**Open Society EUROPEAN POLICY INSTITUTE**

**Presidential portfolio review: EQUALITY AND Antidiscrimination**

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Parameters of the portfolio

Elements of this portfolio review go back to 2013 and to collaboration between the Open Society European Policy Institute (OSEPI), the Roma Initiatives Office (RIO), and the Open Society Justice Initiative (OSJI). However, most of the review concentrates on the years 2014-2016 in order to illustrate the mix of advocacy tools that we used and the adjustments to our work as it progressed. During this period OSEPI reduced some of our work on antidiscrimination due to both success and failures, and strategic shifts in our work that had to respond to the dramatic changes in Europe, including the refugee crisis. This review comes at a perfect moment to critically assess our decisions, to explore achievements and lessons learned, and to shape our future work in this area.

This portfolio overlaps with some areas of work that have already been the subject of portfolios reviews by other entities. However, this is the first time we have critically assessed the body of work from our perspective. The areas of overlap include:

* OSJI’s Antidiscrimination Portfolio Review of August 2015
* Equality Data Initiative, staff review, October 2014
* DH implementation, staff review, April 2015
* Italy, OSIFE staff review, July 2015

OSEPI participated in these reviews and the lead analysts of this review (Costanza Hermanin and Violeta Naydenova) have therefore tried to identify aspects of the portfolio that were not previously discussed in depth and that are relevant to the advocacy work of OSEPI. Of course, we have taken into account the outcomes of the above portfolio reviews to inform our own work.

When we refer to work and activities before 2014 in this document it is only to understand the actions and decisions that came within the time scope of this review (2014-2016). For example, the Equality Data Initiative work is derived, more or less directly, from actions such as the intervention in the case of *D.H. and Others v. Czech Republic* (decided in 2007), which stressed issues related to the availability of ethnic data in Europe. Similarly, all the ‘infringement’ actions that we propose for review are inspired by the work initiated in 2009, both at national and EU level, against the 2008 “nomad census” in Italy.

As illustrated in the accompanying portfolio elements document, the review encompasses OSF’s three main types of advocacy: direct policy advocacy, public advocacy and legal advocacy. Specific activities included research, strategic litigation, public events, public policy reports, indirect advocacy and communication (through the use, for instance, of infographics on the side of more traditional tools).

Our ambition: why have equality and antidiscrimination been a priority for OSF advocacy at the EU level?

OSEPI prioritized this work for two reasons. First, there was the opportunity to seize the 2000 adoption by the EU of an innovating legal framework on discrimination, as well as the jurisprudence developed over the past ten years by the European courts: the Court of Justice of the EU and the Strasbourg court. We decided to concentrate on the enforcement of such international norms because they introduced specialized civil legislation to combat racial discrimination, easily accessible to claimants, and concepts – such as indirect discriminations – that were previously absent from continental law. Our objective has been to activate and complete this legal framework so as to push EU member states towards the eradication of discrimination against Roma and other groups at risk of discrimination, mainly ethnic groups, through a top-down approach. We intended our efforts to be complementary to that of other OSF entities working at the local and national level to exercise bottom-up pressure on states and local administrations, so as to reverse discriminatory policies and practices.

Second, since the 1990s, xenophobic parties have begun to regain political traction in various European states. Terrorist attacks in the early 2000s in Europe – in Madrid and London, and more recently in France and Belgium – had the effect of exacerbating the tensions amongst easily identified ethnic and religious minorities and the rest of the population. The results of the 2014 elections, with increased numbers of populists reaching the European Parliament, confirmed this trend. In a context where defending minorities and the principle of equality became less and less politically appealing, we recognized that legislation and courts could be among the few strongholds left for the implementation of antidiscrimination measures, and to change the conditions of groups at risk of discrimination on the ground. In fact, racial minorities, especially in Western and Southern Europe, still have little political leverage because they often lack citizenship in the states where they live.

Taking the review from a chronological perspective, we started with a specific case, that of Italy, where we detected politically-loaded measures that discriminated against a specific ethnic minority, the Roma. The “**nomad census decree**” was the first act adopted by a right-wing government led by Silvio Berlusconi in coalition with the xenophobic Northern League. As a founding member of the EU, a G8 country, and a state amongst those most engaged in the European project, we considered that the adoption and implementation of such measures in Italy would weaken the entire European human rights framework. We also realized, through analysis in collaboration with the then “Italy project”, that in a context where bottom-up initiatives from NGOs and national political concern was almost totally absent, the EU would have to step forward.[[1]](#footnote-1) The legal and political analysis we and Justice Initiative brought to this case, and repeated in other cases, showed that we could invoke the EU legal framework not limited to antidiscrimination norms. In fact, we could combine them with other EU legislation, in this specific case, data protection law. Our aim became that of obtaining a highly visible infringement action from the European Commission (EC) against Italy, and possibly a ruling by the European Court of Justice on the case. The authority, both moral and executive, of the court would have helped us change the situation on the ground. We thought that this action could strike down the discriminatory measures and, by doing so, point at other systematic discriminatory practices of the public administration against the Roma, especially in terms of segregated housing/nomad camps.

We began the legal advocacy action in 2009, at the EU level but in tight coordination with local level litigation. Enforcing human rights and/or equality for Roma in Italy was a concept present in the strategies of OSEPI, OSJI, and the then Italy project – later the “Xen Fund” and OSIFE, from 2010 till 2016. The action referred above is still ongoing and its progress and outcomes will be discussed later in this document.

In parallel with legal advocacy related to infringements,[[2]](#footnote-2) OSEPI and OSJI realized that EU legislation and action could have been made stronger by measures pointing to the necessity of accurate, safe and inclusive **collection of ethnic data in Europe**. In the OSEPI and Justice Initiative’s strategies of the years 2012-2015, we defined among our core concepts, the objective of “*establishing European states’ obligation to collect data necessary to reveal patterns of inequality, and define modes of collection that are effective and protect privacy*”.

This objective came from a set of different considerations: the lessons learned from the preparation and implementation of the DH case; the work of OSJI’s ethnic profiling team in Europe, showing that although ethnic data were officially not collected in Europe, they were used for law enforcement and security purposes almost everywhere; the experience with the nomad census advocacy, which demonstrated how ignorance about ethnic data collection could translate into dangerous measures that are politically loaded; and last but not least, from the OSF programs with experience in the Balkans, Western, Central and Eastern Europe. Such grant-making programs experienced the difficulty of detecting where to intervene and in what measure. Not knowing the details of the population of specific minorities in various countries and the extent of the inequality they face is an issue that inhibits the capacity of grant-makers to target their funds in the most efficient way. This is why, starting in 2013, we organized consultations among seven OSF programs (OSJI, OSEPI, RIO, the then Xen Fund, the then Disability Initiative, the Human Rights Initiative, and At Home in Europe) and decided to launch the “Equality Data Initiative (EDI)” as a collaborative effort to make progress on data collection in Europe.

The programs participating in the EDI inserted the initiative in respective work plans and strategies, set out a part of their budget to contribute to the “EDI budget”, took part in regular meetings to define the strategy and the actions taken under EDI and review its progress. In parallel, they continued developing, or started grant-making lines addressing the issue of data collection. The aim of the initiative became two-fold. On the one hand, we sought to pressure the EU to establish soft or hard law that would compel member states to collect equality data. This seemed achievable given the vast “international consensus” – from various EU agencies, UN Convention on ERD, the Council of Europe - on the need of ethnic data in Europe. On the other hand, we engaged in research, analysis and stakeholder consultation to define best practices in terms of data collection, both for our advocacy, but also for the activity of our grant-making programs.

In a sense, the EDI was an early OSF “shared framework”. We quickly understood that in order to achieve our two objectives we would have to focus on convincing key recalcitrant member states to change their positions on ethnic data (e.g. France, Germany, Hungary); and convening the groups at risk of discrimination to understand whether they were in favor of ethnic data collection, under what conditions and for what specific purposes. Further details on how we went about this work, and what we learned from it, are provided below.

In addition to the two elements above, our portfolio is composed of our infringement work on particular countries, and other areas of discrimination. For instance, following requests from the network we actively engaged in the **European Commission’s infringement to press the Czech authorities** to implement the DH jurisprudence.

The theory of change was that infringements by the EU – with all their political weight and potential to introduce pecuniary sanctions against the state - would be the final decisive means to ensure that Roma children have access to quality education, free of discrimination, as dictated by Strasbourg. OSEPI resumed work on this in 2012-3, in collaboration with RIO, OSJI and external partners. Our engagement was led by the belief that we could offer a decisive contribution to the work of our colleagues by bringing in another powerful actor, the EU, liaising with EU-focused NGOs, and bringing to Brussels a degree of expertise on the topic that was absent. In addition, we identified the Czech case as being a perfect case for the first-ever infringement on racial discrimination in Europe. In fact, it would have been against a small, politically “weak”, recently-joined member state that had already been condemned by another supra-national entity, the Strasbourg court. The EU did not need to say anything new – it just needed to act. The infringement was eventually adopted in September 2014. Ironically, the above-mentioned conditions we had detected in the Czech case proved to be insufficient for the EU to take purposeful action against discrimination. The infringement was in fact adopted during the transition from the second Barroso Commission (2010-2014) and the appointment of the new Juncker Commission. In this moment of political vacuum, the targets of our long-term advocacy on infringement – the civil servants of the European Commission – became our allies and seized the moment of political vacuum to have the infringement action approved.

One year later, intensified forced evictions against Roma in **Bulgaria** began. The authorities targeted Roma-only houses in Sofia, Garmen and Varna. The decision to evict was made after initial unrest between Roma and non-Roma in these three locations. Shortly afterwards, anti-Roma demonstrations demanded the government demolish “illegal” Roma housing. The Bulgarian government complied. OSEPI decided to address this abuse for several reasons. First, the infringement on Italy was lagging (detailed below). In order to ensure that the Czech Republic would not remain an isolated and exceptional case, we needed to include other countries where EU infringements would make a difference and continue pressuring the Commission for action. Second, OSEPI and OSF had particular assets to use on Bulgaria. Our lead analyst in OSEPI knows the situation and the players well and the recent EU-law based action engaged by OSJI on other Roma-related violations in Bulgaria.[[3]](#footnote-3) Third, this case offered the opportunity to expand the scope of the enforcement action outside the domain of discrimination in education (used in the infringement against the Czech Republic), to that of housing. The latter – relevant also for the Italian case, but for many other European countries – had yet to be targeted at EU level. Last, we had a fortunate coincidence: the new Commissioner for Justice, Vera Jourová, is a Czech national, thus politically sensitive to the fact that her country of origin was the only one that had been targeted, up to that point, for racial discrimination. Our reasoning was sound though the outcome not as expected. One year after the infringements against the Czech Republic, the Commission opened another infringement case against Slovakia. The action on Bulgaria is still ongoing.

Our place: What is our role and how did we play it?

OSEPI played a leading role for most of the work in this portfolio. We defined our work on equality and antidiscrimination with reference to Equality Data and infringements in Italy and Bulgaria as concepts. In the case of the Czech Republic our action was in support to the field. However, we pursued all of these actions in very tight cooperation not only with other OSF programs (mainly OSJI, RIO and OSIFE), but also with governmental and non-governmental allies at different levels. Another characteristic of these actions is that they are multi-layered and simultaneous; at the same time they need to address the international level (see e.g. the CERD submission on Italy),[[4]](#footnote-4) the continental/EU/Council of Europe level, the national and even the local level.

Starting with the **Equality Data Initiative**, our project responded to a need that was felt by many OSF programs and external actors (governmental and non-governmental, i.e. the European Network Against Racism - ENAR), but pursued by none. When we started engaging on the issue in 2013, the most recent EU report on equality data had been delivered four years previously, the French debate on the “*statistiques ethniques*” had been closed with a Constitutional Council ruling in 2011, and CERD and Council of Europe repeated recommendations on the need to collect data on inequality were constantly disregarded. We entered a field full of academic or IGO experts that did not see any more opportunity to raise the issue, and some regional and local NGOs in need of support. The support we decided to offer, after an accurate analysis, was not or not solely financial (this was left to the grant-makers). We decided to employ a mix of advocacy tools in order to explore and understand the issues, connect the local advocates, define a strategy and a model solution and raise the problem of equality data in various policy contexts.

We chose to work in collaboration with two entities interested in the issue of data, but unable to work on their own. The first, ENAR, ensured we had the legitimacy from the representativeness of ENAR membership, including most of the groups representing racial and religious minorities in Europe. The second, the Migration Policy Group (MPG), was the instrumental lobby to ensure the adoption of the 2000 antidiscrimination directives. Since then, MPG has mainly acted as the lead consultancy for the Commission on issues of discrimination. Therefore, it provided legitimacy by expertise to our initiative and was key to opening contacts with EU institutions and member states (MPG manages the European network of 28 antidiscrimination experts, one for each EU country. This three-fold collaboration was not always easy. However, the EDI project ran for over two years producing, first, an internal background report on the state of equality data in various EU countries. This helped us (i.e. the OSEPI lead, the seven programs involved in regular calls, and an ad-hoc advisory board) select seven countries on which we decided to go more in-depth, organizing focus groups with representatives of minorities at risk of discrimination and meetings with relevant local institutions. Apart from gathering in-depth knowledge of their views on ethnic data, these meetings allowed OSEPI and our OSF colleagues to get in touch with new local partners. The two Symposia organized in Brussels with EU stakeholders and partners helped the groups connect. OSIFE took these opportunities to identify grantees and a couple of autonomous projects on equality data collection started in Ireland and France. During the last EDI Symposium, in November 2014, OSEPI presented the report “*Ethnic Origin and Disability Data Collection in Europe: Measuring Inequality—Combating Discrimination*”, which summarized the analysis conducted in seven EU member states. During the same event, the EU Commission announced that it would write (using the same consultants we had employed) a new report extending our research to the full 28 members of the EU. This report is due to come out soon. According to a strategy we set out together, our advocacy partner ENAR is keeping pressure on the Commission so as to have a formal recommendation on equality data tabled in 2017. The recommendation would be addressed to all the member states.

On **infringements**, we also adopted a multi-layered strategy. OSF and ERRC decided to engage together against the Roma census in Italy, and they partnered for a long time concerning the Czech Republic. However, over the years, OSF was the sole entity keeping pressure on Italy for its treatment of Roma. For instance, not only did OSF continue addressing legal briefings to the European Commission (five between 2008 and 2015). OSJI filed two national legal actions on the topic and collaborated with OSEPI on UN documents, while OSIFE funded grantees working on this issues and OSEPI organized advocacy meetings in Italy and Brussels. In 2012, Amnesty International joined this effort and started leading a partly autonomous campaign on Italy and a collaborative campaign on the Czech Republic. At the same time, some OSF grantees from the **Italy** project decided to join the effort vis-à-vis the EU, and started collaborating directly and separately with OSEPI, AI and the European Commission.

In 2013, OSEPI made the decision to advocate for the use of EU law against the discrimination of minorities in a more comprehensive way. We researched and published a detailed shadow report on the enforcement of the Race Equality Directive (RED), which we addressed to the European Commission.[[5]](#footnote-5) The report collected country-by-country information and stressed the most salient shortcomings in the implementation of the Directive, among which were the lack of infringement actions and the need for equality data. Parts of the report were cited in a later document by the European Commission which analyzed national measures implementing the RED.

After 2013, our advocacy has used a number of different tools. For instance, we set up public hearings in the European Parliament, bilateral meetings, and ad hoc consultancies to prove infringement of EU law, e.g. in **Bulgaria**. The hearing raised public awareness among EU and Bulgarian policy makers and it was enough to temporarily stop evictions and triggered the Commission’s questions to the Bulgarian authorities on their decision and on the procedures for evictions.

Our work: adapting to the context, changing and reviewing our strategies

Surprises, Regrets, Successes

There are clear lessons from this work on equality and antidiscrimination: Success seldom comes in the form we expect; a policy maker’s attention to a specific issue is not always positive; and that essential collaboration is often time-consuming, costly and difficult.

Starting with the surprises, the first came from the speed at which the decision on the infringements against the **Czech Republic** were approved. It took the Commission only 18 months to launch the infringement from the time when OSF, ERRC and AI filed our memo. It is necessary to ask ourselves why we did not start this action before, especially in light of the fact that we were pursuing a similar action on Italy, and with exactly the same partners. Another consideration on surprises and successes is that it is not true that **if we do not reach the launch of an infringement action, we have not succeeded.** In the case of **Bulgaria**, raising the issue at the EU level was enough to stop the forced evictions – even though systemic discrimination persists, and we are still at work on it. In the case of **Italy**, awareness-raising only led the then Italian authorities to do the ethnic census in a more politically correct way (taking pictures instead of fingerprints). However, even though the Commission never opened an infringement against Italy formally, our and our partners’ advocacy led to conspicuous amounts of pre-infringement meetings between EU and Italian authorities. A formal report on the enforcement of the Race Equality Directive cited our 2013 report affirming that “nomad camps” are Roma-only camps, i.e. segregated facilities. The Italians stopped building new camps in 2013. In 2014, an OSF-coordinated action towards the EU institutions, spearheaded by local NGOs and ERRC, prevented the refurbishment of a Roma camp in Naples with EU money.[[6]](#footnote-6) A few months before, OSF grantees won the first-ever case of racial discrimination for housing segregation in “nomad camps”.[[7]](#footnote-7) At the time of writing, the Commission was supposed to officially open infringement against Italy in March 2016 but did not. Apparently, the collaborative attitude of the Italian government has delayed the infringement action.[[8]](#footnote-8)

As concerns **equality data**, having the issue back on the agenda of the European Commission is a success. We were, however, extremely disappointed when we discovered that the Commission simply commissioned another report, instead of *acting*. Arguably, one of the best results of the equality data experience – and its main success – was the fact that many representatives of minorities at risk of discrimination in various EU states, the association of the Black German, the Swedish Muslim Women association, the Swedish Roma, the French Muslim Collective against Islamophobia, among others, welcomed and gained momentum from our initiative. Our success was connecting these groups and introducing them to policy makers, getting their insights on how data should be collected, and presenting this collaborative and inclusive method to officials. Our hope is that these groups will be inspired by our efforts to take up similar actions at the national level, in collaboration with OSIFE, to unblock the most reluctant states.

On **regrets**, we have already mentioned that our action on the **Czech Republic** could have started years earlier. Different to the implementation of the DH ruling, the Czech government started amending legislation immediately after the adoption of the infringement process. The leverage of the EU, which was at its maximum during the pre-accession years, seems to be working in the Czech case (even if we should keep in mind that the Commissioner responsible for this infringement is a Czech national). The Slovak infringement will prove the case.

On **Italy** we devoted a lot of resources to provide regular (yearly) updates to the European Commission concerning the situation on the ground and the state of the jurisprudence. Our initial claim that the ethnic census was a violation of EU data protection law was never taken up, neither at the EU nor at the national level. In *Salkanovic* *v. Ministry of Interior* (challenge to a Roma census database before the Rome civil court), notwithstanding the victory, the database of Roma was maintained; only the records of the single plaintiff in the case and his family were deleted. Yet although monetary compensation may provide satisfactory redress for victims our clients included, because *Salkanovic* was won at a relatively low level, the judgment of the court had no precedential value. Moreover, *Salkanovic* told no one he had one the case for fear of having to share his compensation.

Last, our effort to present ethnic profiling as a discriminatory practice outlawed by the EU Race Directive was counter-productive. The Commission took up the suggestion in our 2013 report and answered in its 2014 report that police activities were never to be covered by the report. In other words, we brought the Commission to re-assert a claim we disagree with, but which we would not win in court.

The last point is on **collaboration**: the work on the entire equality and antidiscrimination portfolio was a collaborative OSF effort. We have tried to reflect this in some of the publications about infringements and equality data that are not branded by one particular entity. We could not have worked on so many different geographic levels and tools without tight collaboration with colleagues and partners. However, collaboration has a cost. In the case of **infringements**, we experienced some competition between OSEPI, other OSF entities, grantees or AI. There have been cases where external partners claim success without mentioning OSF’s contribution, or have pursued contacts with institutions that we opened, without letting us know. This is not serious, just an experience that can often frustrate, create tensions and dilute our desire to collaborate, empower, and open avenues for advocacy to others. Internal coordination has been an issue for the filing of various submissions, delaying our action and making our partners nervous.

With reference to the **Equality Data Initiative**, we experienced two main challenges: the first was that of coordination. We set up a shared framework without knowing it, and without the infrastructure to lead it. The EDI ended up taking half of the time of a senior analyst and a full-time trainee for over 18 months.

Calls with board members and regular calls with OSF colleagues pre-empted what is now a charrette, but we lacked the human resources to run the project smoothly. Consultant engagements proved difficult. Second, we outlined an exit strategy that counted upon the collaboration of another OSF program, the Xen Fund, which was then merged into a wider structure. When OSIFE was created, it kept some “equality data relevant” grants, but not a specific line of budget to continue the work.

What would we do differently?

Many lessons can be drawn from this vast and varied portfolio. Our first several years, for instance, saw us focused exclusively on a specific country for **infringement** (Italy), without realizing that we could have taken a broader and more systematic approach. We had an attempt at systematizing the infringement work with the 2013 Shadow Report on the Race Equality Directive, but that effort was never followed up in detail. We took the lead of specific initiatives at the EU level, like the Italy and Bulgarian infringements, and the EDI not only because of our strategic evaluation, but also due to pressures from other programs. We reacted to these pressures once we realized that we had the resources to respond and that we were well-placed to engage - but we could have been more strategic.

For instance, we could have convened a discussion based on the 2013 Shadow Report to discuss, collectively, on which country to focus for infringements over the coming years. Similarly, we could have shared our experience on infringements with **other thematic programs** so that they could check whether they could advocate for the activation of any relevant EU legislation connected with the issues they pursue (this is an element currently under exploration).

On the specific items cited in this report, we should have set out the terms of the collaboration with our internal and external partners more clearly. In the case of the EDI, this would have allowed us not to end up over-burdened by the scope of the exercise. It would have also made it easier to adapt the initiative to various local contexts where other OSF programs have more expertise than we do. In most of the cases, we succeeded at the EU level, but we could have done more on the ground. The connection between OSEPI and the national context is an immense value. Not only because what we do here has consequences at the local level, but also, and more importantly, because our legitimacy is based on our expertise, which comes from knowing the issues raised by the grantees and partners on the ground.

1. <https://www.opensocietyfoundations.org/litigation/ec-v-italy> [↑](#footnote-ref-1)
2. The EU’s infringements procedure is laid out [here](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/index_en.htm): *If a possible infringement of EU law is identified by the Commission or reported in a complaint, the Commission attempts to quickly resolve the underlying problem with the Member State concerned by means of a structured dialogue (EU Pilot). Member States can provide further factual or legal information on a potential case of violation of Union law – the goal being to find a quick solution in compliance with EU law and thus to avoid the need for formal infringement procedure. If the Member State does not agree with the Commission or fails to implement a solution to rectify the suspected violation of EU law, the Commission can launch a formal infringement procedure. These contain a number of steps foreseen by the Treaties, each of which is laid down in a formal decision.*  [↑](#footnote-ref-2)
3. <https://www.opensocietyfoundations.org/litigation/nikolova-v-cez-electricity> [↑](#footnote-ref-3)
4. <http://www.opensocietyfoundations.org/briefing-papers/submission-committee-elimination-racial-discrimination-italy> [↑](#footnote-ref-4)
5. [*The Race Equality Directive: A Shadow Report*](https://www.opensocietyfoundations.org/reports/race-equality-directive-shadow-report) [↑](#footnote-ref-5)
6. <https://www.opensocietyfoundations.org/sites/default/files/briefing-ec-italy-roma-20150608_1.pdf> [↑](#footnote-ref-6)
7. <http://www.21luglio.org/en/tag/open-society-foundations-en> [↑](#footnote-ref-7)
8. Please note: The author has recently taken up a position with the Italian government. [↑](#footnote-ref-8)