

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.10.2006
COM(2006) 643 final

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

1. INTRODUCTION

EC legislation was adopted six years ago with a view to tackling discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation. This legislation has had a major impact in raising the level of protection against discrimination for people throughout the EU. However, there have been delays in transposing these rules into national law in some Member States, and additional efforts are needed to ensure effective implementation and enforcement of the legislation.

This report focuses on Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[1]. This Directive was the first adopted unanimously by the Council under the new Article 13 of the Treaty establishing the European Community which entered into force on 1 May 1999. It was part of a package of proposals put forward by the Commission in November 1999, which included a proposal for a second Directive on discrimination on grounds of religion and belief, age, disability and sexual orientation, and an action programme providing financial support for activities to combat discrimination.

Rather than give a detailed account of the transposition of the provisions of Directive 2000/43/EC in the Member States, the aim of this report is to flag up certain aspects that are particularly problematic or important and to identify good practice. It concentrates on the impact of the Directive, transposition-related problems, dissemination of information, the enforcement of rights, the role of equality bodies, the social partners and NGOs, positive action and recommendations for the future.

In accordance with Article 17 of the Directive, the Member States had to communicate to the Commission the information necessary for this report by 19 July 2005. Despite a reminder in May 2005, many Member States missed the deadline, and some did not respond at all. By December 2005 Austria, Poland, the UK, France, Germany, Lithuania and Portugal had provided no information to the Commission, nor had the social partners, apart from the ETUC. The Commission consulted the European Monitoring Centre on Racism and Xenophobia (EUMC), the social partners[2] and civil society organisations[3]. A number of national equality bodies also contributed information.

2. THE IMPACT OF DIRECTIVE 2000/43/EC

Whilst Directive 2000/43/EC built on some of the concepts of EC legislation prohibiting discrimination on grounds of sex and nationality, the final text adopted by the Council was innovative in many ways. Besides covering **all** persons, the Directive extended the scope of protection against discrimination well beyond the traditional area of employment into fields such as social advantages, health care, education and, crucially, access to goods and services

---

1 Official Journal L 180, 19.07.2000, p. 22.

2 The European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP), the Confédération Européenne des Cadres (CEC), the Union européenne de l'artisanat et des petites et moyennes enterprises (UEAPME) & EUROCADRES (representing managerial staff).

3 The Social Platform of Social NGOs, the European Network against Racism (ENAR), the European Disability Forum (EDF), the International Lesbian and Gay Association (ILGA), the AGE Platform and the European Roma Rights Centre.

which are available to the public, including housing. In some Member States issues linked to the division between the public and private sphere exist, and perceptions of interference in freedom of decision or contract. Where goods, services or jobs are advertised, even if it is only by way of a notice in a window, for example, then they are available to the public and consequently fall within the scope of the Directive.

Directive 2000/43/EC contains clear and detailed definitions of discrimination. While the definition of direct discrimination set out in the Directive was inspired by legislation in the field of sex discrimination[4], the definition of indirect discrimination was drawn from the case law of the European Court of Justice (ECJ) relating to the free movement of workers[5]. Both harassment and an instruction to discriminate are deemed to be types of discrimination. It should be noted that the requirement to provide protection against victimisation, a crucial element in allowing individuals to assert their rights, applies to all four concepts of discrimination - direct or indirect discrimination, harassment or an instruction to discriminate.

The Member States had to introduce the detailed provisions set out in the Directive concerning the enforcement of rights, including the requirement that the burden of proof rests with the defendant once the alleged victim has presented facts from which discrimination may be presumed. Whilst Member States were familiar with this obligation in terms of discrimination between men and women in the employment field, Directive 2000/43/EC extends the rules on the burden of proof into new areas such as access to goods and services.

The Directive was innovative in that it obliged the Member States to create a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (if they did not already have one). Several Member States took the very positive step of extending the remit of their equality bodies, so that they could deal with discrimination based on grounds other than race and ethnic origin (see below, Section 3.2, on the role of equality bodies.).

All the Member States, even those with long-standing race discrimination legislation, had to make some changes to national law to comply with the Directive (for example, the UK amended its definitions of indirect discrimination and harassment). Some Member States brought in new, comprehensive anti-discrimination legislation, although anti-discrimination measures can be found in many Member States' constitutional provisions as well as in both civil and criminal legislation, which can make it difficult to identify the applicable procedure.

For some of the EU 10, the idea of protecting individuals against discrimination on the grounds of "racial or ethnic origin" was very different from their policies aimed at recognising and protecting the rights of "national" minorities[6].

Other problems identified include fundamental issues such as definitions of direct and indirect discrimination and harassment in national law, which in some cases differ considerably from those given in the Directive. It appears that some Member States allow exceptions to the principle of non-discrimination which are wider-ranging than those permitted under the Directive. There is a series of problems related to the enforcement of rights of victims of

---

4 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ L 14 of 20/1/1998, p.6).

5 Case C-237/94, OFlynn, ECR 1996 I-02617 – Directive 2002/73/EC has now incorporated this definition in the sex discrimination field (OJ L 269 of 5.10.2002, p. 15).

6 For example, the Hungarian and Italian minorities in Slovenia.

discrimination, such as incorrect transposition of the rules on the burden of proof, the right of associations to help victims of discrimination, and sanctions and remedies.

In several cases, Member States were either very late in communicating to the Commission the measures transposing Directive 2000/43/EC into national law, or did not provide any information at all. The Commission therefore initiated infringement procedures under Article 226 of the EC Treaty against these States, most of which were resolved as the necessary legislation was brought into force. Only four Member States were referred to the European Court of Justice[7], which found them in breach of their Treaty obligations for not having transposed the Directive fully into national law. Two Member States (Germany and Luxembourg) still have not submitted to the Commission any legislation transposing the Directive.

The Commission is examining the national legislative measures notified by the Member States, in order to assess their conformity with the Directive and to ensure that victims of discrimination can exercise the rights given to them. It will then take the necessary action to ensure full and correct transposition.

Further information on the transposition of Directive 2000/43/EC in each Member State, along with links to publications, national legislation and the equality bodies is available at the following address (http://europa.eu.int/comm/antidiscrimination).

3. KEY ISSUES

3.1 Right of redress

It is clear from the information provided by NGOs and governments that many victims of discrimination do not proceed to court with their complaints because of the cost and for fear of victimisation. Victims of discrimination are more likely to turn to an NGO or an equality body, from which they can usually obtain information and advice quickly and free of charge.

Article 7(2) of the Directive provides that associations must be allowed to help victims of discrimination take cases to court, but that the Member State can determine which associations have a legitimate interest in taking such action. In most Member States, associations are able to help victims or represent them in court, but some countries have laid down strict rules governing the activities of associations in this area.

It appears from the statistics provided by the Member States and equality bodies that most complaints of discrimination before national courts and/or equality bodies involve employment, followed by the provision of goods and services and housing. In the majority of the EU 10, statistics showed the Roma as the group most represented in complaints. Complaints from the travelling community were also numerous in Ireland. The number of cases taken up by the Roma indicates that the Directive is being successfully used to challenge discrimination against that group.

[7] Judgment against Luxembourg in case C-320/04 and Finland in case C-329/04 on 22.02.05, judgment against Germany in Case C-329/04 on 28.04.05, judgment against Austria in case C-335/04 on 4.05.05.

3.2. Equality bodies

Although a number of Member States already had bodies for the promotion of equal treatment, most of them either created a new body or increased the powers of the existing one. Some Member States (Belgium, Cyprus, Sweden, Ireland and the Netherlands) have gone beyond the requirements of Directive 2000/43/EC in setting up equality bodies that deal with *all* the grounds of discrimination covered by EU anti-discrimination law and/or more general human rights instruments. The Directive requires, as a minimum, that the body be able to give independent assistance to victims of discrimination, conduct independent surveys concerning discrimination, publish independent reports and make recommendations on discrimination issues.

The equality bodies in the Member States include Ombudsmen, Labour Inspectorates and Commissions, which sometimes share the tasks set out in the Directive. For example, in Greece the Labour Inspectorate is responsible for the promotion of equal treatment in the employment field, while the Ombudsman deals with non-employment matters, drafts reports and makes recommendations. In Cyprus, Slovenia and Austria, the task of assisting individual victims of discrimination is entrusted to a special legal representative rather than the equality body.

From the information provided, it is clear that the equality bodies give legal advice to individual victims of discrimination, but they only support a small number of cases before the courts. These are chosen on the basis of the importance of the legal point at issue, the availability of other help for the victim (for example, from a trade union or an association) and of course the financial and human resources of the equality body. Supporting only strategic litigation is a clear aim of a number of equality bodies. An additional function performed by some equality bodies is that of giving opinions, at the request of individuals or legal persons, on whether a particular practice complies with national non-discrimination law. In most countries the decision or opinion of the equality body does not have legally binding force, but seems by and large to be followed. The individual can always go before the courts to obtain a legally binding decision. In Denmark, if the equality body finds that there has been unlawful discrimination it can recommend the granting of legal aid so that the complainant can go to court without bearing a financial burden.

In some Member States, the emphasis is on promotion of equal opportunities and prevention of discrimination, rather than legal support for individual complainants. The Finnish Ombudsman for Minorities is an example of an equality body involved in a wide range of awareness-raising activities. In Belgium, Cyprus and the UK, specific guidance for employers is published by the government and/or the equality body, not only to help them fulfil their legal obligations, but to make them more generally aware of how to deal with discrimination issues.

A relevant issue considering the capacity of an equality body to function is the way it is funded (financial and human resources allocated to equality bodies vary hugely across the Member States). Another issue is specific to Member States which have federal and regional governmental structures. If the equality body only exists at one of these levels, it may be powerless to act on matters falling within the other spheres of competence.

3.3. Dissemination of information

The importance of information on the right to non-discrimination was a key finding of the public consultation organised by the Commission in 2004 in connection with the Green Paper on *Equality and non-discrimination in an enlarged EU*[8]. There is little point in protecting legal rights if people do not know about them, and this is recognised in Article 10 of the Directive, which requires the Member States to bring to the attention of all persons concerned the provisions of national law adopted pursuant to the Directive.

There is insufficient information about the way in which this obligation has been fulfilled. However, a number of interesting initiatives were undertaken, including a telephone hotline in the Netherlands. A notice about the new rights had to be put up in every workplace in Portugal. In the information they provided to the Commission, the Member States pointed to the Community Action Programme to combat discrimination, and in particular its information campaign. Under this programme, national conferences on the fight against discrimination were held in a number of Member States, brochures, CDs and leaflets were published, a "diversity truck tour" took place and other activities were financed, such as the Rome Marathon, the theme of which was "I'm running against racism". The website of the Finnish information campaign has proved popular, with 10,000 hits a month. The Commission has funded a number of initiatives aimed at training NGOs, lawyers and judges from the Member States (and the candidate countries) on the anti-discrimination Directives.[9]

3.4. The role of the social partners & NGOs

The Directive stresses the role the social partners can play in promoting equal treatment. Article 11 requires the Member States to promote dialogue between the two sides of industry to foster equal treatment, including through collective agreements, codes of conduct and the exchange of good practice. It is clear, from the information provided by the Member States that this obligation is met in different ways. Some Member States (such as the Netherlands) have subsidised projects run by trade unions in cooperation with members of ethnic minorities, or with the aim of promoting diversity. In Belgium, the inclusion of non-discrimination clauses in collective agreements is a well established tool for fighting discrimination. In Italy, the equality body UNAR is providing training for representatives of employers' associations and trade unions geared to combating discrimination and encouraging diversity.

In a more general sense, the role of the social partners in the negotiation of anti-discrimination policy and legislation is well established in some Member States, with long-standing consultation structures in place, such as the Danish and Latvian tripartite systems. In other countries, although there may be an obligation to consult the social partners on social legislation, they are not actively involved in the promotion of non-discrimination policy.

The ETUC notes a trend among governments to favour dialogue on discrimination issues with NGOs rather than the social partners, although from the information received from the Member States the picture is somewhat mixed.

---

8 COM(2004) 379 final.

9 See for example www.era.int.

Trade unions also have a clear role in helping their members with complaints of discrimination under Article 7(2) of the Directive. In Portugal, the right to represent a worker in a non-discrimination case is limited to the trade unions, and in Sweden the trade unions are the main entity entitled to take legal action.

3.5. Gender mainstreaming and multiple discrimination

Although the Commission specifically asked the Member States for information on gender mainstreaming (in accordance with Article 17(2) of the Directive), not many Member States responded. The ETUC noted that the Member States did not seem to have dealt systematically with gender mainstreaming in their transposition of Directive 2000/43/EC. In Slovenia a gender discrimination expert was involved in the drafting of the Equal Treatment Act, and in Denmark the Minister for Gender Equality promoted equality among ethnic minorities in 2005.

The AGE Platform drew attention to the risk of multiple discrimination faced by older women from ethnic minorities, and ILGA was particularly concerned about the complex overlap between religious identity and sexual orientation. The EUMC pointed to the trend to create single equality bodies dealing with all the grounds of discrimination, which has the advantage of being better able to deal with multiple discrimination, but entails the risk that some grounds of discrimination might be neglected if resources are not increased. The EUMC has looked primarily at the impact of the Directive in the field of access to health care by Roma women.

The Commission is aware of the largely untackled problem of multiple discrimination and has launched a study on the subject as part of its work programme for 2006, which will look at what is being done in the Member States in this area and make recommendations.

3.6. Positive action

As the Commission stated in its 2005 Communication on non-discrimination and equal opportunities for all[10], the long-standing and persisting disadvantages experienced by some groups are such that a legal right to non-discrimination is not sufficient, and positive measures may be necessary to improve equality of opportunity.

Article 5 of the Directive provides that, 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. In this respect, it is worthwhile stressing the difference between positive action measures, which are allowed, and so-called "positive discrimination" measures, which are not compatible with the Directive.

On the one hand, positive action measures aim to ensure full equality in practice by preventing or compensating for disadvantages linked to having a certain racial or ethnic origin. These measures may include, for example, providing specific training to people belonging to groups that do not usually have access to such training, or taking particular steps to ensure that certain racial or ethnic groups are fully informed about job advertisements, including, for example, publishing adverts in publications targeting these groups.[11] On the

---

[10] COM(2005) 224.

[11] See, by analogy, the judgment of the European Court of Justice of 29 March 2000 in case C-185/97, Coote.

other hand, "positive discrimination" measures give an automatic and absolute preference (for example in access to employment) to members of a particular group over others for no other reason than belonging to that group.

Attitudes towards positive action vary hugely across the Member States. In the Netherlands it is only allowed where there is evidence of structural discrimination on grounds of sex, race and disability. In Slovakia positive action is seen specifically as a means of tackling the social exclusion of the Roma, a controversial approach which was challenged before the Constitutional Court and found to be unconstitutional[12]. A programme of positive action for the Roma is also in place in Spain. In Finland positive action is specifically recognised for the Sami people. ENAR has called for strengthening of the provisions on positive action, making it mandatory for the most vulnerable groups. In Hungary, special scholarships are awarded to help Roma students in secondary and higher education.

In a number of Member States (Czech Republic, Finland, Ireland and Cyprus), special measures are being used in the specific context of anti-discrimination and diversity training for the police. The concept of positive promotion of equality is applied in some countries. In both the UK and Finland, public authorities have a statutory duty to actively promote equality. Under Irish case law, employers may have to take positive steps to ensure that they do not discriminate against particular employees on grounds of race, for example where the employees' linguistic and/or cultural background might cause them difficulty in understanding their rights[13].

CONCLUSION

Directive 2000/43/EC represents a major step forward in the fight against racial discrimination across the EU. Although all the Member States already had some sort of legal requirement in respect of equality and non–discrimination, for most of them the transposition of Directive 2000/43/EC required fairly extensive changes to existing legislation, or whole new Acts. This may explain the lateness with which many of the Member States transposed the Directive, but most of them have now done so.

The new legal framework has been in force for just over three years, which is not really long enough to evaluate its full impact or potential. So far, no cases have been referred by national courts to the European Court of Justice under the preliminary ruling procedure, and it is only the ECJ can give definitive guidance on how to interpret the provisions of the Directive. Future judgments will help the Member States to provide clear and uniform protection against discrimination throughout the European Union.

Article 17 of Directive 2000/43/EC states that the European Commission's report on the application of the Directive "shall include, if necessary, proposals to revise and update this Directive". The Commission does not currently see a need to come forward with such proposals. It has reached this conclusion on the basis of the lack of experience with implementation of the Directive since its entry into force and the lack of case law from the ECJ.

The challenge for the coming years will be to ensure the full and effective transposition, implementation and enforcement of Directive 2000/43/EC. This will entail the establishment

---

12 Judgment of 18.10.2004 (PL.US.8/04).

13 Campbell Catering Ltd v Rasaq.

of mechanisms and methods for observing and reporting on the impact of national implementing measures. In this context, it will be important to develop the statistical basis and other indicators. Yet the scarcity of ethnic data in most Member States might hinder proper monitoring of the application of Community legislation.

There have been objections to the collection of such data on the grounds that it would breach the provisions of the EU Data Protection Directive[14]. This does not reflect the true situation. The Directive generally prohibits the processing of sensitive personal data. However, certain exemptions to this rule are provided for, including where "*the data subject has given his explicit consent to the processing of those data"* [15]*;* or "*processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment"* [16]. Furthermore, *"subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions"* [17]. Thus, it is for the Member States to decide whether or not ethnic data should be collected to produce statistics for combating discrimination, provided that the safeguards set out in the Data Protection Directive are respected.

The Commission also recognises that legislation alone is not enough to prevent discrimination and to promote equality. It has set out a number of proposals for further action in this area in its Communication *A Framework Strategy on Non-Discrimination and Equal Opportunities for All* adopted in June 2005[18]. In particular, 2007 has been designated as the European Year of Equal Opportunities for All, a very effective way of raising awareness of the right to non-discrimination, and a catalyst for action at national level. Properly implemented and enforced legislation, combined with complementary policy measures at national and EU level, is the key to reducing discrimination on grounds of racial and ethnic origin.

---

14 Directive 95/46/EC, OJ L 281 of 23.11.1995, p. 31.
15 Idem, Article 8 (2) a).
16 Idem, Article 8 (2) b) See also Article 8 (4).
17 Idem, Article 8 (4).
18 COM(2005) 224 final of 1 June 2005.