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on 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

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Kathalijne Maria Buitenweg

Introduction

In 1997 the Amsterdam Treaty included article 13 on non-discrimination to the EC-Treaty. It serves as a basis for two directives, the Employment Equality Directive¹ and the so-called Racial Equality Directive². The latter Directive had to be implemented by the Member States before the 19th of July 2003.

The report of the European Commission³ provides an analysis of the implementation of the Directive for equal treatment between persons irrespective of racial or ethnic origin. At a later stage this year, the European Commission is likely to provide information on possible infringement procedures.

The Rapporteur is of the opinion that the Racial Equality Directive (2000/43/EC) forms an important piece of legislation. It was a major step forward in protecting people against discrimination and giving them possibilities for redress. Also important is the fact that the Directive applies to **all** persons, regardless of citizenship or residence status.

There is still much work to be done for a correct implementation of the Directive. The Rapporteur calls on the Commission to not only look into the correct legal transposition of the Directives, but also to consider the obstacles on the ground. Many people are unaware of their rights or find it difficult to pursue a claim. Information about the anti-discrimination laws and access to the right of redress should get more priority.

Despite progress in the transposition of the anti-discrimination directives, racism has not decreased. On the contrary. Within the European Union, the amount of registered racial acts has dramatically increased. This is accompanied by evidence of increased tolerance for discriminatory behaviour particularly against immigrants and Muslims. Racism is contrary to the principles of the European Union. It undermines social cohesion and hampers emancipation of people. It is important that the European Parliament gives an impetus to increase the political will to address racism.

For the implementation of the Directive, the Rapporteur has looked into scope, legal redress, burden of proof, the equality bodies, dissemination of information and awareness.

1. Scope

The Racial Equality Directive was revolutionary at the time of its adoption, because it did not limit the protection against discrimination to the area of employment. Article 3 includes in the material scope amongst others social security, education and the access to goods and services, including housing.

¹ Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

² Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

³ COM(2006) 643 final/2 of 15 December 2006.

The broad scope of Directive 2000/43/EC was not mirrored in the Employment Directive (2000/78/EC), which prohibits discrimination on grounds of religion or belief, disability, age or sexual orientation, but only in the area of employment and occupation. The Rapporteur welcomes the fact that a number of Member States have adopted the broad scope of the Racial Equality Directive for all grounds of discrimination, thereby going beyond the Directive.

The Rapporteur is of the opinion that the Employment Directive should be amended, to have the same scope as the Racial Equality Directive. This is necessary in order not to create a hierarchy in forms of discrimination and also to avoid problems in case of multiple discrimination.

Moreover, since racism is interlinked with discrimination on the grounds of nationality and/or religion or belief, adjustment of the scope of the Directive might be necessary to increase access to effective redress.

While most countries seem to meet the material scope of the Racial Equality Directive, there are still some significant gaps that need to be addressed. Five Member States, for example, still have to adequately transpose the Directive in the fields outside employment.¹

Moreover, in some Member States the transposition has been limited to the private sector. In two countries military service is excluded from the scope of transposing legislation.² While the public sector is not adequately covered in many Member States, one Member State has limited the application of the Directive in the private sector.³ Since all public and private bodies fall within the material scope of the Directive, it is necessary to find out why certain sectors have been left out.

The Rapporteur also wants to hear from the Commission if the Directive also covers activities of the police authorities in the Member States, such as ethnic profiling.

2. Legal redress

All states combine judicial proceedings with non judicial proceedings. This is important because in civil proceedings the burden of proof is not only on the side of the victim, and because he or she is not dependent on the state prosecutor to file a complaint.

Generally speaking there is a low number of case law on discrimination. Some might conclude that racism is not too big a problem, but research shows otherwise. A more realistic argument is that there are still many barriers to justice. The length and complexity of the procedures may act as deterrent to victims.⁴

¹ Malta, Latvia, Estonia, Poland, Czech Republic.

² Latvia, Malta.

³ Hungary.

⁴ as is the case in Portugal and in Slovenia there are concerns that some judicial proceedings may take five years or more.

On the contrary when it comes to filing a complaint the time is sometimes too short. For example, victims have only 30 days in Hungary or 2 months in the Netherlands and Ireland to bring their case forward.

In a number of Member States insufficient financial means to pursue a case may be a real obstacle.¹

Associations can be of real help to victims. However, many Member States do not foresee special rules on the engagement of associations in discrimination proceedings.² Few States allow associations to engage in proceedings 'on behalf of' victims of discrimination. There are some positive examples like in Spain or Latvia where legal entities legally authorised to defend legitimate collective rights and interests may engage on behalf of the complainant, with his or her approval, in any judicial procedure in order to give effect to the principle on equal treatment based on racial or ethnic origin.

Infringement of anti-discrimination laws must be met with effective, proportionate and dissuasive sanctions. Yet at this stage few countries are considered to have appropriate sanctions in place.

3. Burden of proof

Proving discrimination is notoriously difficult. Particularly in the employment sector the employer has a much stronger position than the employee, because information concerning the allegedly discriminatory decision is usually held by the employer and witnesses are often reluctant to testify against their employer. For this reason, article 8 provides for a so-called two-staged test. Stage one requires persons who consider themselves to have been discriminated to *establish facts* from which it may be *presumed* that there has been direct or indirect discrimination. The burden of proof will then shift to the respondent *to prove* that there has been no breach of the principle of equal treatment. This does not apply to criminal cases.

Several Member States have not (adequately) transposed the provision on the burden of proof.³ Moreover, in many Member States the burden of proof provisions following transposition remain untested due to lack of case law.

The first indications from the case law appear to suggest that even proof of a *prima facie* case remains a difficult obstacle for claimants to overcome. Statistics are difficult to obtain and situation tests often have to comply with strict conditions.

¹ i.e; in the Czech Republic, Lithuania and Slovakia.

² i.e. Denmark, Finland, Lithuania, Sweden or the UK.

³ Austria, Italy, Latvia, Poland, Estonia, Lithuania, Luxemburg, Germany. See Network of Independent Experts, p.73.

The collecting of sensitive data, which could be necessary to establish indirect discrimination or to assess the extent of discrimination in society, continues to raise concerns and fears in many Member States.

4. Equality bodies

Almost all Member States¹ now have equality bodies or have given the functions to be carried out by such bodies to an existing body such as a national human rights institute. A high proportion of the bodies are competent not only for discrimination based on racial and ethnic origin but also on other grounds. The respective bodies provide assistance to victims of discriminations in a variety of ways, like in taking legal action² or by means of giving non-binding opinions on complaints submitted to them³. A number of specialised bodies can investigate complaints of discrimination and usually can force compliance with their findings by all persons involved.⁴

It remains to be seen whether all bodies will be able to carry out their functions independently as required by the Directive.⁵ For instance both in Italy and in Spain the equality bodies are located within ministries.

In some countries the bodies have insufficient financial means to carry out their functions.

5. Dissemination of information and awareness raising

Rights are generally of little use if people are unaware of them. Therefore, Article 10 of the Directive imposes an obligation on Member States to disseminate information to the public on the relevant provisions of the Directive by all appropriate means.

Both the European Commission and the Network of Independent Legal Experts observe that many Member States have failed here. Also the recent Eurobarometer confirms that the awareness of the existence of anti-discrimination legislation is low. Only 35% of the respondents think that their country has a law to prohibit discrimination based on ethnic origin. And only a third of EU citizens claim to know what to do when they are victim of discrimination or harassment. Particularly in the ten new Member States awareness levels are lower.

¹ The exceptions are the Czech Republic, Luxembourg, Malta and Germany.

² i.e. the Finnish, Belgian, Hungarian, Irish, British and Swedish bodies.

³ This is the situation in Austria, The Netherlands, Denmark, Cyprus, Hungary, Latvia, Lithuania, Greece and Slovenia.

⁴ i.e. in Austria, Cyprus, France, Hungary, Ireland, Lithuania and Sweden.

⁵ See report 'developing anti-discrimination law in Europe' the 25 Member States compared, European Network of Independent Experts in the non-discrimination field, november 2006.

Nonetheless, the Directive has boosted public debate on anti-discrimination and has led to many important initiatives. A number of Member States, including Malta, Poland and Portugal, have incorporated in their national law an obligation on employers to inform their employees on discrimination laws. Finland has been particularly successful at making available a leaflet on the Non-Discrimination Act in Braille and both in print and on internet in Finnish, Swedish, English, Sami, Russian, Arabic and Spanish.

It is imperative, however, that in the context of the European Year for Equal Opportunities both the EU institutions and Member States make sure that everyone in Europe is aware of their rights.