THE STARTING LINE AND THE INCORPORATION OF THE RACIAL EQUALITY DIRECTIVE INTO THE NATIONAL LAWS OF THE EU MEMBER STATES AND ACCESSION STATES

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PREFACE

The Year 2000 was an important one for the European Union in the fight against discrimination. In less than 12 months, the Council of Ministers accepted a package of three proposals from the European Commission to prohibit various forms of discrimination in different areas of everyday life and to promote activities which tackle and dismantle the unjustified barriers which are visible in all Member States of the Union and beyond.

But these 12 months of hard work would not have been possible without the many years of effort which hundreds of people in Europe had devoted to the fight against discrimination in the previous decades. The Year 2000 was the culmination of sometimes difficult co-operation between all the relevant stakeholders. These included non-governmental organisations, the social partners, local and regional authorities, specialised bodies, academics, the European Commission and members of the European Parliament. The Commission is proud to have been able to facilitate some of this co-operation through the wide consultations it held on the implementation of the new anti-discrimination powers of the European Community Treaty leading to a large conference in Vienna at the end of 1998. And this co-operation continued – and was even intensified – throughout the negotiations in the Council, the European Parliament, the Committee of the Regions and the Economic and Social Committee.

The Commission's co-operation with civil society must not end with the adoption of the directives. It is vital that non-governmental organisations play their part in the implementation of the non-discrimination directives and the implementation of the Community Action Programme adopted last year. An important part of the value of laying down standards at European level comes from the debate which is provoked within Member States when national parliaments consider how to implement the laws. This allows European standards to be met in a way which takes account of the needs and the level of development of society in each Member State and enables them to provide higher levels of protection than are required by the Directives. So I welcome this contribution to the debate on the implementation of the Directive on Racial and Ethnic Discrimination and hope that it will help to promote the right of all of Europe's people not to suffer discrimination.

Odile Quintin, *Director General, Directorate General for Employment and Social Affairs, European Commission*

INTRODUCTION

In 2000, the European Union adopted two Directives concerning equal treatment and anti-discrimination, namely the 'Council Directive implementing the principle of equal treatment between persons irrespective of ethnic and racial origin' and the 'Council Directive establishing a general framework for employment equality'. The two Directives, together with the 'Council Decision establishing a Community Action Programme to combat discrimination', are responses to persistent discrimination and outbreaks of racist violence across the European Union. These instruments will have an enormous and positive impact towards black and ethnic minorities across Europe and are invaluable for those who are involved in the fight against discrimination and racism.

Since the early nineties, numerous organisations, among them the Starting Line Group, have pressed for the adoption of European measures against racial discrimination and racism. The Starting Line Group, created in 1991, was a coalition of more than 400 non-governmental actors, from across the European Union, active in the field of anti-discrimination. The Group based its activities on the belief that a well-informed policy debate among and between representatives of all sectors of society – public, private, and business – could lead to the adoption of effective European anti-discrimination policies[1]. To promote such a debate, the Group drafted its own proposals for a Directive, the Starting Line, which received the support of many organisations across the expanding European Union. In the policy debates governmental and European institutions often referred to the Starting Line Group and took into consideration its proposals.

For the Starting Line Group the adoption of the Racial Equality Directive marks the end of the beginning. An almost ten-year-long campaign for European legislative measures against racism has come to its end and with this publication the Starting Line Group discontinues its activities. The incorporation of the Directive into the laws of the Member States before July 2003, is the beginning of the design or reinforcement of national legislation against racial and ethnic discrimination. As part of the *acquis communautaire*, anti-discrimination legislation must also be adopted by the Accession States.

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1 The Starting Line Group's activities are chronicled in Isabelle Chopin, The Starting Line: A harmonised approach to the fight against racism and to promote equal treatment (European Journal of Migration and Law 1: 1999; Jan Niessen, The Amsterdam Treaty and NGO responses (European Journal of Migration and Law 2: 2000) and Isabelle Chopin, Possible harmonisation of anti-discrimination legislation in the European Union. European and non-governmental proposals (European Journal of Migration and Law 1: 2001).

This publication aims to serve as a tool to monitor and influence the incorporation of the Racial Equality Directive into national law and to further develop European anti-discrimination policies. The incorporation process will keep and, in some instances, put racism on the agenda and engage governmental and non-governmental actors in a policy debate on how to combat racism, both within the European Union and in the Accession States. It also offers the opportunity to press for national standards which are higher than those required by the Racial Equality Directive. Like all other European measures, and especially those requiring unanimity, the Racial Equality Directive is the result of negotiations between the Member States and therefore a compromise. It is possible that individual governments would be willing to apply – in general or on specific issues – higher standards than those required by the Racial Equality Directive. The Directive leaves that possibility explicitly open.

In Part I of this publication, Jan Niessen explores whether there is a legal basis for additional European measures against discrimination on the basis of nationality. The Racial Equality Directive is based on Article 13 of the EC-Treaty that regrettably does not include nationality as a ground for discrimination. His paper also makes concrete suggestions as to how to monitor and who to engage in the process of incorporation of the Racial Equality Directive into the national laws of the Member States and Accession States. Furthermore, he draws attention to the opportunities the EU Social Policy Agenda and the European Employment Strategy are offering for the further development of anti-discrimination policies. In Part II, Mark Bell (University of Leicester) compares the Starting Line with the Racial Equality Directive. His paper shows that the European Commission has carefully studied and frequently borrowed from the Starting Line, as was requested on more than one occasion by the European Parliament. Although in some instances the Racial Equality Directive goes beyond the Starting Line, there are many more instances where the Starting Line offers a higher level of protection against discrimination. Mark Bell's paper draws attention to those differences and makes recommendations as to which issues need to be taken up in the policy debates at national level. An Annex to this publication reproduces ECRI's General Policy Recommendation No. 2 on 'Specialised bodies to combat racism, xenophobia, anti-semitism and intolerance at national level'. For the effective implementation of anti-discrimination legislation, such bodies are crucial. The Racial Equality Directive has not elaborated enough on this issue and governments may be convinced to follow this Recommendation adopted within the framework of the Council of Europe.

Patrick Yu, *Executive Director, Northern Ireland Council for Ethnic Minorities*
Chairman, Starting Line Group

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PART I

THE FURTHER DEVELOPMENT OF EUROPEAN ANTI-DISCRIMINATION POLICIES

Jan Niessen, Migration Policy Group

INTRODUCTION[1]

The Amsterdam Treaty, which amended the Treaty establishing the European Community and the Treaty on European Union, provided the European institutions with considerable new powers to act on racial, ethnic and religious discrimination. First, it inserted a new Article 13 in the EC Treaty, allowing the adoption of European legislative and other measures to combat discrimination on grounds of racial or ethnic origin and religion or belief. Second, the new Title IV in the EC Treaty provided a legal basis for the adoption of measures promoting equal treatment between EU citizens and third-country nationals. Third, the inclusion of Title IV extended the scope of the EC Treaty which may lead to a reinterpretation of Article 12 of the EC Treaty, which prohibits discrimination on the basis of nationality. Fourth, Article 137 provided a legal basis for action concerning employment conditions for third-country nationals legally residing in Member States. Fifth, the Treaty on European Union was amended to the effect that police and judicial co-operation on criminal matters (within the framework of the third pillar) now includes the prevention, and combating, of racism.

These changes in the Treaties constitute a clear recognition that various forms of discrimination and racism must be confronted at the European level. Within one and a half years after the entry into force of the Amsterdam Treaty (1 May 1999), the Council of Ministers adopted the Racial Equality Directive[2] and Equality in Employment Directive[3]. Their transposition into national law will keep, for the coming years, discrimination and racism on the national agendas of

1 This article is partly based on speeches given at the Hearing of the European Parliament on the Social Policy Agenda (Brussels, 21 and 22 September 2000) and the NGO Forum of the conference 'All different all equal: from principle to practice'. European contribution to the World Conference against racism, racial discrimination, xenophobia and related intolerance (Strasbourg, 11-13 October 2000).

2 The full name is Council Directive implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (OJ L 180, 19/07/2000).

3 The full name is Council Directive establishing a general framework for employment equality (OJ L 303, 02/12/2000).

the current and future Member States of the European Union[4]. This offers tremendous opportunities to press for the adoption or reinforcement of existing national legislation, which may even go beyond the minimum standards set by the two Directives. Mark Bell's paper in this publication makes concrete recommendations to that effect.

This paper looks first at the legal basis for additional European *legal* measures, in particular those aiming to protect third-country nationals against discrimination (paragraph 1), and makes some general recommendations as to the monitoring and influencing of the transposition process (paragraph 2). It also draws attention to the EU Social Policy Agenda and the implementation of the European Employment Strategy (the Luxembourg Process based on Article 128 (4) EC Treaty) that provide a framework also for the design, consultation and implementation of anti-discrimination and equality *policies* throughout the European Union (paragraph 3).

The developing EU anti-discrimination policies are not only affecting the policies and practices of current Member States, but increasingly also those of the Accession States. Such policies will engage various stakeholders in policy debates in all these countries, from governments to social partners and non-governmental organisations. Throughout this paper stakeholders are identified and suggestions are made for further action.

1. ANTI-DISCRIMINATION AND EQUALITY CLAUSES: GROUNDS AND SCOPE

a. Anti-discrimination and Articles 12, 13 and 14

Prior to the Amsterdam Treaty's amendment of the EC Treaty, the latter already contained a clause prohibiting discrimination on the grounds of nationality (Article 12). The governments of Member States accepted that the interpretation of this clause refers only to nationality of one of the Member States. Article 12 prohibits, *within*

4 In this context it is important to note that in the year 2000, the Council of Europe adopted Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Protocol broadens the scope of the Convention's Article 14 which prohibits discrimination in the enjoyment of the rights enumerated in the Convention. The Protocol was adopted after many years of negotiations which, towards the end of this process, run parallel to the negotiations on the Directives. It is another important instrument to combat racial discrimination in Europe and its ratification by the Council of Europe's Member States offers another opportunity to put anti-discrimination and anti-racism on the national agendas. By the time of the writing of this paper, the Protocol has been signed by 25 Member States of the Council of Europe. The Protocol enters into force after ten ratifications.

the scope of application of this Treaty, discrimination on the basis of nationality. By including Title IV in the EC Treaty (see below), the scope has been widened and includes issues related to admission, residence and equal treatment of third-country nationals. The drafters of the Amsterdam Treaty may have overlooked the possible consequences of this extension. The legal services of the European institutions and lawyers could try and clarify this matter and find out to what extent Article 12 now also applies to third-country nationals. It would seem to mean at least that discrimination between the various groups of third-country nationals is prohibited and that those who are treated less favourably will be granted equal treatment with those third-country nationals who are treated more favourably.

Article 13

Article 13 of the EC Treaty empowers the European institutions to take appropriate action to combat discrimination on the basis of sex, racial or ethnic origin, religion and belief, disability, age or sexual orientation. This is a tremendous step forward compared with the old EC Treaty where such a clear legal basis was lacking. There are, however, some weaknesses in this Article.

First, it has no direct effect, meaning that without implementing measures, individuals cannot invoke this article in cases of discrimination. The adopted Directives and the Action Programme[5] are the first implementing measures taken under Article 13. The Starting Line Group preferred the inclusion in the Treaty of separate anti-discrimination articles, each on a specific ground, and had drafted its own proposals for anti-discrimination clauses prohibiting discrimination on the basis of race, skin colour, religion, belief and ethnic and national origin (the 'Starting Point'). In that case, one implementing measure could have dealt with discrimination on these grounds while other measures would deal with discrimination on other grounds. As is the case now, the Racial Equality Directive deals with racial and ethnic discrimination and is applicable in various areas, whereas the Equality in Employment Directive deals with the other forms of discrimination listed in Article 13 (except for race, ethnicity and gender) and applies only to employment. Measures are required to remedy this situation by either including religion and belief in the Racial Equality Directive or by extending the application of the Equality in Employment Directive to the same fields as the Racial Equality Directive.

Second, European institutions are not obliged to act, but may take appropriate measures for which unanimity is required. Years of cam-

5 Council Decision establishing a Community action programme to combat discrimination (OJ L 303, 02/12/2000).

paigning have prepared the ground for the broad support for legislative measures and exceptional political circumstances in the year 2000[6] have led to the expeditious adoption of the two Directives and the Action Programme. The question is whether such a situation would occur again and make possible the adoption of complementary measures (such as discrimination in areas other than those listed in the two Directives, and the elaboration of positive action measures such as contract compliance, etc). This means civil society organisations should continue to make the elaboration and adoption of additional EU measures one of their priorities.

Third, Article 13 does not include nationality as a ground for discrimination. In other words, third-country nationals may not be discriminated against on the basis of their racial or ethnic origin or religion and beliefs, but can be discriminated against on the basis of their nationality. In its revised proposal for a Directive, the Starting Line Group proposed two additional legal instruments that would partly remedy this situation, namely one on free movement and another on the participation in elections of third-country nationals[7]. Whereas the former has been incorporated in the Amsterdam Proposals (see below), the latter has gained considerable support from immigrant and human rights organisations.

Article 14

According to Article 14, the Community shall adopt measures with the aim of progressively establishing the internal market, which shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. In the past the European Commission has used this article as the basis for proposals to allow all persons, including third-country nationals, to travel freely within the European Union. These proposals have not been adopted by the Council of Ministers, primarily because a number of Member States interpreted, and are still interpreting, this article in a restrictive way. According to these Member States the word 'persons' in Article 14 refers only to EU citizens. They also wanted, for immigration and national security purposes, to maintain control at internal EU borders. The Schengen

6 The stance taken by the governments of fourteen Member States against the current Austrian government that includes an extremist right-wing political party, also on matters related to the position of immigrants and minorities in Austria, favoured the adoption of concrete measures against racial discrimination. If Austria was to prove these states to be wrong, it could not afford to vote against the adoption of anti-discrimination legislation.

7 Isabelle Chopin and Jan Niessen (eds), Proposals for legislative measures to combat racism and to promote equal rights in the European Union (Brussels/London, 1998).

Agreements have abolished such controls and provide for other measures facilitating free travel within the Schengen area of legally residing third-country nationals[8]. These measures have the effect of eliminating discrimination between EU citizens and third-country nationals.

b. Equal treatment and Title IV and Article 137

The Amsterdam Treaty inserted a new Title IV in the EC Treaty, namely on visas, asylum, immigration and other policies related to the free movement of persons. This Title contains various articles providing a legal basis for the adoption of measures promoting the equal treatment of third-country nationals with EU nationals. These articles are 62(1) on internal border control, Article 62(1) on freedom of travel for third-country nationals, Article 63(3)a on conditions of entry and residence, long-term visa and residence permits and family reunion, 63(3)b on irregular migrants, and 6(4) on rights and conditions under which third-country nationals may reside in other Member States.

The Presidency Conclusions of the Tampere European Council called for the fair treatment of third-country nationals and rights comparable with EU citizens[9]. This could have been formulated in a more consistent and ambitious way, namely by endorsing the European Union's commitment to (international) human rights standards, including those calling for and promising equal treatment[10]. Using Title IV as a basis, the European Union institutions can adopt equal treatment policies in areas such as free movement, free travel and family reunion.

In order to stimulate a focussed debate on immigration and asylum and the related issues of equal treatment, the Immigration Law Practitioners' Association and the Migration Policy Group launched in 1999 the Amsterdam Proposals[11]. They include a series of six legislative proposals in the field of asylum and immigration, of which at least three pertain to equal treatment of third-country nationals,

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8 The Amsterdam Treaty has incorporated the Schengen *acquis* in Title IV of the EC-Treaty. Denmark, Ireland and the United Kingdom have the option not to adhere to decisions or to participate in the decision making process under Title IV.

9 Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, point 18.

10 Including the solemnly adopted Charter of Fundamental Rights (Nice European Summit, December 2000).

11 Immigration Law Practitioners' Association and Migration Policy Group, The ILPA/MPG proposed Directives on immigration and asylum. Prepared by Stephen Peers (reader at the University of Essex) for ILPA and MPG (Brussels/London, 2000). This publication and a summary in English, French and German can be downloaded from MPG's website (www. migpolgroup.com).

namely the proposals on family reunion, residence rights, and visas and border controls. They were in part an elaboration of the Starting Line Group's proposals on third-country nationals. The Amsterdam Proposals came out of a series of consultations involving non-governmental organisations, governmental officials and academics. In 2000, they have been introduced in meetings with representatives of the European institutions and discussed by a variety of governmental and non-governmental actors at seminars in all Member States. In the coming years, the Amsterdam Proposals may be used by a variety of organisations to mobilise support for the adoption of legal measures to grant equal rights to third-country nationals.

In addition to Title IV, Article 137(4) provides a legal basis for measures concerning employment conditions for third-country nationals legally residing in the Member States. In particular the social partners could use this article to press for equal treatment in employment, for which the Social Policy Agenda and the European Employment Strategy offer excellent platforms (see paragraph 3).

2. THE TRANSPOSITION OF THE RACIAL EQUALITY DIRECTIVE

The Racial Equality Directive must be transposed in the laws of the Member States before July 2003 and, as it has become part of the *acquis communautaire*, the Directive must also be incorporated into the laws of the Accession States. This process requires the active involvement of stakeholders at the European and national levels of the Member States and the Accession States.

a. The European level

Of the European institutions, the Commission has played a stimulating and leading role in the design and adoption of the Racial Equality Directive. In all likelihood it will play an equally important role in the transposition of the Directive by facilitating the timely and uniform translation of its clauses into the national laws of Member States. For this purpose, the Commission's Directorate General for Employment and Social Affairs will establish two working parties in 2001. One working party will be composed of representatives of the ministries of Member States responsible for anti-discrimination, the other of independent experts.

These working groups, but also non-governmental actors, could make good use of a study that is being prepared by the European Monitoring Centre on Racism and Xenophobia and the Migration Policy Group. The study compares the Starting Line and the Racial Equality Directive with existing legislation in the fifteen Member States. The study will describe what the individual Member States

must do in order to comply with the Racial Equality Directive and which adaptations of national law are to be made[12].

Undoubtedly, the European Parliament and the Economic and Social Committee will monitor the whole transposition process closely and ask the European Commission for regular progress reports. Such reports may indicate where the transposition runs into problems and what is needed to solve these problems.

Non-governmental actors acting on the European level could monitor the transposition and exchange information between their respective constituencies[13]. Targeted exchanges could be organised on specific issues related to adaptations of national laws. To give an example, the Racial Equality Directive requires that Member States designate a body or bodies for the promotion of equal treatment. Some Member States have gained considerable experience with these bodies that may be of use to the Member States that have to establish them. ECRI's Policy Recommendation no. 2 may be used as a guideline[14].

The dynamics of the debates in the Accession States will be influenced more by the accession dates, which vary by groups of countries, than by the deadline of July 2003. Although equal treatment, anti-discrimination and racism are on the accession agenda[15], continuous monitoring is required to keep these issues on the agenda and to provide adequate support for the incorporation of the relevant *acquis communautaire* into the laws of the Accession States.

b. The national level

At the national level, national parliaments and non-governmental actors should monitor the transposition. National parliaments could give clear guidelines as to how and within which timeframe the Racial Equality Directive is to be translated into national law. They should also be regularly informed about the progress made in that process. This could prevent governments from missing the deadline of July 2003, which would lead to legal action from the European Commission or European Parliament.

The transposition offers the opportunity for NGOs to press governments to go further than the requirements of the Racial Equality Directive. As the Directive states, there is nothing that prevents

12 The European Monitoring Centre expects to publish the study in 2001.

13 One can think of the trade unions (ETUC) and employers organisations (UNICE), churches and church organisations (such as the Churches' Commission for Migrants in Europe and Caritas) and of networks of non-governmental organisations (such as the European Network against Racism).

14 This Policy Recommendation is reproduced in this publication as an annex.

15 See for example, European Commission, Enlargement Strategy Paper. Report on progress towards accession by each of the candidate countries (Com (2000)700 final).

Member States from legislating higher levels of protection against racism. As is the case with many European policies and legislative measures, the Racial Equality Directive is the result of negotiations and therefore a compromise. Undoubtedly, there will be Member States that would want to go further on certain clauses. Part II of this publication provides a comparison of the Starting Line and the Racial Equality Directive. It indicates which clauses could and should be strengthened by national legislation, compared with what is required under the Racial Equality Directive.

Governmental and non-governmental actors could already prepare themselves for the period when the Racial Equality Directive will have been incorporated into national law. Institutions that are upholding the law of a country (police, magistrates) and those who could play a role in assisting victims of discrimination (lawyers, trade unions, employers, NGOs) should undergo training on how to apply and adequately use anti-discrimination legislation. An information campaign to promote the awareness of the existence and contents of the Racial Equality Directive should in particular target the victims of racism.

A similar programme of action should be developed with relevant stakeholders in the Accession States. For that purpose, partnerships between governmental and non-governmental actors in the European Union and the Accession States should be strengthened.

c. Consultation and co-operation

In order to promote consultation and co-operation on the transposition of the Racial Equality Directive and also on the ratification of Protocol 12, three international organisations[16] launched a joint project, starting in 2001. This project aims to make the most of the historic opportunity for enhancing anti-discrimination policies and practices created by the Racial Equality Directive and Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[17]. During a three-year period, studies will be conducted, seminars organised and training and policy advice given. The project has

16 These organisations are the London-based Interights (www.interights.org), the Budapest-based European Roma Rights Centre (www.errc.org) and the Migration Policy Group (www.migpolgroup.com). The project will run from 1 January 2001 to 31 December 2003 and is supported by the Open Society Institute.

17 The Protocol broadens the scope of article 14 of the Human Rights Convention which prohibits discrimination of any person in the enjoyment of only those rights which are enumerated in the Convention. Its main provision reads: The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority group, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as mentioned above.

three principal prongs, each designed to promote the Directive's effective application and the Protocol's timely entry into force:

- *Training and capacity building* of target groups including judges, lawyers, NGO anti-discrimination advocates, selected government officials, members of parliament and representatives of specialised bodies, to ensure that key actors throughout the continent are sufficiently informed about the legal obligations flowing from the Directive and the Protocol and know how to creatively make use of it.
- *Legislative advocacy:* targeting individual governments and relevant EU institutions to ensure that the requirements of the Directive – in a nut-shell, the adoption of comprehensive anti-discrimination legislation and the establishment of effective enforcement bodies – are swiftly and adequately complied with, and that Protocol No. 12 of the ECHR is speedily ratified by at least the minimum ten states required for its entry into force.
- *Test litigation:* targeting the European Court of Justice, the European Court of Human Rights and selected constitutional and Supreme Courts, to ensure the adoption in judicial case law of the various elements of the Directive and the Protocol.

3. THE SOCIAL POLICY AGENDA AND THE EUROPEAN EMPLOYMENT STRATEGY

Legislation is important, but it is only one of the instruments available to combat racial discrimination. Legislation should be embedded in a comprehensive approach that includes other policy measures against discrimination, the promotion of equal treatment and the valuing of diversity. Such an approach is itself becoming part of an overall strategy of the European Union to meet new social and economic challenges. European institutions, the Member States' governments, the social partners and other non-governmental actors are re-defining the role they can play, or are responding to expectations as to what role they should play, to meet these challenges.

a. The European institutions and the Member States

The European Union's Social Policy Agenda aims to ensure the positive and dynamic interaction of economic, employment and social policies and the mobilisation of all actors to work jointly towards economic and social renewal[18]. The Agenda includes a whole range of

18 European Commission, Social Policy Agenda. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee on the Regions (COM (2000) 379 final).

measures from competitive and sustainable economic development, full employment and high productivity, to social cohesion and quality of life. It builds upon recently adopted policies and newly established structures for co-operation and consultation among European institutions and national governments and between them, social partners and civil society. This applies in particular to the European Employment Strategy that was launched in 1997. The various elements of the Social Policy Agenda have been endorsed at the highest political level, namely by the heads of state and government at European Councils[19]. They also include programmes preparing the European Union and the Accession States for enlargement. Most documents, including those that have been officially adopted, call for policies that promote inclusion and equality and combat exclusion and discrimination. Careful reading of those texts may well lead to the conclusion that equality of third-country nationals and discrimination of ethnic minorities, although increasingly mentioned, are not receiving the attention they should receive. The frameworks established to further the Social Policy Agenda offer, however, ample opportunities to give these issues the prominent place on the Agenda they deserve.

A good example is the five-year cycle of the European Employment Strategy or the Luxembourg Process of adopting, implementing and reporting on the European Employment Guidelines. Since 1997, the European Commission has drawn up proposals for these guidelines which, after adoption by the Council of Ministers, must be taken into account by Member States in shaping their employment policies. The Member States are obliged to draw up a National Action Plan for Employment and report annually on progress made in the implementation of the Plan. The European Commission brings together and analyses the national reports (the Joint Employment Report), proposes new guidelines and makes specific recommendations to individual Member States.

The European Employment Strategy has four pillars, namely employability, entrepreneurship, adaptability and equal opportunities. Issues related to the inclusion of immigrants and minorities into the labour market can be found under the employability pillar, which deals with such issues as the opening of the labour market to all individuals and training to enable the acquisition of relevant skills. The Joint Employment Report 2000 signals that in most Member States there remain problems with, and differences between, Member States in defining who belongs to a minority or an immigrant group. This has consequences for the collection of data on their labour market position

19 In particular the Luxembourg Summit (held at the end of 1997), the Lisbon Summit (held in the first half of 2000) and the Nice Summit (held in the second half of 2000).

and consequently for the design and implementation of strategies to include them in the labour market. The report further mentions that the policies used most by Member States in these areas are awareness raising for employers, a more consistent involvement of the social partners and the involvement of organisations representing minorities and working to combat racism[20]. Consequently, the Commission proposes to include in the 2001 Guidelines measures to identify and combat discrimination (on the same grounds as mentioned in Article 13) and measures to meet the needs of, among other groups, ethnic minorities and immigrants. For this purpose, Member States are called upon to set targets[21]. The entrepreneurship pillar includes measures to make it easier to start and run businesses, in particular small and medium-sized enterprises. Ethnic minority entrepreneurs could also benefit from these measures. However, they are not mentioned, nor are recommendations made to address the specific problems they encounter. The adaptability pillar is about modernising the work organisation and investing in human resources. However, cultural diversity management is not mentioned in the Joint Employment Report 2000 as a strategy of the Member States to modernise the work organisation[22]. Finally, the equal opportunities pillar deals almost exclusively with gender equality and includes the increased employment of women, balanced gender representation in all economic sectors, an easier return to work and the reconciliation of work and private life. The emphasis on gender equality is understandable given the importance of the issue, the number of people involved and the longstanding tradition of the European Union of working on those issues. Nevertheless, this pillar could also take into consideration equal opportunities for immigrants and minorities, maybe by starting with women from minority and immigrant groups.

The Luxembourg Process already involves a great number of non-governmental actors[23], but deserves greater involvement of organisations working to combat racial discrimination and racism. These organisations could monitor both the drafting and implementation of the National Action Plans for Employment and the national and European reporting mechanisms. They could press for the mainstreaming of the combat against racial discrimination and racism (i.e. their inclusion under all four pillars) and make concrete programme

20 European Commission, Joint Employment Report 2000 (COM (2000) 551 final).

21 European Commission, Proposal for a Council Decision on Guidelines for Member States' employment policies for the year 2001 (COM (2000) 548 final).

22 It is interesting to note that under this pillar the Joint Employment Report 2000 mentions the tightening of the labour market supply of high tech professionals, leading in a few Member States to adaptations of immigration policies (page 56).

23 In particular the social partners (employers' organisations and trade unions) and the European Platform of Social NGOs.

proposals. Such programmes could include the promotion of diversity management strategies, support for ethnic minority businesses, special attention for immigrant and minority women as victims of double discrimination, and all kinds of positive action programmes. Furthermore, governments and European institutions are not only legislators but also employers and purchasers of goods and services. Proposals can be made for pro active employment strategies and the inclusion of a social clause in public procurement rules[24]. Finally, policy research could clarify questions as to how to define minorities and immigrants, and stimulate a wide debate on the advantages and disadvantages of the registration of persons on the basis of ethnicity and nationality. To set targets and to measure results, quantitative data on the composition of the population, also in terms of ethnic and national origin, are indispensable. If ethnic registration is unacceptable, as currently is the case in most Member States, other ways and means must be developed which provide the necessary information to set targets and measure results. Such research will also be highly relevant for the implementation of the Racial Equality Directive. The Directive introduced the principles of indirect discrimination and the shift of the burden of proof. The effective implementation of these principles requires the development of monitoring and measurement systems that are not solely based on ethnic monitoring[25].

The Nice European Council adopted the document 'The European Social Agenda', which can be seen as an endorsement of the Commission's Social Policy Agenda. This document calls for a whole series of recommendations that are relevant for immigrants and minorities. According to this document, the integration of third-country nationals and the fight against exclusion and discrimination are part and parcel of social cohesion policies. It calls for employment policies that also provide minorities with access to the labour market and considers diversity as a productive factor. Furthermore, the document stresses the need for policies that encourage and facilitate the mobility and free movement of persons[26]. It would be very interesting to see how the European institutions are going to combine these

24 For public procurement in the European Union and the current limited possibilities for the effective inclusion of a social clause, see Commission Communication on Public procurement in the European Union (COM (98) 143 final). Currently, the Commission is preparing a new Communication on procurement and social clauses.

25 MPG is exploring the possibilities of linking research initiatives to undertake explorative and comparative research on these issues and is working together on this with the European Centre for Welfare Policy and Research (Vienna) and the University of Leuven (Belgium). For the importance of policy research in the Starting Line campaign, see Jan Niessen, The Starting Line and the promotion of EU anti-discrimination legislation. The role of policy oriented research. Paper presented at the fifth Metropolis Conference (Vancouver, November 2000).

26 Presidency Conclusions, Nice European Council, 7 and 8 December 2000.

issues. Are the goals for social cohesion, labour market inclusion, equality and diversity consistently applied to the goals related to the mobility and freedom of movement of all persons (that is: including legally residing third-country nationals)? Also in this area, non-governmental actors should monitor the policy-making process and present and press for the adoption of their own proposals (such as, for example, the Amsterdam Proposals).

b. The private sector and non-governmental organisations

The more anti-discrimination policies are supported by civil society organisations, the more effective they will be. On the one hand, regular outbreaks of racial violence, persistent overt and covert racism, and patterns of direct and indirect discrimination can be witnessed. On the other hand, there is increased awareness that these evils undermine the basic values of democratic societies, violate human rights and dignity, and leave unfulfilled the social, economic and cultural potentialities of diversity. This means that racial discrimination cannot only be found in extremist organisations but also in mainstream organisations. These organisations can only become part of the solution when they recognise that they are to a certain extent part of the problem. It also means that there is an enormous potential among mainstream organisations to minimize if not eliminate racial discrimination and racism when an appeal is made for democratic and human values and when the value of diversity is demonstrated and recognised.

In the private sector there is an emerging awareness of the social responsibilities of the business community. A growing number of companies integrate in their corporate practices environmental and social matters, which are seen to be of strategic importance for the profitability and sustainability of the company. Increasingly, companies enter into dialogue with all kinds of stakeholders and respond to their demands for transparency on how companies contribute to health and safety in the work environment, promote social cohesion in the communities in which they operate, foster ecological sustainability, respect the human rights of, and take into consideration the diversity of, the population, etc. Companies are beginning to collaborate on those issues and look for improved ways to work together with stakeholders and to report on the way they act as a sustainable or socially responsible business[27]. A review of the reports and debates on corporate social responsibility shows that companies' responsibility for their work force is much further developed than their responsibility for the wider

27 In Europe this has recently lead to the establishment of the Corporate Social Responsibility Europe, an organisation of leading transnational companies. For more information on CSR Europe, formerly the European Business Network for Social Cohesion, see its website www.csreurope.org.

community. Furthermore, environmental issues are addressed much more often than human rights. Consequently, there is an important role for human rights organisations to play in order to convince companies to enhance their external social responsibility. Organisations working to combat racial discrimination and to promote diversity could thus enter into a constructive dialogue with companies on racial discrimination and diversity[28]. Economic growth and the tightening of the labour market make companies more receptive to concrete proposals to integrate minorities and immigrants into the labour market and to eliminate barriers to their career development.

A good starting point for such a dialogue could be the outcome of two research projects. The first project surveyed 27 FTSE 100 companies in the United Kingdom on their attitudes to, and track record on, developing an ethnically diverse work force at all levels of their organisation, but with particular reference to professional and managerial staff. The report showed that there are few ethnic minorities in senior positions, that ethnic minority professionals and managers feel excluded by subtle, covert discrimination, and that race is not firmly on the business agenda[29]. The second report makes an assessment of forty-six FTSE 300 companies' performance on social and employment issues. The report provides broad indications on companies' strategies related to social cohesion and looks in particular at the four pillars of the European Employment Guidelines. The study confirms that companies have a strong sense of internal social responsibility (especially with regard to adaptability and equal opportunities). However, external social responsibility is underdeveloped and the sense of corporate citizenship is not widely spread in the business community[30]. The report presents profiles of the forty-six companies, showing a mismatch of activities on equal opportunities, which often

28 This would have to include contacts at all levels: the companies' leadership, human resources and public affairs departments and workers councils. Partnerships with other stakeholders, such as the trade unions, should be part of the strategy.

29 The research was carried out by Schneider-Ross at the request of the Runnymede Trust and financially supported by a few companies and the European Commission. It was presented at a conference organised by the Runnymede Trust, in co-operation with the Migration Policy Group and the City of Amsterdam (London, 7 February 2000). The research report 'Moving on up? Racial Equality and the Corporate Agenda, a study of FTSE 100 companies' and a report of the conference can be ordered from Runnymede (www.runnymedetrust.org).

30 The research was carried out by a group of research institutes at the request of CSR Europe with the financial support of a few companies and the European Commission. It was made available and discussed at the first CSR conference on social responsibility (Brussels, November 2000). The research report 'A European Assessment of 46 companies' performance on social and employment issues. Towards a social index?' can be obtained from CSR Europe. The report does not identify NGOs as a potential user of the report, but acknowledges them as important sources of information.

include special measures, surprisingly labelled as 'affirmative action', for women, disabled persons and minorities. As far as the 'affirmative' measures for minorities are concerned, the more in-depth research on the FTSE 100 companies shows that these measures must be more closely examined with regard to their effectiveness and that their implementation requires continuous monitoring and auditing.

Non-governmental organisations, in partnership with other stakeholders, can play an important role in this process. Since many non-governmental organisations direct their activities almost uniquely at governments and intergovernmental organisations, an adaptation of their working methods seems to be appropriate. Anti-discrimination legislation is also an issue to be discussed with the private sector. Companies may not be in favour of the introduction or reinforcement of anti-discrimination legislation, fearing that too many legislative measures would hamper their business. They may try and play off legislative measures and voluntary action by companies against each other, clearly preferring the latter above the former. However, the North American situation, where both legislation and voluntary action are well developed, shows that these are complementary strategies. There would be no effective voluntary action by employers when there is not a legislative framework, whereas legislation without voluntary action would mean a legalist and minimalist approach to combating racial discrimination and racism.[31]

31 Lori Lindburg, European and North American approaches to the employment integration of immigrants and ethnic minorities. Voluntary versus legislative measures. Final conference document of MPG's third Transatlantic Dialogue meeting, held under the auspices of European Commissioner Flynn and hosted by the Liberal and Democratic Group of the European Parliament (Brussels, 7-8 July 1998).

PART II

MEETING THE CHALLENGE? A COMPARISON BETWEEN THE EU RACIAL EQUALITY DIRECTIVE AND THE STARTING LINE

Mark Bell, University of Leicester

INTRODUCTION[1]

On 29 June 2000, the EU Council of Ministers adopted its first Directive combating discrimination based on racial or ethnic origin.[2] The Directive legally came into force on 19 July 2000, and all Member States of the European Union have to complete its implementation in their national legal systems no later than 19 July 2003. This initiative has since been complemented by the agreement in the Council on 17 October 2000[3] of a Directive combating discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation. The adoption of the two Directives marks a successful conclusion to the lengthy campaign to persuade the governments of the Member States of the need for Europe-wide protection against such discrimination.

The Starting Line Group has consistently been at the forefront of this campaign since the presentation of their proposal for a Directive against racial discrimination in 1993.[4] This concrete initiative formed an innovative and optimistic response to the general absence of any coherent EU policy on combating racism at that time. The impact of the original proposal is testified by its express endorsement by the European Parliament.[5] The first sign of real progress in this area was

1 Many thanks to Jan Niessen, Isabelle Chopin and Patrick Yu for generous advice and assistance in the preparation of this paper. All responsibility for any errors, factual or otherwise, of course lies with the author.

2 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal (OJ) L 180/22, 19 July 2000.

3 Council Directive 200/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ [2000] L 303/16.

4 The original proposal is reproduced in A. Dummett, 'The Starting Line: a proposal for a draft Council Directive concerning the elimination of racial discrimination' (1994*) New Community Vol. 20*(3) pp. 530-538.

5 Par. 4, Parliament Resolution on racism and xenophobia; OJ [1993] C 342/19, 2 December 1993; calling 'on the Commission to draw up as a matter of urgency a Directive laying down measures to strengthen the legal instruments existing in this field in the Member States, using the document entitled the Starting Line'.

the agreement by the Member States in 1997 at Amsterdam to amend the founding treaties of the European Union to create specific powers for the adoption of European legislation on racial discrimination. This amendment, *Article 13*,[6] paved the way for the European Commission to submit a proposal on 25 November 1999 for a Directive forbidding racial discrimination.[7] Once again, the Starting Line Group made an important contribution to the debate through a revision of its initial proposal for a Directive in 1998.[8] Moreover, active and constructive support for the Directive was provided throughout the legislative process.

This paper examines the precise terms of the EU Racial Equality Directive. Specifically, it will compare the new Directive with the Starting Line proposal to evaluate the extent to which it meets the recommendations of the group. The importance of this exercise is underpinned by the three year period provided for national implementation. As stressed by the Directive in Article 6, nothing prevents Member States from legislating for higher levels of protection against discrimination. Therefore, those aspects of the Directive which fall short of the Starting Line proposal can still be remedied through national laws which go beyond the minimum protection required by the Directive. Following this examination, the paper will turn in conclusion to the agenda for the future. This provides an opportunity to consider further measures which the European Union and its Member States could adopt to meet in full the challenge of the original Starting Line proposal.

In comparing the Directive with the Starting Line, it has been divided into six themes: the definition of discrimination; the personal scope; the material scope; exceptions; remedies and enforcement; and implementation.

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6 'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

7 Commission, 'Proposal for a Council Directive implementing equal treatment between persons irrespective of racial or ethnic origin', COM (1999) 566, 25 November 1999.

8 Starting Line Group (1998) *Proposals for legislative measures to combat racism and to promote equal rights in the European Union,* edited by Chopin, I & Niessen, J, London: Commission for Racial Equality.

1. THE DEFINITION OF DISCRIMINATION

EU Racial Equality Directive: Article 2

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

[...]

Starting Line: Article 2

1. For the purposes of the following provisions, direct discrimination exists where in respect of any of the areas in Article 1(2) a person receives less favourable treatment on grounds of racial or ethnic origin or religion or belief than other persons receive or would receive in any situation where the relevant circumstances of those persons are the same or not materially different.

2. For the purposes of the following provisions, indirect discrimination exists where in respect of any of the areas in Article 1(2) an apparently neutral provision, criterion or practice disproportionately disadvantages persons of particular racial or ethnic origin or religion or belief, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to race, ethnic origin or religion or belief.

[...]

4. In this Directive any reference to a person's religion or belief includes reference to his supposed religion or belief and to the absence or supposed absence of any particular religion or belief.

(a) Direct and indirect discrimination

The first and most obvious point to note is that only discrimination based on racial or ethnic origin is forbidden. In contrast, the Starting Line recommends a ban on racial and religious discrimination. The absence of religion from the text of the Racial Equality Directive is without doubt a significant weakness. However, this has been substantially remedied with the subsequent adoption of the Framework Directive on equal treatment in employment, which forbids discrimination on the grounds of religion or belief in all aspects of employment. The provisions of the Framework Directive are similar, although not identical to those in the Racial Equality Directive, and problems emerge in the areas where the two Directives differ. Most importantly, the Framework Directive will not confer any protection against religious discrimination in areas such as education, health, housing, social welfare and access to and supply of goods and services. The European Commission on Racism and Intolerance has indicated that education in particular is an area where discrimination against Muslims is often manifested.[9] Therefore, pressure will remain for further action to ensure an equivalent level of protection against religious discrimination in EU law as now exists for racial discrimination.

In the meantime, the Racial Equality Directive may be of some assistance in combating those aspects of religious discrimination not addressed in the Framework Directive, because such actions can also constitute indirect racial discrimination. For example, it might be argued that a ban on wearing a headscarf at school places girls of an Algerian ethnic origin at a particular disadvantage when compared with other students, if their religious beliefs require the wearing of the headscarf in public. In this fashion, religious discrimination can be challenged as indirect discrimination on the basis of racial or ethnic origin. Nonetheless, there are limits to the effectiveness of this route to legal protection.[10] For example, a white woman who converts to Islam and then wishes to wear the headscarf could not rely on the line of argument set out above. Such cases can only be properly dealt with through specific laws against religious discrimination.

Recommendation: *NGOs should seek to ensure that national legislation implementing the Racial Equality Directive should extend the same level of protection to discrimination on grounds of religion or belief.*

Overall, the definitions of direct and indirect discrimination adhere quite closely to those proposed by the Starting Line. One difference is

9 See further ECRI (2000) General Policy Recommendation No. 5: combating intolerance and discrimination against Muslims, available from: *www.ecri.coe.int,* 26 May 2000.

10 Particular thanks to Nadia Hashmi for assistance on this point.

in relation to indirect discrimination, where the Starting Line states that justification for discrimination must be 'unrelated to race, ethnic origin or religion or belief'. The Racial Equality Directive is broader – referring generally to the need to establish a 'legitimate aim'. Naturally, it is to be anticipated that judicial authorities will accept that an aim specifically related to racial or ethnic origin could not be legitimate for the purposes of justifying discrimination. For instance, in a Dutch case a woman was refused employment as a receptionist on the basis of her Surinamese accent when she spoke Dutch. The employer tried to justify this on the basis that it was not good for their corporate image. The argument failed under the Dutch Equal Treatment Act.[11] Similarly, such reasoning should be regarded as unacceptable under the Directive, as the justification itself is intrinsically related to racial or ethnic origin.

(b) Harassment

Article 2(3) on harassment is one example of an improvement on the original Starting Line text. The Directive provides a relatively broad definition of harassment. In particular, harassment occurs where either this is the *intent* or the *effect* of the behaviour in question. The main proviso is that the harassment must be 'unwanted conduct'. This expression is also found in the definition of sexual harassment in EU law. Specifically, in 1991 the Commission issued a Code of Practice explaining what constituted harassment in more depth. This states:

> The essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive. Sexual attention becomes sexual harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive…[12]

It may be useful for similar detailed guidance to be provided in respect of the ban on harassment in the Racial Equality Directive.

All forms of behaviour which impact upon the general environment appear to be included in the concept of harassment – this could range from physical violence to racist remarks, jokes or ostracism. Moreover, the ban on harassment extends to actions by a variety of actors, such as clients or co-workers, or alternatively students or patients. The main weakness with this provision lies in the final sentence. At first sight, this appears to confer a wide discretion on the Member States in defining harassment according to national law.

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11 Commissie Gelijke Behandeling (1998) *Annual Report* 1997, Utrecht: Commissie Gelijke Behandeling. Available at: *www.cgb.nl/annualframeset.html*

12 Annex, par. 2, Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, OJ [1992] L 49/1.

However, reading the paragraph as a whole, it is only logical that Member States must at least forbid all the forms of behaviour referred to in the first sentence of Article 2(3). The discretion accorded in the final sentence would therefore relate to those aspects of harassment not addressed by the Directive. For example, the liability of employers, educational authorities or health services for harassment is not specifically addressed in Article 2(3), and this would appear to be an area where Member States enjoy greater discretion. Clearly, the Court of Justice will face a difficult challenge in resolving the full extent of national law discretion conferred by Article 2(3), but in this respect it should be recalled that the Court has traditionally insisted on the need to ensure EU law is applied with uniformity and consistency throughout the Member States.[13]

> **Recommendation:** *NGOs should seek to ensure a high level of protection against harassment in national implementing legislation, including an obligation on the relevant and responsible institutions to take all reasonable measures to prevent harassment, whether this is from employees, clients or service users.*

(c) Victimisation

Article 9	Starting Line: Article 2(3)
Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.	a) For the purposes of the following provisions discrimination shall include victimisation. b) Victimisation occurs where in respect of any of the areas in Article 1(2) a person or group of persons is subject to any detriment by reason of that person or group of persons being involved in or suspected of being involved in making a complaint or assisting a complaint alleging racial or religious discrimination, provided the allegation was not false and was made in good faith.

In the Starting Line, victimisation is dealt with as a further category of discrimination. However, in the Racial Equality Directive it is treated separately, under the provisions on enforcement. Notwithstanding

13 C-6/64, *Costa v ENEL* [1964] European Court Reports (ECR) 585, 594.

this technical difference, the definition of victimisation in the Directive is sufficiently broad to have a similar impact to that proposed by the Starting Line. Indeed, the Directive goes further than the Starting Line in at least one respect – the Directive applies to any complaint, whereas the Starting Line restricted protection to 'good faith' complaints. Another main difference between the two versions emerges in relation to the burden of proof. As shall be discussed in more detail later, Article 8 of the Directive permits a shift in the burden of proof in cases alleging a breach of the principle of equal treatment. However, whilst the Starting Line proposed that this extended to allegations of victimisation, the text of the Racial Equality Directive does not clearly apply the burden of proof provisions to Article 9 on victimisation.

Recommendation: *NGOs should seek to ensure that national implementing legislation applies burden of proof provisions to all forms of discrimination, including victimisation.*

(d) Instruction to discriminate

EU Racial Equality Directive: Article 2(4)

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Starting Line: Article 4(1)

Member States shall take the necessary measures, in conformity with their legal systems, to prohibit by legal sanction:
[...]

(b) incitement or pressure to racial or religious discrimination;

(c) the establishment or operation of any organisation which promotes such incitement or pressure together with membership of any such organisation and the giving of aid, financial or otherwise to any such organisation;

(d) any act or practice by a public authority or public institution of racial or religious discrimination against persons, groups of persons or institutions;

(e) the financing, defence or support by any public authority or public institution of racial or religious discrimination by any person, group or organisation.

Article 2 of the Racial Equality Directive also includes a prohibition on 'an instruction to discriminate'. This most frequently arises in relation to employment placement agencies, where employers request agencies to send only workers of a particular ethnic origin. On this point, the text of the Directive compares unfavourably with the Starting Line, which is more detailed, forbidding 'incitement or pressure' to discriminate. This potentially covers a wider range of behaviour than 'an instruction to discriminate'. For example, if an employer indicates to an agency a 'preference' for domestic nationals, this could certainly be construed as pressure for an agency not to send ethnic minority workers, but it is less evident if it would amount to an instruction to discriminate for the purposes of the Directive.

> **Recommendation:** *NGOs should seek to ensure that national implementing legislation includes an express ban on incitement or pressure to discriminate.*

The Starting Line also sought the application of sanctions to groups which promoted or incited discrimination, and any public sector support for such groups. Whilst this is not covered by the Racial Equality Directive, it should be noted that under a 1996 'Joint action' the Member States are already obliged to ensure 'effective judicial co-operation' with respect to:

> public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin.[14]

Whilst the Joint Action is legally binding on the Member States, the Court of Justice does not enjoy jurisdiction to enforce or interpret its provisions. Importantly, the Commission is now committed to proposing a new 'framework decision' on the 'common incrimination of racism and xenophobia'.[15] This provides an opportunity to reinforce the obligation on the Member States to penalise such activities and, unlike the Joint Action, the framework decision would be subject to the jurisdiction of the Court of Justice, at least in respect of the majority of the Member States.[16]

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14 Title I, par. A(a), Joint Action of 15 July 1996 concerning action to combat rac\ism and xenophobia; OJ [1996] L 185/5.

15 Commission, 'Scoreboard to review progress on the creation of an area of "Freedom, security and justice" in the European Union', COM (2000) 167 final/2, 13 April 2000, at p. 12.

16 By January 2000, all Member States except Denmark, France, Ireland and the UK had accepted the jurisdiction of the Court of Justice over measures adopted under title VI of the Treaty on European Union (on police and judicial cooperation in criminal matters); N. Fennelly, 'The area of "freedom, security and justice" and the European Court of Justice – a personal view' (2000) 49 *International and Comparative Law Quarterly* 1-14, 9.

2. THE PERSONAL SCOPE

The primary issue to consider in relation to the personal scope of the Directive is its application to third-country nationals. European Union law varies in its effects between certain provisions – most notably the right to free movement – which only apply to citizens of the Member States, and other provisions – such as the right to equal treatment for women and men – which apply to all persons resident in the territory of the Union. This question is especially salient in the context of laws against racial discrimination where a high proportion of the potential victims of such discrimination are also third-country nationals.

The Racial Equality Directive follows the broad approach of the Starting Line and applies to 'all persons'.[17] The preamble to the Directive provides further clarification of this statement. Whilst this section of the Directive is not binding, it is highly persuasive evidence of the intended interpretation of the Directive and is regularly relied upon by the Court of Justice in determining the meaning of legislative provisions.[18] Recital 13 of the Racial Equality Directive states 'this prohibition of discrimination should also apply to nationals of third countries'. Whilst this confirms the application of the Directive to third country nationals, its scope is heavily qualified by *Article 3(2):*

> This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

The main difficulty which arises with Article 3(2) lies in the final clause. The exclusion of rules regarding entry is broadly in keeping with the existing case law of the Court of Justice on the rights of third country national workers under bilateral agreements with the European Union. Whilst these may give rise to directly effective individual rights to equal treatment in areas such as social security and employment,[19] these rights to non-discrimination do not alter the control of the state over the initial decision on whether to admit the individual to their territory, and what form of residence/work permit to grant.[20] However, the Directive also excludes from its scope 'any treatment which arises from the legal status of the third-country nationals', which appears to go beyond safeguarding national discretion in immigration law.

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17 Article 3(1).

18 For an example of the importance the Court attaches to the preamble, see C-269/97, *Commission v Council* (beef labelling), judgment of 4 April 2000.

19 For example, C-262/96, *Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685; C-416/96, *El-Yassini v Secretary of State for the Home Department* [1999] ECR I-1209.

20 par. 58, C-37/98, *R. v Secretary of State for the Home Department ex parte Savas,* judgment of 11 May 2000.

In attempting to understand the implications of Article 3(2), it is useful to consider its history. Specifically, certain states expressed concerns that restrictions on access to employment imposed by work permits for migrants could be challenged under the Directive – presumably as a form of indirect discrimination.[21] In order to clarify the continuing legality of such mechanisms, various suggestions for additional recitals in the Directive were submitted, but these were rejected by Germany and Denmark as insufficient.[22] This led to a compromise proposal for a new provision in the Directive from the Portuguese Presidency, which eventually became Article 3(2).[23] Therefore, from the information which is available on the Council's deliberations, it appears the main aim of the text is to protect Member States' immigration law instruments which regulate access to employment by third-country nationals.

On a literal reading, Article 3(2) would seem to block any protection against nationality discrimination. However, where such treatment is also indirect racial discrimination a potential conflict arises between Article 3(2) and Article 2(2)(b) in the Directive. Article 3(2) is best understood as protecting differences in treatment in law which are linked to citizenship/residential status from allegations of unlawful discrimination. Consequently, it should not be extended to unfair treatment by employers of third-country nationals where this is not linked to their immigration status, and would otherwise be unlawful indirect discrimination. For example, an employer who paid third-country national workers less than EU citizens for the same occupation should not be entitled to claim this was due to the differences in their 'legal status'. Providing all the workers enjoy the right to engage in employment in the Member State, then there is no relevant difference in legal status which could apply to the employer's unequal treatment. Similarly, certain employers have sought to evade national laws on racial discrimination through statements such as 'EU nationals only need apply'.[24] Whilst recruitment by employers of EU nationals in preference to third-country nationals may be required by national or EU law, a total exclusion by employers of third-country nationals is evidently indirect racial discrimination and should not be protected by reference to Article 3(2).

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21 par II(d), EU Council, Outcome of proceedings of the Social Questions Working Party of 10 April 2000, Document 7756/00 SOC 138 JAI 38, Brussels, 19 April 2000.

22 par. II(4), EU Council, Report from the Social Questions Working Party to the Permanent Representatives Committee (part 1), Document 8857/00 SOC 201 JAI 58, Brussels, 24 May 2000.

23 *ibid.*

24 See section II, explanatory statement, European Parliament, 'Report of the Committee on Civil Liberties and Internal Affairs on respect for human rights in the European Union (1996)' [Pailler] A4-34/98, 28 January 1998.

Overall, it is unfortunate that the language employed in the Directive is rather loose and ambiguous on this issue, and again the Court may have to clarify this clause in due course. A clearer approach is to be found in the Starting Line Group proposal for a Directive on third-country nationals from 1998. Whilst permitting national rules on initial access to the labour market for third country nationals, Article 4(1) states:

> The Member States of the Community shall as regards remuneration and other conditions of work, including dismissal, grant third-country national workers duly registered as belonging to their labour market treatment involving no discrimination on the basis of nationality between them and Community workers.[25]

Recommendation: *NGOs should seek to ensure that national implementing legislation provides adequate protection to third-country nationals against discrimination.*

The second aspect to the personal scope of the Directive is its application to both natural and legal persons. In December 1999, the Starting Line Group highlighted the importance of including legal persons within the scope of application of the Directive.[26] This theme was further pursued within the Council negotiations, with support from France, Spain and Italy for a general application of the Directive to legal persons.[27] In contrast, Ireland, Finland and Sweden expressed reluctance to extend the Directive beyond individuals.[28] Article 3(1) of the Directive suggests that it does apply generally to legal and natural persons by virtue of the expression 'this Directive shall apply to all persons…'. Recital 16 offers further clarification:

> It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members.

As with the definition of harassment, this provision accords a significant degree of latitude to the national legislator in determining how implementing laws will protect legal persons.

Recommendation: *NGOs should seek to ensure national implementing legislation provides express and adequate protection for legal persons.*

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25 Starting Line Group, *above* n. 40.

26 Starting Line Group, 'Combating racism in the European Union with legal means', available at: *www.migpolgroup.com*, 16 August 2000.

27 EU Council, *above* n. 55, par. II(5).

28 *ibid.*

3. MATERIAL SCOPE

EU Racial Equality Directive: Article 3

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;

(e) social protection, including social security and healthcare;

(f) social advantages;

(g) education;

(h) access to and supply of goods and services which are available to the public, including housing.

Starting Line: Article 1(2)

In this Directive the term 'equal treatment' shall mean there shall be no discrimination whatsoever, direct or indirect, based on racial or ethnic origin or religion or belief in particular in the following areas:

- the exercise of a professional activity, whether salaried or self-employed;
- access to any job or post, dismissals and other working conditions;
- social security;
- health and welfare benefits;
- education;
- vocational guidance and vocational training;
- housing;
- provision of goods, facilities and services;
- the exercise of its functions by any public body;
- participation in political, economic, social, cultural, religious life or any other public field.

The European Union is a body of limited powers,[29] and does not enjoy an unlimited competence to regulate discrimination. Therefore, the desire for an 'all-embracing' ban on discrimination must be balanced against the realities of the EU's legal powers. However, opinions differ as to the exact limits on the powers of the European Union in regulating discrimination. The Starting Line proposed a non-exhausive list of examples of fields in which racial discrimination is to be forbidden. This approach is more flexible and accommodates aspects of discrimination which are unforeseen, or do not fit comfortably into the principle categories listed. Importantly, this could have been reconciled with the limits to the EU's powers by providing that discrimination was forbidden in any area falling within the competences conferred by the EC Treaty. This approach is already taken in respect of discrimination based on EU nationality, which is forbidden in any situation within the scope of application of the EC Treaty.[30] This ensures that the ban on discrimination applies also to any future extension of EC competence, for example into areas such as law enforcement or sport. In contrast, the Directive only applies to a closed list of areas, and therefore any extension in its application will require future amendment.

Within those areas specifically listed in Article 3(1), paragraph (d) represents an improvement on the Starting Line as it extends the Directive to employer/employee organisations. Equal participation in employee organisations is particularly important given the legal rights conferred on trade unions by European and national law. European Union law has provided certain specific rights to trade unions, such as the right to information and consultation through 'European Works Councils', which are mandatory for large, cross-border companies.[31] Alternatively, an increasing proportion of the European Union's social legislation is determined by recourse to the social dialogue mechanisms, where employers and trade unions negotiate agreements which may be subsequently given the force of binding law by a decision of the Council.[32] The Racial Equality Directive builds on these trends and Article 11 requires Member States to promote social dialogue, with a view to collective agreements on combating discrimination. However, if employers and trade unions are to assume such an important role in

29 Article 5 EC.

30 Article 12 EC.

31 See further, Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ [1994] L 254/64.

32 For an overview, see Britz & Schmidt, 'The institutionalised participation of management and labour in the legislative activities of the European Community: a challenge to the principle of democracy under Community law' (2000) 6 *European Law Journal* 45-71.

securing equality in the workplace, it is essential that their organisations provide fair representation for those workers most affected by discrimination. In this context, the application of the Directive to employer and employee organisations is especially appropriate.

Paragraph (f) forbids discrimination in 'social advantages', and this is another improvement on the Starting Line text. The concept of a 'social advantage' has been defined by the Commission as encompassing 'benefits of a social or cultural nature which are granted within the Member States either by public authorities or private organisations'.[33] The breadth of this concept has become evident in EU law on nationality discrimination, where it has been used to challenge discrimination in diverse areas, such as unemployment benefits,[34] or public assistance with funeral expenses.[35] Therefore, this is a valuable concept to apply in the area of racial discrimination.

Paragraph (h) is the most ambiguous section of Article 3, as it fails to explain what is meant by goods and services being 'available to the public'. The origin of this phrase is found in the concerns expressed by some Member States, in particular Germany, Austria, the Netherlands and Ireland, in relation to the application of the Directive within the 'domestic' sphere or to purely private transactions.[36] Specifically, it was suggested that this would conflict with certain constitutional privacy rights. Article 3(1)(h) addresses these fears, and the point is reinforced by Recital 4:

> It is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.

First of all, it is important to be clear as to the scope of 'goods and services'. These concepts have already been defined by EU law in the area of free movement. In that context, the Court has defined 'goods' as 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions'.[37] Article 50 of the EC Treaty defines services:

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33 Commission (1999) 'Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin', COM (1999) 566, 25 November 1999 at p. 7.

34 C-57/96, *H. Meints v Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-6689.

35 C-237/94, *O'Flynn v Adjudication Officer* [1996] ECR I-2617. See further, Allen, R (1999) 'Equal treatment, social advantages and obstacles: in search of coherence in freedom and dignity' in Guild, E (ed.) *The legal framework and social consequences of free movement of persons in the European Union*, London: Kluwer Law.

36 Footnote 31, EU Council, Outcome of proceedings of the Social Questions Working Party on 10 May 2000, Document 8454/00, Brussels, 16 May 2000.

37 C-7/68, *Commission v Italy* [1968] ECR 423.

> Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. 'Services' shall in particular include:
>
> (a) activities of an industrial character
>
> (b) activities of a commercial character
>
> (c) activities of craftsmen
>
> (d) activities of the professions.

If this definition is applied to the Racial Equality Directive, certain public 'services', such as the granting of planning permission or environmental services (refuse collection, water supply, etc.), will not fall within its scope because they are not normally provided for direct remuneration. However, other public services such as health and education will be covered by virtue of specific references elsewhere within Article 3.

The main types of activity which will fall under 3(1)(h) would appear to be banking and financial services, access to any place (such as bars, restaurants, clubs, hotels, shops), leisure services, transport, and housing. Within these, it is possible to foresee at least two situations where it might be argued that the services are not 'available to the public'. First, in the context of housing, where an individual owns and resides in a property, but chooses to rent out another part of the premises. Second, where a bar or restaurant is only accessible by members of a private association – for example, a members-only restaurant attached to a golf club.

The Irish Equal Status Act 2000, which forbids racial discrimination in goods and services, confronts both these situations, and may provide an example of the thinking behind Article 3(1)(h). In the first situation, a property owner (or a near relative of the owner) who resides on the premises and rents out a section of the premises will not fall within the scope of the anti-discrimination law, so long as the premises are 'small',[38] and hence within the private sphere. Where membership of a private club is a condition of access to certain services in Ireland, then discrimination in access to membership is not unlawful per se. However, any person may seek a judicial order that the club in question is a 'discriminating club'. The eventual consequence of such a declaration can be the revocation of the legal registration of the club – with the principle practical effect being the loss of the licence to sell alcohol.[39] These complex and delicate arrangements

39 Sections 8-10, Equal Status Act 2000.

38 Section 6(2)(d), Equal Status Act 2000. 'Small' is defined as not normally more than six persons residing in the property, in addition to the owner (or their near relative) and any persons residing with them (s. 6(4)). A similar provision is found in section 22 of the British Race Relations Act 1976.

in Irish law seek to balance freedom of association and the right to privacy with the right to non-discrimination. Article 3(1)(h) and recital 4 point in a similar direction, and it is no coincidence that the Irish government was instrumental in securing these additions to the Directive.[40] Nonetheless, the final adjudication on the balance the Directive requires will fall to the Court of Justice. In this respect, it is worth recalling that, notwithstanding recital 4, the Court has often stressed the importance of the 'right to equality, which is one of the fundamental principles of Community law'.[41]

Finally, the last two indents of Article 1(2) of the Starting Line are not present in Article 3(1) of the Directive. These omissions were also highlighted by the European Parliament, which recommended an extension of Article 3(1) to include 'the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions'.[42] Whilst Article 3(1) applies to 'public bodies', this is only to the extent their functions fall within the list of activities in that provision. Therefore, racial discrimination in the recruitment of immigration or police officers is prohibited, but there is no protection against racial discrimination in the administration of immigration controls or police powers. This is a particularly notable omission given the competence of the Community for immigration and asylum policy since the Treaty of Amsterdam.[43] In relation to police and judicial bodies, it could be argued that these activities fall outside the legal competence conferred by the EC Treaty. However, there remain opportunities for the European Union to address discrimination in the police and judiciary under the aegis of the Treaty on European Union.[44] As mentioned earlier, the Commission has promised to bring forward a proposal for a framework decision on the 'common incrimination of racism and xenophobia'.[45] This should provide another avenue through which to extend the principles of the Racial Equality Directive to justice and law enforcement.

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40 EU Council, Report from the Social Questions Working Party to the Permanent Representatives Committee (part 1), Document No. 8968/00, Brussels, 30 May 2000 p. 3.

41 C-13/94, *P v S and Cornwall County Council* [1996] ECR I-2143, 2165. See also, C-117/76 & 16/77, *Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, 1811.

42 Amendment 37, European Parliament legislative resolution on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 18 May 2000 (adopting report A5-136/00).

43 Title IV, EC Treaty.

44 Article 29 EU includes among the objectives of the Union 'preventing and combating racism and xenophobia'.

45 Commission, *above* n. 47.

Recommendation: *NGOs should seek to ensure that national implementing legislation provides for a general ban on discrimination, which will also apply to the actions of any body performing functions of a public nature. In particular, anti-discrimination provisions should be extended to cover the activities of police and immigration authorities. Any exceptions for the 'private sphere' should be as narrow as possible.*

4. EXCEPTIONS TO THE BAN ON DISCRIMINATION

(a) genuine occupational requirements

EU Racial Equality Directive: Article 4

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Recital 18

In very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

Starting Line proposal: Article 1(5)

(a) This Directive shall be without prejudice to the right of Member States to exclude from its field of application any occupational activities (and where appropriate the training leading thereto), and any other activities for which by virtue of their nature or the context in which they are carried out the racial or ethnic origin or religion or belief of the person is an essential determining factor.

(b) Member States shall periodically assess any such exclusions in order to decide, in the light of social or other developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.

This exception is designed to provide for very specific circumstances where racial or ethnic origin could be a legitimate consideration in employment. For example, a project to improve awareness of breast cancer amongst women of Chinese ethnic origin might be more effectively conducted by health professionals from within the Chinese eth-

nic community. The Racial Equality Directive improves on the Starting Line text by requiring justification of each particular case, rather than allowing the exclusion of complete 'occupational activities'.

(b) Positive action

EU Racial Equality Directive: Article 5

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Starting Line: Article 1(4)

This Directive shall be without prejudice to national laws, regulations and administrative provisions favouring certain disadvantaged groups defined by racial or ethnic origin or religion or belief with the aim of removing existing inequalities affecting them or promoting effective equality of opportunity between members of society.

As with the Starting Line, Article 5 permits, but does not oblige, Member States to adopt positive action schemes. The experience of EU sex equality law has already provided an indication of the scope for such measures in employment. Whilst the Court of Justice seems prepared to endorse a range of measures, including strict quotas, *prior to the point of employment selection,* it will not accept positive action schemes which produce 'equal results' through automatic mechanisms at the selection stage. For example, in *Badeck,*[46] the Court was prepared to accept measures which imposed a strict quota reserving at least 50% of training places for women, and requiring at least 50% of all candidates invited to interview to be women. These measures were regarded as permissible because they were not 'an attempt to achieve a final result appointment or promotion', but rather to provide women with 'additional opportunities to facilitate their entry into working life and their career'.[47] In contrast, *Kalanke*[48] concerned a Bremen law which provided automatic priority for women where male and female candidates were equally qualified, and women were under-represented in the relevant section of the workforce. The Court held this to be in breach of the equal treatment Directive as it went beyond the ambit of the positive action exception. It seems reasonable to assume the Court of Justice will apply similar principles in respect of the Racial Equality Directive.

46 C-158/97, *Badeck v Hessischer Ministerpräsident,* judgment of 28 March 2000.

47 Par. 60, *ibid.*

48 C-450/93, *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3069.

5. REMEDIES AND ENFORCEMENT

The 1976 equal treatment Directive concentrated mainly on forbidding discrimination between women and men in all aspects of the employment relationship. In contrast, the Directive did not specify in detail mechanisms for enforcing the Directive, nor the remedies to which victims of discrimination would be entitled. Subsequent research concluded that this was one of the main weaknesses in the Directive, as individual women faced a wide range of obstacles to bringing successful litigation.[49] Bearing in mind this experience, the Starting Line was characterised by an emphasis on effective mechanisms for enforcing the Directive.

There are three issues to be considered in this context:

(a) defence of rights;

(b) burden of proof;

(c) sanctions.

49 See generally, Blom, J; Fitzpatrick, B; Gregory, J; Knegt, R & O'Hare, U (1995) *The Utilisation of Sex Equality Litigation in the Member States of the European Community*, V/782/96-EN (Report to the Equal Opportunities Unit of DG V)

(a) Defence of rights

EU Racial Equality Directive: Article 7

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Starting Line: Article 4(4)

Member States shall ensure that:

(a) their legal systems provide appropriate and effective measures whereby all persons who consider themselves to have been wronged by failure to apply to them the principle of equal treatment as set out in this Directive may have recourse to a judicial remedy, in accordance with the most effective national procedures, after possible recourse to other competent authorities where appropriate; [...]

(c) an effective judicial remedy shall enable persons who consider themselves wronged to defend their rights; the State shall provide for adequate information on procedures and remedies and shall provide support in respect of legal costs in accordance with the most favourable provisions of national law;

(d) organisations concerned with the defence of human rights and in particular with the combating of racism and xenophobia shall be able to institute or support legal actions in civil, administrative and criminal courts enforcing the rights granting protection against racial and religious discrimination in areas mentioned in Article 1(2); [...]

(f) appropriate conciliation procedures are made available which are capable of resolving difficulties between various individuals; such conciliation procedures shall not be mandatory; this shall be without prejudice to the right of the complainant to have recourse to judicial remedies in accordance with Article 4(4)(a).

The first point to note is that whereas the Starting Line requires access to a judicial remedy, the Racial Equality Directive refers to 'judicial and/or administrative procedures'. The reference to administrative procedures appears designed to accommodate those Member States, such as Ireland and the Netherlands, which rely on specific agencies to investigate and adjudicate on complaints, at least in the first instance. Whilst this has given rise to concern,[50] it should be noted that any procedure responsible for dealing with complaints of racial discrimination still has to ensure effective sanctions in accordance with Article 15 of the Directive.

Article 7(1) includes the possibility of conciliation procedures, but in a different fashion to the Starting Line. The latter proposes that these should be available where the complainant wishes to pursue conciliation, whereas the Directive permits conciliation where the Member State wishes to make this available. Therefore, certain Member States may choose not to create conciliation mechanisms at all, whilst others could make pre-judicial conciliation compulsory. Nonetheless, paragraph 1 does not allow for Member States to make conciliation the only avenue for redress; there must still be alternative 'judicial and/or administrative procedures'.

Article 7(2) provides legal standing for interested NGOs, but once again the terms are weaker than those proposed by the Starting Line. The latter calls for NGOs to be able to 'institute or support legal actions' for the enforcement of the Directive, which implies an independent right to bring actions without the need for an identified individual victim of discrimination. This could be particularly useful in tackling institutionalised forms of discrimination, which are the product of generalised practices, and consequently less amenable to individual challenge. For example, a higher rate of school exclusions for ethnic minority students provides prima facie evidence that the decision-making procedures are operating in a discriminatory fashion. Yet, in the absence of an obvious comparator, it may be difficult to establish discrimination in any individual case of student expulsion. The Racial Equality Directive, however, does not compel Member States to provide independent legal standing for NGOs. On the contrary, Article 7(2) only permits NGO intervention in litigation 'on behalf or in support of the complainant', thereby retaining the need for an identified individual.

Moreover, the Directive leaves it to national law to determine which NGOs have a 'legitimate interest' in legal standing. This could

50 See the submission by JUSTICE in House of Lords Select Committee on the European Union, 'EU proposals to combat discrimination (with evidence)', Session Report 1999-2000, 9th report, 16 May 2000, HL Paper 68, London: HMSO, at p. 110.

produce unacceptable variations between Member States in access to the law. For instance, one Member State could decide to restrict legal standing in employment cases to trade unions, while at the same time others permit human rights NGOs in general to support such cases. It should also be noted that the absence of any reference to public assistance with legal costs is another gap in the Racial Equality Directive when compared with the Starting Line.

> **Recommendation:** *NGOs should seek to ensure that national implementing legislation provides legal standing for all relevant organisations to bring cases both on behalf of complainants and in their own name.*

The reference to time limits in Article 7(3) is an addition in comparison with the Starting Line. It is not clear what role this paragraph serves other than to render more explicit principles which are already well established in the case law of the Court of Justice. Specifically, the Court has recognised that 'it is compatible with Community law to lay down reasonable limitation periods for bringing proceedings in the interests of legal certainty ...'.[51] In *Preston*, the Court indicated that a six month time limit for bringing claims of sex discrimination in remuneration was compatible with the principles of Community law, providing this was equivalent to similar actions based on rights conferred by domestic legislation.[52]Nonetheless, the Court will set aside time limits if these have the effect of rendering 'virtually impossible the exercise of rights conferred by Community law'.[53]

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51 par. 35, C-231/96, *Edis v Ministero delle Finanze* [1998] ECR I-4951.

52 pars. 34-35, C-78/98, *Preston and others v Wolverhampton Healthcare NHS Trust and others, Fletcher and others v Midland Bank plc,* judgment of 16 May 2000.

53 par. 16, C-208/90, *Emmott v Minister for Social Welfare and Attorney General* [1991] ECR 4269.

(b) Burden of proof

EU Racial Equality Directive: Article 8

1. 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.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Starting Line: Article 5

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 of discrimination of the kind referred to in Article 2(1), 2(2) or 2(3) has occurred, 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 no such discrimination has occurred. The plaintiff shall benefit from any doubt that may remain.

The core definition of the burden of proof provision is almost identical in both texts, reflecting the fact that it is derived from the 1997 Directive on the burden of proof in sex discrimination cases.[54] However, the Racial Equality Directive goes further than the Starting Line in paragraphs 2-5. Paragraph 2 is based on Article 4(2) of the burden of proof Directive. The Starting Line did not opt for this formulation, but instead included another provision which obliged

54 Council Directive 97/80 on the burden of proof in cases of discrimination based on sex, OJ [1998] L 14/6.

Member States to impose more specific rules to ensure full access to the information held by all parties to the dispute. Paragraphs 3 and 5 of the Racial Equality Directive are also drawn from the burden of proof Directive (Articles 3(2) and 4(3) respectively). Clearly, shifting the burden of proof in criminal law cases would be potentially in breach of the European Convention on Human Rights, in particular Article 6(2),[55] so this is relatively uncontroversial. Article 8(5) addresses those Member States where the obligation to prove the case does not rest with the plaintiff, but with another body, such as an investigating magistrate, or a body specifically responsible for adjudicating discrimination complaints – such as the Commissie Gelijke Behandeling in the Netherlands, or the Director of Equality Investigations in Ireland.

(c) Sanctions

The Starting Line is more specific and detailed in its definition of the

EU Racial Equality Directive: Article 15	Starting Line: Article 4(4)(b)
Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. [...	Any judicial remedy in respect of a complaint of racial or religious discrimination shall include adequate compensation for both pecuniary and non-pecuniary damages; there shall be no limitations on the ability of the court or other competent authority to award compensation or such other remedy as is provided for by national law.

sanctions which Member States must provide for a breach of the principle of equal treatment – focusing in particular on the need for financial compensation. In contrast, the Racial Equality Directive only states that Member States 'may' provide for financial compensation. Nonetheless, it can be anticipated that the Court of Justice will elaborate more fully the implications of Article 15. A similar situation exists in relation to the equal treatment Directive, which is even less specific than the Racial Equality Directive with regard to sanctions.[56] The

55 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

56 Article 6 states: Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment …to pursue their claims by judicial process after possible recourse to other competent authorities.

Court has adopted a purposive approach to the equal treatment Directive, based on its objective – 'real equality of opportunity' – and a consequent need to 'guarantee real and effective judicial protection and have a real deterrent effect on the employer'.[57] In this vein, the Court has declared that discriminatory dismissal can only be remedied by 'either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained'.[58] Such compensation must cover all losses in full, and include interest.[59] In relation to discrimination in access to employment, victims must receive some compensation, even where they would not have got the job in the absence of the discrimination.[60] It is to be expected that the same principles of effective judicial protection will be applied by the Court in any future case law on the Racial Equality Directive.

6. IMPLEMENTATION

The Racial Equality Directive prescribes various mechanisms through which its implementation will be controlled. The primary focus will naturally be on the 'bodies for the promotion of equal treatment' required in Article 13. It is also relevant though to consider the role assigned to the social partners and the NGO community. Finally, the Commission retains its oversight role, reinforced by a periodic reporting obligation.

57 par. 24, C-271/91, *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367.

58 par. 25, *ibid.*

59 par. 31, *ibid.*

60 C-180/95, *Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195.

(a) Bodies for the promotion of equal treatment

EU Racial Equality Directive: Article 13

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.

Starting Line: Article 4(4)(e)

In each Member State appropriate bodies shall be established to which complaints of any activities which are contrary to the principle of equal treatment as set out in Article 1(2) may be submitted; such bodies shall be required to investigate all complaints made to them and shall be granted all necessary powers to investigate any complaint; such bodies shall reach conclusions on all complaints, which conclusions shall be public, save that where appropriate the body may exclude from any public document information enabling identification of a complainant.

The Starting Line sets a number of basic requirements for the functioning of the bodies: (a) they will receive complaints; (b) they will investigate all complaints; (c) they may initiate investigations; (d) they will adjudicate on all complaints. In contrast, the Racial Equality Directive speaks only of the bodies 'providing independent assistance to victims of discrimination'. The generality of this provision is disappointing. For example, 'assistance' might only amount to information on how to bring legal proceedings. Whilst such information would be helpful, it continues to place a substantial burden on the individual to initiate the litigation, and to bear the responsibility for the financial costs of the action. Recital 24 goes a little further, referring to the provision of 'concrete assistance' to individuals – but the legal meaning of 'concrete' is not evident. With regard to the right of such bodies to

initiate investigations, the Directive is vague. The right to produce 'independent reports' and to make recommendations on 'any issue' should provide a legal foundation for insisting on an independent right of investigation for these bodies.

The weakness of Article 13 of the Directive is even more obvious when compared with the original text in the Commission proposal. This required Member States to establish 'independent' bodies with responsibility for 'receiving and pursuing complaints from individuals', as well as 'commencing investigations or surveys concerning discrimination'.[61] This model of an anti-discrimination body is already found in a number of Member States: the Netherlands, the UK, Ireland, Sweden and Belgium. Had the Directive maintained its original text, it would have placed an obligation on the remaining Member States to create new institutions, or significantly adapt existing bodies. As it stands, the final text is sufficiently general to suggest that many Member States can mostly continue with existing arrangements.

> **Recommendation:** *NGOs should seek to ensure that national implementing legislation provides for independent bodies to receive and pursue all complaints of racial and religious discrimination, including the right for the independent body to initiate investigations where it deems appropriate.*

(b) Social partners

In a departure from the equal treatment Directive, the Racial Equality Directive creates space for implementation through collective agreements between the social partners, both at the European and the national level. Article 11(1) requires Member States to support social dialogue, with a view to 'the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices'. Certainly, such agreements contain the potential to elaborate with more sophistication on the central concepts underlying the Directive. Harassment is one example of an area which will demand much closer attention if the formal legal provisions are to be put into practice with good effect. In the area of sexual harassment, the European Commission has already produced its own Code of Practice which explains in more depth what types of behaviour should be regarded as unacceptable, and what procedures employers will need to institute to ensure victims feel confident to report such behaviour.[62] The tenor of the Directive suggests that such codes should henceforth emanate from the social partners rather than the Commission. Nonetheless, it is worth recalling that the social

61 Article 12, Commission, *above*, n. 39.

62 Commission recommendation on the dignity of women and men at work, adopted 27 November 1991, OJ [1992] L 49/1.

partners' role will be mainly in relation to employment discrimination. The other areas covered by the Directive, such as health and education, will continue to require a more direct commitment from national and European regulatory authorities. Moreover, Member States remain responsible for guaranteeing the minimum rights provided by the Directive to all individuals. As is well established in European labour law, the failure of the social partners to implement EU legislation through collective agreements, or inadequacies in those agreements, will not be a valid defence for a Member State if it fails to guarantee in law the total implementation of the relevant legislation.[63]

63 C-143/83, Commission v Denmark [1985] ECR 427. See also, C-187/98, Commission v Greece [1999] ECR I-7713.

(c) Periodic review

EU Racial Equality Directive: Article 17

1. Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
2. The Commission's report shall take into account, as appropriate, the views of the European Monitoring Centre on Racism and Xenophobia, as well as the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Starting Line: Article 10

1. Member States shall undertake to submit to the Commission a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Directive to enable the Commission to draw up the report for the Council and the European Parliament:

(a) within one year following the expiration of the period of two years provided for in Article 9(1); and

(b) thereafter every two years.

2. To assist the Commission in drawing up the report for the purposes of paragraph 1, the Commission may request further information from non-governmental organisations.
3. In drawing up the report for the purposes of paragraph 1, the Commission may make suggestions and general recommendations based on the examination of the reports and information received from Member States.

Article 11

1. Within one year after the adoption of this Directive the European Monitoring Centre on Racism and Xenophobia shall specify standard criteria for annual monitoring of the performance by Member States of their obligations under this Directive.
2. Member States shall submit annual monitoring returns based on the specified criteria to the European Monitoring Centre, the first to be submitted one year after the expiration of the period of two years provided for in Article 9(1).

One of the primary functions of the Commission is, of course, ensuring the full enforcement of EU law. The Racial Equality Directive reinforces and systemises this role through the creation of a periodic reporting obligation. Whilst the regularity of the review is considerably less than recommended by the Starting Line, the formal recognition of the contribution to be made by NGOs is encouraging. Moreover, this supplements the requirement in Article 12 for Member States to encourage dialogue with relevant NGOs on the promotion of equal treatment. The Starting Line proposed a formal role for the Monitoring Centre in collecting data on the implementation of the Directive at the national level. This was developed further in the opinion of the Employment and Social Affairs Committee of the European Parliament, which detailed the types of information the Monitoring Centre should collect[64]. For example, the number of complaints received by the independent bodies, the number of complaints submitted to adjudication, the ethnic origin of the complainants, and the outcome of the complaints. Whilst these proposals have not survived in the final version of the Racial Equality Directive, this does not in any way prevent the Monitoring Centre from taking the initiative by itself to establish such a scheme.

Indeed, if one examines the regulation establishing the Monitoring Centre, such data collection clearly falls within its remit. Article 2(1) sets it the general aim of providing 'objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism'. Article 2(2)(a) specifies that the Centre shall 'collect, record and analyse data, including data resulting from scientific research communicated to it by research centres, Member States, Community institutions, international organisations… and non-governmental organisations'.[65] Hence, there are few legal barriers to the Monitoring Centre creating its own data collection system to monitor the operation and effect of the Directive. Obviously the Centre must avoid duplicating the review process to be conducted by the Commission, but the accumulation of statistical and other data on the functioning of the Directive is different in nature. Moreover, such activity will be necessary if the Centre is to be in a position to make a contribution to the review, as foreseen in Article 17 of the Directive. It would also provide the Centre with a transparent mechanism through which to demonstrate its purpose and utility.

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64 European Parliament, 'Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' [Buitenweg/Howitt] A5-136/2000, 16 May 2000, PE 285.903, at p. 56.

65 Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ [1997] L 151/1.

CONCLUSION

Taking a broad overview of the EU Racial Equality Directive and the Starting Line, it is reasonable to conclude that many of the core demands of the Starting Line Group have been addressed. The Directive does not simply forbid discrimination, but provides more detail on implementation and enforcement mechanisms than currently exists in respect of EU sex equality law. This can be attributed, at least in part, to the insistence of the Starting Line Group on the importance of ensuring the legislation facilitates practical utilisation by individuals and non-governmental organisations. When one explores the Directive in more detail, there emerge a variety of areas where its requirements are less rigorous, or less direct, than those in the Starting Line. This is not unsurprising, but it should remind national NGOs of the importance of attention to the exact provisions in national implementing legislation. In particular, the Directive frequently circumvents areas of disagreement between the Member States by devolving control to national law. For example, the definition of harassment, the application of the Directive to legal persons, and the organisations to receive legal standing. The discretion this accords to the Member States is undoubtedly in keeping with wider trends in EU law-making – in particular, the principle of subsidiarity. Respecting national legal traditions is not per se a negative aspect of the Directive. Indeed, probably implementing legislation will be more effective if it fits comfortably with the legal system in which it is located. Nonetheless, the risk entailed in granting such discretion is the emergence of diverse and inconsistent interpretations of the Directive. The trade-off between precision and discretion is a recurrent dilemma in EU law, but it reinforces the need for vigilance in monitoring how Member States transpose the Directive.

The absence of religion from the Directive is a fundamental difference between it and the Starting Line. The adoption of the framework Directive substantially reduces the gap in legal protection which could have emerged, however the inconsistencies between the two Directives will create future difficulties. For example, the requirement to establish bodies for the promotion of equal treatment is not found in the Framework Directive. Therefore, individuals who feel they have been the victims of religious discrimination may not be entitled to assistance in the same fashion as a victims of racial discrimination. Whilst the EU may eventually remedy this regulatory gap through additional Article 13 Directives, a swifter route to legal protection would be for national legislation to extend the rights conferred by the Racial Equality Directive to victims of religious discrimination as far as possible.

The protection accorded to third-country nationals is perhaps the most ambiguous aspect of the Directive. Yet, it remains of crucial

importance. In many Member States, a high proportion of the ethnic minority residents are also third-country nationals. Whilst naturalisation may be a long-term solution, immigration is a process which continues in Europe and therefore, discrimination against third country nationals is an issue which will persist. The Directive will doubtless make an important contribution, but there is a strong argument in favour of complementary measures which deal specifically with nationality discrimination. This was the approach taken by the Starting Line Group in 1998.[66] The Starting Line was accompanied by two further proposals. The first of these was a proposal for a Directive on the rights of third-country nationals in general – dealing with issues such as progressive access to the labour market, family reunion, free movement and non-discrimination. The second proposal sought to extend voting rights in municipal and European elections to third-country nationals with five years residence.

Guaranteeing equal treatment irrespective of nationality does not imply open borders and unregulated access to the EU labour market. Indeed, EU law already extends rights to non-discrimination in employment and social security to a range of third-country nationals by virtue of bilateral agreements.[67] However, the rights conferred by such agreements differ greatly. As a result, a hierarchy of third-country nationals emerges, cascading down from those with more extensive protection from discrimination (such as Norwegians or Turks), to those with more limited protection (such as Moroccans or Czechs), to those with little or no protection (such as Albanians or Indians). Therefore, a first step in reducing nationality discrimination would be to provide all third-country nationals with a common minimum level of protection. This would not only be more equal, it would also render the law more coherent and transparent.

Article 12 of the EC Treaty provides the legal foundation upon which such legislation could be based. This states:

> Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
>
> The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

Furthermore, Article 63(3)(a) extends the Community's competence to include 'conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence

66 Starting Line Group, *above* n. 40

67 See further, S. Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (1996) 33 *Common Market Law Review* 7-50.

permits, including those for the purpose of family reunion'. Also relevant is Article 137(3) which provides legislative powers in respect of 'conditions of employment for third-country nationals legally residing in Community territory'.

Taken together, these provisions remove any doubt as to the legal competence of the Community to legislate against nationality discrimination. Admittedly, Article 12 EC has not been previously deployed to deal with discrimination against (or between) third country nationals. However, the language employed in Article 12 EC is sufficiently open to facilitate its application to third-country nationals in the context of the EC Treaty's extended material scope following the Treaty of Amsterdam.

Despite its imperfections, the EU Racial Equality Directive marks the conclusion of the lengthy campaign for a Directive forbidding racial discrimination. Its adoption signifies a new chapter in EU anti-discrimination law – a step beyond the traditional focus on discrimination between women and men, and against EU migrants. If one considers the wide-ranging impact of the equal treatment Directive since its adoption in 1976, it is possible to appreciate the significance of the Racial Equality Directive. The role of the Union in combating sex discrimination is now almost taken for granted, and seen as a cornerstone of European social policy. A great volume of litigation has elaborated and expanded the effects of the equal treatment Directive within both the EU and the national legal systems. Similarly, our understanding of the Racial Equality Directive will probably only become clear in time as individuals and associations take the next steps in implementing and enforcing the rights which it confers. Sex equality law demonstrates that implementation is an ongoing and evolving process. Making the implementation of the Racial Equality Directive a success is the new challenge for the European Union.

ANNEX

ECRI'S GENERAL POLICY RECOMMENDATION NO 2

Specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level

The European Commission against Racism and Intolerance (ECRI):

- recalling the Declaration adopted by the Heads of State and Government of the member States of the Council of Europe at their Summit held in Vienna on 8-9 October 1993
- recalling that the Plan of Action on combating racism, xenophobia, anti-Semitism and intolerance set out as part of this Declaration invited the Committee of Ministers to establish the European Commission against Racism and Intolerance with a mandate, inter alia, to formulate general policy recommendations to member States
- taking into account Resolution 48/134 adopted by the General Assembly of the United Nations on 20 December 1993 on National Institutions for the Promotion and Protection of Human Rights
- taking into account also the fundamental principles laid down at the first International Meeting of the National Institutions for the Promotion and Protection of Human Rights held in Paris from 7-9 October 1991 (known as the "Paris Principles")
- recalling the different Resolutions adopted at the first and second European meetings of National Institutions for the Promotion and Protection of Human Rights, held respectively in Strasbourg on 7-9 November 1994 and in Copenhagen on 20-22 January 1997
- taking into account Recommendation N· R (85) 13 of the Committee of Ministers on the institution of the Ombudsman
- taking also into account work carried out by the Steering Committee for Human Rights (CDDH) relating to the establishment of Independent National Human Rights Institutions
- emphasising that combating racism, xenophobia, anti-Semitism and intolerance forms an integral part of the protection and promotion of fundamental human rights
- recalling the proposal of ECRI to reinforce the non-discrimination clause (Article 14) of the European Convention on Human Rights

- profoundly convinced that everyone must be protected against discrimination based on race, colour, language, religion or national or ethnic origin or against discrimination which might stem indirectly from the application of the law in these areas
- convinced of the necessity of according the highest priority to measures aiming at the full implementation of legislation and policies intended to combat racism, xenophobia, anti-Semitism and intolerance
- recalling that an effective strategy against racism, xenophobia, anti-Semitism and intolerance resides to a large extent on awareness-raising, information and education of the public as well as on the protection and promotion of the rights of individuals belonging to minority groups
- convinced that specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level can make a concrete contribution in a variety of ways to strengthening the effectiveness of the range of measures taken in this field and to providing advice and information to national authorities
- welcoming the fact that such specialised bodies have already been set up and are functioning in several member States
- recognising that the form such bodies might take may vary according to the circumstances of member States and may form part of a body with wider objectives in the field of human rights generally
- recognising also the need for governments themselves to provide information and to be accessible to specialised bodies and to consult them on matters relevant to their functions

recommends to the governments of member States:

1 to consider carefully the possibility of setting up a specialised body to combat racism, xenophobia, anti-Semitism and intolerance at national level, if such a body does not already exist

2. in examining this question, to make use of the basic principles set out as an appendix to this recommendation as guidelines and a source of inspiration presenting a number of options for discussion at national level.

APPENDIX TO ECRI GENERAL POLICY RECOMMENDATION NO 2

Basic principles concerning specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level

Chapter A: The statutes establishing specialised bodies

Principle 1

Terms of reference

1. Specialised bodies should be given terms of reference which are clearly set out in a constitutional or other legislative text.

2. The terms of reference of specialised bodies should determine their composition, areas of competence, statutory powers, accountability and funding.

Chapter B: Alternative forms of specialised bodies

Principle 2

1. According to the legal and administrative traditions of the countries in which they are set up, specialised bodies may take different forms.

The role and functions set out in the above principles should be fulfilled by bodies which may take the form of, for example, national commissions for racial equality, ombudsmen against ethnic discrimination, Centres/Offices for combating racism and promoting equal opportunities, or other forms, including bodies with wider objectives in the field of human rights generally.

Chapter C: Functions and responsibilities of specialised bodies

Principle 3

Subject to national circumstances, law and practice, specialised bodies should possess as many as possible of the following functions and responsibilities:

a. to work towards the elimination of the various forms of discrimination set out in the preamble and to promote equality of opportunity and good relations between persons belonging to all the different groups in society

b. to monitor the content and effect of legislation and executive acts with respect to their relevance to the aim of combating racism, xenophobia, anti-Semitism and intolerance and to make proposals, if necessary, for possible modifications to such legislation

c. to advise the legislative and executive authorities with a view to improving regulations and practice in the relevant fields

d. to provide aid and assistance to victims, including legal aid, in order to secure their rights before institutions and the courts

e. subject to the legal framework of the country concerned, to have recourse to the courts or other judicial authorities as appropriate if and when necessary

f. to hear and consider complaints and petitions concerning specific cases and to seek settlements either through amicable conciliation or, within the limits prescribed by the law, through binding and enforceable decisions

g. to have appropriate powers to obtain evidence and information in pursuance of its functions under f. above

h. to provide information and advice to relevant bodies and institutions, including State bodies and institutions

i. to issue advice on standards of anti-discriminatory practice in specific areas which might either have the force of law or be voluntary in their application

j. to promote and contribute to the training of certain key groups without prejudice to the primary training role of the professional organisations involved

k. to promote the awareness of the general public to issues of discrimination and to produce and publish pertinent information and documents

l. to support and encourage organisations with similar objectives to those of the specialised body

m. to take account of and reflect as appropriate the concerns of such organisations

Chapter D: Administration and functioning of specialised bodies

Principle 4

Composition

The composition of specialised bodies taking the form of commissions and the like should reflect society at large and its diversity.

Principle 5

Independence and accountability

1. Specialised bodies should be provided with sufficient funds to carry out their functions and responsibilities effectively, and the funding should be subject annually to the approval of parliament.
2. Specialised bodies should function without interference from the State and with all the guarantees necessary for their independence including the freedom to appoint their own staff, to manage their resources as they think fit and to express their views publicly.
3. Specialised bodies should independently provide reports of their actions on the basis of clear and where possible measurable objectives for debate in parliament.
4. The terms of reference of specialised bodies should set out clearly the provisions for the appointment of their members and should contain appropriate safeguards against arbitrary dismissal or the arbitrary non-renewal of an appointment where renewal would be the norm.

Principle 6

Accessibility

1. Specialised bodies should be easily accessible to those whose rights they are intended to protect.
2. Specialised bodies should consider, where appropriate, setting up local offices in order to increase their accessibility and to improve the effectiveness of their education and training functions.

Chapter E: Style of operation of specialised bodies

Principle 7

1. Specialised bodies should operate in such a way as to maximise the quality of their research and advice and thereby their credibility both with national authorities and the communities whose rights they seek to preserve and enhance.
2. In setting up specialised bodies, member States should ensure that they have appropriate access to governments, are provided by governments with sufficient information to enable them to carry out their functions and are fully consulted on matters which concern them.
3. Specialised bodies should ensure that they operate in a way which is clearly politically independent.