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Note for the Hearing on the Non-Discrimination Directives

This briefing note offers general legal and policy oriented perspectives in response to a questionnaire drafted by the European Parliament. Its goal is not to provide comprehensive EU-wide responses that integrate the experiences of all the 27 different Member States. Rather, it aims at providing both conceptual and practical considerations in view of the European legal framework and its operation at both EU and Member State level. In line with the subject of the hearing, this briefing note limits its reflections to the Race and Ethnic Origin Directive 2000/43 and the Framework Directive 2000/78 (hereinafter: the 2000 Directives).

Question 1. Do you think the implementation of the antidiscrimination directives can be qualified as a success so far?

1. Formal Transposition Achieved

It is well known that the transposition of the 2000 Directives into national law has been a rough ride. Many Member States were either very late in communicating to the Commission their transposition measures or did not provide any information at all. The Commission has had to start infringement procedures against many Member States. However, most of these procedures were apparently resolved and only a handful of Member States have been referred to the Court of Justice.¹

The difficulty in realizing a pan-EU transposition of the 2000 Directives was to be expected. Both the Race and Ethnic Origin Directive 2000/43 and the Framework Directive 2000/78 were truly groundbreaking and innovative in a variety of ways, much more than previous European antidiscrimination laws. The Framework Directive has lifted equality in employment beyond the realm of gender towards much more sensitive and complex issues such as age, disability, and religion. The Race and Ethnic Origin Directive has extended the scope of protection against discrimination well beyond the traditional area of employment, to such fields as healthcare, education and access to publicly available goods and services. This breakthrough in protected grounds and in material scope was clearly no spontaneous match for the existing level and diversity of experiences and traditions at Member State level.

2. Effective Implementation is a Challenge

While the transposition process has proven predictably difficult, it is fair to say that an assertive European Commission has pushed this process to a satisfactory result. However, it is crucial to understand *that formal transposition into national law is by no means equal to effective implementation of the 2000 Directives*. Any antidiscrimination legislation is essentially an instrument, a legal tool that seeks to induce societal change but does not itself realize the desired change. To ensure effective implementation Member States should not only transpose but also promote the activation of the transposed directives by the different relevant actors.

Oral communication to the author – September 2007.

This is especially important for the 2000 Directives because of their innovative nature and because of their notorious flexibility in substance and procedure (see Question 2).

The combination of innovation and flexibility seriously compromises the potential of the 2000 Directives and their transpositions to achieve results on their own. Although comprehensive surveys in this respect are lacking, it is also clear that the difficulties encountered in the transposition of the 2000 Directives into national law may lead to situations where the national governments see transposition not only as necessary but also as sufficient. This could be devastating for the eventual impact of these Directives.

Implementation is a legal issue, since Member States have a Treaty duty to ensure the effective implementation of EC law. Beyond formal transposition, however, it is first and foremost a policy issue that rests upon the national political will to turn textbook law into action through such measures as dissemination programmes, awareness programmes, information programmes, outreach programmes etc. As long as this national will is not mobilized across the EU it is impossible to declare a successful implementation of the 2000 Directives.

Question 2. What are the deficiencies of the antidiscrimination directives? Where do you see a potential for improvement?

1. Vagueness and Flexibility

The main deficiency of the 2000 Directives is their vagueness and flexibility. European directives in general only seek to direct Member State policy without regulating it as such. This makes directives intrinsically prone to vagueness and flexibility. The 2000 Directives have turned this intrinsic characteristic into an art form. The general definitions of discrimination are clear enough but they essentially codify the already existing case-law of the Court of Justice in gender. Beyond general definitions, vagueness and flexibility abound.

The 2000 Directives' essential concepts such as "race" or "ethnic origin", "disability", "reasonable accommodation", "religion" or "belief" are simply undefined and therefore remain open ended. The prohibition of age discrimination in employment is coupled with a series of broad exceptions that make its true meaning unpredictable at best. Different protected grounds receive different standards of protection, resulting in a complicated mishmash that defies systematic development.

Vagueness and flexibility have two crucial implications. First, they limit the 2000 Directives' potential to stimulate and coordinate the legislation and actions of Member States in the fight against discrimination. This further exacerbates the issue of effective implementation which is discussed above. Second, they require a battery of case-law to define the bare meaning of the Directives' basic concepts. It should indeed be stressed that, in accordance with well established case-law from the Court of Justice, all the main concepts in the 2000 Directives are European and not national concepts, notwithstanding their utter lack of definition in the Directives. The void of clear concepts in the Directives themselves needs to be filled by the Court of Justice. Without defining case-law from the Court of Justice the 2000 Directives in effect remain largely impotent to impose a true European agenda on the Member States.

However, the development of Court of Justice case-law is a gradual and slow process. It takes typically a couple of decades before a comprehensive body of cases enables an initially vague directive to become sufficiently clear and precise. The Court of Justice has so far received less than ten cases on the 2000 Directives. It is therefore likely that the 2000 Directives will only achieve a real framing force over time.

2. Weak Instruments for Activation through Litigation

Litigation is a useful instrument to ensure the effectiveness of antidiscrimination legislation, for essentially three reasons. First, in the absence of spontaneous changes litigation can be the lever to force the societal and attitudinal changes that the antidiscrimination legislation seeks to achieve. Second, litigation allows for a decentralized enforcement of antidiscrimination, giving purported victims the opportunity to take the initiative personally. This is particularly important since open and direct discrimination is disappearing from our societies. Indirect and hidden discriminations are the most problematic and often need to be established through individual experience. Third, and especially important for the 2000 Directives, litigation helps to determine the exact meaning of antidiscrimination legislation.

Given the importance of litigation it is a pity that EC antidiscrimination law in general and the 2000 Directives in particular only contain a minimal European framework for enforcement. There are common rules or principles on access to court, sanctions, burden of proof and victimization but the concretization of these remains at the discretion of the different Member States. As a result, EC law lacks the instruments that have made litigation successful instruments of change in other countries with broad antidiscrimination statutes: a system for class action, a single competent body to develop guidelines and pursue cases, and a system of sanctions with financial consequences that make litigation a realistic option. By limiting itself to a vague statutory framework while denying citizens effective tools for its definition through litigation, the EU is essentially abandoning the realization of its own antidiscrimination agenda to the vagaries of national policies and to the idealism of the Don Quichotte litigant.

Question 3. Is there enough monitoring by the European Commission and the Member States concerning the implementation of the directives?

As indicated above, the Commission has lived up to its institutional role by actively pursuing the actual transposition of the 2000 Directives into national law. Moreover, a variety of initiatives and reports, either from the Commission or from Commission appointed experts, have disseminated both factual and legal information on the application of the 2000 Directives at Member State level, especially in the context of the 2001-06 Community Action Programme to Combat Discrimination. Given the institutional position of the Commission and its limited operational capacity, it is fair to say that the European Commission is a driving agent for the pan-European development of the 2000 Directives.

However, the effectiveness of the Commission's actions is of course limited by the intrinsic nature of the 2000 Directives which, as indicated above, leave much leeway for interpretation and for Member State action or inaction. This in turn leaves much room for Member State discretion in fulfilling the Directives' obligation to report to the Commission "all the information necessary for (...) a report (...) on the application".

The Commission's agenda is also set by the availability and the quality of Member State information and data on the implementation of the 2000 Directives (see Question 4).

Given the early stage of the 2000 Directives which have just recently been integrated into the national law of the Member States, it is appropriate to state that a genuine understanding of their concrete application across the EU is still in its infancy. Among the main challenges for good monitoring of the Directives' implementation the following can be highlighted:

- Sufficiently clear and uniform definitions of the principles and notions around which the reporting is constructed.
- Concrete translation and application of the Directives' provisions into a comprehensive set of issues, practices, and supporting measures, for the purpose of European wide reporting.
- Availability of reliable and sufficiently uniform data at the level of all the Member States (see Question 4).
- Member State investment into information gathering, capacity building, and careful reporting towards the Commission.

Question 4. Is there enough data easily available on discrimination cases at the workplace (for instance at the hiring process)?

The short answer to this question is an unequivocal "no". The reasons are multiple and complex and have to do, both with data collection on discrimination in general and with data reporting on workplace discrimination in particular.

1. Data Collection: from Neglect to Necessity

The systematic collection of objective, reliable, and uniform data is obviously essential to understand discrimination and to combat discrimination effectively in practice. However, it is a measure of the European Union's *formal and legalistic approach to non-discrimination* that data collection has remained a side show for decades. Even the 2000 Directives do not impose data collection on the Member States.

The traditional neglect of data collection in relation to the fight against discrimination has several causes. Many cases of discrimination are hidden or implicit. It is therefore all but impossible to develop anything more than a limited and targeted statistical appraisal. Discrimination is thus often hard to establish objectively and therefore hard to measure reliably, especially in the presence of elastic concepts such as "race", "disability", or "religion". In the absence of clear and uniform European concepts, it is exceedingly difficult to ensure comparable data collection in the different Member States. Member State traditions moreover are not always supportive of data collection. Monitoring discrimination through data collection indeed presupposes the official and systematic profiling and classification of the citizenry, which some Member States simply find repulsive, inimical to the constitutional neutrality of the state or downright illegal. The issue of privacy protection is a further concern in developing comprehensive schemes for data collection.

The underdevelopment of data collection on discrimination is a primary threat to the future of the 2000 Directives. If these vague and mouldable Directives are to sustain a coordinated European progress towards non-discrimination, it is widely believed that coordinated data collection will be essential. At the same time, the development of data collection will serve *a less formal and a more substantive approach to non-discrimination that seeks to promote and assess effectiveness and results*. The priorities of this development are:

- A supportive legal framework, both at EU and at Member State level, that allows data collection while setting clear limits and protections within the confines of privacy law.
- An operational framework for the collection of objective, reliable, and comparable data for the different Member States, in cooperation with the different actors on the field (employers, social partners, civil society etc.).
- Data collection should not be limited to official statistics but should include complaints data and research evidence.
- Uniform definitions, classifications, and common methods of identification.
- Coordination between national and European agencies or authorities.

The EU has taken the first steps in this strategy by establishing the European Agency for Fundamental Rights (FRA), as a successor to the more limited European Monitoring Centre on Racism and Xenophobia. The FRA may serve as useful European platform for effective and coordinated data collection if it is supported by a real European strategy that incorporates the priorities stated above.

2. Workplace Discrimination Data

Very few Member States have reliable micro data on workplace discrimination, certainly beyond the case of gender. Statistical analysis about workplace discrimination is mostly done by the proxy of *general labour market data*. The overall unemployment rate for immigrant populations, for instance, is used as an indication for probable widespread racial discrimination at the micro level of the workplace. Such rough approximations of the macro level and the micro level are problematic since they do not take into account the many non-discriminatory variables that may influence the different outcomes at macro level.

The lack of reliable workforce data is especially relevant since statistical evidence lies at the heart of proving the archetypical claim of indirect discrimination in the employment context. Indirect discrimination is indeed deduced from the statistically negative impact of ostensibly neutral provisions, criteria or practices on the protected group. The dearth of statistical data is probably one of the reasons why the 2000 Directives, like the Court of Justice before them in the context of gender, allow indirect discrimination to be proven from the mere *potential impact* of an otherwise neutral provision, criterion or practice.

The prohibition of *potential discrimination* is a neat legal trick that bridges the stated gap between macro and micro data. It allows plaintiffs to use macro data to assume indirect discrimination at the micro level of their particular claim, because the macro data suggest at least a potential discrimination at micro level.

The use of a degree or a language requirement at the hiring stage (micro level), for instance, then becomes indirect race discrimination at the workplace simply because of its potential and theoretical effect on race, given the overall underperformance of immigrant populations in the educational system (macro level). Such constructions are clever tools to circumvent the lack of statistical data but they can hardly be seen as reliable detectors of workplace discrimination.

The lack of reliable workplace data therefore eventually works to the detriment of individual employers who can be sued on the basis of mere societal data. A better way ahead is the development of systematic *diversity reporting* by the employers themselves. Diversity reporting has proven successful in the UK and in the Netherlands. It is in line with a proactive, positive and non-litigious application of antidiscrimination laws. It obviously needs to be constructed in accord with privacy rules, which the existing experience has shown to be possible.

Question 5. Is redress easily attained in the different Member States for problems individuals face?

Enforcement and redress are essentially the purview of national law, given the limited guidelines offered by the EC's antidiscrimination directives and by the case-law of the Court of Justice. Under the current standard of EC law, which the 2000 Directives have failed to improve, Member States remain largely free to determine the type and level of redress for the victims of discrimination. Access to court and "effective, proportionate and dissuasive sanctions" are guaranteed by EC law. But the Court of Justice accepts limited financial compensation as an adequate sanction, leaving the potential plaintiff often with little incentive to risk job and fortune for a court case that is likely to be complex and difficult to prove.

In practice therefore, actual redress for the victims often faces genuine hurdles such as the complexity of antidiscrimination law, the short time limits for bringing cases, the cost of litigation, the duration and the complexity of the court procedures, the limited compensation, the overall weakness of the instruments for litigation as described in Question 2, and the general absence of a litigation culture regarding discrimination issues.

Fear of victimization, even though victimization is legally forbidden, may also deter purported victims from seeking effective redress. Purported victims of discrimination are more likely to turn discretely to an NGO or to an equality body than to proceed openly with direct conflict and a public court case.

Question 6. What problems and forms of discrimination (e.g. indirect discrimination) do (potentially) discriminated groups face in the working environment or hiring process and what concrete measures can be taken in order to avoid them?

Work related discrimination, whether direct or indirect, systemic or accidental, conscious or unconscious, can of course manifest itself in countless of ways. The following table gives a sample of the variety of potentially problematic criteria or practices, combined with an indication of the group that could primarily suffer their adverse effects, whether directly or indirectly.

Recruitment, Selection, and Promotion					
Style and channels for dissemination of job vacancies	x	x	x	x	x
Explicit or implicit use of selection criteria (flexibility, languages, educational level, experience, appearance, gender, age, nationality, ...)		x	x	x	x
Type of selection tests and questions		x		x	x
Compensation and Benefits					
Flexibility	x	x	x	x	
Training	x			x	x
Overtime compensation	x	x	x	x	x
Age or seniority	x	x		x	x
Family situation	x	x		x	
Blue collar / white collar distinctions	x				x
Part time / full time		x			
Employment Conditions					
Clothing requirements	x	x	x		x
Working time	x	x	x	x	
Holiday periods and official holidays			x		
Dismissal					
Ill health		x		x	
Absences	x	x	x	x	x
Age or seniority related rights	x	x		x	x
Early retirement		x		x	

What is clear from the above is the wide range of actually or potentially discriminatory criteria, provisions or practices, even for ostensible benign and usual practices. The essence of human resources is to differentiate between individuals and between groups. The proliferation of protected grounds, combined with the technique of both indirect discrimination and potential discrimination (see Question 5) could inspire many a potential claim in the creative mind.

Reality however is still somewhat more prosaic, given the obstacles to litigation (Question 2) and the preventive effect of antidiscrimination legislation on human resources policies (Question 7).

Question 7. What are the companies' HR management practices regarding discrimination and the obligations that result from the implementation of the directives?

It is impossible to give a complete overview of the human resources (hereinafter: HR) responses to the 2000 Directives. Indeed, the nature and scope of these responses will depend on the legal framework in the Member State, on the sector, and on the particular company. From a conceptual point of view, HR policy has essentially a three level response to the proliferation of antidiscrimination provisions.

At the **first level** companies will seek to *avoid any systemic direct discrimination* in their HR practices. In the context of the 2000 Directives this is particularly relevant for the prohibition of age discrimination, since age or seniority are traditionally used in many Member States as a component for career and compensation development, also in the context of collective bargaining.

At the **second level** companies will, either systematically or for a specific purpose or occasion, *preventively screen HR choices that do not directly discriminate* on their potentially indirect discriminatory impact. This screening process itself can take place at two levels. First, any discrimination claim that contests unequal treatment requires the presence of comparable groups. Where a case of two incomparable groups can be made, a company can therefore continue to apply the differential treatment of its current HR practice. Second, the indirect discrimination of a comparable group can be justified if the contested provision, criterion or practice corresponds to a legitimate aim and the means of achieving that aim are appropriate and necessary. This open ended prohibition of indirect discrimination in effect requires companies to ponder the reasons of its ongoing HR practices. Where objective justifications seemingly fail a company can be inclined to reconsider its practice. These kinds of soul-searching balancing exercises are typically entertained at specific occasions such as the negotiation of a new collective bargaining agreement, a change in management, a collective dismissal, or the introduction of occupational social insurance.

At the **third level**, companies may adopt a *more constructive and proactive approach by consciously developing diversity practices*. Diversity has become somewhat of an international hype in HR policy, not just because of antidiscrimination legislation. It is also driven by a paradigm shift in human resources culture where diversity is seen as a necessary and beneficial company response to economic internationalization and to changes on the labour market (diversity in applicants and talent) and in society at large (diversity in clients and customers).

Diversity policies aim to address, within the context of an HR organization, the growing variety in the labour market and in society. Valuing diversity means creating a workplace that respects and includes differences, recognizing the unique contributions that individuals with many types of differences can make, and creating a work environment that maximizes the potential of all employees. Diversity policies can cover a broad spectrum of issues and methods, at every stage of the employment relationship: recruitment, selection, payment, promotion, personnel relations, and redundancy.

The instruments of diversity can range from mere information and awareness, through outreach and promotional initiatives, accommodation measures, up to the most debated forms of positive discrimination, including soft or hard quotas. However, quota systems are very contentious and equally rare, especially in the private sector.

Question 8. What is/should be the role of the social partners in the fight against discrimination?

Given the variety of Member State traditions with regard to social partners in general and with regard to the social partners' position in combating employment discrimination, this question can only be addressed in general terms.

The social partners, both the unions of workers the employer associations, are key players in the operation of labour markets. As such they have an important share of responsibility in eliminating work related discrimination, whether in a specific company or on the labour market in general. This responsibility can express itself in a variety of ways:

- Cooperation with civil society organizations or with the government to convey information and raise awareness.
- Defence and promotion of the antidiscrimination agenda in their respective sectors or companies, whether through general campaigns, data collection, development of good practices, codes of conduct, or the defence of individual cases.
- Provision of personal assistance in specific complaint procedures, settlement procedures or court cases.
- Internal streamlining and activation of the antidiscrimination agenda towards their own members. In the context of unions this also implies the development of more diversity in union membership as a tool to combat corporatist tendencies in the union or discriminatory tendencies on the work floor.
- Respect and promotion of antidiscrimination in their mutual dealings, by avoiding any discrimination in collective bargaining and by agreeing on actions to translate antidiscrimination legislation into concrete practices and action.

The effective implementation of the 2000 Directives could benefit greatly from a concerted effort by the social partners to define and promote the concrete application of the Directives at workplace level. This can go hand in hand with the growing interest of the business community for diversity and would offer a welcome alternative to litigation.