary deflation in which the economy adjusts through the reduction of wages, prices, and public spending to restore competitiveness, which is (supposedly) best achieved by cutting the state’s budget, debts, and deficits’, see M Blyth, *Austerity: The history of a dangerous idea* (OUP 2013) 2, 98, 189-203.

<sup>135</sup> Ireland, Lithuania, Romania Latvia and Luxembourg, Ammer et al (n 11) 142. See also text to n 109-111.

<sup>136</sup> Crowther and O’Cinneide (n 22) 210-221. See also Equinet, *Equality Bodies. Current Challenges* (Equinet 2012) 8; Givens and Case (n 85) 118; Ammer et al (n 11) 78.

<sup>137</sup> See e.g. A F Bentley, *The Process of Government* (UCP 1908) 258-259; D A Farber, ‘Public choice theory and legal institutions’ in F Parisi (ed), *The Oxford Handbook of Law and Economics* (OUP 2017) 181-201.

<sup>138</sup> Equinet (n 136) 22; see also Ammer et al (n 11) 78.

<sup>139</sup> N Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Picador 2008) 9-10.

<sup>140</sup> Commission (EU), Communication Establishing a European Pillar of Social Rights, COM (2017)250 final.

recalled that the evolution of EU anti-discrimination law tends to be slow and incremental,<sup>141</sup> so the 2018 Recommendation could be a first step towards clearer - and perhaps even binding- measures that could enhance the role of EBs and reinforce their effectiveness. The 2020 EU Action Plan to Combat Racism seems to point in that direction where it states that:

The role and independence of equality bodies and *the potential need for new legislation* to strengthen the role of these bodies will be an important theme in the 2021 report [on the Recommendation on standards for equality bodies].<sup>142</sup>

This is indeed the pathway that has been taken in the field of gender pay transparency measures: the 2014 Recommendation has been followed by a proposal for binding legislation,<sup>143</sup> and it could arguably be the logical step to strengthen the role of EBs if the 2018 Recommendation does not lead to substantial improvements. Binding legislation will equally be necessary to resolve the ‘hierarchy challenge’. The adoption of the ever-pending 2008 Horizontal Directive Proposal is much overdue to address, *inter alia*, the still incoherent EU requirements regarding the mandate of EBs.

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<sup>141</sup> S Benedi Lahuerta and A Zbyszewska, ‘EU equality law after a decade of austerity: On the Social Pillar and its transformative potential’ (2018) 18 *International Journal of Discrimination and the Law*, 165-166.

<sup>142</sup> COM(2020) 265 final, p.4.

<sup>143</sup> Commission (EU), Proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM(2021) 93 final. Article 25(1) of the Proposal clarifies that EBs “established in accordance with Directive 2006/54/EC shall be competent with regard to matters falling within the scope” of the prospective Directive.