

**COMBATING
RACIAL AND ETHNIC
DISCRIMINATION:
TAKING THE EUROPEAN
LEGISLATIVE AGENDA
FURTHER**

Edited by Isabelle Chopin and Jan Niessen



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INTRODUCTION

In 2000, two European bodies adopted legal instruments to combat discrimination. The Committee of Ministers of the *Council of Europe* adopted Protocol 12 to the European Convention on Human Rights,¹ a welcome addition to the Convention's non-discrimination clause, which presently prohibits discrimination only in the enjoyment of the rights already enshrined in the Convention. The protocol enters into force only after ten states have ratified it. The Council of the EU adopted the directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive).² Within three years, all EU member states must ensure that their legislation implements the principles laid down in the directive. Moreover, the directive is now part of the *acquis communautaire*, the body of law that must be adopted by all states wishing to join the Union. Thus, each of the EU candidate countries will soon have to enact anti-discrimination legislation.

It is true that these European instruments, adopted after many years of public debates and campaigns, are a compromise and do not provide the maximum legal protection against discrimination one would have hoped for. Nevertheless they set high minimum standards across Europe. It has taken European governments a long time to adopt them, in some cases reluctantly, and it will take considerable time for these standards to be fully implemented. Therefore, civil society organisations and other stakeholders should – in the years to come – give all the attention they can to the ratification of Protocol 12, the transposition of the directive and the implementation of anti-discrimination legislation at the national level. It may be unrealistic to expect that in the near future the newly adopted instruments will be amended and improved or that new instruments will be designed specifically addressing racial and ethnic discrimination. It is, however, very possible that some of the lost terrain can be regained by pressing for the insertion of anti-discrimination clauses in other pieces of European legislation or for the promotion of equal treatment of groups that are (potentially) discriminated against.

In order to promote consultation and co-operation on the transposition of the Racial Equality Directive, and also on the ratification of Protocol 12, the MPG, Interights (based in London) and the European

¹ The text of Protocol 12 is reproduced in Annex I.

² The text of the Racial Equality Directive is reproduced in Annex II.

Roma Rights Centre (based in Budapest) launched a joint project in 2001. During a three year-year period, studies will be conducted, seminars organised and training and policy advice given. These will enable a wide range of stakeholders to participate in debates on the implementation of European standards at the national level.

In addition, the MPG is co-ordinating a group of national independent experts on racial and ethnic discrimination. This programme is part of the European Commission's programme for the establishment of groups on non-governmental experts in the field of discrimination on the various grounds covered by the two anti-discrimination directives.³ The group of experts co-ordinated by MPG will monitor the transposition of the Racial Equality Directive, which will in most EU member states entail considerable changes to national legislation. In some member states there is considerable expertise in the field of combating racial and ethnic discrimination, in others such expertise is rapidly being built up. The creation of the group of national experts on racial and ethnic discrimination promotes the harmonised and effective implementation of measures against this form of discrimination. The policies and practices adopted by the member states will be analysed and their effectiveness assessed over a longer period.

This publication is the third in a series published jointly by the Commission for Racial Equality in Britain and the MPG. The series aims to promote a well-informed debate on anti-discrimination legislation in Europe and may serve as a tool to monitor and influence the process of transposing European standards into national law. The series also explores how the European anti-discrimination legislative agenda can be further developed.

The first publication contained detailed proposals for EU anti-discrimination legislation, the so-called Starting Line proposals.⁴ The second publication compared the Starting Line with the adopted Racial Equality Directive and explored how in the transposition process higher standards than required by the directive could be adopted by individual member states.⁵ It pointed to other legal instruments that could be adopted under the amended EC Treaty's Title IV, and which would promote equality between EU nationals and third country nationals. It also drew attention to other legal and non-legal

³ In 2002, the EU also adopted the Council Directive establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive).

⁴ Isabelle Chopin and Jan Niessen (eds), *Proposals for legislative measures to combat racism and to promote equal rights in the European Union* (Commission for Racial Equality and Migration Policy Group, 1998).

⁵ Isabelle Chopin and Jan Niessen (eds), *The Starting Line and the incorporation of the Racial Equality Directive into the laws of the EU Member States and accession states* (Commission for Racial Equality and Migration Policy Group, 2001).

instruments to combat racial and ethnic discrimination, in particular those developed within the framework of the EU Employment Strategy and the EU Social Policy Agenda. This publication compares Protocol 12 and the Racial Equality Directive in order to identify their differences and similarities. It shows that these instruments are complementary to each other. It also draws attention to other legislative developments at the level of the EU that are relevant to the fight against discrimination, namely those in the field of public procurement.

COMBATING RACISM THROUGH EUROPEAN LAWS: A COMPARISON OF THE RACIAL EQUALITY DIRECTIVE AND PROTOCOL 12

Mark Bell, University of Leicester

INTRODUCTION

The year 2000 witnessed a positive coincidence of new legal instruments in the fight against racism at the European level. In June 2000, the EU's Council of Ministers adopted Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin – hereafter, the 'Racial Equality Directive'.¹ This directive requires all EU states and, following their accession, all EU applicant states, to forbid discrimination on grounds of racial or ethnic origin in the fields of employment, education, healthcare, social protection, housing and access to goods and services. In November 2000, the Council of Europe opened for signature Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).² The protocol seeks to guarantee the right to non-discrimination on a wide range of grounds in any right 'set forth by law' and in the actions of 'any public authority'.³ This paper compares these twin initiatives in order to identify their differences and similarities. In particular, whilst the Racial Equality Directive automatically enters into force within the EU on 19 July 2003, Protocol 12 remains an optional commitment for any member state of the Council of Europe. At the time of writing, 26 states have signed the protocol, but only one (Georgia) has completed

¹ [2000] Official Journal (OJ) L180/22.

² The text of the protocol is available at:
<http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

³ Article 1, *ibid.*

ratification.⁴ Nine EU member states or applicant states have not yet signed the protocol.⁵ Therefore, it is necessary to consider what additional protection that instrument might confer and why states should be encouraged to implement also its provisions. Before proceeding to the detailed analysis of both measures, a short introduction to each is provided.

(a) The Racial Equality Directive

The EU has only recently developed a more substantial role in the fight against racism. Prior to 1999, there were no specific legal powers in the founding EU Treaties permitting the Union to adopt laws against racism. Moreover, despite pressure from the European Parliament and European civil society since the mid-1980s, a lack of political will restrained the EU member states from moving forward in this area. During the 1990s, however, a variety of pressures ultimately provoked a change in policy. Specific factors that help explain this shift include the apparent rise in (violent) racism across Europe; the growth in support for parties of the extreme right-wing; a perceived need to 'balance' the restrictive effects of EU immigration and asylum policies with measures to promote the integration of third country nationals; and the identification of significant discrimination against certain national minorities in many of the EU applicant states.⁶ Pressure was brought to bear on the EU member states by organisations such as the Starting Line Group, which campaigned from 1993 for the adoption of a directive forbidding racial and religious discrimination.⁷

In 1999, the Treaty of Amsterdam came into effect. This created two new provisions in the founding treaties. First, Article 13 was added to the EC Treaty; this provided a legal competence for the EU Council to take 'appropriate measures to combat discrimination based

⁴ The other 25 signatories are: Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Moldova, Netherlands, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Macedonia, Turkey, the Ukraine. The latest information is available at: <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

⁵ Bulgaria, Denmark, France, Lithuania, Malta, Poland, Spain, Sweden and the UK.

⁶ On the background to the development of EU policy on racism, see further: T Hervey, 'Putting Europe's house in order: racism, race discrimination and xenophobia after the Treaty of Amsterdam' in D O'Keeffe and P Twomey (eds), *Legal issues of the Amsterdam Treaty* (Oxford: Hart, 1999).

⁷ I Chopin and J Niessen (eds), *Proposals for legislative measures to combat racism and to promote equal rights in the European Union* (London: Commission for Racial Equality, 1998).

on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. In addition, Article 29 of the EU Treaty was amended in order to specify that one of the key objectives of European police and judicial cooperation was 'preventing and combating racism'. Building on these new legal powers, in November 1999, the Commission submitted a package of anti-discrimination law proposals, leading to the adoption of two anti-discrimination Directives in 2000. The first was the Racial Equality Directive,⁸ as mentioned above. This was complemented by the 'Framework Directive', adopted in November 2000.⁹ This forbids discrimination only in the field of employment, but on a wider range of grounds: religion or belief, age, disability and sexual orientation.¹⁰

These specific legislative initiatives were quickly followed by the declaration in December 2000 of the EU Charter of Fundamental Rights.¹¹ The Charter is, as yet, only a political statement of the fundamental rights recognised by the Union, designed to make these more visible to its citizens. As such, the rights contained therein are not legally binding; individuals cannot directly enforce them. Nonetheless, the Union has agreed to consider incorporating the Charter into the founding treaties by 2004. In the meantime, the Charter rights already appear to enjoy a persuasive value before the Court of Justice.¹² Irrespective of the legal value of the charter, it is important to note the commitment to non-discrimination therein. Indeed, there is a separate chapter on 'equality', which includes a general right to non-discrimination:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.¹³

⁸ See further A Tyson, 'The negotiation of the European Community Directive on Racial Discrimination' (2001) 3 *European Journal of Migration and Law* 199; E Guild, 'The EC Directive on race discrimination: surprises, possibilities and limitations' (2000) 29 *Industrial Law Journal* 416.

⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

¹⁰ See further, P Skidmore, 'The EC Framework Directive on Equal Treatment in Employment: towards a comprehensive Community anti-discrimination policy?' (2001) 30 *Industrial Law Journal* 126.

¹¹ [2000] OJ C364/1.

¹² Several Advocates-General have already relied on the Charter provisions in their interpretations of Community law for the Court. The Court has not yet explicitly referred to the Charter in its own decisions. See, *inter alia*, Case C-173/99 *BECTU* [2001] European Court Reports (ECR) I-4881; Cases C-122/99P and 125/99P *D and Sweden v Council* [2001] ECR I-4319.

¹³ Article 21(1).

(b) Protocol 12 ECHR

One of the inherent weaknesses in the European Convention on Human Rights is the absence of any independent right to non-discrimination within its provisions. Article 14 provides that:

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.

Therefore, in order for any individual to challenge discriminatory treatment, they must first establish that it falls 'within the ambit' of one of the other rights and freedoms guaranteed by the Convention.¹⁴ The Court of Human Rights has sought to alleviate this burden by accepting that there is no need for a finding of a violation of another right of the convention, merely that the issue in question falls within the scope of another convention right. For example, *Abdulaziz, Cabales and Balkandali* concerned a challenge by three women (of third country nationality) to a refusal by the UK to grant residence rights to their husbands. Whilst the court did not find a violation of Article 8 (right to family life), there was a violation of Article 8 combined with Article 14, because it was easier for a man settled in the UK to be joined by a woman, than for a woman to be joined by a man. This was held to be sexual discrimination in breach of the convention.¹⁵

Whilst the court's approach assists applicants, the convention remains primarily focused on civil and political rights. This creates barriers to challenging discrimination in social rights, such as access to healthcare, because it can be difficult to demonstrate how these issues fall within the ambit of the convention. Moreover, the 'parasitic' nature of Article 14 means that frequently the court will not examine potential issues of discrimination if it has already found a violation of a substantive right extended elsewhere in the convention.¹⁶ For example, in *Smith and Grady v UK*,¹⁷ the applicants were homosexuals expelled from the UK armed forces as a result of a government ban on lesbian and gay persons serving in the military. They challenged their dismissals, *inter alia*, as both a breach of Article 8 (right to private life), by reason of the intrusive investigations into their personal lives prior to dismissal, and Articles 8 and 14, based on the inherent sexual

¹⁴ *Gaygusuz v Austria* [1996] 23 European Human Rights Reports (EHRR) 364, 380.

¹⁵ *Abdulaziz, Cabales and Balkandali v UK* [1985] 7 EHRR 471.

¹⁶ E Dixon, 'Freedom from discrimination in respect of Convention right' in Lord Lester and D Pannick (eds), *Human Rights Law and Practice* (London: Butterworths, 1999) 225.

¹⁷ *Smith and Grady v UK* [1999] 29 EHRR 493.

orientation discrimination.¹⁸ The court held that the military's investigations were in breach of Article 8 and, in line with its practice, did not consider further any potential breaches of Article 14.¹⁹

Whilst in cases like *Smith and Grady* the applicants are successful in their action, the court ignores a material aspect of their complaint – unequal treatment. Moreover, this approach has stifled development of case law under Article 14, as well as underestimating the extra severity of a breach of human rights where the act is discriminatory in nature. Consequently, there has been pressure for the establishment of an autonomous right to non-discrimination in the convention, as is the case in many other international human rights instruments.²⁰

A lengthy debate within the various organs of the Council of Europe preceded the decision to adopt a new protocol.²¹ Issues of racial discrimination received greater attention following the adoption in 1993 by the member states of the Council of Europe of the Vienna Declaration on the fight against racism, xenophobia, anti-Semitism and intolerance.²² Similar factors to those influencing the EU explain the growing commitment to combating racism, in particular, the outbreak of ethnic conflict in the former Yugoslavia and the entry into the Council of Europe of many states from central and eastern Europe. Following the Vienna declaration, the European Commission on Racism and Intolerance (ECRI) was established within the Council of Europe. ECRI concluded that improving legal protection against racism demanded, *inter alia*, the establishment of an independent right to non-discrimination attached to the convention.²³ This coincided with an existing recommendation from the Council of Europe's Steering Committee for Equality between Women and Men.²⁴ Following consultations, the Council of Europe's Committee of Ministers approved a draft text for the new Protocol 12 in June 2000

¹⁸ They also argued that there were breaches of Article 3 (freedom from degrading treatment), Article 10 (freedom of expression) and Article 13 (right to an effective remedy).

¹⁹ *Smith and Grady v UK* [1999] 29 EHRR 493, 537.

²⁰ U Khaliq, 'Protocol 12 to the European Convention on Human Rights: a step forward or a step too far?' (2001) *Public Law* 457.

²¹ See further, J Schokkenbroek, 'Towards a stronger European protection against discrimination: the preparation of a new additional protocol to the ECHR' in G Moon (ed), *Race discrimination – developing and using a new legal framework* (London: Justice, 2000).

²² Reproduced in *Netherlands Quarterly of Human Rights*, (1993) Vol 4 p 513.

²³ Para 7, Council of Europe, 'Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms – Explanatory Report' (2000) available from: <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

²⁴ *Ibid*, para 2.

and this was opened for signature on 4 November 2000.²⁵

Having introduced both initiatives, the rest of this paper compares their principal features. Specifically, the following aspects are examined: the grounds for discrimination; the definition of discrimination; the personal scope of protection; the material scope of protection; application to the public and private sectors; national remedies and enforcement; and sanctions for failure to incorporate the rights into national law.

1. THE GROUNDS OF DISCRIMINATION

(a) The Racial Equality Directive

The Racial Equality Directive forbids discrimination on grounds of 'racial or ethnic origin'. These terms are neither defined anywhere in the directive, nor in any of the accompanying official documents. Several national delegations initially objected to the inclusion of 'racial origin' within the directive on the basis that a rejection of racism also requires a rejection of the notion that biologically separate 'races' exist in humanity.²⁶ In contrast, other delegations were concerned that a deletion of racial origin might create potential loopholes in the law. A compromise was reached with the insertion of Recital 6 in the preamble to the directive.²⁷ This states:

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.

One of the main gaps in the Racial Equality Directive is the lack of protection against related forms of discrimination, such as that based on religion or nationality. Discrimination on grounds of religion or belief is forbidden in the Framework Directive, but this only extends to employment (whereas the Racial Equality Directive includes matters such as health, housing and education). The situation in respect of nationality discrimination is more complex. Article 3(2) of the Racial Equality Directive excludes protection against nationality discrimination:

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

²⁵ Ibid, para 13.

²⁶ Tyson (above n 8) 201.

²⁷ This is a non-binding part of the Directive, but this can be of assistance to courts when interpreting its provisions.

Notwithstanding this provision, there are a number of other sources in EU law that can provide some protection against nationality discrimination. First, Article 12 EC forbids nationality discrimination 'within the scope of application of this Treaty'. This is a very broad principle and it is rigorously enforced by the Court of Justice.²⁸ Although it is not explicitly limited to EU nationals, in practice the court has interpreted it as not extending protection to third country nationals.²⁹

Alternatively, third country nationals have discovered increasing protection within specific agreements the EU has negotiated with third countries. The court has allowed individuals to rely directly on rights to non-discrimination in the agreements with Turkey,³⁰ Morocco,³¹ Algeria,³² Poland,³³ the Czech Republic,³⁴ and Bulgaria.³⁵ Whilst these agreements can be useful sources of additional protection, it is an unsatisfactory legal situation. The rights are determined on a case-by-case basis, their scope depending on the content and nature of the particular agreement. Moreover, a hierarchy of third country nationals implicitly emerges, with those from outside central, eastern and southern Europe, or northern Africa, considerably less protected. In response, the commission has now submitted two legislative proposals that would help to establish a common threshold of protection for all third country nationals.

First, the commission has proposed a directive on the rights of long-term residents.³⁶ Subject to certain exclusions, third country nationals with five years legal and continuous residence in a EU

²⁸ For example, it has been applied to the organisation of criminal proceedings in EU member states: Case C-274/96 *Bickel and Franz* [1998] ECR I-7637.

²⁹ For example, para 40, Cases C-95/99 to C-98/99 and C-180/99 *Khalil and others*, judgment of 11 October 2001.

³⁰ Case C-262/96 *Sürül* [1999] ECR I-2685 (non-discrimination in social security); para 38, Cases C-102/98 and C-211/98 *Kocak and Örs* [2000] ECR I-1287 (non-discrimination in working conditions).

³¹ Case C-416/96 *El-Yassini* [1999] ECR I-1209 (non-discrimination in working conditions); Case C-126/95 *Hallouzi-Choho* [1996] ECR I-4807 (non-discrimination in social security).

³² Case C-113/97 *Babehenini v Belgium* [1998] ECR I-183 (non-discrimination in social security).

³³ Case C-63/99 *ex parte Gloszczuk*, judgment of 27 September 2001 (non-discrimination in exercising the right to establish a business in the EU).

³⁴ Case C-257/99 *ex parte Barkoci and Malik*, judgment of 27 September 2001 (non-discrimination in exercising the right to establish a business in the EU). Also, Case C-268/99 *Jany*, judgment of 20 November 2001.

³⁵ Case C-235/99 *ex parte Kondova*, judgment of 27 September 2001 (non-discrimination in exercising the right to establish a business in the EU).

member state would be entitled to 'long-term resident' status.³⁷ Article 12 of the proposed directive grants long-term residents the right to equal treatment with EU nationals in a wide range of areas: employment, training, education (including study grants), recognition of qualifications, social protection (including social security and healthcare), social assistance, social and tax benefits, access to and the supply of goods and services (including housing), and participation in employer, employee and professional associations. Alongside this initiative, the commission has also proposed a directive governing all persons admitted to the EU for paid employment and self-employment.³⁸ Article 11(f) provides a right to equal treatment with EU citizens for both third country national workers and self-employed persons. This extends to: working conditions (including pay and dismissal), training,³⁹ recognition of qualifications, social security (including healthcare), access to and the supply of goods and services (including public housing),⁴⁰ and participation in employer, employee and professional associations. If adopted in their current form, both these proposals would make a major contribution to addressing the deficiencies in the Racial Equality Directive in respect of nationality discrimination. Moreover, they would establish a common platform of equal treatment rights enjoyed by third country nationals legally present in the EU, instead of the fragmented and hierarchical framework that currently governs these persons.

(b) Protocol 12

Article 1(1) states:

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

³⁶ Commission, 'Proposal for a Council Directive concerning the status of third country nationals who are long-term residents' COM (2001) 127.

³⁷ Ibid, Article 5(1). Article 3 specifies that the Directive does not apply to asylum applicants, persons receiving temporary protection, persons otherwise permitted to stay for humanitarian reasons, students, seasonal and posted workers, diplomats and third country nationals who are members of the family of EU nationals exercising their right to free movement.

³⁸ Commission, 'Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed economic activities' COM (2001) 386.

³⁹ This may be restricted to persons with the right to stay in the state for at least one year (Article 11(2)).

⁴⁰ This may be restricted to persons with the right to stay in the state for at least three years (Article 11(2)).

Compared to the various EU instruments, Protocol 12 is clearly much more comprehensive in the range of grounds to which it applies. First, unlike in EU law, there is no distinction in the level of protection accorded to different aspects of racial discrimination; religion and national origin are included alongside race and colour. Second, it is a non-exhaustive list of discriminatory grounds by virtue of the expression 'any ground such as' and the inclusion of reference to 'other status'. This has allowed the Court of Human Rights scope in the past, when interpreting Article 14 ECHR, to recognise additional grounds, such as sexual orientation⁴¹ or marital status.⁴² The Parliamentary Assembly of the Council of Europe sought the explicit incorporation of some of these grounds into Protocol 12,⁴³ but this was ultimately rejected in favour of maintaining the same list as already found in Article 14 ECHR. The explanatory report on Protocol 12 cites concerns that the addition of some grounds, but the omission of others, could lead to negative inferences before the court as regards the scope of the protocol.⁴⁴ On the contrary, O'Hare criticises the implicit equality hierarchy that has emerged between listed and unlisted grounds in the protocol.⁴⁵

2. THE DEFINITION OF DISCRIMINATION

(a) The Racial Equality Directive

Both the Racial Equality Directive and the Framework Directive forbid four forms of discrimination: direct and indirect discrimination, harassment and instructions to discriminate. Direct discrimination is defined as where 'one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'.⁴⁶ This would occur where, for example, two candidates (of different ethnic origin) for a job are interviewed and

⁴¹ Eur. Ct. HR (Fourth section), *Salgueiro da Silva Mouta v Portugal*, Application 33290/96, 21 December 1999, [2001] 1 Family Court Reporter 653.

⁴² *Rasmussen v Denmark* [1984] 7 EHRR 371. See further, G Moon, 'The draft discrimination Protocol to the European Convention on Human Rights: a progress report' (2000) *European Human Rights Law Review* 49, 52.

⁴³ Parliamentary Assembly of the Council of Europe, 'Report of the Committee on Legal Affairs and Human Rights on Draft Protocol No 12 to the European Convention on Human Rights' [Jurgens] Doc 8614, 14 January 2000; Opinion No 216 (2000) on Draft Protocol No 12 to the European Convention on Human Rights, adopted 26 January 2000.

⁴⁴ Explanatory report (above n 23) para 20.

⁴⁵ U O'Hare, 'Enhancing European Equality Rights: a New Regional Framework' (2001) 8 *Maastricht Journal of European and Comparative Law* 133, 138.

the best-qualified candidate is not appointed, this person being from an ethnic minority community. Indirect discrimination covers situations where ‘an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’⁴⁷ An example of indirect racial discrimination would be a requirement that all applicants for a street-cleaning job must pass a written language test. Although an apparently neutral requirement, this could place persons from certain ethnic communities at a particular disadvantage if the national language is not their mother tongue. Moreover, given the nature of the job, such a test would not appear to be proportionate.

One of the novelties of the Racial Equality and Framework Directives was the introduction of an express definition of harassment. This is described as ‘when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.’⁴⁸ While the directives leave considerable discretion to member states (for example, as regards the liability of employers for harassment of a person by their workers, customers or service-users), the definition provided is sufficiently broad in order to cover a wide range of unwanted conduct ranging from racially-offensive remarks to physical violence. Finally, Article 2(4) of both directives provides that ‘an instruction to discriminate against persons on grounds of racial or ethnic origin, or religion or belief, will amount to unlawful discrimination. This will be particularly useful in tackling discrimination via third parties. A common example is where employers recruit through employment agencies, but seek to pressure the agencies into only sending workers of a particular ethnic origin.’⁴⁹

(b) Protocol 12

In contrast to the Racial Equality and Framework Directives, Protocol 12 does not contain any definition of discrimination. The best guidance for the future interpretation of the protocol is to be found in the case law of the Court of Human Rights on the meaning of discrimina-

⁴⁶ Article 2(2)(a). See also Article 2(2)(a), Framework Directive.

⁴⁷ Article 2(2)(b). See also Article 2(2)(b), Framework Directive.

⁴⁸ Article 2(3). See also Article 2(3), Framework Directive.

⁴⁹ For an example from Belgium of such behaviour: *Le Soir* (24 February 2001) ‘Des critères sélectifs sur les formulaires d’inscription Adecco est-il raciste?’.

tion in Article 14 ECHR. This was summarised by the court in its opinion on the proposal for Protocol 12:

A difference of treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.⁵⁰

First, it can be noted that there is no express distinction made between direct and indirect discrimination under both Article 14 and Protocol 12. Therefore, direct discrimination is always open to potential justification. In contrast, direct discrimination contrary to the Racial Equality Directive is not justifiable, unless the behaviour can be brought within one of the limited exceptions provided elsewhere in the directive.⁵¹ The same is also true in respect of the Framework Directive, however, the exceptions provided in this instrument are considerably broader than those found in the Racial Equality Directive.⁵²

In assessing justification, the Court of Human Rights allows states 'a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment'.⁵³ For example, in *Moustaquim v Belgium*, the court had to examine whether differential treatment by Belgium of third country nationals as compared with other EU nationals constituted discrimination. The court held that 'as for the preferential treatment given to nationals of the other member states of the communities, there is objective and reasonable justification for it as Belgium belongs, together with those states, to a special legal order.'⁵⁴ The generosity of the court in permitting justification for differential treatment has been criticised by some observers.⁵⁵ In respect of certain grounds, though, the court is increasingly rigorous. In *Gaygusuz v Austria*,⁵⁶ the applicant was a Turkish national who had been living in Austria for 14 years. Being unemployed, he sought emergency social assistance in the form of an advance based on his existing pension contributions.

⁵⁰ Opinion of the European Court of Human Rights on draft Protocol 12 to the European Convention on Human Rights, Doc 8606, 5 January 2000, para 5.

⁵¹ For example, Article 5 protects positive action measures 'to prevent or compensate for disadvantages linked to racial or ethnic origin'.

⁵² See further, L Waddington and M Bell, 'More equal than others: distinguishing European Union Equality Directives' (2001) 38 *Common Market Law Review* 587, 597.

⁵³ *Abdulaziz, Cabales and Balkandali v UK* [1985] 7 EHRR 471, 501.

⁵⁴ [1991] 13 EHRR 802.

⁵⁵ P Van Dijk and G Van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 1998) 726.

⁵⁶ [1996] 23 EHRR 364.

Whilst this would have been available to an Austrian national in the same circumstances, it was refused on the basis of his nationality. The court held that ‘very weighty reasons would have to be put forward before [it] could regard a difference of treatment based exclusively on nationality as compatible with the convention.’⁵⁷ Given that the applicant was legally resident and employed in Austria, and that he had paid his contributions like any other Austrian worker, no justification for the discrimination was found.

Whilst not specifically mentioned, there is no reason to assume that Protocol 12 is not capable of being applied to situations of indirect discrimination. In *Abdulaziz, Cabales and Balkandali v UK*, the applicants argued, inter alia, that the UK’s immigration rules constituted indirect racial discrimination because they affected a much greater number of persons from ethnic minority communities than from white communities. Although the court did not reject in principle the application of Article 14 ECHR to indirect discrimination, its understanding of the scope of that concept was quite narrow. Regarding the ethnic impact of the immigration laws, the court concluded:

That the mass immigration against which the rules were directed consisted mainly of would-be immigrants from the New Commonwealth and Pakistan, and that as a result they affected at the material time fewer white people than others, is not a sufficient reason to consider them racist in character: it is an effect which derives not from the content of the 1980 rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others.⁵⁸

The court’s analysis would not be consistent with the conceptual definition of indirect discrimination in the Racial Equality Directive. Under the directive, the evidence of a disproportionate impact on particular ethnic group would be deemed to be indirect discrimination, albeit potentially capable of objective justification.

Finally, Protocol 12 evidently does not expressly include harassment or instructions to discriminate, although it is quite possible such discriminatory actions would be interpreted by the Court of Human Rights as falling under the general concept of discrimination.

⁵⁷ Ibid 381.

⁵⁸ [1985] 7 EHRR 471, 504.

3. THE PERSONAL SCOPE OF PROTECTION

(a) The Racial Equality Directive

The personal scope of the directive seems to include all persons present on EU territory. Article 3(1) states ‘this directive shall apply to all persons’. Moreover, the exclusion of protection from nationality discrimination in Article 3(2), strongly suggests that third country nationals are otherwise entitled to rely on the protection of the directive. Recital 16 reinforces this, stating: ‘it is important to protect all natural persons against discrimination on grounds of racial or ethnic origin’. In the light of these statements, it seems clear that the directive must be interpreted as including all third country nationals.

Nonetheless, particular difficulties may be encountered with enforcement of the directive’s provisions in respect of those individuals who are not legally resident in the Union. On the one hand, there are individuals without any legal permission to work or reside in the Union. On the other, there are those in a vague and precarious legal status: for example, rejected asylum applicants against whom a removal order has not been issued. The Charter of Fundamental Rights provides an interesting point of reference in this instance. Most of the rights contained in the charter are not limited in their personal scope, reflecting their ‘fundamental’ nature. Nonetheless, certain rights, such as equal treatment in working conditions,⁵⁹ are limited to legally resident, third country national workers. This dichotomy between universal rights and rights contingent on legal residence may inform the application of the Racial Equality Directive to undocumented migrants, should such a case arise.

(b) Protocol 12

The protocol, like the convention, is framed in broad terms. The preamble refers to ‘the fundamental principle according to which all persons are equal before the law’. Article 1(2) states ‘no one shall be discriminated against by any public authority on any ground’. Its personal scope is settled by Article 3, which states that the protocol shall be regarded as an addition to the convention and that all the other articles of the convention apply accordingly. Article 1 ECHR leaves no room for doubt: ‘the High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section 1 of

⁵⁹ Article 15(3): ‘nationals of third countries who are authorised to work in the territories of the member states are entitled to working conditions equivalent to those of citizens of the Union’.

this convention' (emphasis added).

The wide personal scope of both the convention and the protocol are especially important when one considers that discrimination based on national origins is found within the list of prohibited grounds of Article 14 and Protocol 12. The explanatory memorandum to the Protocol recognises the potential implications, noting that 'the law of most if not all member states of the Council of Europe provides for certain distinctions based on nationality concerning rights of entitlements to benefits.'⁶⁰ However, it argues that such distinctions remain 'sufficiently safeguarded' given that differences of treatment that are objectively justified will not constitute discrimination.⁶¹

4. THE MATERIAL SCOPE OF PROTECTION

(a) The Racial Equality Directive

The directive has a relatively broad scope in comparison with existing EU law on gender equality, which has focused on employment discrimination. It applies essentially to all aspects of employment and training, including 'membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession.'⁶² The Framework Directive also covers all these areas, so discrimination on grounds of religion or belief is forbidden throughout employment. However, the Racial Equality Directive has an extended scope, applying in addition to 'social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services which are available to the public, including housing.'⁶³

At the same time, this broad scope is qualified by the expression 'within the limits of the powers conferred upon the Community'.⁶⁴ Therefore, the prohibition on discrimination in health, education, housing and so on, only applies to the extent that these issues fall within the scope of the powers of the community. This does not pose particular problems in respect of employment, which is already

⁶⁰ Explanatory report (above n 23) para 19.

⁶¹ Ibid.

⁶² Article 3(1)(a)-(d).

⁶³ Article 3(1)(e)-(h). For more detail on the meaning and scope of each of these headings, see M Bell, 'Meeting the challenge? A comparison between the EU Racial Equality Directive and the Starting Line' in I Chopin and J Niessen (eds) *The Starting Line and the incorporation of the Racial Equality Directive into the national laws of the EU Member States and Accession States* (London: CRE and Migration Policy Group, 2001) 33-37.

⁶⁴ Article 3(1).

regulated in many different aspects at the EU level.⁶⁵ Yet, policy fields such as health and education primarily remain the responsibilities of national authorities – indeed, the EC Treaty places strict limits on the powers of the Union in both these areas, where harmonisation of laws is mainly excluded.⁶⁶ The Racial Equality Directive provides no clear indication of which aspects of health and education (for example) it is to be applied to and which aspects, if any, fall outside its scope.⁶⁷ The directive would appear rather meaningless if it did not, as a minimum, protect individuals against discrimination on grounds of racial or ethnic origin, for example, where a child is denied admission to a school, or where a patient is harassed in hospital. Discrimination in these sectors extends to wider issues, though, such as patterns of resource allocation that can indirectly discriminate against persons of a particular ethnic origin, especially where ethnic communities are geographically segregated. The full potential of the directive to address all aspects of discrimination in national social policies remains unfortunately vague at this stage in its implementation.

(b) Protocol 12

One of the main strengths of Protocol 12 is the breadth of its material scope. Whereas the Racial Equality Directive applies only to specified areas (and even then subject to the limits of Community competences), Article 1(1) of Protocol 12 states ‘the enjoyment of any right set forth by law shall be secured without discrimination on any ground’. In addition, Article 1(2) provides that ‘no one shall be discriminated against by any public authority on any ground’. The explanatory memorandum to the protocol suggests that these two paragraphs must be read together, and as a consequence, there are four main areas where discrimination is forbidden:

- any right specifically granted to any individual under national law;
- any right which may be inferred from a clear obligation of a public authority under national law;
- any area where a public authority is exercising discretionary powers;
- any other act or omission by a public authority.⁶⁸

⁶⁵ See generally, C Barnard, *Employment Law* (Oxford: OUP, 2000).

⁶⁶ Articles 149(4) and 152(4) EC.

⁶⁷ Tyson (above n 8) 208.

⁶⁸ Explanatory report (above n 23) para 22.

The protocol appears to forbid comprehensively discrimination throughout the law and in any activities of public authorities. This holds considerable advantages over the Racial Equality Directive. For example, denial of planning permission to construct a mosque could not be challenged easily under the Racial Equality Directive: first, it does not include religious discrimination, and second, it is not evident that the administration of planning permission would fall within the material scope of the directive. In contrast, as this issue concerns the exercise of discretionary powers by public authorities, it would fall within the ambit of Protocol 12 (which includes religion). Alternatively, racial discrimination in the administration of immigration controls or by law enforcement agencies falls outside the material scope of the Racial Equality Directive and there is no alternative means of redress in EU law. Protocol 12, however, will cover both these significant sites of discrimination.

The inclusion of liability for omissions on the part of public authorities has already been recognised by the Court of Human Rights in respect of the existing convention rights.⁶⁹ This is a particularly important aspect of Protocol 12. For example, Protocol 12 could be potentially relied upon to challenge a manifest failure by law enforcement agencies to provide protection against racially-motivated crime, or a failure to investigate or prosecute racist offences.

5. APPLICATION TO THE PRIVATE AND PUBLIC SECTORS

(a) Racial Equality Directive

Article 3(1) states ‘this directive shall apply to all persons, as regards both the public and private sectors, including public bodies.’⁷⁰ Therefore, discrimination on grounds of racial or ethnic origin (and religion or belief) is forbidden in all forms of employment, whether public or private. This means that whereas the directive does not apply to the police in terms of their administration of law enforcement, it does apply to matters such as police recruitment. A possible limitation of this scope lies in relation to Article 3(1)(h), which refers to ‘goods and services *available to the public*, including housing.’ This implies that goods and services, or housing, that are not available to the public fall outside the scope of the directive. This point is reinforced

⁶⁹ *Osman v UK* [1998] 29 EHRR 245, 305.

⁷⁰ Similar provision is made in Article 3(1), Framework Directive.

in Recital 4 of the preamble, which states: 'it is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.' The possible situations to which this refers include the renting of accommodation within a house where the owner continues to reside, or alternatively access to a restaurant which is restricted to members of a private club.⁷¹

(b) Protocol 12

If the strength of the protocol is its broad material scope, its weakness lies in the limited effects on private actors. The convention and the protocol principally impose obligations on the contracting state parties. Protocol 12 imposes a specific duty on 'public authorities' not to discriminate; the explanatory memorandum clarifies that this extends to 'not only administrative authorities but also the courts and legislative bodies'.⁷² Private actors are not mentioned in Protocol 12. There are, nonetheless, at least two possible circumstances where it could provide protection against discrimination by private bodies.

One avenue of redress may be located in the apparent duty imposed on the state in Article 1(1) of Protocol 12 that 'any right set forth by law shall be *secured* without discrimination' (emphasis added). In respect of certain convention rights, the Court of Human Rights has already recognised that these may contain positive duties on states to uphold the substance of the right. In *Abdulaziz, Cabales and Balkandali*, the applicants sought to establish that the right to family life guaranteed in Article 8 ECHR included an obligation on the state to provide residence permits for their husbands. The court accepted that 'although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life.'⁷³ At the same time, the court acknowledged that any positive duties were 'an area in which the contracting parties enjoy a wide margin of appreciation in determining the steps to be taken.'⁷⁴

The explanatory memorandum to Protocol 12 is quite cautious as regards the liability of states for failure to protect against discrimination by private actors. It concludes that positive obligations on the state

⁷¹ See further, Bell (above n 63).

⁷² Explanatory memorandum (above n 23) para 30.

⁷³ *Abdulaziz, Cabales and Balkandali v UK* [1985] 7 EHRR 471, 497. See also, *Sheffield and Horsham* [1998] 27 EHRR 163, 191.

⁷⁴ *Ibid.*

would be most likely to arise where there was ‘a clear lacuna in domestic law protection’ or where the gravity of the discrimination implied a duty on the state to intervene.⁷⁵ For example, if healthcare provision were mainly in the private sector, then it would be essential to ensure that individuals could have access to healthcare without any discrimination. Given the essential nature of healthcare as a public service, then a duty on the state could be more easily inferred. Nevertheless, O’Hare concludes that ‘the parameters of the court’s jurisprudence on the nature and extent of positive obligations are still fluid’.⁷⁶ Therefore, as regards discrimination by private actors, the Racial Equality Directive provides a much stronger level of protection.

Another possible means to challenge discrimination by private actors under the protocol lies in considering whether certain private actors could be regarded as ‘public authorities’ by reason of their functions. For example, in the UK, responsibility for running a number of prisons has been contracted-out to private organisations. Yet, the organisation and management of a prison seems to be a function that is inherently *public* in nature. The question of private bodies exercising public functions is recognised in the British Race Relations (Amendment) Act 2000, which defines ‘public authority’ as ‘any person certain of whose functions are functions of a public nature’.⁷⁷ This point is not explored in the explanatory memorandum on the protocol, but given the blurred boundaries between the public and private sectors that now exist, it cannot be ignored.

6. NATIONAL REMEDIES AND ENFORCEMENT

(a) Racial Equality Directive

Unlike the earlier EU gender equality laws, both the Racial Equality and Framework Directives place considerable emphasis on ensuring practical mechanisms for enforcement and adequate remedies. First, Article 7(1)⁷⁸ obliges states to ensure ‘judicial and/or administrative procedures’ for the enforcement of the rights conferred by the directive. Enforcement actions must be based on an individual complaint, but there is provision for organisations with a ‘legitimate interest’ to intervene on behalf or in support of the complainant, where he or she

⁷⁵ Explanatory memorandum (above n 23) para 26.

⁷⁶ O’Hare (above n 45) 141. See also, Khaliq (above n 20) 459-460.

⁷⁷ Section 19B(2), Race Relations Act 1976 (as amended).

⁷⁸ Article 9(1), Framework Directive.

agrees.⁷⁹ For example, France has implemented this provision by extending legal standing to trade unions, as well as organisations of at least five years existence that have the aim of promoting the interests of the persons affected by discrimination.⁸⁰

Once legal proceedings commence, the complainant is obliged to establish 'facts from which it may be presumed that there has been direct or indirect discrimination'.⁸¹ If this is achieved, then the burden of proof shifts to the respondent, who must prove that there has been no unlawful discrimination. In order to protect victims and other parties to the legal proceedings from the risk of reprisals, victimisation is forbidden. This is defined in the Racial Equality Directive as 'any adverse treatment or adverse consequence as a reaction to a complaint.'⁸²

If a complainant is ultimately successful, the sanctions in national law must be 'effective, proportionate and dissuasive.'⁸³ Article 15 of the directive recognises that this 'may' include the payment of compensation. Although the directive itself leaves quite a broad discretion to Member States in the area of remedies, this is an area where the Court of Justice makes a significant contribution. In its case law on gender equality law, the court has established that national discretion in the choice of remedies remains subject to compliance with two overriding principles: effectiveness and equivalence.

As regards the principle of *effective* remedies, the court has indicated that states may choose between financial compensation and reinstatement (where the discrimination involves a dismissal). Nonetheless, where they choose the former, the compensation must be adequate and a real deterrent.⁸⁴ For example, a statutory limit on the maximum amount of financial compensation was not compatible with the principle of effectiveness.⁸⁵

The principle of *equivalent* remedies introduces a comparison between the remedies in the national legal system for a breach of a right conferred by Community law, with the remedies available for a breach of a similar right based purely on national law. For example, in

⁷⁹ Legitimate interest is to be defined by national law: Article 7(2), Racial Equality Directive; Article 9(2), Framework Directive.

⁸⁰ Law No 2001-1066 of 16 November 2001 concerning the fight against discrimination, [2001] JO 267/18311.

⁸¹ Article 8, Racial Equality Directive; Article 10, Framework Directive.

⁸² Article 9, Racial Equality Directive. See also Article 11, Framework Directive.

⁸³ Article 15, Racial Equality Directive; Article 17, Framework Directive.

⁸⁴ Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367, paras 24-25.

⁸⁵ *Ibid.*

*Levez*⁸⁶ the applicant had been paid less than the previous occupant of her job, who was a man. She sought compensation for unequal pay, but the employer's deception meant that it was several years before she discovered the difference in pay scales. In order to claim compensation for unequal pay dating back more than two years, Ms Levez was obliged under the UK procedural rules to bring a case before the county court. In contrast, industrial tribunals were used to process similar cases concerning racial discrimination in pay. The Court of Justice accepted that if having to use the county court would imply more costs and time delays for Ms Levez, then the remedies were not equivalent and hence in breach of Community law.⁸⁷ The importance of this principle lies in the potential for complainants to challenge the remedies provided in the national legal system, including the procedures for asserting equality rights, before the Court of Justice. Therefore, even if the directive does not provide great detail in the area of remedies, the case-law of the Court of Justice imposes important minimum standards.

Most of the above relates to enforcement and remedies for individual litigants. The Racial Equality Directive also provides several measures designed to promote enforcement by other means. The most important provision in this context is the obligation on member states to establish equal treatment bodies.⁸⁸ These must have, as a minimum, three core functions:

- independent assistance to victims in pursuing their complaints;
- independent surveys on discrimination;
- independent reports and recommendations on discrimination.

The obligation to establish such bodies does not, however, extend to the Framework Directive. Consequently, there is no duty to provide institutional support for victims of religious discrimination. The Racial Equality Directive allows member states to adapt these provisions to their own national traditions and legal systems. For example, in Sweden, Belgium and Great Britain, specific agencies are responsible for combating racial discrimination.⁸⁹ In contrast, in the Netherlands, Ireland and Northern Ireland, there are agencies responsible for

⁸⁶ Case C-326/96 *Levez v Jennings* [1998] ECR I-7835.

⁸⁷ *Ibid*, para 51.

⁸⁸ Article 13.

⁸⁹ The Discrimination Ombudsman (Sweden), the Centre pour l'Égalité des Chances et la Lutte contre le Racisme (Belgium), the Commission for Racial Equality (Britain).

combating all forms of unlawful discrimination.⁹⁰ France is one of the first states to commence revision of its legal codes in order to implement the Racial Equality Directive. Interestingly, it has chosen to establish a free national telephone advice service for victims of racial discrimination in the workplace.⁹¹

Finally, member states are obliged to promote the social dialogue between management and labour with a view to the development of workplace codes of conduct, collective agreements and exchange of experiences on the fight against discrimination.⁹² This dialogue must also extend to non-governmental organisations working against discrimination.⁹³

(b) Protocol 12

In contrast to the considerable attention paid to remedies and enforcement within the Racial Equality Directive, Protocol 12 remains entirely silent on this subject. Remedies are exclusively addressed in Article 13 of the Convention:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The Court of Human Rights has developed a number of principles that states must respect in order to comply with this provision. As a starting point, there must be a remedy before a national authority that can grant ‘appropriate relief’, if a violation of rights is found.⁹⁴ This national authority is not required to be a judicial body, but where a non-judicial forum is selected, the court will scrutinise the powers of such bodies to consider if their remedies would be sufficiently effective.⁹⁵ The court examines the ‘aggregate’ of remedies open to the individual in order to consider the state’s compliance with Article 13 ECHR; these remedies may be sufficient when viewed together as a whole.⁹⁶ Overall, the court continues to provide a fairly wide discretion to states in this area: ‘neither Article 13 nor the convention in

⁹⁰ The Equal Treatment Commission (Netherlands), the Equality Authority and the Office for the Director of Equality Investigations (Ireland), the Equality Commission (Northern Ireland).

⁹¹ Law No 2001-1066 of 16 November 2001 concerning the fight against discrimination, [2001] JO 267/18311.

⁹² Article 11, Racial Equality Directive.

⁹³ Article 12, Racial Equality Directive.

⁹⁴ *Chahal v UK* [1996] 23 EHRR 413, para 145.

⁹⁵ *Silver v UK* [1983] 5 EHRR 347, para 113.

⁹⁶ *Leander v Sweden* [1987] 9 EHRR 433, para 84.

general lays down for the contracting states any given manner for ensuring within their internal law the effective implementation of any of the provisions of the convention.⁹⁷ The Court of Justice, by comparison, has proven considerably more interventionist in its interpretation of what the duty to provide effective remedies requires from national law.

7. SANCTIONS FOR FAILURE TO INCORPORATE THE RIGHTS INTO NATIONAL LAW

(a) Racial Equality Directive

The Directive provides EU Member States with a three year period for transposition of its provisions into national law; this expires on 19 July 2003. If, at the end of this period, the directive has not been fully implemented, then there are primarily two options for enforcement: individual litigation and commission infringement proceedings.

(i) Individual litigation

Since a decision in 1974,⁹⁸ the Court of Justice has held that individuals may directly rely on certain provisions of directives following the expiry of the period allowed for national implementation. This principle, referred to as *direct effect*, in practice means that even where national laws have not been brought into line with the rights guaranteed by the directive, an individual can nonetheless enforce its provisions in national courts. At the same time, this principle is limited to those aspects of the directive that are clear and precise, and unconditional. For example, in *Carbonari*, a directive required specialist doctors to receive 'appropriate remuneration' during their training period.⁹⁹ Although Italy had failed to implement this part of the directive, and the time limit had expired, the right to payment could not be directly relied on by the complainants, because the provision was not sufficiently precise. In particular, it did not specify either the level of payment to be awarded, or who should provide the salary. Many provisions in the Racial Equality and Framework Directives appear capable of direct effect, in particular, the prohibitions on discrimination. Whilst this must be established on a case-by-case basis, it is worth considering that the Court of Justice has already deemed

⁹⁷ *Silver v UK* [1983] 5 EHRR 347, para 113.

⁹⁸ Case C-41/74 *Van Duyn v Home Office* [1974] ECR 1337.

⁹⁹ Case C-131/97 *Carbonari and others* [1999] ECR I-1103, para 8.

similar provisions in the Equal Treatment Directive to be directly effective.¹⁰⁰

Even where an obligation in a directive is sufficiently clear, precise and unconditional, individuals can only rely on it against a state body. This has been defined broadly by the court and it includes decentralised authorities¹⁰¹ and state-run industries.¹⁰² Nonetheless, it greatly limits the utility of 'direct effect' for individuals who suffer discrimination by a private sector employer, or by a private sector service-provider. An alternative avenue of redress was subsequently developed by the court in order to confront some of these limits. In *Van Colson*, the court held that national courts were under a duty, when interpreting national legal provisions, to do so 'in the light of the wording and the purpose' of any relevant directive, in order to achieve the intended results.¹⁰³ This principle, often referred to as indirect effect, is neither limited to those provisions of the directive that are clear and precise, nor to actions against state bodies.¹⁰⁴ It will be of greatest assistance where anti-discrimination provisions already exist in national law, as it will oblige national courts to interpret these in conformity with the Racial Equality and Framework Directives.

Occasionally, there are situations where either no relevant national rule exists or these are unambiguously in conflict with the relevant directive. In these situations, indirect effect is less useful because the obligation on national courts is only to interpret national rules in line with the directive 'as far as possible'.¹⁰⁵ The final option open to individuals in such a situation is to bring an action directly against the state seeking compensation for the losses they have suffered as a result of the state's failure to implement the directive correctly. For example, if a state failed to implement the Racial Equality Directive and a person was subsequently denied a job promotion on grounds of their ethnic origin, that individual could potentially sue the state for damages where the reason why they are unable to bring an action against the employer is the state's failure to implement correctly the provisions of the directive.¹⁰⁶ For such an action to succeed, the complainant will have to demonstrate the following:

¹⁰⁰ For example, Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

¹⁰¹ Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839.

¹⁰² Case C-188/89 *Foster v British Gas* [1990] ECR I-3313.

¹⁰³ Case 14/83 *Van Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 26.

¹⁰⁴ Case C-106/89 *Marleasing v La Comercial Internacional de Alimentacion* [1990] ECR I-4135.

¹⁰⁵ Case C-111/97 *EvoBus Austria v Növog* [1998] ECR I-5411, para 18.

¹⁰⁶ Cases C-6/90 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

- the rule of law infringed was intended to confer rights on individuals;
- the breach by the state was sufficiently serious;
- there was a direct causal link between the breach of the duty on the state and the damage sustained by the complainant.¹⁰⁷

For example, an action against the state might fail where the misinterpretation of the directive was a genuine error on the part of the member state made in good faith.¹⁰⁸

(ii) Commission infringement proceedings

Whilst the court has developed the various principles described above in order to permit individuals to enforce the provisions of directives, the EC Treaty foresees enforcement primarily by the commission. Article 226 EC allows the Commission to bring member states before the Court of Justice for failure to implement correctly Community law. Before judicial proceedings commence, the commission will warn the state concerned that it is in breach of Community law and it will give the state an opportunity to explain its actions or to change its laws accordingly. Indeed, most complaints are resolved prior to referral to the Court of Justice.¹⁰⁹

If the Court ultimately decides that the member state is in breach of Community law, then it is under a legal obligation to comply with the judgment. If a state does not comply with the judgment, then the commission can bring the state back before the Court of Justice. At this stage, the court has the power to impose ‘a lump sum or penalty payment’ until such time as the state complies with its initial decision.¹¹⁰ For example, in 2000, a daily fine of €20,000 was imposed on Greece for failure to implement a Court judgment on environmental law.¹¹¹

Whilst the powers outlined above are ultimately coercive, the process can be slow. In the example of Greece, it was ten years from the time the commission initiated legal proceedings until the imposition of penalty payments. Nonetheless, commission enforcement has certain advantages over individual litigation. In particular, the legal costs are borne by the commission and it is possible to act against breaches of the directive even where no individual complainant has

¹⁰⁷ Case C-46/93 *Brasserie du Pêcheur v Bundesrepublik Deutschland* [1996] ECR I-1029, para 51.

¹⁰⁸ For example, Case C-392/93 *ex parte BT* [1996] ECR I-1631.

¹⁰⁹ J Shaw, *Law of the European Union* (Basingstoke: Palgrave, 2001) 306.

¹¹⁰ Article 228 EC.

¹¹¹ Case C-387/97 *Commission v Greece* [2000] ECR I-5047.

yet been presented. Against these positive aspects, the process rests in the hands of the commission. Whilst individuals can contact the commission in order to disclose breaches of the Directive, they cannot compel the Commission to open infringement proceedings.

Finally, it should be noted that the implementation of the Racial Equality Directive is the subject of a report by the commission every five years, starting in 2005. This provides a useful opportunity for the identification of gaps in national implementation, which could then give rise to infringement proceedings. Alternatively, this review mechanism could highlight weaknesses within the directive itself and any consequent need for amendment.

(b) Protocol 12

There is no obligation on any state to ratify the protocol, but once a state chooses to take this step, national law must conform to its requirements. The protocol will, however, only come into force three months after ratification by at least ten states.¹¹² The effect of convention rights within the national legal system varies considerably, depending on national constitutional law. In some states, ratified international treaties and conventions immediately become enforceable before national courts,¹¹³ whereas in other states formal incorporation of the relevant international instrument into national law is required (usually through adoption of a national statute to this effect).¹¹⁴ Even where incorporation has taken place, the impact of these rights is not identical throughout the contracting states. In some cases, national courts will be able to annul inconsistent national laws; in others this right remains qualified. For example, although the UK incorporated the convention through the Human Rights Act 1998, courts cannot strike down incompatible Acts of Parliament. Instead, courts may issue a 'declaration of incompatibility' and it is up to the national parliament to decide whether or not to amend the law as a result. The diverse impact and status of convention law within European states compares less favourably with the EU directives, which must be accorded priority over any conflicting national norms.

Irrespective of the precise national legal arrangements, in all cases, a breach of the rights conferred by the Protocol will be ultimately actionable before the European Court of Human Rights. Article 34 of the convention allows applications to be made by 'any person,

¹¹² Article 5(1).

¹¹³ For example, Greece and Spain: Commission, 'Legal instruments to combat racism and xenophobia' V/6332/93-EN (Brussels: Directorate-General for Employment, Industrial Relations and Social Affairs, 1992) 32-33.

¹¹⁴ For example, Ireland, Denmark, the UK.

non-governmental organisation or group of individuals claiming to be the victim of a violation’.

The applicant’s first hurdle will be an assessment by the court as to the *admissibility* of the complaint. A committee of three judges will initially consider the application; if all three decide it is inadmissible, then the application is rejected, with no right of appeal.¹¹⁵ If, however, at least one judge considers the application admissible, then it passes to a chamber of seven judges for a decision on admissibility.¹¹⁶ To be admissible, the applicant must have exhausted all domestic remedies available to him or her and lodged their application within six months from the final decision at the national level.¹¹⁷ Applications can also be rejected if they are ‘substantially the same as a matter that has already been examined by the court’, incompatible with the provisions of the convention or protocol, manifestly unfounded, or ‘an abuse of the right of application’.¹¹⁸

Once the chamber decides that the application is admissible, it will then proceed to determine the merits of the complaint. Following its decision on the merits, each party to the case has three months to request that the case be referred to the Grand Chamber (a panel of seventeen judges).¹¹⁹ If the Grand Chamber decides to accept the request, then its judgment on the merits becomes final and binding.

If the court finds in favour of the applicant, and the national law of the state in breach only permits ‘partial reparation’, the court can award ‘just satisfaction to the injured party’.¹²⁰ This compares favourably with the Court of Justice, which cannot award compensation to an individual – this is a matter for subsequent determination by national courts. The Court of Human Rights will make an award in respect of three elements: pecuniary loss, non-pecuniary loss and costs and expenses.¹²¹ Pecuniary losses cover those costs directly linked to the breach of rights. Non-pecuniary losses include personal suffering and distress, whilst costs and expenses means the legal costs incurred in both the domestic and European proceedings. Nonetheless, Reid concludes that ‘the court has not proved unduly generous in its approach to awarding compensation under any of the heads’.¹²²

Decisions by the Court of Human Rights are transmitted to the

¹¹⁵ Article 28 ECHR.

¹¹⁶ Article 29 ECHR.

¹¹⁷ Article 35(1) ECHR.

¹¹⁸ Article 35(2)-(3) ECHR.

¹¹⁹ Article 43 ECHR.

¹²⁰ Article 41 ECHR.

¹²¹ K Reid, *A Practitioner’s Guide to the European Convention on Human Rights* (London: Sweet and Maxwell, 1998) 397.

¹²² *Ibid* 398.

Committee of Ministers of the Council of Europe, which supervises their implementation.¹²³ States are under a legal obligation to comply with the judgment, although the committee will allow the state a reasonable period during which it should take the necessary steps. An overt refusal to comply with a judgment would call into question the state's continuing membership of the Council of Europe; therefore, recalcitrant states are more likely to seek refuge in very slow implementation.¹²⁴ However, until it decides that the judgment has been complied with, the committee will examine the state's actions at least once every six months.¹²⁵

Aside from individual litigation, it should also be noted that national laws and policies on racism are periodically monitored by ECRI.¹²⁶ It issues reports annually on a number of Council of Europe states and it is currently reviewing each state for the second time. These reports and the whole inspection process provide a useful opportunity for national organisations to pressure governments. Although this process of national review is independent of Protocol 12, it should serve in the future as a good occasion to focus public attention on the need to ratify the protocol.

CONCLUSION

Whilst there are places where the Racial Equality Directive and the protocol overlap, fundamentally they are different in scope and in character. Annex III provides a table of comparison of both instruments. As regards the Racial Equality Directive, the grounds of discrimination covered are carefully circumscribed, the material scope is specific (not general) and there is a significant exception in respect of discrimination against third country nationals. In these respects, the protocol is more attractive. It covers a non-exhaustive list of grounds, between which there is no obvious hierarchy, and which include national origin. The material scope is also open-ended, insofar as the public sector is concerned. The strength of the Racial Equality Directive, however, lies in its detail: discrimination is quite thoroughly defined and various requirements are included in order to improve enforcement and to ensure victims have access to effective remedies.

¹²³ See Chapter 9, L Clements, N Mole and A Simmons, *European human rights: taking a case under the Convention* (2nd edn, London: Sweet and Maxwell, 1999).

¹²⁴ For example, although the criminalisation of consenting sexual relations between adult men in Ireland was held to be in breach of the Convention in 1988, it was 1993 before the relevant law was amended.

¹²⁵ Clements et al (above n 123) 105.

¹²⁶ See further: <http://www.ecri.coe.int/en/sommaire.htm>

In contrast, Protocol 12 leaves the definition of discrimination and the guarantee of effective remedies entirely to the Court of Human Rights. The lower emphasis on practical enforcement in the protocol suggests that the Racial Equality Directive will ultimately be more beneficial to individuals.

The absence in the protocol of the detail found in the directive is not surprising. This reflects the reality that it is more constitutional than legislative in nature. The protocol is intended to establish a general framework for the protection of the right to non-discrimination within all aspects of law and all actions (and omissions) by public authorities. As such, it must provide greater flexibility; hence, the open-ended possibility for discrimination to be justified. The open nature of its obligations provides a useful point of departure for addressing diverse forms of discrimination across diverse fields of life. The political sensitivity of certain issues connected to religion and belief, or the rights of third country nationals, has restrained the EU from making a stronger contribution to the protection of individuals against these forms of discrimination. In contrast, the protocol will allow for the elaboration of minimum norms and standards by the Court of Human Rights,¹²⁷ which in turn could pave the way for more detailed legislative protection by national and EU law.

In addition to the directives and the protocol, the relevance of the EU Charter on Fundamental Rights should not be ignored. The former impose important obligations on national public authorities, yet, within this web of protection the EU institutions are strangely excluded. Given their ever-growing significance, it is essential that the duty not to discriminate should also apply to these bodies. The charter could provide such a guarantee, but its provisions would need to become legally binding if it is to be fully effective. O'Hare describes all these initiatives as representing the emergence of a new 'regional framework' on equality rights in Europe.¹²⁸ They are particularly complementary in the light of the EU enlargement process; the protocol is a valuable bridge between the EU and the rest of Europe, whilst the directives establish standards not only for the existing EU Member States, but all those intending to join in the future. In order to make this picture a reality, it is necessary that states now commit themselves to all parts of the framework.

¹²⁷ Khaliq (above n 20) 463.

¹²⁸ O'Hare (above n 45).

PUBLIC PROCUREMENT AND ANTI-DISCRIMINATION LEGISLATION

Janet Cormack and Jan Niessen

The role of government of all levels in promoting the socio-economic inclusion of immigrants and ethnic minorities can be evaluated both in terms of the government's formal capacity as policy-maker, legislator, enforcer and fiscal supporter, and in terms of its role as employer and purchaser. Though often overlooked, these latter functions are particularly significant since government is often the largest employer and purchaser of goods and services in European countries. Consequently, this paper looks at government as 'a business', that is as an employer or facilitator of employment and a buyer of goods and services. In particular it explores whether and how public procurement can be made an instrument to pursue the social goal of the socio-economic inclusion of immigrants and ethnic minorities. The paper also sets out the relevance of public procurement in the fight against racial and ethnic discrimination. It is written against the backdrop of the newly adopted EU legal instruments to combat discrimination¹ and the current review of European public procurement legislation.²

¹ Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (the Racial Equality Directive) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

² Proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts CE COM(2000)275 (the 'classic' Directive); Proposal for a directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors CE COM(2000)276 (the 'utilities' Directive).

1. THE BUSINESS CASE³

European countries are home to diverse communities and international migration continues to add to this. Diversity is increasingly valued and its social, cultural and economic benefits are recognised. In a globalising economy with enhanced mobility of persons, goods, services, capital and information, diversity is an asset, from which both the public and the private sectors could benefit more by strategically incorporating diversity principles into employment, marketing and purchasing policies.

A combination of often overlapping social and commercial factors augments a growing business stake in the inclusion of Europe's immigrants and minorities. As immigrant and minority populations continue to concentrate in urban centres throughout Europe, their participation in the labour force and enterprise development has become part of a larger business necessity in servicing a culturally and racially diverse community and client base. For many companies, a key motivation for engaging in initiatives in the area of societal integration stems from a variety of principles often referred to as 'corporate citizenship'. As members of society, business can and ought to contribute to the development and maintenance of healthy communities. Many firms are discovering that they may obtain a number of commercial benefits from developing the reputation of being a socially responsible company. In an age of increasing consumer scrutiny, cause-related marketing aimed at combating long-term unemployment or environmental rehabilitation can foster a positive public image for the company among public and private consumers, community groups, and current and future employees. It is also increasingly understood that consumers are no longer exclusively buying products and services, but the actual companies – or corporate image – behind them. Several initiatives in the area of

³ As far as the private sector is concerned, we made the business case for pro-active employment policies with regard to immigrants and minorities and for doing business with entrepreneurs from these communities, respectively in: Lori Lindburg, in consultation with Jan Niessen, *Plus Sum Gain: Business investment in the socio-economic inclusion of Europe's immigrant and ethnic minority communities* (Migration Policy Group, 1997), and Janet Cormack and Jan Niessen, *Supplier Diversity, the Case of Immigrant and Ethnic Minority Enterprises* which served as the background paper for the MPG's Transatlantic Round Table of Business Leaders on Supplier Diversity (Brussels, January 2002).

diversity are thus part of an overall, carefully crafted corporate strategy to become the 'supplier', 'producer', 'investor' and/or 'employer of choice'. Some companies go a step further and require that other companies with which they do business adopt the same strategy or encourage them to develop one. Often, and increasingly, the motivation for corporate action in the area of socio-economic inclusion of immigrants and minorities stems from some combination of 'enlightened self-interest', socially responsible activities which result in tangible business gains, and 'win-win strategies' for the company and larger society.⁴

Notwithstanding the clear benefits of the socio-economic inclusion of immigrants and minorities, these communities today still have to cope with economic marginalisation, high unemployment rates and glass ceilings. This has created significant pressure on governments to legislate around labour market issues, leading to the adoption of European legislation against racial and ethnic discrimination. It is important to distinguish between legislation which punishes discriminatory acts and behaviour (anti-discrimination legislation) and legislation which seeks to 'level the playing field' by encouraging the employment of qualified minorities and their engagement as suppliers (positive action or positive discrimination/affirmative action). Clearly, the recently adopted European pieces of legislation make discrimination punishable, and do not permit positive discrimination or affirmative action.

As with the private sector, governments can play a significant role in enhancing the economic foundation of disadvantaged communities by employing immigrants and minorities, and by identifying and including immigrant and ethnic minority-owned businesses in tender lists for supplies and services. A number of governments in Europe have begun to look for strategies to utilise the diversity of the community it serves by building diversity considerations into the strategic planning, policy development and implementation, budgeting and reporting processes of government service delivery. Part of these strategies – which are similar to those applied in the private sector – is the promotion of racial and ethnic equality in the governments' own employment policies and human resources practices. On the contrary, diversity principles are hardly considered and applied when it comes to purchasing goods and services or out-sourcing by governments.

⁴ Diversity and cohesion. *New challenges for the integration of immigrants and minorities*. A report of the Council of Europe prepared by Jan Niessen (Strasbourg, 2000). For corporate strategies, see Marie Stewart and Lori Lindburg, *Gaining from diversity: business participation and benefits in Europe's ethnic and cultural change* (European Business Network for Social Cohesion, 1997).

In more general terms there are probably few European governments that use their purchasing power to pursue policy goals related to the socio-economic inclusion of immigrants and minorities. In other words, whereas an increasing number of companies see clear benefits in linking business principles with equality and diversity issues, governments tend to make and stick to a rigorous distinction between their role as policy-maker in these areas and their role as employer and purchaser of goods and services. The reasons for this may be manifold, including the fact that the current procurement legislation limits governments' scope to act otherwise, and, moreover, that confusion as to what exactly this scope is prevails among many public authorities.

2. THE POWER OF GOVERNMENT SPENDING

In most countries government at all levels is the largest consumer in the market and the current trend in government to contract out an increasing proportion of its spending is adding to this. The World Trade Organisation estimates that government procurement typically represents 10–15 per cent of Gross Domestic Product. In the EU, public procurement contracts account for around 14 per cent of the GDP, that is over €1,000 billion per year.

Public procurement represents a potentially powerful tool for the pursuit of public policy goals, in particular regional development policy, industrial policy and social policy. There are several mechanisms that can be employed to use public sector procurement as an instrument of social policy that are used also in the private sector. Contract compliance is the term used to define a system of public procurement whereby, unless the supplier complies with certain conditions relating to social policy measures, the contracting authority can exclude it from selection, qualification and award procedures for public contracts. Additionally, public bodies can be required by law to set aside certain contracts for particular groups to increase their own procurement to disadvantaged groups, and may require their contractors to do the same in sub-contracting ('second tier'). Alternatively, under 'step-in mechanisms' certain enterprises are granted the opportunity to step in and be awarded the contract once the cheapest bid has been established provided that they match the terms and conditions of this bidder.⁵

⁵ Ron Watermeyer, *The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects*, 2000 Public Procurement Law Review, Issue 5, p.226-250.

In relation to equality and diversity there are a several things that the public sector has the potential to do. A basic requirement of contractors is that they do not discriminate against any employee and tenderer on the basis of their racial or ethnic origin, sex, religion or belief, disability, age or sexual orientation.⁶ A more proactive approach tackles the ever-critical problem of employment opportunities for immigrants and minorities, requiring firms competing for public sector contracts to submit details of their equal opportunities policies and details of diversity in their workforce. A third possibility is to set aside contracts for firms owned by a person belonging to a minority. Whereas in an ideal world all businesses would compete on an equal basis for public contracts, minority business owners – be they immigrants, ethnic minorities, women or disabled persons – still face barriers to their participation. The problem is two-fold: on the one hand, the existing barriers that hinder minority businesses' formation and growth in turn limit their capacity to compete for government contracts; on the other, minorities still face discrimination by contracting authorities whose role it is to award the contract. All this in addition to the inherent challenges faced by all small and medium-sized companies in competing for contracts, including lack of capacity, facilities and, in some case, adequate awareness of available public contracts and procurement procedures.⁷

Through public contracts, minority businesses have the opportunity to increase their participation and to establish more formal relations within the industry they operate in. As government contracts tend to be stable and profitable they can impact considerably the growth of a firm and often provide an assured market for new products and services. By contracting out to minority-owned businesses, governments can reduce unemployment and develop minority communities, which often are low and moderate-income communities. At the same time they can benefit from the stimulation of free enterprise through the expansion of the tax base. Ethnic minority-owned businesses are often small firms, and these are recognised for their contribution to employment, innovation and entrepreneurial culture from which the economy can benefit greatly. Public procurement policies that '...encourage the entry of new competitors on the market often stimulate a far more rapid diffusion of technology, quickening the pace of technical advance and a widening of product variety to cater for consumer needs'.⁸

⁶ Grounds of discrimination included in the two directives mentioned under footnote 1.

⁷ cf. European Network for SME Research Enterprise Survey 1999.

⁸ Geroski, *Public Procurement as a Tool of Public Policy*, 1988, London Business School, Working Paper Series no. 54, in Andrew Erridge, Ruth Fee and John McIlroy, *Involvement of SMEs in Public Procurement*, 1998, *Public Procurement Law Review*, Issue 2, p.39.

The promotion of fairness and equal opportunities is a rational use of the taxpayers' money. It is quality and value for money, given the recognition of equal opportunities policies as good management practice. Public bodies have a moral duty to ensure that public funds are not paid to contractors or activities that directly or indirectly discriminate against any group. Canada, South Africa and the USA all provide examples of such use of public procurement.

Canada operates contract compliance for employment equity purposes, of which women, aboriginals, persons with disabilities and visible minorities are the beneficiaries. The Federal Contractors Programme for Employment Equity requires that organisations that have a federal contract worth \$200,000 or more and 100 employees or more commit to implementing the employment equity principles under the Employment Equity Act as a pre-condition to bidding. Failure to comply with the prescribed employment equity measures can result in the loss of opportunity to compete for future government business. Further, contractors must take steps to improve the employment status of the four designated groups by increasing their participation in all levels of employment. The Procurement Strategy for Aboriginal Business was introduced in March 1996 to promote aboriginal business development through the federal government procurement process, providing set-asides for aboriginal firms: those contracts that serve a primarily aboriginal population and that are worth more than \$5,000 are reserved for competition among qualified Aboriginal businesses. Further, federal buyers are encouraged to set aside other contracts for competition among aboriginal businesses whenever practical. Joint ventures between aboriginal and non-aboriginal firms, sub-contracting to aboriginal firms and the general raising of awareness of aboriginal firms are all encouraged. Aboriginal business are those firms where at least 51 per cent of the firm is owned and controlled by aboriginal people and at least one third of the firm's employees (if it has six or more full-time staff) are aboriginal.

The South African government developed 'targeted procurement' as part of its policy on social integration.⁹ Targeted procurement provides employment and business opportunities for 'targeted groups', that is, disadvantaged individuals and communities. It is being used as a means to implement an affirmative procurement policy aimed at eradicating the legacy of apartheid, and furthermore to address more long term socio-economic issues by increasing the volume of work available to the poor and generating income within the marginalised sectors of society. Under the system, small contracts of a value less than a predetermined threshold are the subject of direct preferences

⁹ see www.targetedprocurement.com

for targeted enterprises; for those above the threshold, tenderers must compete on the basis of both the quality of the product or service, and the social benefits for the targeted groups. The government can leave the contractors the discretion to involve targeted groups in the way they see fit, thus benefiting from private sector expertise and market knowledge.

In the USA, contract compliance has been a successful tool in discouraging discrimination and promoting diversity, and ultimately reducing racial and ethnic minorities inequalities in the market. Government is traditionally a significant source of business for minority entrepreneurs in the USA. Of the \$200 billion spent on average by the federal government in the USA each year on purchases of goods and services, small firms annually receive more than 20 percent of all federal prime contract dollars and another 10–14 percent of the federal procurement pie in subcontracts. In 1997, minority-owned firms were awarded \$11.1 billion in prime contracts, 5.7 percent of total federal contract dollars. About 6 percent of the contract actions over \$25,000 went to minority businesses (total of minority, women and disabled-owned) as well as 2.6 percent of actions of that value or less. In 1942 the first anti-discrimination clauses were included in public contracts and in the 1960s the requirement of affirmative action was added. All companies that are parties to a contract worth more than \$10,000 per year for goods and services are considered to have agreed not to discriminate against any employee or applicant because of race, colour, religion, sex or national origin.¹⁰ Such a contractor or sub-contractor must also take affirmative action to ensure that applicants and employees are treated without regard to race, colour, religion, sex or national origin. Those with 50 or more employees and a contract of \$50,000 or more must also develop and keep on file a written Affirmative Action Plan detailing specific measures the contractor must take to guarantee equal employment opportunity by addressing the problems and needs of members of minority groups and women. Further, where government contractors receive a contract worth \$500,000 or more and there are subcontracting opportunities, they must submit a written subcontracting plan to the government outlining in detail the efforts the contractor will make to ensure that small businesses, small disadvantaged businesses, women-owned

¹⁰ Executive Order 11246 as amended.

small businesses and businesses located in historically under-utilised business zones will have an equal opportunity to compete for subcontracts.¹¹

The evolution of supplier diversity in the US private sector provides an interesting example. Originally such programmes designed to ensure a diverse supplier base were the response to legislative mandates. However, over the years, when firms started to understand the extent to which demographic diversity was becoming a powerful economic force that was creating opportunities for corporate America, the programmes became far more based on perceived economic necessity for companies that want to retain or expand their market shares.¹²

In the EU, whereas in the past government policies have been promoted through preferential or strategic public purchasing, today governments and public authorities are bound by much stricter legislation that is based on the premise of free trade, restricting their possibilities to use public procurement in this way.

3. CONTRACT COMPLIANCE UNDER INTERNATIONAL LAW

In the last decade dramatic changes have taken place worldwide in the public procurement arena, all based on the principle of free trade and the promotion of freedom of movement of goods, services and capital. An increasing number of international agreements have been designed to ensure that free trade extends to public as well as private markets and eliminate discrimination in government procurement. The 1994 *Government Procurement Agreement* (GPA)¹³ covers works, services and supplies contracts worth more than specified threshold values, and applies to contracts of government and local authorities. A cornerstone of the rules in the GPA is non-discrimination, that is to say, government parties to the agreement are required to give the products, services and suppliers of any other country 'no less favourable treatment' than that they give to their domestic products, services and supplies and not to discriminate among goods, services and supplies of other parties. Emphasis is laid on procedures for providing transparency of laws, regulations, procedures and practices regarding government procurement.

Affirmative action clauses constitute a clear breach of the GPA provisions. However, national annexes to the GPA laying down conditions and reservations for individual countries do allow some

¹¹ Public Law 95-507.

¹² for additional information with regard to the USA, see information provided by the National Minority Supplier Development Council (www.nsmdcus.org).

¹³ http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm

signatories to use public procurement as an instrument in implementing their social policies. In such an annex, the USA was granted exemptions in relation to the provisions prohibiting discrimination on the basis of nationality, and to the rules on award procedures in order to respect set-asides for small and minority businesses. Procurement programmes promoting businesses owned by minorities, disabled veterans and women also enjoy a reservation.¹⁴ Canada also included a minority and small business exception in its annex.¹⁵ The EU and its member states disagree with such exceptions to the GPA, a reflection of the general attitude towards affirmative action legislation in Europe.¹⁶

4. EUROPEAN UNION LEGISLATION

All contracts awarded by public authorities in the EU are subject to the fundamental EC Treaty principles of non-discrimination on the grounds of nationality (among nationals of the EU member states), free movement of goods, freedom of establishment and freedom to provide services. Furthermore, those contracts valued above a certain threshold are also subject to the Public Supply Directive, the Public Works Directive, the Public Services Directive and the Utilities Directive.¹⁷ These European Public Procurement Directives govern the way in which these should be advertised in the Official Journal of the European Communities, and awarded in order to ensure that such contracts are not influenced by local or national preferences or by anti-competitive arrangements, and therefore open equally to all

¹⁴ United States annex to Appendix 1, General Notes, note 1. The North American Free Trade Agreement (NAFTA) whose members are the USA, Canada and Mexico, provides for procurements to be set aside for domestic small and minority business enterprises and not be open to foreign competition.

¹⁵ Canadian annex to Appendix 1, Annex 1, General Notes, 1(d).

¹⁶ for further reading see Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights, A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO. Government Procurement Agreement*, Journal of International Economic Law (1999), p 3-48.

¹⁷ Council Directive 92/50/EEC of 18.6.1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 93/36/EEC of 14.6.1993 coordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14.6.1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC; Council Directive 93/38/EEC of 14.6.1993 coordinating the procurement procedures of entities operating in water, energy, transport and telecommunications sectors, as amended by Directive 98/04/EC of the European Parliament and Council of 16 February 1998. The EU procurement rules were extended to cover the European Economic Area in 1992.

companies on an EU-wide basis. Above all, the directives seek to ensure competition, transparent procedures, increased efficiency and the coordination of public procurement systems across the Union.

In relation to those contracts under the value threshold¹⁸ and therefore not covered by the directives, it is for the member state to determine whether contracting authorities may or must pursue such objectives in accordance with national rules. Contracting authorities are free to design selection and award criteria which pursue social objectives, as long as they do not breach the general rules and principles of the EC Treaty, i.e. they must, *inter alia*, ensure an appropriate degree of transparency and compliance with the principle of equal treatment of tenderers and not, however tempting, favour local suppliers. Thus, practices that reserve contracts to certain categories of persons can be permitted by the member state, provided they do not constitute direct or indirect discrimination as regards tenderers from other member states or constitute an unjustified restriction to trade.

The situation for those contracts that fall under the Public Procurement Directives is less clear. The directives do not contain any specific provision on the pursuit of social policy goals within the framework of public procurement procedures.¹⁹ Rules on the incorporation of social aims into procurement procedures are however evolving, a reflection perhaps of the fact that since the drafting of the first public procurement directives in the 1970s, the goals of the EU have expanded from being purely economic objectives to including social aims. Yet the rules remain extremely complicated, which causes problems in terms of assessing the scope to pursue such objectives. This has led to ambiguity, which has resulted in cases before the European Court of Justice, or has discouraged public authorities from pursuing certain social or ethical objectives in their contracting for fear of litigation.

The directives are currently undergoing legislative review. In 1996, the Commission presented a Green Paper on Public

¹⁸ The value threshold above which public contracts are covered by the directives varies. In general, all contracting authorities must comply with the Community procedural rules where the estimated value of the public supplies contract before VAT is not less than €200 000, for public works contracts not less than €1,000,000, for public service contracts not less than €80,000, and for utilities contracts not less than €400,000. For further details see <http://simap.eu.int>

¹⁹ An exception relates to the working conditions of employees: the existing directives on public service contracts (92/50/EEC) and public works contracts (93/37/EEC) stipulate (Articles 28 and 23 respectively) that tenderers or participants may be required to indicate that they have taken into account, when drawing up their tender, the obligations relating to employment protection and working conditions.

Procurement, in 1998 a communication, and in 2000 two proposals for new directives, which seek to consolidate the procurement directives and in doing so eliminate current inconsistencies between the individual directives.²⁰ It is expected that revised legislation will be adopted by the EU in Spring 2002. The objective of the review is primarily to make procurement more flexible and speedier, in particular through increased electronic transmission of information. However, the review has also given rise to renewed exploration of the potential of social clauses in public contracts and the role of public procurement in promoting sustainable development and equalities. In the Green Paper on Public Procurement the commission stated that:

contracting authorities and contracting entities may be called upon to implement various aspects of social policy when awarding their contracts, as public procurement is a tool that can be used to influence significantly the behaviour of economic operators. As examples of the pursuit of social policy objectives, one can mention legal obligations relating to employment protection and working conditions binding in the locality where a works contract is being performed or so-called 'positive action'. The latter occurs, for example by providing a captive market for a disabled workshop which could not reasonably expect to compete on equal terms with normal commercial enterprises enjoying normal levels of productivity.²¹

In the 1998 communication the commission

...encourages the member states to use their procurement powers to pursue the social objectives mentioned above. The commission will act similarly in its own procurement activity.²²

On 15 October 2001, the European Commission adopted *an Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement* in an attempt to clarify how social concerns may be taken into account at each separate stage of the contract award procedure. The communication was one of the actions announced in the Social Policy Agenda adopted by the European Council in Nice in December 2000, and is part of the integrated European approach that aims to achieve the economic and social renewal set out in the conclusions of the Lisbon European Council in March 2000. The communication interprets the EC Treaty internal market rules and the Public Procurement Directives, and applies to both public contracts covered by the directives and those not covered by the directives but

²⁰ Green Paper, Public Procurement in the European Union: Exploring the Way Forward, 27 November 1996, Commission's Communication on Public Procurement in the European Union of 11 March 1998, the two proposals for directives are noted in footnote 2. (see Annex II).

²¹ Green Paper, paragraph 5.39.

²² Commission communication, paragraph 4.4.

nonetheless subject to Treaty rules. It points out that all relevant national rules in the social field are binding on contracting authorities, in so far as they are compatible with Community law. This clearly includes national rules deriving from EC directives such as the Racial Equality Directive and the directive on equal treatment in employment and occupation. While the communication serves as a helpful guide to the current thinking within the European Commission, ultimately, further embellishment of the procurement rules must come from the European Court of Justice.

In analysing the possibilities of using public contracts in the EU to further equality and diversity, four parts of the procurement procedure must be examined: the technical specifications, the selection of candidates, the award of the contract and the execution of the contract.

a. Technical specifications

In defining the subject matter of the product or service, a contracting authority can make certain technical specifications, provided these are in line with the Directives, and no tenderer is thereby favoured.²³ The adherence to certain safety and health standards constitute such requirements, as do technical specifications with social connotations such as the purchase of computers adapted for use by visually impaired persons.

Although an authority could require that a certain production process is used, the commission has expressly rejected the idea that requirements relating to the way in which an undertaking is managed could constitute technical specifications of this kind. The recruitment of staff from certain groups of persons such as ethnic minorities, disabled persons or women, are such requirements that relate to management practices and thus may not be considered to constitute technical specifications.²⁴

The legal authority for such a statement is unclear in the Interpretative Communication, and, moreover, it is hard to see why managerial expertise, which highlights the need for diversity in the workforce, could not legitimately constitute a technical specification.²⁵

²³Article 8(6) Directive 93/36/EEC, Article 10(6) Directive 93/37/EEC, Article 14(6) Directive 92/50/EEC and Article 18(5) Directive 93/38/EEC.

²⁴ p.9 of the Interpretative Communication at footnote 25.

²⁵ See Brian Bercusson's Commentary on the Interpretative Communication of the Commission, King's College, London, 11 November 2001, www.epsu.org/projects/procure/Berc0cfm

b. Grounds for exclusion or selection criteria

With regard to the selection of candidates, social criteria that are unrelated to contract performance cannot be considered in qualifying or shortlisting firms that have tendered because selection criteria must generally relate to the firm's capacity (economic, financial and technical)²⁶ to deliver goods and services which are the subject of the contract and it is difficult to demonstrate that a social consideration affects the contractor's ability to perform the contract. In practice, the result is that a procuring entity, which seeks to give an incentive to firms to promote equal opportunities policies, cannot pursue this objective by including in its selection criteria the requirement that contractors have an equality and diversity policy.

However, access to public contracts can be denied to those providers convicted of breaching equal opportunities legislation even when it cannot be shown to have any relevance to their ability to perform the contract from which they are excluded. The current Public Procurement Directives explicitly provide for the possibility to exclude or disqualify contractors where they have been found guilty of an 'offence concerning his professional conduct by a judgement that has the force of *res judicata*' or has 'been found guilty of grave professional misconduct proved by any means which the contracting authorities can justify'.²⁷ The Green Paper states that 'these rules clearly also apply where the offence or misconduct involves an infringement of legislation designed to promote social objectives'. According to the Commission's Interpretative Communication,

these exclusion clauses can also include, for example, non-compliance with provisions on equal treatment, or on health and safety, or with provisions in favour of certain categories of persons. A contracting authority may, for example, exclude a tenderer from its procurement procedure who has not introduced an equal opportunities policy as required by the national legislation of the member state where the contracting authority is established, provided that non-compliance with such legislation constitutes grave misconduct in the member state in question.²⁸

The commission cites two examples; in Spain, non-compliance with legislation on the employment of disabled persons constitutes grave professional misconduct, and can lead to the exclusion of the tenderer

²⁶ Art 15 Directive 93/36/EEC, Article 18 Directive 93/37/EEC, Article 23 Directive 92/50/EEC, Art 31(1) Directive 93/38/EEC.

²⁷ Art 20(c) and (d) of Directive 93/36/EEC, 24(c) and (d) of Directive 93/37/EEC, Art 24 Directive 92/50/EEC, Art 31(1) Dir 93/38/EEC.

²⁸ paragraph 1.3.1.

in question. In France there are around thirty possible grounds on which a tenderer can be excluded for non-compliance as this constitutes serious professional misconduct. An example of these grounds is the requirement that a company with over 100 employees must employ at least two disabled persons. Analogous legislation can be considered in relation to the employment of ethnic minorities.

Significantly, the application of such provisions on exclusion remains optional for contracting authorities, and it is for the member state to decide which cases of non-compliance with social obligations should be sanctioned with exclusion from the selection process.

c. Award criteria

Public contracts in the EU are awarded on the basis of one of two criteria: either the lowest price or the 'most economically advantageous tender'.²⁹ Regarding the latter, the Public Procurement Directives give a list of criteria that may be applied to determine the price (delivery or completion date, technical merit, quality, aesthetic and functional characteristics, running costs, cost-effectiveness, after-sales service and technical assistance). The contracting authority must indicate beforehand which criteria will be decisive and will be applied and these should be mentioned in the contract notice or in the contract documents, where possible in descending order of importance.

A recent judgement of the ECJ held that the criteria listed in Article 30(1) of Directive 93/37 in respect of the most economically advantageous offer are *not* exhaustive. In *Commission v France* the court rejected a commission challenge to a French public works contract which included social criteria, explaining the criteria for the award of the contract may include social considerations:

Article 30 (1) of Directive 93/37 does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment, provided that that condition is consistent with all the fundamental principles of Community law, and in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, Beentjes paragraph 29).³⁰

Thus the debate around 'most economically advantageous tender' has been widened. However, neither in its Interpretative Communication nor thus far in the proposed directives has the commission fully included this judgement. In stating that 'other criteria may be applied', provided they are linked to the subject matter of the contractor or the manner in which it is performed, it does not refer to the court's judgement in this case.³¹ The consequences of this judgement

²⁹ Article 26 Directive 93/36/EEC, Article 30 Directive 93/37/EEC, Article 36 Directive 92/50/EEC and Article 34 Directive 93/38/EEC.

³⁰ Case C-225/98 *Commission v France*, 26 September 2000, Paragraph 50.

³¹ paragraph 1.4.1 of the Interpretative Communication.

in practice remain to be seen. However, it is likely that any inclusion of social award criteria will be met with opposition based on an alleged infringement of EC Treaty principles.³²

In any event, the commission clearly and decisively contests the compatibility with EU rules of

quotas to reserve contracts for a given category of supplier, or the use of price preferences... This would also be the case for criteria related to whether tenderers employ a certain category of person or have set up a programme for the promotion of equal opportunities, as they would be considered criteria which are unrelated to the subject-matter of a given contract or to the manner in which the contract is executed.³³

The commission explains that the reason such award criteria must be considered as contrary to the provisions of the Public Procurement Directives, especially where they relate to the award of contracts, is that the European Community did not make a reservation to this end under the GPA.³⁴

d. Execution of contract

Although not currently explicitly covered by the Public Procurement Directives, the interpretation of the directives by the European Court of Justice led to the development of the concept of 'additional criteria'. The concept in essence allows purchasers to attach conditions to the performance of contracts, that is, after the contract has been awarded, provided they are not contrary to EU legislation, in so far as it is consistent with the fundamental principles of Community law, in particular that of non-discrimination, and it is advertised in the contract notice.

The concept was first set out in the *Beentjes* judgement³⁵ in which the court pointed out that the respective substantive EC law was not exhaustive so the member states remained free to maintain certain substantive or procedural provisions in their national procurement laws. It held that criteria such as the employment of long-term unemployed have neither a relationship to the checking of a candidate's economic and financial suitability and the candidate's technical

³² cf. Joël Arnould who is of the opinion that the ECJ's judgement complicates the state of the law more than it clarifies it, in *A Turning Point in the Use of Additional Award Criteria?, The Judgement of the European Court in the French Lycées case*, 2001 10 Public Procurement Law Review Issue 1, NA13. There is concern voiced by some parties that the incorporation of social objectives endangers the transparency of the procurement process since it is less easy to predict the decision made on the award of the tender. For the EP's opinion on including social award criteria in the current legislative review see *infra* at note 37.

³³ paragraph 1.4.1.

³⁴ p15, footnote 53.

³⁵ *Gebroeders Beentjes v Netherlands* [1988] ECR 4635.

knowledge and ability nor a connection with the award criteria as listed in Article 29 (of Directive 71/305, now Article 30 of Directive 93/37), but that these criteria are nevertheless compatible with the Public Procurement Directives if they comply with all the relevant principles of Community law.

In their bid, tenderers must undertake to meet relevant conditions if the contract is awarded to them. In its Interpretative Communication, the commission cites as an example of additional specific conditions:

the obligation to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity

adding in a footnote:

In the case of services contracts, this might for example involve establishing a policy aimed at promoting ethnic and racial diversity in the workplace, through instructions given to the person in charge of recruitment, promotion or staff training. It may also involve the appointment by the contractor of a person responsible for implementing such a policy in the workplace.³⁶

Thus, as a condition for the execution of a contract there is certainly potentially invaluable opportunity to use procurement to promote equality and diversity. In addition to the example cited by the Commission, a contract provision could also legitimately require the contractor to agree not to violate anti-discrimination laws. Such clauses can act as a complement to the existing anti-discrimination laws, and an additional guarantee to the possibility to exclude a contractor addressed above in terms of the selection criteria. By explicitly including an anti-discrimination clause in the contract and allowing cancellation of contract and disqualification from future valuable contracts in the case of breach, the contractor is far more likely to be motivated to avoid discrimination in his business than where he faces the distant threat of a formal investigation or court hearing under normal anti-discrimination legislation. Furthermore, it provides a way for authorities and politicians to prove they are serious about counter-acting discrimination.

It should be noted that the allocation of a contract to a business on the grounds that it is owned and operated by a person from an ethnic minority could not constitute a condition for the execution of the contract but a criterion for the award of the contract, the legitimacy of which has, as explained above, for the moment been rejected by the EU institutions.

In recognition of the Court's case law on additional criteria, the

³⁶ paragraph 1.6 of the Interpretative Communication.

European Commission's proposals for new directives make specific mention of the possibility to use contractual conditions regarding the execution of a contract that have as their goal the promotion of employment of disadvantaged or excluded persons, or the combating of unemployment.³⁷

5. SOME CONCLUSIONS

Any alteration of the Public Procurement Directives in favour of a straightforward social approach to public procurement is likely to face fierce opposition in the commission and in the council from those commissioners and member states that are in favour of open competition as a means to complete the internal market. This calls for more debate and a greater involvement of the wide variety of stakeholders. Organisations working to combat racial and ethnic discrimination should become more involved in the policy debates than currently is the case. They should take a position as to what kind of procurement legislation they want. Procurement legislation can either punish discriminatory acts and behaviour by not awarding a contract to companies which do not respect equality principles, or level the playing field by introducing voluntary targets for the employment of immigrants

³⁷ Cf. Recital 22 and Article 23(3) of the commission's proposal. In its report on the proposal for an EP and council directive on the coordination of procedures for the award of public supply contracts, public service contracts and public work contracts (CE COM (2000) 275 – C5-0367/2000 – 2000/0115(COD)) of 29 October 2001 (first reading), the EP called for the inclusion of a recital 29(a) in the preamble of the directive and an amendment to the proposed Article 53(1)b to express that social policy objectives can constitute award criteria as long as they are non-discriminatory and transparent. Article 53 (1)(b) states expressly that 'the tenderer's equal treatment policy' can be considered in determining the most economically advantageous tender, although 'such criteria shall be deemed complementary and not detract from the technical and economic qualities required for the contract... Likewise, objective social considerations may be employed as criteria in choosing two tenders of otherwise equal merit for a given contract' (amendments 12 and 98; similar amendments – 3 and 44 – are proposed by the EP to the proposal for an EP and council directive coordinating the procurement procedures of entities operating in the watee, energy and transport sectors COM(2000)276 – C5-0386/2000 – 2000/0117(COD)). The EP has also included an amendment to the proposed classic directive in order to allow member states to reserve contracts for sheltered workshop schemes, provided it is stated in the contract notice (amendment 36 inserting a new Article 15(a). A sheltered workshop scheme is defined as "a scheme or workshop where over half the persons employed are persons with disabilities which, by their nature or gravity, prevent them from following an occupation in normal working conditions, and which offers such persons the security of an employment contract or an apprenticeship contract for the purpose of occupational rehabilitation or retraining". Such a provision could be envisaged for ethnic minorities. However, products made by disabled persons come under a general exception in the WTO rules (Article XXIII GPA), which is not the case for ethnic minorities. It should be pointed out that Article XXIV: 6 of the GPA lays down a clear procedure for modifying the annexes to the agreement which the EU could employ if it was minded to.

and minorities, and measures to increase contracting activities with minority entrepreneurs and/or sub-contracting with those companies who themselves contract with minority enterprises.

In relation to the first option, it can be maintained that current legislative developments, including the recently adopted European legislation against racial and ethnic discrimination, give some scope for linking anti-discrimination and procurement.

First, contracts under the value threshold are not covered by the Public Procurement Directives and it is for the Member State to determine whether they want to design selection and award criteria which pursue social objectives (for example, racial and ethnic discrimination is punished), while respecting the general rules and principles of EC law. This also permits positive action measures.³⁸

Second, the inclusion of Article 13 in the EC Treaty and the adoption of the two directives against discrimination makes it entirely legal to punish discrimination by not awarding a contract to a bidder that discriminates or is condemned for discrimination on grounds mentioned in the directives. It is therefore advised that in future amendments to the European procurement directives, Article 13 is explicitly mentioned and that contracting authorities explicitly point to European anti-discrimination legislation. Furthermore, in the directives on public service contracts and public works contracts, it is stipulated that where the contract documents state the authority from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions, tenderers may be required to indicate they have taken into account these obligations. These include obligations deriving from the Racial Equality Directive.³⁹

Third, a condition attached to the execution of the contract can require not just the elimination of discrimination, but also the promotion of racial and ethnic diversity in the workplace. Contractors can also be required to adopt a policy to avoid discrimination in subcontracting, to gather data on the minority status of suppliers and to assess for under-representation. In terms of positive action authorities could take positive measures to increase opportunity for minority firms to bid successfully for contracts, and can require their contractors to do the same. Contractors could also be required to provide the public authority with monitoring information.

Pressure must be brought to bear on governments to make (greater) use of these three possibilities.

³⁸ The Racial Equality Directive permits positive action, which is not the same as positive discrimination or affirmative action.

³⁹ cf. Paragraph 3.1 'Social Provisions Applicable to Public Procurement', Commission's Interpretative Communication.

As far as the second option is concerned, namely the introduction of positive discrimination or affirmative action, more reflection is required. One could argue that these measures run counter to European equalitarian traditions, which is reflected in European Court of Justice rulings concerning gender discrimination.⁴⁰ One could also argue that business principles are more effective than legal obligations. Therefore, the role of government as employer and purchaser of goods and services ('government as business') must be better emphasised, and the business case for linking social issues with business practices more forcefully argued. It is precisely the latter that the European Commission wants to promote among private sector undertakings.⁴¹ It will become difficult for the European Commission (and many governments) to maintain the position that what is good for the private sector does not entail the same benefits for public businesses. Current restrictive legislation is not an acceptable excuse, since legislation can be amended to eliminate restrictions on the inclusion of social clauses in public contracts.

⁴⁰ See Mark Bell, *Meeting the challenge? A comparison between the EU Racial Equality Directive and the Starting Line*. In: Isabelle Chopin and Jan Niessen, *The Starting Line and the incorporation of the Racial Equality Directive into the national laws of the Member States and accession states* (Commission for Racial Equality and MPG, 2001).

⁴¹ cf. the Commission's Green paper "Promoting a European framework for Corporate Social Responsibility", July 2001 COM(2001)416 final. For MPG's comments on the Green paper, see http://europa.eu.int/comm/employment_social/social/csr/csr_responses.htm

ANNEX I

PROTOCOL NO.12 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Rome, 4.XI.2000

The member States of the Council of Europe signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”);

Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

Article 1 – General prohibition of discrimination

- 1** The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 2** No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Article 2 – Territorial application

- 1** Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
- 2** Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on

the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.
- 4 A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
- 5 Any State which has made a declaration in accordance with paragraph 1 or 2 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

Article 3 – Relationship to the Convention

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 4 – Signature and Ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 5 – Entry into force

- 1 This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.

- 2 In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 6 – Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Protocol in accordance with Articles 2 and 5;
- d any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Rome, this 4th day of November 2000, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

ANNEX II

COUNCIL DIRECTIVE 2000/43/EC OF 29 JUNE 2000

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

The Council of the European Union;

Having regard to the Treaty establishing the European Community and in particular Article 13 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

Having regard to the opinion of the Committee of the Regions⁴,

Whereas:

- 1 The Treaty on European Union marks a new stage in the process of creating an ever closer union among the peoples of Europe.
- 2 In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and should respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.
- 3 The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination

¹ Not yet published in the Official Journal.

² Opinion delivered on 18.5.2000 (not yet published in the Official Journal).

³ Opinion delivered on 12.4.2000 (not yet published in the Official Journal).

⁴ Opinion delivered on 31.5.2000 (not yet published in the Official Journal).

of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

- 4 It is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.
- 5 The European Parliament has adopted a number of Resolutions on the fight against racism in the European Union.
- 6 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.
- 7 The European Council in Tampere, on 15 and 16 October 1999, invited the Commission to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty as regards the fight against racism and xenophobia.
- 8 The Employment Guidelines 2000 agreed by the European Council in Helsinki, on 10 and 11 December 1999, stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.
- 9 Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice.
- 10 The Commission presented a communication on racism, xenophobia and anti-Semitism in December 1995.
- 11 The Council adopted on 15 July 1996 Joint Action (96/443/JHA) concerning action to combat racism and xenophobia⁵ under which the Member States undertake to ensure effective judicial cooperation in respect of offences based on racist or xenophobic behaviour.

⁵ OJ L 185, 24.7.1996, p.5.

- 12 To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection (including social security) and healthcare, social advantages and access to and supply of goods and services.
- 13 To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.
- 14 In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.
- 15 The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.
- 16 It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members.
- 17 The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.
- 18 In very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement,

when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

- 19 Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.
- 20 The effective implementation of the principle of equality requires adequate judicial protection against victimisation.
- 21 The rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.
- 22 Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.
- 23 Member States should promote dialogue between the social partners and with non-governmental organisations to address different forms of discrimination and to combat them.
- 24 Protection against discrimination based on racial or ethnic origin would itself be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.
- 25 This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.
- 26 Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.
- 27 The Member States may entrust management and labour, at their joint request, with the implementation of this Directive as regards

provisions falling within the scope of collective agreements, provided that the Member States take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive.

28 In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty, the objective of this Directive, namely ensuring a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community. This Directive does not go beyond what is necessary in order to achieve those objectives,

CHAPTER I, GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

- 1 For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
- 2 For the purposes of paragraph 1:
 - a direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
 - b indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
- 3 Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to

racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

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

Article 3

Scope

- 1 Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
 - a conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
 - b access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
 - c employment and working conditions, including dismissals and pay;
 - d membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
 - e social protection, including social security and healthcare;
 - f social advantages;
 - g education;
 - h access to and supply of goods and services which are available to the public, including housing.
- 2 This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third country nationals and stateless persons concerned.

Article 4

Genuine and determining occupational requirements

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

Article 5

Positive action

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

Article 6

Minimum requirements

- 1 Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
- 2 The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II, REMEDIES AND ENFORCEMENT

Article 7

Defence of rights

- 1 Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even

after the relationship in which the discrimination is alleged to have occurred, has ended.

- 2 Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
- 3 Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment

Article 8

Burden of proof

- 1 Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
- 2 Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
- 3 Paragraph 1 shall not apply to criminal procedures.
- 4 Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).
- 5 Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 9

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 10

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

Article 11

Social dialogue

- 1 Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.
- 2 Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

Article 12

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

CHAPTER III, BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13

- 1 Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of

agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2 Member States shall ensure that the competences of these bodies include:

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

CHAPTER IV, FINAL PROVISIONS

Article 14

Compliance

Member States shall take the necessary measures to ensure that:

- a any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- b any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.

Article 15

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 16

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003 or may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements. In such cases, Member States shall ensure that by 19 July 2003, management and labour introduce the necessary measures by agreement, Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 17

Report

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

Article 18

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Luxembourg, 29 June 2000.

For the Council.

The President

M ARCANJO

ANNEX III

TABLE OF COMPARISON

	Racial Equality Directive	Protocol 12
Grounds of discrimination	Racial/ethnic origin; nationality excluded.	Non-exhaustive list including, race, language, religion, national origin.
Definition of discrimination	Direct and indirect; harassment; instruction to discriminate.	Differential treatment without objective and reasonable justification.
Personal scope of protection	All persons.	All persons.
Material scope of protection	Employment, social protection, healthcare, education, goods and services, housing.	Any right set forth by law and any action or omission by a public authority.
Public and private sectors	Applies to both.	Only public authorities.
National remedies and enforcement	Shift in burden of proof; ban on victimisation; legal standing for relevant organisations; equal treatment body.	Wide discretion for national law. Appropriate relief must be available.
Sanctions for failure to implement	Directive can be directly enforced in national courts; Commission can bring proceedings against states.	Violations can be challenged at Court of Human Rights; compensation available.

