



COMBATING RACISM IN THE EUROPEAN UNION WITH LEGAL MEANS
A comparison of the Starting Line and the EU Commission's proposal for a Race Directive

Isabelle Chopin and Jan Niessen

The Starting Line Group welcomes the two proposals for legal action against discrimination and racism, which have been adopted by the European Commission and presented to the Council of Ministers in December 1999. The proposal for a *Council Directive Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* (henceforth, Race Directive) sets a minimum framework for the prohibition of discrimination based on racial and ethnic origin. It also establishes a minimum level of legal protection within the European Union for persons who have suffered from discrimination. The proposal for a *Council Directive establishing a general framework for equal treatment in employment and occupation* (henceforth, Employment Directive) provides protection against discrimination in employment and occupation on grounds of racial or ethnic origin, religion and belief, disability, age or sexual orientation.

The much needed and long-awaited proposed legislative measures, together with the adopted Action Plan to Combat Racism (2001-2006), are very important instruments for the fight against racism in the European Union. Where legal action at the European level was lacking, the proposals represent an enormous step forward. European measures can assist individual Member States to put such legislation in place or improve existing legislation.

Compared with the Starting Line Group's proposal for a *Council Directive concerning the elimination of racial and religious discrimination* (henceforth, Starting Line), however, the Race Directive has five major shortcomings.

- ***Grounds of discrimination***

In the Starting, Line discrimination on four grounds is prohibited, namely race, ethnic origin, religion and belief. In the Race Directive, only discrimination on the basis of race and ethnic origin is addressed. In the Employment Directive discrimination on the basis of these four grounds (and other grounds mentioned in article 13 of the Treaty establishing the European Communities) is addressed. It is often difficult to distinguish between these forms of discrimination. Therefore, discrimination on all those four grounds should have been tackled in the Race Directive, just as they are in the Employment Directive.

- ***Concept of discrimination***

The Race Directive rightly addresses direct and indirect discrimination and racial harassment. Unfortunately, incitement and pressure to racial and religious discrimination is not addressed.

The Race Directive could have been strengthened by using definitions and concepts of racial and religious discrimination as are used in both the UN Convention on the Elimination of all

Forms of Racial Discrimination and the UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief.

- ***Material scope***

Article 13 is stated to apply within the powers conferred by the Treaty upon the European Community. In amending the Treaty to provide power to take appropriate action to combat racial and religious discrimination, member states - according to the Starting Line - have provided a new power to the Community to combat racial and religious discrimination. The Race Directive, however, limits such action to the scope of the Treaty.

- ***Defence of rights and sanctions***

The proposed measures to defend the rights of victims of racial and religious discrimination should have been elaborated more and should have included compensation for both pecuniary and non-pecuniary damages. Associations should be entitled to pursue, regardless of whether this is on behalf of or has the approval of the victims of discrimination, judicial and/or administrative procedure provided for the enforcement of obligations under national law. The financing, defence or support by any public authority or public institution of racial or religious discrimination by any person, group or organisation must be prohibited.

- ***Implementation***

Monitoring of the implementation needs to be reinforced by requiring a report on the implementation every two years. The European Commission should be entitled to receive information on the implementation of the Race Directive from non-governmental organisations, and to make recommendations to the Member States. The European Monitoring Centre on Racism and Xenophobia needs to be given a clear role.

A more detailed comparison is made between the Starting Line and the Race Directive follows. The suggested amendments to the Race Directive can also be used, where applicable, for the Employment Directive.

**COMMISSION'S PROPOSAL
FOR A RACE DIRECTIVE**

Article 1

Purpose

The purpose of this Directive is to put into effect in the Member States the principle of equal treatment between individuals irrespective of racial or ethnic origin.

STARTING LINE

Article 1

3. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment.

Instead of using the word individuals it is better to use the words persons and groups of persons as is the case in articles 2 and 5 of the Race Directive and in the Employment Directive. Persons and groups of persons include all legal and natural persons under the jurisdiction of the member states.

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 on grounds of racial or ethnic origin;
 - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to affect adversely a person or a group of persons of a particular racial or ethnic origin, unless that provision, criterion or practice is objectively justified by a legitimate aim which is unrelated to the racial or ethnic origin of a person or group of persons and the means of achieving that aim are appropriate and necessary.
3. Harassment of a person or group of persons related to racial or ethnic origin, which has the purpose or effect of creating an intimidating, hostile, offensive or disturbing environment in any of the areas covered in Article 3, shall be deemed to be discrimination within the meaning of paragraph 1.

Article 2

1. For the purposes of the following provisions direct discrimination exists where in respect of any of the areas in Article 1(2) a person receives less favourable treatment on grounds of racial or ethnic origin or religion or belief than other persons receive or would receive in any situation where the relevant circumstances of those other persons are the same or not materially different.
2. For the purposes of the following provisions indirect discrimination exists where in respect of any of the areas in Article 1(2) an apparently neutral provision, criterion or practice disproportionately disadvantages persons of particular racial or ethnic origins or religion or belief, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to race, ethnic origin or religion or belief.

The introduction of the concepts of direct and indirect discrimination strengthens the Race Directive considerably. In addition to these concepts and racial harassment, incitement to discrimination should have been included. In line with Article 4.1b of the Starting Line the following amendment can be made to the Race Directive:

- Incitement to racial discrimination shall be deemed to be discrimination within the meaning of this Directive.

Article 3

Material scope

Within the limits of the powers conferred upon the Community, this Directive shall apply to:

- (a) the conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions, whatever the sector or 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;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of and involvement in an organisation of workers or employers, or any other organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- (e) social protection and social security;
- (f) social advantages;
- (g) education, including grants and scholarships, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity;
- (h) access to and supply of goods and services.

Article 1

2. In this Directive the term 'equal treatment' shall mean there shall be no discrimination whatsoever, direct or indirect, based on racial or ethnic origin, or religion or belief in particular in the following areas:

- the exercise of a professional activity, whether salaried or self-employed;
- access to any job or post, dismissals and other working conditions;
- social security;
- health and welfare benefits;
- education;
- vocational guidance and vocational training;
- housing;
- provision of goods, facilities and services;
- the exercise of its functions by any public body;
- participation in political, economic, social, cultural, religious life or any other public field.

This principle is hereinafter referred to as 'the principle of equal treatment'.

The Race Directive is more elaborated as far as employment and education are concerned than the Starting Line. In Community policies social protection includes health. The scope of the Starting Line is much broader and includes also welfare, housing, provision of facilities, the exercise of its functions by any public body, participation in political, economic and cultural life or any other public field.

Article 4**Genuine occupational qualifications**

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 occupational qualification.

Article 1

5.a) This Directive shall be without prejudice to the right of Member States to exclude from its field of application any occupational activities, (and where appropriate the training leading thereto) and any other activities for which by virtue of their nature or the context in which they are carried out the racial or ethnic origin or religion or belief of the person is an essential determining factor.

b) Member States shall periodically assess any such exclusions in order to decide, in the light of social or other developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.

The Starting Line's formulation is preferred, over that of the Race Directive (and Employment Directive), because the Starting Line limits the possibilities for exemptions and requires periodical assessments and reporting.

Article 5**Positive action**

This Directive shall be without prejudice to the right of the Member States to maintain or adopt measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin.

Article 1

4. This Directive shall be without prejudice to national laws, regulations and administrative provisions favouring certain disadvantaged groups defined by racial or ethnic origin or religion or belief with the aim of removing existing inequalities affecting them or promoting effective equality of opportunity between members of society.

The concept of positive action could have been formulated more forcefully making use of the Convention on the Elimination of all Forms of Racial Discrimination and ILO Convention no. 111.

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.

Article 7

Defence of rights

1. Member States shall ensure that judicial and/or administrative 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 may pursue, on behalf of the complainant with his or her approval, any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

Article 7

The provisions of the present Directive do not affect national legislation or applicable international treaties granting more favorable guarantees against racial or religious discrimination.

Article 3

1. Member States shall take the measures necessary to ensure that laws, regulations and administrative provisions and practices relating to the areas listed in Article 1(2), shall confirm to the principle of equal treatment defined in that Article.
2. The obligation to comply with Article 1(2) to ensure the principle of equal treatment is a duty of Member States, owed to any person who may be adversely affected by a contravention of that Article, and any breach of the duty is actionable accordingly.

Article 4

4. Member States shall ensure that:
 - a. Member states shall ensure that their legal system provide appropriate and effective measures whereby all persons who consider themselves to have been wronged by failure to apply to them the principle of equal treatment as set out in this Directive may have recourse to a judicial remedy, in accordance with the most effective national procedures, after possible recourse to other competent authorities where appropriate.
 - b. any judicial remedy in respect of a complaint of racial or religious discrimination shall include adequate compensation for both pecuniary and non-pecuniary damages; there shall be no limitations on the ability of the court or other competent authority to award compensation or such other remedy as is provided for by national law;
 - c. an effective judicial remedy shall enable persons who consider themselves wronged to defend their rights; the State shall provide for adequate information on procedures and remedies and shall provide support in respect of legal costs in accordance with the most favourable provisions of national law;

d. organisations concerned with the defence of human rights and in particular with the combating of racism and xenophobia shall be able to institute or support legal actions in civil, administrative and criminal courts enforcing the rights granted under this Directive and provisions in national law granting protection against racial and religious discrimination in areas mentioned in Article 1(2).

f. Appropriate conciliation procedures are made available which are capable of resolving difficulties between various individuals; such conciliation procedures shall not be mandatory; this shall be without prejudice to the right of the complainant to have recourse to judicial remedies in accordance with Article 4 (4)(a).

The Starting Line is much stronger in spelling out the rights of victims and, judicial remedies and the role of organisations combating racism, Associations should be entitled to pursue, not only on behalf and with the approval of victims of discrimination, judicial and/or administrative procedure provided for the enforcement of obligations under national law.

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, unless otherwise provided by the Member States.
4. Paragraphs 1, 2 and 3 shall apply to any legal proceedings commenced in accordance with Article 7(2).

Article 5

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 discrimination of the kind referred to in Article 2(1) 2(2) or 2(3) has occurred, establish, before a court or other competent authority, facts from which may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that no such discrimination has occurred. The plaintiff shall benefit from any doubt that may remain.

Paragraph 3 of this article is redundant and does not appear in the 1997 directive on the burden of proof in cases of discrimination based on sex.

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 legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 2

3.a) For the purposes of the following provisions discrimination shall include victimisation.

b) Victimisation occurs where in respect of any of the areas in Article 1(2) a person or group of persons is subject to any detriment by reason of that person or group of persons being involved in or suspected of being involved in making a complaint or assisting a complaint alleging racial or religious discrimination, provided the allegation was not false and was made in good faith.

The Starting Line provides a stronger article on victimisation.

Article 10**Dissemination of information**

1. Member States shall ensure that adequate information on the provisions adopted pursuant to this Directive is provided throughout their territory, and in particular in vocational training and educational bodies and in the workplace.
2. Member States shall ensure that competent public authorities are informed by appropriate means as regards all national measures taken pursuant to this Directive.

Article 8

Member States shall ensure that the provisions adopted pursuant to this Directive together with the relevant provisions already in force, are brought to the attention of the public by all appropriate means.

Article 4

2 Member states shall ensure by means of information and training and where need arises by appropriate sanctions that all officials and other representatives of the public authorities at every level abstain in the exercise from any racially and religiously discriminatory speech or behaviour.

The Starting Line adds to the dissemination of information the important issue of training. Given the scope of the Race Directive social security agencies need to be included in article 10 (1) of the Race Directive.

Article 11

Social dialogue

1. Member States shall 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. Member States shall encourage the two sides of the industry to conclude, at the appropriate level, including at undertaking 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 11 of the Race Directive could be amended to the effect that other organisations than the two sides of industry are involved in the social dialogue.

Article 12

Independent bodies

1. Member States shall provide for an independent body or bodies for the promotion of equal treatment of persons of different racial or ethnic origin. These bodies may form part of independent agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the functions of these independent bodies include receiving and pursuing complaints from individuals about discrimination on grounds of racial or ethnic origin, commencing investigations or surveys concerning discrimination based on racial or ethnic origin and publishing reports and making recommendations on issues relating to discrimination based on racial or ethnic origin.

Article 4

4. Member States shall ensure that:
 - e) In each Member State appropriate bodies shall be established to which complaints of any activities which are contrary to the principle of equal treatment as set out in Article 1(2) may be submitted; such bodies shall be required to investigate all complaints made to them and shall be granted all necessary powers to investigate any complaint. such bodies shall reach conclusions on all complaints, which conclusions shall be public, save that where appropriate the body may exclude from any public document information enabling identification of a complainant.

Article 13**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 lucrative or non-lucrative associations, and rules governing the independent professions and workers' and employers' organisations, are declared null and void or are amended.

Article 3

1. Member States shall take the measures necessary to ensure that laws, regulations and administrative provisions and practices relating to the areas listed in Article 1(2), shall conform to the principle of equal treatment defined in that Article.

Article 4

1. Member states shall take the necessary measures, in conformity with their legal systems, to prohibit by legal sanction :

- a) any discrimination of the kind mentioned in Article 2(1), 2(2) and 2(3) practised by any natural or legal person and group or organisation.

The Race Directive is stronger on this point.

Article 14**Penalties**

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by the date specified in Article 15 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 4

- 1. Member States shall take the necessary measures, in conformity with their legal systems, to prohibit by legal sanction
 - b) incitement or pressure to racial or religious discrimination;
 - c) the establishment or operation of any organisation which promotes such incitement or pressure together with membership of any such organisation and the giving of aid, financial or otherwise to any such organisation.
 - d) any act or practice by a public authority or public institution of racial or religious discrimination against persons, groups of persons or institutions;
 - e) the financing, defence or support by any public authority or public institution of racial or religious discrimination by any person, group or organisation.

The Starting Line is much stronger on this point.

Article 15

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2002. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 9

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than two years after the adoption of the Directive. They shall forthwith inform the Commission thereof.

2. When Member States adopt the provisions referred to in paragraph 1, such provisions shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

3. Member States shall communicate to the Commission the texts of the provisions of national law already adopted or being adopted in the field governed by this Directive.

The Race Directive is weak on monitoring the implementation of the Directive. In the Starting Line the Monitoring Centre is given an important role in the monitoring process.

Article 16

Report

Member States shall communicate to the Commission, within two years of the date mentioned in Article 15, 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.

Article 10

1. Member States undertake to submit to the Commission a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Directive to enable the Commission to draw up a report for the Council and the European Parliament:

- a) within one year following the expiration of the period of two years provided for in Article 9(1); and
- (b) thereafter every two years.

2. To assist the Commission in drawing up the report for the purposes of paragraph 1, the Commission may request further information from Member States and may receive information from non-governmental organisations.

3. In drawing up the report for the purposes of paragraph 1, the Commission may make suggestions and general recommendations based on the examination of the reports and information received from Member States.

Article 11

1. Within one year after the adoption of this Directive the European Monitoring Centre shall specify standard criteria for annual monitoring of the performance by Member States of their obligations under this Directive;
2. Member States shall submit annual monitoring returns based on the specified criteria to the European Monitoring Centre, the first to be submitted one year after the expiration of the period of two years provided for in Article 9(1).

The Race Directive is weak on reporting. The Starting line is stronger and better spelled out in terms of reporting and also gives the Monitoring Centre an important role to that effect.

Article 17**Entry into force**

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

Article 18**Addressees**

This Directive is addressed to the Member States.

