



# Law 15/2022, A Comprehensive Law for the Equality of Treatment and Non-Discrimination: a ‘milestone’ and ‘a meaningful tool’ in the fight against racism in the workplace?\*

LEY 15/2022, DE 12 DE JULIO, INTEGRAL PARA LA IGUALDAD DE TRATO Y LA NO DISCRIMINACIÓN: ¿UN ‘HITO’ E ‘INSTRUMENTO TRASCENDENTAL’ PARA LA LUCHA CONTRA EL RACISMO EN EL EMPLEO POR CUENTA AJENA?

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## ABSTRACT

On, 21 March 2023, the International Day of the Elimination of Racism, the Spanish government, declared that the Comprehensive Law on the Equality of Treatment and Non-Discrimination passed law year, was a ‘a milestone’ and that its application and development will constitute, without doubt, ‘an important tool’ in the fight against racism. This article will examine to what extent this is a reasonable assertion in the context of tackling racial or ethnicity discrimination relating to the workplace. It will also make suggestions for the proposed new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance which, at the time of writing, has yet to be published.

## PALABRAS CLAVE

Non-discrimination  
Equality of treatment  
Racism  
Racial discrimination  
Intolerance  
Ethnic discrimination  
Recruitment  
Employment  
Work  
Racial origin  
Ethnic origin

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## ABSTRACT

El 21 de marzo de 2023, el Día Internacional de la Eliminación del Racismo, el Ministerio de Igualdad de España, declaró que 'la aprobación de la Ley 15/2022, de 12 de julio de 2022, integral para la igualdad de trato y la no discriminación, ha supuesto otro hito, y su aplicación y desarrollo van a constituir sin duda un instrumento trascendental para la lucha contra el racismo.' Este artículo examinará si este análisis es razonable en el contexto de la discriminación por origen racial o étnico en el empleo por cuenta ajena. Además, propone surgencias para el contenido de la nueva Ley Orgánica Contra el Racismo, la Discriminación Racial y las Formas Conexas de Intolerancia que aún, no se ha publicado.

## KEYWORDS

Igualdad de trato  
No discriminación  
Racismo  
Discriminación racial  
Intolerancia  
Discriminación étnica  
Acceso al empleo  
Empleo  
Trabajo  
Origen racial o étnico

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## I. INTRODUCTION

As at 31 August 2023, according to the data available from the Ministry of Inclusion, Social Security and Migrations, 12.95% of all workers (both employed and self-employed) registered with the social security system in Spain were foreign<sup>1</sup>. Foreign

1. Data from the Ministry of Inclusion, Social Security and Migrations available at: <https://www.seg-social.es/wps/portal/wss/internet/EstadisticasPresupuestosEstudios/Estadisticas/EST8/EST10/EST305/EST307?changeLanguage=es>

workers are therefore a sizeable minority in Spain, by definition, a-typical workers, however, foreigners, have not, to date, enjoyed the same legal protections from the Spanish legislator as other comparably sized minorities<sup>2</sup>. A new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance has been proposed but has not yet been published<sup>3</sup>.

The European Race Directive (Council Directive 2000/43/EC of 29 June 2000 (hereinafter 'the Race Directive') implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, remains the key European Union legislation that sets out the minimum standards which Members States must adopt in order to prevent discrimination on the grounds of racial or ethnic origin in recruitment and the workplace<sup>4</sup>.

The Race Directive was implemented in Spain through articles 27 to 43 of a general piece of legislation called Law 62/2003 of 30 December, on Fiscal, Administrative and Social Measures (hereinafter 'Law 62/2003'). The Council of Europe's European Commission against Racism and Intolerance ('ECRI') noted in its Report on Spain published on 28 February 2018 that the anti-discrimination provisions in Spain were 'hidden' and 'almost no race/ethnicity discrimination cases have been brought to court<sup>5</sup>.

Law 15/2022 of 12 July 2022, A Comprehensive Law on the Equality of Treatment and Non-Discrimination ('Law 15/2022') entered into force last year, and it has been described by the Spanish government as 'a milestone' and 'an important tool' in the fight against racism in general<sup>6</sup>. It provides that employers are liable for discrimination that takes place in their organisation if they do not comply with the general obligations in this legislation to adopt sufficient measures to detect, prevent and to stop discriminatory situations<sup>7</sup>. This article will examine to what extent it is reasonable to describe Law 15/2022 as a 'milestone' and 'an important tool' in the fight against racism in the context of work. It will do this by examining the different tools/measures that are currently available to detect, prevent and stop racial or ethnic discrimination in the workplace. It will also make some suggestions to strengthen the law which could be included in the proposed new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance.

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viewed on 4 October 2023.

2. See, for example, Law 4/2023, of 28 February, for the equality and effective rights of trans people and the guarantee of the rights of LGTBI people (hereinafter, 'Law 4/2023').

3. Public consultation available at: <https://www.igualdad.gob.es/index.php/servicios/participacion/consultapublica/consulta-previa-ley-organica-contra-el-racismo/> viewed on 1 September 2023.

4. Although Article 2.2 of Council Directive 2000/43/EC of 29 June contained important limitations in so far as it expressly states that it does not apply to difference of treatment based on nationality, or to any treatment which arises from the legal status of third-country nationals and stateless persons.

5. European Commission against Racism and Intolerance *Report on Spain published on 27 February 2018* available at: <https://rm.coe.int/fifth-report-on-spain/16808b56c9> (page 9) viewed on 1 September 2023.

6. Ministry of Equality, *Institutional Declaration on the International Day of the Elimination of Racial Discrimination on 21 March 2023* (second paragraph on page 2) available at: <https://www.igualdad.gob.es/ministerio/dgigualdadtrato/Paginas/index.aspx> viewed on 1 September 2023

7. Articles 25.1 and 27.2 of Law 15/2022 of 12 July 2022, A comprehensive law on the equality of treatment and non-discrimination (hereinafter 'Law 15/2022').

## II. DEFINITIONS IN DISCRIMINATION LAW

Discrimination law in Spain is notable because it does not contain uniform definitions. Definitions of concepts such as direct or indirect discrimination can vary depending on which piece of legislation one is consulting. It is therefore worth considering whether the definitions in Law 15/2022 may help or hinder those candidates or employees who potentially wish to bring race/ethnic discrimination employment law claims.

### A. Protected characteristics

The Race Directive provides that the principle of equal treatment in the Directive means that there shall be no direct or indirect discrimination based on 'racial or ethnic' origin, in relation to, for example, the conditions for access to employment, employment and working conditions, training, pay, promotion and dismissals<sup>8</sup>. The Directive itself does not define the meaning of 'racial' or 'ethnic' origin<sup>9</sup>. When the Directive was implemented in Law 62/2003 these terms were not expanded upon.

Despite the prohibition in the European Union against discrimination on the grounds of racial or ethnic origin, when a survey was conducted on behalf of the European Commission in 2019, it found that it remains the perception of many people in the European Union that discrimination on the grounds of racial or ethnic origin remains common<sup>10</sup>. For example, 59% of Europeans interviewed believed discrimination based on ethnic origin was widespread in their country (54% of those interviewed in Spain). 61% of Europeans interviewed believed discrimination against gypsies was widespread in their country (65% interviewed in Spain). 59% of Europeans interviewed believed that people were discriminated against because of the colour of their skin in their country (55% interviewed in Spain).

Law 15/2022 proclaims the rights of all people in Spain to equality of treatment and not to suffer discrimination, 'regardless of their nationality, their age or whether or not they enjoy legal residency'<sup>11</sup>. It expressly states that nobody can be discriminated against 'by reason of their birth, racial or ethnic origin, sex, religion, language, socioeconomic situation, or any other personal or social condition or circumstance' ('the protected characteristics')<sup>12</sup>. However, arguably, the legislator has missed the opportunity to expand the category of 'protected characteristics' to expressly include 'lineage or national origin' or 'colour of skin' in the context of ordinary workplaces

8. Articles 2.1 and 3.1(a), (b), (c) of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter 'Directive 2000/43/EC').

9. *CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia*, (C-83/14, EU:C:2015:480), Judgment of 16 July 2015, in which the court held at paragraph 46 that the concept of 'ethnicity' has 'its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and background.'

10. European Commission, 2019 *Eurobarometer Discrimination in the European Union* available at: <https://europa.eu/eurobarometer/surveys/detail/2251> viewed on 1 September 2023.

11. Article 2.1 of Law 15/2022.

12. *Ibid.*

(although interestingly these concepts are covered by separate legislation in Spain in the world of sport)<sup>13</sup>.

It is suggested that the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance should expand protected characteristics beyond race and ethnic origin to expressly include 'skin colour' or 'lineage or national origin'<sup>14</sup>. Equally, to protect individuals against xenophobia, it would be helpful to protect those who are simply perceived to be 'foreigners' and who are treated less favourably and unlawfully. Discrimination can occur, not necessarily because someone comes from a particular group or country, but simply because someone is perceived to be 'foreign' and therefore 'not one of us' by the dominant majority.

## B. Direct racial/ethnic discrimination

Direct discrimination is defined in the Race Directive as 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'<sup>15</sup>. The Directive further provides that the *only* circumstances in which a difference of treatment based on a characteristic related to racial or ethnic origin does not constitute unlawful direct discrimination is where, 'by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic *constitutes a genuine and determining occupational requirement*, provided that the objective is legitimate and the requirement is proportionate'<sup>16</sup>. When the Directive was implemented in 2003, the Spanish legislator defined direct discrimination as: 'when a person is treated less favourable than another in an analogous situation by reason of race or ethnicity'<sup>17</sup>. The Spanish legislator arguably therefore did not fully implement the Directive because there is no express reference to *past* or *potential* future treatment. The genuine and determining occupational requirement exception was included when the Directive was implemented in 2003<sup>18</sup>.

Law 15/2022 defines direct discrimination as: 'the situation in which a person *or group that they belong to*, are, have been or could be treated in a less favourable manner than others in an analogous or comparable situation by reason of any of the protected characteristics'<sup>19</sup>. It is therefore a curious piece of legislation because the definition of direct discrimination departs from the definition of direct discrimination in the European Race Directive in two ways. Firstly, it extends the definition of

13. Article 1(e) of Law 19/2007, of 11 of July, Law against violence, racism, xenophobia and intolerance in sport.

14. The Autonomous Community of Navarra has included 'national origin' and colour of skin' as prohibited grounds of discrimination in Article 1 of Law 13/2023, Floral Law, of 5 of April, on the fight against racism and xenophobia (hereinafter 'Floral Law 13/2023').

15. Article 2.2(a) of Directive 2000/43/EC.

16. Article 4 of Directive 2000/43/EC.

17. Article 28.1(b) of Law 62/2003 of 30 December, on fiscal, administrative and social measures (hereinafter 'Law 62/2003').

18. Article 34.2 of Law 62/2003.

19. Article 6.1(a) of Law 15/2022.

direct discrimination from one person to a group. Secondly, it contains a general justification defence clause that appears to apply to *any* type of discrimination. This states 'a difference of treatment based on one of the protected characteristics is not considered unlawful discrimination if the rule, conduct, act, criteria or practice can be objectively justified with a legitimate aim and the means to achieve it is adequate, necessary and proportionate'<sup>20</sup>. In applying this general justification defence to *all* forms of discrimination (including both direct and indirect discrimination), the Spanish legislator has therefore departed from the Race Directive which, as previously noted, in the context of employment law only permits direct discrimination in very limited circumstances, namely, if there is a *genuine and determining* occupational requirement<sup>21</sup>. This drafting therefore confuses rather than clarifies existing rights in the context of direct race/ethnic discrimination in the employment context, notwithstanding that Law 15/2022 itself acknowledges that 'more favourable rules may apply to the different types of discrimination, and in such cases, these are to be followed'<sup>22</sup>. It is suggested that, for the sake of clarity and consistency, the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance the legislator restates the original definition of direct discrimination as per the European Race Directive.

### C. Indirect race/ethnic discrimination

Indirect discrimination is defined in the European Race Directive as: 'taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared *with other persons*, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'<sup>23</sup>. When this Directive was implemented in Spain, Law 62/2003 defined indirect discrimination as: 'when a legal or regulatory provision, a conventional or contractual clause, an individual agreement or a unilateral decision, apparently neutral, may cause a particular disadvantage to *a person* with respect to others by reason of racial or ethnic origin, provided that objectively they do not respond to a legitimate aim and the means to achieve this aim are not adequate and necessary'<sup>24</sup>.

Indirect discrimination is defined in Law 15/2022 as: 'when an apparently neutral provision, criterion or practice causes or may cause *one* or various people a particular disadvantage compared to others because of one of the protected characteristics'<sup>25</sup>. The drafting is interesting again for two reasons. Firstly, it appears to depart from the drafting of indirect discrimination in the European Race Directive because it includes circumstances where only *one* person as opposed to a group of people who share a

20. Article 4.2 of Law 15/2022.

21. Article 4 of Directive 2000/43/EC.

22. Article 3.2 of Law 15/2022.

23. Article 2.2.(b) of Directive 2000/43/EC.

24. Article 28.1 (c) of Law 62/2003.

25. Article 6.1(b) of Law 15/2022.

protected characteristic is put at a particular disadvantage by a provision, criterion or practice. Secondly, there is no objective justification element to the definition of indirect discrimination *itself*. Instead, as noted above, a general justification appears to apply to all forms of discrimination<sup>26</sup>.

The interpretation clause of law 15/2022 states, on the one hand, that this law should be interpreted conform with the sources of international law and the jurisprudence from the international courts<sup>27</sup>. However, on the other hand, the interpretation clause also states that where there are differing interpretations, the courts should prefer that which offers the greatest protection to people or groups of people affected by discriminatory or intolerant conduct. It is obviously easier for an individual to prove a particular disadvantage to him/herself as a consequence of a workplace policy, rather than a particular disadvantage to a group who shares his/her protected characteristics. It remains to be seen how the courts will interpret the drafting of the concept of indirect discrimination if this argument is ever presented by lawyers acting on behalf of an employee.

Earlier this year, the Foral Community of Navarra, an autonomous region in Spain, passed its own specific legislation to tackle racial and ethnic discrimination. The legislator of Navarra has chosen to define 'indirect discrimination' conform with the European Race Directive<sup>28</sup>. It is suggested that this approach is adopted, for the sake of clarity and consistency in the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance.

#### D. Harassment on the grounds of racial or ethnic origin

The Race Directive defines discrimination by means of harassment as: 'when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'<sup>29</sup>. The Directive goes on to state that: 'the concept of harassment may be defined in accordance with the national laws and practice of the Member States.'

When Spain implemented the Race Directive it defined harassment as: 'any unwanted conduct related to a person's racial or ethnic origin which has the objective or consequence of violating their dignity and creating an intimidating, humiliating or offensive environment'<sup>30</sup>. The word 'degrading' was not included.

The word 'degrading' has now been included in Law 15/2022 as harassment is defined as: 'any conduct carried out by reason of any of the causes of discrimination provided (...) with the objective or consequence of violating the dignity of a person or

26. Article 4.2 of Law 15/2022.

27. Article 7 of Law 15/2022.

28. Article 2 of Foral Law 13/2023.

29. Article 1.3 of Directive 2000/43/EC.

30. Article 28.1.(d) of Law 62/2003.

*group* in which they are integrated and of creating an intimidating, hostile, degrading, humiliating or offensive environment<sup>31</sup>. This definition of harassment, is, once again, a departure from the wording of the Race Directive because it refers not only to the effect of the dignity of an individual but, alternatively, to the potential effect of the dignity of a *group* which the individual belongs to. It is difficult to imagine in practice circumstances in which an employee or job applicant would choose to bring a harassment claim on the grounds that it affects the dignity of the racial or ethnic group that he or she belongs to, as opposed to simply their own dignity. Indeed, from a tactical perspective, it would potentially be an error to bring a harassment claim which focused on the effect of the dignity of the group which an individual belonged to (rather than the hurt/injury caused to the individual him or herself), because the danger is that this wording invites the employer to ask the court to dismiss the claim on the grounds that not *everybody* in the group would find the conduct complained of intimidating, hostile, degrading, humiliating or offensive.

It is noted that, once again, the legislator of the Foral Community of Navarra has chosen to define 'harassment' conform with the definition in the Race Directive referring simply to the potential effect of harassment on an individual<sup>32</sup>. It is suggested that the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance should adopt the definition of harassment contained in the Race Directive, once again for the sake of consistency and clarity.

## E. Instruction to discriminate on the grounds of racial or ethnic origin

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The Race Directive expressly states that an instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination.<sup>33</sup> Law 62/2003 implementing the Directive states that any order to discriminate against people by reason of race or ethnicity will be considered discriminatory in every case<sup>34</sup>.

Law 15/2022 law prohibits 'inducements, orders or instructions to discriminate or instructions to commit an act of intolerance'<sup>35</sup>. However, the law states that the inducement must be 'specific, direct and effective' in order to be an attributable act of discrimination. This may be difficult for employees to prove in practice.

Proving an 'inducement' should not face a higher evidential burden than, for example, an indirect order or indirect instruction to discriminate. It is suggested that this higher evidential burden for inducements is deleted from the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance.

31. Article 6.4 of Law 15/2022.

32. Article 2 of Foral Law 13/2023.

33. Articles 2.4 of Directive 2000/43/EC.

34. Article 28.2 of Law 62/2003.

35. Articles 4.1 and 6.5 of Law 15/2022.

## E. Victimization for raising a complaint relating to racial or ethnic origin

The Race Directive requires Member States to introduce measures to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or proceedings aimed at enforcing compliance with the principle of equal treatment<sup>36</sup>. When Spain implemented the Race Directive in law 62/2003, it amended the Spanish Workers' Statute to state that 'decisions by an employer that mean unfavourable treatment for workers as a reaction to a claim made in the company or to a judicial action aimed at demanding compliance with the principle of equal treatment and non-discrimination will be null and void'<sup>37</sup>.

Law 15/2022 prohibits retaliations. Retaliations are defined for the purposes of this law as 'any adverse treatment or negative consequence that a person or group of which they belong may suffer for intervening, participating or collaborating in an administrative procedure or judicial process intended to prevent or put an end to a discriminatory situation, or for having filed a complaint, claim, denunciation, demand or resource of any kind with the same objective'<sup>38</sup>.

In so far as this protection clearly extends not only to those who have themselves made a race/ethnic discrimination complaint, but also to those who may support such a complaint, this extension of protection is to be welcomed. It is recommended that this wording is maintained in the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance.

## G. New types of discrimination claims (discrimination by association, discrimination by error, discrimination, multiple and intersectional discrimination)

Law 15/2022 introduces new potential race/ethnicity related claims that individuals can bring that were not originally defined in the European Race Directive. For example, discrimination by association, discrimination by error, discrimination, multiple and intersectional discrimination. Discrimination by association is defined as 'when a person or group to which they belong, due to their relationship with another who has a protected characteristic, is the subject of discriminatory treatment'<sup>39</sup>. Discrimination by error is defined as that 'which is based on an incorrect assessment of the characteristics of the person or persons discriminated against'<sup>40</sup>. Multiple discrimination is defined as when a person is 'discriminated against in a simultaneous or consecutive way for two or more

36. Article 9 of Directive 2000/43/EC.

37. Fourth paragraph of Article 37 of Law 62/2003 amending article 17.1 of the Spanish Workers' Statute passed by Royal Legislative Decree 1/1995, of 24 of March (hereinafter 'the Spanish Workers' Statute).

38. Article 6.6 of Law 15/2022.

39. Article 6.2(a) of Law 15/2022.

40. Article 6.2(b) of Law 15/2022.

protected characteristics'<sup>41</sup>. Intersectional discrimination is 'when diverse protected characteristics concur or interact generating a specific form of discrimination'<sup>42</sup>.

The general justification defence applies to all these forms of discrimination and so it is not unlawful discrimination if the disposition, behaviour, act, criteria or practice that is alleged to be discrimination by association or error or multiple or intersectional discrimination can be 'objectively justified with a legitimate aim with an adequate, necessary and proportionate measure to meet that aim'<sup>43</sup>. In cases of multiple and intersectional discrimination, the 'reasons for the difference in treatment must be given by the employer in its defence of each of the protected characteristics'<sup>44</sup>.

The express inclusion of these categories of discrimination is to be welcomed in so far as their inclusion extends the protection of the law to others who may be affected by these issues even if they are not themselves from an immigrant background, such as an employee who is trying to advocate for employees from racial and ethnic minorities in the workplace. The law also expressly recognises that it is possible for certain groups, such as women from ethnic minorities, to suffer multiple discrimination.

## H. Burden of proof

The Race Directive required Member States to take measures to ensure that when a person considers themselves wronged because the principle of equal treatment has not been applied to them and establishes before a court or competent authority, 'facts from which it may be presumed that there has been direct or indirect discrimination' it is for the employer to prove that there has been no breach of the principle of equal treatment<sup>45</sup>. This rule also applies to claims relating to harassment or instructions to discriminate as these are also classified as forms of discrimination which breach the principle of equal treatment<sup>46</sup>.

Law 63/2003 implementing this Directive chose not to following the drafting of the burden of proof provisions in the Directive. It provides 'if from the allegations of the employee it can be deduced the existence of well-founded indications of discrimination due to the racial or ethnic origin of the person, the employer is responsible for providing an objective and reasonable justification, sufficiently proven, of the measures adopted and their proportionality'<sup>47</sup>. This drafting is reflected in the procedural law which applies to employment law claims<sup>48</sup>, and very drafting is in Law 15/2022<sup>49</sup>.

41. Article 6.3(a) of Law 15/2022.

42. Article 6.3(b) of Law 15/2022.

43. Article 4.2 of Law 15/2022.

44. Articles 6.3(c) of Law 15/2022.

45. Article 8.1 of Directive 2000/43/EC (this rule does not apply to criminal proceedings in terms of Article 8.3).

46. Articles 2.3 and 2.4 of Directive 2000/43/EC.

47. Articles 32 and 36 of Law 63/2002.

48. Article 96.1 of Law 36/2011 of 10 October, the regulation of the social jurisdiction (hereinafter 'LRJS').

49. Article 30.1 of Law 15/2022.

It is submitted that it is unhelpful to have the burden of proof provision drafted in such a way that it appears to conflate a concept such as the objective justification defence that applies to indirect discrimination claims, to other types of discrimination where it does not apply such as direct racial discrimination/harassment claims. As noted above, there is only one lawful justification for direct discrimination in the context of the workplace and that is if race/ethnic origin '*constitutes a genuine and determining occupational requirement*'<sup>50</sup>. The considerations and legal principles that apply to, for example, a direct age discrimination claim where objective justifications are permitted, are simply not the same as the considerations and legal principles that apply to a direct race/ethnicity discrimination claim where, as we have already seen, they are not<sup>51</sup>.

These differences between the Spanish and the European drafting of the burden of proof provisions have been implicitly acknowledged by the legislator in the aforementioned Foral Law of Navarra 13/2023. The legislator states that the burden of proof rules which apply will be both those in Spanish legislation and European law<sup>52</sup>. It is suggested that a more helpful drafting of the burden of proof provision in the context of employment law cases, in the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance, would more closely reflect the drafting in the Race Directive. Put simply, once the employee has established facts from which it may be presumed that there has been direct or indirect discrimination or harassment or any other type of discrimination, it is for the employer to prove that there has been no unlawful direct or indirect discrimination or harassment or whatever the type of discrimination complained of (conform with the relevant legal principles which apply to each category of discrimination).

### III. MEASURES TO DETECT, PREVENT AND STOP DISCRIMINATION

As noted at the outset, there is a general obligation in Law 15/2022 on employers to adopt measures to 'detect, prevent and to stop' discriminatory situations. Let us consider what measures currently exist, and whether Law 15/2022 provides new tools/measures to tackle discrimination on the grounds of racial and ethnic origin in the workplace?

#### A. Collective agreements

Collective agreements have, to date, arguably been under-utilised as a tool to prevent racial and ethnic discrimination in the workplace. By way of illustration, a quick glance at the Collective Agreements applicable to Offices in Madrid published on 13 August

50. Article 4 of Directive 2000/43/EC.

51. Article 6.1 of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

52. Article 25 of Foral Law 13/2023.

2022, the Collective Agreement applicable to the Cleaning Sector of Buildings and Premises in Madrid published on 9 September 2022, the State Collective Agreement applicable to Security Businesses 2023-2026, and the 2023 VI Labour Agreement relating to the Hospitality Sector shows that none of them make *express* reference to the prevention of discrimination on the grounds of racial or ethnic origin in the workplace.

This is no doubt, in part, because the Race Directive and Law 62/2003 simply contained an *invitation* rather than an *obligation* to include measures to prevent discrimination on the grounds of racial or ethnic origin in collective agreements<sup>53</sup>. Arguably, Law 15/2022 continues this tradition of *inviting* rather than *obliging* the use of collective agreements to 'prevent, eliminate and correct' all forms of discrimination. Law 15/2022 simply states that collective negotiations can't establish 'limits, segregations, or exclusions' on the grounds of racial or ethnic origin in collective agreements<sup>54</sup>. It also states that collective agreements *could* contain positive measures to 'prevent, eliminate and correct' all forms of discrimination<sup>55</sup>.

This is in contrast to the express obligation in the Spanish Workers' Statute to negotiate measures designed to ensure equality of treatment and opportunities in collective agreements between women and men in the workplace<sup>56</sup>. Likewise, in relation to people who are lesbian, gay, trans bisexual or intersexual (hereinafter 'the LGTBI' collective,) there is an obligation to boost, through collective bargaining, the inclusion in collective agreements of clauses promoting LGTBI diversity as well 'as the prevention, elimination and correction' of all forms of discrimination against LGTBI people, as well as procedures for a complaint procedure<sup>57</sup>.

It would be a progressive step forward if the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance imposed *an express obligation* to negotiate in collective agreements measures to promote equality of opportunities and non-discrimination on racial or ethnic grounds. If this proposal were to be adopted, this would indeed be a 'milestone' in the fight against racism in the workplace given how few collective agreements currently address discrimination on these grounds.

## B. Equality plans

One of the most effective tools to 'detect, prevent and stop' discriminatory situations is to oblige employers to undertake an analysis of discrimination in their own organisations. An analysis to understand if hidden barriers exist together with an action plan to identify specific objectives to make improvements, where required, through the use of bespoke equality plans. Law 15/2022 does not, however, *expressly*

53. Article 11 of Directive 2000/43/EC and Article 42 of Law 62/2003.

54. Article 10.1 of Law 15/2022.

55. Article 10.2 of Law 15/2022.

56. Article 85.1 of the Spanish Workers' Statute.

57. Article 14(e) of Law 4/2023.

impose an obligation on employers to use equality plans to analyse and tackle racial or ethnic discrimination within their own organisations, and so there is no progression in the law in this regard.

In contrast, employers with 50 employees or more, are already obliged to draft gender equality plans, the contents of which should be negotiated with the workers' legal representatives<sup>58</sup>. It would clearly be a 'milestone' if employers were obliged to undertake similar steps to address racial and ethnic discrimination as those steps they are already obliged to take in relation to gender discrimination. In order to reduce gender discrimination, employers are required to analyse gender equality within their organisations including gender equality gaps that may exist in recruitment, training, promotion, employment conditions, female underrepresentation<sup>59</sup>. Thereafter, the equality plans should contain specific objectives in relation to any inequalities identified, the strategies or measures which the organisation proposes to adopt to achieve the identified objectives, as well as establishing how monitoring and achievement of the objectives will be undertaken<sup>60</sup>. There is transparency in relation to gender equality plans because employee representatives or, in their absence, employees have the right to access information about the content of equality plans and the achievement of their objectives<sup>61</sup>. In order to encourage the voluntary adoption of gender equality plans, the Spanish government is obliged to establish training measures directed at small and medium sized businesses, including the necessary technical support<sup>62</sup>.

Similarly, employers with over 50 employees are already under an express obligation to plan for the real and effective equality of LGTBI employees<sup>63</sup>. These measures must include 'the adoption of sufficient methods of prevention and detection of discrimination' against the LGTBI collective<sup>64</sup>.

It has been reported in the press that the drafts of the Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance include an obligation on employers with more than 250 employees to draft equality plans tackling racism, structural racism racial discrimination and other forms of intolerance which includes measures to prevent, eliminate and correct all forms of racial discrimination or connected intolerance in the workplace<sup>65</sup>. Whilst this would be an important step forward, the reality is that only 36.23% of registered employees work for large employers (employers with over 250 employees)<sup>66</sup>. Extending this obligation to employers with

58. Article 45.2 of Organic Law 3/2007 of 22 of March, for the Effective Equality of Women and Men (hereinafter 'Organic Law 3/2007').

59. Article 46.2 of Organic Law 3/2007.

60. Article 46.1 of Organic Law 3/2007.

61. Article 47 of Organic Law 3/2007.

62. Article 49 of Organic Law 3/2007.

63. Article 15.1 of Law 4/2023.

64. Article 62.3 of Law 4/2023.

65. Valdés, I. and Romero, M. J. reporting in *El País* on 25 May 2023, available at: <https://elpais.com/sociedad/2023-05-25/la-ley-contra-el-racismo-de-igualdad-preve-multas-de-hasta-medio-millon-y-mas-carcel-por-discriminar-a-colectivos.html>.

66. Data from the Ministry of Industry, Commerce and Tourism available at: <https://ipyme.org/Publicaciones/Cifras%20PYME/CifrasPYME-agosto2023.pdf> viewed on 4 October 2023.

more than 50 employees would increase coverage to over 51% of employees<sup>67</sup>. It would indeed be a 'milestone' if an express obligation to draft equality plans to tackle race and ethnic discrimination is applied to employers with over 50 employees to bring the law in line with existing similar obligations for gender discrimination and discrimination against the LGBTBI collective.

### C. Harassment protocols and training

The racist abuse directed at Real Madrid's Brazilian winger, Vinícius Júnior during a football match against Valencia on 21 May 2023 made international headlines and brought the issue of racism in Spain to the attention of the world<sup>68</sup>. Here was a highly successful and highly paid worker, yet, in his place of work, he was suffering taunts due to the colour of his skin in front of the cameras of the world<sup>69</sup>. This incident shows very clearly that there is a need for harassment training in Spain, and not only to protect the human dignity of workers. Each and every person who engaged in this discriminatory conduct is a potential liability for their employers if they were to behave similarly in their workplaces.

As previously noted, Law 15/2022 holds employers responsible for the damage caused when discrimination, including harassment, occurs within the scope of organization or under their management, and they have not complied with their obligations to adopt measures to detect discrimination and to take preventative steps<sup>70</sup>. There is therefore an implicit requirement to take steps to prevent harassment on racial and ethnic grounds, such as through the provision of harassment training.

It would be a welcome step forward if the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance were to impose *an express obligation* on employers with over 50 employees to provide harassment training on the grounds of racial and ethnic origin in the workplace. Spain already has laws in place which require employers with 50 employees or more to have protocols to tackle sex and sexual harassment<sup>71</sup>, and harassment of people from the LGBTBI communities in the workplace<sup>72</sup>. Employers with fewer than 50 employees are also obliged to have sexual harassment policies in place if required by a term in the applicable collective bargaining agreement to their business<sup>73</sup>, or if required to do so by the Spanish labour authority<sup>74</sup>. It is important to correct the morally indefensible perception created by

67. Ibid.

68. See, for example: <https://www.theguardian.com/world/2023/may/24/its-not-just-in-football-young-players-families-on-racism-in-spain>.

69. Despite, as noted above, a specific law to tackle racism in sport: Law 19/2007, of 11 of July, Law against violence, racism, xenophobia and intolerance in sport.

70. Articles 25.1 and 27.2 of Law 15/2022.

71. Articles 45.2 and 46.2(i) of Organic Law 3/2007.

72. Article 15.1 of Law 4/2023.

73. Articles 45.3 and 46.2(i) of Organic Law 3/2007.

74. Article 45.4 of Organic Law 3/2007.

these current differences in the law, that harassment on the grounds of racial or ethnic origin is less serious than harassment on the grounds of gender or sexual orientation.

#### D. Positive measures

The Race Directive leaves it up to Member States to decide whether 'to maintain or adopt specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin'<sup>75</sup>. Law 62/2003 acknowledges the possibility of 'specific measures in favour of specific collectives designed to prevent or compensate for disadvantages that affect them by reason of their racial or ethnic origin' without imposing any *express* obligations in this regard<sup>76</sup>.

Similarly, Law 15/2022 defines 'positive actions' as 'differences of treatment designed to prevent, eliminate or, where relevant, compensate any form of discrimination or collective social disadvantage'<sup>77</sup>. These measures can be applicable whilst the situations of discrimination or the disadvantages that justify them exist. The measures must be 'reasonable and proportionate in relation to the way they are developed and the objectives they pursue.' As noted previously, this legislation suggests that positive measures may be established through collective negotiation<sup>78</sup>. In such cases, Law 15/2022 suggests that, where appropriate, objectives and mechanisms for information and periodic evaluation may be established jointly by the companies and the legal representatives of the workers within the framework of collective bargaining. Law 15/2022, once again, therefore does not impose any *express* obligations to adopt *specific positive measures* to eliminate discrimination on the grounds of racial or ethnic origin.

It would be a 'milestone' in the fight against racism if the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance were to impose *express positive obligations* on employers with over 50 employees to adopt positive measures to address 'racial or ethnic gaps' in their organisations. For example, it appears that recruitment is an area in which there is currently a 'racial/ethnic gap' that urgently requires addressing. Whilst 20% of Spaniards work as employees in the public sector, only 2.5% of foreigners are employees in the public sector<sup>79</sup>. The majority of foreigners therefore work in the private sector. It has been reported that around 42% of foreigners work in jobs with the lowest qualification requirements, compared to around 20.2% of Spaniards<sup>80</sup>. Foreigners are more likely to have temporary jobs

75. Article 5 of Directive 2000/43/EC.

76. Article 30 of Law 62/2003.

77. Article 6.7 of Law 15/2022.

78. Article 10.2 of Law 15/2022.

79. Observatorio Español del Racismo y la Xenofobia (OBERAXE), *Report on the Integration of Foreigners in the Spanish Labour Market 2022*, paragraph 4.19, available at: [https://inclusion.seg-social.es/oberaxe/es/publicaciones/documentos/documento\\_0141.htm](https://inclusion.seg-social.es/oberaxe/es/publicaciones/documentos/documento_0141.htm) consulted on 1 September 2023.

80. *Ibid.* paragraph 5.3.

(36%) compared to Spaniards (23.4%)<sup>81</sup>. Foreigners are more likely to have part-time contracts (17.6%) compared to Spaniards (13%)<sup>82</sup>.

Furthermore, in an investigation carried out between March and August 2021, investigators demonstrated the difficulties faced in recruitment by young people of immigrant descent. Investigators responded to 1002 job offers covering 13 different sectors sending two identical applications to each offer, one purportedly from a young person of Spanish descent and one purportedly from a young person of immigrant descent (Chinese or Peruvian or Moroccan or Dominican)<sup>83</sup>. The results showed that young people of Spanish descent had, overall, a 36% greater possibility than the young people of immigrant descent to be invited to the first stage of a selection process<sup>84</sup>. In comparison with young people of Spanish descent, young people of Moroccan descent had a 50% higher chance of being rejected, young people of Chinese descent had a 31.7% higher chance of being rejected and children of Peruvian descent had a 31.7% greater chance of being rejected<sup>85</sup>.

This investigation proves that *equally qualified candidates* still do not have the same access to the same opportunities in the workplace, because of factors that are beyond the control of candidates, such as their racial or ethnic origin. The new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance should include positive measures to address the issue of inequality in recruitment. This could be done by expressly obliging employers with over 50 employees to adopt positive measures to identify and correct any 'racial/ethnicity gaps' in the context of recruitment. Perhaps organisations with over 50 employees in which the racial and ethnic diversity does not reflect the general racial and ethnic diversity in the working population (less than 10%), should be legally obliged to offer interviews to racial/ethnic minority candidates who meet the minimum requirements for a role/promotion. This would be a positive measure to facilitate integration in the workplace and to concentrate minds on whether invisible barriers amounting to indirect discrimination exist.

## E. Measures to ensure equal pay

In theory, there should be no discrimination in relation to pay on the grounds of racial or ethnic origin<sup>86</sup>. Notwithstanding this, in 2022, the overall pay gap between Spaniards

81. *Ibid.* paragraph 4.24.

82. *Ibid.* paragraph 4.26.

83. Observatorio Español del Racismo y la Xenofobia (OBERAXE), *Report on the Empirical Approach to Discrimination against Children of Immigrants in the Labor Market* page 8, available at [https://inclusion.segsocial.es/oberaxe/es/publicaciones/documentos/documento\\_0154.htm](https://inclusion.segsocial.es/oberaxe/es/publicaciones/documentos/documento_0154.htm) consulted 1 September 2023.

84. *Ibid.* page 9.

85. For certain, high qualified positions, young people of immigrant descent have a 4.6% greater possibility of being invited to the first stage of recruitment. The investigators thought this may be explained by potential additional language skills required by employers in the case of young people of Moroccan or Chinese descent.

86. Articles 4.2 and 17.1 of the Spanish Workers' Statute.

and foreigners was reported as being around 34%<sup>87</sup>. However, once differences between occupation, activity, working hours and length of service are taken into account, it was reported that this difference between the pay between Spaniards and foreigners falls to 5,3%<sup>88</sup>.

Law 15/2022 provides that the government can pass regulations to require employers with more than 250 employees to publish salary information necessary to analyse whether there are any salary differences when taking account differences in racial or ethnic origin<sup>89</sup>. It is not known when, or if, these regulations will be passed.

In the meantime, the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance could include transparency measures in relation to pay which could help to reduce the racial/ethnicity equality gap. Measures could include, for example, requiring employers to provide upfront information about pay or pay ranges in the job vacancy or at the job interview stage, or by prohibiting employers from asking applicants about their pay history during their current or previous employment relationships, or ensuring that workers are not prevented from disclosing their pay. These are all changes which employers will already be required to make, in any event, when Directive 2023/970 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women is implemented<sup>90</sup>.

## E. Trade unions and workers' representatives

Spanish law places great importance on the informing and consulting of workers representatives generally<sup>91</sup>. Workers' representatives and trade union representatives therefore have an important role to play in ensuring equality of opportunity and no discrimination on the grounds of racial and ethnic origin. By way of illustration, the Spanish Workers' Statute provides workers' representatives with a unique right to 'be informed by the employer of the parameters, rules and instructions on which the algorithms or artificial intelligence systems are based that affect decision-making that may affect working conditions, access and maintenance of employment, including the preparation of profiles'<sup>92</sup>. Examining the information provided by employers to establish whether algorithms used in recruitment or promotion are potentially indirectly discriminatory on racial or ethnic grounds (or on any other grounds) is therefore arguably a duty of the workers' representatives.

87. Observatorio Español del Racismo y la Xenofobia (OBERAXE), *Report on the Integration of Foreigners in the Spanish Labour Market 2022*, paragraph 6.1, available at: [https://inclusion.seg-social.es/oberaxe/es/publicaciones/documentos/documento\\_0141.htm](https://inclusion.seg-social.es/oberaxe/es/publicaciones/documentos/documento_0141.htm) consulted on 1 September 2023

88. Ibid. Paragraph 6.3.

89. Article 9.6 of Law 15/2022.

90. Articles 5.1 and 5.2 and 7.5 of Directive 2023/970 of 10 May 2023 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. Member States have until 7 June 2026 to implement the Directive.

91. See, for example, Article 64 of the Spanish Workers' Statute.

92. Article 64.4(d) of the Spanish Workers' Statute.

Law 15/2022 further provides that both the representatives of the workers and the business are obliged 'to ensure compliance with the law of equality of treatment and non-discrimination in the business, and in particular, compliance with any positive measures and the attainment of those objectives'<sup>93</sup>. Law 15/2022 expressly states that 'inaction, failure to discharge duties, or failure to comply with obligations' is a breach of the right to equality<sup>94</sup>. In addition, the most representative trade unions are under an annual obligation to produce a report on compliance with articles 9 (employment) 10 (collective negotiation) and 11 (self-employment)<sup>95</sup>. These combined obligations mean that trade union and workers' representatives have general obligations to ensure that the principles of equal treatment and non-discrimination are complied with, including on racial and ethnic grounds.

The current prevailing silence in many collective agreements and equality plans on the issue of racial and ethnic discrimination suggests that there is a training need for workers' representatives. It is suggested that new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance places express obligations on trade union/workers' representatives to attend specific training on racial and ethnic discrimination to enable them to adequately discharge their duties to ensure compliance with the principles of equality and non-discrimination. It is suggested that any training should cover not only the legal and ethical case for upholding the principles of equality of treatment and non-discrimination on ethnic/racial grounds but also the economic case. Fears can exist within dominant populations (and not only in Spain) about whether more opportunities for immigrants/people of immigrant descent will automatically mean less opportunities for locals thus discouraging initiatives relating to racial/ethnic diversity. However, studies undertaken by consulting firms such as McKinsey & Company, which have shown that businesses with greater ethnic diversity in corporate leadership are more likely to deliver greater profitability than businesses with less ethnic diversity in corporate leadership, can be helpful in this regard in making the economic case for diversity and showing that it is not necessarily a zero-sum game<sup>96</sup>. Diversity in any organisation can bring fresh ideas, open new doors, create new connections and broaden perspectives.

## G. Social security and labour inspectors

Law 15/2022 provides that social security and work inspectors should ensure respect for equality of treatment and no discrimination in the access to employment and the

93. Article 10.3 of Law 15/2022.

94. Article 4.1 of Law 15/2022.

95. Fifteenth additional disposition of Law 15/2022.

96. *Diversity wins: How inclusion matters* published by McKinsey and Company dated 19 May 2020 available at: <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters> consulted on 1 September 2023.

conditions of employment<sup>97</sup>. The inspectors are now obliged to include in their annual planning how they will monitor compliance with the equality and discrimination laws<sup>98</sup>.

In the strategic plan for the work inspectors which covers the period 2021 to 2023 the work inspectors undertake to collaborate with the General Directorate of Equal Treatment and Racial Ethnic Diversity of the Ministry of Equality, to undertake to take 'actions' aimed mainly at people who suffer racial or ethnic discrimination more frequently in the workplace such as gypsy people, migrants, Africans and Afro-descendants, Arabs and Asians<sup>99</sup>. Unfortunately, it is not clear what these specific 'actions' will be.

It is suggested that new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance places a specific obligation on labour inspectors to inspect whether organisations appear to lack racial and ethnic diversity when carrying out an audit, and to give them powers to require organisations to implement racial/ethnic equality plans in circumstances where there appears to be a prima facie gap in racial/ethnic diversity. The law should also require inspectors to explain *how* they intend to try to achieve their stated objectives.

## H. Assessment of potential race/ethnic discrimination claims

Law 15/2022 provides that people who are victims of discrimination have the right to receive 'complete and comprehensible information, as well as an assessment into their personal situation, adapted to their context, needs and capacities' through the services, organisations and offices that the public administrations can offer<sup>100</sup>. People are entitled to receive a free legal assessment prior to lodging a claim<sup>101</sup>. However, it can be difficult to provide a 'comprehensive' assessment of a potential employment law discrimination claim because of a lack of a right to transparency explaining the decisions of recruiters or employers. Recruiters and employers are not currently obliged to provide a written response in answer to any discrimination conciliation claim or discrimination judicial claim lodged by prospective candidates or employees.

Whilst Law 15/2022 states that 'it will be understood as discriminatory the criteria and job application processes, in the public and private sector' that produce situations of indirect race discrimination<sup>102</sup>. In practice, external candidates to an organisation do not necessarily have access to data which can prove that, for example, an organisation routinely excludes applications from candidates who are immigrants/of immigrant descent. Similarly, an internal candidate who is refused a promotion may not have the

97. Article 9.4 of Law 15/2022.

98. *Ibid.*

99. Secretary of State for Employment and the Social Economy, *Strategic Plan for the Inspectors of Work and Social Security 2021-2023*, action 6.4, at: [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2021-20005](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-20005) consulted on 1 September 2023.

100. Article 5.2 of Law 15/2022.

101. Article 5.4 of Law 15/2022.

102. Article 9.2 of Law 15/2022.

data to assess whether, as a matter of fact, across a large organisation, there is data that may support that there is a general policy of not promoting foreigners.

It is suggested that the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance should amend employment law procedural rules, such as Law 36/2011, of 10 of October, regulating the Social Jurisdiction, to enable candidates and workers to access data which they may need in order to receive a full assessment of their situation prior to the lodging any potential employment law claims, and certainly prior to the date of any court hearing itself. There are already steps in this direction in other areas of equality law. Directive 2023/970 on Pay Transparency, for example, requires Member States to ensure that in proceedings concerning gender equal pay claims, employers are expressly required to disclose any relevant evidence that lies within their control<sup>103</sup>. Employees also have the right to request and receive information in writing information that may be relevant to an equal pay claim<sup>104</sup>. In any assessment of discrimination claims, legal advisers need to be able to assess, at an early stage, not only the data which may support the claim of an employee or prospective employee, but also the explanation from an employer for the situation that has arisen, and whether, for example, the employer has a potential objective justification defence.

## I. Compliance and sanctions

The Race Directive requires Member States to set out sanctions for breaches of the obligations contained in the Directive and to take 'all measures necessary' to ensure that they are applied<sup>105</sup>. The Directive requires the sanctions, which could compromise the payment of compensation to the victim, to be 'effective, *proportionate* and dissuasive.' There are two ways to enforce the principle of equal treatment in Spain, either through individuals bringing individual claims in the social courts, or labour inspectors inspecting workplaces and issuing sanctions for any breaches of employment law.

There are five breaches of employment law relating to discrimination on the grounds of race or ethnic origin and they are all classified as 'very serious' breaches of employment law. The financial penalties for 'very serious breaches' currently range between €7,501 to €225,018<sup>106</sup>. These breaches include 'unilateral decisions' by a business that involve 'unfavourable direct or indirect discrimination in terms of remuneration, hours, training, promotion and other working conditions due to circumstances of origin, including race or ethnic origin'<sup>107</sup>. The breaches also include

103. Article 20.1 of Directive 2023/970 of the European Parliament and of the Council 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 (hereinafter 'Directive 2023/970') and enforcement mechanisms.

104. Article 7.1 of Directive 2023/970.

105. Article 15 of Directive 2000/43/EC.

106. Article 40.1 (c) of Royal Legislative Decree 5/2000, of 4 of August which approved the revised text of the Law of Breaches and Sanctions in the Social Order (hereinafter 'LISOS').

107. Article 8.12 of LISOS.

'harassment because of racial or ethnic origin when it takes place in the workplace and if it is known by the business and if the business has not taken the necessary measures to stop it'<sup>108</sup>.

Factors taken into account when determining the level of the fine include 'the negligence and intentionality of the discriminator, fraud or collusion, non-compliance with prior warnings and inspection requirements, company turnover, number of workers or beneficiaries affected, where appropriate, damage caused and amount defrauded'<sup>109</sup>. In addition, those employers who are held responsible for having made 'unilateral decisions' amounting to direct or indirect discrimination due to race or ethnic origin, and those employers who are held responsible for harassment on the grounds of racial or ethnic origin in the workplace face additional potential 'accessory sanctions'<sup>110</sup>. These include losing certain economic employment incentives that the employers may have been receiving from the Spanish State for a period of between six months and two years.

It is submitted that the Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance should not necessarily follow the current system of breaches and sanctions. Firstly, it is worth questioning whether it is *proportionate* to *automatically* classify 'unilateral decisions that amount to indirect discrimination' as 'very serious' breaches of employment law and in the same category as directly discriminatory decisions? Direct discrimination usually involves intentionality because a person is not being hired because they are, for example, Roma. Indirect discrimination that arises because 'an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared *with other persons*' does not necessarily involve any intentional discrimination. Nobody is an expert on all the potential forms of unintentional indirect discrimination that may exist in an organisation. When other jurisdictions implemented the Race Directive, some, such as the United Kingdom, provided that financial compensation may not necessarily be awarded in indirect discrimination cases where there had been *no intention* to discriminate<sup>111</sup>. The most appropriate remedy may sometimes consist simply in ordering a change to workplace policies, training or the implementation of an equality plan.

Secondly, to encourage employers to invest in quality annual or bi-annual training on racial/ethnic discrimination in the workplace, perhaps the law should expressly state that there could be reduced financial sanctions for employers who have done this? Indeed, in other jurisdictions, such as the UK, employers who can prove that they took 'all reasonable steps' to prevent an employee from discriminating, can potentially escape liability for any financial compensation awarded (leaving the employee who has committed the discriminatory act fully financially responsible for any compensation

108. Article 8.13bis of LISOS.

109. Article 39.2 of LISOS.

110. Article 46.bis.1 of LISOS.

111. See, for example, section 124(4) of the Equality Act 2010 in the UK.

awarded to the victim)<sup>112</sup>. A clear possibility of personal liability and economic fines that they (rather than their employer), may have to pay, should encourage employees who receive harassment training yet may still be inclined to express bigoted views to think again or risk the financial consequences.

Thirdly, it is worth considering whether workers' representatives should be subject to express sanctions if they fail to discharge their joint responsibilities (with businesses) to ensure that there is no direct or indirect discrimination against employees/prospective employees on the grounds of their racial or ethnic origin<sup>113</sup>. Law 15/2022 expressly states that 'inaction, failure to discharge duties, or failure to comply with obligations' is a breach of the right to equality<sup>114</sup>. As an initial step, perhaps the most representative trade unions could be subject to such sanctions if they fail to consider racial and ethnic discrimination when negotiating collective agreements. The sanctions could consist of obligatory ethnic/racial focused discrimination training for their representatives.

## J. Monitoring of racial/ethnic discrimination employment law claims

Of the 28,275 individual claims relating to a contract of employment presented in 2022 in the social courts in Spain, it is not possible to see how many of these claims relate to discrimination on the grounds of racial or ethnic origin. This information is not currently published in the data summarising these types of claims before the employment courts<sup>115</sup>. Law 15/2022 provides that statistics for the courts will collate data specifically about matters registered for breaches relating to discriminatory treatment<sup>116</sup>. It is not clear whether information relating specifically to racial or ethnic discrimination complaints in workplace will be collated (unless the complaints are criminal in nature in which case they will be)<sup>117</sup>.

It is suggested that the new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance expressly requires statistics to be collated showing how many conciliation claims relating to discrimination on racial/ethnic grounds, and thereafter, employment law claims are lodged, together with their outcomes. This would enable legal advisers to understand how many employment law claims relating to discrimination on the grounds of ethnic or racial origin are settled, dismissed or upheld. It would also be interesting to see if there are any differences in how these types of claims are resolved in the different autonomous regions of Spain.

112. Section 109(4) of the Equality Act 2010.

113. Article 10.3 of Law 15/2022.

114. Article 4.1 of Law 15/2022.

115. Data from: <https://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Datos-penales--civiles-y-laborales/Civil-y-laboral/Asuntos-Judiciales-Sociales/> viewed on 1 September 2023.

116. Article 36.4 of Law 15/2022.

117. Article 36.4 of Law 15/2022.

## IV. CONCLUSIONS

Whilst Law 15/2022 contains some welcome changes that should help in bringing claims on the grounds of ethnic or racial discrimination related to the workplace, it can hardly be described as a 'milestone' in the fight against racism in this context. This is because it does not clearly oblige employers to adopt any specific measures to tackle ethnic and racial discrimination in the workplace. It also confuses rather than clarifies existing definitions in discrimination law by, for example, departing from the key definitions of direct discrimination, indirect discrimination, and harassment in the Race Directive.

The new Organic Law Against Racism, Racial Discrimination and Connected Forms of Intolerance is an opportunity to ensure that discrimination and harassment on the grounds of racial and ethnic origin are expressly tackled in collective agreements, equality plans and in the training for both employees and their representatives. It also presents an opportunity to return to the original definitions of direct and indirect discrimination and harassment in the Race Directive, and to redraft the burden of proof provisions so they are consistent with this Directive. It would be a positive development if this law were to revise the system of sanctions and penalties so that unintentional breaches of indirect discrimination law by employers were not automatically classified as 'very serious breaches.'

In addition, it would be a helpful step forward if greater transparency from recruiters and employers explaining their decisions was required in writing, and ahead of any judicial claims being lodged. This would enable legal advisers to provide a more complete assessment of any potential discrimination claims after analysis of the relevant data, and any objective justification defences put forward by employers. Finally, it would be wise to provide a financial incentive for employers to invest in diversity training that covered discrimination on the grounds of racial and ethnic origin (with particular focus on discrimination against people of African descent including Moroccans, discrimination suffered by Roma people, by people of colour generally and by the Chinese community).

This could be done by offering a clear percentage reduction in fines for employers if regular, quality training has been provided to employees. It takes positive action and consistency to change a culture and training is a key component of this. Twenty years after the implementation of the Race Directive, there is still much to be done to achieve its original objective of 'the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin!'<sup>118</sup>.

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118. Recital 12 of Directive 2000/43/EC.

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