E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX
(CFR-CDF)

ETHNIC PROFILING

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Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. tchèque) Editha Ziobene (Lithuanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.

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The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

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Executive Summary

Ethnic profiling, understood broadly as the practice of classifying individuals according to their race or ethnic origin, religion or national origin, in order to facilitate decision-making in law enforcement, may or may not be discriminatory, depending on the purpose of such classification and on the use made of this information; and that it may or may not be compatible with the rules pertaining to the protection of private life in the processing of personal data.

However, the use of 'racial' or ethnic characteristics as part of a set of factors that are systematically associated with particular offences and used as a basis for making law enforcement decisions is clearly discriminatory, not only because of the absence of any proven statistically significant correlation between indicators linked to race or ethnicity, religion or national origin, on the one hand, and propensity to commit certain criminal offences, on the other hand, but also because the principle of non-discrimination requires that only in exceptional circumstances should the race or ethnicity, the religion or the nationality of a person, influence the decision about how to treat or not to treat that person. Under Article 14 of the European Convention on Human Rights, 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures' (Eur. Ct. HR (2nd sect.), *Timishev v. Russia* (Appl. nos. 55762/00 and 55974/00), judgment of 13 December 2005 (final on 13 March 2006), § 58). The same conclusions follow from the International Convention for the Elimination of All Forms of Racial Discrimination. In 2005, considering that 'the risks of discrimination in the administration and functioning of the criminal justice system have increased in recent years, partly as a result of the rise in immigration and population movements, which have prompted prejudice and feelings of xenophobia or intolerance among certain sections of the population and certain law enforcement officials, and partly as a result of the security policies and anti-terrorism measures adopted by many States, which among other things have encouraged the emergence of anti-Arab or anti-Muslim feelings, or, as a reaction, anti-Semitic feelings, in a number of countries', the Committee for the Elimination of Racial Discrimination adopted a General Recommendation in which it emphasizes, in particular, that 'States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion' (Committee on the Elimination of Racial Discrimination, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005), para. 20).

Indeed, the consequences of treating individuals similarly situated differently according to their supposed 'race' or to their ethnicity has so far-reaching consequences in creating divisiveness and resentment, in feeding into stereotypes, and in leading to overcriminalization of certain categories of persons in turn reinforcing such stereotypical associations between crime and ethnicity, that differential treatment on this ground should in principle be considered unlawful under any circumstances.

At the same time, while individuals should be protected from any form of ethnic classification which could lead to these individuals being subjected to discrimination, ethnic profiling typically takes the form of *practices* by public authorities, which remain unregulated or may even be prohibited by law. Only the monitoring of the behaviour of the public authorities by the use of statistics may serve to highlight such practices. For instance, the revsion in the United Kingdom of the Police and Criminal Evidence Act 1984 Code A on Stop and Search in order to require the police when undertaking a stop and search of someone to record the person concerned's self-defined ethnic background and why the person was questioned, seeks to contribute to the monitoring of the behaviour of the police in such procedures. This constitutes the first condition for such discriminatory practices to be effectively combated. Indeed, proving discrimination may be difficult where the victim is required to put forward elements demonstrating, beyond reasonable doubt, that a discriminatory motive has been underlying a particular behaviour, if the victim cannot rely on such statistics. This is particularly the case since

ethnic profiling may be unintentional or unconscious. As noted by the Canadian courts : 'As with other systemic practices, racial profiling can be conscious or unconscious, intentional or unintentional. Racial profiling by police officers may be unconscious' (*The Queen v. Campbell*, Court of Quebec (Criminal Division) (n° 500-01-004657-042-001) (judgment of 27 January 2005 by The Honourable Westmoreland-Traoré), at para. 34). 'The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping' (*R. v. Brown,* 173 CCC (3d) 23, para. 8). This implies that the fact that ethnic profiling has occurred typically will be impossible to prove except by circumstantial evidence.

The rules on the protection of the right to respect for private life in the processing of personal data, as contained in the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (C.E.T.S., n° 108) or in the Basic Principles contained in the Appendix to the Recommendation Rec(87)15 addressed by the Committee of Ministers to the Member States of the Council of Europe, regulating the use of personal data in the police sector, or as may be expressed in the future in the Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters proposed by the European Commission in October 2005 (COM (2005) 475 of 4 October 2005), do not impose obstacles to such statistical processing of data collected in order to ensure an improved monitoring of the law enforcement authorities in the situations where they are allowed broad discretionary powers, which they might use arbitrarily or in discriminatory fashion.

In most of the EU Member States, law enforcement officers are granted broad discretionary powers in the fulfilment of certain duties, such as the performance of identity checks or 'stop-and-search' arrests, or the proactive surveillance of certain individuals identified as posing a threat to public order or security. The Constitutional Court of Slovenia, in a judgment delivered on 30 March 2006, found that such powers may have to contain sufficiently precise indications about how and in which conditions they should be exercised, in order to comply with the principle of legality and to avoid the risk of arbitrariness (judgment U-I-152/03). This position is also that of the European Court of Human Rights in its reading of the requirements of Article 5 of the European Convention on Human Rights, which guarantees the right to liberty and safety (Eur. Ct. HR (2nd sect.), *Enhorn v. Sweden* (Appl. No. 56529/00), judgment of 25 January 2005, § 37).

In sum, a legal framework ensuring an adequate protection from the risk of ethnic profiling in the field of law enforcement, should a) clearly prohibit ethnic profiling, to the extent that indicators relating to 'race' or ethnicity, religion or national origin, cannot be used as proxies for criminal behaviour, either in general or in the specific context of counter-terrorism strategies; b) facilitate the proof that such ethnic profiling is being practiced by law enforcement authorities by allowing the use of statistics to highlight the discriminatory attitudes of such authorities, insofar as this may be reconciled with the rules relating to the protection of private life in the processing of personal data; c) define with the greatest clarity possible the conditions under which law enforcement authorities may exercise their powers in areas such as identity checks or stop-and-search procedures; d) sanction any behaviour amounting to ethnic profiling not only through the use of criminal penalties, but also (or instead) through other means, including by providing civil remedies to victims or by administrative or disciplinary sanctions, insofar as the rules relating to evidence in criminal proceedings may constitute an obstacle to effectively combating such behavior and protecting the victims of such behaviour.

The practices referred to above do not take the form of systematically classifying individuals according to their 'race', ethnic origin, religion or national origin. They constitute, rather, discriminatory practices by law enforcement authorities which are in principle not codified – hence the difficulty of proving them, although there are exceptions (see *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, 9 December 2004, where the practice of the immigration officers operating at Prague Airport against Roma seeking to travel from that airport to the United Kingdom was practiced openly). In contrast, the profiling operation (*Rasterfahndung*) developed in Germany from the end of 2001 until early 2003 did entail such a

classification on a systematic basis. The Federal Constitutional Court (*Bundesverfassungsgericht*) decided on April 4th, 2006, that the *Rasterfahndung* was not conform to the individual's fundamental right of self-determination over personal information (Art. 2(1) and 1 of the *Grundgesetz*). In its view, the method of automatic data processing whereby police authorities and public prosecutors combine certain sets of personal data of private individuals as available on general registers (such as name, address, date and place of birth) with additional data (in particular sensitive data) from other registers (such as University registers revealing religion, political attitude, university curriculum, etc.) in order to narrow the circle of persons to be observed in order to detect potential suspects of serious criminal offences, could only be considered admissible where the public authorities are acting in response to a 'specific endangerment' to public order and/or individual rights (1 BvR 518/02).

A review of the practices found to exist in the Member States leads to the following conclusions. The wide discretionary powers of the police in 'stop and search' procedures, and the absence of any monitoring of the behaviour of the police, in particular by the collection of data allowing to evaluate the impact of such searches on the members of visible minorities, are particularly problematic, since they create a sense of impunity within the police, and of powerlessness – but also resentment – among the targeted minorities. In addition, the role of law enforcement authorities in the enforcement of immigration rules will justify in many cases stopping persons, for the purpose of checking their identity and administrative situation, on the basis of indicia, in particular based on ethnicity, of the persons targeted having a foreign nationality. Finally, proactive policing has been significantly encouraged by the need to combat more effectively the terrorist threat following the events of September 11th, 2001, but has since largely extended beyond counter-terrorism to various forms of organized criminality. This consists in taking action prior to the commission of the crime, in order to prevent the crime from being committed, rather than to seek to intercept and arrest the authors of crimes once these have been committed. This redefinition of the role of criminal investigations, which leads the police to borrow methods (including profiling methods) from security services, also significantly raises the risk of discriminatory practices, in this case consisting in the targeting of certain individuals because of their membership in certain communities or groups, in particular on the basis of religion or national origin. The opinion provides a number of examples illustrating these risks.

Ethnic Profiling

1. The definition of ethnic profiling

In its letter of 7 July 2006, the European Commission defines racial or ethnic profiling as 'encompassing any behaviour or discriminatory practices by law enforcement officials and other relevant public actors, against individuals on the basis of their race, ethnicity, religion or national origin, as opposed to their individual behaviour or whether they match a particular 'suspect' description'.

This definition is obviously overbroad. Taken literally, it would cover any form of discrimination on grounds of race, ethnicity, religion or national origin, whether or not they take the form of 'profiling' as such. Thus, the definition offered does not indicate to which extent 'racial or ethnic profiling' is specific from any other kind of differential treatment committed by 'law enforcement officials and other relevant public actors'. Moreover, the definition offered confuses what it attempts to define (ethnic profiling) with discrimination, although there are instances of profiling which should not be considered as discriminatory.[1] The Network believes, instead, that ethnic profiling, understood broadly as the practice of classifying individuals according to their race or ethnic origin, religion or national origin, in order to facilitate decision-making, may or may not be discriminatory, depending on the purpose of such classification and on the use made of this information; and that it may or may not be compatible with the rules pertaining to the protection of private life in the processing of personal data. Moreover, in order to avoid relying on an overbroad definition of ethnic profiling, it will be assumed in this opinion that ethnic profiling is treatment on the basis of 'race' or ethnic origin, religion or national origin, which relies on the assumption that there exists a statistically valid correlation between certain behaviours and the membership in these categories.[2] Thus, the definition proposed by the Network in this opinion is of ethnic profiling as

> the practice of classifying individuals according to their 'race' or ethnic origin, their religion or their national origin, on a systematic basis, whether by automatic means or not, and of treating these individuals on the basis of such a classification.

The purposes of thus classifying individuals may be legitimate or not, since it may serve a variety of means, such as monitoring the behaviour or law enforcement authorities in order to ensure that they do not commit direct or indirect discrimination, ensuring a diverse composition of the workforce,[3] or,

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[1] See, for instance, the 2002 Report on Terrorism and Human Rights of the Inter-American Commission on Human Rights, where it noted : 'Any use of profiling or similar devices by a State must comply strictly with international principles governing necessity, proportionality, and non discrimination and must be subject to close judicial scrutiny' (Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, paras 351 – 353 (2002) *available at* https://www.cidh.oas.org/Terrorism/Eng/toc.htm). This presupposes that certain forms of profiling may be acceptable, to the extent they comply with the criteria of necessity and proportionality and are not discriminatory.

[2] The link between 'ethnic profiling' and stereotyping is perfectly highlighted in the following definition proposed by J. Goldston, the Executive Director of the Open Society Justice Initiative : 'By "ethnic profiling" we mean the use of racial, ethnic or religious stereotypes in making law enforcement decisions to arrest, stop and search, check identification documents, mine databases, gather intelligence and other techniques' (*Ethnic Profiling and Counter-Terrorism : Trends, Dangers and Alternatives*, June 2006).

[3] In **Sweden** for instance, most of the debate concerning ethnic profiling has concerned the necessity for employers to have an overview of the ethnic composition of their staff, in order to design adequate positive measures : see Ombudsman against Ethnic Discrimination, Råd till arbetsgivare – att främja lika rättigheter och lika möjligheter oavsett etnisk tillhörighet, religion eller annan trosuppfattning, 2nd ed., 2004. In the **United Kingdom**, public authorities are required to undertake ethnic monitoring as a result of the duty in section 71(1) to produce race equality scheme (public authorities), or a race equality policy (schools and institutions of further and higher education). Similar monitoring of workforces is being encouraged by the Commission for Racial Equality. All the data gathered for this purpose would be governed by the requirements of the Data Protection Act 1998. **Northern Ireland** offers another example. The *Fair Employment and*

indeed, treating individuals differently according to their 'race' or ethnic origin, their religion or their national origin, in ways which are discriminatory. Moreover, both the processing of sensitive personal data which such classifications entail and the adoption of certain decisions on the basis of such data may or may not comply with the conditions of legitimacy and proportionality which are required under data protection legislation. Thus, ethnic profiling may be part of a discriminatory policy, and it may violate the rules pertaining to the processing of sensitive personal data. Any such profiling therefore should include adequate safeguards to protect the fundamental rights of the individual. However, it is unjustified to equate ethnic profiling with discrimination, since this requires a case-by-case examination of the objectives pursued and the means used.

However, 'ethnic (or racial) profiling' in current debates has been given a more restricted meaning, corresponding to the following definition provided by J. Goldston, the Executive Director of the Open Society Justice Initiative, which aptly emphasizes the link between 'ethnic profiling' and stereotyping :

> By "ethnic profiling" we mean the use of racial, ethnic or religious stereotypes in making law enforcement decisions to arrest, stop and search, check identification documents, mine databases, gather intelligence and other techniques.[4]

The use of 'racial' or ethnic characteristics as part of a set of factors that are systematically associated with particular offences and used as a basis for making law enforcement decisions is clearly discriminatory, not only because of the absence of any proven statistically significant correlation between indicators linked to race or ethnicity, religion or national origin, on the one hand, and propensity to commit certain criminal offences, on the other hand, but also because the principle of non-discrimination requires that only in exceptional circumstances should the race or ethnicity, the religion or the nationality of a person, influence the decision about how to treat or not to treat that person.[5] As explained in a case concerning the United Kingdom Race Relations Act by Baroness Hale of Richmond from the House of Lords :

> The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have that strength. If strength is a qualification, all applicants should be required to demonstrate that they qualify.[6]

This is also the position of the European Court of Human Rights. In the judgment it delivered on 13 December 2005 in *Timishev v. Russia*, the European Court of Human Rights, the Court addresses the distinction between 'race' and 'ethnic origin'. The circumstances were that Timishev, a Chechen lawyer, lived in Nalchik, in the Kabardino-Balkaria Republic of the Russian Federation, as a forced

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*Treatment (Northern Ireland) Order 1998 (FETO) (*1998 No. 3162 (N.I. 21), 16 December 1998, as amended by the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003, which came into operation on 10 December 2003). The FETO places a number of significant duties on employers which may lead to the adoption of affirmative action measures in order to ensure a proportionate representation of the Protestant and Catholic communities. In particular, all registered employers must submit annually to the Commission a "monitoring return" giving details of the community background of their workforce and of those applying to positions. Such monitoring of the composition of the workforce requires that the employees, or those applying for employment, be classified as belonging either to the Protestant or to the Roman Catholic communities (see sect. 53(3) of the FETO). Many other such examples could be provided.

[4] *Ethnic Profiling and Counter-Terrorism : Trends, Dangers and Alternatives*, June 2006.

[5] See, in particular, James A. Goldston, *Justice Initiative Presentation: Fighting Terrorism while Fighting Discrimination: Can Protocol No. 12 Help* Open Society Justice Initiative Seminar to Mark the Entry into Force of Protocol No. 12 to the ECHR *available at* http://www.justiceinitiative.org/db/resource2?res_id=103058 (describing the use of racial and ethnic profiling in Europe since September 11, 2001 under the guise of 'national security').

[6] *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, 9 December 2004, at para. 74. We return to this case below.

migrant: his property in Grozny, in the Chechen Republic, had been destroyed by a military operation in 1996. In 1999, the applicant and his driver travelled by car from Nazran in the Ingushetia Republic to Nalchik. Their car was stopped at checkpoint and officers of the Inspectorate for Road Safety refused him entry. The Court finds it sufficiently established that the refusal was based on an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit persons of Chechen ethnic origin. Timishev had to turn round and make a detour of 300 kilometres to reach Nalchik through a different checkpoint. The Court concluded that the non-discrimination provision of Article 14 ECHR had been violated in combination with the freedom of movement guaranteed in Article 2 of Protocol n° 4. It noted that the Kabardino-Balkarian senior police officer ordered traffic police officers not to admit 'Chechens', and continued :

> … As, in the Government's submission, a person's ethnic origin is not listed anywhere in Russian identity documents, the order barred the passage not only of any person who actually was of Chechen ethnicity, but also of those who were merely perceived as belonging to that ethnic group. It has not been claimed that representatives of other ethnic groups were subject to similar restrictions […]. In the Court's view, this represented a clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one's ethnic origin.
> […] A differential treatment of persons in relevant, similar situations, without an objective and reasonable justification, constitutes discrimination (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV). Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination […]. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment […].[7]

The Court seems to exclude that any difference in treatment based on ethnicity may be justified, where this leads to imposing disadvantages on the basis of this criterion alone or to a decisive extent :

> The Government did not offer any justification for the difference in treatment between persons of Chechen and non-Chechen ethnic origin in the enjoyment of their right to liberty of movement. In any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.[8]

The implication is that, even if there existed a statistically proven correlation between certain characteristics relating to 'ethnicity' such as religion, national origin, language or tribal affiliation, on the one hand, certain criminal behaviors such as, for instance, suicide terrorist attacks on the other hand, this would not justify imposing a differential treatment on the basis of ethnicity.[9] Indeed, the consequences of treating individuals similarly situated differently according to their supposed 'race' or to their ethnicity has so far-reaching consequences in creating divisiveness and resentment, in feeding into stereotypes, and in leading to overcriminalization of certain categories of persons in turn reinforcing such stereotypical associations between crime and ethnicity, that differential treatment on this ground should in principle be considered unlawful under any circumstances.

However, while ethnic (or racial) profiling which associates members of certain groups defined by their ethnicity, religion or national origin, to criminal behaviour, or to terrorist activities, clearly violates the principle of non-discrimination thus understood, the simply fact of classifying individuals

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[7] Eur. Ct. HR (2nd sect.), *Timishev v. Russia* (Appl. nos. 55762/00 and 55974/00), judgment of 13 December 2005 (final on 13 March 2006), §§ 54-57.
[8] At para. 58.
[9] In that respect, the position adopted by the Network in March 2003, which shall be referred to below (see text corresponding to fn. 17), should be considered as insufficiently protective of the right to equal treatment, in the light of the evolution of the case-law of the European Court of Human Rights.

according to ethnicity, religion or national origin, is not necessarily illegitimate or disproportionate, and this may in fact be required in order to unmask certain discriminatory practices, especially when they remain informal rather than codified or the subject of internal or public orders.

Another difficulty encountered in attempting to define adequately 'ethnic (or racial) profiling' is that 'race' is a non-scientific notion. There are no 'races' but there is 'racism', i.e. ideologies or policies based on the false assumption of the existence of races.[10] Likewise, there exists 'racial discrimination', which is broadly construed in international law as discrimination based either on physical characteristics of the individual or on elements such as national origin, language, religon or lifestyle, which constitute 'ethnicity'.[11] Hence, using the term 'racial profiling', with the distinctively negative connotation attached to this term, is inappropriate, unless this is used as a way to refer to discriminatory forms of 'ethnic profiling', the latter notion in principle including also instances of non-discriminatory, permissible use of ethnic factors by private or public bodies. In the remainder of this opinion, the term 'ethnic profiling' will be used, with the understanding that this includes all forms of classification of individuals according to their 'race', their ethnicity, their religion or their national origin. The term 'racial profiling' is used only where this expression corresponds to the concepts addressed in the Member States' legislations.[12]

The definition retained here does not include in the concept of ethnic profiling the practice referred to in the Netherlands as 'red lining' in public policies. This refers to the practice of so-called rating offices which single out certain *geographical zones or neighbourhoods* (e.g. because of high crime rates, unemployment or other indicators), and result in excluding the individuals living in these areas from certain services because they might pose a higher risk. This practice may have a disproportionate impact on individuals belonging to ethnic minorities, if they are overrepresented in these neighbourhoods – indeed, sometimes the prevalence of ethnic minorities is directly used as a negative indicator. The notion of 'ethnic profiling' is distinct, since it is based on the identification of particular *individuals* to certain categories, either in order to evaluate the impact of a particular regulations or practices, or in order to adopt decisions relating to that individual.

That 'red lining' in the meaning referred to above may present certain similarities with 'ethnic profiling' is illustrated by a case presented in 2004 to the Equal Treatment Board *(Commissie gelijke*

[10] See, on the question of the definition of racism or xenophobia, EU Network of Independent Experts on Fundamental Rights, Opinion n° 2005-5, Combating Racism and Xenophobia through criminal legislation: the situation in the EU Member States, 28 November 2005, at 1.2. There exists no authoritative definition of racism, but a number of instruments have defined this notion in specific contexts. Thus, Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (660 U.N.T.S. 195, entered into force on 4 January 1969) imposes on States Parties to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof'. For the purposes of the Additional Protocol to the Convention on Cyber crime of the Council of Europe of 28 January 2003, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 'racist and xenophobic material' means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors. The European Commission against Racism and Intolerance (ECRI) of the Council of Europe, in its General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Discrimination defines 'racism' as 'the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons'.

[11] As noted by the European Court of Human Rights in the case of *Timishev v. Russia*, cited above n. 7, at § 55 : 'Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds'.

[12] It will be seen that in the United Kingdom, the effect of the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000, is to impose an absolute prohibition of 'racial profiling', while 'ethnic profiling', by contrast, remains admissible in immigration and nationality functions (where this is contained in legislation or expressly authorized by ministers). This constitutes a rather exceptional case where a distinction should be made between 'ethnic' and 'racial' profiling, for reasons other than symbolic. It is for symbolic reasons that, in general, the expression 'ethnic profiling' will be preferred in this opinion.

behandeling). The applicant in this case had a dispute with a commercial company that transmitted encoded television programmes. Subscribers receive a decoder that enables them to receive the programmes. In the instant case, the applicant was experiencing difficulties with her decoder, but the company refused to send a serviceman to the neighbourhood where she was living. It turned out that for security reasons the company did not wish to service certain parts of Amsterdam with high crime rates; these areas where defined by reference to their postal codes. The Board noted that the neighbourhoods concerned was primarily inhabited by *autochtonen,* i.e. citizens with a non-Dutch origin. Hence the exclusion of these neighbourhoods amounted to indirect discrimination based on race. The Board accepted that the policy served a legitimate aim (i.e. to protect the security of the servicemen, their cars and their equipment), but it still found that the proportionality requirement was not met. Crime levels were not particularly high in the specific part of neighbourhood where the applicant lived, and in addition other measures to protect the personnel were conceivable.[13] A closely related example is a report published in 2000 by the Dutch Data Protection Supervisor (*Registratiekamer)* on the phenomenon of 'credit scoring', i.e. the practice of companies to have an assessment of the financial credibility of potential clients. It turned out that the ethnic background of individuals is sometimes used as an indicator for their creditworthiness. For instance individuals living in neighbourhoods with a large proportion of immigrants, or in camps set up for Travellers, will be rated lower on that count; services may even be denied solely on that ground.[14] However, in contrast with the previous example, no ethnic stereotyping linking ethnicity to crime was involved here.

2. Ethnic profiling in the context of anti-terrorism strategies and in the fulfilment of law enforcement duties

As illustrated, perhaps most dramatically, by 'shoot-to-kill' policies designed for those who are suspected of taking part in terrorist activity and are considered to represent an immediate threat to the life and security of others, ethnic profiling may have particularly severe consequences in the context of the 'war on terror' launched since the attacks on New York and Washington on September 11th, 2001.[15] 'Shoot-to-kill' policies developed in order to neutralize suspected suicide bombers identified on the basis of a set of indicia including membership of certain ethnic or religious groups, it has been rightly noted, illustrate a focus on particular behavioral and physical characteristics', which is 'representative of a broader trend to substitute reliable intelligence with confusing and often stereotyped profiles of threatening individuals'.[16] In March 2003, the Network issued its Thematic Comment n°1 on the balance between freedom and security in the response by the European Union and its Member States to the threat of terrorism. It commented in the following terms on the recommendation of the Justice and Home Affairs Council of 28-29 November 2002 on the development of terrorist profiles[17]:

> The development of terrorist profiles on the basis of characteristics such as nationality, age, education, birthplace, 'psycho-sociological characteristics', or family situation – all elements which appear in the recommendation on developing terrorist profiles – in order to identify terrorists before the execution of terrorist acts and in cooperation with the immigration services and the police to prevent or reveal the presence of terrorists in the territory of Member States – presents a major risk of discrimination. The development of these profiles for operational

[13] Case 2004-15, views of 1 March 2004.
[14] R.W.A. Wishaw, *De gewaardeerde klant – privacyregels voor credit scoring (*Registratiekamer, Den Haag, 2000). Similar conclusions were drawn in M. Aalbers, *Redlining in Nederland – Oorzaken en gevolgen van uitsluiting op de hypotheekmarkt* (Amsterdam, 2003).
[15] A systematic analysis of these policies has recently been presented, which focuses in particular on Training Keys I and II released in July 2005 by the International Association of Chiefs of Police (IACP). These Training Keys aim to provide police officers with guidance about how to deal with suspect suicide bombers. See the briefing paper prepared by the Centre for Human Rights and Global Justice of New York University School of Law, *Irreversible Consequences: Racial Profiling and Lethal Force in the 'War on Terror'*, May 2006.
[16] Id., p. 12.
[17] JHA Council of 28 and 28 November 2002, doc. 14817/02 (press 875), Annex II p. 21. For the recommendation itself, which is not mentioned in the summary of the conclusions, see doc. 11/11858/02.

> purposes can only be accepted in the presence of a fair, statistically significant demonstration of the relations between these characteristics and the risk of terrorism, a demonstration that has not been made at this time.

The Council of Europe Commission against Racism and Intolerance (ECRI) also noted that 'the fight against terrorism engaged by the member States of the Council of Europe since the events of 11 September 2001 has in some cases resulted in the adoption of directly or indirectly discriminatory legislation or regulations, notably on grounds of nationality, national or ethnic origin and religion and, more often, in discriminatory practices by public authorities', and it therefore recommended the Member States of the Council of Europe 'to review legislation and regulations adopted in connection with the fight against terrorism to ensure that these do not discriminate directly or indirectly against persons or groups of persons, notably on grounds of "race", colour, language, religion, nationality or national or ethnic origin, and to abrogate any such discriminatory legislation'; 'to refrain from adopting new legislation and regulations in connection with the fight against terrorism that discriminate directly or indirectly against persons or groups of persons, notably on grounds of "race", colour, language, religion, nationality or national or ethnic origin'; and 'to ensure that legislation and regulations, including legislation and regulations adopted in connection with the fight against terrorism, are implemented at national and local levels in a manner that does not discriminate against persons or groups of persons, notably on grounds of actual or supposed "race", colour, language, religion, nationality, national or ethnic origin'.[18]

While the recent use of ethnic profiling in anti-terrorist strategies is particularly alarming, it is not without precedents. Indeed, the notion of 'racial profiling' has its source in the fulfilment of law enforcement duties, particularly by the association of certain profiles, including 'race' or ethnicity among other indicators, with certain criminal offences. Thus, before Canadian courts, racial profiling has been defined as involving 'the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group'.[19] In *R. v. Richards*, a case presented to the Ontario Court of Appeals, the African Canadian Legal Clinic defined 'racial profiling' thus:

> Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.[20]

In accordance with the questions formulated by the European Commission in its request of July 7th, 2006, this opinion will essentially address ethnic profiling in the context of the fulfilment of law enforcement duties by public officials. In the next section, the general framework is recalled. The question of ethnic profiling in the context of law enforcement activities is related to general requirements relating to the prohibition of discrimination, the restrictions imposed on the processing of personal data which are considered particularly 'sensitive', such as data relating to 'race' or ethnic origin, and the evidentiary burden in discrimination cases.

3. The protection of the individual against discriminatory ethnic profiling : the general framework

All the EU Member States offer some protection against discriminatory ethnic profiling in general antidiscrimination legislation. Most national constitutions contain an equality and/or an

[18] ECRI General Policy Recommendation N° 8 on Combating racism while fighting terrorism (adopted on 17 March 2004).
[19] *R. v. Brown,* 173 CCC (3d) 23, para. 7.
[20] *R. v. Richards* (1999), 26 C.R.(5th) 286 (Ont. C.A.).

antidiscrimination provision which may be invoked against such practices. Moreover, all the EU Member States provide for certain safeguards against the processing of personal data relating to 'race' or ethnic origin, religion or national origin, to the extent that such information is identified or identifiable to any particular natural person. Finally, in order to address the question of ethnic profiling in the context of law enforcement activities by public authorities, it is necessary to recall how the question of the burden of proof arises in discrimination cases.

3.1. The prohibition of discrimination on grounds of race or ethnic origin, religion or national origin

All the EU Member States are parties to the 1965 International Convention on the Elimination of All forms of Racial Discrimination (ICERD). This convention defines 'racial discrimination' as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.[21] It prohibits ethnic profiling which results in such a discrimination.[22] In 2005, considering that 'the risks of discrimination in the administration and functioning of the criminal justice system have increased in recent years, partly as a result of the rise in immigration and population movements, which have prompted prejudice and feelings of xenophobia or intolerance among certain sections of the population and certain law enforcement officials, and partly as a result of the security policies and anti-terrorism measures adopted by many States, which among other things have encouraged the emergence of anti-Arab or anti-Muslim feelings, or, as a reaction, anti-Semitic feelings, in a number of countries', the Committee for the Elimination of Racial Discrimination adopted a General Recommendation in which it emphasizes, in particular, that

> States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.[23]

However, in the same General Recommendation, the Committee for the Elimination of Racial Discrimination encourages the States parties, in order 'to better gauge the existence and extent of racial discrimination in the administration and functioning of the criminal justice system', to adopt a set of factual indicators facilitating the identification of such racial discrimination. In this respect, according to the Committee:

> 1. States parties should pay the greatest attention to the following possible indicators of racial discrimination:
> (a) The number and percentage of persons belonging to the groups referred to in the last paragraph of the preamble who are victims of aggression or other offences, especially when they are committed by police officers or other State officials;
> (b) The absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination in the country. Such a statistic should not be viewed as necessarily positive, contrary to the belief of some States. It may also reveal either that victims have inadequate information concerning their rights, or that they fear social censure or reprisals, or that victims with limited resources fear the cost and complexity of the judicial process, or that

[21] Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force on January 4th, 1969.
[22] Committee on the Elimination of Racial Discrimination, *Concluding Observations:*
Canada, U.N. Doc. CERD C/61/CO/3, para. 338 (2002) (calling on Canada to ensure that application of Canada's Anti-Terrorism Act 'does not lead to negative consequences for ethnic and religious groups, migrants, asylum seekers and refugees, in particular as a
result of racial profiling').
[23] Committee on the Elimination of Racial Discrimination, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005), para. 20.

there is a lack of trust in the police and judicial authorities, or that the authorities are insufficiently alert to or aware of offences involving racism;
(c) Insufficient or no information on the behaviour of law enforcement personnel vis-à-vis persons belonging to the groups referred to in the last paragraph of the preamble;
(d) The proportionately higher crime rates attributed to persons belonging to those groups, particularly as regards petty street crime and offences related to drugs and prostitution, as indicators of the exclusion or the non-integration of such persons into society;
(e) The number and percentage of persons belonging to those groups who are held in prison or preventive detention, including internment centres, penal establishments, psychiatric establishments or holding areas in airports;
(f) The handing down by the courts of harsher or inappropriate sentences against persons belonging to those groups;
(g) The insufficient representation of persons belonging to those groups among the ranks of the police, in the system of justice, including judges and jurors, and in other law enforcement departments.
2. In order for these factual indicators to be well known and used, States parties should embark on regular and public collection of information from police, judicial and prison authorities and immigration services, while respecting standards of confidentiality, anonymity and protection of personal data.
3. In particular, States parties should have access to comprehensive statistical or other information on complaints, prosecutions and convictions relating to acts of racism and xenophobia, as well as on compensation awarded to the victims of such acts, whether such compensation is paid by the perpetrators of the offences or under State compensation plans financed from public funds.

Therefore, one central question in this opinion is the distinction between ethnic profiling as a means to identify instances of racial or ethnic discrimination, on the one hand, and ethnic profiling which constitutes *per se* a form of racial discrimination, on the other hand. Perhaps paradoxically, while individuals should be protected from any form of ethnic classification which could lead to these individuals being subjected to discrimination, ethnic profiling typically takes the form of *practices* by public authorities, which remain unregulated or may even be prohibited by law. Only the monitoring of the behaviour of the public authorities by the use of statistics may serve to highlight such practices.[24] This constitutes the first condition for such discriminatory practices to be effectively combated.

3.2. The question of the processing of personal data relating to the 'race' or ethnic origin, religion or national origin of an identified or identifiable individual

In this context, the framework of the existing regulations on the protection of the right to respect for private life vis-à-vis the processing of personal data relating to 'race' or ethnic origin, religion or national origin, takes on a crucial importance. All the EU Member States are bound by the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[25] This Convention secures for every individual respect for his right to privacy, with regard to automatic processing of personal data relating to him, in both the public and private sectors. Although, in European Union law, the guarantees contained in this instrument have been further developed by Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[26] and, when it will be adopted, by the Framework Decision on the protection of personal data processed in the framework of police

[24] For instance, the revsion in the **United Kingdom** of the Police and Criminal Evidence Act 1984 Code A on Stop and Search in order to require the police when undertaking a stop and search of someone to record the person concerned's self-defined ethnic background and why the person was questioned, seeks to contribute to the monitoring of the behaviour of the police in such procedures. We return to this below.
[25] C.E.T.S., n° 108.
[26] OJ L 281 of 23.11.1995, p. 31.

and judicial cooperation in criminal matters proposed by the European Commission in October 2005,[27] it should nevertheless be recalled that, since 1981, it has been a cardinal principle of data protection legislation that data relating to the 'race' or ethnic origin, or to the religion of the individual, deserve a high level of protection, because of the risks of discrimination entailed in the processing of such data. Article 6 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data states in this regard that:

> Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards.

However, this guarantee may be restricted under certain conditions, defined in Article 9 of the Convention : any derogation[28] must be provided for under national legislation and must constitute a necessary measure in a democratic society in the interests of protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences ; or of protecting the data subject or the rights and freedoms of others.

Article 6 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data applies to the police sector. Indeed, the Committee of Ministers of the Council of Europe has gone even further in ensuring the protection of sensitive personal data. Under Principle 2.4. of the Basic Principles contained in the Appendix to the Recommendation Rec(87)15 addressed by the Committee of Ministers to the Member States of the Council of Europe, regulating the use of personal data in the police sector[29]:

> The collection of data on individuals solely on the basis that they have a particular racial origin, particular religious convictions, sexual behaviour or political opinions or belong to particular movements or organisations which are not proscribed by law should be prohibited. The collection of data concerning these factors may only be carried out if absolutely necessary for the purposes of a particular inquiry.

The Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters proposed by the European Commission is intended to apply to 'the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system by a competent authority for the purpose of the prevention, investigation, detection and prosecution of criminal offences'.[30] Article 6 concerns the processing of 'special categories of data'. It states:

> 1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.
> 2. Paragraph 1 shall not apply where
> - processing is provided for by a law and absolutely necessary for the fulfilment of the legitimate task of the authority concerned for the purpose of the prevention, investigation, detection or prosecution of criminal offences or if the data subject has given his or her explicit consent to the processing, and
> - Member States provide for suitable specific safeguards, for example access to the data concerned only for personnel that are responsible for the fulfilment of the legitimate task that justifies the processing.

[27] COM (2005) 475 of 4 October 2005.
[28] This term is used in the Convention. However, 'derogation' should not be understood here in the technical sense it has under Article 15 of the European Convention on Human Rights.
[29] Adopted by the Committee of Ministers on 17 September 1987, at the 401st meeting of the Ministers' Deputies.
[30] Article 3(1).

The importance of these safeguards could hardly be overemphasized.[31] At the same time, it may be recalled that 'personal data' are defined as any information relating to an identified or identifiable natural person.[32] No processing of such 'personal data' is required where information is collected, on an anonymous basis, in order to establish the existence of discriminatory practices amounting to ethnic profiling. In its Thematic Comment n°3 on the rights of minorities in the European Union, the Network explained the distinction thus[33]:

> … once personal data are made anonymous in order to be used in statistics, the information contained in such statistics should not be considered as personal data. This should be taken into consideration when comparing the three possible forms which monitoring, based for example on ethnic or religious categories, is envisaged. Such a monitoring may consist in:
>
> 1° collecting information from the individuals concerned, in order to use this information for statistical purposes after these data are anonymized;
> 2° processing information not obtained from the individuals concerned but relating to particular individuals, for the same statistical purpose;
> 3° the use of other reliable techniques, such as those traditionally used in social science empirical research, including the use of representative samples, personal interviews conducted by independent researchers, under the principle of anonymity.
>
> In many cases, this latter approach (3°) may lead to obtaining results both reliable and comparable. Indeed, the collection of data relating, for instance, to ethnicity or religion, […], by the use of individual questionnaires initially linked to identified or identifiable individuals, as in the case of censuses including an item on the membership of the individual to any particular group, may in many cases lead to underreporting or over-reporting […]. Therefore the latter monitoring technique, where it is practicable and presents a same or better degree of reliability, may be preferred to a monitoring based on the collection of personal data from the individuals concerned, because of the absence of risk it presents for the protection of personal data.
>
> Where monitoring techniques are used which imply the processing of personal data, the rules relating to the protection of personal data must be fully observed, and the interference with the right to respect for private life limited to what is strictly necessary. Under these forms of monitoring, certain data, some of which may be sensitive (ethnicity and religion), may be collected from the individual concerned for statistical purposes, for instance on the basis of a questionnaire addressed to him/her (primary collection of personal data) (1°); or certain data collected for other purposes may be processed or communicated for statistical purposes (secondary collection of personal data) (2°). Recital 29 of the Preamble and Article 6(1)(b) of

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[31] These safeguards have occasionally been interpreted broadly, so as to make it impossible in practice to implement positive actions schemes in a field such as employment. In **Belgium** for instance, the Commission for the protection of privacy has issued an opinion concerning the registration by private interim agencies of religious opinions or racial or ethnic origins of job seekers in their files. The Commission stresses that these are sensitive data whose treatment is in principle prohibited, except with the written consent of the person concerned. However, such consent cannot allow the processing of data that would not respect the general conditions of legality of the treatment of data: personal data must be processed fairly and lawfully and be adequate, relevant and not excessive in relation to the purposes for which they are processed. The Commission stresses that in the present case, there is a real danger that such data be used by interim agencies for discriminatory purposes. Since workers cannot be selected on the basis of their religious opinions or their racial or ethnic origins, these data are irrelevant and inadequate to the purposes of the processing. Their processing is, therefore, illegal (Commission pour la protection de la vie privée (Commission for the protection of private life), *Avis d'initiative relatif au traitement de données à caractère personnel réalisé par les sociétés privées d'interim,* Opinion 8/2002, 2 November 2002).

[32] The definitions of the instruments cited coincide in this regard. For instance, under both Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and the Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, 'personal data' are defined as 'any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity' (Art. 2, a)).

[33] Para. 2.4.

[Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data] make it clear that, insofar as the initial collection of personal data took place for specified, explicit and legitimate purposes, the further processing of personal data for historical, statistical or scientific purposes should not generally to be considered incompatible with the purposes for which the data have previously been collected provided that Member States furnish suitable safeguards, which must in particular rule out the use of the data in support of measures or decisions regarding any particular individual.

However, where the monitoring involves the use of personal data, the principles enumerated in the Recommendation No. R (97) 18 of the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes, adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers' Deputies, should be complied with. In particular, this Recommendation prescribes that personal data collected and processed for statistical purposes shall be made anonymous as soon as they are no longer necessary in an identifiable form (Principle 3.3.), i.e., immediately after the end of the data collection or of any checking or matching operations which follow the collection, except if identification data remain necessary for statistical purposes and the identification data are separated and conserved separately from other personal data, unless it is manifestly unreasonable or impracticable to do so (Principle 8.1. and Principle 10.1), or if the very nature of statistical processing necessitates the starting of other processing operations before the data have been made anonymous and as long as all the appropriate technical and organisational measures have been taken to ensure the confidentiality of personal data, including measures against unauthorised access, alteration, communication or any other form of unauthorised processing (Principle 8.1. and Principle 15). It also prescribes that, where personal data are collected and processed for statistical purposes, they shall serve only those purposes, and shall therefore not be used to take a decision or measure in respect of the data subject, nor to supplement or correct files containing personal data which are processed for non-statistical purposes (para. 4.1.); and that, in order for the processing of personal data for statistical purposes to remain proportionate, only those personal data shall be collected and processed which are necessary for the statistical purposes to be achieved, which implies in particular that identification data shall only be collected and processed if this is necessary (para. 4.7.). Specific principles governing the information of the persons concerned apply, moreover, in the context of either the primary or the secondary collection of personal data for statistical purposes (Principles 5.1. to 5.5.).

Recommendation No. R (97) 18 provides that when, for statistical purposes linked to monitoring, personal data are collected from the person concerned, he/she must be informed of the compulsory or optional nature of the response and the legal basis, if any, of the collection (Principle 5.1.), and any penalties for a refusal to reply may only be imposed by law (Principle 6.4.). However, where the data collected from the person concerned relate directly or indirectly to the membership of the person of a minority, replying to such a question should always be optional. This follows both from Article 3 of the Framework Convention on the Protection of National Minorities, which provides that every person belonging to a national minority shall have the right freely to choose to be treated as such, and, with respect to the membership of ethnic or religious minorities which require that the person concerned provide information about his/her ethnic origin or religion, from Principle 6.2. of the Recommendation No. R (97) 18 of the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes, which provides that "Where the consent of the data subject is required for the collection or processing of sensitive data, it shall be explicit, free and informed. The legitimate objective of the survey may not be considered to outweigh the requirement of obtaining such consent unless an important public interest justifies the exception".

> Where the monitoring involves the use of data which have not been collected directly from the individual whom these data relate to (secondary collection of personal data (2°)), this individual should in principle be informed of the use of these data when the data are recorded or at the latest when the data are first disclosed to a third party, for instance where an employer communicates certain statistical data on the ethnic break-up of his workforce to the public authorities, unless providing the individuals concerned with such information would involved disproportionate efforts, for instance because of the large number of persons concerned or because the further processing is purely for statistical purposes. In the view of the Network, this follows from Recitals 39 and 40 of the Preamble of the Data Protection Directive, and from its Article 11. This is also compatible with Principles 5.2. and 5.3. of Recommendation No. R (97) 18 of the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes.

Therefore, rules pertaining to the protection of private life in the processing of personal data should not constitute an obstacle to an adequate monitoring of law enforcement authorities in order to facilitate identification of ethnic profiling, and thus to effectively tackle this phenomenon. As noted by the Executive Director of the Open Society Justice Initiative, whose work on this issue has been of decisive importance to give it the visibility it deserves :

> To date, no European countries other than the United Kingdom systematically collect information on ethnicity and police stop and search practices. This is a serious problem. Ethnic profiling misdirects law enforcement resources and alienates some of the very persons whose cooperation is necessary for effective crime detection and terrorism prevention. Absent hard information about the extent of ethnic profiling, and the generation of data on patterns of law enforcement practice, it is hard if not impossible to develop strategies to address profiling's impact on police relations with minority communities.[34]

3.3. The regulation of the exercise of discretionary powers by the law enforcement authorities

In most of the EU Member States, law enforcement officers are granted broad discretionary powers in the fulfilment of certain duties, such as the performance of identity checks or 'stop-and-search' arrests, or the proactive surveillance of certain individuals identified as posing a threat to public order or security. This is further detailed hereunder in this opinion.[35]

It should be noted at the outset that the exercise of such powers leads to intereferences with the right to respect for private life of the individuals over whom such powers are exercised. As confirmed by the European Court of Human Rights in the case of *Sari and Colak v. Turkey*, this may imply the existence of a positive obligation imposed on the State concerned, to provide the legislative framework required to ensure 'affording practical and effective protection against a violation of Article 8 of the Convention'.[36] In particular, the attribution to the police of extended powers to stop and search individuals or to monitor individuals without having to show that they have good reasons to do so, and in the absence of a sufficiently precise legal framework enabling the individual to challenge forms of behaviour which appear arbitrary or discriminatory, may constitute a violation of the requirement according to which any interference with the right to respect for private life should in accordance with the law : this not only means that such interference should be in accordance with the national legislation applicable, but also that the law should be sufficiently accessible and precise, so as to offer an adequate protection against arbitrariness.

This was precisely the reasoning followed by the Constitutional Court of Slovenia, in a judgment delivered on 30 March 2006 (judgment U-I-152/03: see Appendix B to this opinion). The Ombudsman for Human Rights challenged before the Court Art. 35.1 of the Police Act (Zpol), initially adopted in

[34] J. Goldston, *Ethnic Profiling and Counter-Terrorism*, cited above, at p. 3.
[35] See section 7 of the opinion (Deficiencies in the protection against racial profiling).
[36] Eur. Ct. HR (2nd sect.), *Sari and Colak v. Turkey* (Appl. N° 42596/98 and 42603/98) judgment of 4 April 2006, § 37.

1998,[37] which concerns the power of the police to stop individuals for the purpose of checking their identity. This provision states: 'Policemen may establish the identity of a person who by his or her behaviour, conduct, and appearance or by being situated in a certain place or at a certain time arouses the suspicion that they will perpetrate, are perpetrating, or have perpetrated a minor or criminal offence, or of a person concerning whom the authority determined in Art. 41 of this statute is exercised'.

As summarized in the judgment of the Court, the opinion of the Ombudsman was that this provision

> …was inconsistent with Arts. 2, 19, 32, and 35 of the Constitution, (…) Arts. 5 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (…), and Art. 2 of Protocol No. 4 to the ECHR. He asserted that in a procedure for the establishment of identity a policeman stops a person and thereby interferes with their freedom of movement (Art. 32 of the Constitution). The person is allegedly obliged to show the policeman their personal identity card or some other valid public document containing their photo that was issued by a state authority, on the basis of which the policeman can establish their identity. If identity cannot be established by any other means, the police are allegedly empowered to take the person's fingerprints, take their photo and make such available to the public, and make a record of their personal description. The Ombudsman opined that thereby the State interferes with the individual's right to privacy (Art. 35 of the Constitution). Furthermore, he asserted that an identification procedure can also be carried out by arresting and taking the person to a police station, thereby interfering with their personal freedom (Art. 19 of the Constitution). According to the Ombudsman, from Art. 2 of the Constitution it follows that police authority which entails some interference with human rights and fundamental freedoms must be regulated by the legislature precisely and unambiguously. The statutory norm should meet the *lex certa* requirement such that there are no unclear, ambiguous, or loose words. Police authority must allegedly be defined precisely in the law such that the police officer and the individual clearly understand what the conditions are on the basis of which the use of police authority is allowed for the establishment of identity. The challenged provision allegedly did not meet the mentioned requirements. Its formulation was allegedly general and imprecise such that it allowed broad interpretation and thereby enabled the police to use their authority to establish identity at any time. The proposer opined that due to such loose and imprecise norm a person can become suspect merely for reason of their appearance (e.g., the length of their hair, having a beard, their manner of dress, and, especially the colour of their skin, respecting different national, cultural, or religious traditions in dressing). Merely the mentioned reasons allegedly should not suffice for the exercise of such police authority. Carrying out a procedure to establish identity merely due to one's appearance allegedly often entails an unsubstantiated interference with an individual who is respecting the legal order, and such interference is allegedly not necessarily effective from the view of the prevention and detection of minor and criminal offences. In view of the importance of the rights affected by such interference, it is also allegedly disproportionate in comparison with the successfulness of ensuring the legitimate goal that is pursued by such. In the opinion of the proposer, the suspicion that a person will perpetrate, is perpetrating, or has perpetrated a minor or criminal offence must be based on objective circumstances, must have a concrete basis, and may not be grounded only on the externally visible circumstances of the individual, or on stereotypical views that members of certain groups are probable perpetrators of minor or criminal offences. Appearance could be the basis for carrying out the procedure to establish identity if it referred to some objective elements which pointed to some connection with the perpetration of a minor or criminal offence. The provision of the statute regarding arousing suspicion merely on the basis of appearance, in the opinion of the proposer, allows a completely arbitrary use of police authority and even its abuse. In addition to that, the [Ombudsman] asserted that besides appearance, the challenged provision determines other linking circumstances (such as behaviour, conduct, being situated in a certain place and at a certain

[37] Police Act (Official Gazette RS, Nos. 49/98, 66/98 – corr., 93/01, 56/02, 79/03, 43/04 – off. consol. text, 50/04, 102/04 – off. consol. text, 14/05 – corr. off. consol. text, 53/05, 70/05 – off. consol. text, 98/05 and 3/06 – off. consol. text) (ZPol).

> time) to be the basis for carrying out the procedure for establishing identity. However, [according to the Ombudsman, Art. 35 of the Police Act is] written in a manner such that the existence of one of the stated circumstances already sufficed for such interference. Such conclusion was allegedly justified by the alternative use of the conjunction "or." According to [the Ombudsman's] assertions and findings, this has also followed from police practice. The [Ombudsman] was of the opinion that such procedure for establishing identity as was allowed by the challenged provision was an excessive or disproportionate interference with human rights and fundamental freedoms.

The position of the Ombudsman for Human Rights was endorsed by the Constitutional Court. It found the challenged provision to be unconstitutional, and prescribed that the unconstitutionality should be remedied by the legislature within a year of the publication of its decision. Before that deadline expires, the legislature should 'determine criteria which enable a police officer to make the conclusion whether it is suspected that a certain person will « perpetrate, is perpetrating, or has perpetrated a minor or criminal offence », in particular when the basis for such conclusion is the appearance of such a person or his or her being situated in a certain place' (para. 18 of the judgment). The Court referred in this respect, *inter alia*, to the conditions set forth in certain German Länder determining the conditions under which the police may perform identity checks. In reaching its conclusion, the Court reasoned that[38]:

> From the text of Art. 35.1 of ZPol it […] follows that in order for the suspicion to be aroused that a person 'will perpetrate, is perpetrating, or has perpetrated a minor or criminal offence' it suffices that only one of the circumstances mentioned in the first part of the sentence exists: his or her behaviour, conduct, appearance or being situated in a certain place or at a certain time. […] Thereby the statute does not contain detailed criteria on when an individual circumstance can be a sufficient basis for arousing such suspicion. The Constitutional Court does not deny the possibility that in certain cases also the appearance of a person (e.g. if the matter concerns a person who looks like the person the police are searching for due to the perpetration of a criminal or minor offence) or a person being situated in a certain place and/or at a certain time (e.g. if the matter concerns searching for the perpetrator of an already perpetrated criminal or minor offence) can be the basis for establishing identity. However, for the very reason that the statute does not determine additional conditions it enables the police authority to establish identity to also be used in the event there is no justified reason. Due to its indeterminacy it can not namely be clearly discerned from the challenged provision, where the limit between the admissible and inadmissible conduct of state authorities (in this case police officers) is, and thus it does not also meet the requirement of foreseeability. In addition to that, the statute does not differentiate between the cases when the purpose of the establishment of identity is to search for the perpetrator of an already perpetrated criminal or minor offence, and cases when the matter only concerns the assumption that a certain person might perpetrate a criminal or minor offence.

The requirement of lawfulness also is imposed in the exercise of the power of law enforcement authorities to arrest a person. Article 5(1) of the European Convention on Human Rights provides that no one shall be deprived of his liberty save in certain well-defined cases and 'in accordance with a procedure prescribed by law'. The European Court of Human Rights has confirmed recently that[39]:

> Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently accessible and precise to allow the person – if

[38] Para. 15 of the judgment. The Court was also influenced by the consideration that the term 'appearance', in Slovenian, may be interpreted very widely, and that it might therefore legitimate discriminatory identity checks, as performed, in particular, on the Roma. See fn. 8 of the judgment.
[39] Eur. Ct. HR (2nd sect.), *Enhorn v. Sweden* (Appl. No. 56529/00), judgment of 25 January 2005, § 37.

necessary with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences a given action may entail (see, for example, *Varbanov v. Bulgaria*, no. 31365/96, § 51, ECHR 2000-X; *Amann v. Switzerland* [GC], no. 27798/95, § 50, ECHR 2000-II; *Steel and Others v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2735, § 54; *Amuur v. France*, judgment of 25 June 1996, *Reports* 1996-III, pp. 850-51, § 50; and *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 51, 8 June 2004). Moreover, an essential element of the "lawfulness" of a detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness (see, amongst other authorities, *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, p. 1864, § 118, and *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III).

3.4. The question of the burden of proof

A fourth relevant consideration, closely related to the previous ones, concerns the modalities of proving discrimination in the context of ethnic profiling. As illustrated by the provisions of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[40] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[41] which prescribe the possibility of shifting the burden of proof where discrimination is alleged in the course of administrative or civil proceedings,[42] proving discrimination may be difficult where the victim is required to put forward elements demonstrating, beyond reasonable doubt, that a discriminatory motive has been underlying a particular behaviour.

This is particularly the case here, since ethnic profiling may be unintentional or unconscious. As noted by the Canadian courts : 'As with other systemic practices, racial profiling can be conscious or unconscious, intentional or unintentional. Racial profiling by police officers may be unconscious'.[43] 'The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping'.[44] This implies that the fact that ethnic profiling has occurred typically will be impossible to prove except by circumstantial evidence. Again, as Canadian courts have acknowledged: 'Failing an admission on the part of the officers, which is unlikely, the proof of racial profiling will most often be indirect. 'A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence''.[45] In practice, this has led the Canadian courts to allow a shifting of the burden of proof in such cases, by allowing a criminal defendant, arrested following a stop and search procedure alleged to constitute a form of ethnic profiling, to establish a presumption that such profiling has taken place simply by establishing that 'it is more probably than not' that there was no articulable cause for the stop other than the fact of the racial or ethnic origin of the accused. In *The Queen v. Campbell*, the Court of Quebec (Criminal Division) stated:

[40] OJ L 180 of 19.7.2000, p. 22. On the implementation of the Directive, see Communication from the Commission to the European Parliament and the Council, The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(2006) 643 final of 30.10.2006.
[41] OJ L. 303 of 2.12.2000, p. 16.
[42] See Article 8(1) of Directive 2000/43/EC : 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'. This requirement however does not apply to criminal procedures (Art. 8(3)). Article 10 of Directive 2000/78/EC contains similar provisions.
[43] *The Queen v. Campbell*, Court of Quebec (Criminal Division) (n° 500-01-004657-042-001) (judgment of 27 January 2005 by The Honourable Westmoreland-Traoré), at para. 34.
[44] *R. v. Brown,* 173 CCC (3d) 23, para. 8.
[45] *The Queen v. Campbell*, cited above, at para. 35 (quoting from *R. v. Brown,* 173 CCC (3d) 23, para. 44).

> The test for the challenge based on racial profiling to succeed was enunciated in *R. v. Brown* [173 CCC (3d) 23, par 10 ff]*;* the accused must prove that it is more probable than not that there was no articulable cause for the stop and that based on the evidence, the real reason for the stop was the fact that the accused was black.
>
> > There is no dispute respecting the test to be applied under s. 9 of the Charter. The question is whether the police officer who stopped the motorist had articulable cause for the stop. Articulable cause exists where the grounds for stopping the motorist are reasonable and can be clearly expressed: *R. v. Wilson* (1990), 56 C.C.C. (3d) 142 (S.C.C.) at 144. If a police officer stops a person based on his or her colour (or on any other discrimination ground) the purpose is improper (*Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.) at 17), and clearly would not be an articulable cause.

In a different context, but also implying alleged discriminatory practices by law enforcement officers, the European Court of Human Rights also insisted on the duty of the public authorities to establish any racially discriminatory motives underlying action taken by such officers. For instance, in the judgment it delivered in the case of *Bekos and Koutropoulos v. Greece* on 13 December 2005,[46] the European Court of Human Rights confirmed its view that 'when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events'. Although the Court recognizes that proving racial motivation 'will often be extremely difficult in practice', leading it to consider that the State's obligation to investigate possible racist overtones to a violent act is 'an obligation to use best endeavours and not absolute', the Court nevertheless considers that 'The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence'.[47]

The case-law of the European Court of Human Rights itself, however, illustrates how difficult it may be to prove discrimination, where this results from practices by public authorities, such as law enforcement officers, who deny that they are acting consciously on the basis of race or ethnicity, of religion, or of national origin, or that they are being influenced unconsciously by the visible membership of the individual to such categories. In the case of *Cissé v. France*, a group of some two hundred illegal immigrants, most of whom of African origin, had been occupying the St Bernard's Church in Paris in June 1996. They were supported by several human-rights organisations, some of whose activists decided to sleep on the premises in a show of solidarity with their predicament. When, on 23 August 1996, the police executed an order for the total evacuation of the premises, they set up a checkpoint at the church exit to verify whether the aliens evacuated from the church had documentation authorising them to stay and circulate in the territory.[48] As described in the judgment of the Court[49]:

> All the occupants of the church were stopped and questioned. Whites were immediately released while the police assembled all the dark-skinned occupants, apart from those on hunger strike, and sent them by coach to an aliens' detention centre at Vincennes. Orders were made for the detention and deportation of almost all of those concerned. More than a hundred were

[46] Appl. No. 15250/02. The judgment delivered by a Chamber constituted within the 4th section of the Court is final since 13 March 2006.

[47] At § 69. See already see the judgment of 26 February 2004 in *Nachova and Others v. Bulgaria*, Appl. nos. 43577/98 and 43579/98, §§ 158-59 ; and the Grand Chamber judgment delivered on 6 July 2005 in this case, *Nachova and Others v. Bulgaria* [GC], Appl. nos. 43577/98 and 43579/98.

[48] The stop and search practiced in the circumstances were on the basis of Article 78-2, subparagraph 1, of the Code of Criminal Procedure, which reads : 'Senior police officers and ordinary police officers acting on the orders of senior police officers who are accountable for their actions,... may invite any person to prove his or her identity by any means if there are grounds for suspecting that he or she : (i) has committed or attempted to commit an offence ; (ii) is preparing to commit a serious crime (*crime*) or other major offence (*délit*), may be able to provide information that will assist in the investigation of a serious crime or other major offence, or is wanted by a judicial authority.'

[49] Eur. Ct. HR (2nd sect.), *Cissé v. France*, Appl. no. 51346/99, judgment of 9 April 2002 (final on 9 July 2002), § 13.

> subsequently released by the courts on account of certain irregularities on the part of the police, which even extended to making false reports regarding the stopping and questioning procedure.

Despite this, the allegation that the arrests were discriminatory – as the identity verifications were alleged to have been decided on the basis of the colour of the skin of the individuals concerned – was dismissed at the admissibility stage. The Court considered : 'As to the applicant's complaint under Article 5 [right to liberty and security] taken together with Article 14 of the Convention [non-discrimination], the Court notes that the system set up at the church exit for checking identities was intended to ascertain the identity of persons suspecting of being illegal immigrants. In these circumstances, it cannot conclude that the applicant was subjected to discrimination based on race or colour'.[50]

The *Cissé* case illustrates the need to facilitate the role of the alleged victim of a discrimination resulting from the practice of ethnic profiling, which even the European Court of Human Rights seems reluctant to identify in the absence of any positive proof[51] that the practices of the authorities were tainted, consciously or unconsciously, by considerations relating to the colour of the skin of the individuals concerned.[52] Where ethnic profiling is prohibited under the threat of criminal penalties, the principle of the presumption of innocence (as established by Article 6(2) of the European Convention on Human Rights) may impose limits to the technique of the shifting of the burden of proof in the absence of direct evidence of the discriminatory motive. But these limits are not such as to impose insuperable obstacles to facilitating the proof of discrimination by allowing circumstantial evidence to operate a shift of the burden of proof to the defendant. In the 1988 case of *Salabiaku v. France*, the European Court of Human Rights stated:

> Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. (…) Article 6 para. 2 does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[53]

It considered in that case that the criminal law of a State party to the Convention could establish a presumption of guilt, insofar as such a presumption was not absolute and did not lead to depriving the criminal defendant from every possibility of defence, for instance by establishing a case of force majeure or proving unavoidable error.

In a more recent case, *Radio-France and Others v. France*, the applicants – who had been convicted for defamation by the French courts – asserted that section 93-3 of the Audiovisual Communication Act of 29 July 1982, which established an irrebuttable presumption of the publishing director's responsibility (such responsibility was automatically and necessarily inferred from his function, notwithstanding any evidence to the contrary he might seek to adduce, relating to his conduct or the conditions in which information was published or broadcast), had infringed the right to the presumption of innocence. The Court confirmed the view adopted in *Salabiaku*, and did not consider this regime to be in violation of the principle of presumption of innocence since no absolute presumption of guilt was established[54]:

> The result of section 93-3 of the 1982 Act and section 29 of the 1881 Act is that in the field of audiovisual communication a publishing director is criminally responsible – as principal – for

[50] Eur. Ct. HR (2nd sect.), *Cissé v. France*, Appl. no. 51346/99, admissibility decision of 16 January 2001.
[51] In the case of *Timishev v. Federation of Russia* referred to above n. 7, there existed such a positive proof, in that case consisting in the order of the Kabardino-Balkarian senior police officer that traffic police officers should not admit "Chechens".
[52] See further sect. 9.4. of this opinion.
[53] Eur. Ct. HR, *Salabiaku v. France*, Appl. n° 10519/83, judgment of 7 October 1988, § 28.
[54] Eur. Ct. HR (2nd sect.), *Radio-France and Others v. France*, Appl. no. 53984/00, judgment of 30 March 2004, § 24.

any defamatory statement made on air, where the content of that statement has been "fixed prior to being communicated to the public". In such a case, as soon as the statement's defamatory character has been established, the offence is made out as regards the publishing director – the maker of the statement being prosecuted as an accessory – without it being necessary to prove *mens rea* on his part. (…), section 93-3 is intended to punish a publishing director who has failed to perform his duty of overseeing the content of remarks made on air in those cases where he would have been able to exercise such oversight before they were broadcast.
A number of elements have to be proved before the publishing director can be convicted: he must have the status of publishing director; the offending statement must have been broadcast and must be defamatory; and the content of the statement must have been fixed before it was broadcast. (…) where there has been no "prior fixing" responsibility is no longer presumed and the rules of ordinary law apply instead, so that the prosecution has to prove that the publishing director had a personal hand in the broadcasting of the offending statement.
(…) the difficulty in the present case stems from the fact that this presumption is combined with another, namely that defamatory remarks are presumed to have been made in bad faith. However, this second presumption is not irrebuttable; [the defendants] may overturn that presumption by establishing their good faith. (…).
Therefore, as the Government submitted, a publishing director has a valid defence if he can establish the good faith of the person who made the offending remarks or prove that their content was not fixed before being broadcast; moreover, the applicants raised such arguments in the domestic courts.
That being the case, and having regard to the importance of what was at stake – effectively preventing defamatory or insulting allegations and imputations being disseminated through the media by requiring publishing directors to exercise prior supervision – the Court considers that the presumption of responsibility established by section 93-3 of the 1982 Act remains within the requisite "reasonable limits". Noting in addition that the domestic courts examined with the greatest attention the applicants' arguments relating to the third applicant's good faith and their defence that the content of the offending statement had not been fixed in advance, the Court concludes that in the present case they did not apply section 93-3 of the 1982 Act in a way which infringed the presumption of innocence.

3.5. Conclusion

In sum, a legal framework ensuring an adequate protection from the risk of ethnic profiling in the field of law enforcement, should a) clearly prohibit ethnic profiling, to the extent that indicators relating to 'race' or ethnicity, religion or national origin, cannot be used as proxies for criminal behaviour, either in general or in the specific context of counter-terrorism strategies; b) facilitate the proof that such ethnic profiling is being practiced by law enforcement authorities by allowing the use of statistics to highlight the discriminatory attitudes of such authorities, insofar as this may be reconciled with the rules relating to the protection of private life in the processing of personal data; c) define with the greatest clarity possible the conditions under which law enforcement authorities may exercise their powers in areas such as identity checks or stop-and-search procedures; d) sanction any behaviour amounting to ethnic profiling not only through the use of criminal penalties, but also (or instead) through other means, including by providing civil remedies to victims or by administrative or disciplinary sanctions, insofar as the rules relating to evidence in criminal proceedings may constitute an obstacle to effectively combating such behavior and protecting the victims of such behaviour.

4. Ethnic profiling by public authorities: the situation in the EU Member States

The focus of the questions addressed to the Network is on instances of behavior of the public authorities which constitute ethnic profiling, and the legal framework of such practices, in particular in the field of law enforcement. The overview of the existing provisions in the laws of the EU Member States will therefore focus on ethnic profiling in that context. In a number of EU Member States, the

existing antidiscrimination legislation[55] extends to the acts of public authorities, including law enforcement authorities. In many countries, this legislation was adopted in order to implement the international obligations of the State concerned under the ICERD.

In addition, this legislation has recently been improved, or in certain cases adopted, in order to meet the requirements of European Community law. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive)[56] prohibits both direct and indirect discrimination in employment and occupation, social protection, social advantages, education, and access to and supply of goods and services which are available to the public, including housing, applies to 'all persons, as regards both the public and private sectors, including public bodies' (Art. 3(1)). Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive)[57] prohibits discrimination in employment and occupation on grounds, *inter alia*, of religion, imposing such a prohibition both on the private and the public sectors. Both these instruments, adopted on the basis of Article 13 EC, therefore may be relevant to the prohibition of ethnic profiling under the broad definition offered above (for instance, in the allocation of social housing, or in the field of education), and they have significantly contributed to improving the legislative framework protecting individuals from such practices in the EU Member States. However, these directives have a limited scope of application *ratione materiae*. In particular, they do not extend the prohibition of discrimination to policing functions exercised by the law enforcement authorities. In general therefore, the national legislation implementing the Racial Equality and Employment Equality Directives have no bearing on the question addressed in this opinion, and it will be referred to only incidentally or where this is justified by the choice of the national authorities to extend that legislation to the law enforcement activities of the police.

In **Austria**, Article I of the Federal Constitutional Act on Racial Discrimination (*BVG über die Beseitigung rassischer Diskriminierung*)[58] implementing the ICERD prohibits any form of racial discrimination and states that 'legislation and execution shall refrain from any discrimination for the sole reason of race, colour of skin, descent or national or ethnic origin.' At federal level, several legislations have been passed in connection with the Council Directive 2000/43/EC and the Council Directive 2000/78/EC, generally not going further than their minimum requirements. The Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz – B-GlBG*)[59] is addressed to federal employees (public servants). Its scope covers equal treatment without discrimination by reason of *inter alia* ethnic origin, religion or belief, but it primarily deals with discrimination in the context of employment. Discrimination constitutes an infringement of one's official duty (*Dienstpflichtverletzung*) (Sec.16a). The Equal Treatment Act (*Gleichbehandlungsgesetz, GlBG*),[60] applies to the private sector. Part II concerns equal treatment in employment without discrimination by reason of ethnic origin, religion or belief, age or sexual orientation. Part III covers 'equal treatment without discrimination by reason of ethnic origin in other areas'. It concerns contracts and activities in the fields of *inter alia* social protection, education and access to and supply of goods and services which are available to the public, including housing (Sec. 30). The Equal Treatment Commission and the National Equality Body – GBK/GAWAct (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*) contributes to monitoring compliance with this legislation.[61] In addition, anti-discrimination acts have been passed in all nine federal provinces (Länder) of Austria. Their scope of application in general correspond to that of Council Directive 2000/43/EC, as defined

[55] In some States, in addition to general antidiscrimination legislation, specific regulations or non-binding instruments (guidelines or codes of ethics) apply to the activities of law enforcement authorities, and include a specific provision prohibiting discrimination or human rights violations.
[56] OJ L 180 of 19.7.2000, p. 22. On the implementation of the Directive, see Communication from the Commission to the European Parliament and the Council, The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(2006) 643 final of 30.10.2006.
[57] OJ L. 303 of 2.12.2000, p. 16.
[58] Federal Law Gazette No. 390/1973.
[59] Federal Law Gazette No. 65/2004
[60] Federal Law Gazette No. 66/2004 as amended by Federal Law Gazette No. 82/2005
[61] Federal Law Gazette No. 66/2004. See below under III.Remedies.

in Article 3(1) of this instrument (e.g. social protection, education and access to and supply of goods and services which are available to the public, including housing).

The Introductory Act to the Administrative Procedure Acts 1991 (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen, EGVG*)[62] declares certain discriminatory behaviour an administrative offence: 'IX.1.3.: Persons who subject persons to unjustified discrimination solely for reasons of their race, colour of their skin, their national or ethnic origin, their religious affiliation or disability or prevent such persons from entering premises or from obtaining services available for general public use, commit an administrative offence'. The situations covered by this provision are similar to the situations covered by the Equal Treatment Act in Sec. 30 no 4 (access to goods and services which are available to the public). However the EGVG does not refer exclusively to the reason of race, whereas Sec. 30 no 4 Equal Treatment Act only refers to ethnic origin (Part III).

In addition, Section 31 of the Security Police Act (*Sicherheitspolizeigesetz - SPG*) and the corresponding guidelines addressed to law enforcement authorities (*Richtlinien-Verordnung – RLV,* containing the Richtlinien für das Einschreiten)[63] impose compliance with the principle of non-discrimination in the field of police acts. Section 31 stipulates that in interfering with the rights of persons, the public security organs shall see to it that their conduct clearly reflects their impartiality, thus giving the persons affected the feeling that they are not discriminated against because of their race, colour, national or ethnic origin, religious belief or political opinion. Sec. 5 Subsec. 1 of the directive (Richtlinien-Verordnung – RLV) requires the law enforcement authorities to abstain from any action that might be regarded as discrimination. Where a civil servant violates the directive, he or she can be subject to disciplinary sanctions.[64]

In **Belgium**, the Law of 30 July 1981 criminalizing certain acts inspired by racism or xenophobia,[65] which is based on a definition of discrimination which almost exactly reproduces that of the Internnational Convention on the Elimination of All Forms of Racial Discrimination, provides for criminal sanctions against any civil servants – this includes law enforcement agents – who commit acts of discrimination. Article 4 of the Law states in this regard:

> Est puni d'un emprisonnement de deux mois à deux ans, tout fonctionnaire ou officier public, tout dépositaire ou agent de l'autorité ou de la force publique qui, dans l'exercice de ses fonctions, commet une discrimination à l'égard d'une personne en raison de sa race, de sa couleur, de son ascendance, de son origine ou de sa nationalité, ou lui refuse
> arbitrairement l'exercice d'un droit ou d'une liberté auxquels elle peut prétendre.
> Les mêmes peines sont applicables lorsque les faits sont commis à l'égard d'un groupe, d'une communauté ou de leurs membres, en raison de la race, de la couleur, de l'ascendance, de l'origine ou de la nationalité de ceux-ci ou de certains d'entre eux.
> Si l'inculpé justifie qu'il a agi par ordre de ses supérieurs pour des objets du ressort de ceux-ci et sur lesquels il leur était dû obéissance hiérarchique, les peines sont appliquées seulement aux supérieurs qui ont donné l'ordre.
> Si les fonctionnaires ou officiers publics prévenus d'avoir ordonné, autorisé ou facilité les actes arbitraires susmentionnés prétendent que leur signature a été surprise, ils sont tenus en faisant, le cas échéant, cesser l'acte, de dénoncer le coupable ; sinon ils sont poursuivis personnellement.
> Si l'un des actes arbitraires susmentionnés est commis au moyen de la fausse signature d'un fonctionnaire public, les auteurs du faux et ceux qui, méchamment ou frauduleusement en font usage sont punis des travaux forcés de dix à quinze ans.

62 Federal Law Gazette No. 50/1991 as amended by Federal Law Gazette I No. 106/2005.
63 Federal Law Gazette No. 266/1993
64 CERD, Fourteenth Periodic Report of Austria, 1999, CERD/C/362/Add.7, 5.
65 Moniteur belge, 8.8.1981. This law was amended on a number of occasions, most recently by the Law of 20 January 2003 (*Loi relative au renforcement de la législation contre le racisme*)**,** *Moniteur belge*, 12.2.2003.

This law has not been particularly effective, since the high level of evidence required in the context of criminal prosecutions has proven difficult to achieve, as most instances of racist behaviour by law enforcement agents are hidden by their authors and have no witnesses.[66] In addition however, the Law of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up the Centre for Equal Opportunities and the Fight against Racism[67] implements, for the Federal State, the Racial Equality and the Employment Equality Directives, while going beyond the minimum requirements of those instruments. This Law prohibits both direct and indirect discrimination in a number of fields, including but not limited to the fields to which the prohibition laid down in the Racial Equality Directive applies (Article 2(4)). However, even under the broadest interpretation possible, the Law of 25 February 2003 does not extend to law enforcement activities by police officers. Moreover, although the law originally provided for criminal sanctions against any public official (including any official in charge of law enforcement) who, in the exercise of his or her functions, made him- or herself guilty of discrimination against a person, a group, a community or its members on the basis of *inter alia* birth, religious or philosophical conviction, or a physical characteristic, in the field of application *ratione materiae* of the law,[68] this provision was annulled by the judgment n°157/2004 delivered on 6 October 2004 by the Court of Arbitration (Constitutional Court). The Court of Arbitration considered that it would not be compatible with the principle of legality in criminal matters (as stipulated in Article 14 of the Belgian Constitution and Article 7 of the European Convention on Human Rights) to criminalize a 'discrimination', which that same judgment defined broadly as any difference in treatment which lacks a reasonable and objective justification, following the partial annulment of Article 2(1) of the Law of 25 February 2003 by the judgment.[69] This legislation will be replaced, probably early in 2007, in order to better implement the lessons of this judgment. Civil remedies remain available to victims of discrimination by public authorities, as well as by private persons, however, as already mentioned, this would not appear to cover law enforcement activities.

Specific prescriptions exist however, which provide that the police in Belgium are bound to respect human rights. A specific chapter in the Penal Code concerns the violation by civil servants of constitutionally protected rights[70]: one provision of this chapter criminalized arbitrary deprivations of liberty[71]; another provision concerns violations of the home[72]; and the chapter also contains a general provision, according to which the public officer who either orders, or executes directly, an arbitrary act or an act constituting a violation of the rights and freedoms of the Constitution, may be convicted to an imprisonment of 15 days to a year[73]. Perhaps even more significantly, the law enforcement function of the police is described in law as having as its very purpose to ensure the protection and the promotion of the rights and freedoms of the individual. The Act of 5 August 1992 on the police function[74] has defined the protection of fundamental rights and freedoms and the promotion of a democratic development of society as the principles which should guide the activites of the police.[75] Article 123 of

[66] This is confirmed by the data collected on racism within the police by the Comité P : see, for the background of this document, presented as Appendix A, hereunder, section 9.1. of the opinion.
[67] *Moniteur belge*, 17.3.2003.
[68] 'Est puni d'un emprisonnement de deux mois à deux ans, tout fonctionnaire ou officier public, tout dépositaire ou agent de la force publique qui, dans l'exercice de ses fonctions, commet une discrimination à l'égard d'une personne, d'un groupe, d'une communauté ou des membres de celle-ci sur base du sexe, de l'orientation sexuelle, de l'état civil, de la naissance, de la fortune, de l'âge, de la conviction religieuse ou philosophique, de l'état de santé actuel ou futur, d'un handicap ou d'une caractéristique physique.' (Article 6. § 2, of the Law of 25 February 2003, in its original version).
[69] See Cour d'arbitrage, judgment n° 157/2004 of 6 October 2004, paras. B.16 to B.22.
[70] Chap. III, " Des atteintes portées par des fonctionnaires publics aux droits garantis par la Constitution ", in Title II (" Des crimes et des délits qui portent atteinte aux droits garantis par la Constitution "), in Book II of the Penal Code.
[71] Art. 147, Penal Code.
[72] Art. 148, Penal Code.
[73] Art. 151, Penal Code.
[74] Loi du 5 août 1992 sur la fonction de police, M.B., 22.12.1992. On this law, see G. Bourdoux and Chr. De Valkeneer, *La loi sur la fonction de police*, Bruxelles, Larcier, 1993, 351 pages ; the *Manuel pour les fonctinonnaires de police dirigeants. La loi sur la fonction de police*, prepared by G. Bourdoux, E. De Raedt, A. Duchatelet, J. Seurynck, Bruxelles, ed. Politeia, 1993, 243 pages : C. Fijnaut and F. Hutsebaut, *De nieuwe politiewetgeving*, Antwerpen, Kluwerrechtswetenschappen, 1993. For a more recent appraisal, see G. Bourdoux and E. De Raedt, *De Wet op het politieambt*, Het handboek van de politiefunctie, Bruxelles, 2001.
[75] Art. 1 al. 2 of the Act of 5 August 1992.

the Act of 7 December 1998 organizing the police in Belgium into one single new structure[76] again emphasizes this:

> Les fonctionnaires de police contribuent en tout temps et en toutes circonstances à la protection des citoyens et à l'assistance que ces derniers sont en droit d'attendre ainsi que, lorsque les circonstances l'exigent, au respect de la loi et au maintien de l'ordre public.
>
> Ils respectent et s'attachent à faire respecter les droits de l'homme et les libertés fondamentales.

The obligation thus imposed on the police to respect the fundamental rights and freedoms clearly impacts on the exercice of acts of authority, such as searches and seizures, administrative or judicial arrestation, the use of firearms, or identity checks. The Act of 5 August 1992 on the police function – largely amended by the Act of 7 December 1998 – defines in great detail in which circumstances and under which conditions these acts may be performed. It would not be useful for this report to describe the legal regime of these acts. Their strict codification in the Act of 1992 – stating, for instance, in which situations the identity of a person can be controlled[77] and which consequences follow if a person is unable to prove his/her identity[78], or how the police are to protect detainees from the curiosity of the media[79] – seeks to ensure that the police will not exercise its powers either in violation of the relevant human rights or in an arbitrary fashion, targeting, for instance, certain vulnerable groups or persons of foreign descent.

The risk of subjectivity is, nevertheless, hardly avoidable by simple reliance on legal norms. For instance, the notion of 'public order' appears in the Act of 5 August 1992 with respect to a number of prerogatives of the police, including the practice of corporal searches (these corporal, or 'security' checks, may be performed i.a. on persons who participate in meetings which present a real threath to the public order : Art. 28 § 1, 3°), or of identity checks (the identity of a person may be checked if the police have reasons to believe, on the basis of her attitudes, of material indicia or of circumstances of time or place, that she may disrupt the public order : Art. 34 § 1). But this is a notion relatively hard to define, and the available case-law does not offer sufficient guidance to ensure that the powers of the police are circumstances with the required legal clarity[80]. Apart from the legal definition of the police powers and the circumstances in which these powers may be used, therefore, there is a need for complementary measures, which could both contribute to ameliorating the legal certainty and to creating an organisational culture within the police which encourages the full respect by its members of human rights and the protection of minorities against discrimination. Two initiatives may be noted, which constitute steps in this direction.

First, amending the Act of 13 May 1999 on the disciplinary status of the members of the police two years after its adoption, an Act of 31 May 2001[81] introduced Articles 65bis to 65quinquies in that legislation to provide for the constitution of a data bank on case-law relating to disciplinary proceedings[82]. This data bank will collect all decisions adopted in disciplinary proceedings against members of the police, although the decisions will be anonymized. It may be consulted by all the members of the personnel of the police, without restriction. This will ensure more transparency, but it could also serve – if the police are encouraged to consider it under this light – as an educational device, to familiarize themselves better with the obligations imposed on the members of the police and how these obligations are interpreted by the disciplinary organs.

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[76] *Loi organisant un service de police intégré, structuré à deux niveaux,* M.B., 5.1.1999.
[77] Art. 34 § 1 of the Act of 5 August 1992.
[78] Art. 34 § 4 of the Act of 5 August 1992: the person concerned may be detained for a maximum period of 12 days so that his/her identity can be established.
[79] See Art. 35 of the Act of 5 August 1992. See, on this matter, de Declaration adopted by the Committee of Ministers of the Council of Europe on 10 July 2003, and the accompanying Recommendation (Rec(2003)13).
[80] On this difficulty, see G. Bourdoux and Ch. De Valkeneer, *La loi sur la fonction de police*, cited above, pp. 197-200.
[81] Loi du 31 mai 2001 modifiant la loi du 13 mai 1999 portant le statut disciplinaire des membres du personnel des services de police et la loi du 7 décembre 1998 organisant un service de police intégré, structuré à deux niveaux, M.B., 19.6.2001.
[82] These provisions also prescribe the adoption of an annual report by the chairs of the chambers of the disciplinary council within the police.

Second, in 2006, a Code of Deontology for the police was formally adopted.[83] This code is based, in particular, on the European Code of Police Ethics recommended to the Council of Europe Member States on 19 September 2001.[84] It includes a requirement that the members of the police respect fundamental rights and freedoms at all times.[85]

In the **Czech Republic**, discrimination based on various grounds is expressly prohibited in criminal law, labour law and employment law. In 2003-2004, the definitions of discrimination required by the Directives 2000/43/EC and 2000/78/EC were inserted into the Labour Code,[86] the new Law on Employment[87] and the Law on service by members of the security services.[88] The requirement of non-discrimination also is imposed on the administrative authorities under the Administrative Code,[89] which stipulates that the administrative authority acts impartially and all persons have equal position. Discrimination is not mentioned explicitly in this law, only the explanatory report to this law mentions it explicitly.[90] In most circumstances, the Administrative Code's provisions would apply to activities conducted by the police, although in the course of criminal investigations, the Code of Criminal Procedure would apply. The Czech Police also has an Ethical Code, which is not issued in the form of a law and therefore is not legally binding, but it still gives some instructions. The Ethical Code states, that the Police apply equal and correct approach to every person, with the respect for cultural differences of persons belonging to the minority groups in all areas where it is not contrary to laws.[91]

In **Denmark**, racial profiling could result in violation of the principle of equality imposed on public authorities under general administrative law, and which covers police methods of investigation. Thus, investigating an individual solely on the basis of his or her race, ethnicity, religion, or national origin, would be a violation of said principle. Observance of the general principles of proportionality and objectivity are also guiding principles in public administration, hence a racial profiling could violate these fundamental principles. The principle of equality is stipulated in the section 70 of the Danish Constitution, which reads that "no person shall be denied the right to full enjoyment of civil and political rights by reason of his creed or descent (…)". However, the constitution is rarely invoked directly before courts of law.

Protection against discrimination based on race exists in the criminal legislation in *Act on Prohibition against Discrimination on the basis of Race, etc*[92] and in the *Criminal Code*.[93] In addition, it is an aggravating circumstance when a particular offence was committed with racially discriminatory motives. However, none of this ensures that ethnic profiling will be tackled under the criminal law. The *Act on Prohibition against Discrimination on the basis of Race, etc* applies only in regard to refusal, in connection with commercial or non-profit business, to serve or admit a person on the basis

[83] *Arrêté royal fixant le code de déontologie des services de police, M.B.*, 30 mai 2006.
[84] Recommendation Rec(2001)10 of the Committee of Ministers of the Council of Europe, adopted on 19 September 2001 at the 765th meeting of Ministers' Deputies.
[85] See Art. 3 of the Code : 'Les membres du personnel respectent et s'attachent à faire respecter les droits de l'homme et les libertés fondamentales.
Les fonctionnaires de police contribuent en tout temps et en toutes circonstances à la protection des personnes et à l'assistance que ces dernières sont en droit d'attendre, ainsi que, lorsque les circonstances l'exigent, au respect de la loi et au maintien de l'ordre public.
Ils contribuent également à la protection des biens.
Dans l'exercice de leurs missions de police administrative ou judiciaire, les membres du personnel veillent au respect et contribuent à la protection des libertés et des droits individuels, ainsi qu'au développement démocratique de la société' ?
[86] Law no. 46/2004 Coll., which amends Law no. 65/1965 Coll., Labour Code (Collection of Laws 2004, no.14 p. 746).
[87] Law no. 435/2004 Coll., on Employment (Collection of Laws 2004, no.143 p. 8270).
[88] Law no. 361/2003 Coll., on Service by Members of the Security Services (Collection of Laws 2003, no. 121 p. 5850). This legislation protects members of security services from the different forms of discrimination prohibited under Directive 2000/43/EC and 2000/78/EC. It does not concern discrimination committed by members of the security services, unless against other members of these services.
[89] Sec. 7 (1) of the Law no. 500/2004 Coll., Administrative Code.
[90] See http://www.psp.cz/sqw/text/tiskt.sqw?o=4&ct=201&ct1=0.
[91] See Sec 3 (c) of the Ethical Code, available at http://www.mvcr.cz/policie/kodex.html (in Czech).
[92] Consolidated Act 1987-09-29 No. 626 om forbud mod forskelsbehandling på grund af race mv.
[93] Consolidated Act 2005-09-27 No. 909 Straffeloven.

of race etc. Section 266 b of the *Criminal Code* prohibits the dissemination of statements or other messages whereby persons are threatened, scorned or degraded on the basis of race, creed, ethnic or national origin, etc., rather than discriminatory acts as such. Racial profiling is not mentioned in domestic legislation and thus is as such not directly prohibited. Moreover, law enforcement officials and other relevant public actors are generally perceived to have a wide discretion to conduct investigations and control measures in a way which they deem most effective.

However, it could be argued that ethnic or racial profiling by law enforcement authorities could entail a violation of anti-discrimination legislation. The *Act on Ethnic Equal Treatment*[94] protects victims of discrimination on grounds of race or ethnic origin, who have been refused access to goods or services on either of these grounds, by recognizing civil remedies to the victims of such discriminatory practices. However, neither the Committee on Ethnic Equal Treatment (the specialised equality body) nor the courts have taken a position on this issue yet. Moreover, the exercise of police work such as behaviour by police officers in the interaction with citizens and other investigative measures is not mentioned directly in the Act implementing the Racial Equality Directive 2000/43/EC. The Act covers access to "goods and services" by private as well as public entities. According to the explanatory notes[95], there is no organisational limitation to the scope of the Act. Thus, one could argue that also the Parliament, the courts and attached institutions insofar they conducts actions within the scope of the term "goods and services" are covered by the Act. The term "goods and services" term is used for economical activities of a certain level and intensity. It is uncertain, but doubtful, that they also would be construed to cover law enforcement activities.

The activities of the police are regulated by the *Act on the work and duties of the Police*.[96] Section 5 states that if the police suspect an individual to be in possession of an object which could constitute a danger to public safety or order or which could endanger an individual, the police can issue an order, or can stop and search individuals including vehicles or other possessions, clothes etc. Such a suspicion should be well-founded, however: the police should have observed the attempt to hide the object or have received credible information on the individual and the alleged possession of a dangerous object. In addition the intervention by the police will be justified only if a disturbance of the public order is threatened. Thus, the mere fact that an individual is perceived to belong to an ethnic or religious group will not suffice to justify the performance of a search on that individual. The *Act on the Administration of Justice*[97] also contains various possibilities for the police to interfere in the privacy or integrity of an individual in the course of an investigation.[98] However, the investigatory measures regulated under this Act (e.g. phlebotomy, wiretapping, surveillance, search of house, etc.) will only be admissible under strictly defined conditions. These safeguards seem to exclude there being a risk of racial profiling, since the discretionary powers of the police are strictly constrained, minimizing the risk of arbitrariness of the intervention.

Section 77 of the *Road Traffic Act*[99] authorizes the police to stop and search a vehicle with the aim of finding defects jeopardizing road safety or to control whether the driver fulfils the requirements for driving the vehicle. No suspicion of misconduct is required. Hence the risks of an arbitrary, and potentially discriminatory, use of these powers, seem real. Section 38 No. 6 of the *Aliens Act*[100] authorizes the police to stop and inspect a vehicle anywhere in Denmark for illegal immigrants regardless of whether there exists a concrete suspicion of illegal entry or human trafficking. The police can require the presentation of travel documents. The inspection must be proportionate to the aim of finding illegal immigrants and must not go beyond what is necessary in this regard.[101] However, the

[94] Act 2003-05-28 No. 374 om etnisk ligebehandling
[95] LFF2002-2003.1.155 page 10.
[96] Act 2004-06-09 No. 444 om Politiets virksomhed.
[97] Consolidated Act 2005-09-27 No. 910.
[98] Particularly chapters 71, 72 and 73 (section 780-800) of the *Act on the Administration of Justice.*
[99] Consolidated Act 2005-11-14 No. 1079 Færdselsloven.
[100] Consolidated Act 2005-08-24 No. 826 Udlændingeloven.
[101] For instance, a search of the luggage compartment must be in accordance with sect. 794 of the Act on the Administration of Justice (requiring reasonable suspicion, significant importance for the investigation).

section does not as such require a suspicion of misconduct; hence it seems that this authority can be used more arbitrarily and the risk population must be perceived to be 'foreign looking' individuals.

In **Finland,** Section 11 :9 of the Penal Code, which concerns discrimination, covers *inter alia* discrimination committed by the public authorities. In addition, there are a number of specific non-discrimination provisions that prohibit discrimination in a specific field of law, such as in a particular type of employment. The non-discrimination act (*Yhdenvertaisuuslaki* (21/2004)), by contrast, does not go beyond the Racial Equality Directive in terms of material scope, and does not cover activities of the police in relation to the general public. Under the applicable laws, i.e. the Constitution and the Penal Code, the permissibility of ethnic profiling depends thus on a comprehensive assessment of the particular circumstances of each case where profiling is used. To be in line with the law, such action must have pursued a legitimate purpose, in addition to which the means used to attain that purpose must have been proportionate.

In **Germany**, the measures recently adopted in order to implement Directives 2000/43/EC and 2000/78/EC (under the framework of the *Gesetz zur Umsetzung europäischer Richtinien zur Verwirklichung des Grundsatzes der Gleichbehandlung* of 14 August 2006[102] [Act implementing European Directives in order to realize the Principle of equal Treatment], which includes both the *Allgemeines Gleichbehandlungsgesetz* [General Equal treatment Act] and the *Gesetz über die Gleichbehandlung von Soldatinnen und Soldaten* [Soldiers Equal Treatment Act]) in certain areas cover, to a certain extent, the activities of law enforcement officers, or of public servants in general. This is the case, for instance, as regards access to the public service, or social protection (a new Section 33c has been inserted in Book 1 of the Social Security Code in order to prohibit discrimination in this field). These are indeed rules which apply to public servants within the public administration, which protect from the risk of racial profiling being practiced by those servants, for example in the delivery of administrative documents necessary for the reception of certain social benefits. However, the *Allgemeines Gleichbehandlungsgesetz* [General Equal Treatment Act], which is the main component of the Act of 14 August 2006, does not apply to further sectors of the law enforcement authorities. Moreover, the *Gesetz über die Bundespolizei* [Act on Federal Police] and the respective Police Acts in the 16 Länder [States] which regulate the functions and competences of the police, in particular prohibit the processing of personal data for undefined reasons or for reasons which are not yet able to be determined,[103] do not contain specific antidiscrimination clauses[104]. While the police are bound by the Equality Clause of Article 3 (3) of the German Constitution (Basic Law) ("No person shall be favored or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions (…)"), this may not be precise enough to effectively protect from instances of ethnic profiling. Neither does the training of the police, whose curriculum includes how to avoid discrimination and how to promote tolerance for minorities,[105] fully compensate for the absence of specific provisions prohibiting discrimination in the regulations concerning the police.

In **Greece**, the 'Code of ethics of the police officer' was promulgated by presidential decree on 3 December 2004.[106] Like the equivalent Code of ethics adopted in Belgium in 2006, this Code is based on the European Code of Police Ethics recommended to the Council of Europe Member States on 19 September 2001.[107] It includes an explicit prohibition to commit any discrimination on the basis of colour, sex, national origin, ideology, religion, sexual orientation, age, disability, family situation, economic or social status or any other distinctive sign. Any violation of the Code may lead to disciplinary sanctions, or criminal sanctions if the criminal law has also been violated.

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[102] Federal Law Gazette Part I 2006 page 1897. in force since 18 August 2006

[103] See e.g. Section 9 (5) Police Act of the Land North Rhine-Westphalia.

[104] Naturally the police is bound to Article 3 (3) of the German Constitution (Basic Law): "No person shall be favored or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. …"

[105] See 16th – 18th CERD - Report submitted by the Federal Republic of Germany, October 2006, paragraph C.II.2 – 4 (see www.bmj.de/files/-/1632/CERD_16_bis_18_engl.pdf). See further Günter Schicht, *Menschenrechtsbildung für die Polizei*, Deutsches Institut für Menschenrechte, 2007, page 56, 58.

[106] Presidential Decree no 254/2004, 3 December 2004.

[107] Recommendation Rec(2001)10 of the Committee of Ministers of the Council of Europe, adopted on 19 September 2001 at the 765th meeting of Ministers' Deputies.

Following the judgment delivered by the European Court of Human Rights in the case of *Bekos and Koutropoulos v. Greece* on 13 December 2005,[108] the National Direction of the Police adopted a circular in June 2006 according to which officers conducting administrative inquiries into behavior contrary to the ethics of the police as regards persons belonging to vulnerable ethnic, religious or social groups (such as the Roma or foreigners) should investigate whether the said behaviour was motivated by a racist intent. In addition, the Minister of public order and the National Direction of the Police have adopted circulars (concerning, in particular, the exercise of the power to stop an individual and bring him or her to the police office in order to verify his or her identity) reaffirming their determination to combat the development of xenophobic or racist behaviour within the police and to control and monitor any such behaviour.

In **Hungary**, Act No. CXXV of 2003 on equal treatment and the promotion of equal opportunities contains a general prohibition of discrimination based among others on racial, national or ethnic origin, nationality, religious or ideological conviction (Article 8). The law prohibits both direct (article 8) and indirect (article 9) discrimination. Article 10 proscribes *inter alia* 'unlawful segregation', defined as 'a conduct that separates individuals or groups of individuals from others on the basis of their characteristics as defined in Article 8 without a reasonable explanation resulting from objective consideration.' The principle of equal treatment shall be observed – among others – by the Hungarian state, organizations exercising power as authorities, armed forces and police authorities (Article 4). The prohibition of racial profiling is implicit in the provisions of the Act on equal treatment. This prohibition is not limited to the law enforcement agencies, but applies to all state actors and – under certain conditions – to non-state actors as well.

In **Italy**, legal provisions establishing urgent measures as regards racial and ethnic discrimination were introduced by the legislative decree n° 215/2003 of 9 July 2003, in order to implement Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Although this legislative decree imposes a general obligation of non-discrimination, it does not abolish the pre-existing antidiscrimination rules contained in the Immigration Act of 1998 ; on the contrary, Article 2, al. 2 of the legislative decree n°215/2003 refers to the Immigration Act. Article 43 of the Immigration Act imposes a general obligation of non-discrimination,[109] inter alia, on public servants, including law enforcement officers (§ 2). This prohibition protects from discrimination not only aliens, but also Italians (§ 3).

In **Latvia**, although Directives 2000/43/EC and 2000/78/EC appear have not been fully implemented, activities of public institutions and law enforcement authorities are also regulated by other means which may be relevant to tackle the issue of ethnic profiling. The Administrative Procedure Law[110] imposes on all public authorities, including the courts, an obligation to observe the principle of equality : 'In matters where there are identical factual and legal circumstances, institutions and courts shall adopt identical decisions (in matters where there are different factual or legal circumstances – different decisions) irrespective of the gender, age, race, skin colour, language, religious beliefs, political or other views, social origin, nationality, education, social and financial status, type of occupation or other circumstances of participants in the administrative proceedings.'[111] The Administrative Procedure Law also provides for the right of everyone to claim due compensation for

[108] Appl. No. 15250/02. The judgment is described above in this opinion.
[109] The notion of discrimination is given a broad definition in Article 43 § 1 of the Immigration Act 1998, which clearly includes racial profiling in the meaning defined above. Discrimination is 'ogni comportamento che, direttamente o indirettamente, comporti una distinzione, esclusione, restrizione o preferenza basata sulla razza, il colore, l'ascendenza o l'origine nazionale o etnica, le convinzioni e le pratiche religiose, e che abbia lo scopo o l'effetto di distruggere o di compromettere il riconoscimento, il godimento o l'esercizio, in condizioni di parità, dei diritti umani e delle libertà fondamentali in campo politico, economico, sociale e culturale e in ogni altro settore della vita pubblica'.
[110] Administrat_v_ procesa likums (Administrative Procedure Law), in effect since 1 February, 2004, with amendments adopted till 23 January, 2004.
[111] Ibid., Article 6

financial loss or personal harm, including moral harm which has been caused him or her by an administrative act or an actual action of an institution.[112]

In addition, the equality principle is also explicitly included in several specific laws relating to the performance of police and border guard work. The Law on the Police[113] and the Border Guard Law[114] provide that the operations of (respectively) police and border guard shall be organised in conformity with the law, humanism, human rights, transparency, a single command structure, and based upon the assistance of the inhabitants. The police and border guard shall protect the rights and lawful interests of persons irrespective of their nationality, social, economic and other status, race and ethnicity, gender and age, education and language, attitude towards religion, political and other conviction. The Operational Activities Law[115] also includes a prohibition to discriminate on the basis of, inter alia, citizenship, ethnicity, place of residence, political and religious beliefs. On 5 December 2003 the head of the State Police order put into effect the Code of Professional Ethics and Behaviour of State Police Staff, which states that police staff while performing their duty ensures the respect of each individual's human rights, regardless of ethnicity, race, gender, language, religion, political or other conviction, age, education, social status. However, the principle of equality still requires to be further operationalized in practice ; moreover, the precise scope of these requirements still has to be tested in court.

In **Lithuania**, the Law on Equal Treatment (*Lygi_ galimybi_ _statymas*),[116] which entered into force on 1 January 2005, prohibits any direct or indirect discrimination on the grounds of the person's age, sexual orientation, state of health, race, ethnic origin, religion or opinions and provides instruments for implementing the principle of equal treatment. The law establishes the obligation of State government and administration institutions, educational institutions and employers to implement equal rights and sets the requirement to ensure equal treatment in the area of consumer protection. Article 4 of Law on Police Activities (*Policijos veiklos _statymas*)[117] provides that the police shall, in compliance with laws and other legal acts, impartially protect all persons who are in the territory of Lithuania, regardless of their nationality, race, gender, language, origin, social status, religious beliefs, convictions or views. Police officers who violate the requirements of the law shall be subject to disciplinary, administrative, material, or criminal liability, depending on the nature of the violation.

In **Luxembourg**, the main provisions against discrimination are to be found in the Penal Code, in Articles 454 to 457. Individual and collective discrimination are prohibited under these provisions and can lead to a fine or imprisonment of up to two years. Article 454 of the Penal Code defines discrimination as 'Any difference of treatment applied to natural persons on grounds of their racial or ethnic origin, skin colour, sex, sexual orientation, family situation, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual or supposed, of an ethnic group, nationality, race or specific religion'. The administration and the behaviour of the civil servants are covered by Article 456 of the Penal Code, which states : 'Discrimination as specified in Article 454, committed against a natural person or legal entity, group or community of persons by a person exercising public authority or responsible for a task in the public service, in the exercise of, or while exercising his duties or tasks shall be punishable by a term of imprisonment of from one month to three years and a fine of from 10,001 francs to 1,500,000 francs, or one of these punishments alone, where it consists of: refusal of the benefit of a right granted by law; constraint of the normal exercise of any economic activity whatsoever'.

[112] Ibid., Article 92
[113] Likums par policiju (Law on Police), in effect since 4 June, 1991, with amendments adopted till 26 October, 2005, Article 5.
[114] Robe_sardzes likums (Border Guard Law), in effect since 1 January, 1998, with amendments adopted till 25 November, 2005.
[115] Operat_v_s darb_bas likums (Operational Activities Law), in effect since 14 January, 2004, with amendments adopted till 26 October, 2005, Article 4
[116] *Lygi_ galimybi_ _statymas*, V_ 2003, Nr. 114-5115.
[117] Law on Police Activities (*Policijos veiklos _statymas*) amended by 16 May 2002 No. IX – 887.

In **Malta**, under section 4 of the Police Act (Chapter 164) the main objectives of the force are stated to be, among other things, 'the application of the law without discrimination on any grounds such as the ground of race.'

In **The Netherlands**, racial discrimination is prohibited in Article 1 of the Constitution, Articles 137c-137g and 429quater of the *Wetboek van Strafrecht* [Criminal Code] as well as in the *Algemene wet gelijke behandeling* [*Awgb*, General Equal Treatment Act]. These provisions do not contain a definition of racial discrimination, but another provision – Article 90quater of the Criminal Code – defines discrimination. Although it is not confined to *racial* discrimination, it closely follows the definition of Article 1(1) ICERD. Article 429quater of the Criminal Code applies to law enforcement officers in the exercise of their duties, and should be interpreted to cover ethnic profiling. The usual burden of proof applies, i.e., there is no possibility here, as under Article 10 of the General Equal Treatment Act, to shift the burden of proof on the shoulders of the defendant.[118].

In **Poland**, the prohibition against discrimination based on membership of an ethnic group is contained in Article 2 of the Law on National and Ethnic Minorities and Regional Language adopted in 2005.[119] Furthermore, under Article 6 para. 2 of said Law, public authorities are obliged to take appropriate steps to support full and actual equality in spheres of economic, social, political and cultural life between the minorities and the majority ; and to ensure the protection of persons subject to discrimination, enmity or violence resulting from their minority status as well as to reinforce intercultural dialogue. In addition, the Penal Code of 6 June 1997[120] penalises activities taken against national, ethnic and religious minorities. Ethnic profiling would be considered in particular under Art. 194 of the Penal Code, which provides that infringing upon a person's rights because of their denomination or non-denomination is subject to a fine, limitation of liberty or up to two years of imprisonment.

In **Portugal**, the existing anti-discrimination legislation, which protects from discrimination on grounds of race, ethnic origin, nationality or religion, does extend to the acts of public authorities, including law enforcement authorities, but the enforcement of the legislation remains deficient. In the police sector, Decree-Law 275-A/2000 (*Organic law of the Judiciary Police*), imposes on the police officers a duty to act without discrimination on the grounds of ascendancy, sex, race, language, origin territory, religion, political or ideological ideas, education, economic and social condition (Art. 13-b).

In the **Slovak Republic**, the prohibition of racial profiling follows from the imposition of the principle of equal treatment and the prohibition of discrimination contained in the Constitution of the Slovak Republic and in the existing anti-discrimination legislation. According to the Section 3 paragraph 1 of Anti-discrimination Act [*antidiskrimina_n_ zákon*][121], the principle of equal treatment must be observed by all public authorities, self-governing bodies, self-governing interest groups, natural persons and legal persons. This legal obligation, however, does not apply if in a specific situation the observation of this legal imperative would or might be inconsistent with measures adopted on the basis of specific laws that are necessary for the safeguarding of security, public order, prevention of unlawful acts, safeguarding of protection of health or protection of rights, legally protected interests and freedoms of persons.[122]

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[118] See, e.g., Rechtbank Dordrecht, 3 December 2003, LJN AN9333, where the 'bouncer' of a bar was charged with refusing entry to Turkish visitors whilst admitting a white visitor: the 'bouncer' was acquitted since the court did not rule out there may have been other reasons than their ethnic background for refusing entry to the complainants

[119] Dz.U. [Journal of Law] from 2005 No. 17, pos. 141, pursuant to art. 2 of this law, this applies only to Polish citizens.

[120] Dz.U. [Journal of Law] from 1997 No. 88, pos. 553, as later amended.

[121] *Zákon _. 365/2004 Z. z. rovnakom zaobchádzaní v niektor_ch oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektor_ch zákonov (antidiskrimina_n_ zákon)* [Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws (Anti-discrimination Act)].

[122] Moreover, according to the Section 4 paragraph 1 of the Anti-discrimination Act the provisions of the Anti-discrimination Act shall not apply to differences of treatment resulting from the requirements for entry and stay of aliens in the territory of the Slovak Republic, including the treatment of these aliens provided for under separate regulations.

In **Slovenia**, in addition to the Act Implementing the Principle of Equal Treatment[123] which implements the Racial Equality and the Employment Equality Directives, Article 141(1) of the Penal Code prohibits discrimination on the basis of nationality, race, color of skin, religion, ethnic roots, gender, language, political or other beliefs, birth status, education, social position or any other circumstance.[124] Both instruments may potentially apply to discrimination by public officials, in particular law enforcement officers. Article 1(1) of the Act Implementing the Principle of Equal Treatment (Contents and purpose of the act) provides that the Act seeks to ensure 'equal treatment of all persons in performing their duties and exercising their basic freedoms in every field of social life, and especially in the fields of employment, labour relations, participation in trade unions and interest associations, education, social security, access to and supply of goods and services. This shall be available, irrespective of personal circumstances such as nationality, racial or ethnic origin, sex, health state, disability, language, religious or other conviction, age, sexual orientation, education, financial state, social status or other personal circumstances.' Article 1(3) provides that the Act shall be implemented also to the 'legal protection of discriminated persons in judicial or administrative procedures, initiated due to particular violation of prohibition of discrimination as determined by law'. The scope of application ratione materiae of the Act therefore is significantly wider than that of the Racial and Employment Equality Directives. As to Article 141 of the Penal Code, it is clear from its third para. that the prohibition of discrimination it imposes under the threat of criminal sanctions applies to public agents.[125] Moreover, the 1998 Police Act (Zpol)[126] imposes on police officers to respect human rights and fundamental freedoms in carrying out their tasks (Art. 30.1 of ZPol). Article 28 of the Police Act provides for a right to complaint with the police for the individuals aggrieved by a violation of this provision.

In **Spain**, Article 511 of the Penal Code prohibits racial or ethnic discrimination committed by the public authorities : any civil servant (including any police officer) guilty of having committed such discrimination may be convicted to imprisonment for six months to two years, to financial penalties, and to inability to occupy public office for one to three years (for private individuals working in a public service) or for two to four years (for civil servants). Article 314 of the Penal Code sanctions persons guilty of 'aggravated discrimination' in the field of employment, practiced on the basis of ideological affiliation, religion or conviction, race or ethnicity. In addition, specific legislations exist in the field of employment (*Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y del orden social [*Law 62/2003 of 30 December 2003 containing fiscal, administrative, and social order measures] BOE 31.12.2003), and as regards law enforcement authorities (*Ley Orgánica 2/1986, de 13 marzo, de Fuerzas y Cuerpos de Seguridad* [Organic Law 2/1986, on security forces and bodies] BOE 4.3.1986) ; Article 5 of this latter legislation imposes an obligation of non-discrimination on the members of law enforcement authorities. The Organic Law 4/2000 also contains measures prohibiting discrimination by public authorities against aliens (Art. 23, located in Chapter IV among the measures combating discrimination).

In **Sweden**, the Prohibition of Discrimination Act (2003 :307) implementing the Racial Equality and Employment Equality directives only imposes a prohibition of discrimination based on ethnic origin, religion or other belief in work and employment, goods, services, housing, social services, the social insurance system, unemployment insurance, study support and health and medical care. The Act does not apply to the judicial system nor law enforcement officials (even though certain parts of the public sector are covered, e.g. social insurance). However, there is a pending Bill for a new discrimination act which widens considerably the scope of those bound by the prohibition of discrimination. Under this draft legislation, the prohibition of discrimination would apply to all persons in the public sphere when

[123] *Zakon o uresni_evanju na_ela enakega obravnavanja (ZUNEO)*, Official Gazette 2004, nr. 50.
[124] In addition, Article 82(3) of the Aliens Act (Integration of Foreigners) protects aliens from any form of discrimination based on racial, religious, national, ethnic or other types of difference.
[125] Article 141(3) of the Penal Code reads: 'In the event of the offence under the first or the second paragraph of the present article being committed by an official through the abuse of office or of official authority, such an official shall be sentenced to imprisonment for not more than three years'.
[126] Police Act (Official Gazette RS, Nos. 49/98, 66/98 – corr., 93/01, 56/02, 79/03, 43/04 – off. consol. text, 50/04, 102/04 – off. consol. text, 14/05 – corr. off. consol. text, 53/05, 70/05 – off. consol. text, 98/05 and 3/06 – off. consol. text) (ZPol).

they come in contact with the general public ('går allmänheten till handa', draft Chapter 3, Section 22). The will cover also police and other law enforcement activity. In addition, the Swedish Penal Code prohibits unlawful discrimination (Penal Code, Chapter 16, Section 9), and a new paragraph inserted in 2006 in this section extends the prohibition to all public officials (including law enforcement officials). The provision has been in force for less than a year and it is not yet possible at this time to evaluate its impact in case law and practice.

In the **United Kingdom**, while there is no primary or secondary legislation that specifically deals with ethnic profiling, the general prohibition on racial discrimination would mean that it would be unlawful (i.e., a civil wrong or administratively an excess of power but not a crime) were it to be undertaken to the extent that it does not fall within the exceptions in the Race Relations Act 1976 and the Data Protection Act 1998. However, the immigration authorisation (which constitutes an exception to the antidiscrimination legislation) and guidance on stop and search, although they are not formal rules, have a bearing on ethnic profiling. Both are briefly commented upon here.

National rules prohibiting discrimination on the ground of race or ethnic origin and national origin are to be found in the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000.[127] The latter measure strengthened the 1976 Act by outlawing discrimination in all public authority functions not already covered by the original 1976 Act, with only a few exceptions being retained. In particular it extended the prohibition of discrimination to the law enforcement functions of the police and other enforcement agencies. The remaining exceptions include a) discrimination on grounds of nationality and ethnic or national origin (but not on grounds of race or colour) in immigration and nationality functions (where this is contained in legislation or expressly authorized by ministers) and b) the core functions of the intelligence and security agencies. There is no information publicly available about discrimination in the exercise of the latter but an instance of the former can be seen in the Race Relations (Immigration and Asylum) (No 2) Authorisation 2001, which provides as follows:

> "DISCRIMINATION ON GROUND OF ETHNIC OR NATIONAL ORIGIN
>
> ## Examination of passengers
>
> 2. Where a person falls within a category listed in the Schedule and is liable to be examined by an immigration officer under paragraph 2 of Schedule 2 to the Immigration Act 1971 the immigration officer may, by reason of that person's ethnic or national origin -
> (a) subject the person to a more rigorous examination than other persons in the same circumstances;
> (b) exercise powers under paragraphs 2(3), 2A, 4 and 21 of Schedule 2 to the Immigration Act 1971;
> (c) detain the person pending his examination under paragraph 16 (1) of Schedule 2 to the Immigration Act 1971;
> (d) decline to give the person's notice of grant or refusal of leave to enter in a form permitted by Part III of the Immigration (Leave to Enter and Remain) Order 2000; and
> (e) impose a condition or restriction on the person's leave to enter the United Kingdom or on his temporary admission to the United Kingdom.
>
> ## Persons wishing to travel to the United Kingdom

[127] Anti-discrimination legislation in the United Kingdom is in a transitory phase. The Equality Act 2006 will extend the protection against religion and belief to the provision of goods, facilities and services and the prohibition on discrimination applies to public authority functions, subject to the same exceptions already noted in respect of the Race Relations Act 1976. The 2006 Act is not yet in force and this may only occur once the Commission for Equality and Human Rights also envisaged in the Act has been established.

(3) Where a person falls within a category listed in the Schedule and is outside the United Kingdom but wishes to travel to the United Kingdom, an immigration officer or, as the case may be, the Secretary of State may, by reason of that person's ethnic or national origin-
(a) decline to give or refuse the person leave to enter before he arrives in the United Kingdom; and
(b) exercise the powers to seek information and documents under articles 7(2), 7(3) and 13(8) of the Immigration (Leave to Enter and Remain) Order 2000."

Law enforcement powers are generally based on a requirement of reasonable suspicion and their exercise could not, therefore, be based solely on the fact that the person affected belonged to a particular race or religion or had a particular ethnic or national origin since this would be insufficient to satisfy the objective standard being imposed. In all cases the exercise of powers on such a basis would constitute a civil wrong (race discrimination) and in many of them also an offence (the lack of legal power resulting in at least an assault) and another civil wrong (trespass to the person). However, powers such as those in section 44 of the Terrorism Act 2000 (and the power to stop at ports contained in Schedule 7 of that Act) allows for a search to be carried out where there is only suspicion and this is likely to make it much harder to challenge the exercise of a search power in a given case. In any event there does not seem to be anything in the current law which would preclude taking account of a person's race, religion and ethnic or national origin in assessing a particular situation and it remains to be seen whether this could be used to water down the objective basis required for the exercise of these powers. Certainly the Code A guidance on Section 44 advises first that:

> Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers

but it goes on to say that:

> There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities).

Moreover the Home Office's *Stop & Search Action Team Interim Guidance*, which is a guidance document for police managers published in 2004, suggests that: "There may be circumstances where it is appropriate for officers to take account of a person's ethnic background when they decide who to stop in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic groups, such as Muslims)" (although there is of course actually no such ethnic group as "Muslims"). Furthermore a Home Office Minister suggested in 2005 that Muslims would have to accept as a "reality" that they will be stopped and searched more often than the rest of the public but subsequently responded to an outcry by saying that police stops would be intelligence-led and denied that she had ever endorsed ethnic profiling by the police. The matter has not so far been tested in the courts; although the stop and search powers under the Terrorism Act 2000 were found in principle to be compatible with the European Convention on Human Rights in *Gillan v Commissioner of Police for the Metropolis* [2006] UKHL 12, the specific circumstances of their use in certain instances was not addressed by the House of Lords. We return to this case below.

In addition note should be taken of *A formal investigation of the police service of England and Wales* (March 2005), a report for the Commission for Racial Equality, as it shows that there is much to be done in this sector in tackling race discrimination and there that there may well be informal, if not formal, racial profiling. As Sir David Calvert-Smith, who led the investigation, said: "There is no doubt that the Police Service [in England and Wales] has made significant progress in the area of race equality in recent years. However, there is still a long way to go before we have a service where every officer treats the public and their colleagues with fairness and respect, regardless of their ethnic origin. Willingness to change at the top is not translating into action lower down, particularly in middle-management where you find the ice in the heart of the Police Service. For example, managers are not

properly supported or fully trained on how to handle race grievances, so relatively minor issues are often unnecessarily escalated … We also found that none of the organisations we worked with complied fully with the race equality duty. For example, we wanted to find out whether ethnic minority officers were being disproportionately disciplined, but when we asked a sample group of forces for their discipline statistics, two thirds were unable to provide them in the requested format. These forces were either not recording the data as required by the ethnic monitoring duty or were not properly monitoring them. We also found that few forces appeared to be carrying out full race impact assessments of their new policies; risking difficulties arising which could have been ironed out earlier". The report recommended that racial misconduct be made a separate and, depending on the gravity, sackable offence but this is still a matter of discipline rather than the criminal law.

The Commission for Racial Equality has recently indicated that it would use its powers under the 1976 Act to challenge any use of racial profiling in respect of air passengers, which has been mooted in public debate (without any official backing) after the alleged planning for an attack on planes interrupted in August 2006.

The Police and Criminal Evidence Act 1984 Code A on Stop and Search has been revised to require the police when undertaking a stop and search of someone to record the person concerned's self-defined ethnic background and why the person was questioned. However, it seems no more than a third of encounters are actually recorded (Home Office's Policing and Reducing Crime Unit, *Police Stops and Searches: Lessons from a Programme of Research*, 2006). Statistics on the use of stop and search powers have been compiled by the Home Office and reports based on them are published at http://www.homeoffice.gov.uk/rds/policingdc.html. This is done partly as a result of the requirement under the Criminal Justice Act 1991, s 95 for the Secretary of State each year to publish such information as he considers expedient for the purpose of "(b) facilitating the performance of such persons of their duty to avoid discriminating against any persons on the ground of race or sex or any other improper ground" and the latest report - Statistics on Race and the Criminal Justice System - 2005 – deals specifically with the issue of stop and search, which is shown to affect disproportionately those belonging to ethnic minorities, particularly in the exercise of anti-terrorism powers after 11 September 2001. This disproportionate impact does not necessarily mean that there was anything unlawful in the individual stops and searches; in some instances at least there is a consistency with patterns of recorded crime (Home Office's Policing and Reducing Crime Unit, *Police Stops and Searches: Lessons from a Programme of Research*, 2006).

The Parliamentary Joint Committee on Human Rights has twice expressed concern about the danger of counter-terrorism measures discriminating against members of minority groups, and in particular Muslims, and warned of the danger of the counter productivity of some of those measures (Third and Twelfth Reports for 2005-06). More recently it noted that "Two of the counter-terrorism powers in the UK which gives rise to strong concerns about racial profiling are the power to stop and search without reasonable suspicion contained in s. 44 of the Terrorism Act 2000 and the power to stop at ports contained in Schedule 7 of the Act" (Twenty-Fourth Report for 2005-06, para 158).

5. The existing case-law on ethnic profiling

5.1. International case-law

There exists little case-law from international jurisdictions or expert bodies relating directly to ethnic profiling. Reference has been made already to the positions of the Committee for the Elimination of Racial Discrimination and, in part, to the case-law of the European Court of Human Rights. While emphasizing the obligations of States to duly investigate any allegation that certain offences were committed with a racist motive, the European Court of Human Rights at the same time has proven

reluctant to identify instances of racial discrimination in situations where the behaviour of State agents was not openly discriminatory and could be given diverse interpretations.[128] The European Court of Human Rights has been confronting these questions of proof of discrimination only recently. In the case of *Hugh Jordan v. the United Kingdom*,[129] the Court was confronted with statistics showing that, over a period of 25 years (1969-1994), 357 people had been killed by members of the security forces, the overwhelming majority of whom were young men from the Catholic or nationalist community. According to the applicant, whose son has been killed by the security forces while unarmed, 'When compared with the numbers of those killed from the Protestant community and having regard to the fact that there have been relatively few prosecutions (31) and only a few convictions (four, at the date of his application), this showed that there was a discriminatory use of lethal force and a lack of legal protection vis-à-vis a section of the community on grounds of national origin or association with a national minority'.[130] The Court noted however that mere statistical data would not suffice to prove discrimination as prohibited under Article 14 ECHR:

> Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14.[131]

In *Nachova*, where it was confronted with the killing by State agents of two deserters of Roma origin and the ensuing lack of effective investigations, in particular into the alleged racist motives behind the killing, the Grand Chamber of the Court, while not excluding in principle that 'in certain circumstances, where the events lie wholly, or in large part, within the exclusive knowledge of the authorities (…) it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis', refused to conclude that Article 14 of the Convention had been violated despite indicia showing that the fact that the deserters were Roma might have led the police to react disproportionately. It said:

> …where it is alleged – as here – that a violent act was motivated by racial prejudice, such an approach [shifting the burden of proof on the State authorities] would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated. The Grand Chamber (…) does not consider that the alleged failure of the authorities to carry out an effective investigation into the alleged racist motive for the killing should shift the burden of proof to the

[128] See, in particular, Eur. Ct. HR (2nd sect.), *Cissé v. France*, Appl. no. 51346/99, admissibility decision of 16 January 2001; Eur. Ct. HR (GC), *Nachova and Others v. Bulgaria*, Appl. nos. 43577/98 and 43579/98, judgment of 6 July 2005, §§ 157-159.

[129] Eur. Ct. HR (3d sect.), *Hugh Jordan v. the United Kingdom* (Appl. N° 24746/94), judgment of 4 May 2001.

[130] Ibid., § 152.

[131] Ibid., § 154. The same wording was adopted by a Chamber constituted within another section of the Court in the case of *McShane v. the United Kingdom*, which raised similar issues : see Eur. Ct. HR (4th sect.), *McShane v. the United Kingdom* (Appl. No. 43290/98), judgment of 25 May 2002, §§ 132-136. In the case of *D.H. and Others v. the Czech Republic* (Appl. No. 57325/00), which concerned the overrepresentation of Roma pupils in special schools meant for pupils with learning disabilities, a Chamber constituted within the 2nd section of the Court reiterated this view that statistics demonstrating such an overrepresentation, as such, cannot be treated as proof of discrimination (§ 46). The Court acknowledged that these statistics 'disclose figures that are worrying and that the general situation in the Czech Republic concerning the education of Roma children is by no means perfect', however it considered that is could not in the circumstances find that the measures taken against the applicants were discriminatory (§ 52). This case is currently pending before the Grand Chamber of the European Court of Human Rights to which is has been referred.

respondent Government with regard to the alleged violation of Article 14 in conjunction with the substantive aspect of Article 2 of the Convention.[132]

In later cases, the Court has shown it was unwilling to find that discrimination has occurred in the absence of material facts pointing strongly to that conclusion. For instance, in *Balogh v. Hungary*, the applicant, of Roma ethnic origin, has been ill-treated by police officers, leading the Court by a narrow majority of 4 votes to 3 to find a violation of Article 3 of the Convention ; but although he argued that the suspected police officers were aware of the fact that he was of Roma origin and noted that the Hungarian police's discriminatory conduct vis-à-vis persons of Roma origin was well-documented, the Court refused to conclude that the non-discrimination clause of Article 14 of the Convention had been violated.[133] In *Hasan Ilhan v. Turkey*, the applicant argued that the destruction of his family home and possessions was the result of an official policy, which constituted discrimination because of his status as a member of a national minority; this claim was dismissed, the Court considering that there is an insufficient basis in fact for grounding this allegation.[134]

It is unclear which lessons can be drawn from this case-law, as regards the protection against ethnic profiling which should be ensured under the national legislations of the States parties to the Convention. As an international court deciding issues of State responsibility, the Court is not passing judgment on the responsibility, civil or criminal, of any individual defendant facing an allegation that he or she has acted in a discriminatory fashion.[135] It is on the other hand attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights.[136] Therefore it would not be justified to transpose the approach adopted by the European Court of Human Rights as regards the question of the evidence of discrimination by the national authorities of the States parties, to the same question arising before the national courts, for instance in criminal, disciplinary, or civil proceedings against law enforcement officers alleged to have practiced ethnic profiling. In addition, this case-law may be considered unsufficiently protective of the victims of discrimination, especially insofar as it does not require an explanation from the State concerned where statistics would seem to allow to establish a presumption of discrimination. This is especially striking since in other areas, for instance when an individual has been injured when under the power of State agents, the Court allows for the burden of proof to be shifted.

5.2. The national jurisdictions of the EU Member States

[132] Eur. Ct. HR (GC), *Nachova and Others v. Bulgaria*, Appl. nos. 43577/98 and 43579/98, judgment of 6 July 2005, § 157. In contrast, the Chamber constituted within the 1st section of the Court, which delivered the first judgment in the *Nachova* case on 26 February 2004, considered that when confronted with the allegation that killings by State agents were committed with racial overtones, States are under a positive obligation to pursue an official investigation with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence (§ 157). It took the view that where the public authorities fail to comply with this obligation, it becomes justified to shift the burden of proof and presume the existence of discrimination even in the absence of any positive evidence demonstrating this.

[133] Eur. Ct. HR (2nd sect.), *Balogh v. Hungary* (Appl. N° 47940/99), judgment of 20 July 2004, § 79.

[134] Eur. Ct. HR (2nd sect.), *Hasan Ilhan v. Turkey* (Appl. N° 22494/93), judgment of 9 November 2004, §§ 128-130.

[135] See Eur. Ct. HR, *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 24, § 32; Eur. Ct. HR (1st sect.), *Nachova and Others v. Bulgaria* (Appl. N° 43577/98 and 43579/98), judgment of 26 February 2004, § 166, with further references. In the *Nachova and Others v. Bulgaria* judgment of 6 July 2005, the Grand Chamber of the Court notes: 'Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof.' (§ 147).

[136] See, among others, the following judgments: *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, § 161; *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 24, § 32; *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1211, § 68; *Tanli v. Turkey*, no. 26129/95, § 111, ECHR 2001-III; and *Ila_cu and Others v. Moldova and Russia* [GC], no. 48787/99, § 26, 8 July 2004. These judgments, significantly, are cited by the Grand Chamber of the European Court of Human Rights in the *Nachova* case, where they serve to justify the cautious attitude of the Court as regards the suggestion that it should allow shifting on the defending government the burden of proof where discrimination is alleged under Article 14 of the Convention.

a) Ethnic profiling as a violation of the principle of non-discrimination[137]

In the **United Kingdom**, two cases presented before the House of Lords have given some consideration to the question of ethnic profiling. In *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, 9 December 2004, immigration officers operating at Prague Airport were held to have discriminated on racial grounds – contrary to the Race Relations Act 1976, s 1(1)(a) - against Roma seeking to travel from that airport to the United Kingdom by treating them more sceptically than non-Roma when determining whether to grant them leave to enter the United Kingdom. The House of Lords considered that the immigration officials should have been given careful instructions in how to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their intentions from the answers they had given to standard questions which were put to everyone. The operation in this case, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group, was considered to require enormous care if it was to be done without discrimination but that had not happened, with the result that it was inherently and systemically discriminatory and unlawful. It should be noted that the authorisation previously referred to was not considered applicable in this case.

More recently, in *Gillan v Commissioner of Police for the Metropolis* [2006] UKHL 12 the House of Lords upheld the lawfulness of the use of the power of stop and search under the Terrorism Act 2000.s.44 with regard to a student demonstrator and a journalist in the vicinity of an arms fair. The ruling did not require the issue of racial profiling to be determined but the observations of two of their Lordships are worthy of note as they point to it not being seen as completely inconsistent with prohibitions of discrimination, albeit that it cannot be the sole basis for decision-making. Thus Lord Hope of Craighead stated:

> 43. What then if it is found that the police are using the section 44 power more frequently to stop Asians than other racial groups in the community? Does this amount to direct discrimination contrary to domestic law (…)? The issue does not arise directly in this case, of course, because neither of the appellants is of Asian origin. But it cannot be overlooked, especially in view of the concern that the House expressed in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1 about the fact that all Roma applicants were being routinely treated, simply because they were Roma, with more suspicion and subjected to more intensive and intrusive questioning than non-Roma. (…) The evidence showed that the operation that was being conducted in that case was inherently and systematically discriminatory and unlawful.
>
> 44. The decision in the *Roma* case reminds us that if a person discriminates on racial grounds the reason why he does so is irrelevant. The use of the section 44 power on racial grounds is not exempt for being treated as discriminatory simply because of the purpose for which it is being exercised. (…) The whole point of making it unlawful for a public authority to discriminate on racial grounds is that impressions about the behaviour of some individuals of a racial group may not be true of the group as a whole. Discrimination on racial grounds is unlawful whether or not, in any given case, the assumptions on which it was based turn out to be justified.
>
> 45. Where then does this leave the police officer when he is deciding whom to stop and search in the exercise of the section 44 power? The key must surely lie in the point which Baroness Hale made in her speech in the *Roma* case, at p 59H, para 82, that the object of the legislation is to ensure that each person is treated as an individual and not assumed to be like

[137] See, in addition to the cases discussed in this section, judgment U-I-152/03 delivered by the Slovenian Constitutional Court on 30 March 2006, and referred to in section 3.3. of this opinion.

other members of the group [138]. That was the trap into which the immigration officers fell at Prague airport, as the evidence showed that all Roma were being treated in the same way simply because they were Roma. So a police officer who stops and searches a person who appears to be Asian in the exercise of the section 44 power must have other, further, good reasons for doing so. It cannot be stressed too strongly that the mere fact that the person appears to be of Asian origin is not a legitimate reason for its exercise.

46. Times and places will vary, of course, and the numbers and mixture of people of different races and ethnic backgrounds that one sees using buses, railways and the London Underground may not be typical of the places where authorisations are given throughout the country. But a decision to use the section 44 power will in practice always be based on more than the mere fact of a person's racial or ethnic origin if it is to be used properly and effectively, especially in places where people are present in large numbers. The selection process will be more precisely targeted, even if in the end it is based more on a hunch than on something that can be precisely articulated or identified. Age, behaviour and general appearance other than that relating to the person's racial or ethnic background will have a part to play in suggesting that a particular person might possibly have in his possession an article of a kind which could be used in connection with terrorism. An appearance which suggests that the person is of Asian origin may attract the constable's attention in the first place. But a further selection process will have to be undertaken, perhaps on the spur of the moment otherwise the opportunity will be lost, before the power is exercised. It is this further selection process that makes the difference between what is inherently discriminatory and what is not.

47. On balance, therefore, I think that it is not inevitable that stopping persons who are of Asian origin in the exercise of the section 44 power will be found to be discriminatory. But the risk that it will be employed in a discriminatory fashion cannot be discounted entirely. No more can the risk that the power will be used on occasions, as the appellants claim but has yet to be established by evidence, for a purpose that has nothing to do with the prevention of acts of terrorism. These thoughts lead to the problem of satisfying the test of legal certainty. This must be done if the use of the section 44 power is not to be open to the objection that it is, by its very nature, arbitrary.

Lord Brown of Eaton-under-Heywood was perhaps a little more sympathetic to the use of profiling when he said:

81. Ethnic origin accordingly can and properly should be taken into account in deciding whether and whom to stop and search provided always that the power is used sensitively and the selection is made for reasons connected with the perceived terrorist threat and not on grounds of racial discrimination.

(…)

91. (…) It is one thing to accept that a person's ethnic origin is part (and sometimes a highly material part) of his profile; quite another (and plainly unacceptable) to profile someone solely by reference to his ethnicity. In deciding whether or not to exercise their stop and search powers police officers must obviously have regard to other factors too.

92. Of course it is important, indeed imperative, not to imperil good community relations, not to exacerbate a minority's feelings of alienation and victimisation, so that the use of these supposed preventative powers could tend actually to promote rather than counter the present terrorist threat. I repeat, therefore, as Lord Carlile has consistently done in his annual reports, that these stop and search powers ought to be used only sparingly. But I cannot accept that,

[138] This decision is referred to in the preceding paragraph of this opinion.

> thus used, they can be impugned either as arbitrary or as 'inherently and systematically discriminatory' (Lord Steyn's characterisation of the Prague operation) simply because they are used selectively to target those regarded by the police as most likely to be carrying terrorist connected articles, even if this leads, as usually it will, to the deployment of this power against a higher proportion of people from one ethnic group than another. I conclude rather that not merely is such selective use of the power legitimate; it is its *only* legitimate use. To stop and search those regarded as presenting no conceivable threat whatever (particularly when that leaves officers unable to stop those about whom they feel an instinctive unease) would itself constitute an abuse of the power. Then indeed would the power be being exercised arbitrarily.

The position adopted in **Spain** by the Constitutional Court (*Tribunal Constitucional*) also deserves being mentioned.[139] On 29 January 2001, the Second Chamber of the Constitutional Court took the view that the arrest of a woman in a train station, in order to identify her and to control the legality of her administrative situation, could not be considered discriminatory, although she was dark skinned. The woman concerned was an African-American of naturalized Spanish citizenship. The identity check by the police took place upon her leaving a train. She had no identity documents with her but assured the police that she was of Spanish nationality, and that the documents were at her home. She was travelling with her husband, who was white and was not checked. Only after she was brought to the police office in the station was it proven that she indeed had the Spanish nationality. The identity check was based on the Regulation on Foreigners (Royal Decree 1119/1986, at the material time) and Organic Law 1/1992 on citizens' security, the latter legislation obliging all foreigners to be in possession of their passport or other document authorizing entry into Spain, although they may be allowed to prove their identity by other means. The Constitutional Court considers that insofar as police identity checks serve such an objective, determined physical or ethnic characteristics may be taken into consideration as reasonable indicia of the non-Spanish origin of the persons concerned. Ethnicity may be used as a proxy for the identification of foreigners in Spain. Nothing in the behaviour of the police officers created the impression that they might have been motivated by a discriminatory intent. Notably, the police officer had been acting upon instructions that he should verify the identity of persons defined by their non-Spanish ethnicity: according to the Constitutional Court, although he did comply with that order, nothing in the attitude of the police officer could be labelled racist.

On September 12, 2006, a coalition of advocacy groups submitted an application to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights, seeking to halt racial profiling by police in Spain (*Rosalind Williams Lecraft v. Spain*). The application challenged the abovementioned 2001 ruling by the Spanish Constitutional Court which held that police could target blacks for identity checks because racial appearance is a proxy for immigration status. The application asks the Committee to rule that race may not be used as a criterion in police stops.

In contrast to the position adopted by the Spanish Constitutional Court, a complaint for discrimination filed in **Austria** in similar circumstances did succeed before the Austrian Constitutional Court. An Austrian citizen born in Ghana[140] and her four-year-old daughter travelled by train from the Netherlands to Austria. During the train ride her luggage was controlled by law enforcement organs without any result. After arriving in Vienna she was controlled a second time without any result and had to declare her consent to an X-ray examination, which passed also without any result. The woman submitted a complaint to the Independent Administrative Tribunal (Unabhängiger Verwaltungssenat, UVS) in Vienna, according to Art 129 Subsec. 1 Number 2 of the Federal Constitutional Law (B-VG), Sec. 67a Subsec. 1 Number 2 General Administrative Procedure Act[141] (AVG) and Sec. 88 Subsec. 1 of the Security Police Act (SPG). The complainants argued, that the above-mentioned treatment has only happened by reason of their colour and birth. Their complaint has been dismissed by decision

[139] Tribunal Constitucional, Sala Segunda, Sentencia 13/2001 de 29 Ene. 2001, rec. 490/1997.
[140] No. B1128/02, dated 9 October 2003, Collection No. 17017.
[141] Federal Law Gazette No. 51/1991 as amended by Federal Law Gazette I No. 10/2004.

(*Bescheid*). The Independent Administrative Tribunal did not assess the claim of the complainants that the law enforcement organs acted only because of their colour. This decision was annulled by the Austrian Constitutional Court, where the woman and her daughter appealed. The Constitutional Court took the view that the Independent Administrative Tribunal did not sufficiently take into account evidence on which the claim of racial discrimination of the law enforcement organs was based. Instead, it concluded that there had been racial discrimination, in violation of Article 7 of the Federal Constitution.

In **Cyprus**, the Ombudsman – which delivers opinions on issues of equality and discrimination after receiving relevant complaints – delivered an opinion on a particular case of ethnic profiling on 23 June 2005.[142] The Ombudsman decided that the policies of insurance companies to exclude Pontian Greeks from getting insured and/or have them insured at a higher rate, is discriminatory.[143] The insurance companies argued that the reason why it is more difficult for Pontian Greeks to get insured is because of their past practice which has shown that Pontian Greeks are more prone to accidents and usually do not cooperate well with the insurance companies. The Ombudsman noted that "such a policy is based on the racial or ethnic origin of the insured and is unacceptable as it violates the Equal Treatment (Racial or Ethnic) Origin Law of 2004 (L. 59(I)/2004)."[144] In the **Netherlands**, the National Ombudsman deals occasionally with allegations of ethnic profiling by law enforcement officials. In case 1992/876, for instance, police officers required a person to show an ID, assuming on the basis of his ethnicity that he was a foreigner. The Ombudsman recalled a motion accepted in Parliament in 1984 stating that a person's appearance is not a factor to assume that he does not have Dutch nationality. He emphasised that police officers may not be guided by ethnic characteristics when determining their course of action.[145]

Even where the principle is clearly affirmed that stereotyping based on ethnicity, religion or national origin, should be considered discriminatory and thus inadmissible, it will remain in many cases difficult for potential victims to bring forward positive evidence that such stereotyping has indeed taken place, and that the decision affecting them has been based on one of those factors. In **Denmark**, the Complaints Committee declared that it could not, based on the facts uncovered in the case, determine whether or not a certain municipality had used profiling, i.e. generalized information on social and/or cultural characteristics about a specific ethnic group, in its decision-making procedures. The Complaints Committee did express the view that a public authority is not permitted to use such information in decision-making or adjudication, unless it is objectively justified for a legitimate aim and the means for achieving this aim are suitable and necessary. However, in the case at hand, based on the municipality's statement that generalized information on Somali cultural and social circumstances should not enter into the adjudication of specific cases, and on the fact that there was no evidence of other cases where the municipality had in fact taken such information into consideration; and taking into account, moreover, that the municipality had waived repayment of rent subsidies in the case in question, the Complaints Committee took no further action. (*Decision of 4 February, 2005 (Case 780.5))*

A legal aid organization informed the Complaints Committee that the municipality of Vejle had composed a school class consisting exclusively of pupils of non-Danish ethnic origin. Moreover, the legal aid organization stated that the municipality of Albertslund placed certain pupils in special classes on the basis of their performance in a language test. The Complaints Committee decided to investigate the case on its own motion. It declared that placing pupils in special classes based on their ethnic origin constitutes direct discrimination in violation of the Act on Ethnic Equal Rights. Furthermore, it declared that, depending on circumstances, placing pupils in special classes based on linguistic or pedagogical criteria may also amount to indirect ethnic discrimination. Pupils may only be placed in special classes if the criteria on which their selection are based are objectively justified

[142] A/K 5/2004, A/K 50/2005, 23 June 2005.
[143] Ibid., paragraph 4.1.
[144] Ibid., paragraph 4.1.
[145] Case 1992/876 of 21 November 1992.

towards a legitimate aim, and the means for achieving this aim (the placement) are suitable and necessary. (*Decision of 4. February, 2005 (Case 780.3)*)

b) Ethnic profiling as a violation of rules pertaining to the protection of personal data

The practices which, in the cases mentioned above, led to the decisions of the House of Lords in the United Kingdom, the *Tribunal Constitucional* in Spain, or the Constitutional Court decision in Austria, although clearly constituting ethnic profiling according to the definition provided above, did not take the form of systematic classification of persons according to certain criteria, such as 'race' or ethnic origin, religion or national origin. In contrast, the profiling operation - *Rasterfahndung* - developed in **Germany** from the end of 2001 until early 2003 did entail such a classification on a systematic basis. The operation and its results are described as follows by J. Goldston[146]:

> In this massive exercise, German police reportedly collected sensitive personal data from public and private databases pertaining to approximately 8.3 million persons.[147] The profile was based on characteristics of members of the "Hamburg cell" around Mohammed Atta, one of the 9/11 hijackers. Criteria established at national level included:
>
> - 18 - 40 years old
> - Male
> - Current or former student
> - Resident in the regional state (Land) where the data is collected
> - Muslim
> - Legal residency in Germany
> - Nationality or country of birth from a list of 26 countries with predominantly Muslim population / or stateless person / or nationality "undefined" or 'unknown'.[148]
>
> In the end, not a single terrorist suspect was identified.[149]

This search method was developed by the German authorities in order to detect potential 'dormant' terrorists (such as the 'Hamburg cell' which prepared the 9/11 attacks) and identified roughly 11,000 students of Arabic origin in the Federal State of North Rhine-Westphalia. Then, in a process carried through until December 2001, the public authorities added further selection criteria, such as information on who was the holder of a pilot license. As a result, the public authorities obtained a final search profile on about 70 private individuals, including a citizen from Morocco. This individual was registered as a student at the University of Duisburg and a Muslim. He objected to this processing as a violation of his privacy rights.

In response to this claim, the Federal Constitutional Court (*Bundesverfassungsgericht*), however, decided on April 4th, 2006, that the *Rasterfahndung* was not conform to the individual's fundamental right of self-determination over personal information (Art. 2(1) and 1 of the *Grundgesetz*). The method of automatic data processing whereby police authorities and public prosecutors combine certain sets of personal data of private individuals as available on general registers (such as name,

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[146] J. Goldston, *Ethnic Profiling and Counter-Terrorism*, cited above, at pp. 5-6. The references have been retained from the original.

[147] M. Kant, "Nothing doing? Taking Stock of Data Trawling Operations in Germany after September 11, 2001," *Statewatch Bulletin*, May/August 2005.

[148] These criteria were established by the "Sub-Working Group Grid" of the Coordination Group on International Terrorism (KG IntTE), a Germany governmental body. The KG IntTE was set up by decision of a Working Group (AK II) of the Interior Ministers' conference (IMK); it is chaired by the Bundeskriminalamt (BKA) and includes the subcommittee leadership, operations and fight against crime (UA FEK), AG Krip, Federal Border Guards, Foreign Intelligence Service, internal intelligence service, chief public prosecutor and army representatives.

[149] The Berlin Data Protection Commissioner has commented: 'Rasterfahndung was without result. No arrests or conviction resulted from this.... Two people were arrested in Hamburg soon after 9/11, but they were not caught by rasterfahndung. They were caught using conventional methods, such as telephone tapping ... Rasterfahndung took up an enormous amount of manpower and time within the police force.' Justice Initiative Interview, Berlin, March 2006. See also D. Moeckli, 'Discriminatory Profiles: Law Enforcement after 9/11 and 7/7', 2005 *European Human Rights Law Review 517 (2005).*

address, date and place of birth) with additional data (in particular sensitive data) from other registers (such as University registers revealing religion, political attitude, university curriculum, etc.) in order to narrow the circle of persons to be observed in order to detect potential suspects of serious criminal offences, could only be considered admissible where the public authorities are acting in response to a 'specific endangerment' to public order and/or individual rights ('*wenn eine konkrete Gefahr für hochrangige Rechtsgüter wie den Bestand oder die Sicherheit des Bundes oder eines Landes oder für Leib, Leben oder Freiheit einer Person gegeben ist'*). Since the *Rasterfahndung* programme did not meet this condition, it was declared unconstitutional.[150]

We may also place in this category a limited number of cases presented to the Discrimination Ombudsman in **Sweden**, although such cases did not concern ethnic profiling by law enforcement authorities, or only indirectly touched upon this. One case concerned alleged discrimination on the basis of citizenship through the registration of non-citizenship in the Swedish so called personal numbers. Another case concerned the blacklisting of Roma by the Swedish Camping Association and in a couple of similar cases concerning housing lists when private housing companies but also the housing companies of local authorities have been registering personal data concerning potential tenants on the basis of ethnicity. In one such case concerning the housing company in Malmö (*Malmö kommunala bostäder*, MKB) the Data Inspection Authority decided that there was use of an unlawful register (under the Personal Data Act) and later on the Discrimination Ombudsman intervened in order to follow up the practice of the housing company. Finally, the Discrimination Ombudsman has been involved in discussions with border and custom authorities concerning excessive searches of passengers of non-Swedish origin. In one occasion, a private bus company in Southern Sweden explicitly introduced a policy of limiting the number of non-Swedish passengers on board its busses, in order to avoid the repeated checks of coaches by border authorities where there were many non-Swedish looking passengers. Due to the absence of an appropriate legal provision at that time and due to the difficulty in gathering the evidence, the Discrimination Ombudsman did not have the possibility to initiate legal proceedings with regard to the border control authority, but the company was found guilty at first instance for unlawful discrimination.

6. Studies or reports on practices of ethnic profiling

The following studies or reports have been brought to the attention of the Network in the course of the preparation of this opinion :

Austria. As was reported by several media,[151] in the Spring of 2005, following a series of brutal robberies against postmen allegedly committed by two dark-skinned perpetrators, an internal directive issued by the Vienna department of criminal investigation (Kriminalamt) called upon all security police officers to stop all black Africans in public places for an identity check, if they are two persons together. When this prompted an immediate public outcry, the directive was modified so that it more narrowly focused on black Africans of about 25 years old, 170 cm height, slim figure, wearing light down jackets. While Roland Horngacher, the head of the department, did not share the concerns raised, Heinz Mayer, a renowned university professor for public law, said that the directive in its original form was beyond any doubt racist and unlawful.

Finland. Some 10 years ago there were allegations and concerns related to possible "profiling" of Roma by the police. Before the enactment of the current legislation on the processing of personal data by the police, the police apparently often entered the Roma ethnicity of a person in their registers on crime suspects. The issue came up in a government report on the implementation of the UN Convention Against Torture, where the government reported in 1995 that "according to the Advisory Board for Romany Affairs a disproportionate number of prisoners belongs to the Finnish Romany minority. The police maintain a special computerized register of the Romany population."(UN Doc.

[150] Decision of 4 April 2006 – 1 BvR 518/02 – , Neue Juristische Wochenschrift 2006, No. 27, page 1939.
[151] Kurier (Austrian daily newspaper) of 9 March 2005, p. 12; Falter (Vienna weekly newspaper) volume 11/05 p. 15.

CAT/C/25/Add.7, para. 120) In the hearing before the Committee Against Torture in 1996, the Finnish government delegation gave the following answer to questions posed by members of the Committee: "the police maintained a special computerized register of the Romany population, not because they were Romanies but because they had committed crimes. Keeping such crime registers was standard practice in most countries." (UN Doc. CAT/C/SR.250, para. 22) Also in 1996, the Finnish League for Human Rights, in their shadow report to the UN Committee for the Elimination of All Forms of Racial Discrimination, reported that "The Roma persons are a special target group of police surveillance and all Roma have experienced an excessive amount of car-stopping by police. When Roma cars are stopped by the police the usual practice is to check the ID of every person travelling in that car. This is an unusual practice, when majority population is concerned." There is no information available suggesting that such practices of clear "profiling" would exist still today.

Hungary. In 2005 and 2006 the Hungarian research institute Tárki Ltd. on behalf of the Open Society Justice Initiative carried out a research entitled "A Comparative Study of Stop and Search Practices in Bulgaria, Hungary and Spain". The questionnaire-based public poll targeted a representative group within the Hungarian population, inquiring about people's experiences of stop and search by the police and their attitudes towards the police. The research also included personal interviews with officers conducting stop and search. The results of the research indicate that in Hungary the Roma are discriminated against in the context of stops and searches by the police, especially in the practice of stopping pedestrians. Presuppositions that posit a link between ethnicity and the likelihood of criminal behaviour are widespread within the police as well as within the general population (to a large extent, even among the Roma). There is strong societal support for the practice of ethnic profiling in the following respect: even though the majority is fully aware of the fact that stop and search practices are arbitrary, they still would not consider the police presence (with the police enjoying an extraordinarily wide, basically unlimited range of competences) to constitute harassment and are instead in favor of and would even step up the control of "suspicious" individuals and groups (including the Roma).

The Hungarian Helsinki Committee has also conducted a research project in 2002-2003, assessing discrimination against Roma in the criminal justice system. By scrutinising court files, the research of the HHC focused, among other things, on how perpetrators were initially detected by the authorities. The researchers found that Roma offenders and suspects were significantly more likely to have been identified via police stops and searches, whereas in the case of non-minority defendants, the cause of their capturing were other investigative methods, and most of all being caught in the act.

Spain. A report issued by Open Society Justice Initiative *Ethnic Profiling in Spain: Investigations and Recommendations*,[152] concludes that racial profiling and discriminatory conduct by Spanish law enforcement officers against racial and ethnic minorities are widespread. The report documents the pervasiveness of racial profiling by law enforcement in Spain, including repeated stops and searches of ethnic minorities without explanation and the use of racist language by police officers. The report is based on personal interviews and information coming from other NGO's and research centres. The study noted in particular that 'racial and ethnic profiling promote a self-fulfilling prophecy that justifies the initial hypothesis that minorities commit more crimes', and that 'data gathering, evaluations, supervision and indicators of police practice efficiency in Spain appear to be weak or sometimes non existent'. It found, in particular, the following:

> By their own admission, police officers at every law enforcement level (municipal, regional and national) stop and arrest ethnic minorities and immigrants more often than they do Spaniards. Although some police officers explained these disproportionate stops, identifications and searches of ethnic minorities as directly tied to the country's immigration policy and the need to verify immigrants' documentation status and/or the operationalization of counter-terrorism initiatives, the most common reason cited by the interviewed police officers has to do with their belief that ethnic minorities are more likely to commit crimes. (…)

[152] Open Society Justice Initiative, *Perfil racial en España: Investigaciones y recomendaciones*. Daniel Wagman. Grupo de Estudios y Alternativas 21. Available at www.justiceinitiative.org/db/resource2?res_id=103400

> The lack of clarity in the stop, identification, and search criteria utilized by police further compounds the disproportionate effect on ethnic minorities. Although Spanish law is clear in allowing all police forces to stop and identify individuals, the only motive requirements being that the action be carried out "within the framework of prevention and investigation of criminal activity" and that the suspicion of criminal activity not be "illogical, irrational or arbitrary," many police officers could not cite the appropriate law or regulation authorizing them to carry out stop operations. Internal protocols on stops, identifications, and searches were not always acknowledged or followed, and police officers acknowledged that these protocols often allowed them to exercise wide discretion in their stop activities. When asked what stop criteria they used, most officers cited "intuition," a "sixth sense," "common sense" or their "experience" as motivating factors behind their stopping people who appeared "suspicious, " nervous," "out of place," or "strange." In practice, these arbitrary criteria mean that very often ethnic minorities and immigrants become the targets of stops and identifications precisely because they tend to be unknown, appear to be foreign, or exhibit "suspicious" behavior such as avoiding contact with the police or loitering in public spaces. It is unclear, even to the police officers themselves, whether there is a requirement that police officers give an explanation for why they stop, identify and search individuals. Almost all the individuals with stop, identification and search experience reported not receiving any explanation at all. (…)
>
> There is a decided absence of and/or lack of clarity about internal and external mechanisms to monitor the efficiency, utility and effect of police stops. There is no systematical data kept on stop, identification and search operations, and what is kept is classified "not for public dissemination" by the Ministry of the Interior. It appears that supervision or evaluation of stop, identification and search operations is weak or non existent, particularly as it relates to ethnic minorities (both on its own and in comparison to non-Roma, non-ethnic minority Spaniards). The aggregate number of stops, identifications and searches (to the extent that it could be estimated by researchers) appears to minimally correlate to arrest records, putting in question the overall utility and efficiency of stops.

Sweden. A recent academic study gathers some evidence of discriminatory treatment on the basis of ethnic origin in the law enforcement field in Sweden.[153] Through analysis of statistics the authors argue that the police targets non-Swedes to a larger extent, e.g. in alleged crimes of drug trafficking and drug use, rape etc. While there are a number of smaller local studies covering various fragments of the entire law enforcement field (arrest, prosecution, court proceedings, requirements of evidence, harshness of verdicts, and everyday treatment by law enforcement officials) there is no comprehensive study of the law enforcement field, partly due to the difficulty in identifying persons on the basis of ethnicity since no such data is collected statistically.

7. Deficiencies in the protection against racial profiling

Several experts of the Network report deficiencies in their national legal systems resulting in an insufficient protection against ethnic profiling. The wide discretionary powers of the police in 'stop and search' procedures, and the absence of any monitoring of the behaviour of the police, in particular by the collection of data allowing to evaluate the impact of such searches on the members of visible minorities, are particularly problematic, since they create a sense of impunity within the police, and of powerlessness – but also resentment – among the targeted minorities. In addition, the role of law enforcement authorities in the enforcement of immigration rules will justify in many cases stopping persons, for the purpose of checking their identity and administrative situation, on the basis of indicia, in particular based on ethnicity, of the persons targeted having a foreign nationality. Finally, proactive policing has been significantly encouraged by the need to combat more effectively the terrorist threat

[153] Christian Diesen et al., *Likhet inför lagen*, Natur och Kultur, 2005.

following the events of September 11th, 2001, but has since largely extended beyond counter-terrorism to various forms of organized criminality. This consists in taking action prior to the commission of the crime, in order to prevent the crime from being committed, rather than to seek to intercept and arrest the authors of crimes once these have been committed. This redefinition of the role of criminal investigations, which leads the police to borrow methods (including profiling methods) from security services, also significantly raises the risk of discriminatory practices, in this case consisting in the targeting of certain individuals because of their membership in certain communities or groups, in particular on the basis of religion or national origin. The following examples may illustrate these risks.

In **Hungary**, the police[154] have wide discretionary powers to stop individuals; they have full discretion to perform routine control-checks on motorists and pedestrians. The police may stop anyone at any time and ask any questions deemed necessary.[155] The vacuous language of Article 29 of the Act on Police gives full authorisation for the police to stop and request identification of 'anyone, whose identity needs to be established.' Apart from arrests or detentions, the police are under no obligation to provide an explanation, unless such an explanation is requested by the individual concerned.[156] The Constitutional Court ruled on several challenges to these provisions.[157] It has always rejected claims that the current system led to arbitrariness and potentially discrimination.

Border control agencies are another area of law enforcement worth considering. In enumerating competencies and coercive measures, the Act on Border Control Forces[158] gives almost identical authorisation as that of the police forces. What makes this peculiar is that besides classical border guard competencies, Articles 22 and 61 of the Act give a wide authorisation to both the police and the border control agencies to supervise regulations set forth in the Act on Immigration and Alien Control.[159] Among other things, the latter law obliges aliens to carry at all times and upon request present their immigration and identification documents. Should an alien be unable to provide these, she can be arrested and held for 12 hours.[160] In order to check this and other provisions of alien law, police and border guard officers are authorised to enter private premises.[161] These provisions thus establish a legal environment, which enables, even requires law enforcement agents to stop and control persons with alien accents, appearance, etc.

In **Austria,** immigration legislation in many cases allows differential treatment of foreigners by public authorities. Foreigners can be checked in terms of search and go, just because they are foreigners (Sec. 35 Security Police Act and Aliens Police Act (*Fremdenpolizeigesetz*, FPG)[162]). Of course, the colour of skin is the main criterion for e.g. police officers to judge whether a person is foreign or not and whom they are allowed/obliged to control. The Aliens Law Codification 2005 (*Fremdenrechtspaket*), which came into force on 1 January 2006, provides for several new regulations in the wider context of racial profiling. Pursuant to Sec. 34 of the Aliens Police Act (*Fremdenpolizeigesetz*, FPG), the police can stop persons in order to check their identity if it can be assumed for certain reasons that they have illegally entered are or illegally staying in Austria. Sec. 35 goes on to provide for the possibility of checks on the legality of the entry and the residence of foreigners, if certain circumstances justify the assumption that the foreigner has illegally entered the Federal territory or is illegally resident, in so far this could not be determined with the required certainty in the course of the determination of the identity. New provisions were adopted in order for the police to have a legal basis for identity checks in the field of immigration law beyond there being a suspicion that the person concerned has committed a criminal or administrative offence. If the police happen to establish other personal data

[154] Act No. CXXV of 1995 regulates the authorities and competencies of the Security Forces. The competence of the Services in most cases runs parallel with that of the police. Agents of the Security Forces therefore may utilise all coercive measures and procedures that are provided for police officers.
[155] Article 32. of the Act No. XXXIV. of 1994 on the Police.
[156] Articles 29 and 33.
[157] Decisions No. 9/2004. and 65/2003.
[158] Act No. XXXII of 1997
[159] Act No. XXXIX of 2001
[160] Article 61 of the Act on Border Control and Border Guards.
[161] Id.
[162]Federal Law Gazette I No. 100/2005 as amended by Federal Law Gazette I No. 157/2005.

during the identity check, they are authorised to collect them provided there is a legal basis in the Aliens Police Act. However, they are not permitted to actively enforce the collection of such additional data in the course of the determination of a foreigner's identity. The Explanatory Notes to the Government Bill[163] point out that the new legal provisions would not stipulate a general duty for foreigners to carry documents with them showing their identity. Rather, any identity check would require certain reasons. From an *ex ante* perspective specific reasons would be established if there is certainty on facts and connections which support the reasonable assumption. However, this should not be restricted to circumstances of a specific situation but the authority should also take into consideration its knowledge about previous incidents, credible witness statements or closeness to offences in terms of time and place. According to Sec. 99, foreigners can be subjected to the taking of police records, including date and place of birth, nationality, fingerprints, and photographs, in particular if their identity cannot be ascertained otherwise or if they are found to be illegally resident in Austria. The police are not allowed, however, to establish a DNA profile. Since the law does not expressly connect the requirement for identity checks of foreigners to specific circumstances in the person, there is some danger that these provisions could be enforced in a discriminatory way.

In **Denmark**, section 77 of the Road Traffic Act[164] authorizes the police to stop and search a vehicle with the aim of finding defects jeopardizing road safety or to control whether the driver fulfil the requirements for driving the vehicle. The section does not as such require a suspicion of misconduct; hence the risk of arbitrariness in the exercise of this authority is clearly present. In addition, section 38 No. 6 of The Aliens Act[165] authorizes the police to stop and inspect a vehicle anywhere in Denmark for illegal immigrants regardless of whether there exists a concrete suspicion of illegal entry or human trafficking. The inspection must be proportionate to the aim of finding illegal immigrants and must not go beyond what is necessary in this regard. The section does not require a suspicion of misconduct. 'Foreign looking' inevitably risk being especially targeted by such controls, although no statistical data seem to exist concerning the impact of these checks on visible minorities.

In the **United Kingdom** and **Ireland**, plans to impose on foreign nationals to be in possession of their identity documents may further raise the risk of ethnic profiling. In **Ireland** for instance, Head 82 of the Scheme for the *Immigration, Protection and Residence Bill 2006* provides that 'foreign nationals' must produce documents as to their identity on the demand of a police officer. The Scheme contains no reference as to how the officers making these demands will determine on sight who is or is not a 'foreign national.' The Bill will require certain private (hotels) and public bodies (education) to hold 'registers' of foreign nationals using their services. The Bill, if enacted, will have the effect of contributing to racial profiling by skin colour, apparel, head dress, facial beard growth, or frequentation of places of worship of minority faiths. At the time of writing, the Bill is at an advanced stage of drafting and the Scheme has been approved by Government.

8. Racial Profiling and Personal Data Protection

It has been noted in preceding parts of this opinion that the protection of private life vis-à-vis the processing of personal data could constitute an essential guarantee against certain forms of ethnic profiling, such as the *Rasterfahndung* conducted in Germany between 2001 and 2003, which the Federal Constitutional Court strongly condemned in its judgment of April 4th, 2006. In this respect, the adoption of the Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters proposed by the European Commission in October 2005,[166] would constitute a welcome improvement in the protection of members of ethnic, religious or national groups, in the face of counter-terrorism strategies which, all too often, are tempted to rely on

[163] 952 der Beilagen XXII. GP – Regierungsvorlage – Materialien, § 34.
[164] Consolidated Act 2005-11-14 No. 1079 Færdselsloven
[165] Consolidated Act 2005-08-24 No. 826 Udlændingeloven
[166] COM (2005) 475 of 4 October 2005.

ethnic, religious or national stereotyping in the hope of better guiding the crime prevention efforts of law enforcement authorities.

This is not to say, of course, that no such safeguards exist at the present time in the national legislations of the EU Member States. Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[167] does not apply to the processing of personal data effectuated 'in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law' (Art. 3(2)). However, although most EU Member States have either implemented Directive 95/46/EC without extending its scope of application to law enforcement duties, or have adopted data protection legislations of general scope of application but including certain exceptions with regard to the police sector, they also all are bound by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data adopted on 28 January 1981 in the framework of the Council of Europe. In addition, Article 8 of the European Convention of Human Rights is applicable to such instances of processing of personal data.[168]

As a result, all the EU Member States have certain provisions relating to the protection of personal data in the context of law enforcement duties performed by the police. Some Member States have specific legislation on the protection of personal data in the police sector. In **Austria** for instance, apart from the Federal Act Concerning the Protection of Personal Data (*Datenschutzgesetz* 2000, DSG 2000),[169] based upon Directive 95/46/EC,[170] other legal acts provide special protection for sensitive data: According to Sec. 149i Subsec. 3 of the Austrian Code of Criminal Procedure (*Strafprozessordnung* 1975, StPO)[171] the use of sensitive data for computer searches (*Rasterfahndung*) is explicitly prohibited.[172] Sec. 56 Subsec. 1 no 1 of the Security Police Act (*Sicherheitspolizeigesetz*, SPG)[173] stipulates that public security authorities are only allowed to transfer personal data with the explicit consent of the data subject (*Betroffener*). The Federal Law on statistical data (*Bundesstatistikgesetz*)[174] prohibits to 'order the collection of data with personal relevance, which shows racial or ethnic origin, political opinion, religious of philosophical convictions or membership of trade unions' (Sec. 5 Subsec. 3), unless this is obligatory under any specific Federal Law or based on a directly applicable international provision (Sec. 4 Subsec.1/1). Similar prohibitions can be found in regional legislation on the collection of statistical data.[175] Other Member States have chosen simply to extend the legislation implementing Directive 95/46/EC to the processing of personal data by the police. This is the case in **Belgium** for instance, under Article 191 of the Act of 7 December 1998 organizing the police in Belgium into one single new structure.[176]

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[167] OJ L 281 of 23.11.1995, p. 31.

[168] See, e.g., Eur. Ct. HR, *Leander v. Sweden* of 26 March 1987, Series A n° 116, p. 22, § 48 ; Eur. Ct. HR (GC), *Rotaru v. Romania* (Appl. n° 28341/95) judgment of 4 May 2000, §§ 43-45 ; but see, for the limits of this protection, Eur. Ct. HR, partial inadmissibility decision of 6 March 2003 in the case of *Zdanoka v. Latvia* (Appl. n° 58278/00).

[169] Federal Law Gazette I No. 165/1999 as amended by Federal Law Gazette I No. 13/2005.

[170] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, L 281 of 23 November 1995, p.31-50.

[171] Federal Law Gazette No. 631/1975 as amended by Federal Law Gazette I No. 103/2006

[172] In accordance with this general prohibition, the order of the Federal Ministry of Justice (*Einführungserlaß zum Bundesgesetz über besondere Ermittlungsmaßnahmen*, Federal Law Gazette I No. 105/1997) also prohibits the use of personal data for surveillance and linkage of databases, which contain or might lead to data about racial or ethnic origin, religious or philosophical beliefs, political opinion, sexual orientation, and data concerning health or sex life.

[173] Federal Law Gazette No. 566/1991 as amended by Federal Law Gazette I No. 56/2006

[174] BGBl. I Nr. 163/1999

[175] See, e.g., Sec. 7 Subsec. 2 of the Styrian Law on regional statistical data in Styria (*Steiermarkisches Landesstatstikgesetz*) LGBl Nr.18/2005.

[176] *Loi organisant un service de police intégré, structuré à deux niveaux,* M.B., 5.1.1999 Art. 191 of the Act of 7 December 1998 inserts Articles 44/1 to 11 into chapter IV (Missions des services de police) of the Law on the police function of 5 August 1992 (Loi sur la fonction de police), M.B., 22.12.1992. The provisions have since been modified on more minor aspects by successive Acts of 2 April 2001 and 26 April 2002.

At the same time, important as they deserve to be, restrictions on the processing of sensitive data (relating, in particular, to ethnicity and religion) should not be such as to make it a legal or practical impossibility to monitor the behaviour of law enforcement authorities to whom wide discretionary powers are recognized, not only in the field of counter-terrorism or proactive strategies against organized crime, but also in the increasingly highly sensitive fields of illegal immigration and trafficking of human beings.[177] In particular, the collection of data on the impact on visible minorities (or, more generally, ethnic or religious groups) of the exercise of such powers may be crucial for the identification of racial profiling by law enforcement agencies, which may otherwise go unnoticed. The challenge is to ensure a high level of protection of the right to respect for private life in the face of technological developments and the development of data banks which create the risk of computerized ethnic profiling, on the one hand, and allowing the detection of *de facto* racial profiling in the practices of law enforcement authorities, on the other hand. This challenge is not, strictly speaking, a dilemma: as emphasized above, a clear distinction between the processing of personal data and the use of anonymized data for statistical purposes might make it possible to meet both imperatives, which should be treated as equally important.

The recent developments concerning the registration of ethnicity in **Latvia** illustrate the tendency to prohibit all processing of data relating to ethnicity, to such an extent that even the statistical treatment of such data, in order to monitor the impact of criminal policies on minorities or the behaviour of law enforcement agencies, might become impossible. Until 2002 the ethnicity of persons[178] listed in the Offenders Registry was indicated in the "alphabetic cards", but it was stopped when the new Law on Offender Register[179] was adopted at the end of 2001, since the new legislation does not foresee the inclusion of ethnicity in the required information. The same law also no longer includes the information on ethnicity for offenders if a criminal case was not initiated or the case closed, for an accused person, for a tried person as well as for a person guilty of an administrative violation. With the amendments to the Code of Criminal Procedure that came into force on November 1, 2002, record of 'ethnicity' is no longer required among the personal data of the accused in the protocol of interrogation and has been replaced by 'citizenship'.[180] Record of 'ethnicity' has also been deleted from the personal data of the accused in the indictment.[181] Lower level regulations are currently in the

[177] Neither should such restrictions make it impossible for the EU Member States to pursue positive action policies, requiring that the ethnic origin, the religion or the national origin of the potential beneficiaries of such schemes be defined and registered : see, e.g., the example of Belgium, mentioned above, n. 38. It will also be noted that – replicating in this respect a provision already contained in the original proposal of the Commission for a Framework Decision on combating racism and xenophobia (COM(2001) 664 final, 28.11.2001) –, Article 4 of the draft Framework Decision on combating racism and xenophobia presented by the Presidency to the Council of the European Union (doc. 8994/05, 19 May 2005) provides that the Member States 'shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating factor, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties'. Although this does not necessarily imply that the ethnicity of the victims of crimes be determined, since there may be a racist and xenophobic motivation to such crimes independently of the ethnicity of the victims, the adoption of this proposal may lead the Member States to broaden the range of circumstances where the processing of sensitive data relating to the ethnicity of individuals will be authorized. See also **ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (paragraph 18, point h)). Finally,** it may be worth noting that occasionally, the existence of data protection legislation prohibiting or severely restricting the processing of sensitive data has been invoked to justify not recording instances of racial violence. This is the case in **Hungary**, where data protection laws[177] prohibit the collecting and processing of sensitive data, among them data on national or ethnic origin, without the concerned person's explicit consent (Articles 2(2) and 3(2) of Act No. LXIII of 1992 on the Protection of Personal Data and the Access to Public Data), which is sometimes presented by officials as creating an obstacle to recording incidents of racial violence – although the Criminal Code (Act IV. of 1978) acknowledges certain racially motivated crimes, such as 'violence against members of national, ethnic or racial minorities and religious groups' or 'incitement against community'.

[178] The Law on Personal Identity Documents (*Personu apliecino_u dokumentu likums* (Law on Personal Identity Documents), in effect since 1 July 2002, with amendments adopted till 24 February, 2006) entered into force in 2002. Since then, ethnicity entry in identity documents is no longer mandatory, but may be recorded upon the choice of the passport holder.

[179] Sodu re_istra likums (Law on Offenders Register), in effect since 1 January 2002, replaced with new Law on Offenders Register, in effect since 21 October 2005

[180] Article 153

[181] Article 209

process of being amended in order to ensure consistency with these changes in the Code of Criminal Procedures, and it seems that ethnicity will no longer be available for criminal procedure statistics on a disaggregated basis. In **Sweden**, similarly, the prohibition of the processing of personal data revealing race, ethnic origin or religious belief (Personal Data Act 1998:204), results in the absence of any official statistics on persons' ethnic origin, apart from citizenship and country of birth. This means that it is difficult to process existing data concerning e.g. arrest, prosecution, court verdicts in order to draw reliable conclusions concerning the ethnicity of those covered by the statistics. However, the Personal Data Act (1998:204) is accompanied by a number of specialised acts, mostly adopted in 2001, concerning the personal data use by tax authorities, the customs authorities, the police and the military. It is in general provided in these legal acts that 'sensitive information' (e.g. reference to ethnic origin) should not be registered as such but can be added when other information (e.g. suspected crimes) is registered, 'if necessary' for the purposes of the registration. The preparatory works of the Police Data Act (1998:622) refers explicitly to Council of Europe Recommendation R(87) 15 concerning the use of personal data by the police, which has been referred to above.

The balance between the protection of private life in the processing of personal data, especially sensitive data, and the possibility of collecting data about the impact on visible minorities of the activities of law enforcement officials, varies between the Member States. In **Germany** the Federal Data Protection Act (see for the English version www.bmi.bund.de/cln_012/nn_174390/Internet/Content/Themen) contains a definition of 'Special types of personal data' (Section 3 (9)). This refers to information on a person's racial and ethnic origin, political opinions, religious or philosophical convictions, union membership, health or sex life. According to Section 13 (2) the collection of such sensitive data by public bodies is permissible only in so far as such collection is provided for in a legal provision or essential for the pursuance of an important public interest (No. 1) or if such collection is necessary in order to avert a substantial threat to public safety (No. 5). Section 14 (5) and Section 16 (1) , in a similiar way, restrict the storage and transfer of special types of personal data. In **Portugal**, the protection of personal data is mentioned in the Constitution. Under Article 35 (3) of the Constitution, '[c]omputers shall not be used to treat data concerning philosophical or political convictions, party or trade union affiliations, religious beliefs, private life or ethnic origins, save with the express consent of the data subject, with authorisation provided for by law and with guarantees of non-discrimination, or for the purpose of processing statistical data that cannot be individually identified.' According to article 7 of Law 67/98 of 26 October 1998, the treatment of sensitive personal data is in principle forbidden but the National Council for the Protection of Data may authorise the treatment of those data in certain cases, provided the requirement of non-discrimination is fully complied with.

In the **Slovak Republic**, the police are explicitly authorized under the applicable legislation to process sensitive data. According to the Section 69a paragraph 3 of the Act no. 171/1993 Coll. on Police Force as amended [*zákon _. 171/1993 Z. z. o Policajnom zbore v znení neskor_ích predpisov*], the Police Force is authorised, by processing personal data in the implementation of its general duties in connection with the criminal proceeding, to process special categories of the personal data revealing inter alia racial or ethnic origin and religious belief or philosophical conviction, if such processing is necessary because of the nature of the crime. The Police Force is authorised to process also special categories of personal data concerning persons, who are the members of certain communities, and who have committed a crime, if there is a mass occurrence of crimes committed by the members of this community. According to the Section 69a paragraph 4, while the data subject is not to consent to the processing of personal data (including sensitive data) relating to him or her, his/her privacy must at all times be respected ; moreover the data must be deleted once their conservation ceases to be justified by the needs of law enforcement, and the data subject must be informed.

The **United Kingdom** legislation provides for an exemption from the application of the requirements of the Data Protection Act 1998 in the case of the processing of sensitive personal data where this is required for the purpose of safeguarding national security. There are also exemptions from the duties regarding fair and lawful processing and technical safeguards and obligations relating to disclosure where the data is processed for the prevention or detection of crime, the apprehension or prosecution

of offenders and the assessment or collection of any tax or duty or of any imposition of a similar nature. These exemptions might allow some profiling to be undertaken but it would not necessarily be a sufficient basis for the actual exercise of law enforcement powers.

In **Finland**, the provisions of the Finish Personal Data Act [*Henkilötietolaki* (523/1999)] are applicable unless a specific law otherwise ordains ; there are a range of laws that grant further exceptions to the above rules, two of which merit consideration here. The Act on the processing of personal data by the police [*Laki henkilötietojen käsittelystä poliisitoimessa* (22.8.2003/761)] provides for a potentially widely applicable exception to the prohibition to process sensitive data as laid down in section 11 of the Personal Data Act. Section 10 of the police data act allows the processing (including thus e.g. collection and storage) of sensitive data "when such processing is necessary for the carrying out of a specific assignment [i.e. police operation]". The Act on the processing of personal data within the Border Guard Agency [*Laki henkilötietojen käsittelystä rajavartiolaitoksessa* (15.7.2005/579)] allows the processing of data relating to, inter alia, 'nationality' (*'kansallisuus'*), a concept that refers to the national, ethnic or geographical origin of the person and is to be distinguished from the formal notion of 'citizenship' ('*kansalaisuus*') which is separately mentioned in the Act, in the contexts of the investigation of crimes (sections 7 and 11 of Act), granting of licences (section 9) and security (section 12). Section 14 deals with the processing of sensitive data in the context of border control: according to section 14(2) sensitive data relating to e.g. racial or ethnic origin or religion, may be collected and stored (only) when the processing of such information is 'necessary for the carrying out of a specific assignment'.

In **Hungary**, despite certain interpretations to the contrary in the context of the recording of racial incidents,[182] data protection regulations in fact do not prevent the handling and processing of data on the self-declared or perceived ethnic origin of individuals ; and the Data Protection Act[183] moreover does not explicitly prohibit the processing of anonymous ethnic data of statistical nature, or the anonymous collection for research purposes of data relating to one's perceived ethnic origin. Although on the national level, the existence of such statistics is mostly denied, ethnic data is collected by many institutions – for administering minority self government elections, affirmative action quotas, minority scholarships, etc. In practice, several authorities (such as, for instance, the Minority Ombudsman) allegedly keep ethnic data based on the perceived ethnicity of persons, and researchers and human rights NGOs also sometimes rely on such estimates. In this context, it is paradoxical that the fact that Hungarian law allows for the handling of data on racial and ethnic origin only with the consent of the person concerned results in practice in imposing a severe impediment on the prospect of litigation against indirect discrimination or institutional racism. As the European Commission against Racism and Intolerance (ECRI) reported in 1999: 'while acknowledging the fact that the collection and utilisation of data on ethnic origin is restricted in Hungary for valid reasons, ECRI is concerned that the lack of reliable information about the situation of various minority groups living in the country makes evaluation of the extent of possible discrimination against them or the effect of the actions intended to fight such discrimination difficult.'[184]

9. Racial Profiling and Redress Mechanisms

Although only judicial or quasi-judicial bodies provide the kind of remedy which is required under human rights law for instances of racial discrimination, four kinds of redress mechanisms should be distinguished. These are : control mechanisms specifically instituted to monitor law enforcement authorities, whether these mechanisms are internal or external to the bodies concerned ; ombudspersons ; independent equality bodies or independent data protection supervisory authorities ; or courts. It would of course not be feasible, in the framework of this opinion, to review all these

[182] See above, section 6.
[183] Act No. LXIII of 1992 on the Protection of Personal Data and the Access to Public Data.
[184] Second report on Hungary, Adopted on 18 June 1999 made public on 21 March 2000, Para. 26. http://www.coe.int/T/E/human_rights/Ecri/5-Archives/1-ECRI's_work/5-CBC_Second_reports/Hungary_CBC_2.asp

mechanisms, in each of the 25 EU Member States. Rather, certain illustrations are provided of how such mechanisms may contribute to highlighting and combating ethnic profiling. In practice, these mechanisms work in combination with one another, and it is not uncommon to have a situation where the person alleging to be a victim of ethnic profiling will have to make a choice between different instances before which to file a complaint.[185]

9.1. Control mechanisms of law enforcement authorities

In most EU Member States, there are mechanisms which allow for the filing of complaints about abuses committed by the police, in particular where such abuses lead to the violation of fundamental rights, such as the right not to be discriminated against. However, not all the Member States have established such mechanisms. Where such mechanisms exist, they may be either internal to the police, or external. The quality of these mechanisms, measured by their independency, the diligence with which they carry on their duties, the means they have at their disposal (including the possibilities they are recognized to investigate complaints by requesting information from the police services concerned, and the budget and personnel put at their disposal), and the follow-up which is given to their findings (which may lead, for instance, to disciplinary proceedings against the individual members of the police concerned, to civil suits brought by victims, or to prosecutions before criminal courts), vary widely. Moreover, the efficacy of such mechanisms in the context of racial profiling is impossible to ascertain, since the awareness of such practice is relatively recent, and few of the existing mechanisms have in fact been tested in this context.

In **Belgium** for instance, the police are controlled both by an internal mechanism (which benefits however a certain degree of independence), and an external mechanism which reports to the Government and the Parliament. This is detailed in the box hereunder. In **Cyprus**, an Independent Committee has recently been created to investigate allegations and complaints against the police.[186] It will review in particular complaints about bribery and corruption by the Police, discriminatory practices and acts and practices that violate human rights (obviously, including issues of discrimination and racism).[187] The purpose of the investigation is to gather evidence that is necessary in order for the Attorney-General to be able to launch a criminal investigation on the matter.[188] However, the investigation of the complaints by the Committee shall not prejudice any authority or competence that the Attorney-General has on the same issue.[189] Each year the Committee will publish a report on its activities and making certain suggestions. In **Greece**, complaints of racist behaviour by police officers may be reviewed according to the general procedure established by the disciplinary codes of police officers. In **Luxembourg**, a complaint may be lodged at the Inspectorate of the Police (*Inspection Générale de la Police*) or at the State's Prosecutor (State Attorney) against racial targeting by some Police officers. An inquiry is being made, but usually no sanctions follow this inquiry. In theory a police officer may be sanctioned for unlawful behaviour. In **Slovakia**, according to the Act on complaints [*zákon o s_a_nostiach*][190], a citizen may submit a complaint to the Police Force of the Slovak Republic or to the Ministry of Interior of the Slovak Republic in connection with violation or endangerment of his/her rights by performance or operation of the Police Force of the Slovak Republic, which is in conflict with the prohibition of racial profiling. In the **United Kingdom**, it would be possible in the context of the use of law enforcement powers to complain to the Independent

[185] In **Portugal** for instance, complaints against police officers on the grounds of discrimination can be addressed directly to the general inspectorate of the relevant ministry, to the High Commissioner for Immigration and Ethnic Minorities or the Commission on Equality and Racial Discrimination, to the Public Prosecution offices, to the police, to the Ombudsman, etc. According to the gravity of the offence, different measures can be taken. The General Inspectorate of Internal Administration (*Inspecção-Geral da Administração Interna*) is responsible for the issuing of an annual report, in which events related with abuse or ill-treatment perpetrated by police officers and prison guards can be reported. Portugal is not an isolated example.

[186] Law on the Appointment and Establishment of an Independent Committee Investigating Allegations and Complaints against the Police (_____ π__ _____ ___ __ _____ ___ _____ _____ _____ _____ _____ ____π____ ____ ___ _____), _. 9(_)/2006.

[187] Ibid., Section 5(1).

[188] Ibid., Section 14.

[189] Ibid., Section 7.

[190] *Zákon _. 152/1998 z. z. o s_a_nostiach* [Act no. 152/1998 Coll. on complaints].

Police Complaints Commission (England and Wales), the Police Ombudsman (Northern Ireland) and the Chief Constable (Scotland). A complaint that is upheld may lead to disciplinary action and/or criminal proceedings against the officer(s) concerned. The procedures in England, Wales and Northern Ireland involve investigation by a body that is independent of the police. Paragraph 3 of the police code of conduct provides that: "Officers should treat members of the public and colleagues with courtesy and respect, avoiding abusive or deriding attitudes or behaviour. In particular, officers must avoid: favouritism of an individual or group; all forms of harassment, victimisation or unreasonable discrimination; and overbearing conduct to a colleague, particularly to one junior in rank or service." There do not appear to be any specific measures to denounce racial profiling and, although the police service has a responsibility to eliminate discrimination within the service and to promote good relations between police and the population in its local communities, the effective implementation of this has some way to go.

The control on the police in Belgium

In Belgium, the control on the police has been significantly improved since the reforms initiated in 1991 after the crisis of the late 1980s (where suspicions arose that the police were transforming into a 'State within the State') and in 1996-1998 as a result of the 'Dutroux' case. The result of these reforms, in this area, has been the combination of an internal control mechanism, by the General Inspectorate of the Federal and Local Police ; and of an external control mechanism, by the 'Comité P'.

The Internal Control on the Police : the General Inspectorate of the Federal and Local Police

Articles 143 and ff. of the Act of 7 December 1998 provide for the creation of a General Inspectorate of the Federal and Local Police (*Inspection générale de la police fédérale et de la police locale*), which is placed under the authority of both the Minister of the Interior and the Minister of Justice. The Inspectorate is entrusted with controlling the application of the laws and regulations, including norms and standards (i.e., non formally binding rules) which regulate the police function. It also must control the efficiency and efficiency of the police forces, both federal and local, in fulfilling their missions. It may contribute to the evaluation of individual members of the police and to training within the police, if an Executive Decree so provides[191]. It thus combines a *monitoring* function – which may entail contributing to disciplinary proceedings within the police[192] – with an *auditing* function.

The competences of the General Inspectorate. The Inspectorate may exercise its powers upon its own initiative (*ex officio*)[193]. It may also receive complaints and denunciations concerning the functioning

[191] Art. 44/7 of the Act of 5 August 1992 on the police function also provides that the control organ instituted to monitor the processing of information and personal data within the police may request the assistance and operational support of the General Inspectorate.

[192] See Art. 27 of the Act of 13 May 1999 on the disciplinary status of the members of the police (Loi portant le statut disciplinaire des membres du personnel des services de police), M.B., 16.6.1999 (where the disciplinary authority considers that it would not be suitable to request a report or an inquiry from the hierarchical superior of the member of the police force who faces disciplinary proceedings – this would be the case, typically, in situations of conflict between the person subject to such proceedings and his/her hierarchical superior, making it doubtful that the superior will report fully impartially –, it may request from the General Inspectorate to draw up such a report of make such an inquiry as is needed for the disciplinary proceedings to move forward). Article 121 of the Act of 26 April 2002 relating to the essential components of the status of the members of the police (Loi du 26 avril 2002 relative aux éléments essentiels du statut des membres du personnel des services de police et portant diverses autres dispositions relatives aux services de police, M.B., 30.4.2002) has now added that any contestation on this choice – not to ask an inquiry/a report from the hierarchical authority but to request it rather from the General Inspectorate, for " serious reasons " – will be submitted to the Minister of the Interior, whose decision will be final.

[193] Article 27 of the Executive Decree of 20 July 2001 (Arrêté royal du 20 juillet 2001 relatif au fonctionnement et au personnel de l'inspection générale de la police fédérale et de la police locale, M.B.,18.8.2001) provides nevertheless that these inspections initiated *motu proprio* will follow a general scheme proposed each year by the General Inspectorate to the Ministers of the Interior and of Justice (" Les missions d'inspection exécutées d'initiative font l'objet d'un plan général d'action proposé annuellement par l'inspecteur général aux Ministres de l'Intérieur et de la Justice "). When confronted with the project of Decree, the Council of State expressed its concern that this might deprive of its significance, by subordinating its exercise to the prior approval of the Ministers concerned, this power of the General Inspectorate to launch inspections

of the police, in the treatment of which it may seek to act as a mediator where the act complained of does not constitute a criminal offence[194]. The conditions under which denunciations can be made to the General Inspectorate are very liberal.[195] A number of authorities also may request the Inspectorate to launch an inquiry: both the general commissioner of the federal police and the head of the local police force may request an inquiry into the police force they direct ; the Minister of the Interior and the Minister of Justice may request such an inquiry; in general, all administrative and judicial authorities, each within its competences, may make such a request.

The investigatory powers of the General Inspectorate. Not only may the Inspectorate launch inquiries under virtually any circumstances. It also is recognized very broad powers of investigation in the exercise of its control mission: indeed, Article 147 of the Act of 7 December 1998 defines these powers as "a general and permanent power to enquire into the federal and local police" ("un *droit d'inspection général et permanent* au sein de la police fédérale et de la police locale"). More precisely, the members of the General Inspectorate may hear the members of the federal and local police, who are obliged, under a modification of the Act of 7 December 1998 introduced by the Act of 2 April 2001, to submit to any requests for such a hearing before the General Inspectorate[196]; they may enter into the premises where the police exercises its functions, when these functions are being exercised; they may consult and, if necessary, make a copy of, all the documents which may serve their inspection, although one restriction applies where such documents relate to a criminal investigation[197]. The results of the inspection performed under such circumstances are transmitted a) to the Ministers of the Interior and of Justice (and to the mayor (*bourgmestre*) where the inspection concerned the local police or individual members of the local police); b) to the authority (administrative or judicial) which has requested the inspection; c) to the competent authority where the inspection leads to the conclusion that the launching of disciplinary proceedings may be justified[198].

The control on the police forces by the General Inspectorate remains internal to the police. Indeed, the Inspectorate is directed by a "General Inspector" (inspecteur général) who is nominated to this function, for a five-year mandate renewable once, by the Federal Government (Ministry of the Interior and Ministry of Justice). The other members of the General Inspectorate are members of the local and federal police. However, the Act of 7 December 1998 (Art. 149) nevertheless stipulates that the General Inspectorate must be organized so as to ensure its independency vis-à-vis the police forces it monitors. This independency is now based on the following mechanisms:

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upon its own initiative. This concern was rejected as ill-founded by the Ministers, who maintained the original text of Article 27 of the Executive Decree, stating that " le fait de proposer un plan général d'action n'exclut pas, par lui-même, un plan particulier ni même des inspections ponctuelles ".

[194] Art. 146 of the Act of 7 December 1998.

[195] Art. 30 of the Executive Decree of 20 July 2001 provides that any natural or legal person may lodge a complaint or file a denunciation against a police service or an individual member of the police ; where the filing is by a member of the police, he/she must not inform his/her hierarchy (" Toute personne physique ou morale qui estime qu'un service de police ou que l'un de ses membres n'a pas agi conformément à ses missions ou à sa déontologie, peut introduire une plainte ou une dénonciation auprès de l'inspection générale.
Lorsque la plainte ou la dénonciation émane d'un membre des services de police, ce dernier n'est pas tenu d'en informer son autorité hiérarchique "). On the other hand, the complainant or the person who has denunciated certain acts is not actively involved in the procedure which follows : the conclusions at which the General Inspectorate arrives at after its inquiry – where such an inquiry is launched – are transmitted to the person who filed the complaint or the denunciation, but only in " general terms " (Art. 37 § 1).

[196] Art. 24 of the Act of 2 April 2001 (Loi du 2 avril 2001 modifiant la loi sur la fonction de police, la loi du 7 décembre 1998 organisant un service de police intégré, structuré à deux niveaux, et d'autres lois relatives à la mise en place des nouvelles structures de police, M.B., 14.4.2001) completes Art. 147 of the Act of 7 December 1998 by adding the following precision : " Les membres de la police fédérale et de la police locale sont tenus de donner suite aux convocations de l'inspection générale. " Articles 15 and 16 of the Executive Decree of 20 July 2001 (Arrêté royal du 20 juillet 2001 relatif au fonctionnement et au personnel de l'inspection générale de la police fédérale et de la police locale, M.B.,18.8.2001) now regulate the modalities of these convocations. Art. 15 states that the General Inspectorate may, acting discretely (" en faisant preuve de la discrétion nécessaire "), request from the members of federal or local police to attend a hearing. The provision further stipulates that the letter will mention the nature of the case and the quality in which the member of the police shall be heard.

[197] When such is the case, the members of the General Inspectorate of the Federal and Local Police may only consult these documents or take a copy when authorized to do so by the competent magistrate.

[198] Art. 148 of the Act of 7 December 1998.

First, the Inspector General and the members of the General Inspectorate are placed under the disciplinary authority of the Minister of the Interior and the Minister of Justice, acting jointly, rather than – as would otherwise be the case – under the disciplinary authority of their hierarchical superior within the police force they originate from[199].

Second, where the General Inspectorate will require the logistical assistance of the federal police (e.g. for the maintenance of its equipment, the management of its personnel, the preparation of its administrative tasks, its budget), this assistance may be requested by binding directives of the Ministry of the Interior, which should ensure that the functioning of the General Inspectorate will not be hostage to the good will of the police services it monitors[200].

The External Control on the Police : the Comité P (Comité permanent de contrôle des services de police)

The Act of 18 July 1991 created for the first time an external supervision mechanism designed specifically to monitor police services and security services[201]. The Act sets up a new organ to that effect, the permanent control committee on the police services, known as the "Comité P", and which is fully operational since 1 May 1994. Conceived as the tool by which the Parliament will better control the police services and ensure more accountability within these services, the Comité P comprises five members, all nominated by the House of Representatives for a mandate of five years renewable twice. The House of Representatives also may revoke these members for "serious motives" or if an incompatibility emerges[202]. The *Comité P* supervises the federal and the local police, as well as all the services or public servants invested with policing powers in fields such as, for instance, agriculture, employment, health or public works[203]. The administrative or judicial authorities are not subject to the control of the *Comité P*.

The Act of 18 July 1991 states that the control should ensure that the rights recognized to the individual by the Constitution or by law are fully respected, and that the police service act in a coordinated and efficient manner (Art. 1). However, although the law does not seem to hierarchize these two functions of the control effectuated by the *Comité P*, the *Comité P* clearly sees it as its primary mission, not to identify, in individual cases, acts or omissions of police forces which could lead to penal, administrative or disciplinary proceedings, but rather to advise the Government and the Parliament of the need of any reforms to ameliorate the functioning of police services or, where required, their accountability. The Comité P for instance has found that identity checks have frequently been denounced as disproportionately targeting certain groups, such as minors or persons of non-Belgian origin, since such checks are not justified by any publicly stated reasons.[204] In 2005, the Comité P prepared a systematic analysis of the instances where the police had allegedly been discriminating on grounds of 'race' or ethnic origin, highlighting the presence of ethnic profiling in the activities of the Belgian police. Because this report does not easily lend itself to being summarized,

[199] See Art. 19, 3° and 20, 3°, of the Act of 13 May 1999 on the disciplinary status of the members of the police (Loi portant le statut disciplinaire des membres du personnel des services de police), M.B., 16.6.1999. See also Art. 23 of the Act of 13 May 1999 : where the member of the police is subject to disciplinary proceedings for acts committed when he/she was a member of the General Inspectorate, he/she still is under the protection of those provisions.

[200] See Art. 13 of the Executive Decree of 20 July 2001 (Arrêté royal du 20 juillet 2001 relatif au fonctionnement et au personnel de l'inspection générale de la police fédérale et de la police locale, M.B.,18.8.2001). The Council of State, asked to deliver an opinion on a first draft text of the Decree, was particularly insisting on this point.

[201] Loi du 18 juillet 1991 organique du contrôle des services de police et de renseignements, M.B., 26.7.1991. The Act of 18 July 1991 has been modified on a number of occasions, by Acts of 15 December 1993 (M.B., 09.3.1994), of 21 December 1994 (M.B., 23.12.1994), of 30 November 1998 (M.B., 18.12.1998), of 1 April 1999 (M.B., 3.4.1999), of 20 July 2000 (M.B., 1.8.2000), and of 7 December 1998 (M.B., 5.1.1999)

[202] Art. 4 of the Act of 18 July 1991.

[203] This represents, altogether, 65 police services or services having police powers, or 40.000 public servants in total.

[204] See *Report of activities* 2005, p. 144 : 'lors de contrôles d'identité trop ciblés sur certains milieux ou groupes de population spécifiques, comme les mineurs d'âge, les citoyens d'origine étrangère. Il apparaît assez souvent que le contrôle ou l'intervention a lieu sans légitimation et sans raison claire'.

it is appended to this opinion, as an illustration of the kind of study which, if made in the other EU Member States, could shed further light on the phenomenon of ethnic profiling (see Appendix B).

The treatment of individual complaints also constitutes an important aspect of the work of the *Comité P*[205]. The *Comité P* comprises an Inquiry Service (" *Service d'enquêtes* ")[206], the mission of which is to receive any complaints or denunciations from persons who have been affected by a police intervention ; public servants who wish to lodge such a complaint or file such a denouncement must not refer to their hierarchy before doing so[207]. The guarantee of anonymity of the complainant or the denouncer is stronger here than in the Act of 7 December 1998, in the context of allegations made to the General Inspectorate of the Federal and Local Police: indeed, the author of the complaint or the denouncement may request anonymity, in which case the complaint or denouncement will be treated confidentially[208]. The Inquiry Service may also inquire about criminal offences which members of police services are suspected of having committed. Such inquiries may be launched upon request of the judicial authorities (investigatory judge or public prosecutor), but also upon the initiative of the Inquiry Service (*ex officio*). In this respect, the Inquiry Service of the *Comité P* acts as a specialized police, competent for the investigation of offences committed by members of the police. It must then observe the rules of the *Code d'instruction criminelle*, which regulates in Belgium the criminal procedure.

The *Comité P* itself, moreover, may conduct inquiries into police services, either upon its own motion (*ex officio*) – in which case the House of Representatives is immediately informed –, or upon request of the Minister of the Interior or of Justice, of the House of Representatives or the Senate[209]. The inquiry leads to the formulation of a report in which the Comité P presents its conclusions. The implementation of these conclusions, by whichever competent authority they are addressed to (the Minister of the Interior or of Justice, the mayor, the *collège de police,* or the prosecuting authorities, depending on which services have been subject to an inquiry in the fulfilment of which missions, administrative or judicial), is subject to a control by the House of Representatives, on behalf of which the *Comité P* exercises its monitoring function : indeed, the conclusions of the *Comité P* are transmitted to the House of Representatives and the Senate, wherever the *Comité P* considers that, after a reasonable time which is of 60 days at least, no measures have been taken on the basis of its conclusions, or the measures which have been adopted are inadequate[210]. Especially in combination with the power of the *Comité P* to conduct inquiries *motu proprio*, this constitutes a potentially powerful tool for controlling the police services in Belgium, whenever certain facts are brought to the knowledge of the *Comité P* which it considers deserve its attention.

For the fulfilment of their missions as defined by the Act of 18 July 1991, the Comité P and its Inquiry Service have certain investigatory powers[211]. They may hear any person. The president of the *Comité P* may impose members of police services to testify before the committee[212], and these members of the police may not invoke professional secrecy to escape this obligation[213]. The members of the Inquiry Service may, moreover, enter any premise where members of a police service exercise their missions, to make the necessary findings. They may seize any object or document useful to the inquiry, except those concerning a judicial investigation.

[205] In 2001, the Comité P registered 1047 complaints. 832 had been registered in 2000, and 485 in 1999. The complaints are dealt with in reasonable delays : on 15 June 2002, 737 out of the 832 complaints received in 2000 had been completed ; at the same date, 796 out of 1047 complaints registered in 2001 had been completed. These data are the last available ; they are provided in the *2001 Annual Report* of the Comité P, available from www.comitep.be

[206] See the section 2 of Chapter II (Contrôle des services de police) of the Act of 18 July 1991 (Art. 16 and ff.). The Inquiry Service comprises three members. It is currently presided by Henri Berkmoes.

[207] Art. 16 al. 2 of the Act of 18 July 1991.

[208] Art. 16 of the Act of 18 July 1991.

[209] Art. 8 of the Act of 18 July 1991.

[210] Art. 11, 3° of the Act of 18 July 1991.

[211] These powers are described in Articles 24 to 27 of the Act of 18 July 1991.

[212] It is a criminal offense for a member of the police, punishable by an imprisonment of one month to a year, to refuse to testify (Art. 24 § 4 al. 3 of the Act of 18 July 1991).

[213] However, where the testimony would risk putting a person in physical danger, the president of the Comité P may decide that the member of the police will not have to testify.

The consequences of the inquiry by the Comité P. The inquiry launched by a complaint or a denunciation may be abandoned, for instance because the allegation is found to be baseless or cannot be treated by the *Comité P* because it falls outside the scope of its competences. Otherwise, the inquiry leads to a *rapport final d'enquête*, in which the Comité P states its conclusions as to which measures should be taken by the competent authorities. This report is sent to the competent authorities, and also to both Houses of the Parliament. The authorities to whom these conclusions are addressed must react within a reasonable time, and inform the *Comité P* of whichever measures have been adopted as a reaction to those conclusions. As already mentioned, if these measures are unsatisfactory or if no measures are adopted, the *Comité P* notifies its opinion to that effect to the legislative Chambers. These may then derive from these findings whichever political conclusions they consider adequate.

9.2. Ombudspersons

Some countries have an Ombudsman, potentially competent to receive complaints related to ethnic profiling (Estonia, Finland, Austria). **Finland**, in particular, has a Parliamentary Ombudsman and Minority Ombudsperson. The Act on the Minority Ombudsperson and the Nondiscrimination Board [*Laki vähemmistövaltuutetusta ja syrjintälautakunnasta* (13.7.2001/660)] provides for the monitoring role of the Minority Ombudsperson and a complaint mechanism before the Nondiscrimination Board. Both entities would have the possibility to address issues related to ethnic profiling. The Minority Ombudsperson acts primarily through recommendations and advice but can also initiate judicial or other procedures in cases of ethnic discrimination. The Nondiscrimination Board has the power to issue an injunction, prohibiting the continuance of a practice or measure that constitutes discrimination.

In **Austria**, the Ombudsman Board is entrusted under the Federal Constitution with the task of examining all alleged or presumed grievances arising in connection with the public administrative system. Its decisions are exclusively based on legal principles and the requirements of an equitable, fair and efficient administrative system.[214] The review competence of the Ombudsman Board covers the entire system of public administration including the enforcement of laws by authorities, agencies and government offices. In addition, a Human Rights Advisory Board (HRAB) was established in 1999 to monitor and examine on a continuous basis and from the human rights perspective the activities of the safety and security authorities[215]. It acts on its own initiative or on request by the Federal Minister of the Interior. It submits proposals for improvement to the Federal Minister of the Interior.[216] The Human Rights Advisory Board's Function, contrary to the tasks of judiciary or disciplinary authorities, does not affect the single individual case but rather the structural and institutional level. An important part of its work is the adoption of thematic reports which contain recommendations to the Minister of the Interior.[217]

9.3. Equality Bodies and Independent Data Protection Supervisory Bodies

As emphasized throughout this opinion, ethnic profiling may take the form either of discriminatory practices not implying the automatic means of processing personal data (but consisting in treating individuals on the basis of their ethnicity, religion or national origin in law enforcement decisions), or of the use of racial, ethnic or religious stereotypes the use of databases or the gathering and processing of intelligence through computerized means.[218] Therefore, two kinds of independent bodies may

[214] http://www.volksanw.gv.at/i_sprechta.htm

[215] Also the authorities otherwise subordinated to the Federal Minster of the Interior and the bodies with direct administrative powers of command and compulsion

[216] See http://www.menschenrechtsbeirat.at/cms/index.php?option=com_content&task=view&id=103&Itemid=110

[217] Kriebaum, S., The Austrian Human Rights Advisory Council, 2004, point 6.1.1.

[218] The definition of ethnic profiling proposed by J. Goldston ('the use of racial, ethnic or religious stereotypes in making law enforcement decisions to arrest, stop and search, check identification documents, mine databases, gather intelligence and

potentially be involved in documenting ethnic profiling, either on the basis of complaints they receive of even acting on their own motion.

Article 13 of the Racial Equality Directive provides for the establishment of independent bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin, which should provide independent assistance to victims of discrimination in pursuing their complaints about discrimination ; conduct independent surveys concerning discrimination; and publish independent reports and making recommendations on any issue relating to such discrimination. A number of Member States have gone beyond the minimum requirements of the directive in this regard, as regards both the extension of the powers of these bodies to the other grounds of discrimination and the contents of their powers. In addition, certain of these bodies have been authorized to assist victims complaining against discrimination by law enforcement agencies, or to prepare reports or recommendations on discrimination by such agencies.[219]

Article 28 of the Data Protection Directive provides for the establishment within each Member State of an independent data protection supervisory authority with investigative powers, effective powers of intervention, and the power to engage in legal proceedings where the national provisions adopted pursuant to the Data Protection Directive have been violated or to bring these violations to the attention of the judicial authorities. Instances of ethnic profiling falling under the second of the two categories distinguished above may be denounced before such authorities. In its conclusions and recommendations on the year 2005, the Network already emphasized the importance, for the adequate implementation of Directive 95/46/EC, not only of setting up independent supervisory bodies as required by Article 28 of that instrument, but also of ensuring that these bodies are fully independent and that they have the necessary resources to fulfil their tasks effectively. Referring also to the first report on the implementation of Directive 95/46/EC,[220] the Nertwork recalled its position according to which the obligation imposed by the EC Treaty (Art. 10 EC) on the Member States to contribute faithfully to the implementation of EC Law must necessarily include an obligation to ensure an adequate financing of the independent control authorities created according to Article 28 of Directive 95/46/EC, and required under Article 8(3) of the Charter of Fundamental Rights.[221]

9.4. Courts

Whatever the other possibilities left to the victim of ethnic profiling, it is indispensable that he or she has an effective access to courts having the required power to provide a remedy and to order a cessation of the violation. It is unnecessary to review in detail which courts may be competent, in each EU Member State, to receive such claims concerning alleged instances of ethnic profiling, and which remedies, and under which conditions, these jurisdictions may provide. Instead, a consideration of a

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other techniques') combines both of these modalities (*Ethnic Profiling and Counter-Terrorism : Trends, Dangers and Alternatives*, June 2006).

[219] In the **United Kingdom** for instance, he Commission for Racial Equality is empowered under the Race Relations Act 1976 to carry out an investigation into possible discrimination and require changes in practice and so it could challenge profiling where this amounts to discrimination under the 1976 Act. It can also support legal proceedings brought by individuals. In **Germany**, according to Section 27 of the General Treatment Act of 14 August 2006, every individual who thinks to be disfavoured by reasons mentioned in Section 1 (e.g. race, ethnic origin, sex, religion or philosophical creed) is entitled for claiming to a "Body for Antidiscrimination". This applies also to the field of law enforcement. This body gives the remonstrant support in getting trough his rights to protection against discrimination.

[220] COM (2003) 265 final, 15.5.2003.

[221] *Report on the situation of Fundamental Rights in the European Union and its Member States in 2005 : Conclusions and Recommendations*, March 2006, p. 93. In previous conclusions (Concl. 2005 (concerning the year 2004), p. 33), the Network had emphasized that 'these authorities should be given the means necessary for their effective functioning, in budgetary terms and by providing them with the needed personnel. This is indispensable not only for their independency, but also for the very possibility for these authorities to adequately perform the missions assigned to them, in particular by using their investigatory powers (which may comprise in situ inspections conducted without prior announcements) and their powers to engage in legal proceedings where they find privacy regulations to be violated. In the view of the Network, the financing of these authorities must not only be ensured and maintained, it must be improved, in line with the extension of the supervisory functions of these authorities, which is in proportion to the development of technologies processing personal data, for example biometrics as a means of identification'.

more general nature should be made concerning the conditions which have to be fulfilled for such a remedy to be considered truly effective, taking into account the diagnosis offered in section 3.4. of this opinion.

Clearly, where ethnic profiling takes the form of practices by law enforcement authorities rather than of a publicly announced data mining (such as the the profiling operation (*Rasterfahndung*) developed in Germany over the period 2001-2003), it will be rare that specific action against an individual will show that this was taken against him or her on account of his or her race : the *Roma* case presented to the House of Lords in 2004, which has been referred to above, is an unusual exception[222]. Furthermore, even where statistics would be available to the victim showing that stop and search powers or other policing powers are used disproportionately against members of racial or ethnic minorities – as is the case in the United Kingdom, which constitutes an exception in this regard –, this would probably not be sufficient to prove discrimination, since, in typical cases, it would be possible for the police to put forward objective grounds for suspicion even if that membership was also a factor taken into account. In this context, it may be useful to draw the attention to a briefing note produced by the United Kingdom Home Office's Policing and Reducing Crime Unit (*Police Stops and Searches: Lessons from a Programme of Research*, 2006), which pointed to a need for:

- supervisors to scrutinise rather than simply sign off search forms to ensure that they are legal and not based on negative stereotypes and weak generalisations
- dedicated officers to monitor records to identify officers or teams who appear to search (or stop) unusually high numbers of people from minority ethnic groups
- the visible use of stops and searches to respond to local crime problems
- improved skills in handling encounters
- a review of searches not requiring grounds
- training guidance on reasonable suspicion and clearer guidance on the use to be made of generalisations.

Moreover, it may be required to allow for the shifting of the burden of proof of ethnic profiling, where circumstantial evidence justify establishing a presumption that such practice has occurred. Pursuant to Directives 2000/43/EC (Racial Equality Directive) and 2000/78/EC (Employment Equality Directive), all the EU Member States have to insert in their relevant antidiscrimination legislation a special rule on the burden of proof, ensuring that when a person alleging to be the victim of discrimination establishes, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.[223] In addition, it may be necessary, for ethnic profiling to be effectively combated, to allow for it to be proven by the use of statistics. This of course presupposes that such statistics exist and that data protection legislation is not seen as imposing an obstacle to such statistics being established. It has been argued above, however, that such an obstacle does not exist insofar as the data collected for this purpose are anonymized.[224] For the same reasons, it may be necessary to allow for evidence of discrimination to be provided by 'testing', i.e., by presenting the law enforcement authorities suspected of ethnic profiling with situations which will exhibit the fact that they treat differently individuals presenting otherwise identifiable characteristics on the basis exclusively of their ethnicity, religion or national origin, to the extent that these are visible.

There should be no obstacle in transposing, to the domain of law enforcement, and even where such discrimination would be sanctioned by criminal penalties,[225] the techniques already developed in other fields, in particular in certain national legislations implementing the Racial Equality and Employment

[222] *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, 9 December 2004 : see above, section 5.2., a) of this opinion.
[223] Article 10(1) of Directive 2000/78/EC ; Article 8(1) of Directive 2000/43/EC
[224] See above, section 3.2. of this opinion.
[225] See above, section 3.3. of this opinion (on the limits imposed to the use of presumptions by the principle of presumption of innocence in criminal proceedings).

Equality Directives. These directives lay down, in their preamble, that national law or practice 'may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.'[226] Certain states have expressly allowed the use of statistical data as evidence in courts, in situations which may relate to the exercise by law enforcement authorities of their discretionary powers. In **Finland** for instance, statistical evidence has been presented, deemed admissible and used by the courts also in the context of discrimination suits.[227] This means that statistical evidence showing e.g. ethnic imbalances in police's "stop and search" practices would likely be admissible albeit the status and effects of such evidence may vary in concrete cases. In the **United Kingdom**, statistics may be used in proving both direct and indirect discrimination (see, e.g., *Enderby and Others v Frenchay Health Authority* (1994) ICR 112 and *Commissioners of Inland Revenue and another (appellants) v Morgan* [2002] IRLR 776). Although the only instances of this occurring in the course of litigation appears to be in the employment context, this is not surprising as the extension to law enforcement functions – with respect to which allegations have been made – is still relatively recent. Other States too have allowed discrimination to be proven by statistics, although in more limited fields not including law enforcement. Thus, the **Belgian** federal law of 25 February 2003 (*Loi tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme*) mentions "statistical data" and "testing" as two examples of evidence that would lead to the shifting of the burden of proof in civil cases on indirect discrimination (Art. 19 § 3). The Decree of the Walloon Region of 27 May 2004 (Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle)[228] (art. 17) contains an identical provision.[229] The **Italian** legislation also expressly provides that statistical data may be used to prove the existence of a direct or indirect discrimination. Of course, in a number of States, the use of statistics in suits alleging discrimination will not be afforded the same weight:

> 'Not all jurisdictions however allow the use of statistical data in this context, as appears from the following case from the Czech Republic: 'Eight months of detailed research was conducted by the ERRC and its partner organisations to provide a comprehensive statistical basis to the complaint in which 18 Romani children from the Czech city of Ostrava challenged the system of racial segregation in Czech schools under which Romani children predominantly ended up at special schools intended for pupils with learning difficulties. The syllabus taught in special schools is far inferior to that taught in "normal" schools. The data collected by the petitioners showed that in Ostrava, Romani children were 27 times more likely to be in special schools than were non-Romani children. An administrative action and subsequent application to the Czech Constitutional Court were unsuccessful as the court ruled that it had no jurisdiction to consider statistical evidence'.'[230]

The current situation as regards the use of statistics in discrimination cases in the areas covered by the Racial Equality and Employment Equality Directives has been summarized thus:

> 'The use of statistical data in the context of legal proceedings relating to discrimination on the basis of the grounds covered by the two Directives has been infrequent. [Only the United Kingdom] has anything like a well-established and a reasonably systematic approach in this

[226] See the identical recitals (15) of Employment Equality Directive and Racial Equality Directive.
[227] See e.g. Supreme Administrative Court b. 08.08.2001/1766, KHO: 2001:38.
[228] *Moniteur belge*, 23.6.2004.
[229] Statistics are not explicitly mentioned in the Flemish Decree of 8 May 2002 on proportionate participation on the labor market (M.B., 26.7.2002), nor in the Decree of 17 May 2004 of the German-speaking Community on equal treatment on the labor market (*Décret relatif à la garantie de l'égalité de traitement sur le marché du travail*). However, it would seem that this mode of proof is allowed under Article 14 of the Flemish Decree and Article 18 of the German-speaking Community Decree, both of which provide for the shifting of the burden of proof in civil law cases. In any case, statistics have so far never been invoked in the context of judicial proceedings.
[230] T. Makkonen, *Statistics and Equality – Data Collection, Data Protection and Anti-discrimination Law*, draft report prepared in the framework of the Network of legal experts on discrimination, European Commission, DG Employment and Social Affairs (version of 1.6.2006), at p. 18 (citing ERRC – Interights – MPG: *Strategic Litigation in Europe: From Principles to Practice.* Russell Press ltd, Nottingham (2004), p, 82). We are grateful to T. Makkonen for having shared with us the preliminary conclusions of his report.

area. Ireland and the Netherlands have considerable experience of the use of statistics in this context, although in the case of Ireland the main body of case law predates the Directives, and in the case of the Netherlands it appears that the experience is limited to the use of statistics by the Equal Treatment Commission, whereas the use of statistics by the regular courts has been infrequent. Four more countries, Czech Republic, Finland, France and Hungary, have had one or two cases where statistics have played a major role. In the rest of the EU countries, effectively forming an overwhelming majority, no case law could be found where statistics would have played any major role so far. The cases that were found concerned most often discrimination on the basis of age or racial or ethnic origin, and occasionally also with religion, while it was much harder to find examples of cases dealing with sexual orientation, disability or belief. There were examples of the use of statistics in relation to both direct and indirect discrimination. (…) Some jurisdictions allow the use of situation testing to prove the breach of the principle of equal treatment (…).'[231]

[231] T. Makkonen, *Statistics and Equality*, cited above, at pp. 18-19 (references omitted).

APPENDIX A : Comité P (Comité permanent de contrôle des services de police – Belgique), analysis of the complaints relating to racism in the year 2004- analyse des plaintes concernant le racisme au cours de l'année 2004)

TABLE DES MATIERES

ANALYSE DES PLAINTES CONCERNANT LE RACISME

1. DEFINITION DU SUJET

1.1. DESCRIPTION

Dans les années 2001 et 2002, le Comité P a effectué un « zérotage» de ses activités dans le cadre de sa fonction de contrôle pour les années 1996 à 2000. Un tel « zérotage » permet de détecter les accents et tendances que prennent certaines problématiques spécifiques en matière de fonctionnement des services de police.
Ces dernières années, la réforme des polices a aussi mis en place de nouvelles structures, ce qui a certainement eu une influence sur le travail des organes de contrôle. Afin de rencontrer et de mesurer l'effet de l'entrée en vigueur de nouvelles dispositions légales, le Comité P a décidé de procéder à un « zérotage » *bis* qui couvre les années 2000 à 2004 et ce, dans des thèmes récurrents concernant l'exercice des compétences policières, l'usage de la qualité de policier ou le rôle de la police en général.
La problématique que nous allons étudier est le racisme dans les services de police qui est une des composantes des problèmes supposés rencontrés par les citoyens au sujet de l'exercice des compétences de police. Nous nous baserons sur les plaintes et dénonciations reçues par le Comité à ce sujet et enregistrées dans sa base de données.
Nous pouvons d'ores et déjà nous douter du fait que le racisme éventuel est peut-être perceptible dans certaines interventions au moment même mais difficile à prouver par la suite car il s'agit de propos, rarement d'écrits. Ceux-ci ne peuvent être identifiés que par la parole de l'une des parties contre celle de l'autre. Contrairement par exemple aux délais d'intervention, aux fouilles ou à la violence, il ne s'agit souvent pas de faits concrets mesurables.
Sur le plan pénal, il y a plusieurs dispositions qui punissent le racisme ou plutôt certains comportements ayant pour mobile le racisme. En effet, la loi distingue différents faits et gestes qu'elle dénommera en fonction par les termes de racisme, négationnisme, discrimination, propos injurieux ou encore atteinte à l'honneur des personnes. Les sources juridiques sont très nombreuses et rédigées à l'origine au niveau international.
En outre, le racisme peut prendre des formes variées et venir, comme précisé par les dispositions légales[i] en la matière, de policiers vis-à-vis de citoyens, entre collègues policiers même, à l'embauche dans les services de police, ou même encore lorsqu'il s'agit de promotions internes des membres du personnel dans leur corps de police. On pourrait théoriquement retrouver ces facettes de la problématique dans les plaintes rencontrées par le Comité P.

1.2. REFERENCES – CADRE LEGAL

La lutte contre le racisme et les discriminations est consacrée dans des textes généraux conclus au niveau international, européen et dans la législation belge qui sont repris en annexe.

Les faits punissables à l'article 1er de la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie sont donc des incitations à la haine, à la discrimination, à la violence raciale au moyen de paroles ou d'écrits et non la haine elle-même matérialisée plutôt par des injures ou insultes racistes. Ces dernières sont traitées par le code pénal comme mentionné par la suite. Ce qui est visé par la loi « Moureaux » est en quelque sorte le prosélytisme : pousser les autres à la discrimination raciale. L'article 4 de cette même loi vise les fonctionnaires et donc les policiers qui pratiqueraient, en service, des discriminations, agiraient différemment, modifieraient leur comportement en fonction des caractéristiques ethniques d'une personne, sans justification objective et raisonnable. Par exemple, refuser systématiquement d'acter une plainte d'un belge d'origine étrangère ou d'un étranger, s'abstenir de venir en aide aux personnes d'origine étrangère, n'arrêter

[i] Voir annexe A.

administrativement que des allochtones dans un groupe de manifestants se comportant de la même manière, etc.

La loi du 20 janvier 2003 relative au renforcement de la législation contre le racisme modifie la loi du 30 juillet 1981. La définition de la discrimination est complétée par l'alinéa suivant *« Tout comportement consistant à enjoindre à quiconque de pratiquer une discrimination à l'encontre d'une personne, d'un groupe, d'une communauté ou de leurs membres est considéré comme une discrimination »*. Dans la loi, « race » devient aussi « prétendue race ». La loi créant un Centre pour l'égalité des chances et la loi du 13 mai 1999 contenant le statut disciplinaire des services de police sont également modifiées : *« Art 10 : « Lorsque le Centre pour l'égalité des chances et la lutte contre le racisme communique au Comité permanent de contrôle des services de police ou à l'inspection générale des services de la police fédérale et de la police locale des faits laissant supposer un traitement discriminatoire au sens de la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie ou de la loi du 6 janvier 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, le président du Comité permanent ou l'inspecteur général, selon le cas, fait mener une enquête à propos de ces faits, en informe l'autorité compétente et saisit l'autorité disciplinaire ou judiciaire si les faits le justifient. Le président du Comité permanent ou l'inspecteur général, selon le cas, informe le Centre du suivi réservé à ses démarches et en particulier des suites que l'autorité disciplinaire ou judiciaire a réservées à l'examen des faits »*.
Si le Comité permanent ou l'inspection générale est saisi de faits qui laissent supposer un traitement discriminatoire au sens des lois précitées, le président du Comité permanent ou l'inspecteur général, selon le cas, en informe le Centre pour l'égalité des chances et la lutte contre le racisme sans communiquer l'identité des parties concernées. Il l'informe également des suites que l'autorité disciplinaire ou judiciaire a réservées à l'examen des faits ».

La loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des changes et la lutte contre le racisme rajoute des critères dans la définition de la discrimination comme le handicap, la fortune ou l'orientation sexuelle. Le champ d'application de la loi est plus vaste que le racisme uniquement. Des interdictions (sans peine associée) sont précisées comme la discrimination dans l'attribution d'un emploi ou d'une promotion visée à l'article 2, §4 qui pourrait déboucher dans le cadre de notre étude sur une plainte.
Les sanctions pénales sont prévues dans des cas similaires à la loi de 1981 contre le racisme, mais sont complétées par des critères tels que le handicap, la fortune ou l'orientation sexuelle. En dernier lieu, la loi punit plus sévèrement certains crimes lorsque la motivation est le racisme.

2. ANALYSE

2.1. METHODOLOGIE

Nous faisons notre analyse sur base d'un listing de tous les dossiers issus de la base de données du Comité P comprenant le code 5600 : racisme, pour les années 2000 à 2003 en fait car 2004 n'était pas disponible lors de la réception du listing. Nous en recensons 153. Nous travaillons à partir des résumés de plainte et de la base de données pour obtenir de plus amples renseignements. Nous avons d'abord sélectionné une trentaine de dossiers pour lesquels il n'y avait pas de résumé. Nous avons pris un échantillon réparti sur les années 2000 à 2003. Après avoir fait le résumé de la plainte de ces dossiers et après recherche ultérieure dans la banque de données, il ne nous manque finalement qu'une dizaine de dossiers sur le total pour lesquels nous n'avons pas pu faire de résumés. L'étape suivante a été de faire un tableau reprenant toutes les caractéristiques recherchées par dossier. Nous avons rassemblé un maximum de données sur le plaignant (sexe, langue, etc.), le suspect (police locale, fédéral, en service, etc.), le reproche émis dans la plainte (qualité de policier, compétences de police, etc.) ou encore les actes posés reprochés. L'objectif étant de « contextualiser » les différentes plaintes, la dernière étape a consisté dans l'analyse des données du tableau et des conclusions y afférentes.

2.2. CONTENU

Sur base de l'analyse du contenu de plainte et du résumé, on peut regrouper celles-ci en trois catégories. La première, qui est la plus grande, est celle qui concerne les propos, injures et remarques racistes lors d'interventions policières qui semblent légales. La deuxième est celle qui concerne les plaintes pour intervention arbitraire, discriminatoire, motivée soi-disant par l'origine étrangère du plaignant et la dernière regroupe des plaintes sans véritable lien avec le racisme. Il s'agit par exemple d'une personne d'origine étrangère qui porte plainte pour coups et blessures sans faire référence à du racisme.
À la lumière des dispositions légales, on constate que la plupart des plaintes ont pour cadre la relation policier-citoyen. Une ou deux plaintes concernent des membres des services de police qui souffrent du racisme éventuel d'un de leurs collègues et aucune ne fait référence à la discrimination éventuelle interne au corps de police en matière de recrutement, de promotion ou d'avancement.

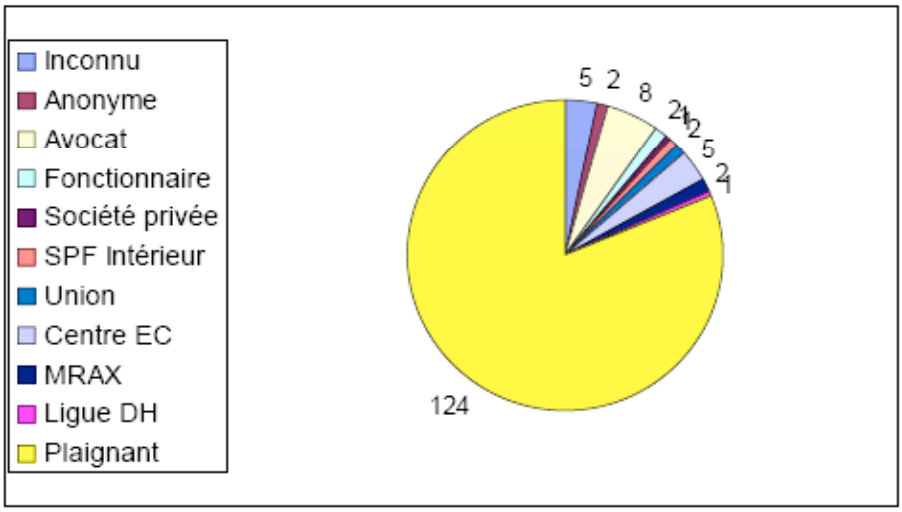
2.3. IDENTITE

2.3.1. La plainte

2.3.1.1. Généralités

La manière de déposer plainte est schématisée dans le graphique suivant:

Graphique 1 : Parcours de la plainte



Dans la majorité des cas, la plaignant s'adresse directement au Comité P ou aux autorités judiciaires, soit en envoyant une plainte écrite, soit en se présentant sur place. Mais comme le montre le schéma, le plaignant peut aussi choisir de passer par un avocat, par le Centre pour l'égalité des chances (Centre EC) ou encore par la Ligue des droits de l'homme (Ligue DH).
Dans quelques cas, la plainte est déposée par une asbl comme l'Union des Juifs de Belgique (Union).
Il y a cinq plaintes qui émanent du Centre pour l'égalité des chances, qui a vu ses compétences élargies dernièrement.

2.3.1.2. Classement de la plainte

Pour 56 dossiers c'est-à-dire un tiers, aucune attribution n'est précisée dans la base de données. Il s'agit essentiellement des plaintes à caractère judiciaire.
Pour les cas où une suite est mentionnée, l'analyse montre que certaines plaintes sont classées sans suite par le Comité P. Il peut y avoir plusieurs raisons de classement sans suite par plainte. Les tableaux suivants donnent une indication des « attributions », c'est-à-dire des raisons du classement sans suite :

Tableau 1 : Pas d'enquête

Attribution	Nombre de cas
102	1
109	6
111	1
117	1
122	1
125	4
127	5

En tout, ces 19 cas d'attribution « classement sans suite » correspondent à 17 plaintes. Cela ne signifie pas que la plainte est non fondée. Dans 6 cas (attribution 109), la plainte est de la compétence du pouvoir judiciaire et le Comité P s'en dessaisit au profit du ministère public. Mais il continuera à suivre l'évolution de ce dossier en y demandant, s'il échet, accès.

Tableau 2 : Examen du dossier

Attribution	Nombre de cas	Signification
201	2	
202	31	Par le Service d'enquêtes
203	1	
204	42	Par le contrôle interne
205	1	

Les plaintes pour racisme sont souvent envoyées pour examen au contrôle interne des polices concernées (42 cas).

Tableau 3 : Enquête et décision après enquête : clôture du dossier

Attribution	Nombre de cas	Signification
301	3	
303	19	Pas établi à suffisance
304	3	
307	3	
308	4	
311	2	
312	13	Pas de faute
313	12	Pas de dysfonctionnement
314	3	
319	1	
320	7	Contrôle marginal
325	4	

Cela correspond à 59 plaintes clôturées après enquête. Environ un tiers des plaintes du total se terminent à ce stade. Il peut cependant y avoir d'autres suites par après en fonction de la décision du ministère public ou du contrôle interne.

Tableau 4 : Clôture provisoire – plainte fondée

Attribution	Nombre de cas
401	4
402	2
404	6
406	7
408	3
409	7
410	1

Il y a 21 plaintes fondées pour racisme à ce stade de l'enquête, ce qui fait sur 153 : 13,7 %. Si on considère les dossiers pour lesquels une attribution est mentionnée (97), on obtient 21,6 %.

Tableau 5 : Clôture définitive

Attribution	Nombre de cas
501	14
505	3
506	1
510	2
520	2
525	1

Cela correspond à 21 plaintes qui sont clôturées de manière définitive ; 14 le sont après suite positive à un faute ou dysfonctionnement individuel (rubrique 501).
En conclusion, en considérant les 97 dossiers pour lesquels une attribution de classement est donnée dans la banque de données, on voit que 17 sont classés sans suite par le Comité (la plainte est peut-être fondée), 59 sont clôturés après enquête et 21 ont une clôture définitive avec suites. Ce dernier chiffre est le plus significatif car il peut s'agir des mêmes dossiers. Certaines plaintes sont classées sans suite par le Comité et débouchent sur une faute individuelle après enquête du contrôle interne et contrôle marginal.

2.3.2. Le plaignant

Le nombre de plaignants par dossier varie de un à cinq. Les 153 plaintes correspondent à 175 plaignants. Dans 79 % des cas, le plaignant est un homme, dans 18% des cas, le plaignant est une femme et on compte 3 % de non spécifiés ou anonymes dans la base de données. On constate donc que la majorité des plaignants sont des hommes. 57 % des plaignants sont francophones, 34 % sont néerlandophones. La langue du plaignant n'a pu être déterminée dans 9 % des plaintes.
En se basant sur les noms et prénoms et sur le contenu des plaintes (« je suis métisse », « je suis un belge »), nous avançons l'hypothèse que 87 % des plaignants sont « d'origine étrangère » (non belge européen ou extra européen), 11 % sont « belges » et 2 % sont d'origine indéterminée (plaintes anonymes ou inconnu).
Dans 12 cas, la victime de l'infraction de racisme supposée n'est pas le plaignant (donc dénonciateur). Il s'agit d'une personne par exemple qui a été témoin de certains faits. Pour 52 cas, il y a des témoins de l'incident, policier ou citoyen, ce qui constitue à peu près un tiers des plaintes. Le nombre de témoins varie de 1 à 52[i], ce qui signifie aussi qu'il n' y a pas de témoin mentionné pour deux tiers des plaintes rendant de ce fait la preuve plus difficile à établir. Il ressort également que 4 plaintes proviennent de membres du personnel des services

[i] Dans un cas en 2000 où la plainte émanait des membres du personnel d'un commissariat à l'encontre d'une collègue.

de police qui reprochent le comportement d'un ou plusieurs de leurs collègues soit à leur égard, soit à l'égard d'autrui.

2.3.3. Le suspect

Dans 69 dossiers, le nombre de suspects n'est pas vraiment spécifié dans l'analyse ou synthèse de la plainte ou la base de données.

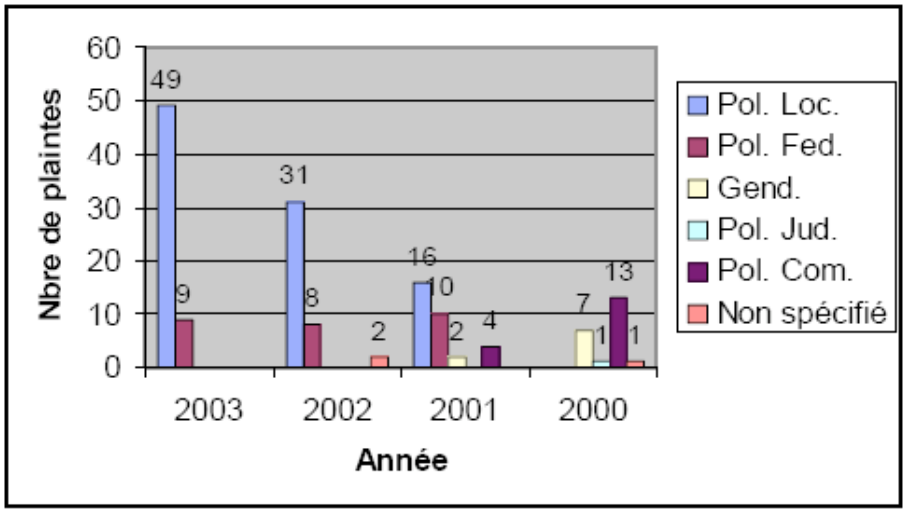
Tableau 6 : Répartition du nombre de suspects par plainte

Nombre de suspects	Nombre de dossiers
1	45
2	30
3	7
4	2

Il y a 201 suspects recensés au total. 88 sont des hommes, 6 sont des femmes. Le sexe des 107 suspects restants n'a pu être déterminé. Soit la base de données ou le résumé ne le précise pas (« des policiers m'ont insultés »), soit uniquement le nom de famille du suspect est mentionné. Dans 82 % des cas, les personnes portent plainte pour racisme contre des policiers identifiés ou non. Ce qui est logique puisqu'on a vu que la plainte survient en général dans un contexte d'intervention précise de la police. Dans 6 % des cas, les personnes portent plainte pour racisme contre un service ou corps de police en général. C'est le cas par exemple d'un plaignant, qui reproche l'attitude raciste supposée de la police de Saint-Nicolas. Un seul cas fait part d'une plainte pour racisme contre la police dans son ensemble.
Finalement, il n'est pas possible de déterminer vers qui la plainte est adressée dans 11 % des cas.

Le corps d'origine du suspect se répartit de la façon suivante :

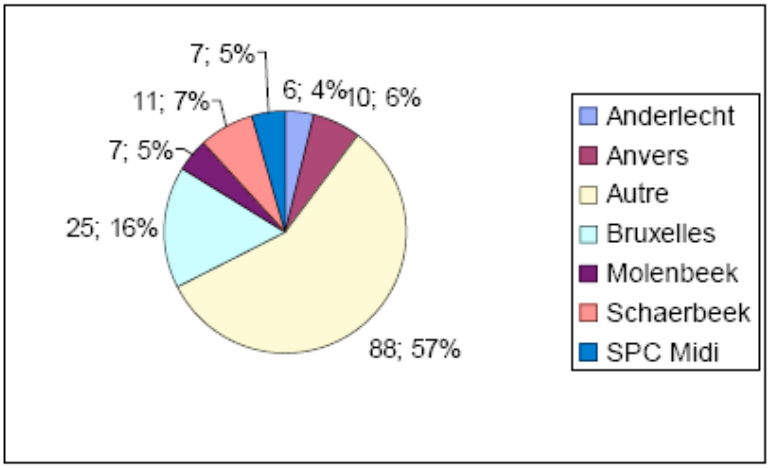
Graphique 2 : Corps de police concernés



Les années étudiées étant à cheval sur le changement du paysage policier, on retrouve les corps de gendarmerie, police communale et police judiciaire pour l'année 2000 et pour l'année 2001. Les zones de police se sont en effet constituées dans le courant de l'année 2001. À partir de 2002, on n'a exclusivement que la police fédérale et locale.
Les plaintes concernent majoritairement des membres du personnel appartenant à la police locale. Il est vrai que ce sont ces personnes qui sont sur le terrain et au contact du public. Les services de la police fédérale que l'on retrouve dans ce schéma sont les unités opérationnelles comme DGA/DAR ou DGA/DAC/SPC. Il est aussi intéressant de cibler quels sont ces corps de police faisant l'objet de plaintes à l'égard de leur personnel. Le graphique ci-dessous donne le détail des corps d'appartenance des suspects pour les quatre années. On a

pour chaque « partie de camembert » le nombre de plaintes à l'égard d'un membre du personnel du corps de police et le pourcentage du total que cela représente.
La zone de police de Bruxelles-Ixelles est le corps de police qui fait l'objet du plus plaintes avec 25 cas sur 154, ce qui fait 16 %. Il y a 154 cas et non 153 car une plainte concernait deux zones de police. La catégorie « autre » regroupe les corps de police cités dans une ou deux plaintes maximum.

Graphique 3 : Corps de police concernés



Il faut préciser que bien que la zone de police de Bruxelles soit la plus représentée, le nombre de plaintes contre son personnel en matière de racisme diminue depuis 2001.

Tableau 7 : Zone de Bruxelles-Capitale-Ixelles

2000	2001	2002	2003
4	9	7	5

Le nombre de plaintes est par contre en légère augmentation depuis 2000 pour les zones de Schaerbeek, Anvers et Molenbeek. Celle-ci pourrait résulter du fait que ces zones sont constituées depuis 2001 de plusieurs anciens corps de police communale. Toujours au sujet du suspect, il ressort de l'analyse des dossiers que, dans 89 % des cas, la plainte concerne un ou plusieurs membres des services de police en service. Dans 5 % des cas, le policier n'est pas service. La donnée est inconnue dans 6 % des cas.
Il y a donc quelques cas où le policier incriminé n'est pas en service, lorsqu'il a un problème avec le plaignant, un accident de roulage en privé par exemple, et fait ouvertement mention de sa qualité de policier ou appelle des collègues à son secours.

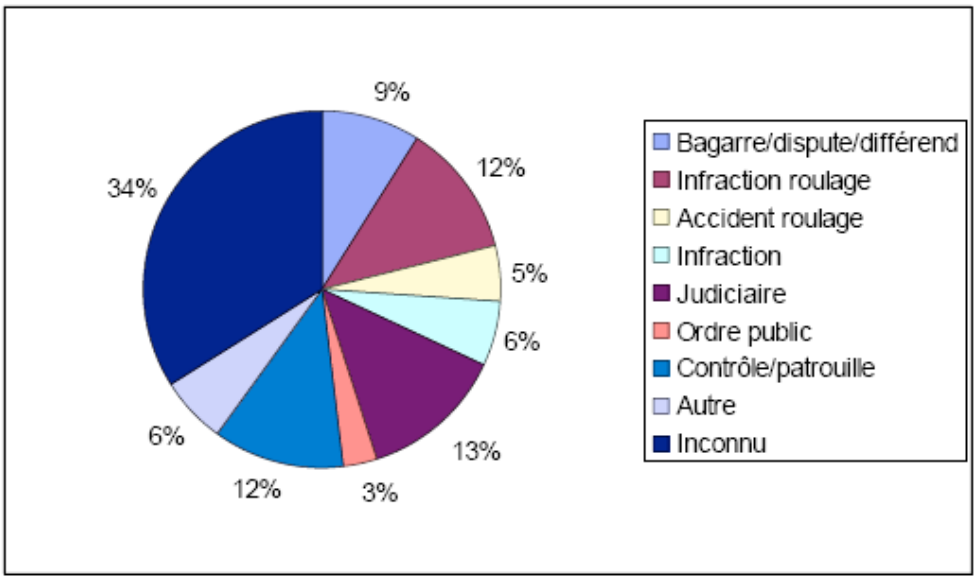
2.4. CONTEXTE

Le contexte a pour but de comprendre dans quelles circonstances a lieu l'incident qui a été à l'origine de la plainte et quel aspect de la fonction de police vise la plainte.

2.4.1. Origine de l'intervention

Le résumé de la plainte ou la plainte elle-même mentionne parfois les circonstances de l'action de la police. De l'analyse, la première remarque qui nous vient à l'esprit est que la plainte pour racisme est déposée dans un contexte qui est souvent une intervention policière. Seule une petite dizaine de cas correspondent à une plainte qui dénonce le comportement raciste en général d'un policier ou d'un service de police sans qu'il y ait une intervention précise.
Le graphique en « camembert » ci-dessous indique quelle est l'origine de l'intervention policière qui a donné lieu à la plainte ultérieure pour racisme. Pour ce faire, nous nous sommes basés sur le résumé de la plainte.

Graphique 4 : Origine de l'intervention



Dans 34 % des plaintes, le contexte de l'intervention policière n'est pas donné ou n'est pas clair dans le résumé de la plainte, ce qui, dans le cas du racisme, peut s'interpréter de plusieurs manières, à charge ou à décharge du suspect.
Pour les autres cas, nous avons essayé de répartir les interventions par thème représentatif : (1) bagarre/dispute/différend : le plaignant est supposé impliqué dans une altercation de type dispute de voisinage, rixe dans un café, différend familial, etc. qui a nécessité l'intervention de la police ; (2) infraction de roulage : le plaignant est suspecté d'avoir commis une infraction de roulage, la police est intervenue et a éventuellement dressé procès-verbal ou fait dépanner le véhicule ; (3) accident de roulage : le plaignant a été supposé victime ou responsable d'un accident de roulage qui a nécessité une action de la police ; (4) infraction : le plaignant est suspecté d'avoir commis ou a été la victime supposée d'une infraction quelconque comme un vol, voie de faits, ivresse publique, etc. et la police intervient ; (5) judiciaire : la police agit dans le cadre d'une enquête judiciaire ; (6) ordre public : police administrative. Le plaignant est par exemple dans un évènement où il y un service d'ordre, ou fait l'objet d'un rapatriement, etc. ; (7) contrôle/patrouille : les policiers sont en patrouille et procèdent à un contrôle d'une personne ou d'un véhicule suspect en fonction des circonstances de temps, de lieu, etc. ; (8) autre : cette catégorie vise l'accueil du plaignant au commissariat, l'appel 101, le dépôt de plainte ou encore les cas de non-intervention de la police. L'origine de la plainte est, par exemple, un comportement raciste en général du policier.

Il ressort de l'analyse que les grandes catégories à l'origine des plaintes pour racisme sont le roulage (infraction ou accident), à la source d'un cinquième des plaintes environ, le judiciaire au sens large (perquisition sur mandat, audition, etc.) et le contrôle d'identité ou de documents.
Dans de nombreux cas, le plaignant est lui-même supposé en infraction lorsque la police intervient. L'intervention policière a lieu car il y a une infraction supposée dans laquelle le plaignant est impliqué d'une manière ou d'une autre.

2.4.2. Actes posés et problèmes survenus

Étant donné le contexte de la plainte pour racisme qui est surtout l'intervention policière, on peut se demander quels sont les actes posés à l'origine de l'incident éventuel. On retrouve dans le tableau ci-dessous le nombre de fois où un acte de police est cité dans la plainte. Plusieurs actes peuvent être mentionnés dans une même plainte et c'est souvent le cas pour le schéma classique : fouille, arrestation et audition.

Tableau 8 : Citation d'un acte de police dans la plainte

Mesure de police	Nombre
Arrestation/privation de liberté	63
Audition	39
Contrôle d'identité/documents véhicule	25
Procès-verbal dressé	16
Autre	16
Fouille	11
Perquisition/visite domiciliaire	7
Inconnu, non précisé	7
Dépannage véhicule	6
Acter une plainte	2

La catégorie « autre » reprend des faits tels que la saisie de biens mobiliers, le test d'haleine, l'accueil téléphonique au commissariat, etc.
L'arrestation, judiciaire ou administrative, est la plus souvent mentionnée dans les plaintes. L'audition suit logiquement car il s'agit souvent de celle ayant lieu dans la foulée de l'arrestation. La dernière rubrique « acter une plainte » signifie que le plaignant voulait déposer plainte et la police se serait alors comportée de manière raciste.

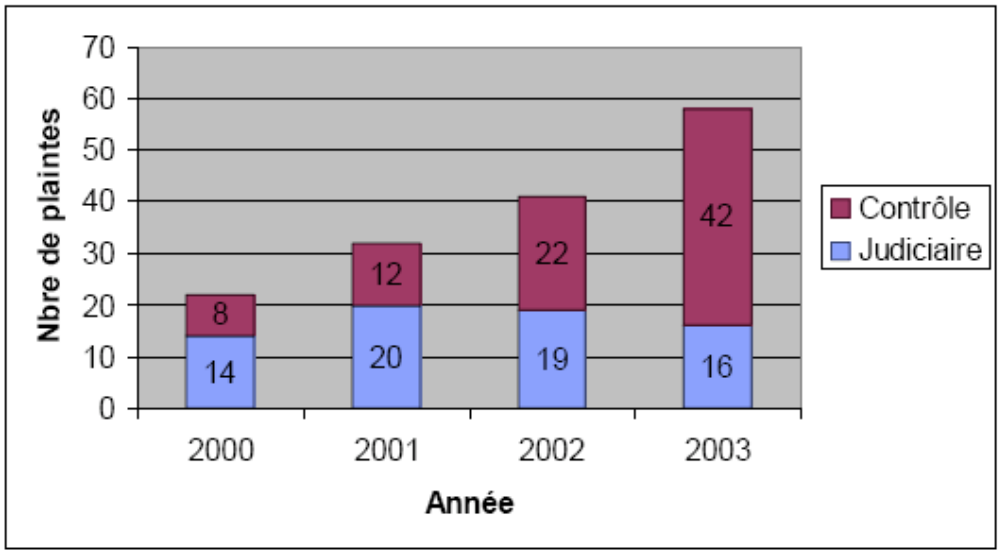
Selon les champs 4 et 5 des « fiches jaunes » d'analyse du Comité P, les plaintes visent le rôle de la police selon la répartition suivante : (1) 78 % concernent l'exercice des compétences de police : propos racistes lors d'une intervention, discrimination lors des contrôles d'identité, etc. ; (2) 8 % concernent la qualité du policier : on reproche au policier l'atteinte à la vie privée (à cause du racisme éventuellement), les faux en écriture, etc. ; (3) 3 % visent plutôt le rôle de la police : la plainte concerne l'abus d'alcool, l'attitude du policier en service, etc.
Il est difficile de faire une analyse quantitative du détail des faits reprochés dans la plainte au cours de ces interventions car les plaignants formulent des griefs très divers et plusieurs par plainte. Il nous semble qu'à la lecture des plaintes, 37 ne mentionnent pas d'actes racistes ou discriminatoires spécifiques. Elles font part de coups et blessures, de menaces, de refus d'acter, etc. sans préciser un lien quelconque avec du racisme ou de la discrimination.

2.5. ÉVOLUTION

Tableau 9 : Augmentation du nombre de plaintes au fil des ans

Année	Nombre
2000	22
2001	32
2002	41
2003	58

Graphique 5 : Évolution du nombre de plaintes



Depuis 2001, les plaintes déposées au judiciaire diminuent alors qu'elles augmentent en contrôle. Or, la législation pénale sur le racisme et son application se sont, assez paradoxalement, renforcées ces dernières années, ce qui signifie peut-être que les comportements reprochés n'ont pas évolué à la lumière des nouvelles législations ou bien ne répondent pas aux critères des nouvelles incriminations.
Quant au contenu, on ne constate pas une évolution bien spécifique du type de plaintes. Ce sont les propos racistes ou injures racistes qui sont la plupart du temps mentionnés et qui sont, rappelons-le, plus visés par les articles du Code pénal que par la législation contre le racisme.

3. CONCLUSION

3.1. CATEGORIES

On distingue trois catégories de plaintes : les propos racistes lors d'interventions policières justifiées, l'intervention policière arbitraire ou discriminatoire et, finalement, les plaintes qui n'ont pas de lien apparent avec le racisme.
La première catégorie de plaintes est punie surtout par les dispositions du Code pénal sur les atteintes à l'honneur des personnes. La deuxième catégorie pourrait tomber en théorie sous le coup des articles punissant les discriminations commises par les officiers publics insérées dans les lois de 1981 et 2003 sur la lutte contre le racisme. Mais il est difficile de prouver le motif discriminatoire du policier lors de son intervention si celle-ci est légale et justifiée à la base. Surtout que, comme il ressort de l'analyse, deux tiers des plaintes ne mentionnent pas de témoins.

3.2. INTERET DU THEME POUR LE COMITE P

Le nombre de plaintes est en augmentation mais reste relatif comparé aux 40 000 policiers et à l'échelle du pays. Il y en a 153 concernant le racisme en quatre ans. Le pourcentage le plus élevé de plaintes vient des zones où les personnes étrangères ou d'origine étrangère sont les plus nombreuses comme Bruxelles, Schaerbeek et Anvers. Il est dès lors peut être intéressant pour le Comité P, avant de lancer une enquête thématique (plus précise) nationale sur le sujet, de cibler ces zones plus sensibles.

ANNEXE A

Conventions internationales

Citons pour mémoire les traités suivants, qui servent de cadre général :

- Déclaration universelle des droits de l'homme ;
- Convention du 4 novembre 1950 de sauvegarde des droits de l'homme et des libertés ;
- Convention de sauvegarde des droits de l'homme et des libertés – protocoles ;
- Pacte international fait à New York du 19 décembre 1966 relatif aux droits civils et politiques (traduit en droit belge par la loi du 15 mai 1981) ;
- Convention internationale du 7 mars 1966 sur l'élimination de toutes les formes de discrimination raciale.

AU NIVEAU EUROPEEN :

Directives européennes contre la discrimination

- Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail ;
- Directive 2000/43/CE du conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique ;
- Proposition de décision-cadre du conseil concernant la lutte contre le racisme et la xénophobie.

AU NIVEAU NATIONAL :

Législation belge

- Constitution articles 10, 11 et 191 : égalité des hommes, tous les hommes sont égaux en droit… ;
- Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, modifiée par la loi du 12 avril 1994. Il s'agit de la loi dite « Moureaux ».

Art. 1er : définition de la discrimination

« toute distinction, exclusion, restriction ou préférence ayant ou pouvant avoir pour but ou pour effet de détruire, de compromettre ou de limiter la reconnaissance, la jouissance ou l'exercice, dans des conditions d'égalité, des droits de l'homme et des libertés fondamentales dans les domaines politique, économique, social ou culturel ou dans tout autre domaine de la vie sociale ».

Infractions :

Art. 1er, 1° : *« est puni […] quiconque, dans l'une des circonstances indiquées à l'article 444 du Code pénal, incite à la discrimination, à la haine ou à la violence à l'égard d'une personne en raison de sa race, couleur, de son ascendance ou de son origine nationale ou ethnique ».*

Art. 1er,2° : *« est puni […] quiconque, dans l'une des circonstances indiquées à l'article 444 du Code pénal, incite à la discrimination, à la ségrégation, à la haine ou à la violence à l'égard d'un groupe, d'une communauté ou de leurs membres, en raison de la race, de la couleur, de l'ascendance ou de l'origine nationale ou ethnique de ceux-ci ou de certains d'entre eux ».*

Art. 1er,3° : *« est puni […] quiconque, dans l'une des circonstances indiquées à l'article 444 du Code pénal, donne une publicité à son intention de recourir à la discrimination, à la haine ou à la violence à l'égard d'une personne en raison de sa race, couleur, de son ascendance ou de son origine ou de sa nationalité ».*

Art. 1er,4° : *« est puni […] quiconque, dans l'une des circonstances indiquées à l'article 444 du Code pénal, donne une publicité à son intention de recourir à la discrimination, à la haine, à la violence ou à la ségrégation à l'égard d'un groupe, d'une communauté ou de leurs membres, en raison de la race, de la couleur, de l'ascendance, de l'origine ou de la nationalité de ceux-ci ou de certains d'entre eux ».*

Art. 444 du Code pénal :
« les faits ont lieu :
soit dans des réunions publiques ;
soit dans des lieux publics ;
soit en présence de plusieurs individus dans un lieu non public, mais ouvert à un certain nombre de personnes ayant le droit de s'y rassembler ou de le fréquenter ;
soit dans un lieu quelconque, en présence de la personne offensée et devant témoins ;
soit : par des écrits, imprimés ou non, des images ou des emblèmes affichés, distribués ou vendus, mis en vente ou exposés aux regards du public ; par des écrits, non rendus publics, mais adressés ou communiqués à plusieurs personnes ».

Art. 2, 2*bis* : pour mémoire ;

Art. 3 : pour mémoire ;

Art. 4 : *« est puni d'un emprisonnement de deux mois à deux ans, tout fonctionnaire ou officier public, tout dépositaire ou agent de l'autorité ou de la force publique qui, dans l'exercice de ses fonctions, commet une discrimination à l'égard d'une personne en raison de sa race, de sa couleur, de son ascendance, de son origine ou de sa nationalité, ou lui refuse arbitrairement l'exercice d'un droit ou d'une liberté auxquels elle peut prétendre.*

Les mêmes peines sont applicables lorsque les faits sont commis à l'égard d'un groupe, d'une communauté ou de leurs membres, en raison de la race, de la couleur, de l'ascendance, de l'origine ou de la nationalité de ceux-ci ou de certains d'entre eux.

Si l'inculpé justifie qu'il a agi par ordre de ses supérieurs pour des objets du ressort de ceux-ci et sur lesquels il leur était dû obéissance hiérarchique, les peines sont appliquées seulement aux supérieurs qui ont donné l'ordre.

Si les fonctionnaires ou officiers publics prévenus d'avoir ordonné, autorisé ou facilité les actes arbitraires susmentionnés prétendent que leur signature a été surprise, ils sont tenus en faisant, le cas échéant, cesser l'acte, de dénoncer le coupable ; sinon ils sont poursuivis personnellement.

Si l'un des actes arbitraires susmentionnés est commis au moyen de la fausse signature d'un fonctionnaire public, les auteurs du faux et ceux qui, méchamment ou frauduleusement en font usage sont punis des travaux forcés de dix à quinze ans ».

Loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale.

Art. 1er : *« est puni […] quiconque, dans l'une des circonstances indiquées à l'article 444 du Code pénal, nie, minimise grossièrement, cherche à justifier ou approuve le génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale ».*

Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme.

Art. 2 : définit la discrimination directe et indirecte.

« § 1er. Il y a discrimination directe si une différence de traitement qui manque de justification objective et raisonnable est directement fondée sur le sexe, une prétendue race, la couleur, l'ascendance, l'origine nationale ou ethnique, l'orientation sexuelle, l'état civil, la naissance, la fortune, l'âge, la conviction religieuse ou philosophique, l'état de santé actuel ou futur, un handicap ou une caractéristique physique.

§ 2. Il y a discrimination indirecte lorsqu'une disposition, un critère ou une pratique apparemment neutre a en tant que tel un résultat dommageable pour des personnes

auxquelles s'applique un des motifs de discrimination visés au § 1er, à moins que cette disposition, ce critère ou cette pratique ne repose sur une justification objective et raisonnable.

§ 4. Toute discrimination directe ou indirecte est interdite lorsqu'elle porte sur :
la fourniture ou la mise à la disposition du public de biens et de services ;
les conditions d'accès au travail salarié, non salarié ou indépendant, y compris les critères de sélection et les conditions de recrutement, quelle que soit la branche d'activité et à tous les niveaux de la hiérarchie professionnelle, y compris en matière de promotion, les conditions d'emploi et de travail, y compris les conditions de licenciement et de rémunération, tant dans le secteur privé que public ;
la nomination ou la promotion d'un fonctionnaire ou l'affectation d'un fonctionnaire à un service ;
la mention dans une pièce officielle ou dans un procès-verbal ;
la diffusion, la publication ou l'exposition en public d'un texte, d'un avis, d'un signe ou de tout autre support comportant une discrimination ;
l'accès, la participation et tout autre exercice d'une activité économique, sociale, culturelle ou politique accessible au public.

§ 6. Le harcèlement est considéré comme une forme de discrimination lorsqu'un comportement indésirable qui est lié au motifs de discrimination figurant au § 1er a pour objet ou pour effet de porter atteinte à la dignité d'une personne et de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant.

§ 7. Tout comportement consistant à enjoindre à quiconque de pratiquer une discrimination à l'encontre d'une personne, d'un groupe, d'une communauté ou de leurs membres pour un des motifs visés au § 1er est considéré comme une discrimination ».

Chapitre III – Dispositions pénales

Art. 6, § 1er : *« est puni d'un emprisonnement […] quiconque, dans une des circonstances de l'art 444 du Code pénal, incite à la discrimination, à la haine,ou à la violence à l'égard d'une personne, d'un groupe, d'une communauté ou des membres de celle-ci, en raison du sexe, de l'orientation sexuelle, de l'état civil, de la naissance, de la fortune, de l'âge, de la conviction religieuse ou philosophique, de l'état de santé actuel ou futur, d'un handicap ou d'une caractéristique physique ; […] quiconque, dans une des circonstances de l'art 444 du Code pénal, donne une publicité à son intention de recourir à la discrimination, à la haine,ou à la violence à l'égard d'une personne, d'un groupe, d'une communauté ou des membres de celle-ci, en raison du sexe, de l'orientation sexuelle, de l'état civil, de la naissance, de la fortune, de l'âge, de la conviction religieuse ou philosophique, de l'état de santé actuel ou futur, d'un handicap ou d'une caractéristique physique ».*

Art. 6, § 2 : *« est puni […] tout fonctionnaire ou officier public, tout dépositaire ou agent de la force publique qui, dans l'exercice de ses fonctions, commet une discrimination à l'égard d'une personne, d'un groupe, d'une communauté ou des membres de celle-ci, en raison du sexe, de l'orientation sexuelle, de l'état civil, de la naissance, de la fortune, de l'âge, de la conviction religieuse ou philosophique, de l'état de santé actuel ou futur, d'un handicap ou d'une caractéristique physique.*

Si l'inculpé justifie qu'il a agi par ordre de ses supérieurs pour des objets du ressort de ceux-ci et sur lesquels il leur était dû obéissance hiérarchique, les peines sont appliquées seulement aux supérieurs qui ont donné l'ordre.

Si les fonctionnaires ou officiers publics prévenus d'avoir ordonné, autorisé ou facilité les actes arbitraires susmentionnés prétendent que leur signature a été surprise, ils sont tenus en faisant, le cas échéant, cesser l'acte, de dénoncer le coupable ; sinon ils sont poursuivis personnellement.

Si l'un des actes discriminatoires susmentionnés est commis au moyen de la fausse signature d'un fonctionnaire public, les auteurs du faux et ceux qui, méchamment ou frauduleusement en font usage sont punis des travaux forcés de dix à quinze ans ».

Art. 7 : les peines pour certains crimes ou délits seront augmentées *« lorsqu'un des mobiles du crime ou délit est la haine, le mépris ou l'hostilité à l'égard d'une personne en raison de sa*

prétendue race, de sa couleur, de son origine nationale ou ethnique, de son orientation sexuelle, de son état civil, de sa naissance, de sa fortune, de son âge, de sa conviction religieuse ou philosophique ou d'une caractéristique physique ».

Ces crimes et délits sont l'attentat à la pudeur et le viol, le meurtre, l'homicide volontaire non qualifié de meurtre et les lésions corporelles volontaires, les abstentions coupables, les attentats à la liberté individuelle et l'inviolabilité du domicile commis par des particuliers, le harcèlement, les atteintes portées à l'honneur ou à la considération des personnes (ex : injures), l'incendie, la destruction ou détérioration de denrées, marchandises ou autres propriétés mobilières

Code pénal

Art. 448 : *« quiconque aura injurié une personne soit par des faits, soit par des écrits, images ou emblèmes, dans l'une des circonstances indiquées à l'article 444 du Code pénal, sera puni […] »*. (délit)

Art. 561 : *« seront punis […] ceux qui auront dirigé, contre des corps constitués ou des particuliers, des injures, autres que celles prévues au chapitre V, titre VIII, livre II du Code pénal »*. (atteintes portées à l'honneur ou à la considération des personnes) (contravention 3e classe)

Commentaire

Sont ici visés l'injure, la remarque, les propos racistes sans la notion d'incitation qui est reprise par la loi « Moureaux ».

Services de police

Citons pour mémoire :

Art. 1er, al. 2 de la loi du 5 août 1992 sur la fonction de police.

Art. 123, 127, 129 et 130 de la loi du 7 décembre 1998 organisant un service de police intégré, structuré à deux niveaux.

APPENDIX B : Constitutional Court of Slovenia, judgment of 30 March 2006 (U-I-152/03)

Akt:
Police Act (Official Gazette RS, Nos. 49/98, 66/98 – corr., 93/01, 56/02, 79/03, 43/04 – off. consol. text, 50/04, 102/04 – off. consol. text, 14/05 – corr. off. consol. text, 53/05, 70/05 – off. consol. text, 98/05 and 3/06 – off. consol. text) (ZPol), Art. 35.1
Geslo:
1.5.51.1.15.1 - Constitutional Justice - Decisions - Types of decisions of the Constitutional Court - In abstract review proceedings - Finding that a regulation is not in conformity - With the Constitution.
1.5.51.1.16 - Constitutional Justice - Decisions - Types of decisions of the Constitutional Court - In abstract review proceedings - Call to the norm-giver to adjust a regulation with the Constitution.
1.5.51.1.22 - Constitutional Justice - Decisions - Types of decisions of the Constitutional Court - In abstract review proceedings - Determination of the manner of implementing a decision.
5.3.30 - Fundamental Rights - Civil and political rights - Right to a private life.
3.9 - General Principles - Rule of law.
5.2.2.52 - Fundamental Rights - Equality - Criteria of distinction - Other Personal Circumstance (14/1).
Pravna podlaga:
Constitution, Arts. 2, 14.1, 35
Constitutional Court Act, Arts. 40.2, 48
Izrek:
Art. 35.1 of the Police Act (Official Gazette RS, Nos. 49/98, 66/98 – corr., 93/01, 56/02, 79/03, 43/04 – off. consol. text, 50/04, 102/04 – off. consol. text, 14/05 – corr. off. consol. text, 53/05, 70/05 – off. consol. text, 98/05 and 3/06 – off. consol. text) (ZPol) is inconsistent with the Constitution.
The National Assembly must remedy the established inconsistency within a time limit of one year from the publication of this Decision in the Official Gazette of the Republic of Slovenia.
Until the remedying of the established inconsistency, merely the appearance of a person cannot be grounds for the establishment of identity.
Eviden_ni stavek:
The purpose of the provision of Art. 35.1 of the Police Act (hereinafter ZPol), which regulates police authority concerning the establishment of identity and which entails an interference with Art. 35 of the Constitution, is to ensure the effective implementation of the tasks of the police in accordance with Art. 3 of ZPol. From this view the challenged provision pursues a constitutionally admissible aim, and the exercise of police authority is also a necessary and appropriate measure for ensuring such an aim. However, due to its indeterminacy (Art. 2 of the Constitution) the challenged provision does not stand the test of proportionality in the narrow sense and as such does not meet the requirements of foreseeability. The circumstances or criteria which enable a police officer to conclude that "it is suspected that a person will perpetrate, is perpetrating, or has perpetrated a minor or criminal offence" are not sufficiently defined in particular when such concerns "appearance" and "being situated in a certain place". Thus, due to its indeterminacy the challenged provision allows excessive interferences with the right to the inviolability of privacy protected by Art. 35 of the Constitution.

In order that until the remedying of the established inconsistency appearance itself is not used as a circumstance for the establishment of identity, which would be inconsistent with Art. 14.1 of the Constitution, the Constitutional Court determined the manner of implementing its decision. This entails that appearance as a basis for the establishment of identity can only be used in conjunction with any of the other circumstances determined by Art. 35 of ZPol.
Objava:
Official Gazette RS, No. 36/2006
Opomba

Polno besedilo
U-I-152/03
23 March 2006

D E C I S I O N

At a session held on 23 March 2006 in proceedings to review constitutionality commenced at the request of the Human Rights Ombudsman, the Constitutional Court

d e c i d e d a s f o l l o w s:

1. Art. 35.1 of the Police Act (Official Gazette RS, Nos. 49/98, 66/98 – corr., 93/01, 56/02, 79/03, 43/04 – off. consol. text, 50/04, 102/04 – off. consol. text, 14/05 – corr. off. consol. text, 53/05, 70/05 – off. consol. text, 98/05 and 3/06 – off. consol. text) (ZPol) is inconsistent with the Constitution.

2. The National Assembly must remedy the established inconsistency within a time limit of one year from the publication of this Decision in the Official Gazette of the Republic of Slovenia.

3. Until the remedying of the established inconsistency, merely the appearance of a person cannot be grounds for the establishment of identity.

R e a s o n i n g

A.

1. The Ombudsman for Human Rights challenged Art. 35.1 of the Police Act (hereinafter ZPol). He was of the opinion that the challenged provision was inconsistent with Arts. 2, 19, 32, and 35 of the Constitution, and Arts. 5 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter the ECHR), and Art. 2 of Protocol No. 4 to the ECHR. He asserted that in a procedure for the establishment of identity a policeman stops a person and thereby interferes with their freedom of movement (Art. 32 of the Constitution). The person is allegedly obliged to show the policeman their personal identity card or some other valid public document containing their photo that was issued by a state authority, on the basis of which the policeman can establish their identity. If identity cannot be established by any other means, the police are allegedly empowered to take the person's fingerprints, take their photo and make such available to the public, and make a record of their personal description. The Ombudsman opined that thereby the State interferes with the individual's right to privacy (Art. 35 of the Constitution). Furthermore, he asserted that an identification procedure can also be carried out by arresting and taking the person to a police station, thereby interfering with their personal freedom (Art. 19 of the Constitution). According to the Ombudsman, from Art. 2 of the Constitution it follows that police authority which entails some interference with human rights and fundamental freedoms must be regulated by the legislature precisely and unambiguously. The statutory norm should meet the *lex certa* requirement such that there are no unclear, ambiguous, or loose words. Police authority must allegedly be defined precisely in the law such that the police officer and the individual clearly understand what the conditions are on the basis of which the use of police authority is allowed for the establishment of identity. The challenged provision allegedly did not meet the mentioned requirements. Its formulation was allegedly general and imprecise such that it allowed broad interpretation and thereby enabled the police to use their authority to establish identity at any time. The proposer opined that due to such loose and imprecise norm a person can become suspect merely for reason of their appearance (e.g., the length of their hair, having a beard, their manner of dress, and, especially the colour of their skin, respecting different national, cultural, or religious traditions in dressing). Merely the mentioned reasons allegedly should not suffice for the exercise of such police authority. Carrying out a procedure to establish identity merely due to one's appearance allegedly often entails an unsubstantiated interference with an individual who is respecting the legal order, and such interference is allegedly not necessarily effective from the view of the prevention and detection of minor and criminal offences. In view of the importance of the rights affected by ssuch interference, it is also allegedly disproportionate in comparison with the successfulness of ensuring the legitimate goal that is pursued by such. In the opinion of the proposer, the suspicion that a person will perpetrate, is perpetrating, or has perpetrated a minor or criminal offence must be based on objective circumstances, must have a concrete basis, and may not be grounded only on the externally visible circumstances of the individual, or on stereotypical views that members of certain groups are probable perpetrators of minor or criminal offences. Appearance could be the basis for carrying out the procedure to establish identity if it referred to some objective elements which pointed to some connection with the perpetration of a minor or criminal offence. The provision of the statute regarding arousing suspicion merely on the basis of appearance, in the opinion of the proposer, allows a completely arbitrary use of police authority and even its abuse. In addition to that, the proposer asserted that besides appearance, the challenged provision determines other linking circumstances (such as behaviour, conduct, being situated in a certain place and at a certain time) to be the basis for carrying out the procedure for establishing identity. However, in accordance with linguistic interpretation, the challenged provision was allegedly written in a manner such that the existence of one of the stated circumstances already sufficed for such interference. Such conclusion was allegedly justified by the alternative use of the conjunction "or." According to the proposer's assertions and findings, this has also followed from police practice. The proposer was of the opinion that such procedure for establishing identity as was allowed by the challenged provision was an excessive or disproportionate interference with human rights and fundamental freedoms.

2. The National Assembly (hereinafter the NA) opined that the proposer's request was not substantiated. It asserted that Art. 48 of the Internal Affairs Act (Official Gazette RS, No. 28/80 et seq., Official Gazette RS, No. 19/91 et seq. – hereinafter ZNZ) provided that in addition to the other types of authority that officials of certain bodies within the Ministry of Internal Affairs exercised, in

the performance of official tasks they also had the authority to check individuals' identity. Without containing the stated criteria or linking circumstances on the basis of which authorized officials could check individuals' identity, the mentioned provision has been applied in an unchanged form despite other changes to this statute since the challenged provision of Art. 35 of Zpol first came into force. Furthermore, from the NA's reply it follows that when ZPol was adopted, in particular because the procedure for establishing identity actually entails an interference with certain fundamental human rights and freedoms, the viewpoint prevailed that in order to avoid the abuse of the challenged police authority and in consideration of the principle of proportionality, it was necessary to state with examples at least certain criteria or linking circumstances which would demonstrate the possibility of using this authority, bearing in mind the fact that concerning such, discretion cannot be completely avoided. The NA stated that also the appearance of a person belongs among such linking circumstances. However, it was of the opinion that the proposer of the request interpreted the challenged provision erroneously. The appearance of a person allegedly does not represent the only element due to which identification is carried out, since the authorized person thereby also establishes some other elements and circumstances determined in the statute which represent the basis for carrying out the procedure for establishing identity. In this connection they particularly evaluate whether it is suspected that a person will perpetrate, is perpetrating, or has perpetrated a minor or criminal offence. The NA emphasized that a police officer as an authorized person is professionally trained and on the basis of his authority carries out the police tasks determined in Art. 3 of ZPol. In the event that in the establishment of a person's identity such authority is exceeded, there is the possibility of establishing the responsibility of the authorized person.

3. The Government explained that the exercise of police authority is a measure determined by statute, which enables police officers to perform their tasks. It stated that the establishment of identity falls under the so-called security authority of the police, which is used under conditions determined by statute. It opined that ZPol determined more legally correct and particularly more precise (lex certa) statutory conditions that must be fulfilled when exercising the police authority of establishing identity, which by means of a general authorizing norm was written into the previously valid ZNZ and named *"legitimiranje"* [i.e. establishing someone's identity]. The more precise regulation in the challenged provision allegedly referred in particular to Art. 35.1 of ZPol, wherein the reasons for establishing identity are stated. The Government was of the opinion that concerning the circumstances stated in Art. 35.1 of ZPol the suspicion of a policeman is not only their subjective evaluation, but is also supported by objective suspiciousness. In addition to that, it must also be suspected that the person will perpetrate, is perpetrating, or has perpetrated a minor or criminal offence. The Government evaluated that the subjective linking circumstance which refers to the person's appearance (e.g. a masked person in front of a bank building arouses the suspicion that they will perpetrate a criminal offence) is necessary for effective police work, as policemen search for unknown suspicious persons regarding whom an arrest warrant or other investigative act was ordered. In the opinion it referred to comparable legislation (e.g. that of Germany, Austria, Belgium), where given the linking circumstances, including the appearance of a (searched for) person, policemen are allegedly empowered to carry out a procedure of police control and establishing identity. Such authority is allegedly not regulated in the United States of America and the United Kingdom, where it applies that a person's appearance can be one of the circumstances which following or during the perpetration (or suspicion of perpetration) of a deviant act can require police action. Moreover, the Government asserted that in these systems the duty of submitting a document in order to prove one's identity is not prescribed, however, in the event that a person does not have such a document with them, police actions can be more severe. It opined that the challenged provision was not inconsistent with the Constitution and that in order to effectively implement security tasks the police necessarily need the authority to establish a person's' identity. Concerning such, it stated that a person's appearance can only be one of the linking conditions, which under correct interpretation and professional guidelines should not enable inadmissible or discriminatory arbitrary decision-making by the police.

4. In the proceedings to review constitutionality the Constitutional Court inspected files Nos. 6.1-70/2002 – SE and 6.1-78/2002 – SE of the proposer.

B. – I.

5. The entire text of Art. 35.1 of ZPol reads as follows: "Policemen may establish the identity of a person who by his or her behaviour, conduct, and appearance or by being situated in a certain place or at a certain time arouses the suspicion that they will perpetrate, are perpetrating, or have perpetrated a minor or criminal offence, or of a person concerning whom the authority determined in Art. 41 of this statute is exercised."

6. The proposer first explicitly asserted that the challenged provision was inconsistent with the Constitution as it allowed the policeto establish the identity of a person who merely by his or her "appearance" arouses the suspicion that he or she will perpetrate, is perpetrating, or has perpetrated a minor or criminal offence. However, from his statements in the review request it is also possible to discern that the challenged provision, which also contains other personal linking circumstances, is for reason of the use of the conjunction "or" inconsistent with the Constitution also due to the fact that it allows such interference only on the basis of the existence of one of these personal subjective circumstances, without the basis for "suspicion" being objectively concretized. Due to the mutual substantive connection of all the circumstances contained in the challenged provision, the Constitutional Court carried out the constitutional review of Art. 35.1 of ZPol to the extent as follows from the reasoning of this decision.

7. The proposer asserted that the challenged provision was inconsistent with Arts. 2, 19, 32, and 35 of the Constitution, Arts. 5 and 8 of the ECHR, and Art. 2 of Protocol No. 4 to the ECHR. The Constitutional Court carried out a constitutional review of the mentioned provision from the aspect of the provisions of the Constitution in which also the relevant substance of the ECHR provisions to which the proposer referred is contained.

B. – II

8. The establishment of identity is an official activity which can only be carried out by authorized persons as determined by the legislature . By the challenged provision the special or general authority was in the first place given to police officers. In their daily work police officers carry out various procedures which are generally commenced by establishing the identity of a person. Thus, it is reasonable to conclude that the establishment of identity is one of the most frequently exercised forms of police authority. Concerning such, it is already initially necessary to emphasize that the basic tasks and types of authority of the police are determined precisely in ZPol, while special tasks and special types of authority are determined in numerous other regulations. Such also follows from Art. 29.1 of ZPol, which determines that for the performance of their tasks the police are granted the authority determined by this act and other acts. The challenged provision concerns the implementation of the general authority for the implementation of the basic tasks of the police. However, police officers are not the only ones who are granted by the legislature the status of official persons who may use authority to establish identity. This status is also enjoyed by officials of the inspection services, game and fish wardens, certain authorized persons on trains employed by the railway authorities, etc. From the view of the substantive admissibility of the use of such authority, the challenged provision as a general authorizing norm is undoubtedly the broadest. Art. 148.2 of the Criminal Procedure Act (Official Gazette RS, No. 63/94 et seq. – ZKP) and the provisions, e.g. Arts. 108 and 110, of the Minor Offences Act (Official Gazette RS, No. 7/03 et seq. – ZP-1), supplement the general authorizing provision, however, they limit the possibility of using such police authority for the establishment of identity to only establishing the identity of persons in the event of the occurrence (perpetration) of a criminal offence or when dealing with the perpetrator of a minor offence. Provisions which partially and for substantively limited cases refer to the authority to establish identity are also contained in the Monitoring of the State Border Act (Official Gazette RS, No. 87/02 et seq. – hereinafter ZNDM-1)[1] and the Road Traffic Safety Act (Official Gazette RS, No. 83/04 et seq. – hereinafter ZVCP-1)[2]. ZNDM-1 restricts the mentioned authority to only cases in which a certain person crosses the State border, and ZVCP-1 in the event a person drives a motorized vehicle in road traffic. In the event of the application of the mentioned provisions the use of the police authority to establish identity is personally and/or territorially restricted.

9. The establishment of identity is one of the so-called types of security authority of the police, which is known in a majority of legal systems. This authorizing institution has developed through historical changes in normative regulations and through the increasing guaranteeing role of the state concerning interferences with human rights and fundamental freedoms. The normative regulation of the police authority to establish identity has changed historically. In recent history this police authority was generally know under the name *"legitimiranje."* Its renaming indeed demonstrated the essential purpose of this authority, which did not originate from the obligatory empowerment of the then police (i.e. *mili_niki)* but from the obligation to posses a personal identity card and to demonstrate one's identity by such. The present Personal Identity Card Act (Official Gazette RS, No. 75/97 et seq. – hereinafter ZOIzk) no longer contains such obligation. Its Art. 1 determines that a personal identity card is a public document by which a citizen of the Republic of Slovenia demonstrates his or her identity and citizenship. Art. 2 of this act determines the right to such of every citizen with permanent residence in the Republic of Slovenia. A citizen with permanent residence in the Republic of Slovenia who has reached the age of 18 and who does not have a valid public document containing a photo that was issued by the state authority must have a personal identity card (Art. 2.2. of ZOIzk). According to Art. 3.1 of ZOIzk, a citizen must present his or her personal identity card or the public document determined in Art. 2.2. of this act at the request of an official who is according to the law authorized to make such request. ZOIzk determines the violation of the above mentioned statutorily determined obligations to be a minor offence and determines sanctions for such. ZOIzk no longer obliges citizens of the Republic of Slovenia to either obtain such upon reaching full age or to carry such with them. However, it obliges all persons to have with them a document by which they can demonstrate their identity. With regard to this fact, concerning the purpose of exercising the mentioned authority, and the legislature's "different" reasons for establishing the identity of a person, in the challenged provision the legislature used a different wording of this authority, i.e. the establishment of identity.

10. The substance of the challenged provision enables the conclusion that in view of the definition of authority, its exercise has two intentions: (1) to establish the identity of a person in a procedure, i.e. to establish who such a person is (the identity is proved by specific documents) and (2) to establish the personal data of persons in a procedure.[3] Personal data is any data which demonstrates the characteristics, status, or relations of an individual irrespective of the form in which it is expressed. The significance of the establishment of identity as follows from the challenged provision, and which is otherwise broader than the previously mentioned provision, is actually double: preventive (proactive) and repressive. Such authority has preventive (proactive) significance when the police establish the identity of unknown persons who are potential perpetrators of a prohibited activity, i.e. when the act has not yet been committed. Such authority has repressive significance when in the establishment of identity the police discover persons who have already perpetrated a minor or criminal offence, persons concerning whom an arrest warrant has been ordered, or persons who escaped from prison or are being sought by some other authority.

11. The use of police authority is determined in detail by the Rules on Police Authority (Official Gazette RS, No. 51/2000 et seq. – hereinafter the Rules), which was adopted on the basis of Art. 29 of ZPol. It defines the manner of exercising such and further determines the use of individual types of police authority determined in ZPol and in other statutes if such define authority of the same kind (Art. 1 of the Rules). It determines that the exercise of police authority is a measure determined by statute which enables the police to carry out their tasks (Art. 2 of the Rules). Police authority must be exercised professionally and decisively but with due respect such that the personal dignity of the persons in a procedure are not unnecessarily affected (Art. 6 of the Rules). Similarly, according to Art. 10 of the Rules, police officers must cease to exercise police authority immediately when the grounds for the exercise of such cease to exist. Chapter II of the Rules, which is entitled "General Police Authority," includes Arts. 20 to 25, which determine the manner of establishing identity and the identification procedure. The police establish identity in a manner such that they request that a person show his or her personal identity card or some other valid public document containing a photo that was issued by the state authority, on the basis of which the police can establish his or her identity (Art. 22.1 of the Rules). Pursuant to Art. 22.2 of the Rules, the police officer is obliged to explain the reasons for establishing identity if the persons requests such. If the person whose identity is being established by the police officer does not have with him or her the documents determined in Art. 22, or if the matter concerns a foreigner as determined in Art. 23 of the Rules, the police officer establishes such person's identity, if the circumstances allow such, according to existing records or by means of other persons whose identity is established. The police officer may also make use of other documents which contain data on the person whose identity is being established (Art. 24.1 of the Rules). If the police officer cannot established the identity of the person in a manner such as is determined by the previous paragraph, and the person whose identity is being established by the police officer lives nearby, the police officer may check his or her identity at such person's home (Art. 24.2 of the Rules). In the event the police officer cannot establish the identity of the person in any other manner, the police officer takes him or her to the police station and carries out an identification procedure such that, in accordance with the provisions of the statute, the person's fingerprints are taken, and his or her photo and a record of his of her personal description made. The photo and personal description may also be made known to the public (Art. 25 of the Rules).

12. The exercise of the police authority to establish identity entails an interference with the constitutionally guaranteed right to the inviolability of privacy that is ensured in Art. 35 of the Constitution.[4] Concerning the provisions of Arts. 34 to 38 of the Constitution, by which people's personal dignity, personal rights, their privacy and security are safeguarded, the Constitutional Court already took the position (Para. 32 of the reasoning of Decision No. U-I-25/95, dated 27 November 1997, Official Gazette RS, No. 5/98 and OdlUS VI, 158) that the matter concerns provisions that have a special place among human rights and fundamental freedoms, and which prohibit everyone – in the first place the state, but also individuals – from interfering with such (see also Constitutional Court Decision No. U-I-238/99, dated 9 November 2000, Official Gazette RS, No. 113/2000 and OdlUS IX, 257). In conformity with the principle that in this area everything is prohibited that is not explicitly allowed, any interference with the mentioned rights is prohibited save such as are allowed in conformity with the Constitution. The individual's right to privacy may reach its limit only where it comes into conflict with a constitutionally protected stronger interest of others. 13. In accordance with established constitutional case law, interferences with human rights or fundamental freedoms are allowed if they are in conformity with the principle of proportionality. The review whether an interference with a human right is admissible is carried out by the Constitutional Court on the basis of the so-called strict proportionality test (see Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03 and OdlUS XII, 86). The Constitutional Court must thus first establish (evaluate) whether the interference pursues a constitutionally admissible aim. Thereby it considers that, in accordance with Art. 15. 3 of the Constitution, human rights and fundamental freedoms may be limited due to the rights of others or due to a public benefit. In addition to determining that the interference pursues a constitutionally admissible aim and is from this aspect not inadmissible, it is always necessary to evaluate whether such is in conformity with the principles of a law-governed state (Art. 2 of the Constitution), i.e. with that principle which prohibits excessive interferences. This entails that the restriction must be (needed) necessary and appropriate for achieving the pursued

constitutionally admissible aim and in proportion with the importance of this aim (the principle of proportionality in the narrow sense). The principle of a law-governed state, which originates from Art. 2 of the Constitution, also contains the requirement that regulations must be clear and definite. In conformity with the constitutional requirement that a statute must be definite, interferences with constitutional rights must be regulated precisely and unambiguously. If a norm is not clearly defined there is the possibility of the different application of the statute and the arbitrariness of state authorities or other authorities exercising public authority that decide on the rights of individuals. This must also be considered.

14. Art. 3 of Zpol, which is entitled "The Tasks and Organization of the Police", determines that the tasks of the police are the following: (1) the protection of life, the personal security and property of people; (2) the prevention, detection, and investigation of criminal and minor offences, the detection and apprehension of perpetrators of criminal and minor offences, other persons being sought and their delivery to competent authorities, data collection, and the investigation of circumstances which are important for the establishment of a property benefit that derives from criminal and minor offences; (3) maintaining public order; (4) the control and regulation of traffic on public roads and non-categorized roads which are used for public traffic; (5) the protection of the state border and the performance of border control; (6) the performance of tasks determined in the regulations on foreigners; (7) the protection of certain persons, authorities, buildings, and districts; (8) the protection of certain work posts and the secrecy of the data of state authorities if statute does not determine otherwise; and (9) the performance of the tasks determined by this and other statutes and executive regulations. As already mentioned, in the performance of police tasks, police officers are granted the authority determined by this statute or other statutes (Art. 29 of ZPol). In carrying out their tasks police officers are obliged to act in conformity with the Constitution and statutes, and respect and protect human rights and fundamental freedoms (Art. 30.1 of ZPol). Policemen may, however, restrict human rights and fundamental freedoms but only in cases determined by the Constitution and statute (Art. 30.2 of ZPol). In accordance with Art. 33 of ZPol, in the performance of their tasks police officers may inter alia issue warnings, commands, establish identity, and also carry out identification procedures.

15. The goal that the legislature wanted to achieve,in determining as one of the types of police authority the possibility that under the conditions determined in the challenged provision police officers may establish the identity of persons, was to ensure the effective performance of police tasks, the purpose of which is inter alia to ensure general security and thereby also the security of every individual. As regards the challenged provision, in order to achieve this goal the legislature otherwise interfered with the constitutionally protected substance of privacy determined in Art. 35 of the Constitution, however, it had a constitutionally admissible, i.e. reasonably justified, goal for such. From this viewpoint the interference is not inadmissible. Moreover, the considered interference of the legislature is necessary and appropriate (as a goal) for ensuring the pursued goal. However, the challenged provision does not pass the review of proportionality in the narrow sense. From the text of Art. 35.1 of ZPol it namely follows that in order for the suspicion to be aroused that a person "will perpetrate, is perpetrating, or has perpetrated a minor or criminal offence" it suffices that only one of the circumstances mentioned in the first part of the sentence exists: his or her behaviour, conduct, appearance or being situated in a certain place or at a certain time. That this is so also follows from the case which the proposer cited in his request.[5] Thereby the statute does not contain detailed criteria on when an individual circumstance can be a sufficient basis for arousing such suspicion. The Constitutional Court does not deny the possibility that in certain cases also the appearance of a person (e.g. if the matter concerns a person who looks like the person the police are searching for due to the perpetration of a criminal or minor offence) or a person being situated in a certain place and/or at a certain time (e.g. if the matter concerns searching for the perpetrator of an already perpetrated criminal or minor offence) can be the basis for establishing identity. However, for the very reason that the statute does not determine additional conditions it enables the police authority to establish identity to also be used in the event there is no justified reason. Due to its indeterminacy it can not namely be clearly discerned from the challenged provision, where the limit between the admissible and inadmissible conduct of state authorities (in this case police officers) is[6], and thus it does not also meet the requirement of foreseeability. In addition to that, the statute does not differentiate between the cases when the purpose of the establishment of identity is to search for the perpetrator of an already perpetrated criminal or minor offence, and cases when the matter only concerns the assumption that a certain person might perpetrate a criminal or minor offence.

16. The principle of a law-governed state determined in Art. 2 of the Constitution, which also contains the principle of the clarity and definiteness of regulations, obliges the legislature to define a norm or its substance clearly. The more important the legal value is, the more emphasized the requirement is that the statute be precise (see Constitutional Court Decision No. U-I-25/95). This even more applies to the regulations which determine the authority of repressive bodies to interfere with human rights and fundamental freedoms. In cases in which an interference with human rights occurs due to the so-called preventive or proactive purposes (e.g. when the prohibited act has not yet been committed) the authority of the state must be more restricted than when the purpose of the interference is already repressive. Otherwise all safeguards against the arbitrary application of statute would be ineffective. The purpose and reason of statutory regulation is in that such application of statute is prevented and that effective control is enabled (see e.g. Constitutional Court Decision No. U-I-272/98, dated 8 May 2003, Official Gazette RS, No. 48/03 and OdlUS XII, 42).

17. As was already mentioned, by the challenged provision the legislature wanted to abolish the so-called *"preventivno legitimiranje"* [i.e. preventive establishment of someone's identity] which had been allowed according to the previous ZNZ. The fact is that the challenged statutory provision requires that there exist the suspicion that a certain person will perpetrate, is perpetrating, or has perpetrated a minor or criminal offence. A suspicion or the degree of the standard of evidence must certainly always be concretized and must be expressed in linking circumstances. The circumstances which according to the challenged provision are the basis for the establishment of identity are not defined enough, thus they allow excessive interferences with the right to the protection of privacy and personality rights determined in Art. 35 of the Constitution.[7]

18. Concerning the above-mentioned, the Constitutional Court evaluated that the challenged provision of Art. 35.1 of ZPol is inconsistent with Art. 35 of the Constitution. It issued a declaratory decision

(Item 1 of the operative provisions) as to an important extent an annulment of the challenged provision would make unable the effective performance of the police tasks determined in Art. 3 of ZPol. It imposed on the legislature the obligation to remedy the established inconsistency within a time limit of one year from the publication of the decision in the Official Gazette of the Republic of Slovenia (Item 2 of the operative provisions). In determining the mentioned time limit the Constitutional Court considered the demanding character of the subject of regulation. The legislature must remedy the established inconsistency such that it considers the framework and extent of the reasons as follow from the reasoning of this decision. The legislature will have to determine criteria which enable a police officer to make the conclusion whether it is suspected that a certain person will "perpetrate, is perpetrating, or has perpetrated a minor or criminal offence", in particular when the basis for such conclusion is the appearance[8] of such a person or his or her being situated in a certain place.[9] Depending on the manner of how it determines the substance of the required criteria, the legislature will also have to evaluate whether for the admissibility of an interference merely their listing, i.e. alternative application, suffices or the cumulation of such is needed. From the aspect of the proportionality of the interference, the legislature will have to consider the double character of the authority's significance: its preventive (proactive) and repressive significance.

19. In order that until the remedying of the established unconstitutionality appearance is not used as a circumstance for the establishment of identity by itself, which would be inconsistent with Art. 14.1 of the Constitution, the Constitutional Court determined the manner of the implementation of this decision (Art. 40.2 of the Constitutional Court Act, Official Gazette RS, No. 15/94 – hereinafter ZUstS), as follows from Item 3 of the operative provisions of this decision. This entails that appearance can be the basis for the establishment of identity only in connection with any of the other circumstances determined in Art. 35.1 of ZPol.

20. As the Constitutional Court established the unconstitutionality of the challenged provision already due to its inconsistency with Art. 35 of the Constitution, it did not review other asserted inconsistencies with the Constitution.

C.

21. The Constitutional Court reached this Decision on the basis of Art. 48 and Art. 40.2 of ZUstS, composed of: Dr. Janez _ebulj, President, and Judges Dr. Zvonko Fi_er, Lojze Janko, Milojka Modrijan, Dr. Ciril Ribi_i_, Dr. Mirjam _rk, Jo_e Tratnik and Dr. Dragica Wedam Luki_. The Decision was reached unanimously.

Dr. Janez _ebulj
President

Notes:
[1] See, e.g., the provisions of Arts. 27 and 28 of ZNDM-1.
[2] See, e.g., the provision of Art. 237 of ZVCP-1.
[3] Personal data are established on the basis of a document for proving identity. If such concerns data that the document does not contain, which, however, the police need for the procedure, they may acquire such by inquiring at official authorities or directly from the person whose identity is being established.
[4] In Decision No. U-I-370/98, dated 18 December 2002 (Official Gazette RS, No. 7/03 and OdlUS XI, 260) the Constitutional Court already took the position that the police authority determined in Art. 14.1 of the Road Traffic Safety Act (Official Gazette RS, No. 30/98 et seq. – ZVCP) entails an interference with the general freedom of activity, as one of the human personality rights protected in Art. 35 of the Constitution.
[5] The case of the proposer, No. 6.1-70/2002 – SE.
[6] The Kranj Police Administration in Case No. 6.1-78/2002 – SE, which was considered by the proposer in his Reply No. 3C105-S-22/44-51/02, dated 28 August 2002, wrote inter alia the following: "The provisions of Art. 35.1 of ZPol and Art. 20 of the Rules are so broad that a policeman can establish identity practically anytime, as otherwise police officers could not approach a suspected person except when he or she is apprehended the perpetrator *in flagrante delicto*. Thereby the legislature wanted to alleviate the work of police officers, while a consequence of this could be that also honest citizens are involved in such procedure."
[7] In the case of the challenged provision it does not concern the same situation as was the subject of review in Constitutional Court Decision No. U-I-370/98. In that decision the Constitutional Court established that the "challenged provisions which regulate police authority for the control of traffic, vehicles, drivers and other participants in road traffic, cannot be considered unclear and that they allow arbitrary interpretation, and thus there is no violation of the principles of a law-governed state as provided by Art. 2 of the Constitution." Moreover, "such control can only be effective if it is preventive, as otherwise it would be carried out after the consequences have already occurred and could not be prevented." It established "that the measure that was carried out, in comparison with the positive effects it ensures, does not present an excessive interference with the right determined in Art. 35 of the Constitution, and thus it is not inconsistent with it." Thereby it is necessary to consider that drivers in road traffic are in a different position as they drive a motor vehicle, which is a dangerous thing.
[8] Appearance is to a certain extent already in itself an indefinite and substantively very comprehensive concept. The [Slovene] word *appearance* [i.e. *videz],* which is used in the statutory text, can namely mean the following: *(1) z vidom zaznavne lastnosti, zna_ilnosti _esa, polep_ati, spremeniti videz, opisati videz napadalca, _lovek z mrkim videzom, resen, sme_en videz junaka, _enska s ciganskim videzom – taka kot ciganka, kar se ka_e na zunaj, dajati, ustvarjati videz, da je vse v redu, la_ni, povr_inski videz, biti podoben po videzu, soditi po videzu* [characteristics perceived by sight, characteristics of something; to embellish, to change appearance, to describe the appearance of the attacker; a human being with a gloomy appearance, the serious, funny appearance of a hero, a woman with the appearance of a Roma– such as a Roma, which is demonstrated externally; to give, create an appearance that everything is fine; false, superficial appearance; to look like by appearance, to judge by appearance]. See *Slovar Slovenskega knji_nega jezika* [The Dictionary of Slovene Literary Language], DZS, Ljubljana 1994, p. 1512.
[9] See, e.g., the Federal Police Act of the Federal Republic of Germany. Art. 23 of such determines that the federal police may establish the identity of a person:

(1) when a danger is to be diverted;
(2) at a police border control point;
(3) in the border zone to the extent of thirty kilometres (…);

(4) in the event that a person is situated in a building of the federal police, in a building of the federal railway authorities, in a building of the air traffic authorities or in the building of an airport, in the office of a federal body established by the Constitution or in the office of a federal ministry, at a border crossing, or near such buildings, and if the factual situation justifies the assumption that a criminal offence can be perpetrated which would directly endanger persons in the mentioned buildings or the buildings themselves, whereby the identity of the person is to be established due to a general danger or since there exist grounds for suspicion concerning the individual (…).

However, solely by the mentioned provision the possibilities of the German Federal Police to establish identity are not exhausted.
See, e.g., also the Act on Police Tasks of the Bavarian State Police. Art. 13 of such determines that the police can establish the identity of a person:
(1) when a danger is to be diverted;
(2) when a person is situated in a certain place:
(a) whereby from the state of the facts it is possible to conclude that at such place
(aa) persons are making an agreement to perpetrate a criminal offence, are preparing or committing such;
(bb) persons are staying without proper residency permission;
(cc) perpetrators of criminal offences are hiding;
(b) where persons are engaged in prostitution;
(3) who is situated in a building intended for traffic or supplying goods, in a public transportation vehicle, in a building of an administrative authority or any other especially important building, or near such buildings, whereby the state of facts justify the assumption that there the perpetration of a criminal offence could occur which would endanger persons in the mentioned buildings or the buildings themselves;
(4) who is situated at a check point that the federal police have established in order to prevent the perpetration of criminal offences in the sense of Art. 100.a of the Criminal Procedure Act (…);
(5) in the border zone to the extent of thirty kilometres as well as also on transit roads (federal highways, European roads, and other more important roads for international traffic), and in public institutions intended for international traffic, and for the purpose of preventing illegal crossings of the border or illegal residing, and fighting against criminal offences connected with illegal crossings of the border;
(6) when the matter concerns the protection of privacy rights. Similar provisions are also contained in Art. 26 of the Police Act, which regulates the authority of the state police in Baden-Württemberg in connection with the establishment of the identity of an individual, and Art. 9 of the Police Act, which regulates the similar authority of the state police in Saarland.