

Combating Religious and Ethnic Discrimination in Employment

From the EU and
International Perspective

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April 2004

Published by the
European Network Against Racism (ENAR)
with the financial support of
the European Commission (DG "EMPL")



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Preface

The year was 1970. I had just arrived as a young tourist to Denmark from Canada, wanting to experience this blessed part of mother earth. Scandinavia has always been my favourite area in Europe because of its beautiful landscape, functioning democracies, laidback life style and zero unemployment.

Once I had decided to stay in Copenhagen for a while, I went job hunting. As an American educated engineer, I thought, it would be a 'piece of cake' to find a suitable position matching my qualifications. 69 applications and personal visits to different companies later, I got an appointment for an interview in a large, international, well known construction company. The personal manager looked at my papers, smiled and said 'Mr Quraishy, your qualifications are fine but you are the wrong colour. I do not think that any Dane would like to work under a man of your background'.

34 years later, the situation is worse. According to almost all surveys, nearly 50% among ethnic minorities are unemployed. Now it is not only the colour or ethnic origins, which are the barriers to employment but one's religion and culture also is being used in discriminatory practices in the labour market.

Denmark, no matter how terrible, is not the only place where this is happening but throughout the EU, there are signs that discrimination in unemployment is marginalising different ethnic and religious communities socially, economically and even politically. With the enlargement of EU, Roma exclusion is also coming under focus.

Unemployment creates tension among families and stigmatises a person's human value. Lack of access to employment and daily discrimination at work often results in diminished chances in housing and health services as well as welfare benefits. Work is alpha and omega for a successful mutual integration.

ENAR is acutely aware of this deteriorating situation where not only the first generation migrants and refugees from

non-European countries are finding it hard to get a foothold in the labour market, but their children, born and bred in various EU countries are also excluded. Employers use many excuses: lack of language skills, low qualifications, ignorance of native culture, fear of non-acceptance by co-workers and foreign religious customs. In many countries, the unskilled jobs are being filled with exploited, low waged labour from Eastern and Central Europe.

This report not only looks into the tools for combating religious and ethnic discrimination in employment that are available in the EU but also at national and international level. But tools require an active plan of action. Laws can only help if states implement these, change the national mind set and in some instances put in place some affirmative actions to reduce the inequality.

It is in the interest of EU governments to provide jobs for ethnic and religious communities in their societies. Populations are aging, child birth rate is very low and EU alone needs nearly 16 million extra hands to keep the present welfare standard intact. Labour unions, employers unions and business communities not only have a moral duty but it also makes economic sense to remove the barriers so that the hidden resources among diverse minority groups can be tapped to its full capacity.

ENAR is doing its best to inform the Commission, the local authorities and the European public to the benefits of inclusive practices and strategies. Hopefully our voice will be heard soon, real soon. Former EU Commissioner for Employment and Social Affairs, Anna Diamantopoulou very beautifully put this need in perspective in 2003:

'We all stand to benefit from ensuring that our workplaces and other areas of daily life are free from discrimination. Member States must do more to put EU anti-discrimination rules into force'.

Bashy Quraishy
President ENAR

A. Expressions of Discrimination in the Employment Sector: Stories from the Workplace

This report looks into the tools for combating religious and ethnic discrimination in employment that are available at the UN, EU and national level of the EU-15.

Over the last decades the population of the EU has developed into a multi-cultural and multi-ethnic society. There are roughly three different clusters of EU-Member States those who have taken in immigrants from their former colonies (like France, the Netherlands, the UK), those that recruited 'guest-workers' (e.g., Austria, Belgium, Denmark, Germany, Luxembourg, Sweden) and those that have only recently become countries of immigration (like Greece, Finland, Ireland, Italy, Portugal, Spain). Lately, immigration and asylum policies have been harmonised towards establishing a fortress Europe, which is only willing to lower its drawbridges for the highly qualified few but keep it firmly up for others. This policy seems to be strongly supported by citizens of the EU-15: A telephone survey among 7,500 citizens conducted in December 2003 showed that 80% of the respondents were in favour of strengthening 'controls of entry into the EU for persons coming from non-Member States' (European Commission 2004a, 30).

There is a strong emphasis by Member States' governments on the preference of integration over immigration. The concept of integration promoted by most of the EU governments focuses on long term residents and is a questionable one, as it is conceptualised as a task solely to be fulfilled by those who migrated. Integration means first of all learning the language and is seldom followed by the granting of equal economic, social, cultural and political rights. The telephone survey performed in December 2003 established that two thirds of the respondents agreed that 'legal immigrants' should have exactly the same rights as the nationals of the respective country (European Commission 2004a, 19). This rather positive attitude towards equal rights could be seen as a positive incentive for governments to address these issues.

I. Who is Vulnerable to Discrimination?

Third country nationals, migrants¹, asylum seekers, undocumented migrants, Geneva Convention refugees, and members of ethnic as well as religious minorities are vulnerable to racial, ethnic and religious discrimination. Membership in the groups specified can of course overlap. People vulnerable to discrimination are perceived as different for reasons of skin colour, language competencies, faith- or identity related attire and symbols (headscarves, skull-caps, turbans, long beards, etc.) and cultural as well as religious practices (halal or kosher food, praying practices,

feasts, etc.). Discrimination is also related to the degree of visibility of the ascribed differences.

Ethnic and religious minorities include among others people from the following communities: Roma, Sinti, Gypsies and Travellers, Muslim, Jewish and Sikh. Members of ethnic groups share cultural norms and traditions, identities, values and a common language; members of religious groups identify themselves along the lines of common religious creed, beliefs, doctrines, practices or rituals. However, the boundaries between these two concepts are rather fuzzy, as ethnic identification might also involve racial classifications and religion. Besides, the Member States have different approaches towards using these concepts. The British Race Relations Act of 1976 does not cover religion as a ground of discrimination. The concept of ethnic minorities also incorporates religious aspects though: policemen of a Sikh background are allowed to wear traditional beards and turbans just as policewomen of a Muslim background have the option of wearing the Hijab as a uniform. The French approach is a totally different one, as ethnic or racial distinctions are seen as inherently discriminatory even when used for the benefit of the victim of discrimination. Therefore, no segment of the French population may claim to be a minority and attach cultural or other rights to such a status.

II. Discrimination on the Labour Market

Introduction

The opportunity for members of these vulnerable groups to actively participate in the labour market is an important determinant for in- or exclusion in other areas of social life. Active participation in the labour market is not only a way of earning one's living but also of obtaining status and acceptance by other members of society. Unemployment adds to the stigmatisation of members of vulnerable groups. Limited access to employment and persistent discrimination at the workplace often result in discrimination suffered in other spheres, such as housing and health services as well as welfare benefits. Therefore, the workplace is one of the most strategic entry points from which to combat discrimination in society (ILO 2003, X).

Members of vulnerable groups experience discrimination in the field of employment at various levels. First of all, they face structural discrimination, which is determined by the legal framework conditions in each Member State. Non-citizens and their family members usually must have residence status in order to gain access to the labour market. These access barriers prevent active participation in the labour market and add to the stigmatisation of those excluded. A further aspect resulting in exclusion from the labour market is institutional discrimination. This kind of unequal treatment is exerted by public authorities or other organisations and is closely related to structures, mecha-

¹ Who might be called allochtonen like in the Netherlands, foreign-born or of foreign origin like in Sweden or first/second generation migrants. For an overview of the varying concepts used in the Member States see Jandl/Kraler/Stepien (2003, 7ff.).

nisms, functions and roles within these institutions. The Stephen Lawrence Inquiry defined institutional racism as

'the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people (Home Office 1999, 6.34).'

Agencies issuing work permits, public and private placement agencies, labour inspectorates, temporary agencies, trade unions and employers' organisations, as well as employers including human resource managers are susceptible to institutional discrimination.

Ethnic and religious discrimination can be exerted by quite a number of actors and can occur in a wide scope of labour market relevant processes. They include conditions for access to employment like selection criteria, recruitment conditions and advancement procedures, access to vocational guidance and all kinds of vocational training, employment and working conditions (e.g., pay, allocation of tasks, dismissal,...) as well as membership in employers', employees' or professional organisations. In the following sub-sections, examples of racial, ethnic and religious discrimination on the labour market are displayed.

Recruitment

Recruitment of staff members happens via different channels. In-house recruitment is often preferred to other channels. This procedure restricts recruitment to those represented in an enterprise or to relatives/friends of the current staff. This results in recruitment from a very restricted segment of the labour market and reproduces the ethnic composition of the staff.

Another way of recruiting new staff members are job advertisements. They very often contain elements of direct discrimination like 'Natives only' or 'True natives only', the latter addition indicating that naturalised citizens will not be accepted. There are also advertisements displaying indirect discrimination when demanding qualification criteria, like accent less language competencies or being a practicing Christian, which are irrelevant to the vacancy announced.

Recruitment via placement or temporary agencies also has the potential for discrimination. Employers indicate that they do not want non-natives with placement agencies, who often comply with this wish and no longer try to place potential employees not fulfilling these criteria with these employers.

Documented Incidents

A former employee of a major temporary agency in Belgium reported internal electronic messages that contained a list of jobs marked 'BBB' (*Blanc, Bleu, Belge*²) or '*d'origine belge*³' (Centre for Equal Opportunities and Opposition to Racism s.a.). A similar practice is reported for French

employment agencies labelling jobs as 'BBR' (*Bleu, Blanc, Rouge*⁴), which is a code referring to the colours of the French flag and excludes all non-French citizens from the job (Wrench 2004).

In France, pupils of technical high schools of African but also of Asian origin are often victims of racial discrimination when they apply for training or work experience. Half of them would be excluded from gaining work experience even when it is a compulsory component of their course, unless their school assists them in finding a job as an intern (ADRI 2003, 8f.).

Selection Process

Selection processes are very often not guided by standards and sometimes the standards themselves might lead to the exclusion of certain members of vulnerable groups from obtaining a specific job. Employers may disproportionately reject applicants from ethnic or religious minorities, because they may believe that, on average, they are less productive than applicants belonging to the majority population or may think that it is relatively more difficult or costly to evaluate the minority members' productivity (Bloch 1994). Such practices are defined as statistical discrimination.

Documented Incidents

A woman belonging to the Irish Traveller Community applied for a cleaning job in a hotel. The supervisor refused her the position on the ground that she 'did not have the same concept of cleaning as other employees would have but how could she be expected given the way they lived' (Equality Authority 2002, 38).

A man from the Sikh community was refused a job as a bus driver in Vienna⁵. The dress code of the Public Transport Association specifies that the drivers of buses, trams or subways have to wear a cap easily identifiable to the passengers in case of an emergency. However, people from the Sikh community are not allowed to take off their turbans and therefore this dress code is a clear incident of indirect discrimination.

In Sweden, a Bosnian woman who hardly had any accent did not get the job of a telephone interviewer, as perfect Swedish language skills were demanded. The employer placed demands on the job applicant's qualifications that did not match the job (Lappalainen/Johnsson 2003).

A similar case happened in a recruitment agency in Dublin, where a potential employer asked a Sudanese national questions about his religion and country of origin, which

² White, Blue, Belgian

³ of Belgian origin

⁴ Blue, White, Red

⁵ Turban-Träger können in Wien nicht U-Bahnfahrer werden, available at: <http://www.volksgruppen.at/htdocs/at/de/news/200303/20030318075134kle.html>.

were wholly irrelevant to the job in question (NCCRI s.a., 6). A woman of Muslim background applied for a job at a school in the state of Baden-Württemberg; she was refused unless she agreed to remove the headscarf while teaching. The education minister in the state of Baden-Württemberg tried to justify the decision by saying that the headscarf was 'understood as a symbol of the exclusion of women from civil and cultural society' and thus was inappropriate to wear as a teacher (Carnell 2003).

In France, discrimination against people whose names suggest foreign origin and presumably undesirable characteristics appears to be a significant factor in the rejection of job applicants (ADRI 2003, 7).

Discrimination also takes place among members belonging to groups of different ethnic or religious minority groups: 5,000 labourers, most of them of Maghrebian origin, were rejected work in the strawberry harvest in Huelva (Spain), whereas seasonal workers of other origins (e.g., South American) were recruited (Jandl/Kraler/Stepien 2003, 53).

At the Workplace

Bullying is a form of discrimination that is reported frequently. Bullying – persistent, offensive, abusive, intimidating, malicious or insulting behaviour, abuse of power or unfair penal sanctions – makes the victim feel upset, threatened, humiliated or vulnerable, causing stress and diminishing self-confidence – is often mixed with elements of ethnic or religious discrimination. Vulnerable groups are ridiculed or insulted because of their accent, their attire or skin colour.

Documented Incidents

A woman with a French accent is offended by her colleagues. She is especially ridiculed when she mispronounces words or does not know the meaning of a term (ZARA 2004).

A Geneva Convention refugee from Rwanda works for a catering business. His colleagues try to sabotage his work and insult him by calling him: 'You black fool!' (ZARA 2003). People of Asian descent also face harassment: A Chinese man who works as an engineering machinist is called 'Mao', 'Chink' and 'Gook' and has had swarf put in his jacket pockets (TUC 2000). Neither of these two men's superiors believed them when they complained.

An incident that was interpreted as inciting racism occurred at a department store in Brussels. Verbal attacks including the statement 'Sale nègre⁶' were directed at the black floor manager and another black employee using the company's microphone (Jandl/Kraler/Stepien 2003, 64).

The following case reported to the British Trade Union Congress is an example of both racial and sexual harassment: A black female worker eventually worked her way into a management position. However, she noticed that she was given staff 'nobody else wanted' and found the office banter offensive. Men very crudely talked about sex, women and

masturbation in her presence. The woman became ill, very stressed and felt isolated (TUC 2000).

Another area in which discrimination is frequently reported is promotion: A black African council worker applied for promotion. A white man lacking the necessary qualifications received the job instead of him. When he complained to his boss, he was asked to bring his passport to prove that he was British. The boss indicated that he hated the black race for coming in here and taking away their jobs. An Asian male working for a management consultancy in London was 'promoted to fail'. His promotion took place shortly before the company's statistics were submitted to the Equal Opportunities Council, subsequently he was moved into an area where he had no experience and was fired soon afterwards (TUC 2000).

A great majority of the cases reported by the RAXEN network⁷ are wage-related ones. In Spain, the employer of 120 seasonal migrant workers employed in the strawberry harvest withheld about 3 of the total daily wages to pay for the rent and only paid half the rate specified by the collective agreement (Jandl/Kraler/Stepien 2003, 64).

Members of vulnerable groups are also exposed to assaults by customers or clients. To 'avoid' such infringements, employers in France oblige young women to change their first names in order 'not to frighten customers' (ADRI 2003, 7). A taxi driver from Nigeria even experienced physical harm. When he asked for the fare determined by the standard rate, he was insulted: 'Nigger, what do you want?' and afterwards hit in the face by his customer (ZARA 2004).

Termination of the Employment Contract

Termination of contracts and dismissals are often not guided by factors like the quality of work performance but by underlying assumptions concerning members of ethnic and religious minorities.

Documented Incidents

A man of African descent was laid off together with four other staff members of African origin by a cleaning company situated in Vienna. He was told that although his work performance was OK he had to leave the company. The client (a do-it-yourself store), for whom he was doing the cleaning job, no longer wanted to have blacks cleaning the premises⁸.

⁶ Dirty female niggers

⁷ The Racism and Xenophobia Network (RAXEN) is one of the central tools of the EUMC providing it with objective, reliable and comparable data on the phenomena of racism, xenophobia and anti-Semitism. It consists of 25 National Focal Points (NFPs), one in each Member State, being either governmental institutions, NGOs, research bodies, specialised bodies and/or Social Partners. (See: http://www.eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=3e4a71f3d0ab8)

⁸ Counselling unit for victims and witnesses of racism at ZARA Zivilcourage und Anti-Rassismus-Arbeit.

In Denmark, a woman of Muslim background was dismissed by a department store for the sole reason that she was wearing a headscarf. This was the result of the enforcement of clothing guidelines implying that the employees had to look business-like. This incident constitutes indirect discrimination as it typically affects a specific group sharing the same religious background (Hansen 2004).

An unskilled worker of African descent was employed by an Austrian company. After the contract had been terminated, he received his certificate of employment. The space indicating the former employees' citizenship was not marked Burkina Faso but 'Nigger' (ZARA 2004, 38).

What is to Be Done with Anecdotal Evidence?

This is only a selection of the anecdotal evidence on labour market related discrimination. It clearly demonstrates that members of ethnic and religious minorities are regularly affected by direct and indirect discrimination as well as bullying. However, the lack of systematic documentation or research makes it difficult to show a clear pattern of discrimination on the labour market and to prove whether there has been an actual increase in the level of abuse or in the level of reporting during the last years. Statistics show that members of vulnerable groups are concentrated in certain industries that are physically strenuous and hazardous to the health as well as subject to seasonal fluctuation, and only yield low incomes. The data available makes it difficult to evaluate how many of the disadvantages are caused by human capital factors (such as education, work experience, occupational attainment), structural, institutional or direct/indirect discrimination. According to a recent British study, the wage difference of members of minority groups

relative to their white counterparts range from 9 to 150 pounds sterling per week, depending on the ethnic group. Key facts such as age, education, recency of emigration, economic environment and family structure can explain just 5 to 116 pounds of this wage gap (Cabinet Office Strategy Unit 2003, 35). So an 'ethnic penalty' between 4 and 34 pounds sterling per week remains, which is a strong indicator for racial discrimination.

This introductory section has set the frame for the report by introducing the policy field, the relevant concepts related to religious and ethnic discrimination and the key actors. The next chapter looks into the framework conditions for combating discrimination established by the European Union: It analyses the development and scope of the Racial Equality and the Employment Equality Directive, the link between social cohesion and antidiscrimination policies in the Employment Guidelines and the National Action Plans, as well as the potential of the European Structural Funds as tools of policy development. As the EU is not the only arena in which anti-discrimination policies and measures are developed and implemented, section number 3 compares the scope and monitoring procedures of UN, ILO and Council of Europe conventions and covenants to those of the two Council-Directives. These explications are followed by an analysis of what kind of policies, measures and actions are devised by relevant actors in the Member States to comply with these standards developed at EU and international level. This evaluation takes the reader to the conclusions summarising who does what and at which level to combat religious and ethnic discrimination in employment and what has to be done to develop more effective remedies against incidents of discrimination as described in the introduction.

B. Analysis of the EU Tools to Combat Religious and Ethnic Discrimination in Employment

I. Introduction

With the introduction of Art 13, extending the Community's powers to adopt actions to combat discrimination, in the Treaty of Amsterdam, the original 15 Member States have set the basis for the development of a common supranational approach to enhance antidiscrimination legislation. The Member States therein recognised that racism and other forms of discrimination are best confronted at the European level. The Racial Equality Directive and the Employment Equality Directive, which were unanimously adopted by all Member States in 2000, set forth the most rigid set of antidiscrimination provisions worldwide. They not only provide specific minimum requirements facilitating the enforcement of the prohibition of discrimination, but also provide an active role to civil society organisations such as Social Partners and NGOs in

supporting victims of discrimination. Although the directives only mark the lowest common denominator all Member States' governments could agree upon, they constitute a pivotal step forward in regard to outlawing various forms of discrimination, particularly in the employment sector.

Although legal tools are the cornerstones of the antidiscrimination policy of the European Union, they are not the only instruments for implementation. Making use of its competence in the area of employment, the European Union has implemented a variety of programmes and activities as tools to implement European employment policy goals. Among them, the European Employment Strategy as the overall framework for economic and employment policies and the programmes administered by the European Social Funds are the most important.

Although the promotion of measures against ethnic and religious discrimination has gained growing importance within both, it is still not tackled substantially, and there is the risk that it might lose impact with the planned mainstreaming of antidiscrimination into regular programmes. Therefore NGOs active in this field will have to regularly monitor the development in this area and mobilise pressure on governments to secure sufficient support.

II. Legal Tools: The two Council Directives Combating Discrimination in the Employment Sector

How the EU Became a Driving Force in Fighting Discrimination within its Member States

When the European Communities were founded in 1965 no one would have thought that some decades later the legislative measures adopted in this framework would once become a decisive tool in combating discrimination in the Member States. Art 119 (now Art 141) of the Treaty of Rome – laying down the principle of equal pay between women and men – can be seen as the starting point of antidiscrimination policies at the level of the European Community. However, economic rather than social concerns led to the inclusion of this provision. In fact, when adopting Art 119, the original Member States intended to prevent any distortion of competition due to particularly low wages of women in some Member States rather than to promote equal treatment of women and men. This provision, however, triggered some path breaking decisions of the European Court of Justice (ECJ). Furthermore, the issue of equal treatment of women and men was no longer a purely national one but became subject to further EC-directives prohibiting gender discrimination in regard to employment.

The issue of racism entered EC policy debate during the second half of the 1980s (Bell 2002a, 62). The European Parliament can be described as one of the driving forces behind this development, which however had its limits in the lack of the Community's competence to legally adopt antidiscrimination measures.

The Process towards the Extension of the Community's Competencies to Combat Discrimination

In the early 1990s the increase in racist violent incidents in the Member States and the up-coming EU enlargement indicated to many policy makers that racism, xenophobia and other forms of discrimination might jeopardise the Community's aims of full market integration, social cohesion and a common labour market. The increasing political success of extreme-right wing parties across many Member States also gave an impetus to overcome the Community's reluctance in adopting measures to counter these disintegrative developments.

In 1991, the so so-called Starting Line Group, a coalition of non-governmental actors of EU-Member States, was created in order to lobby for legal measures to combat

racism at the European level. At its peak the coalition, which was supported by the Commission and the European Parliament, counted approximately 400 nongovernmental actors. Only one year after its foundation the Starting Line Group came up with a draft EC Directive prohibiting discrimination based on race, colour, descent, nationality, national or ethnic origin regarding a wide range of fields. The almost ten-year-long campaign of the Starting Line Group can be seen as the most important driving force in the adoption of the two Antidiscrimination Directives in 2000 (Chopin 2001, 5).

After the so-called Kahn commission, which was composed of representatives of all Member States and charged with the formulations of recommendations on the EU's role in combating racist discrimination in Member States, had released its report in 1995, it became increasingly acknowledged that racism in fact posed an issue relevant to the Union. Hence the objections of some Member States that problems of racist and religious discrimination were best dealt with through national legislation lost their clout. These developments lead to the introduction of Art 13 into the Treaty of the European Community in 1997, which finally provided the European Community with the legal basis to adopt appropriate actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. However, actions with regard to the issue of discrimination require the Council to act unanimously, which poses a high risk of watering down related measures in order to achieve a wide consensus among Member States. Due to the fact that antidiscrimination policies are perceived as being politically sensitive, the chances to adapt this requirement and change it to a qualified majority voting are very low.

In the case of the *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* (further Racial Equality Directive) it took less than fourteen months to achieve a unanimous decision by the fifteen Member States. The political situation in Austria with the inclusion of an extreme right wing party into the government coalition in fact speeded up this adoption process. When the other fourteen Member States decided to impose diplomatic sanctions on Austria, the draft Directive on racial discrimination got more attention and was used as a political signal against racism and the politics of exclusion. In such a political climate, in which the issues of racism and xenophobia were in the spotlight of media and public debate, it became difficult for Member States to impede the drafting process as none of them wanted to be perceived as being in favour of extreme right wing policies. The *Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation* (further Employment Equality Directive) was adopted five months after the Racial Equality Directive.

Why Are there Two Different Legal Tools to Combat Racist and Religious Discrimination?

As it soon became evident that the political will among Member States to adapt legal measures against

discrimination on the grounds of race and ethnic origin was stronger compared to the other grounds mentioned in Art 13 TEC, it was decided to draft two separate directives: One directive to combat discrimination on the grounds of racial and ethnic origin going beyond the labour market and a separate directive on the other grounds mentioned in Art 13 TEC except for sex applying only to aspects related to employment⁹. This separation proved to be decisive for the speedy adoption process as Member States would not have been willing to consent on the non-employment related scope regarding discriminations on the grounds of religion or belief, disability, age or sexual orientation.

However, this difference in the material scope of both directives, prohibiting discrimination outside the employment sphere only on the grounds of race and ethnic origin, in fact establishes different standards of protection depending on the specific ground of discrimination. This division seems to be at odds with the idea of equal rights and non-discrimination as such. If one perceives the right not to be discriminated against on arbitrary grounds as a fundamental right, there seems to be no reasonable justification for this different standard of protection. Furthermore, in practice it will be very difficult if not impossible to identify whether a person has been discriminated because of his or her ethnicity or religion. These different standards of protection do not only leave potential victims in a vacuum, as they do not know whether they benefit from protection against discrimination outside the work sphere, but also confront judges with difficult borderline questions.

These conceptual deficits clearly show that both directives only mark the lowest common denominator on which all fifteen Member States could agree. Member States should therefore be aware of the fact that these instruments do not provide a comprehensive and complete set of antidiscrimination rules but only minimum standards. The directives leave it open to national legislators to adopt higher standards of protection against discrimination and to also apply the wider scope of the Racial Equality Directive to other grounds of discrimination, such as religion or belief.

Another drawback stemming from the fact that all fifteen Member States have very different national approaches to combat discrimination is that the directives are rather vague in many regards. For example, there is no definition of the terms 'race', 'ethnic origin', 'religion' and 'belief'¹⁰. Although Member States are free to choose the means how to incorporate the directives' objective into national law, national courts are obliged to interpret and apply national

law in accordance with the directives. Finally, it will be the ECJ that will have the last word on the interpretation of the rights conferred by the directives.

What Does Discrimination Mean According to the Directives?

Both directives define four different forms of discrimination: direct and indirect discrimination, discriminatory harassment and instruction to discriminate. For all four forms of discrimination it is irrelevant whether the person who discriminates has the **intention** to do so or not. According to Art 1 of the directives they aim at combating discrimination 'on grounds of racial or ethnic origin and respectively religion and belief. This wording indicates that the prohibition of discrimination also applies to so-called **perceived characteristics**. This means, for example, that a person is discriminated against because of his or her skin colour although the person has just come back from a long summer vacation. Situations where a person is discriminated against because of his or her **association** with a person of a different ethnic or religious background seem to be covered by the wording of the directives. A person who has suffered disadvantageous treatment because he or she is married to a black person could therefore claim his or her right to non-discrimination according to the Racial Equality Directive.

Direct discrimination occurs when a person is, has been or would be treated less favourably in a comparable situation on one of the grounds mentioned in the directives. This definition not only covers less favourable treatment that has occurred in the past or is currently going on, but also regulations or provisions that would result in a form of direct discrimination in the future. In the latter case the claimant can refer to a hypothetical comparator and does not have to put forward a concrete case. In contrast to the definition of indirect discrimination explained below, the directives leave no space for any exceptions others than those explicitly mentioned in the directives. The directives are very clear in outlawing a person's racial or ethnic background, religion or belief as a criterion for any kind of differential treatment by only allowing for exceptions with regard to positive measures or to a particular condition constituting a genuine occupational criterion (for further details see section 2.1.7).

The definition of **indirect discrimination** applies to situations where an apparently neutral provision, criterion or practice puts persons with a certain racial or ethnic origin or religion or belief at a disparate/disproportionate disadvantage compared with other persons. Such provisions, criteria or practices, however, do not constitute indirect discrimination if the employer can put forward that such measures are justified by a legitimate aim and that the means of achieving that aim are appropriate and necessary (Waddington/Bell 2001 594). A certain dress code, for example, might indirectly discriminate members of certain religious groups who wear headscarves or skullcaps. However, certain regulations, like the wearing of hardhats, might be justified due to security reasons

⁹ See: Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination, COM (1999) 564, 7f.

¹⁰ However, recital 6 of the preamble clarifies that '[...] the European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories'.

although they possibly conflict with certain religious obligations.

Statistical evidence can help to prove indirect discrimination. As in some Member States the collection of data according to race, ethnic origin or religion is unlawful, the directives also allow for other forms of evidence that show that a group of persons has been or would be put at a particular disadvantage. As previously mentioned above, the intention behind such provisions does not need to be discriminatory. The definition of indirect discrimination also applies irrespectively of whether its disproportionate impact has been foreseeable or not (De Schutter 2003, 23).

The third aspect of discrimination mentioned by the directives is **discriminatory harassment**. It is defined as any unwanted conduct related to one of the grounds mentioned in the directives which 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. This definition includes any form of bullying that is directed against a person because of his or her racial or ethnic background, religion or belief. In contrast to direct and indirect forms of discrimination, claimants who bring their case to court do not have to refer to a comparator. In cases where an employer is confronted with a claim of harassment he or she cannot refer to the argument of treating all employees equally badly. Harassment can occur vertically, meaning by employers in regard to employees, or horizontally by other employees or customers. The directives leave it open to the Member States whether an employer becomes an accessory to harassment if he or she does not intervene to protect an employee against harassment by another employee or customer (Waddington/Bell 2001, 595).

Finally, the fourth form of discrimination covered by the directives includes **instructions to discriminate** against persons on one of the enumerated grounds. In cases where an employer asks a placement or temporary agency not to select people with a particular ethnic background or religion, and a person is therefore rejected, both the employer and the agency are liable according to this definition.

Who is Protected and Who is Liable under the Directives?

The protection against discrimination conferred by the directives applies to all persons that are on the territory of one of the EU-Member States irrespectively of their nationality. Legal persons can also enforce their right not to be discriminated against on one of the grounds mentioned by the directives. This means that the obligation to equal treatment applies to everyone: private parties and public authorities, natural as well as legal persons.

In What Cases Does the Prohibition of Discrimination Apply in regard to Employment Issues?

As already mentioned above, the material scope of the Race Equality Directive and the Equal Treatment Directive

overlap in regard to employment issues. According to Art 3 of both directives the principle of equal treatment shall apply to all persons and public bodies in the public and the private sector. The directives afford protection against discrimination in the following areas:

- Conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- Employment and working conditions, including dismissals and pay;
- 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.

Due to the ECJ's extensive interpretation of the term 'pay', the related prohibition of discrimination applies also in regard to occupation pension schemes, temporary post-employment payments, sick leave benefits, severance allowances and travel concessions.

In Which Cases can Race, Ethnic Origin, Religion or Belief Constitute a Legitimate Criterion of Differentiation?

The Racial Equality Directive and the Employment Equality Directive provide for three categories of exceptions: discrimination on the ground of nationality and in relation to immigration policies, genuine and determining occupational requirements and positive actions. According to European law, exceptions to general principles, like in this case the principle of equal treatment, should be interpreted strictly and narrowly.

Both directives provide for an exception regarding discrimination on the ground of **nationality**. Whereas EU citizens can refer to Art 12 TEC, which protects them against any form of discrimination on the ground of their Member States' nationality this is not the case for third country nationals. If non-EU citizens feel themselves wronged due to their nationality, they have to refer to the grounds of either racial or ethnic origin, religion or belief. For example, if an employer pays non-EU citizens less than domestic nationals for equal work and justifies this treatment on the ground of the employees' third country nationality, this might constitute a form of indirect discrimination based on racial or ethnic origin (Bell 2002a, 77). Furthermore, both directives neither cover provisions and conditions determining entry and residence status of third-country nationals nor stateless persons nor treatment arising from the legal status of the third-country nationals or stateless persons concerned.

Another exception to the principle of equal treatment refers to **genuine and determining occupational requirements**. Thus differential treatment based on racial or

ethnic origin, religion or belief is not discriminatory if it is justifiable by certain characteristics related to the job, by reason of the particular occupational activities concerned or by the context in which these activities are carried out. Furthermore, to constitute a genuine and determining occupational requirement, the objective must be legitimate and the requirement must be proportionate. The rationale for this exception is that it is generally recognised and accepted that a legitimate need exists to allow employers to look for persons from a specific ethnic background or with a specific religion (O'Neill 2004, 1). In order not to evade the strict prohibition on discrimination the preambles of both directives state that a difference in treatment based on a genuine and determining occupational requirement is justified only in very limited circumstances¹¹.

This exception might apply to any job that involves a person's authenticity like in the case of an actor, or a model or a waiter in a restaurant that serves food from a particular country or culture. Also, for example, counselling services providing assistance to migrants are not hindered by the directives to recruit only people who have a particular ethnic background.

The Equal Employment Directive provides for a more specific exception in cases where the employer is a religious institution or other organisation with a religious ethos such as faith schools, religious charitable organisations etc. (Scharf 2003, 24). Thus Member States may maintain national legislation or practices existing at the date of the adoption of the Employment Equality Directive pursuant to which a difference in treatment based on an employee's religion or belief shall not constitute discrimination. However, this exception only applies to cases where by reason of the nature of the occupational activity or the context in which it is carried out a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement. Thus, different standards regarding occupational requirements apply depending on whether the person concerned works, for example, as a press officer or simply as a typist.

Both directives permit Member States to maintain or adopt so-called positive measures to prevent or compensate for disadvantages linked to racial or ethnic origin, religion or belief, with the aim of achieving full equality in practice. In the context of positive measures adopted to ensure the equality of women and men the ECJ held that absolute and unconditional priority for members of one group overstretches the scope of justified positive measures (O'Neill 2004, 4). Thus positive measures require a justification in the form of a need to overcome past discrimination that originates from the disadvantaged position of ethnic minorities. According to the wording of the directives, Member States are permitted but not required to adopt legislation that provide for the possibility of positive action.

What Instruments Do the Directives Provide in order to Ensure Effective Enforcement?

The directives have a strong focus on remedies and enforcement. Furthermore, they follow a so called **rights-based approach** obliging Member States to ensure that judicial and/or administrative procedures for the enforcement of the rights provided by the directives are put in place. The directives also refer to conciliation procedures that should be foreseen by Member States in order to provide for extrajudicial means to resolve related conflicts. Such procedures have proved to be very important in regard to an ongoing working relationship where a claim before a court might lead to an unbearable working atmosphere. Additionally, the directives foresee a number of instruments and measures, which are supposed to facilitate the enforcement of the rights conferred by the directives.

Firstly, Member States are obliged to create a legal basis that allows **organisations with a legitimate interest** in compliance with the principle of equal treatment to bring enforcement actions on behalf or in support of the complainant. A precondition for organisations to engage or initiate such proceedings is that the alleged victim consents to the related action. This means that the directives do not foresee an autonomous right of action for trade unions or other relevant organisations to bring discrimination cases in their own name (Bell 2002a, 78). The enforcement of antidiscrimination provisions therefore relies on the individual litigation.

Secondly, both directives foresee a **shift of the burden of proof** in favour of the person who wants to enforce his or her right to non-discrimination. Whereas the complainant has to establish facts from which discrimination can be presumed, the respondent has to prove that he or she has not discriminated on one of the grounds mentioned by the directives. This procedural regulation becomes particularly important in cases where an employee or a job candidate has no access to staff files, payrolls or other documents that would provide information on the discriminatory act.

Another aspect crucial to the effective enforcement of the right not to be discriminated is the protection against **victimisation**. The directives prohibit any adverse treatment or consequences as reactions to a complaint. In a working environment it seems particularly important that this protection also applies to other employees or witnesses who might need to bear evidence in court proceedings. In order to ensure an effective protection against victimisation it should be defined as a form of discrimination resulting in the same effective, proportionate and dissuasive sanctions as well as in shifting the burden of proof.

In order to effectively prevent discrimination both directives oblige Member States to adopt effective, proportionate and dissuasive **sanctions**. It is up to the Member States whether they choose to adopt criminal sanctions such as fines or civil law sanctions comprising compensation claims for material and immaterial damages. Community service or the ban of certain activities, as well as the confiscation of property or the withdrawal of subsidies,

¹¹ See recital 18 Racial Equality Directive and recital 23 Employment Equality Directive.

might also qualify as sanctions as long as they seem effective, proportionate and dissuasive in relation to the breach of the principle of equal treatment.

The Racial Equality Directive requires Member States to designate one body or several **bodies for the promotion of equal treatment** of all persons irrespective of their racial or ethnic origin. These so-called bodies for the promotion of equal treatment shall be responsible for providing independent assistance to victims of discrimination, conducting independent surveys concerning discrimination, publishing independent reports and making recommendations on any issue relating to such discrimination. Although the Employment Equality Directive does not provide for a similar obligation, the majority of Member States extended the competences of such bodies or established new institutions with similar mandates to also encompass the other grounds of discrimination.

What other State Obligations Do the Directives Include?

In addition to the timely and correct transposition of the directives' minimum standards the directives oblige Member States to **encourage dialogue with appropriate NGOs** having a legitimate interest in contributing to the fight against discrimination and with a view to promoting equal treatment. This state obligation recognises the pivotal roles of such organisations in enhancing the protection against discrimination and in supporting victims of discrimination in their access to justice. NGOs can therefore call upon governments to interact with them and, for example, to take into account their expertise in regard to drafting and mainstreaming antidiscrimination policies.

In regard to **social partner organisations** Member States must adopt measures to promote social dialogue between the two parties in industrial relations in order to foster equal treatment. Such measures can include monitoring workplace practices, collective agreements, codes of conduct, research and exchange of experience as well as good practice. Where consistent with national traditions and practices Member States must encourage the Social Partners to conclude agreements laying down antidiscrimination rules in regard to employment issues falling within the scope of collective bargaining.

The final provisions of the directives place the duty upon Member States to **screen the national legal framework** for laws, regulations and administrative provisions contrary to the principle of equal treatment in order to abolish them. Furthermore, discriminatory provisions included in individual or collective contracts or agreements, internal rules or undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions as well as workers' and employers' organisations shall be declared null and void or shall be amended.

III. The European Employment Strategy

Historical Development

Further to the legal instrument described above, antidiscrimination has become a prominent feature of the economic and social policy of the European Union, most importantly within the European Employment Strategy.

In the 1990s, high and persistent unemployment rates raised growing concerns about the need to increase the effects of economic growth on employment in Europe. The lack of community-competence in the field of labour market and social policy contrasted sharply with the need for more coordinated employment policies in Europe. Although the Maastricht Treaty (1992) extended the social dimension of Europe by passing a social protocol, it did not include community-competence in the area of labour market policy. It was not until the Amsterdam European Council (June 1997) that the heads of states agreed on new employment provisions in the Treaty of the European Communities. While the Council confirmed national competence for employment policy, it declared employment a matter of common interest and called on Member States to develop a coordinated employment-strategy on EU-level. The new title on employment (Art 128) created a framework for developing national employment policies on the basis of shared European priorities and interests and set a legal basis for the exchange of good practices in employment. With this new Article the 'social dimension' of Europe had become a concrete political dimension of European integration for the first time (European Commission 2000, 8).

Against the background of high unemployment rates, the Luxembourg 'Jobs' Summit (November 1997) passed the first guidelines for employment policies in the Member States. The thematic priorities agreed at the Luxembourg Summit were grouped into four pillars (European Commission 2000, 10):

- Entrepreneurship: encouraging the development of self-employment, reducing administrative formalities and identifying new sources of employment,
- Employability: bridging the skills gap in Europe in an attempt to prevent the long-term unemployed and other disadvantaged groups from becoming increasingly excluded,
- Adaptability: increasing the ability of workers to cope successfully with changes in the labour market,
- Equal opportunities: facilitating the entry of more women into the labour market.

The National Action Plans for Employment

These priorities should encourage a more active policy of the Member States concerning the reintegration of the unemployed and the adaptation of the labour market to globalisation. The Summit suggested that all unemployed young people and adults should have the right to be offered a job, training or other measures to make integration of the most vulnerable groups into the labour market possible. Annual 'National Action Plans for

Employment' (NAPs) for each Member State should serve as tools to implement the agreed priorities. These NAPs, which were to follow European Employment Guidelines agreed by the Council and the Commission, should report on the state of the labour market in each Member State and the activities of the Member States to implement the guidelines. They should be regularly evaluated and their main results should be presented in annual 'Joint Employment Reports', which should contain specific recommendations for individual Member States and allow a continuous reshaping of the Employment Strategy. Although the 'Joint Employment Report' could only highlight good practices or shortcomings and did not foresee any ranking or benchmarking, the regular comparison between the Member States should nevertheless initiate transfers of good practice and enhance competition between the Member States in the field of employment policy (Scottish Parliament 2002, 4ff.).

The Lisbon Strategy

The narrow focus of the NAPs on unemployment and the lack of a coherent employment strategy soon came under scrutiny. It took until the European Council of Lisbon (2000) to overcome the narrow focus on unemployment. In Lisbon, the Council passed a challenging project for EU integration in a variety of economic and social fields aimed at preparing the EU for the challenges of globalisation and technological change. By 2010, the EU intended to 'become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion' (European Council 2000, 15). The Lisbon strategy should encourage the EU to catch up in areas where it lagged behind the USA, namely economic growth, innovation and technological change and level and quality of employment and should further advance the development of the internal market.

In order to become the leading region of the world in the coming 'knowledge society', a fairer balance between economic integration and social cohesion should be reached. In this context, employment levels and employment quality should be improved. Now full employment and quality of employment, not only the fight against unemployment, were defined as main political targets for the first decennium of the 21st century. For the first time, quantitative targets were set: The employment rate in the EU should be raised from an average of 61% to 70% by the year 2010, and the proportion of women in employment should increase from an average of 51% to 60%, and employment should rise by 3% each year (Lisbon European Council Presidency Conclusions 2000, 15). At the Stockholm European Council in 2001, intermediate employment targets to be achieved by 2005 were set at an average employment rate of 67% and an employment rate for women of 57%. The Council also defined lifelong learning, the improvement of employability and the promotion of all aspects of equal opportunities, including the reduction of occupational segregation, as major political targets.

The Open Method of Coordination (OMC)

The Member States were interested in putting employment on the EU-agenda for a variety of reasons. On the one hand, they envisaged that this move could help them transfer good practices and learn from experiences in other countries; on the other hand they also preferred implementing unpopular labour market and social policy reforms with reference to European decisions (Goetschy 2003, 8ff.). Nevertheless, they did not want the traditional 'Community Method', whereby European directives have to be implemented in the Member States, to govern labour market policies. Although convinced that European labour market policies would need stronger coordination, their main concern during the preparation of the Luxembourg Summit in 1997 was to prevent the adoption of a fixed common target on unemployment, like it had been set with regard to budgetary discipline in the Maastricht criteria. Thus, fearing the imposition of fixed and easily measurable quantitative targets, they agreed on setting more qualitative guidelines instead, which would allow for more flexibility in allowing unemployment and less rigid mechanisms of control in the fight against unemployment (Rodriguez 2001, 101): The 'Open Method of Coordination', whereby Member States implement targets set at European Union level in a framework of loose policy coordination, was born.

This new form of 'flexible integration' reflected a wide-ranging uneasiness with the prevailing methods of EU-governance. These methods either aimed at harmonisation (Community-Method) or allowed the Member States to develop their policies without or with limited involvement of the European Commission (Intergovernmentalism), but did not provide an instrument for the coordination of sensible policy areas, where the Member States did not want to transfer national competence completely to the European level. Therefore, both harmonisation and coordination were seldom realised due to the absence of an appropriate model of governance.

The Presidency Conclusions of the Lisbon Council describe the new method of governance as a means of spreading best practices and 'achieving greater convergence towards the main EU goals' (European Council 2000, 16). The method, which according to the Conclusions, was 'designed to help Member States to progressively develop their own policies' (ibid., 37), was not, like the Community Method, aimed at reaching the harmonisation of legal rules. Instead, Member States should achieve targets set by the European Union by developing their own policies. Common targets, not common rules, should lead to the integration and coordination of different policies in the Member States. This move from 'governance by legislation' to 'governance by objectives' should allow the Member States to develop common policies in areas with different national traditions and policies without being forced to transfer national competence to the Union level. This new European 'governance architecture' (Radaelli 2003, 1) was strongly imbedded into the discourse of competitiveness

reframing European policies in the language of management.

The Lisbon Conclusions also defined the main tools of the OMC. Instead of the law-centred approach of the Community-Method, the OMC concentrates on steering and implementation mechanisms common in the modern management literature. Thus guidelines and timetables, indicators and benchmarks, the setting of targets as well as periodic monitoring, evaluation and peer reviews were defined as the main tools of coordination (ibid., 15ff.). The OMC should be implemented through domestic policies and legislation aimed at reaching the goals set, not through implementation of European law. The Commission should secure coordination by constant monitoring and comparing the progress of the Member States. Although the Council did not define the 'main EU goals', employment and social policies soon became the main arena for the implementation of the Open Method of Coordination.

The Employment Strategy and Antidiscrimination

The move towards a higher relevance of the quality of employment was fostered by the political developments in the field of antidiscrimination at the end of the 1990s. According to the Commission's evaluation of the Employment Strategy in 2002 (European Commission 2002a), measures against discrimination of minorities and immigrants did not have a high rating in the Action Plans of the Member States. Consecutive Joint Employment Reports concluded that a comparative analysis of the progress made by Member States would not be possible because of lack of data, non comparable definitions of target groups and the lack of targets set by the Member States. The report stated that only Sweden, the UK, the Netherlands, Belgium and Denmark would have responded to the call for a coherent set of policies combining both measures to promote integration and combat discrimination (European Commission 2002a, 6). According to the report, the employment position of disadvantaged groups and individuals would remain weak, and both general and targeted measures would show rather poor results. 'This could be the result of ineffective measures', the report continued, 'however, an alternative explanation or additional factor to take into account may be discrimination on the labour market, although this is not an issue raised by many of the Member States in their evaluation reports' (ibid., 10). This critical account was echoed by the Communication of the Commission on 'Five Years of the Employment Strategy' (European Commission 2002b), which stated that although the labour market policies of the Member States generally would converge towards the common targets, the employment situation of disadvantaged people would remain weak. Therefore, the Commission pointed 'to the need of (...) comprehensive approaches involving both the supply and the demand side (awareness of employers, enforcement of antidiscrimination), as well as a close link with the wider policies for social inclusion' (European Commission 2002b, 12).

According to the European Commission's 'Green Paper on Equality and Non-Discrimination in an Enlarged European Union' (European Commission 2004b) most of the Member States continued to place their main emphasis on the need for migrants and ethnic minorities to adapt to mainstream society through measures like language and integration-courses. Although language courses are an important tool to improve employability, this approach solely focuses on the individual immigrant and neglects structural inequalities and discrimination. Furthermore, it can easily lead to a public picture of immigrants and members of ethnic minorities as people with deficits, which have to be overcome by training. 'There is a lack of measures addressing the potentially discriminatory behaviour, attitudes or practices of the majority of the population, which can prevent a migrant or member of an ethnic minority from accessing a job or service or training course irrespectively of his or her qualifications, experience or language ability. Member States should be encouraged to make greater use of the European Social Fund to tackle discrimination, as well as more traditional integration measures such as the provision of training,' the Green Paper critically comments (European Commission 2004b, 19).

In reaction to the critical evaluation of the Employment Strategy, the Council of the European Union amended the Employment Guidelines in 2003. Following the principles of the Open Method of Coordination, three overarching objectives – *full employment, quality and productivity at work* and – for the first time – *social cohesion and inclusion* – were set. The new guidelines also defined ten priorities of action and auxiliary quantitative targets. For the first time, action to promote the integration of immigrants and ethnic minorities was mentioned, directly forging a strong link between labour market integration and anti-discrimination. In Guideline 7, Member States are summoned to foster 'the integration of people facing particular difficulties on the labour market, such as early school leavers, low-skilled workers, people with disabilities, immigrants and ethnic minorities, by developing their employability, increasing job opportunities and preventing all forms of discrimination against them' (Official Journal of the European Union 2003, L197/13).

'Supporting integration and combating discrimination in the labour market for people at a disadvantage' has also been defined as a key priority for the future of the European Employment Strategy (European Commission 2003a, 16). Member States are motivated to develop quantified targets for their inclusion into the labour market and to implement measures against discrimination based on the Council-Directives (ibid.). The recent Third Report on Social Cohesion of the European Union (Council of the European Union 2004) has also highlighted that support for disadvantaged groups will stay a priority in the funding of the Structural Funds.

Although social cohesion and inclusion are firmly linked with antidiscrimination as a key priority in several programmes, the lack of European-wide targets, as they have been developed in the area of active ageing, still gives

the Member States much leeway in defining what they regard as success in relation to combating discrimination in employment. Like in the fight against unemployment, where the Member States did not accept the setting of quantitative targets like in other economic areas, there is much reluctance against clear targets and benchmarks, which would allow comparing Member States with regard to their success in the fight against discrimination. Thus the stakeholders of the debate will have to put continuous pressure on the Member States to ensure that the fight against discrimination in practice will live up to the promises of the programme documents and that the advantages of the OMC will be used.

Good Practices in the National Action Plans¹²

United Kingdom: Equality Targets within the 'New Deal'

The 'New Deal' is the major active labour market programme in the UK. It is divided into several sub-programmes and offers education and training, employment counselling, subsidies employment and other measures to integrate people into the labour market. To improve the functioning of the New Deal for minorities, equality targets were set in 2001. When the term of this government ends, a position of equality of minorities should have been reached. The 'Black Training and Enterprise Group' was commissioned to develop a toolkit to help identify the extent to which existing New Deal programmes are relevant to, and taken up by, minority ethnic groups. Every six months the Employment Service reviews the progress all New Deal programmes have made in delivering equal opportunities and issues guidance to the New Deal Partnerships on how to better engage minority ethnic jobseekers. Within the Public Sector, a target has been set to have 3.2 percent of senior civil servants from minority ethnic background by 2004/2005. Information of ethnic make up of staff will be published annually, together with departmental action plans for meeting the target.

The 'New Deal for Communities' targets social exclusion and multiple deprivations in the poorest regions. The programme combines New-Deal measures with regional development policies by setting up local partnerships, which are to develop proposals for neighbourhoods of 1000-4000 people. These proposals do not only tackle labour-market issues, but also issues of urban development, housing, childcare or security and aim at the restructuring of problem-ridden areas. Ethnic monitoring measures have been introduced for all local partnerships, and they have to follow a checklist to prevent racism and discrimination. (Source: UK National Action Plans for Employment, 2001-2004).

Netherlands: Covenants with Companies

In the Netherlands, the 'Wet Samen' (Promotion of Employment for Minorities Act) obliges all companies

employing 35 workers or more to recruit a proportion of immigrant workers equal to the proportion of immigrants living in the region where the firm is established. In order to fulfil their obligations, the companies have to report on the ethnic composition of their workforce. Employment of immigrants is further supported by the activities of company minority advisers employed by the Central and Local Employment Service Board(s), who assist trade and industry to find qualified employees among minorities and individual minority members to find suitable employment. They also act as brokers between employers and ethnic minority organisations, which are sometimes involved in the recruitment process. The Act was discontinued as of January 1, 2004.

Since 1998, the Dutch National Action Plans have reported on a variety of measures to improve the functioning of the WET SAMEN.

The most challenging plan to improve minority employment has been the agreement between the Dutch Association of Small and Medium Sized Enterprises and the Dutch Employment Service to place 20.000 people from ethnic minority groups in jobs in SMEs until May 2001. It was agreed that the association for employers in small and medium-sized enterprises would send 30.000 job vacancies to the Employment Service in one year, which would preferentially be filled by jobseekers from ethnic minorities. The Employment Service agreed to fill 20,000 of these job vacancies with ethnic minorities. This covenant was made because it was observed that ethnic minorities who were classified as being able to find a job without assistance (so-called phase-1 job seekers) were less likely to find a job than native Dutch persons with the same classification.

The National Action Plan for 2002 informs the reader that the target for reducing unemployment of ethnic groups was reached in 2000, mainly due to the covenants signed with various major companies and with the Association for Employers in Small and Medium Sized Companies. After an initially slow start, in the second half of 2000 the results of this covenant became visible. The Centres for Work and Income (CWI, former Employment Service Centres) had created separate project-organisations and made counselors available for intensive assistance (one on one approach, job search assistance, accompanying jobseekers to job interviews, intensive contacts with employers etc.) to all ethnic minority job seekers. During the same period of time the association for employers in small and medium-sized enterprises approached employers of SMEs with an intensive communication-campaign. In order to improve matching between employers and ethnic minority jobseekers, specific services were created, such as a periodically appearing regional paper for employers listing available ethnic minority jobseekers individually, by function and by qualification.

Encouraged by the successes of the SME covenant, the government started a similar covenant with large companies in 2001. By the end of March 2002, 110 large companies had agreed to covenants concerning the inflow of ethnic minorities and their subsequent mobility within the com-

¹² Source: National Action Plans for Employment 2001-2004.

pany. The numbers of employees in these companies vary between 500 and over 150,000. These tailor-made covenants touch upon a wide variety of subjects, varying from offering dual programmes (combining work and training) to action plans to increase the employment rate of higher educated ethnic minorities. Often, the company has a separate budget or personnel available for this purpose. For example, several companies have appointed a project manager to take care of the implementation of the covenant.

The covenants contain agreements in the following areas (number in brackets indicates number of agreements in companies): Hiring of personnel; inflow and guidance (75), mobility and education (45), personnel-policy, communication, works council (60); integration/dual programmes (33). These agreements are often underpinned by concrete targets, for example the participation of at least 20% of the ethnic minorities within a company in internal training programmes or participation of 20% of ethnic minorities in projects involving school-dropouts. For the implementation of the entire projects, an organisation called 'Make way for ethnic minorities' has been set up to advise companies in the implementation of the plans to which they have agreed.

(Source: Netherlands Action Plans for Employment 2000-2004)

Ireland: Framework for the Development of Equal Opportunities at the Workplace

Within the last years, Ireland has implemented a comprehensive antidiscrimination framework. The Employment Equality Act 1998 (EEA) and the Equal Status Act 2000 (ESA) form a basis for Irish antidiscrimination policy that is by now seen as one of the most developed in the world. The EEA 1998 prohibits discrimination on the grounds of gender, marital status, family status, disability, age, sexual orientation, religion, race (including colour, nationality, ethnic/national origin) and membership of the Traveller community. Discrimination is prohibited in the areas of recruitment, terms and conditions, training and termination of employment. Antidiscrimination policy is implemented by the Equality Authority, which was established in 1999. A major task of the Equality Authority is the development of codes of conduct and training programmes for the implementation of antidiscrimination measures within companies. During 2002 the Equality Authority organised an Anti-Racist Workplace Week, including a billboard and radio campaign and seminar, on the theme of migrant workers, and conducted research on the labour market inequalities experienced by four groups of people: older workers, people with disabilities, refugees and members of the Traveller Community. It convened the Equal Opportunities Framework Committee with the Social Partners; published guidelines of equality and diversity training and on equality policies in enterprises, organised seminars and provided funding for a range of projects carried out by social partner organisations. A National Framework Committee for Equal Opportunities at the Level of the Enterprise including Social

Partners and NGOs was set up. The work of the Committee includes developing and disseminating practical support for the 'equal opportunities workplace', supporting individual projects, and engaging with equality planning and equality reviews. The activities of the Committee are supported by a specific budget. These activities led to a countrywide anti-racism awareness campaign called 'Know Racism'. In 2004, this campaign was followed by a National Action Plan Against Racism, which had been developed after consultations with the civil society and the Social Partners.

(Source: Irish National Action Plans for Employment 2000-2004).

IV. The European Social Funds

History and Main Targets

The European Social Fund is the main European Union instrument for the funding of programmes and initiatives in the field of employment policy. It is one of the four Structural Funds of the European Union¹³ that have been established in order to reduce the differences in living standards in Europe. In the seven-year period between 2000 and 2006, the activities of the fund will be fully integrated into the European Employment Strategy. Thus it will become the main tool of implementation of the Strategy in the Member States.

For the period 2000-2006, five priority areas have been set for the ESF (European Commission 2000, 14):

- Development of an active labour force.
- Assistance for people at risk of social exclusion, especially with regard to their chances on the job market.
- Improvement of general education and vocational training, with the aim of lifelong learning and acquisition of the skills needed by the labour market.
- Promotion of employee adaptability, entrepreneurship and workforce skills in the fields of research, science and technology.
- Fostering of self-employment and employability of women, and measures to combat gender inequalities on the labour market.

For each of these five targets, the Commission agrees on the amount of resources per objective and per country. The Member States must define programming priorities, which are to be approved by the Commission. The breakdown of the funding and the selection of specific projects that will receive ESF-co-funding is a matter for the national authorities, which will publish calls for tender for their specific programmes. The national ministry responsible for employment is the contact point for ESF-funded programmes (European Commission 2000a, 15).

¹³ The other three funds are the European Agricultural Guidance and Guarantee Fund (EAGGF), the Financial Instrument for Fisheries Guidance (FIFG) and the European Regional Development Fund (ERDF).

The EQUAL-Programme

Most of the Member States tend to use ESF-funding for overall programmes administered by the national employment authorities or agencies, which gives NGOs and Trade Unions only limited possibilities of influence. The main source of funding for projects against discrimination is the EQUAL Community Initiative. The EQUAL-programme, which runs from 2000-2006, includes the different strands of its predecessors 'ADAPT' and 'EMPLOYMENT'¹⁴ into one single programme supporting measures to combat unequal treatment and discrimination on the labour market based on the grounds of sex, ethnic origin, age, disability, sexual orientation and limited qualifications. The projects funded by the EQUAL-programme must include government organisations, the business world, Social Partners and NGOs, and are integrated into trans-national networks to allow for exchange of good practices. The Initiative EQUAL is by far the most important tool to implement the idea of antidiscrimination into overall labour market policies.

The EQUAL-programme emphasises trans-national cooperation and innovative approaches. To qualify for funding, partners of at least three Member States must cooperate in a 'development partnership', which involve associations and organisations of the public and private sector to ensure its compliance with one of the four main pillars of the employment strategy. In the first round of EQUAL (2000-2005), the EU contribution to the programme amounted to 3,000 million Euros¹⁵.

The EQUAL-Initiative is structured in five pillars: Employability, Entrepreneurship, Adaptability, Equal Opportunities for Women and Men, and Measures for Asylum Seekers. Combating racism and xenophobia in relation to the labour market is the thematic field 2 of the 'Employability'-pillar of EQUAL. The development partnerships in this field should provide a testing ground for the development of joint projects of employers, trade unions and NGOs in different fields, such as

- Action or research aimed at gaining a better understanding of what constitutes discriminatory behaviour;
- Publicity and information campaigns;
- Promotion of examples of good practice in the workplace;
- Action aimed at improving the effectiveness of legal requirements and collective agreements;
- Integrated approaches in the fight against racism;
- Intercultural training, training of social workers or mediators of immigrant origin;
- Positive action aimed at improving the employment prospects of migrants¹⁶.

By the end of 2002, twelve Member States¹⁷ were involved in a total of 78 development partnerships, with 33 partnerships in France alone. The measures co-financed by EQUAL include i.e. antiracism training for Social Partners and civil servants, the development and implementation of codes of conduct within companies and awareness-raising among potential victims of racism or the set up of advice structures for victims of racial discrimination. Many projects include antidiscrimination issues in a broader framework, e.g. the development of management tools to create a positive climate for diversity within labour organisations and the development of a transferable method to realise a change to a non discriminatory culture or the development of knowledge and business support centres for ethnic minorities (Jandl/Kraler/Stepien 2003, 72ff.). Although the EQUAL-programme has not been evaluated yet, the variety of projects gives room for hope that one of its main tasks, the development and exchange of knowledge about antidiscrimination measures in society, has been reached. Furthermore, the possibility of EU-funding allows NGOs and activists to put pressure on their governments to take the issue seriously and to include it into national labour market programmes.

The growing importance of the issue of antidiscrimination within the EQUAL-programme can be seen in the selection of 'Building on Diversity' as the leitmotif for the Employability Pillar for 2003-2004 by the Thematic Group on Employability¹⁸. The decision was based on the fact that more than half of the 540 development partnerships active in the Employability Theme had selected priorities related to 'Managing Diversity'. The priorities most frequently mentioned in the work programmes had been the promotion of non-discriminatory practices in the workplace (52%) and the enhancement of the capacity of authorities, training organisations and employers to understand and manage diversity (44%) (European Thematic Group 1 2003). The Working Group will focus its activities on the issue of convincing and involving employers in order to ensure their proactive support in the creation of employers' networks and the development of E-Quality criteria or labels.

Other Funding Sources for Projects against Discrimination

In addition to the EQUAL-programme, the 'Action Programme to Combat Discrimination' (2001-2006) is directly geared at projects combating discrimination. With a total budget of Euro 98.4 million, it supports a wide range of measures. The programme aims to improve the understanding of issues relating to discrimination through funding research and studies, to develop the capacity to address the prevention of discrimination effectively and to

¹⁴ The Employment Initiative had four strands: Now, Horizon, Youthstart and Integra

¹⁵ http://europa.eu.int/comm/employment_social/equal/index_en.html

¹⁶ http://europa.eu.int/comm/employment_social/equal/index_en.html

¹⁷ Austria, Belgium, Czech Republic, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, United Kingdom.

¹⁸ On the European level, five 'European Thematic Groups', each dealing with a pillar of the programme, allow for the sharing of information and the exploitation of innovative results of the about 1,400 EQUAL-partnerships. ¹⁹http://europa.eu.int/comm/justice_home/funding/inti/funding_inti_en.htm

promote and disseminate values and practices underlying the fight against racism. Three years after its launch, the programme has supported about 100 projects and activities per year involving public authorities, Social Partners, equality bodies and NGOs (Council of the European Union 2004, 8).

Although not directly geared at antidiscrimination, the INTI-programme (Integration of Third Country Nationals) of DG Justice and Home Affairs is also funding several projects dealing with antidiscrimination issues under its strands 'improved knowledge of integration issues' and 'innovative projects'¹⁹.

How can NGOs Make Use of the Structural Funds?

As most of the funding of the ESF is administered by the governments, the involvement of NGOs into programme development varies between Member States. In most cases, NGOs cannot directly influence the allocation of ESF-funds, but have to rely on lobbying to pressure governments to allocate funding towards antidiscrimination measures. The clear mentioning of measures against discrimination in Guideline 7 of the Employment Strategy can be a helpful tool in lobbying for targeted programmes against discrimination.

Nevertheless, for the moment the EQUAL-programme is the main tool of funding for NGO-led projects. Every Member State has set up a support-structure and a coordination office for the development of projects, and a dedicated web-site of the European Commission informs about the programme and calls for tender²⁰.

Examples of EQUAL-funded Antidiscrimination Projects

The EUQAL-database²¹ mentions 78 development partnerships within the thematic field 'combating racism'. The following examples can only give a hint about the different development partnerships' projects funded by EQUAL. The selection does not entail any kind of evaluation.

Development Partnership 'Colourful Workshop'²²:

The Development Partnership is working within the Flemish community in Belgium and brings together three main trade unions – ABVV (the Socialist Trade Union), ACV (the Christian Trade Union), and ACLVB (the Liberal Trade Union) and seven non-profit organisations. It is one of the very few EQUAL-projects, which are directly promoted and sponsored by the Social Partners.

According to a number of studies in the late 1990s, racial discrimination within the labour market in the Flemish Community of Belgium is widespread. In June 2001, the

Flemish Trade Unions and the Flemish Ministry of Employment and Tourism signed a protocol geared to promoting non-discrimination and diversity in the workplace. The EQUAL-partnership, which was developed within the framework of this protocol, aims at the development of practical tools for union delegates and shop stewards to influence the employment policies of the companies and institutions where they are employed to develop a non-discriminatory employment practice.

In order to develop these tools and to identify examples of good practice, each trade union carries out research in a minimum of five pilot companies on how management and the staff deal with immigrant colleagues at the workplace. Main areas of research include the organisation of each company's Human Resources Management, particularly in relation to the recruitment of new employees and the selection criteria used, and the role of the trade union representatives within these companies. They organise training sessions within the companies for employees and shop stewards based on the field research and the factual situation within the company and plan to produce a guide to good practices, a handbook on promoting non-discrimination and diversity as well as a concept for office or factory floor training in intercultural communication.

The Development Partnership 'Colourful Workshop' is involved in a trans-national partnership with a Development Partnership in the Netherlands called 'Towards a Workforce without Discrimination' with similar tasks.

Development Partnership 'Majakka'²³

The main aim of the Development 'Majakka' (the Finnish word for beacon) is to develop innovative ways to promote full social inclusion and empowerment of people whose employment and everyday coping is impeded by cultural and language barriers as well as health and social problems. This goal is reached by developing empowering rehabilitation and employment services modified according to the special needs of the target group. The services are targeted to immigrants living in the Helsinki region who are in severe risk of social exclusion and are in need of special support. The Development Partnership consist of nine partners: The municipalities of Helsinki, Espoo and Vantaa, training centres and immigrant organisations, i.e. the Ingrian Centre, the Finnish Somali League and the Iran and Iraq Employment Association.

The employment services are now carried out by six job coaches, a job finder and two language teachers working in the area of three municipalities in the Helsinki region involved. The employment team gets additional services for their clients from a case manager and a rehabilitation team of specialists. The employment services follow the basic principles of supported employment (SE) and include ongoing personal support by the job coach in e.g. job-

¹⁹ http://europa.eu.int/comm/justice_home/funding/inti/funding_inti_en.htm

²⁰ http://europa.eu.int/comm/employment_social/equal/index_en.html

²¹ <https://equal.cec.eu.int/equal/jsp/index.jsp?lang=en>

²² http://forum.europa.eu.int/Public/irc/empl/equal_etg/library?l=/etg1/04_examples&vm=detailed&sb=Title

²³ http://www.kuntoutussaatio.fi/majakka-beacon/english/beacon_esite.pdf

C. What do the UN and the Council of Europe have to add?

seeking, job interviews, and also after getting employed. The services for employers include support in on-the-job training, on-the-job work-specific language training, support and aid in necessary paperwork and information concerning immigration, multicultural issues and diversity. The project is building a new recruitment and support service for employers by focusing on developing a more diverse workforce in the Helsinki region.

As to the future, supported (competitive) employment services are not yet an established part of mainstream employment or social services in Finland. Since the beginning of 2003, job-coaching services have been included in the service selection of employment offices, but the number of service providers is still quite small (European Thematic Group 1 2004, 9f.).

The Development Partnership 'Dream Up'

The Development Partnership 'Dream Up' in Greece targets the media coverage of ethnic minorities and immigrants. Starting from the assumption, that the portrayal of immigrants and minorities in the media is often characterised by stereotyping or cultural clichés, the DP felt that the answer to this problem lay in making cultural diversity part of the regional and national broadcasting reality. However, it also recognised that the culture of media organisations tends to produce managers and staff who have full agendas, who are not particularly committed to any social objectives and who are not used to cooperating with other organisations such as training centres and NGOs. So they decided to show media companies what they would gain from employing people from ethnic minority or migrant backgrounds.

The basic concept of the Development Partnership is the idea of an 'Equality Audit'. This innovative process involves both the application of guidelines and the provision of consultancy, and acknowledges that every media organisation has its own particular environment and its own specific needs. It gradually helps employers and workers to understand the benefits of hiring people from minority/migrant backgrounds. The DP explains these as:

- Enlarging the audience;
- Increasing profits from alternative types of advertisements;
- Providing new sources of information for journalists;
- Developing the organisational culture;
- Improving the company's image in terms of its social responsibility.

This process is then backed by targeted training for representatives of ethnic minority and migrant groups. This takes account of the requirements of the company in which the 'trainee' will be placed. This placement is also subsidised for a few months in the case of companies that are willing to provide continuing employment if the placement proves to be successful.

Currently the Development Partnership involves 16 media organisations, fourteen people have gained jobs through this 'opening up to diversity' process and another 30 people from ethnic minority backgrounds have been trained in specific media professions. The equality audit is being developed in cooperation with the Greek Ministry of Press, which should in the future promote and sustain the 'equality audit' and other good practices that emerge from this project (Equal European Thematic Group 1 2004, 13).

C. What do the UN and the Council of Europe have to add?

I. Introduction

The United Nations, which was created in the aftermath of the horrors of racism, fascism and National Socialism, has since its very beginnings placed the battle against discrimination at the forefront of its human rights activities (Nowak 1993, 460). The prohibition of discrimination as such forms an intrinsic part of every human right which State Parties are obliged to guarantee to every human being within its territory and subject to its jurisdiction without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin etc. One sub-section will focus on the ILO, which was founded in 1919 and was established as the first specialised agency of the UN in 1946. It sets standards in basic labour rights amongst which equality of opportunity and treatment are important aims. Regarding the prohibition of discrimination in respect to employment there are a number of important declarations and conventions, which will be described in more detail in the following sections. Due to the limited scope of the present publication, the following sections can-

not cover all antidiscrimination provisions in UN Treaties but rather focus on the most important ones in relation to employment issues.

II. Convention on the Elimination of all Forms of Racial Discrimination (CERD)

As already mentioned above, the fight against racial discrimination formed a core priority of the UN from its very beginning. In reaction to antisemitic incidents in the early 1960s, particularly in Germany, the Human Rights Commission was mandated with the elaboration of a Convention aiming to counteract racist forms of discrimination. The Convention entered into force in 1969 and so far has been ratified by 177 countries²⁴. The Committee on the

²⁴ An overview on the status of ratification of the principal international human rights treaties can be found on the following website of the Office of the High Commissioner for Human Rights: <http://www.unhcr.ch/pdf/report.pdf>.

Elimination of Racial Discrimination²⁵, consisting of 18 experts, was established in 1970 as the first UN human rights treaty body with the task of monitoring state compliance with the Convention (see below).

What Forms of Discrimination are Prohibited by the Convention?

According to Art 1 of the Convention 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life²⁶.

By referring to the purpose and the effect of discriminatory actions the definition not only covers direct but also indirect forms of discrimination. Any action that has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin shall therefore be prohibited by the Convention²⁷. Furthermore, this wording leaves space for the adoption of temporary affirmative action and positive measures to counteract discrimination and to support historically disadvantaged groups. The Convention, however, allows for distinctions between citizens and aliens.

To Which Areas Does the Prohibition of Racial Discrimination apply?

Art 5 of the Convention contains the obligation of State Parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination. The list of enumerated rights in Art 5 is only exemplary as the prohibition of racial discrimination refers to every internationally recognised human right²⁸.

In regard to employment issues Art 5 explicitly obliges Member States to prohibit and eliminate racial discrimination in respect to:

- The right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
- The right to form and join trade unions;
- The right to public health, medical care, social security and social services;
- The right to education and training.

²⁵ For further information on the Committee on the Elimination of Racial Discrimination see: <http://www.unhchr.ch/html/menu2/6/cerd.htm>.

²⁶ International Convention on the Elimination of All Forms of Racial Discrimination, available at: http://www.unhchr.ch/html/menu3/b/d_icerd.htm.

²⁷ See CERD General Recommendation No. 14: Definition of discrimination (22/03/1993), available at: <http://www.unhchr.ch/tbs/doc.nsf>.

²⁸ See CERD General Recommendation No. 10: non-discriminatory implementation of rights and freedoms (Art 5), para 1 (15/03/1996), available at: <http://www.unhchr.ch/tbs/doc.nsf>.

The non-exhaustive catalogue of rights in Art 5 also mentions the right to access any places and services intended for use by general public such as hotels, restaurants and theatres as well as public transport.

What State Obligations Does the Convention Include?

Under Art 2 of the Convention, State Parties are obliged to engage in no act or practice of racial discrimination against individuals, groups of persons or institutions, and to ensure that public authorities and institutions do likewise. Furthermore, states shall refrain from sponsoring, defending, or supporting racial discrimination by persons or organisations.

Art 2 of the Convention additionally obliges State Parties to screen their laws and to nullify any law or practice which has the effect of creating or perpetuating racial discrimination. Moreover, states shall prohibit and stop racial discrimination by persons, groups and organisations. In addition, other measures shall be adopted by State Parties in order to encourage integrationist or multiracial organisations and movements, to eliminate barriers between races and to discourage anything that tends to strengthen racial division.

In Art 6 the Convention puts State Parties under the duty to assure comprehensive protection and remedies against any racial discrimination, including compensation for damages before national tribunals for everyone concerned. In regard to compensation the Committee held that

'[...] the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, [...], is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate²⁹.'

States are therefore not only obliged to adopt penal law provisions but to provide for a legal basis of compensation claims in order to provide victims with the possibility of seeking redress for their material and immaterial damages.

Furthermore, states are obliged to adopt immediate and effective measures particularly in the fields of education, teaching, culture and information, with the result of preventing discrimination, while tolerance between peoples and ethnic groups is to be promoted (Art 7).

How is the Convention Monitored and How are the Rights Enforced?

State Parties are required to submit **periodic reports** on the legislative, judicial, administrative and other measures that they have adopted in order to give effect to the provisions of the CERD. The committee welcomes so-called 'shadow reports' composed by international or local NGOs to present their opinion on the adherence to the convention of the

²⁹ See CERD General Recommendation No. 26: Article 6 of the Convention (24/03/2000), para 2, available at: <http://www.unhchr.ch/tbs/doc.nsf>.

state subject to the reporting procedure. The Committee then summarises its country-specific findings and recommendations in so called 'Concluding Observations'. When shadow reports have been submitted, they are most of the times mentioned in the Concluding Observations. These reports can therefore constitute a very useful tool in regard to lobbying and advocating legislative reform and other measures to counteract racial discrimination (Pleše 2003, 3).

The Convention provides for an optional individual communication procedure, which allows individuals or groups of individuals to bring a communication before the Committee and to complain about the violation of one of the rights conferred by the Convention by the State Party³⁰. A precondition for this procedure is that the country concerned has recognised the Committee's competence to receive such communications. Presently, 42 States, among them the majority of EU-Member States³¹, have recognised this optional procedure. Another precondition for the admissibility of such communications is that all domestic remedies, including those before a designated national body (i.e. Ombudsperson), have to be exhausted, except when the remedies are unreasonably prolonged. Furthermore, communications may not be anonymous and must be submitted within six months after all domestic remedies have been exhausted, except in the case of proven exceptional circumstances. The Committee first decides on the admissibility of a case and, if declared admissible, adopts an opinion whether the state concerned has violated the Convention. Although this opinion is not legally binding and cannot be enforced, it renders an authentic interpretation of the CERD and can contribute to the concretisation of state obligations under the Convention³².

So far only 33 communications have been brought before the Committee; thirteen thereof have been declared inadmissible and only in five cases has the Committee identified violations of the Convention³³. The reason for this small number of complaints might be that other international treaties, all of them including a provision on the prohibition of racial discrimination, seem to provide more efficient protection. The Human Rights Committee (see below), for example, has rendered several decisions in regard to the prohibition of racial discrimination (Nowak 2004 Art 26 para 36). In comparison to decisions issued by the European Court of Human Rights the procedure before the CERD Committee seems less attractive. The decisions of the European Court of Human Rights are not only legally binding, in cases where a violation of the European Con-

vention on Human Rights has been found, the Court also awards monetary compensation to victims on account of the damages suffered. In contrast, the CERD Committee only recommends just compensation regarding those cases in which a violation was realised.

However, the scope of the CERD, which covers the prohibition of racial discrimination with regard to any human right guaranteed internationally, is broader than any other human rights treaty, except for the Covenant on Civil and Political Rights (see below). The states' obligations to counteract racial discrimination by all kinds of means are only specified in such detail in the CERD. The CERD, which is one of the widest ratified international human rights treaties, should therefore not be underestimated. Due to its not very attractive complaint mechanism, NGOs should rather focus on the reporting procedure by compiling well-documented shadow reports. Furthermore, the Convention's catalogue of state obligations provides a useful tool for lobbying the government in question to enhance antidiscrimination legislation and to adopt additional measures to effectively counteract racial discrimination in the public and private sector.

III. Covenant on Civil and Political Rights (CCPR)

The Covenant on Civil and Political Rights (CCPR) was adopted by the UN General Assembly in 1966 and entered into force in 1976 after a lengthy consultation process³⁴. This legally binding Convention³⁵ focuses on so called liberal rights providing individuals with claims against state interference such as, for example, in regard to their right of personal liberty or freedom of speech etc. This Convention therefore rather obliges signatory states not to interfere with the private sphere of individuals.

In regard to antidiscrimination, however, Art 26 of the Covenant provides one of the strongest antidiscrimination rights that can be found in legally binding international treaties.

Article 26

*'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'*¹

Art 26 does not only prohibit discrimination in regard to the rights guaranteed by the Covenant itself but includes a **free-standing prohibition of discrimination**³⁶. This means that in whatever case a signatory state guarantees rights it has to do so without discrimination on the grounds of race,

³⁰ As the inter-state complaint has never been used by any state of the treaty, it seems not relevant to discuss it in the context of this study.

³¹ The EU-Member States who have not yet recognised the individual communication procedure are: Estonia, Greece, Latvia, Lithuania, Slovenia and the United Kingdom (as of June 2004).

³² For further information on the individual complaint procedure see: <http://www.unhchr.ch/html/menu6/2/fs7.htm#cerd>.

³³ Statistical survey of individual complaints considered under the procedure governed by Art 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, available at: <http://www.unhchr.ch/html/menu2/8/stat4.htm>.

³⁴ Available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

³⁵ The CCPR has been ratified by 152 states including all 25 EU-Member States (as of June 2004).

³⁶ See: CCPR General Comment No. 18, para 12, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>.

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status³⁷. Furthermore, Art 26 entitles all persons to equality before the law and equal protection by the law. This involves a two-fold obligation, on the one hand states must refrain from adopting discriminatory laws and on the other hand public authorities have to apply laws in a non-discriminatory way. Hence the latter obligation protects individuals against arbitrary use of legal provisions that results in any form of unjustified discrimination. Furthermore, Art 26 obliges Member States to prohibit discrimination by enacting special laws and to afford effective protection against discrimination (Nowak 2004 Art 26 para 17).

Concerning employment it is important to mention that Art 26 provides some protection also in regard to discrimination by private parties. The Human Rights Committee, which is the responsible treaty body to monitor the State Parties' compliance with the Covenant and to interpret the rights therein, has repeatedly held that individuals should be protected from discrimination by private parties in quasi-public sectors such as employment, schools, transportation, restaurants etc. (Nowak 2004 Art 26 para 56-59). In these areas the employer or the restaurant owner cannot claim that the obligation to refrain from discrimination on the enumerated grounds would be a matter of legitimate, personal decision-making protected by his or her right to privacy. In cases, for example, where certain groups of the population are persistently discriminated in the labour market states must ensure with statutory or other measures that such discrimination is stopped and prevented (Nowak 2004 para 57). Discrimination entailed in a collective bargaining agreement also falls under the scope of Art 26 CCPR. After having exhausted domestic remedies, individuals who consider themselves wronged by such agreements are therefore entitled to file a complaint to the Human Rights Committee (Nowak 2004 para 59).

Art 26 thus includes a positive state obligation to take steps in order to protect individuals against discrimination by private parties such as companies or employers as well as state actors. From a human rights perspective the transposition of the Racial Equality Directive and the Employment Equality Directive prohibiting discrimination also in the private sector can therefore be perceived as a state obligation under international (human rights) law.

How is the Convention Monitored and How are the Rights Enforced?

The **Human Rights Committee**, which is composed of 18 experts, is the relevant body to monitor the observance of the State Parties' obligations under the CCPR. All EU-

Member States have ratified the additional Protocol No 1, allowing for **individual complaints** before the Committee. Over the past three decades the Human Rights Committee, whose decisions are not legally binding, developed into a quasi judicial monitoring body as its opinions are of a very high quality comparable to the decisions of the European Court of Human Rights.

Member States have to provide the Committee with regular **country reports** in which they have to elaborate on measures adopted to counteract existing discrimination practiced either by public authorities or by private persons or bodies. The reports are reviewed by the Committee, which issues its findings and observations in so-called country-specific 'Concluding Observations'³⁸. NGOs, worker unions and other interest groups should refer to the state obligations under Art 26 and use them to put public pressure on national governments to comply with these international human rights standards.

IV. Covenant on Economic, Social and Cultural Rights (CESCR)

The Covenant on Economic, Social and Cultural Rights (CESCR) was adopted in 1966 at the same time as the CCPR and equally entered into force in 1976. The CESCR is the most important international treaty for the codification of the main economic rights (right to work, right to fair and favourable working conditions etc.), social rights (i.e. protection of the family, maternity protection, right to social security) and cultural rights. It has often been argued that these rights cannot be enforced before national courts and therefore are of mere programmatic character. While it is true that the CESCR provides for progressive realisation and acknowledges the constraints due to limits of available resources, it also imposes various obligations of immediate effect such as the prohibition of discrimination regarding the rights set forth in the Covenant³⁹. Furthermore, the Committee on Economic, Social and Cultural Rights, which is the responsible treaty-monitoring body, has held that 'progressive implementation' also produced direct and immediately effective obligations for States Parties in regard to the preservation of standards already achieved, as well as the obligation to take concrete, effective and target-orientated steps towards a rapid realisation of these rights⁴⁰.

According to Art 2 para 2 of the Covenant 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national

³⁷ The wording 'other status' indicates that the list of grounds is not exhaustive but that any other unjustifiable criterion can form a prohibited ground of discrimination. In several decisions the Committee acknowledged that nationality, for example, qualifies as falling under the category of 'other grounds' in cases where distinctions between citizens and aliens or between different categories of aliens are not based on reasonable and objective criteria (Nowak 2004 Art 26 para 37).

³⁸ A complete list of country-specific Concluding Observations can be found at: <http://www.unhcr.ch/tbs/doc.nsf/webDocumentsPage?OpenPage>.

³⁹ CESCR General Comment 3 (Art 2, para 1), 1990, available at: http://www.unhcr.ch/html/menu3/b/a_ceschr.htm.

⁴⁰ CESCR General Comment 3 (Art 2, para 1), 1990, available at: http://www.unhcr.ch/html/menu3/b/a_ceschr.htm.

or social origin, property, birth or other status.' States Parties are hence obliged to take all measures needed to effectively ensure that all economic, social and cultural rights can be enjoyed in practice without discrimination. In regard to the private sector the Committee on Economic, Social and Cultural Rights has noted that also non-public entities, such as private employers and private suppliers of goods and services should be subject to both non-discrimination and equality norms, especially given the increasing privatisation of public services⁴¹.

Compared to the International Covenant on Civil and Political Rights the CESCR does not provide for an individual complaints procedure. Its monitoring mechanism has therefore often been described as one of the Covenant's main weaknesses. States Parties, however, are obliged to provide the Committee on Economic, Social and Cultural Rights with regular state reports on the national implementation of the Covenant. The Committee turned this reporting procedure into an efficient monitoring tool by integrating non-governmental organisations into the process of state reporting (Nowak 2003, 83). Furthermore, the Committee has issued several general comments, which had a decisive impact on the interpretation of these rights and the corresponding treaty obligations.

V. Convention on the Rights of Migrant Workers and their Families (ICMW)

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) was adopted by the UN General Assembly on December 18th⁴², 1990, and entered into force on July 1st after the 20th country had ratified it. This Convention has yet to be ratified by the vast majority of migrant-receiving states, including all Member States of the EU⁴³.

The ICMW constitutes the **first comprehensive universal codification of migrants' rights** going beyond the ILO competencies by also dealing with issues related to culture, education, and political participation. The Convention, in fact, does not create new rights for migrants but aims at guaranteeing equality of treatment and the same working conditions for migrants and nationals. Furthermore, the ICMW addresses specific protection needs of migrant workers rendered vulnerable by their absence from their country of origin⁴⁴. One of the Convention's objectives is the incor-

poration of certain minimum standards that State Parties must apply to migrant workers and members of their families as well as irregular migrants if they are under their jurisdiction.

The two main rationales behind the Convention are to improve the situation of migrant workers and their families by building upon existing international standards and to prevent clandestine migration while recognising the fundamental human rights of irregular migrants. The convention thereby recognises that irregular migrant workers and their families face greater human hardships than regular migrants and hence advocates action to prevent and eliminate illegal labour migration. At the same time it aims to ensure that fundamental human rights are also granted to undocumented migrants. Thereby, the Convention faces some challenges in balancing the protection of migrants' rights with the principle of state sovereignty (Cholewinski 1997, 146). This might be the main reason for the low level of acceptance among the majority of states.

Who Qualifies as a Migrant Worker According to the Convention?

The Convention's definition of a 'migrant worker' is the broadest that can be found in any international document concerned with migrants such as the ILO Conventions No. 97 and No. 143. The term 'migrant worker' is defined as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national. The definition includes seasonal workers as well as self-employed workers. Due to the rejections of some Member States, the definition does not apply to persons who (were seeking) seek employment for the first time. Refugees and stateless persons were excluded on the basis that they are protected under other international standard setting instruments.

What are the Rights Conferred by the Convention?

The rights conferred by the Convention are structured in two sets of rights. The first one, including so-called fundamental human rights (Part III of the Convention), applies to *all* migrant workers and members of their family, hence protecting also irregular migrants⁴⁵. The second set of rights contains more specific rights and applies only to those migrant workers and members of their families who are documented or who find themselves in a regular situation.

In regard to employment related issues the Convention obliges Member States to treat regular and irregular migrants and members of their families as not less favourable than nationals of the respective state with regard to:

- Remuneration and conditions of work including issues such as overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of work contract,

⁴¹ CESCR General Comment 5 (09/12/94), para 11, available at: http://www.unhchr.ch/html/menu3/b/a_ceschr.htm

⁴² In 2000, the United Nations proclaimed December 18th as International Migrant's Day. DECEMBER 18 is also the day of an online organisation with the aim to support the work of migrant organisations in the different regions by using the Internet as a tool for advocacy, networking and the dissemination of information. For further information see: <http://www.december18.net/>.

⁴³ Until June 2004, 25 states have ratified the ICMW.

⁴⁴ For further information on the Convention see: UNESCO's Information Kit on the United Nations Convention on Migrants Rights, available at: http://portal.unesco.org/shs/en/ev.php-URL_ID=3448&URL_DO=DO_TOPIC&URL_SECTION=201.html See also the website of the Global Campaign for Ratification of the Convention on Rights of Migrants: <http://www.migrantsrights.org/>.

⁴⁵ The Convention provides a 'subjective' definition, leaving it up to the law of the state of employment to determine whether migrant workers and members of their families are non-documented migrants or in an irregular situation (Cholewinski 1997, 187).

minimum age, restrictions on home work, etc. (Art 25)⁴⁶,

- Security benefits (Art 27) and
- Emergency medical care (Art 28).

Additional rights ensuring equal treatment in respect to work and employment are only conferred to **documented migrants and members of their families**. These rights to equal treatment apply to:

- Access to vocational guidance and training, social and health services, cooperatives and self-managed enterprises (Art 43(1)),
- Protection against dismissal, unemployment benefits, access to public work schemes intended to combat unemployment and access to alternative employment in the event of loss of work or termination of other remunerated activity.

The ICMW provisions governing equal work and employment conditions have a wider scope than equivalent ILO standards because they **directly** guarantee **rights to migrant workers** protecting them against their employers as well as against the state, whereas relevant ILO conventions solely contain state duties to prevent discriminatory practices of public authorities or to promote equal opportunity with regard to work and employment (Cholewinski 1997, 161).

The Convention obliges State Parties to ensure that any person whose rights have been violated under the ICMW has an **effective remedy** and that the person seeking a remedy is entitled to a review of his or her claim as well as to a decision by competent judicial, administrative or legislative authorities. If such remedies are granted to persons whose rights have been violated, the states must also provide for their effective enforcement.

Even though the Convention explicitly confers rights to irregular migrants the vulnerability of this group remains highly critical, as the threat of detection and expulsion mostly prevents these persons from seeking redress for any violations. Due to state resistance, the ICMW lacks a clear obligation of national legislators to regularise the irregular status of migrant workers if they have resided in and contributed to the economy of the country of employment for some considerable time.

How is the Convention Enforced and Who is Responsible for its Supervision?

After the entry into force, a Committee of independent experts was established to receive and examine **reports by State Parties** to the Convention and to monitor the implementation of its provisions. Due to the fact that so far none of the 25 EU-Member States have accepted the possibility of an individual complaint procedure before the Committee no such mechanism is in place.

Outlook on the Convention's Impact on EU-Member States

As no major migrant-receiving country has ratified the Convention yet, its impact continues to remain limited. Many states argue that their national legislation already protects migrant workers in a satisfactory way, which would render ratifying the Convention superfluous. In fact, many receiving states fear an increased financial burden resulting from the facilitation of family reunification which is recommended by the Convention.

Another reason for not ratifying the ICMW is associated with the Convention's explicit reference to basic human rights of undocumented migrant workers. Although the Convention does not encourage their presence, states fear that granting rights to irregular migrants would make the respective country more attractive for irregular immigration. The Convention, however, does not force State Parties to liberalise their immigration policies, nor does it propose any new set of rights, but rather aims at ensuring that human rights are properly applied to migrant workers (i.e. it emphasises the connection between migrant rights and human rights).

A lot of lobbying and awareness raising therefore remains to be done in convincing states to acknowledge migrant workers and members of their families as a particularly vulnerable group that is in need of an international human rights treaty specifically addressing their situation as non-nationals.

Due to the broader scope of the ICMW encompassing not only civil and political rights but also economic, social and cultural rights it would in fact complement the European Convention on Human Rights (ECHR) which is the only legally binding instrument in Europe also guaranteeing human rights to irregular migrants. In contrast to the Racial Equality Directive and the Employment Equality Directive the ICMW would additionally prohibit discrimination on the grounds of nationality in regard to employment. The ICMW would thereby narrow down the possibility of EU-Member States to adopt laws conferring different rights to workers or employees according to their nationality.

VI. ILO Initiatives to Combat Discrimination in the Workplace

The International Labour Organisation is the principal international body with expertise in the area of labour issues and the development of international labour standards, including those involving human rights concerns. Its policy-making bodies are composed of government, workers' and employers' representatives participating on an equal basis. This tripartite construction is very unique among intergovernmental organisations concerned with human rights.

What are the Implications of Convention 111?

One of the ILO's areas of concern is the promotion of equal treatment of migrant workers, which is closely related to the Convention concerning Discrimination in respect of

⁴⁶ Art 25 (2) prohibits Member States to derogate from the equal treatment principle in private contracts of employment.

Employment and Occupation (C111), adopted in 1958. It is one of the seven core labour standard conventions of the ILO.

It defines discrimination as

'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. (Art 1(1)(a))'

This definition refers to 'race', 'colour' and 'religion' as prohibited grounds of discrimination but not to ethnic origin or nationality as such. 'National extraction' refers to a rather narrow concept – namely naturalised citizens or people whose parent(s) is/are non-nationals. However, Art 1(1)(b) stipulates that additional grounds may be added by ILO-Member States after a tripartite consultation process has taken place within the respective Member State. The terms 'employment' and 'occupation' cover access to vocational training, employment and particular occupations as well as terms and conditions of employment (Art 1(3)). Several areas in which there is ample evidence of discrimination are not explicitly mentioned – access to self-employment, promotion, pay and termination of a contract. Compared to the two EU-directives, the scope of this Convention seems less explicitly and nevertheless more narrowly defined. The Convention requires ratifying countries to declare and pursue a national policy designed to promote equality of opportunity and to biannually send in reports scrutinised by an ILO expert committee. Workers' and employers' organisations in each Member State have the right to comment on the report during its drafting phase.

Although ILO conventions are legally binding standards that, once ratified, impose obligations upon states in international law, options for sanctioning noncompliant states are rather limited. In cases of serious discrepancies the Committee of Experts on the Application of Conventions and Recommendations publishes its observations in an annual report, which also encompasses a list of countries that have received direct requests regarding minor discrepancies. The reports available on the web are not up to date though; they seem to focus on very obvious non-compliances and rather on gender than any other forms of discrimination⁴⁷. The tools available 'to attain member compliance are limited to moral persuasion, publicity, shame, diplomacy, and technical assistance' (Ehrenberg 1996, 164). Nevertheless, ILO standards have influenced provisions in other international human rights instruments and established targets that countries should aspire in law and practice.

⁴⁷ Examples of such reports can be found at: <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-appl.htm> and <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-pd1.htm>.

Table 1:
Years of Ratification of Convention No. 111 by the EU-25

Year of ratification	Country	Year of ratification	Country
1959	Portugal	1977	Belgium
1960	Denmark	1981	France
1961	Germany, Hungary, Poland	1984	Greece
		1992	Latvia, Slovenia
1962	Sweden	1993	Czech Republic, Slovakia
1963	Italy	1994	Lithuania
1967	Spain	1999	Ireland, United Kingdom
1968	Cyprus, Malta		
1970	Finland	2001	Luxembourg
1973	Austria, Netherlands	⁴⁸	Estonia

Source: ILO

In 1998, the ILO wanted to demonstrate that the issue of discrimination was central to its work. The principle of 'the elimination of discrimination in respect of employment and occupation', originally contained in Convention No. 111, was incorporated into the Declaration of Fundamental Rights and Principles at Work. This Declaration tries to generate an obligation for those ILO-Member States that have not ratified Convention 111. Except for Estonia, though, the EU-25 have all ratified this ILO-standard.

The ILO's Migration Policy and Related Initiatives

Over the decades, the ILO has adapted its migration policy according to the ebbs and flows of global economic fluctuations and developments. This means that their policy has gradually shifted towards supporting a more restrictive and controlled migration regime but making those responsible for paying the social costs of migration that obtain the highest level of benefits (Cholewinski 1997, 94).

In the 1970s, the need for promotional measures and positive programmes to secure real equality at the workplace was recognised, as migrant workers were often victims of prejudice and had limited opportunities for seeking redress. Two decades passed before the research programme 'Combating Discrimination Against Ethnic Minority and (Im)migrant Workers in the World of Work' was launched. It examined the dimensions and causes of disparities between national and migrant workers in access to employment (ILO/IOM/OHCHR 2001, 14) including countries like Belgium, Denmark, Finland, France, Germany, the Netherlands, Spain, Sweden and the UK. Its findings showed that at least in one out of three application procedures migrants or members of minorities were discriminated against (ibid., 15)⁴⁹. In 2000, a manual on best prac-

⁴⁸ Not ratified

⁴⁹ The effects of discrimination were isolated from other intervening variables like age, experience, education, language, skills, marital status and gender.

tices was drafted to encourage the utilisation of the lessons learned and the models identified at global, national, bilateral and regional levels to promote the global effort of combating discrimination and achieving equality for migrant and minority workers (ILO 2000).

Since then, the ILO has engaged in a project profiling initiatives against discrimination/for equality of migrant and ethnic minority workers. These examples are called initiatives and not 'good' or 'best practices', as such labels imply evaluative or even comparative assessment. Standards, indicators or measures for evaluating such practices have, however, not been developed or agreed on by any international institution (Gächter 2003, 9). More than 90 examples of such initiatives by governments, employers, workers' organisations and NGOs in 25 European countries (not restricted to EU-Member States) and Armenia are identified to provide practical guidance, material and support to government bodies and organisations in strengthening antidiscrimination policies, legislation and activities. For each initiative a substantive description of the activity and its context, preliminary evaluative data regarding results and possible effectiveness of the measures will be made available on the World Wide Web⁵⁰. The site will not only provide downloads for information but is primarily designed as a discussion forum (ibid., 8).

Most Important Findings and Consequences of the Report 'Time for Equality at Work'

In 2003, this Global Report, which is part of the follow-up to the Declaration of Fundamental Rights and Principles at Work, was published and received broad media coverage. It identifies and examines diverse forms of discrimination including grounds such as race, ethnic origin, skin colour and religion. Blatant forms of discrimination are identified as still prevailing but being supplemented by new and less visible forms of discrimination, which are more difficult to combat. Racial and religious discrimination have become more virulent due to the combined effect of global migration, the redefinition of national boundaries and the growing economic problems and inequalities (ILO 2003, XI). Labour market processes, practices and institutions as evidenced by the cases described in section 1 not only generate but also reinforce discrimination. The publication draws a strong link between poverty and discrimination. Not having access to the labour market or being employed in insecure, unprotected as well as badly paid jobs are the main causes of material deprivation and vulnerability that poor people experience (ILO 2003, 27). Differences in wealth are often attributed to differences between people, i.e., they are ethnicised or racialised, leading to further social exclusion (Gächter 1997, 1) and stigmatisation. The persisting remuneration gap is not only addressed in connection with gender issues but also with discrimination on the grounds of race and ethnic origin. The reader is updated on

various policy and practical responses to discriminatory practices. It is made clear that the benefits of eliminating discrimination are clearly not limited to those affected but extend to economy and society. If all workers enjoy equal treatment and equal opportunities, efficient use of all their resources and diverse talents is guaranteed. The business case for equality is an important point in convincing both governments and employers to support or engage in measures against discrimination. The report also outlines an action plan (ILO 2003, 115ff.) for addressing discrimination at work, an issue that was taken up and adopted during the 288th Session of the Governing Body and its committees in November 2003. The plan aims at enhancing the coherence, visibility and impact of the ILO's actions in the area of eliminating discrimination in employment and occupation (ILO, Governing Body 2003). Until 2007, the plan will focus on the link of racial/ethnic discrimination in employment to development and poverty and the payment inequalities not only between the sexes but also between racial/ethnic groups. The plan suggests that national programmes for equality should be analysed to identify obstacles in the successful promotion of equality. Such programmes should encompass the adoption of antidiscrimination legislation and the enhancement of effective enforcement mechanisms, the development, implementation and monitoring of national equality policies and affirmative action measures, the provision of capacity building to employers' and workers' organisations as well as awareness raising. In 2007, the second Global Report on the issue of discrimination at work will determine whether the action plan has generated measurable results. The action plan can be interpreted as a further attempt to effectively monitor the elimination of discrimination in employment and occupation and to actively involve not only those representatives participating in the ILO but also civil society organisations.

VII. Council of Europe

The Council of Europe (CoE) was founded in 1949 by eleven Western European states to promote human rights, the rule of law and pluralistic democracy. Within a limited amount of time, a highly effective human rights protection system was established under the European Convention for the Protection of Human Rights and Fundamental Freedoms providing for a judicial individual complaints procedure before the European Court of Human Rights.

According to Art 14 of the Convention

'[The] enjoyment of the rights and freedoms set forth in this Convention 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, property, birth or other status.'

As the wording indicates, the prohibition of discrimination only applies to the rights set forth in the Convention including its additional protocols. The Convention, however, focuses on civil and political rights including i.e. the right to life, liberty, integrity etc. The prohibition of discrimination

⁵⁰ The publication is planned for July 2004 and will be available at: <http://www.ilo.org/migrant>.

D. How are Antidiscrimination Policies and Tools Implemented in the Member States: Who is doing What to Combat Religious and Ethnic Discrimination in Employment?

therefore generally does not apply to employment related issues like working conditions, or access to work in general. The absence of any independent right to non-discrimination within its provisions is often described as an inherent weakness of the European Convention on Human Rights (Bell 2002b, 10).

In order to improve legal protection against discrimination, the Council of Europe's Committee of Ministers adopted Protocol No. 12 to the European Convention on Human Rights in June 2000, containing a general and self-standing prohibition of discrimination. It will enter into force following the tenth ratification of one of the Member States. Whereas the majority of Member States has signed the Additional Protocols only six states have in fact ratified it so far. Protocol No. 12 contains a non - exhaustive list of grounds on which discrimination is prohibited in regard to the enjoyment of any right granted to an individual under national or supranational law. It seems important to note that discrimination based on national origin is covered by the Protocol. This means that any national law providing for distinctions based on nationality would have to be objectively justified in order not to constitute discrimination under the Protocol (Bell 2002b, 20).

The principal objective of the Protocol is to protect individuals from discrimination by public authorities, including the courts, as well as legislative and administrative bodies. The Protocol therefore sets a general limit on state responsibility in regard to discrimination between private persons⁵¹. Hence, it does not impose a positive obligation on the State Parties to take appropriate measures to prevent discrimination in the private sector. However, following the Explanatory Report of the Protocol, State Parties might be held responsible for discrimination between private parties if there is a clear lacuna in the protection provided by domestic law, or if the gravity of the discrimination implies a duty on the state to intervene. Furthermore, positive state obli-

gations to prevent discrimination by private parties might arise in regard to relations in the public sphere normally regulated by law, for which the state has a certain responsibility (e.g., arbitrary denial of access to work, restaurants, or services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc.)⁵².

Compared to the Racial Equality Directive and the Employment Equality Directive, Protocol No. 12 thus provides a much weaker level of protection as regards discrimination by private actors.

Apart from these legal instruments the framework of the Council of Europe also includes a specialised body to combat racial discrimination; the European Commission on Racism and Intolerance (ECRI). ECRI, which was established in 1993, has the mandate to review Member States' legislation, policies and other measures to combat racism, xenophobia, antisemitism and intolerance as well as their effectiveness. Furthermore, ECRI's tasks include the elaboration and proposal of further action at local, national and European level and to formulate general policy recommendations for Member States⁵³. The Commission furthermore conducts country-by-country monitoring visits, meeting key actors in the fight against racism and intolerance in the country concerned in order to obtain as detailed and comprehensive a picture as possible of the situation as regards racism and intolerance in each country. The findings are summarised in country-specific reports, which are first discussed confidentially with the government concerned and then published. Given the fact that ECRI aims to meet with civil society organisations fighting against racism and intolerance during their visit in the country concerned, this can be a very useful way for NGOs to contribute to the findings of the country specific report and to draw attention to the specific problems and loopholes in the protection against racist discrimination.

D. How are Antidiscrimination Policies and Tools Implemented in the Member States: Who is doing What to Combat Religious and Ethnic Discrimination in Employment?

I. Introduction

Experiences with antidiscrimination policies vary widely among the Member States of the EU. Whereas several Member States, for instance the United Kingdom, the Netherlands and Sweden had implemented antidiscrimination policies long before the EU-directives, the implementation of antidiscrimination legislation is a new challenge for many other Member States. In many Member

States, the transposition of the directives does not only pose a legal but also a political challenge, as their self-understanding traditionally has denied the sheer existence of ethnic and religious discrimination. In other Member States, the inclusion of openly anti-immigrant or right wing extremist parties into the government has prevented a timely and effective implementation of the directives. Civil

⁵¹ Explanatory Report of the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CoE: ETS No. 177D, para 26, 27.

⁵² Explanatory Report of the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CoE: ETS No. 177D, para 28.

⁵³ All ECRI General Policy Recommendations can be downloaded at: http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/.

society will therefore have to stay alert to secure that the target of the directives, the development of a strong and effective antidiscrimination-system, will be realised.

The intensity and degree of Trade Union involvement in the fight against ethnic and religious discrimination has varied considerably between the Member States. There is a need for a more continuous and substantial involvement of the Social Partners in the further development of antidiscrimination policies and legislation, especially with regard to the further development of the European Employment Strategy and the funding priorities of the European Social Funds. But antidiscrimination is also a business case. Within the last ten years, 'Managing Diversity' has become a buzzword in international business' reactions on the demographic changes and the challenges of globalisation. Properly understood, corporate social responsibility includes the need to develop tools for the implementation of business procedures that prevent discrimination and positively utilize the growing diversity of staff and consumers. Nevertheless, company-based measures may well support a rights-based approach, but cannot replace it. Both approaches must be combined to secure employment free of discrimination as well as high levels of productivity in an increasingly diverse society.

II. Member States' Responses to the Two Anti-discrimination Directives

Constitutions in all Member States guarantee equal treatment, which in most of the cases is limited to citizens of the respective country. Exceptions are for instance the Netherlands, Portugal or Germany, where the constitution guarantees equal treatment or equality before the law to all persons not specified as citizens. These provisions are very often applied in situations involving the use of public power and not with regard to relations between private individuals. Antidiscrimination provisions can be found in various parts of the legislation, primarily including administrative law, penal, civil and labour codes. This dispersal makes antidiscrimination legislation hard to grasp and to raise awareness for, as well as difficult to access for victims of discrimination. This view is evidenced in the country reports⁵⁴ submitted by independent experts belonging to the Migration Policy Group: Legal proceedings in relation to ethnic/religious discrimination are hardly ever taken up in countries without laws specified as promoting equality or antidiscrimination and specialised equality bodies.

The Member States' Reluctance to Transpose the Directives

The EU has been rather tardy in initiating promotion of equal treatment on the grounds of race, religion, belief and ethnic origin, as most of the Member States have experienced demographic changes resulting in multi-ethnic societies not only at the turn of the century. Nevertheless, the two directives (2000/43/EC and 2000/78/EC) are an

important starting point and incentive for harmonising antidiscrimination provisions in the Member States. The transposition of the directives would have been an opportunity for the Member States to unify antidiscrimination legislation, to make it more accessible as well as to remove discriminatory provisions in other pieces of legislation. Apparently this unification process to facilitate victim support has not taken place on a large scale. In the UK, amending legislation to comply with the directives has complicated the race relations legislation and has rendered it less accessible (Cohen 2003).

The reasons for the reluctance of the Member States' governments to enforce antidiscrimination legislation in time and in compliance with the directives were very well summarised by Zarrehparvar (2004): Each Member State perceives itself as a functioning democracy and does not want to acknowledge that democratic structures do not inherently promote equality and diversity. Respective governments have not addressed the increasing xenophobic fears of society, which results in mainstream parties adopting strategies of the far right and political discourse no longer providing any space for the issue of inclusion. Another overused argument is that minorities are only discriminated because they are not integrated. Integration, though, is very often equated with assimilation and Member States' governments draw a picture of allegedly homogeneous societies. A decision that reflects elements of all three arguments was taken in France just this year, when the legislator decided to ban Islamic headscarves and other visible religious symbols in state schools. A further aspect that has also limited public discourse on diversity are security policies developed as a consequence of the assaults in New York on September 11, 2001 and in Madrid on March 11, 2004.

Regarding antidiscrimination legislation we can almost talk about a 'two-speed' Union⁵⁵: Those Member States that have already established specialised bodies and only needed to amend existing legislation to transpose the directives (UK, the Netherlands, Belgium, Sweden and Ireland) and the remaining ones which almost had to start from scratch. Most of those countries that had previously established a system of antidiscrimination measures, i.e., relevant legislation and one or more institutions implementing the respective legislation (Perchinig 2003, 45), amended or passed the relevant legislation to comply with the directives in 2003. Among the second set of Member States France, Italy, Spain, Austria and Portugal have amended or issued legislation to transpose the directives, but in neither of these countries have the specialised bodies been de facto established yet. Draft legislation is available in Finland; Greece is still working on its draft bill, as is Luxembourg where no details have trickled through yet. Germany drafted an antidiscrimination bill in 2001, which is no longer on the

⁵⁴ These reports are available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/legis/msleglnraceequal_en.htm.

⁵⁵ For an evaluation of the situation in the ten new Member States see European Commission (2003c, 10ff.), the authors have also reverted to the RAXEN Focal Points to update the data provided by the Commission in 2003: All the new Member States have adopted legislation seeking to implement the two directives, although none of the laws address all elements of the directives.

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political agenda as it was heavily criticised by the churches and employers' organisations⁵⁶.

In the Member States not displaying a system of antidiscrimination, monitoring discrimination is often provided by alternative structures – namely NGOs like SOS-Racism in Spain, the German Documentation and Information Centre for Research on Racism as well as ZARA in Austria or Trade Unions like in Italy. The German Trade Unions have played a more important part in tackling discrimination since 2001, as the responsibilities of the works councils were then strengthened in this area (Funk 2003, Perching 2003). In France, the Departmental Commissions for Access to Citizenship (CODAC) and the toll free telephone hotline 'le 114' were established in 1999 as mechanisms to support victims of discrimination.

Who was Involved in the Transposition Process?

When looking at the legislative drafting processes in various Member States, knowledge transfer and exchange of experience between Member States do not seem to have taken place. Member States inexperienced in the development of effective antidiscrimination measures could have learned from what has and has not worked in those Member States that have been going ahead, of course taking differences in the political and legislative systems of the Member States into account. One of the exceptions in this respect seems to be France where the State Ombudsman drafted a report (Stasi 2004) looking at the experience of specialised bodies in other Member States and in Canada and matching them with the French administrative structure in the field of antidiscrimination policy (Viprey 2004). Other than that, legislation was primarily drafted by civil servants working in ministries responsible for labour affairs. During the drafting process, Social Partners were more often consulted than NGOs working with immigrants, ethnic minorities or active in the field of combating racism and discrimination. In Austria, for instance, almost 60 comments, many of which were very critical, were generated during the two months' assessment process only after draft legislation had been finished (Schindlauer 2004). Danish NGOs only had two weeks to give their opinion on the proposals, as the key actors did not want to get involved in public discussion before they had finished their reports on proposals for transposition of the directives (Hansen 2004).

Furthermore, the passing of the equality or antidiscrimination acts by the competent legislative bodies was not accompanied by public debates. In Italy, a secretive approach was already chosen when antidiscrimination rules were included in the Immigration Act of 1998. These provisions were given little visibility to avoid political costs and are therefore neither known to lawyers nor to the general public (Simoni 2003). The Spanish government hid away the transposition of the directives in 32 amendments accompanying

the Finance Bill (Albarracín 2003). Such legal amendments often go far beyond the scope of a Finance Bill, which successfully prevents public debate of these issues and deprives society of the opportunity to get a clear idea of its contents (Cachón 2004). Although the Dutch Equal Treatment Act has been in force for a decade, it is conceded that it is not widely known among the public (Zwamborn 2003). It would have therefore been important to accompany the drafting processes with campaigns raising awareness for the issues of racial, ethnic and religious discrimination among potential victims but also among the population in general.

Contrary to the rather covert strategies chosen by the less progressive Member States, the more experienced ones have by and large promoted social dialogue and public debate. Ireland launched a five million euro national anti-racism awareness programme called 'Know Racism'. In 2004, this campaign was followed by a National Action Plan Against Racism, which was developed by way of a consultative process including Social Partners and civil society (Ellis 2003, see also sub-section 2.6.6). For Sweden it is stated that there is minimal but increasing dialogue between policy makers and NGOs. A development that is also reflected in supporting the establishment of a national NGO-Centre Against Racism as well as local NGO-run antidiscrimination bureaus (Lappalainen/Johnsson 2003).

Transposition of Concepts Defined in the Directives

(Draft) legislation defines 'direct' and 'indirect discrimination' in all the Member States pretty much along the lines of the two directives. This is less true for the definition of the concepts of 'instruction to discriminate' and 'harassment'. Neither is adequate judicial protection against victimisation accounted for by all Member States – this holds e.g. true for Denmark (Hansen 2004) and France (Kretzschmar/Ebermeyer/Dehoumon 2004), the Netherlands, where victimisation is currently restricted to cases of dismissal (Zwamborn 2003) and Italy, where this kind of protection is only relevant in the assessment of damages (Simoni 2003). The provision regarding the shifting of the burden of proof has not been complied by all Member States either. Member States have especially to a large extent disregarded those provisions protecting the victims of discrimination. It remains to be seen whether all these concepts defined at the European level and to a great extent influenced by the British antidiscrimination legislation (Geddes/Guiraudon 2002, 21ff.) can be well integrated into the different legal systems and traditions of the Member States.

Establishment of Specialised Bodies

Member States have chosen quite different institutional frameworks for the establishment of the specialised bodies. Art 13 of the Race Directive provides the minimum requirements: These bodies must be independent institutions promoting equal treatment of all persons on the grounds of racial or ethnic origin. Besides that, they should be competent to provide independent assistance to victims of discrimination pursuing complaints as well as to perform a monitoring function by way of independent surveys, reports

⁵⁶ According to a representative of the German Federal Chancellery, present at the Seminar on the Occasion of Ireland's Presidency of the European Union: Combating Racism Through Building a More Inclusive, Intercultural Europe, Dublin, June 9, 2004, draft legislation was ready and would be passed in September 2004.

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concerning discrimination and issuance of recommendations based on their experiences.

Some Member States like Ireland, Belgium and the Netherlands have chosen an institutional setting going beyond these minimum restrictions. Their specialised bodies do not only cover racial and ethnic discrimination, but also other grounds like religion, gender or sexual orientation. The French and the Austrian government seem to opt for such a horizontal approach. The Austrian Office of the Ombud for Equal Employment Opportunities, which is made up of state employees, is guaranteed independence and will be responsible for the counselling and support of victims. In contrast, the Equal Treatment Commission, whose members are appointed by ministries and the Social Partners, is not independent and will perform their functions of giving expert opinions on an unsalaried voluntary basis (Schindlauer 2004). Unlike the Austrian institutions, the specialised bodies mentioned above also have boards encompassing representatives from organisations experienced in the field of discrimination, regional representatives or legal experts in the field. Furthermore, they have between 40 and 70 staff members carrying out the tasks of investigation and victim support. Bodies with competences covering different grounds have the advantage of being better equipped for coping with cases of multiple discrimination.

The majority of Member States will restrict their bodies to the grounds of ethnic and racial origin, some also incorpo-

rating religion or belief. The UK and Sweden have originally adopted such a vertical approach. The mandate of the British Commission for Racial Equality (CRE)⁵⁸ will not be expanded to the ground of religion⁵⁹. This field will be left to law centres, trade unions and NGOs (Cohen 2003). The mandate of the Swedish Ombudsman against Ethnic Discrimination (DO) was extended to religion, which is a development in the direction of a more horizontal approach. Many of the Member States will establish institutions restricted to racial and ethnic origin, but they will neither have as far reaching competencies nor as much resources⁶⁰ as the CRE. Furthermore, many of these newly set up bodies will be integrated into ministerial structures, and will therefore largely depend on the respective governments without having a budget of their own.

(Draft) legislation not at all meeting the minimum requirements for the specialised bodies has been put forward by Denmark and Greece. The Danish Centre for International Studies and Human Rights is not responsible for any complaints concerning the labour market. Assistance in the field of employment is totally left to the Trade Unions. This is seen as rather problematic as most of the victims of discrimination are students, trainees and newly arrived refugees who are not members of Trade Unions and will not be represented by them (Hansen 2004). The Greek government views the existence of racial and ethnic minorities as a taboo subject with 'dangerous implications for its ethnic

and territorial integrity' (Sitaropoulos 2004). The competencies of the Greek Ombudsman will thus not be expanded to ethnic and racial discrimination.

Quality of Victim Support Offered by the Specialised Bodies

It will have to be closely monitored whether these future specialised bodies merely engage in promotional activities and public relations work or whether the quality of victim support is taken seriously. Most of the already established bodies first of all aim at mediation between the complainant and the respondent. The Belgian Centre for Equal Opportunities and Opposition to Racism (CEOOR) tries to put pressure on the conflicting parties by publishing cases or organising campaigns (Perching 2003). One tenth of the

Table 2: Reporting Mechanisms in Member States

Member State	Reporting Mechanism	Name of institution/organisation
Austria	Public Bodies	Equal Treatment Commission Attorneys for Equal Treatment (to be established)
	NGOs ⁵⁷	ZARA – Zivilcourage und Anti-Rassismus-Arbeit
Belgium	Public Body	The Centre for Equal Opportunities and Opposition to Racism (incl. local antidiscrimination centres)
Denmark	Public Body	Centre for International Studies and Human Rights
Finland	Public Bodies	Office of the Ombudsman for Minorities Board Against Discrimination (to be established)
France	Public Bodies	High Authority against Discrimination and for Equality (to be established) Departmental Commissions for Access to Citizenship (CODAC), toll free help line 'le 114'
Germany	Public Bodies	Antidiscrimination offices, e.g., Antidiscrimination Office of Brandenburg in the Office of the Agent for Aliens
	Trade Unions	Federation of German Trade Unions (DGB)
Greece	Public Body	Greek Ombudsman
Ireland	Public Bodies	Equality Authority (EA) Office of the Director of Equality Investigations (ODEI)
Italy	Public Body	Department for Equal Opportunities of the Presidency of the Council of Ministers (to be established)
	Trade Unions	at regional level
Luxembourg	Public Body	Special Commission against Racial Discrimination
Netherlands	Public Bodies	Equal Treatment Commission
	NGO	Anti-Discrimination Agencies (ADB) National Bureau against Racial Discrimination (LBR)
Portugal	Public Bodies	High Commissioner for Immigration and Ethnical Minorities (HCIEM) Commission for Equality and Against Racial Discrimination (CEARD)
Spain	Public Body	Council for the promotion of equal treatment and non-discrimination between persons on the grounds of racial or ethnic origin (to be established)
	NGO	SOS Racism (Claim Office)
Sweden	Public Body	Ombudsman against Ethnic Discrimination (DO)
	Trade Unions	e.g., Swedish Trade Union Confederation (LO), Swedish Federation of Professional Associations (SACO), Swedish Confederation of Professional Employees (TCO)
United Kingdom	Public Bodies	Commission for Racial Equality (CRE) Employment Tribunal Service (ETS) Arbitration and Conciliation Service (ACAS)
	Trade Unions	Trade Union Congress – Rooting out Racism hotline

⁵⁷ NGOs reporting and monitoring only at local or regional level were not included in the list

⁵⁸ It is intended, however, to merge the CRE with the Equal Opportunities Commission responsible for gender discrimination and the Disability Rights Commission.

⁵⁹ The Swedish system also established ombudsmen for the grounds of gender, sexual orientation and disability.

⁶⁰ The CRE has about 200 staff members (incl. regional offices) and the budget exceeded EURO 30 million in 2002/2003.

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nearly 1.000 complaints in 2000 concerned racism in employment, half of which concerned recruitment, employment relationships and job advertisements. Almost half of the cases involved giving advice; about 40% encompassed mediation and only two percent legal action (Centre for Equal Opportunities and Opposition to Racism s.a.). The numbers for legal proceedings are rather low, although the CEOOR has one of the strongest mandates allowing for court actions even where there is no direct victim of discrimination.

The CRE can support complainants by providing lawyers or bearing the costs of the proceedings. In 2002, 58% of the 1.300 applications for assistance concerned employment, two thirds of the 45 employment cases that were taken to court were settled during litigation and every fifth case was heard successfully (Commission for Racial Equality 2003).

The Director for Equality Investigations of the Irish Equality Authority has rather far reaching powers. He or she cannot only represent victims but can also question and hear relevant persons and enforce decisions. 40% of the cases processed by the Authority concern the area of employment. About one third of the 300 new cases under the Employment Equality Act were brought forward on the grounds of race, religion or membership in the Traveller Community. About half of the cases taken to court⁶¹ were closed, one quarter was resolved for satisfaction and only every fifteenth case was decided, a majority in favour of the claimant, though (Equality Authority 2002).

The Swedish Ombudsman against Ethnic Discrimination supports victims and takes over the costs of the proceedings if a victim is not represented by the Trade Union. Nevertheless, the Ombudsman's assistance only results in seven to ten convictions each year (Schindlauer 2003). The Dutch Equal Treatment Commission was established as a semi-judicial body and seems to follow the principle of only taking on board cases that are likely to be successful (Perchinig 2003). In 2002, 80% of the about 200 opinions given by the Commission concerned the labour market, one quarter of these dealt with race, nationality or religion. One third of all the opinions given ascertained a violation of the Equal Treatment Act (Equal Treatment Commission 2003).

The numbers cited show that mediation is an important element in the work of the specialised bodies as discrimination is a very sensitive issue and may not always lend itself to legal proceedings. Although most of the authorities described have had the opportunity to gain experience in their field of work, they are not awfully successful in taking cases to court. It remains to be seen how the specialised bodies in the remaining Member States will provide victim support. Finland is planning a Board Against Discrimination which should provide speedy legal remedy for victims of discrimination without any process costs and which should also be able to request a party to fulfil its obli-

gation under the penalty of fines (Makkonen 2003). It will be important to closely monitor what kind of incidents is recorded, resolved by mediation or taken to court.

Measures Complementing Antidiscrimination Legislation

Legislation by itself cannot guarantee the promotion of equality on the labour market. Therefore, some of the specialised bodies develop additional measures often implemented on a voluntary basis by public authorities or other employers. The CRE can develop codes of practices regarding employment that suggest what an institutional process has to look like so that it is free of discrimination (Perchinig 2003). These codes are elaborated together with Social Partners and NGOs and can be used as guidance in legal proceedings. If a defendant can prove that he or she has complied with the code, then he or she will not be found guilty with discrimination. The Irish Equality Authority may require companies to establish equality action plans and to conduct equality reviews.

Another aspect that is important for the promotion of equality on the labour market is the increase of minority employees in public authorities as well as the public sector and private companies. Such measures do not only raise awareness among the majority staff members for the issue of discrimination but also give minority members the chance of equal participation at all hierarchical levels. Furthermore, it makes public authorities more fit to adapt their services to the needs of minority clients, and it also heightens the chances of enterprises to offer goods and services reflecting the desires of a broadened spectrum of customers. Such activities were launched in the UK, where public authorities are obliged to develop Race Equality Schemes. These measures also include evaluation of outcomes of policies by establishing for instance target quotas for labour market programs guaranteeing that minority members are represented to the same extent as majority members (see sub-section 2.2.6). Also, Sweden, Flanders and several Dutch cities developed action plans for cultural diversity in the public sector.

All these antidiscrimination measures must be closely monitored in order to evaluate their effectiveness. Monitoring should not only be applied during the recruitment procedure though, but also to applications for career advancement and training as well as the outcomes (e.g., services provided, policies developed etc.). The process of monitoring has to be a continuous and regularly repeated one. It must be based on data providing information on the status quo and on indicators that reflect the multidimensional nature of inequalities and the intersection of inequalities experienced by members of different vulnerable groups; they may also need to reflect both objective and subjective experiences of discrimination. Research and organisations experienced in documenting discriminatory incidents are therefore important sources for developing monitoring procedures and informing the work of relevant institutions at the European level like the EUMC, competent DGs and the European Parliament.

⁶¹ These numbers refer to all grounds, as the report does not split them according to the different grounds.

III. Social Partner Involvement and Activities

In October 1995, The European Social Partners signed a 'Joint declaration on the prevention of racial discrimination and xenophobia and promotion of equal treatment at the workplace' (UNICE/ETUC/CEEP). The signatories commit themselves to taking 'an active part in a common endeavour to prevent racial discrimination and to act jointly' against racism and xenophobia 'in their own sphere of influence, the workplace'. It aims at joint and active involvement of individuals and organisations in the field of employment to implement specific actions with the aim of promoting equal treatment and preventing discrimination based on race, colour, ethnic or national origin, or religion.

In 2000, the sector Commerce produced a 'Joint statement on the fight against racism and xenophobia' (Uni-Europa Commerce/EuroCommerce) in the framework of the sectoral social dialogue at the European level. It of course bans any form of discrimination on the grounds of race, ethnic or national origin, religion or any comparable reason at commerce workplaces in Europe. The statement recommends that enterprises and their associations establish guidelines as well as codes of conduct for the promotion of equality and include the issues of racism and discrimination in training programmes for employers and employees in the sector.

What Effects Do such Assertions Have at the National Level?

Whether the Joint declaration had an impact at national level very much depended on the Social Partners' history of addressing racial discrimination in the respective Member States (Carley 1997). Especially Trade Unions in Belgium, Denmark, Germany, the Netherlands, Spain and the United Kingdom had implemented policy and actions prior to the Declaration. The dissemination of the Joint declaration among relevant actors at national level was also influenced by membership in the three organisations at EU level. In Austria and France not all the key Social Partners are members of these organisations.

In five Member States⁶², the European Joint declaration was referred to in joint recommendations, pacts or general collective agreements at the national level. Most of these joint statements by trade unions and employers' organisations aimed at encouraging the Social Partners to actively and jointly participate in the fight against racial discrimination at the workplace. In Belgium, a booklet on equal treatment was disseminated to cooperation committees (i.e., works councils) at the company level to raise awareness and inspire the work of these committees. At the sectoral level a code of good practice was agreed on in the framework of a collective agreement concerning the temporary employment agencies sector. More detailed guidelines were issued in Ireland in the form of a 'Joint code of practice on preventing racism in the workplace', which provides guidelines for recruitment, training and the development of policies on racial equality including the concepts of dis-

crimination and harassment. Social Partners in central Italy signed the Joint Declaration on a regional level and committed themselves to develop measures against racism at the workplace. The Joint declaration primarily manifested itself in agreements at the national level and did not inspire action on a broad sectoral/regional or company level.

Such declarations at the EU level contribute to raising awareness for the issue of racial and ethnic discrimination at the workplace among Trade Unions and employers' organisations. The development of such agreements initiates an important discussion process, in which experiences are shared and new ideas generated. The dissemination of the most important aspects of such declarations very much depends on the committeemen of the Social Partners at the national level. Further action is influenced by the role the Social Partners play in the respective political system and the power they have in negotiating collective agreements. A drawback of all these declarations is that they are not enforceable and are therefore based on the voluntary commitment of those involved. The development of measures and actions for the promotion of equality seems to lie with Trade Unions rather than with employers' organisations.

Are the Trade Unions Well Equipped for the Fight Against Racism?

Trade Unions face the challenge of representing the interests of an increasingly composite workforce – both in terms of contractual arrangements or forms of employment as well as characteristics ascribed to workers such as skin colour, religion, race or ethnic origin. The needs of such a multifaceted labour force require profound changes in their institutional structures, services they provide and alliance-building strategies (ILO 2003, 100). The Trade Unions seem to be aware of the necessity of such adaptations, but institutional change has not been initiated in all Member States.

Most of the Trade Unions do not have any information on the membership of migrants and ethnic minorities in their organisations. In those countries⁶³ where details are available, the percentage ranges from about 2 percent in Spain to 35 in Luxembourg (Fulton 2003, 24ff.⁶⁴). In most of the Member States the Unions said that they had an explicit strategy to increase the proportion of vulnerable groups among their members. Such initiatives focused on offering specific counselling services in various languages, drafting concrete action plans as well as organising campaigns against discrimination.

Only few Trade Unions have strategies, though, to get migrants and minority members elected to works councils or other representative trade union bodies. The British Trade Union Congress (TUC) for instance has reserved

⁶² Greece, Luxembourg, Netherlands, Portugal and Sweden.

⁶³ They also include Denmark, Germany, Italy, the Netherlands, Sweden and the UK.

⁶⁴ All the results presented relate to a survey based on a questionnaire sent to the national confederations affiliated to the ETUC. The only EU-Member State that did not reply was Greece. It has to be emphasised that the results reflect the self-evaluations of the respective Trade Unions.

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seats on executive bodies, specialised conferences and training events as well as an Equality Audit also covering its affiliated unions (ibid., 30ff.). Whereas the TUC has a clear strategy for increasing the number of trade union activists belonging to ethnic minorities, the Austrian legal situation excludes third country nationals⁶⁵ from standing as candidates in works council, Chamber of Labour and Chamber of Commerce elections. The Spanish General Workers' Confederation (UGT) has identified indirect discrimination: Most of the migrants work in sectors where they have temporary contracts, but a prerequisite for being eligible is a six months' contract (ibid., 36).

All the Trade Unions said that they had paid staff with a particular responsibility for issues affecting migrants and ethnic minorities. It ranged from one staff member in Denmark to 30 in Italy and Spain (ibid., 44f.). Combating prejudice among the broader membership including anti-racist work was evaluated as the third most important area of work. Hardly any Trade Unions rated this issue as least important. In twelve Member States there are special committees meeting regularly to discuss issues of (im)migration, integration into the labour market and less often discrimination. Trade Unions in many Member States indicated that their rules or statutes included 'something' on combating racism (ibid., 75f.). In eight Member States⁶⁶ there are guidelines for negotiators encouraging them to take up issues of concern to migrants and ethnic minorities (ibid., 78ff.), but it has to be kept in mind that not all of the national confederations are directly involved in collective bargaining. Almost all the responding Trade Unions have very general statements on equality of treatment and most of them provisions on outlawing harassment; only the TUC has guidelines on all three issues related to religious practices – namely food in the canteen, working time as well as uniform/dress.

The inclusion or absence of non-discrimination or equality clauses in collective agreements is a good indicator of the commitment of Social Partner organisations to the elimination of discrimination at the workplace. Decentralisation of the industrial relations framework has caused collective bargaining processes to be less successful in reaching their aim of social redistribution, though. Therefore, initiatives at the company level seem to have become more important. Although these initiatives are essential for improving the working situation of all employees, it should be kept in mind that it is the state's responsibility to provide the necessary legal framework conditions for enforcing labour law, social security legislation and antidiscrimination legislation.

What Kind of Agreements are Concluded Between the Social Partners?

Agreements on issues of specific concern to migrants and ethnic minorities vary from joint guidelines agreed with employers at the national level to agreements reached with

particular employers in specific workplaces. Negotiations of general statements on equality of treatment seem to be most successful and are followed by access to training, promotion as well as other workplace benefits and outlawing harassment. More confederations reported that either they themselves or their affiliates had succeeded in negotiating specific issues linked to religious practices than have guidelines on these issues (ibid., 81f.). Such success stories are described for ten Member States.

43 of the examples of agreements provided by the trade unions are relevant to the issue of discrimination (ibid., 83ff.). Almost two thirds of the agreements were concluded at the company level, 20% at the sectoral and 14% at the national level. In Germany and the UK, only agreements at enterprise level were reported. The first agreements in Germany were signed in the mid 1990s. Most of these declarations signed by the works council in the respective company promote equality of opportunity and protect against discrimination – in few agreements harassment and bullying is explicitly mentioned. Some provide for complaints mechanisms and sanctions including dismissal. In the UK, some agreements cover the promotion of equal opportunities or diversity, usually specifying policies in explicit areas like recruitment. Sometimes they include provisions regarding holidays, vacations and practices of prayer.

Such issues were also taken up by sectoral arrangements in Italy and Spain, where it was agreed that working time could be adjusted during Ramadan (e.g., in the textile, the construction and hospitality industries). National agreements were signed in Belgium, Denmark, Finland, the Netherlands (see sub-section 2.6.6) and Sweden. They ranged from very general provisions in Finland and Sweden to very detailed ones in the other states.

Most of these more detailed agreements aimed at the increase in the percentage of ethnic minorities among the workforce. Such measures were taken by the region of Flanders in the framework of the so-called VESOC-Plan in 1998: The administration established positive action managers to improve the participation of migrants by directly cooperating with companies and placement agencies (Perching 2003, 49). Such initiatives were backed by the Belgian national agreement No 38 (1998), which specified that all applicants had to be treated equally. In 2000, the government adopted a programme fighting racism and other forms of discrimination, which recommends the Social Partners to convince enterprises to sign codes of conduct against discrimination. The region of Flanders developed concepts of diversity involving more than 200 companies, NGOs and researchers. In 2002, 240 companies had positive action or diversity management plans, which encompass trainings for managers, works council members and employees (Perchinig 2003, 49). This was followed by an agreement for 2003-2004, which permits migrant workers to count twice towards the quota system that requires larger employers to have a three percent share in young workers.⁶⁷

⁶⁵ Except for workers fulfilling the criteria of the Decision No 1/80 of the Association Council of September 19, 1980 on the development of the Association between the EEC and Turkey.

⁶⁶ Belgium, Denmark, France, the Netherlands, Portugal, Spain, Sweden, UK.

⁶⁷ If an enterprise has to employ three youngsters, it is sufficient to retain two if one of them is a migrant.

Danish and Italian trade unions seem to focus more on improving the language competence of migrants by making companies provide language courses at or near their premises and during working hours.

ETUC Action Plan Aiming at the Exchange of Experiences

The initiatives described above vary to a great extent on the level on which they were agreed and on the specifications of aims, measures and monitoring. The issue of monitoring is a largely neglected one, making the evaluation of the effectiveness of such initiatives hardly possible. More action seems to be going on at the company level rather than at national or regional levels. This tendency was also detected by the ETUC that agreed on launching an Action Plan to encourage action of its affiliates at national level (ETUC 2003). Member States should learn from one another and determine which of the initiatives that were successful could be transferred to other countries. The Action Plan aims at active recruitment of migrant workers both as members and as activists, to raise awareness for the issues of discrimination, racism and xenophobia among the broader membership and to promote the conclusion of collective agreements incorporating issues referring to the situation of migrant workers. Furthermore, the links with NGOs and the European Monitoring Centre on Racism and Xenophobia (EUMC) should be reinforced. The European Social Partners aim to update the Joint declaration on the prevention of racial discrimination and xenophobia and promotion of equal treatment at the workplace together with the new Member States.

What is the Role of the Social Partners Regarding New Antidiscrimination Legislation?

The Social Partners were more often involved in the drafting process than NGOs, and will have to define their roles vis-à-vis the new antidiscrimination legislation in the Member States. Trade Unions seem to have been less opposed to the transposition of the two directives than employers' organisations that prefer a focus on human rights. They might be afraid of the costs that really dissuasive sanctions could impose on their members when violating the new legislation. The Social Partners will be represented in several specialised bodies and the Trade Unions could – at least in the Member States where they are allowed to take cases to court – play an important role in victim support. Especially in this field, cooperation with NGOs could be fruitful for both sides, as the Trade Unions have the knowledge of the labour code and the NGOs experience with victims of discrimination. Such co-operations have partly been developed in the framework of EQUAL (see sub-section 2.3.5).

IV. Corporate Social Responsibility and Antidiscrimination as Business Case

History of CSR

The fall of the Berlin Wall in 1989 and the end of the cold war not only reshaped the political geography of the world but also led to increased discussion about the role of busi-

ness in society. This was reflected by the Earth Summit in Rio in 1992, where the Agenda 21 was adopted, which defined 'sustainable development' as a main principle of economic relations. Based on the three pillars of social, environmental and economic sustainability, 'responsible entrepreneurship' was understood as 'responsible and ethical management of products and processes from the point of view of health, safety and environmental aspects' (UNO 1992, 406) and was seen as a major element of the Agenda. The implementation of the idea of sustainability should be achieved by increased self-regulation, 'guided by appropriate codes, charters and initiatives integrated into all elements of business planning and decision-making, and fostering openness and dialogue with employees and the public', the Agenda stated (UNO 1992, 409).

Initiated by the Agenda 21, the idea of 'responsible entrepreneurship' soon became an important issue in the thinking about global development. Originally focused on environmental protection and development cooperation, soon the debate extended to employment conditions and the safeguarding of workers' rights. In the mid-1990s, the debate began to influence the discourse about the relationship of civil society and business in the 'industrialised' countries. In 1995, a group of business leaders together with the former president of the European Commission, Jacques Delors, signed 'The European Business Declaration against Social Exclusion'⁶⁸ committing themselves and their companies to contribute to social inclusion by inter alia rejecting discriminatory practices in recruitment and promotion. At the end of the 1990s, the debate about CSR found growing public recognition as a possible answer to the challenges of globalisation. Business associations started to work on management tools for Corporate Social Responsibility, and the growth of interest in ethical investment also led to the development of the Dow Jones Sustainability Group Index, the first tool for benchmarking the performance of investments in sustainability companies and funds.

The CSR Debate in Europe

The debate on CSR was taken up by the European Commission at the end of the 1990s with the development of a Green Paper on 'Promoting a European Framework for Social Responsibility' (2001), which opened an intense discussion between the business world, Trade Unions, civil society organisations and governments. The Green Paper defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis' (European Commission 2001, 5). Facing the challenge of a changing environment in the context of globalisation, a growing number of companies would be 'increasingly aware that corporate social responsibility can be of direct economic value', the Paper stated. The Lisbon European Council linked the issue with the strategic goal of

⁶⁸ http://www.csreurope.org/aboutus/socialexclusion_page393.aspx

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making Europe the most competitive and dynamic knowledge-based economy by 2010, and demanded the Union to develop a common framework for CSR in Europe.

In the following discussion, a major dividing line between enterprises on the one hand and Trade Unions and civil society organisations on the other developed. Whereas enterprises emphasised the voluntary nature of CSR and argued against a regulations at the EU-level, Trade Unions and NGOs stressed that voluntary initiatives would not be sufficient to protect workers' and citizens' rights, and pressed for the development of a regulatory framework setting minimum standards. This debate undulating between a voluntary and a rights-based approach has not been decided yet, although in its latest Communication on Social Responsibility the Commission proposed to build a strategy based on the recognition of the voluntary nature of CSR, compatible with existing international agreements and instruments (European Commission 2002c, 8).

Antidiscrimination and CSR

At the end of the 1990s, the general debate on CSR has been followed by the development of tools for implementation. A wide array of mechanisms for measuring, evaluating, improving and communicating corporate performance has been developed, which range from broad guidelines, codes of conduct, and best practice guidelines to screening mechanisms, standards and benchmarks. Most CSR-instruments have been developed in an environmental or development-cooperation context and stress only one of the three pillars of sustainable development (social, environmental or economic).

The existing CSR instruments can be grouped into four categories (European Commission 2003b, 12)

- Aspirational principles set general guidelines and define broadly agreed methods of substantive performance for companies, but they lack external auditing and implementation mechanisms.
- Management system and certification schemes are based on detailed external auditing procedures applying specified minimum standards. Most certificates are granted for a limited period of time and require a follow-up evaluation for renewal. They are administered by external auditing institutions applying standardised monitoring and measurement tools in order to establish credibility with consumers and stakeholders
- Rating indices are external evaluation procedures used by socially responsible investment agencies to provide information for investors and the financial sector on socially responsible investing.
- Accountability and reporting frameworks are process guidelines covering reporting and accountability mechanisms. They normally do not specify certain levels of performance, but provide a framework for informing stakeholders in relation to social, economic and environmental performance.

The idea to standardise quality management with regard to CSR has been taken in by a variety of codes and standards.

Only a few of them take antidiscrimination directly into account. One of the best known standards so far, the ISO 9000 (quality management) standard, which, according to the International Organisation for Standardisation, has been implemented in some 610,000 organisations in 160 countries. However, it does not include issues of labour conditions or corporate social responsibility⁶⁹. Among the standards sensitive to social responsibility, the 'Social Accountability (SA) 8000', a certification procedure published by the US-based non-profit organisation 'Social Accountability International' in 1998, is most directly geared at labour conditions and covers inter alia discrimination in employment using a detailed questionnaire⁷⁰. Most of the other instruments covering antidiscrimination are aspirational principles and Codes of Practice, like e.g. the 'Amnesty International Human Rights Guidelines for Companies'⁷¹, the OECD 'Guidelines for Multinational Enterprises'⁷² or the UN 'Global Compact'⁷³. Although all of them cover the implementation of antidiscrimination measures in the company, they neither have a common understanding of the issue nor do they provide evaluation and certification procedures. Furthermore, the implementation of CSR-standards in one company does not protect the employees of its suppliers and thus might only cover a small part of the chain of production.

A specific standard on antidiscrimination has not been developed yet, and the issue is not reflected widely in the ongoing discussion on quality management. Thus there are no studies on the effect of the implementation of CSR-standards and certificates with regard to discrimination. Even if CSR-tools may help to prevent discrimination and may be a valuable tool in awareness raising, they cannot replace a rights-based approach: Whereas the development and implementation of CSR-instruments depends on decisions of business associations and the management and do not allow for individual complaint procedures, a rights-based approach relies on state law and gives the potential victim the possibility to approach judicial complaint procedures for course of action and remedies, which may be enforced from outside the company. Reliance on voluntary measures would not only weaken the victim, but would also release the state from its responsibility to guarantee equal treatment and freedom from discrimination for all people under its legislation.

V. Going beyond Antidiscrimination – the Case for Positive Measures

Antidiscrimination – a Business Case?

For a long time, business in Europe had argued that there was no need for antidiscrimination measures, as in Europe, contrary to the USA, racism did not exist (Wrench 1997). In

⁶⁹ <http://www.iso.org/iso/en/iso9000-14000/index.html>

⁷⁰ <http://www.cepaa.org/SA8000/SA8000.htm>

⁷¹ <http://www.amnesty.org.uk/business/pubs/hrgc.shtml>

⁷² <http://www.oecd.org/daf/investment/guidelines/>

⁷³ [Http://www.unglobalcompact.org](http://www.unglobalcompact.org)

the context of growing evidence of discrimination of minorities and immigrants and the lobbying of NGOs, immigrant groups and Trade Unions, this view lost credibility and employers and Trade Unions developed growing awareness of discrimination at the workplace. This development was fostered by the activities of the International Labour Organisation (ILO), which in the 1990s started a major research programme on discrimination in the world of labour and published several studies on good practices on employment integration of immigrants and measures against discrimination within companies (Wrench 1997).

In the 1990s, the internationally active business sector began to see diversity as a precondition for innovation and creativity, and a diversity management consciousness, which had developed in the US in the late 1980s, reached Europe. There, diversity management had become a buzzword since the late 1980s for a variety of reasons (Wrench 2002, 4). In the first phase, business and the public had started to take note of the increasingly diverse workforce and the declining proportion of white males. Politically, affirmative action had come under attack as constituting 'reverse discrimination' by the Reagan government. Thirdly, several studies had argued that companies that did not implement diversity management would lose in terms of performance and image.

In Europe, the discussion on business diversity was mainly fuelled by two reports, the 'European Compendium of Good Practice for the Prevention of Racism at the Workplace' published by the European Foundation for the Improvement of Living and Working Conditions (Wrench 1997) and the study 'Gaining from Diversity' by the European Network for Social Cohesion (1997). At the same time, the ILO published a series of major studies analysing discrimination in recruitment and employment in European countries and evaluating antidiscrimination training and educational activities (for an overview: Wrench 2002, 4ff.). The 'European Year Against Racism 1997' further supported an increase in awareness about the issue.

But the focus on antidiscrimination was not so well received among the business community, as most employers felt embarrassed by the underlying assumption that their human resources management might entail discriminatory procedures. On the other hand, globalisation and the growing demographic diversity of Europe's population demanded new ways to deal with the diversity of staff and consumers. So the idea of diversity management nevertheless began to take hold in the business community.

Business Arguments for Diversity Management

According to a recent study (Centre for Strategic and Evaluation Studies 2003, 3), companies that have implemented workforce diversity policy identify important benefits strengthening the long-term competitiveness and enhancement in performance, above all with regard to the improvements of the organisational structure and the business culture. Nevertheless, awareness of the advantages of diversity management is still low, especially among smaller

and medium enterprises without elaborate human resources management strategies.

The main arguments for the implementation of diversity management mentioned by employers are:

- Attracting, recruiting and retaining people from a broad array of talents
Companies excluding members of minorities or immigrants from their recruitment pool reduce the number of suitable candidates and thus diminish the potential quality of their workforce.
- Developing the customer base
As diversity within the population increases, the percentage of customers with a diverse background also increases. In cases with a great deal of customer contact, the existence of a diverse workforce can dramatically increase the number of customers and sales, as staff having a similar background to customers better understands their languages, needs and preferences.
- Increasing productivity and flexibility
Working through diversity may serve as a preparation for learning how to manage change and innovation. Lessons learned in managing diversity within the company can help managers and employees to solve complex problems and to better deal with changes in other areas of their work.
- Responding to globalisation and gaining a competitive advantage
In a global enterprise, the workforce must understand the language and requirements of people of different cultural backgrounds. If the workforce of a company does not include staff that has lived in several countries, its performance on global markets might suffer. Recruitment of immigrants and members of minorities enriches the cultural capital of the company and helps to get a competitive advantage on global markets.
- Enhancing the reputation and image of the institution/company
The image of the company is an important factor in the selection of an employee or a product. Only companies with the image of a global and innovative competitor celebrating diversity will attract top employees; and only those companies will be able to successfully compete for international customers.

Diversity Management and Antidiscrimination

Diversity management is geared at the recruitment, retaining and development of staff from a diverse social and ethnic background. The development of business practices and culture prone to a strengthening of human, organisational and knowledge capital should help to better adapt to globalisation and changing product and labour markets. Recognising diversity thus involves a combination of activities to promote non-discriminatory practices and positive action and to capitalise on the diverse backgrounds, knowledge and skills of individuals or groups as resources for development (European Thematic Group 1 2003, 3).

E. Conclusions: Raising the Standards on Combating religious/ethnic Discrimination in Employment

In this respect, two dimensions of diversity are discussed: Primary dimensions include essential characteristics of an individual which cannot be or normally are not changed in one's lifetime, like age, gender, physical abilities, ethnic origin, skin colour or sexual orientation, religious beliefs etc.; secondary dimensions of diversity may be changed and include educational background, skills and work experience, political beliefs, language capacities etc. Diversity management in a proper understanding has to tackle both dimensions and thus follows a much broader approach than antidiscrimination.

It is exactly this broader approach, which raises criticism on diversity management thinking. On the one hand, antidiscrimination and affirmative action may conflict with the idea to capitalise on the diverse cultural capital of staff, as exactly this move might entail further discrimination reducing people to representatives of real or imagined groups. On the other hand, the focus on gaining from diversity may overlay existing inequalities and prevent a change of discriminatory practices, if it is not accompanied by measures against discrimination. Furthermore,

antidiscrimination and affirmative action aim at the implementation of enforceable measures at company level irrespective of economic considerations. A focus on 'gaining from diversity' may easily be misused for rejecting measures that are seen as costly, non-profitable or challenging established powers within a company. Recent studies support a critical view on diversity management in Europe. As business cultures are strongly influenced by local and national traditions, the understanding of diversity management varies considerably and ranges from minimalist approaches like the organisation of language training and the adaptation to religious dietary requirements to a broader concept including monitoring of recruitment and promotion of staff with minority background (Wrench 2002, 8). In absence of a common understanding of diversity management and established monitoring procedures, the risk of window-dressing and negligence of antidiscrimination within diversity management exists. It will be the task of NGOs and Trade Unions to pressure for clearer rules and definitions in order to prevent diversity management to become a surrogate for non-existing measures against discrimination.

E. Conclusions: Raising the Standards on Combating religious/ethnic Discrimination in Employment

I. Where Do We Come from?

Incidents recorded by governmental and non-governmental actors provide ample evidence of racial, ethnic and religious discrimination on the labour market. Furthermore, these examples make clear that many actors involved in labour market relevant procedures are susceptible to discriminatory behaviour and that discrimination does not only occur when applying for a job but during the entire employment process.

It is without doubt that the adoption of the Racial Equality Directive and the Employment Equality Directive in 2000 constitutes a milestone in combating discrimination in the 25 Member States. The Member States' reluctance to transpose the directives clearly indicates though that such a leap forward in antidiscrimination legislation would have been inconceivable outside the framework of the European Union. The importance of the extension of the European Community's competence to adopt measures to combat discrimination on certain grounds by the Treaty of Amsterdam can therefore not be underestimated. Many of the new requirements set forth by the directives mirror provisions and incorporate related lessons learned from gender equality directives and related jurisprudence of the ECJ. Both directives follow a rights-based approach and have a strong focus on the enforcement of the right to equal treatment and on the support of victims of discrimination regarding their access to justice. Whereas the scope of the Community directives compared to international human

rights provisions is generally more limited, the enforcement procedures are much more effective. Furthermore, human rights treaties predominantly target discrimination by public authorities and the national legislator, only the Racial Equality Directive and the Employment Equality Directive provide a detailed set of regulations in regard to the prohibition of discrimination between private actors, particularly in the employment sector.

Parallel to the extension of the legal competencies in the field of antidiscrimination, the European Union has expanded its powers in the field of employment and social policies. In this respect, the introduction of the European Employment Strategy (EES) has been a major step in the development of coordinated labour market policies. Antidiscrimination did not play an important role within the EES, until it had been linked with the Lisbon Strategy aiming to develop Europe into 'the most competitive and dynamic knowledge-based economy in the world'. Nowadays there is widespread consensus among European policy actors that this target can only be reached if the growing diversity of the European population is regarded as resource for innovation and ethnic as well as religious discrimination on the labour market is eradicated.

Despite the firm link of antidiscrimination with the Lisbon Strategy, no common European targets for the implementation of non-discrimination in the labour market have been developed until now. There is a rather lenient approach to standard setting in the area of

antidiscrimination within the governments of the Member States giving them too much leeway in defining what constitutes a success in the prevention of discrimination.

This reluctance is contrasted sharply by the fact that more than half of the projects funded under the EQUAL programme-initiative of the European Social Funds have put antidiscrimination on their agenda. They have developed a variety of tools for benchmarking and implementation, which has made the EQUAL-programme to the far most important framework for innovation and practical development in this field. The strength of the development partnerships formed within the EQUAL-framework certainly lies within the inclusion of various stakeholders such as NGOs, Social Partners, representatives of works councils, public authorities, local governments and employers.

Besides legal and policy instruments, a third approach to tackle antidiscrimination has developed in the context of the international Corporate Social Responsibility (CSR) debate. The European Union has embarked on the issue with the publication of a Green Paper on 'Promoting a European Framework for Social Responsibility' (2001), which opened an intense discussion between the business world, Trade Unions, civil society organisations and governments. Since then, the discourse on CSR brought business into the debate which formally had centred on the role of the state.

Although a few CSR instruments are concerned with labour relations, including the prevention of discrimination, the majority of the CSR debate neglects or downplays the issue. Nevertheless, CSR-tools may complement legally binding antidiscrimination provisions, as they focus on the business case of equality and can enhance public understanding of the issue.

In recent years, diversity at the workplace and among the population in general has developed from a marginal issue to a core element in the debate of Europe's future. Labour market diversity nowadays is seen as an important precondition for economic competitiveness and innovation in a globalised market, whereas discrimination is increasingly perceived as a threat to Europe's economic and social development. This change of view is increasingly reflected by actions taken by the business world as well as policy makers.

II. Where Do We Go?

The various legal documents at the international, European and national level combating discrimination make it increasingly difficult for lawyers and bodies supporting victims to find their way through the maze of different provisions. Considering the different strengths and weaknesses of these legal documents it is important to find out, which is the right forum to pursue the NGOs', Social Partners' or the victims' particular concerns or interests. On the one hand, the accumulation of international documents dealing with antidiscrimination adds to the complexity of the issue, but on the other hand makes it more difficult for states to adopt or perpetuate discriminatory legal provi-

sions and to stay passive in regard to discriminatory practices in their territory. More emphasis should therefore be put on the screening of national legislation to make sure that they still comply with the obligation of equal treatment under European and international law.

Like no other EC-directive or relevant international human rights treaty the directives provide for an active involvement of NGOs by entitling them to engage in relevant judicial and administrative procedures to support victims of discrimination if they approve. By closely co-operating with judges and lawyers, NGOs could play an important role in instigating preliminary rulings procedures before the ECJ and in bringing test litigation before higher courts. This would not only enhance the applicability of relevant antidiscrimination provisions by concretising related obligations and rights, it would also enhance awareness of the general public. Only if potential discriminators as well as victims know what they can expect from the relevant antidiscrimination provisions they will be applied effectively and might have a preventive effect.

To draw attention to particularly severe or structural violations of the prohibition of discrimination, NGOs should increasingly make use of opportunities to file shadow reports in the course of the so-called state report procedure established by international human rights treaties. The rise of public pressure and awareness in regard to state reports on the CCPR, CESCR or the CERD can in fact play a decisive role in enhancing national legislation or other public actions to combat discrimination in a wide range of fields.

Legislation is only one aspect in combating religious and ethnic discrimination. This issue also plays an important role within the European Union employment and social policies. Unlike in the field of legislation where directives secure a minimum common standard, this policy field gives much leeway for Member States to define their aims. Clear and assessable targets will have to be created in order to promote protection against discrimination at the highest possible level. This task will not be possible without the development of widely agreed methods of evaluation and monitoring, which allow for European wide comparison and benchmarking. The experiences of projects funded under the EQUAL-programme can be a starting point for the development of European standards.

After the expiry of the EQUAL-programme initiative in 2006, the Commission intends to mainstream antidiscrimination into all programmes funded by the European Social Funds. Given the reluctance of a majority of Member States to seriously implement measures against discrimination into their overall labour-market policy, the planned mainstreaming of antidiscrimination will have to be extremely well prepared to prevent a downplaying of the issue. Improved co-operation between the NGOs active in the field and the Social Partners will be necessary to encourage governments to give antidiscrimination a prominent place in future labour market programmes. The role of public authorities as employers can have a decisive impact on private business, as they can function as role models rein-

forcing recruitment of minority members, making contract compliance for their sub-contractors obligatory and evaluating the effects of their outputs on minority groups.

In times of increasing privatisation of public goods and services and the continuous outsourcing of state obligations the prohibition of discrimination between private actors becomes more and more important. As the two EC-directives also prohibit discrimination between private parties in the employment sector, their implementation can be understood as an obligation under international human rights law: All the international treaties described in this report include the state obligation to adopt efficient measures to combat discrimination between private parties and to afford effective protection against discrimination by public and private actors. This development indicates that private actors are increasingly made responsible for discriminatory practices in their realm. This is also reflected in the CSR-debate, which has brought business into a human rights discourse which used to only focus on the role of state actors. In order to become more effective, future efforts will have to concentrate on the development and the monitoring of assessable and binding standards.

A precondition for monitoring is the availability of data making longitudinal comparisons possible. The collection of

systematic and comparable data is not only necessary for continuously assessing antidiscrimination policies and laws, but also for the understanding the structure and extent of discrimination in the labour market. The EU together with researchers, statisticians and institutions and NGOs experienced in recording discriminatory incidents should tackle the challenge of making data reliable and comparable across the EU-25. Further empirical research including for instance discrimination testing, analysis of recruitment and promotion practices and recorded complaints is necessary for the identification of structural and institutional mechanisms of discrimination.

All these processes point into the right direction and mark a considerable improvement. Nevertheless, their sustainability and further development may easily come to a halt in times of economic turmoil and worrying unemployment rates. Therefore, the efforts to fight discrimination and promote equal treatment have to be inclusive involving all stakeholders in order to ensure that these issues stay on the political agenda at the international, European and national level. In this process vulnerable groups must be included and given a strong voice to truly secure their empowerment.

List of Abbreviations

ACAS	Arbitration and Conciliation Service	ICCR	Interfaith Consortium on Corporate Responsibility
ADRI	Agence pour le développement des relations interculturelles	ICMPD	International Centre for Migration Policy Development
CCPR	Covenant on Civil and Political Rights	ICMW	Convention on the Rights of Migrant Workers and their Families
CEARD	Commission for Equality and Against Racial Discrimination	ILO	International Labour Organisation
CEEP	European Centre of Enterprises with Public Participation and Enterprises of General Economic Interest	INTI	Integration of Third Country Nationals
CEOOR	Centre for Equal Opportunities and Opposition to Racism	IOM	International Organization for Migration
CERD	Convention on the Elimination of all Forms of Racial Discrimination	ISO	International Organization for Standardization
CESCR	Covenant on Economic, Social and Cultural Rights	LBR	National Bureau against Racial Discrimination
CODAC	Departmental Commissions for Access to Citizenship	LO	Swedish Trade Union Confederation
CoE	Council of Europe	MPG	Migration Policy Group
CRE	Commission for Racial Equality	NAP	National Action Plan
CSR	Corporate Social Responsibility	NCCRI	National Consultative Committee on Racism and Interculturalism
DG	Directorate-General	NGO	Non governmental organisation
DGB	Federation of German Trade Unions	ODEI	Office of the Director of Equality Investigations
DO	Ombudsman against Ethnic Discrimination	OECD	Organisation for Economic Co-operation and Development
DP	Development Partnership	OHCHR	Office of the United Nations High Commissioner for Human Rights
EA	Equality Authority	OMC	Open Method of Coordination
ECRI	European Commission on Racism and Intolerance	RAXEN	Racism and Xenophobia Network
ECCR	Ecumenical Consortium on Corporate Responsibility	SA	Social Accountability
ECHR	European Convention on Human Rights	SACO	Swedish Federation of Professional Associations
ECJ	European Court of Justice	SME	Small and medium enterprises
EES	European Employment Strategy	TCO	Swedish Confederation of Professional Employees
ESF	European Social Funds	TEC	Treaty of the European Community
ETA	Equal Treatment Commission	TUC	Trade Union Congress
ETS	Employment Tribunal Service	UGT	Spanish General Workers' Confederation
ETUC	European Trade Union Confederation	UNICE	Union of Industrial and Employers' Confederations of Europe
EUMC	European Monitoring Centre on Racism and Xenophobia	UNO	United Nations Organisation
HICEM	High Commissioner for Immigration and Ethnical Minorities		

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Links

International institutions/bodies

Committee on the Elimination of Racial Discrimination: <http://www.unhchr.ch/html/menu2/6/cerd.htm>

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: <http://www.unhchr.ch/html/menu2/6/cmwf/>

Human Rights Committee: <http://www.unhchr.ch/html/menu2/6/hrc.htm>

International Migration Branch of the ILO (MIGRANT): <http://www.ilo.org/public/english/protection/migrant/>

Office of the High Commissioner for Human Rights (OHCHR): <http://www.unhchr.ch>

The website of the OHCHR provides useful information complaint procedures under international human rights treaties: <http://www.unhchr.ch/html/menu6/2/fs7.htm>

United Nations Educational, Scientific and Cultural Organization: <http://portal.unesco.org/>

EU institutions/bodies

EQUAL: http://europa.eu.int/comm/employment_social/equal/index_en.html

European Commission DG Employment and Social Affairs: http://europa.eu.int/comm/employment_social/index_en.html

European Commission DG Justice and Home Affairs: http://europa.eu.int/comm/dgs/justice_home/index_en.htm

European Employment Strategy: http://europa.eu.int/comm/employment_social/index_en.html

European Monitoring Centre on Racism and Xenophobia (EUMC): <http://www.eumc.eu.int>

European Social Fund: http://europa.eu.int/comm/employment_social/esf2000/index-en.htm

INTI: http://europa.eu.int/comm/justice_home/funding/inti/funding_inti_en.htm

Social Inclusion: http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/index_en.htm

Homepages of other institutions/organisations

Arbitration and Conciliation Service (ACAS): <http://www.acas.org.uk>

Centre for Equal Opportunities and Opposition to Racism (CEOOR): http://www.antiracisme.be/en/kader_eng.htm

Commission for Racial Equality (CRE): <http://www.cre.gov.uk/>

Danish Centre for International Studies and Human Rights: <http://www.dcism.dk/>

Departmental Commissions for Access to Citizenship (CODAC), toll free help line 'le 114': <http://www.le114.com>

Employment Tribunal Service (ETS): <http://www.ets.gov.uk>

Equal Treatment Commission (ETA): <http://www.cgb.nl/english/default.asp>

Equality Authority (EA): <http://www.equality.ie/>

Greek Ombudsman: http://www.synigoros.gr/en_index.htm

High Commissioner for Immigration and Ethnical Minorities (HCIEM): <http://www.acime.gov.pt>

National Bureau against Racial Discrimination (LBR): <http://www.lbr.nl/euroinfo/english/folderengl.html>

National Consultative Committee on Racism and Interculturalism (NCCRI): <http://www.nccri.com>

Office of the Director of Equality Investigations (ODEI): <http://www.odei.ie/>

Ombudsman against Ethnic Discrimination (DO): <http://www.do.se/o.o.i.s?id=618>

Homepages of Social Partners

European Centre of Enterprises with Public Participation and Enterprises of General Economic Interest (CEEP): <http://www.ceep.org/>

European Trade Union Confederation (ETUC): <http://www.etuc.org/>

Federation of German Trade Unions (DGB): <http://www.dgb.de>

Trade Union Congress (TUC): <http://www.tuc.org.uk/equality/>

Union of Industrial and Employers' Confederations of Europe (UNICE): <http://www.unice.org/>

National Action Plans on Employment: http://europa.eu.int/comm/employment_social/employment_strategy/national_en.htm

Homepages of NGOs and platforms

ENAR website:

Links to homepages of NGOs and other organisations: <http://www.enar-eu.org/en/links/links.shtml>

Links to national institutions per country: http://www.enar-eu.org/en/info/2_1.shtml

Links related to CSR

CSR Europe: <http://www.csreurope.org/default.aspx>

Corporate Social Responsibility: http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_index.htm

ILO International Labour Standards and Human Rights: <http://www.ilo.org/public/english/standards/norm/index.htm>

Amnesty International's Human Rights Guidelines for Companies: <http://www.amnesty.org.uk/business/pubs/krgec.shtml>

Dow Jones Sustainability Group Index: <http://www.sustainability-index.com>

ECCR/ICCR Benchmarks for Global Corporate Responsibility: <http://www.web-net/~tccr/benchmarks/>

Global Reporting Initiative Guidelines: <http://www.globalreporting.org>

International Organisation for Standardization ISO 9000: <http://www.iso.ch>

OECD Guidelines for Multinational Enterprises: <http://www.oecd.org/daf/investment/guidelines/>

Social Accountability SA 8000: <http://www.cepa.org>

UN Global Compact: <http://www.unglobalcompact.org>

Relevant UN and EU documents

CERD General Recommendation No. 14: Definition of discrimination (22/03/1993), available at: <http://www.unhchr.ch/tbs/doc.nsf>

CERD General Recommendation No. 10: non-discriminatory implementation of rights and freedoms (Art. 5), (15/03/1996), available at: <http://www.unhchr.ch/tbs/doc.nsf>

CERD General Recommendation No. 26: Article 6 of the Convention (24/03/2000), available at: <http://www.unhchr.ch/tbs/doc.nsf>

Convention concerning Discrimination in respect of Employment and Occupation (C111), available at: http://www.ilo.org/public/english/employment/skills/recomm/instr/c_111.htm

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_303/l_30320001202en00160022.pdf

Declaration of Fundamental Rights and Principles at Work, available at: http://training.itcilo.it/ils/foa/library/declaration/decl_en.html

International Covenant on Civil and Political Rights, available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

International Convention on the Elimination of All Forms of Racial Discrimination, available at: http://www.unhchr.ch/html/menu3/b/d_icerd.htm

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, available at: http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm

Statistical survey of individual complaints considered under the procedure governed by article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination available at: <http://www.unhchr.ch/html/menu2/8/stat4.htm>

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