



## Response of the European Network against Racism (ENAR)

### Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation - Assessment of the European Network against Racism

December 2005

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*The European Network against Racism (ENAR) is a network of some 600 European NGOs working to combat racism in all EU Member States. Its establishment was a major outcome of the 1997 European Year against Racism. ENAR is determined to fight racism, xenophobia, anti-Semitism and Islamophobia, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national initiatives with European initiatives. Further information is available at: [www.enar-eu.org](http://www.enar-eu.org)*

## INTRODUCTION

Employment in discrimination continues to be amongst the most serious problems facing ethnic and religious minorities in Europe. As the EUMC has put it there is “continued presence of widespread racist and xenophobic discrimination in European labour markets”.<sup>1</sup> Evidence from the ENAR 2004 Shadow Reports demonstrates racism and discrimination across the full range of experiences of the labour market, from education to recruitment to leaving employment.<sup>2</sup>

On 17 November the ENAR received a request from the European Commission to provide an assessment of the transposition of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation into national law.<sup>3</sup> Based on ongoing reflections within the network ENAR immediately sent a questionnaire to all its National Coordination, and partners (where National Coordinations have not yet been formalised).<sup>4</sup> The Policy and Lobbying Committee (PLC) considered the Directive at its most recent meeting in Brussels on 25 November 2005. In addition the Network analysed relevant material in its 2004 *Shadow Reports*.<sup>5</sup>

ENAR is committed to ensuring that the Article 13 Directives reach their full potential in terms of the protection that they offer those who experience racism and discrimination. To this end, ENAR has engaged in a range of activities aimed at promoting **strategic litigation**. ENAR is a core partner in the SOLID project.<sup>6</sup> In addition ENAR has planned a number of activities in 2005/2006 aimed at promoting strategic litigation, including: a conference on strategic enforcement in December 2005; a training seminar in February 2006; and the publication of national information leaflets in the Spring of 2006. In early 2006 ENAR plans to publish a report on the shift in the burden of proof.

This report seeks to provide an initial overview of the views of ENAR regarding the implementation of Directive/2000/78, consequently it is divided into two parts. Part A considers the challenges in assessing Directive 2000/78 for anti-racism civil society, this overview provides a context for the findings of the survey of the ENAR membership conducted for this assessment, presented in Part B.

Due to time constraints this presentation of the views of ENAR is intended to be preliminary, while it indicates key conclusions it does not represent a comprehensive assessment for the views of the Network.

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<sup>1</sup> EUMC (2005) Annual Report 2004, Part 2, p. 34

<sup>2</sup> For example the report from the Netherlands concludes that “according to a number of sources, employment-related discrimination is a constant problem”.

<sup>3</sup> This request follows a similar assessment of Directive 2000/43/EC (the Race Directive) in August/September 2005.

<sup>4</sup> A copy of the questionnaire is included in Annex 1. Annex 2 provides an overview of the results of the questionnaire.

<sup>5</sup> During 2005 ENAR published 12 national shadow reports, available at: <http://www.enar-eu.org/en/publication/index.shtml>.

<sup>6</sup> For further information see: <http://www.solid-eu.org/>

## **A. CHALLENGES IN ASSESSING DIRECTIVE 2000/78/EC**

ENAR welcomes the opportunity to contribute to the European Commission's assessment of Directive 2000/78, however any such assessment must be preliminary. To date ENAR Coordinations have had very mixed experiences of the implementation of the Directive, though it has not reached its full potential in any context. Generally it must be acknowledged that it is too early to measure the impact of the Directive, however there are other factors that serve to complicate this preliminary assessment. In particular ENAR is very aware that discrimination in employment cannot be considered independently from the broader social experiences of ethnic minority groups, consequently ENAR is concerned by the 'hierarchy' of protections between race and discrimination on other grounds, particularly religion or belief.

Any assessment of the impact and implementation of Directive 2000/78 is complicated by the fact that protections against discrimination on the ground of race/ethnicity are elaborated separately from discrimination on the ground of religion or belief included in the Directive. ENAR believes that racism is not limited to discrimination based on the ethnic or racial origin of a person but also on the basis of all elements of an individual or communities' culture or identity, including religion or belief.<sup>7</sup> Consequently for ENAR it is difficult to assess the implementation of protections against discrimination on the ground of religion or belief in Directive 2000/78 without reference to protections against discrimination in Directive 2000/48.

While ENAR warmly welcomed the adoption of the Directive and has noted a range of positive developments in terms of its implementation, assessing the Directive is an extremely challenging task in the current context. Not least as it is still much too early to be able to measure the significance of the contribution of the Directive to the overall fight against racism, and in particular discrimination on the basis of religion or belief. There have been very few legal cases on the basis of the Directive, and in many contexts the Directive has not yet been fully implemented.

Without adequate data on the employment experiences of ethnic minority groups, it is impossible to implement and evaluate policies and law that seek to protect against discrimination. ENAR welcomes the initiatives of the European Commission which seek to enhance data collection, and believes that data collection is essential not only in terms of implementing the provision of the Directive, but also in measuring its impact.

In the implementation of Directive 2000/78 there have been many different starting points, which continue to colour the level of protection that exists; some member states have a history of protections against discrimination while others had no previous experience of such a legal framework. In some countries the incumbent level of protection has meant that the Directive has had very little impact, while in others it represents a first step in the creation of an anti-discrimination legal framework.

ENAR members have noted that in the absence of a *real* common European labour market, implementing common anti-discrimination protections will not only be

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<sup>7</sup> See ENAR's forthcoming General Policy Paper No. 1 'The fight against religious discrimination'.

difficult to assess, but the task itself will remain complicated. On the one hand, discrepancies in the protection of the rights of migrant workers have a direct relationship to how migrants experience discrimination in the labour market, while on the other hand national labour market laws and regulations directly affect, and in some cases prevent, migrant workers from enjoying protections granted by anti-discrimination legislation.<sup>8</sup>

There has been much debate in recent years concerning the changing nature of the European labour market, in particular in relation to the increasing levels of diversity that both exist and will continue to be augmented in the coming years. During the discussion on the implementation of Directive 2000/78 ENAR members asked whether the existing legal framework will have the capacity to respond to the new and emerging challenges. In particular the question of accommodating religious and cultural diversity.

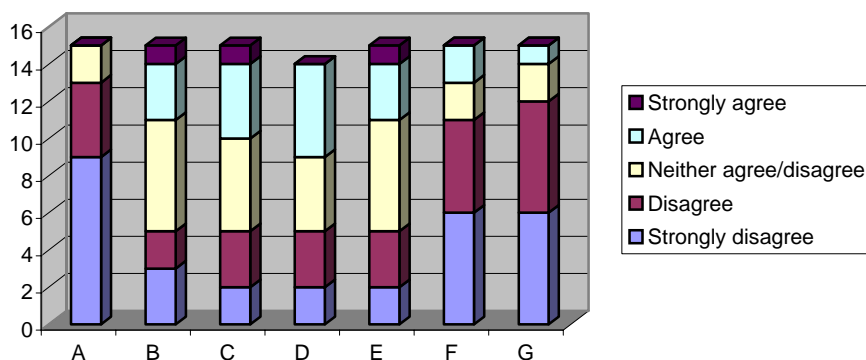
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<sup>8</sup> In its 2004 Annual report the EUMC noted the ‘mixed messages’ which characterise the fights against discrimination in employment in European Member States, the EUMC stated that “There are mixed messages emerging from, on the one hand, policies to combat discrimination in the labour market, and, on the other hand, policies in certain Member States that restrict the rights of third country nationals,” EUMC (2005), Annual Report 2004, p. 10.

## B. RESULTS OF THE QUESTIONNAIRE

A questionnaire was circulated to all ENAR National Coordinations. The National Coordinations were asked to consult their membership and return the questionnaire to the ENAR Secretariat in under two weeks, 16 responses were received (see Annex 2). The questionnaire composed of two parts; the first asked the respondents to agree or disagree with a series of statements aimed at assessing the overall impact of Directive 2000/78. The second part asked for qualitative responses a number of issues.

### Part 1: Overall assessment of the impact of Directive 2000/78



#### Statements

- A. There has been a decrease in discrimination in employment.
- B. There is greater awareness that discrimination in employment is illegal
- C. The Employment Directive has increased protections against discrimination.
- D. The Employment Directive has made the work of NGOs easier.
- E. There is more dialogue between the government and NGOs concerning discrimination in employment.
- F. Anyone who wants to take an employment discrimination case can find the support and resources they need.
- G. There are adequate sanctions and redress for cases of discrimination in employment.

#### Summary

Five years after the Directive was adopted none of the ENAR National Coordinations either agreed or strongly agreed with the statement that there has been a decrease in employment discrimination. However a significant number did consider that there is greater awareness that discrimination in employment is illegal, and many noted that the Directive has led to increased protection. Increased protection do seem to have contributed to the work of the NGOs, with many agreeing that the Directive has made the work of NGOs easier and that there is now more dialogue between NGOs and government. There was significant disagreement with the statement that there are sufficient supports for the victims of discrimination who want to take a case, and many believed that the existing sanctions and redress are ineffective.

Overall the most negative responses related to the level of discrimination, and the outcomes for those who see to take cases both in terms of support, but also the sanctions should their case be successful. Responses tended to be more positive in relation to awareness, enhanced legal protections, and engagement with NGOs.

## Part 2: Key findings regarding the implementation of Directive 2000/78

### 1. Enhanced protections against discrimination in employment

Overall there appears to be general agreement that to a greater or lesser extent the adoption of Directive 2000/78 led to increased protections against discrimination in employment. However the impact of this has varied drastically across the member states. While there have been some improvements, many civil society actors remain unconvinced that there is adequate protections across the European Union, particularly in contexts where discrimination cases in employment are increasing such as in Hungary. Some National Coordinations felt that the Directive had not led to any increased protections in the area of employment.

The Belgium National Coordination indicated that they believed that there may have been some increase in positive action initiatives in recent years, but by and large there have not been significant initiatives to address the legacy of discrimination in the majority of member states. In the words of ENAR Estonia partners “these developments are indeed insufficient, however constitute improvements”. This contrasts with the experience of the Swedish National Coordination where the concept of positive action is illegal.

There have been different experiences when it comes to awareness of protections against discrimination, with some saying that there has not been an increase while others believe that while much work remains to be done on awareness raising, the Directive has contributed to a ‘cultural’ shift which is more open to addressing the problem of discrimination in employment. Lack of awareness was identified by a number of National Coordinations as the key problem in relation to the application of the protections in the Directive.

### 2. Gaps in implementation and the existing legal framework

A number of gaps have emerged both in the implementation of the existing anti-discrimination protections, as well as in the European framework itself. ENAR members have identified a number of key areas of concern:

1. The directive fails to address **institutional discrimination**. Many National Coordinations noted that one of the biggest issues in addressing inequality in the labour market is experiences of institutional discrimination, however the Directive fails to provide a mechanisms for overcoming this reality.
2. There are gaps in the **application** of protections across the full range of employment sectors, as the French National Coordination put it "Peu de protection contre la discrimination fondée sur les motifs de race/religions ou convictions dans certains secteurs". The Irish National Coordination raised the specific issue of recruitment of personal services, particularly domestic workers.
3. The **nationality** exclusion and non-application of the Directive to immigration has undermined the effectiveness of the Directive, as in many cases it fails to protect the rights of migrant workers, who are one of the most vulnerable groups in European societies. One National Coordination noted that in many situations of serious discrimination allegations the individual involved may also face uncertainties regarding their legal status. The current gaps in employment protection relating to migrant workers, in particular the nationality exemption,

mean that migrants are not adequately protected from racial or religious discrimination in employment.<sup>9</sup>

4. The biggest issue in terms of the application of the Directive is the **hierarchy of protection** that exists between protections under the Directive 2000/43 for race/ethnicity, and the protections for religion or belief under Directive 2000/78. The Dutch National Coordination raised this issue in the specific context of social benefits, while the UK National Coordination noted this discrepancy in relation to the application in the shift of the burden of proof.

### 3. Jurisprudence and burden of proof

Most National Coordination's were unable to identify jurisprudence directly related to the implementation of Directive 2000/78, on the grounds of religion or belief. In the field of employment Ireland identified an increase in cases by domestic workers, who are now protected in the terms of conditions of employment (but not recruitment).

In many countries the shift in the burden of proof has either not been applied, or to date there have been no cases where its application is relevant. ENAR's Estonian partner believes that there are insufficient provisions in the Directive concerning the burden of proof, which leaves "a very wide space for interpretation by the member states". In Latvia, experts believe that the lawyers have not shown appropriate experience and skills in applying this provision.

### 4. Enhanced NGO activity

In contexts where NGOs have traditionally been very active, there has not necessarily been an increase in NGO activity since the implementation of the Directive, however they have significantly contributed to its application. However some countries that have experienced more recent immigration, have noted an increase in NGO activity in recent years.

The potential for enhanced NGO activity was identified in a number of cases, such as in the application of testing methodologies in Belgium, however in many cases the potential of NGOs is not fulfilled due to a lack of funding. In particular the risk of bearing costs should a case lose was identified as a significant factor in hindering NGO activity.

In terms of enhanced cooperation between the State and NGOs many National Coordinations noted that where there was a history of cooperation the Directive did not make a significant contribution, however in contexts where there is not the same level of traditional engagement there are indications that the Directive has contributed to a 'culture' of cooperation. In all cases the experience is mixed, with the vast majority of National Coordinations reporting insufficient cooperation. A number of NGOs indicated that there is some level of dialogue on specific issues or levels of government, but that this is not representative of a comprehensive approach.

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<sup>9</sup> This picture is contrasted by the development of soft law instrument such as the National Actions Plans on employment which include ethnic minority groups, as Bell has pointed out "to the extent that the Employment Strategy is bringing third country nationals back into the picture, then it offers a valuable complement to the limits of the Race Directive". Bell, M (2005) 'Combating Racial Discrimination through the European Employment Strategy', in: Bell and Kil Patrick (eds) Cambridge Yearbook of European Legal Studies, Vol. 6, 2003-2004, p. 64

### 5. Support and assistance in bringing anti-discrimination cases

Most National Coordinations identified serious gaps in the framework to support victims to take cases of discrimination in employment. Where support is available this is often provided by NGOs who lack adequate resources to offer a professional service to all the people who need it. It appears that there has been some improvements in the provision of services and in state funding of NGOs to provide such services, however all National Coordinations identified gaps in provision.

While there are experiences of state funded NGO services, many NGOs noted that the state does not provide any resources towards providing support the victims of discrimination.

## CONCLUSIONS

It is difficult to draw substantive conclusions regarding the impact of the implementation of either of the Article 13 directives, and a number of factors particularly complicate any assessment in the case of Directive 2000/78. Nonetheless based on the ongoing discussion in the Network and a dedicated questionnaire circulated to all National Coordinations in November 2005, ENAR is able to draw a number of preliminary conclusions.

- While the directives have increased protections against discrimination in employment, there remain substantial gaps in protection. ENAR is particularly concerned about the hierarchy of protection that exists across the discrimination grounds, particularly the differences in protection between race/ethnicity and religion or belief.
- Generally the reference to positive action in the Directive has not led to increased activity aimed at addressing the legacy of experiences of discrimination in the labour market and broader society.
- While the Directive appears to have contributed to the development of a 'culture' of protection where there is increased awareness that discrimination in employment is illegal, there remain significant gaps in awareness regarding the specific anti-discrimination protections in the field of employment.
- A number of specific gaps in protection have come to the fore in particular the Directive fails to address institutional discrimination, is not applied to all sectors of employment, and fails to adequately protect migrant workers.
- There has been no substantial application of the shift in the burden of proof.
- Governments need to engage more with NGOs, especially in those contexts where there is not a strong tradition of engagement with civil society. NGOs and civil society actors need to be more adequately supported and resourced.
- There is inadequate support for the victims of discrimination in bringing cases. In the majority of contexts neither state bodies nor NGOs are in a position to provide comprehensive support and assistance.
- In general sanctions and redress against discrimination are perceived to be inadequate.

## ANNEX 1: ENAR QUESTIONNAIRE



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

### Survey of ENAR National Coordinations

Following a request from the European Commission received on 17 November 2005 ENAR National Coordinations are kindly requested to respond to this questionnaire in order to provide an assessment of the transposition of the Framework Equality Directive. ENAR's assessment will contribute directly to the Commission's **five year report** on the application of the Directive. This is the second such request that ENAR has received from the Commission; the first on the Race Directive was completed in August 2005.

The questionnaire is composed of three sections. It should be returned in English or French to [anna@enar-eu.org](mailto:anna@enar-eu.org) not later than 17.00 on **Tuesday 29th November**, so that the ENAR Secretariat can respond to the Commission deadline of Friday 2 December 2005.

#### *A. Contact details*

Name:	
Position:	
Organisation:	
Country:	
Telephone No.:	
Email:	

*B. Please answer the following questions with a number between 1 to 5, where 1 is strongly disagree and 5 is strongly agree.*

	1	2	3	4	5
There has been a decrease in discrimination in employment.					
There is greater awareness that discrimination in employment is illegal.					
The Employment Directive has increased protections against discrimination in employment.					
The Employment Directive has made the work of NGOs easier.					
There is more dialogue between the government and NGOs concerning discrimination in employment.					
Anyone who wants to take an employment discrimination case can find the support and resources they need.					
There are adequate sanctions and redress for cases of discrimination in employment.					

*C. Please use as much space as you need to answer any of the following questions that are relevant to your work.*

1. Have you noticed improvements in protection against discrimination in employment since the transposition of the Directive? Do you think there has been more positive action against discrimination in employment since the Directive?

2. In your view, what are the biggest problems/gaps in the Directive? Have the provisions on 'occupational requirements' (Article 4) meant that there is no protection against discrimination on grounds of race/religion or belief some sectors?

3. Have there been more legal cases against discrimination in employment? If so have you noticed a shift to the employer in the burden of proof (Article 10)?

4. Have NGOs been more active in taking employment discrimination cases to court? If not what do you think are the difficulties they face (Article 9.2)?

5. Can the victims of discrimination access the support they need to take cases against discrimination? Does the government fund NGOs to provide support to the victims of employment discrimination?

6. Do you think the government has been more open to engaging with NGOs on issues of discrimination in employment (Article 14)?

## ANNEX 2: QUESTIONNAIRE RESULTS

**Table 1: Summary of responses received from ENAR National Coordinations and partners**

Questionnaires from National Coordinations	Questionnaires received from partners (not yet formalised National Coordinations)	General responses (due to failure of government to implement the Directive)
Belgium	Estonia	Luxembourg (Part 1)
Denmark	Poland	Germany
France	Latvia	
Hungary	Slovenia	
Ireland		
Italy		
Malta		
Netherlands		
Sweden		
United Kingdom		

**Table 2: Summary of results of Part 1 of the questionnaire**

	Strongly disagree	Disagree		Agree	Strongly agree	Total
A. There has been a decrease in discrimination in employment.	9	4	2	0	0	15
B. There is greater awareness that discrimination in employment is illegal	3	2	6	3	1	15
C. The Employment Directive has increased protections against discrimination in employment.	2	3	5	4	1	15
D. The Employment Directive has made the work of NGOs easier.	2	3	4	5	0	14
E. There is more dialogue between the government and NGOs concerning discrimination in employment.	2	3	6	3	1	15
F. Anyone who wants to take an employment discrimination case can find the support and resources they need.	6	5	2	2	0	15
G. There are adequate sanctions and redress for cases of discrimination in employment.	6	6	2	1	0	15