



European Network Against Racism  
Réseau européen contre le racisme  
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## **The Exceptions Must Not Become the Rule**

### **Preliminary Position and Proposed Amendments of the European Network Against Racism on the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation**

**December 2008**

### **Overview**

#### **ENAR welcomes the following aspects of the proposed Directive:**

- That it is a horizontal multi-ground Directive
- That it uses the scope of the Race Equality Directive as the starting point
- That it uses mostly the same concepts and definitions as the Race Equality Directive
- The reference to the 'Paris Principles'
- The potential for enhanced legal standing for NGOs given by Recital 21

#### **However, the following aspects must be remedied in order to secure the effectiveness of the proposal:**

- The Directive is a tool for securing fundamental rights, and should be seen as such;
- Multiple discrimination must be provided for;
- Discrimination by association and by assumption should be explicitly covered;
- The use of 'blanket exceptions' should be avoided: Exceptions relating to access to education on ground of religion or belief, the role of religion in the public sphere, nationality and legal status, public security and 'Commercial activity' go beyond what is necessary and proportionate;
- Positive Action needs to be recognized as a vital tool in securing the right to equal treatment;
- Effect access to justice for victims of discrimination requires independent legal standing for NGOs and independent National Equality Bodies.

*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)*

## 1. The Directive is a tool for securing fundamental rights, and should be seen as such

Non-Discrimination is a core part of the human rights framework. Provisions guaranteeing the right to non-discrimination are found in all European and International Human Rights Instruments. It is important that the proposed Directive is viewed as a part of the protection of fundamental rights in order to further enable the use of that framework in the implementation of the provisions, including for example in balancing the rights to freedom of religion with the rights to non-discrimination on grounds of religion or belief.

We believe that the amendments proposed below would re-enforce this and are necessary to ensure that the Directive is placed firmly in the context of international human rights law. Of particular importance is the inclusion of the Convention on the Rights of the Child and the UN Convention on the Rights of Migrant Workers and their Families, both recognised as part of the 7 'core' Human Rights Treaties.

It is also necessary to firmly establish the fundamental importance of the principle of equal treatment to the attainment of the goals of the EU. This recognition was there in the Race Equality Directive and we therefore propose the inclusion of a new recital based on the text taken from the Race Directive (2000/43, recital 9). This text would highlight the right to equal treatment as a fundamental principle in the EU and clearly establish the relationship between equal treatment and the achievement of objectives of the EC treaty.

**On this basis, ENAR puts forward the following proposals for amendment:**

### Amend Recital 2

#### Amendment

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 of all forms of Racial Discrimination, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, ***the United Nations Convention on the Rights of the Child, the UN Convention on the Rights of Migrants Workers and their Families***, the United Nations Convention on the Rights of Persons with Disabilities, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, to which [all] Member States are signatories. In particular, the UN Convention on the Rights of Persons with Disabilities includes the denial of reasonable accommodation in its definition of discrimination.

### Amend Recital 3

#### Amendment

This directive respects ***and implements*** the fundamental rights and observes the fundamental principles recognised in particular by the Charter of Fundamental Rights of the European Union. Article 10 of the Charter recognises the right to freedom of thought, conscience and religion; Article 21 prohibits discrimination, including on grounds of religion

or belief, disability, age or sexual orientation; and Article 26 acknowledges the right of persons with disabilities to benefit from measures designed to ensure their independence.

### **New Recital 7 a**

#### **Amendment**

Discrimination based on religion or belief, disability, age, or sexual orientation 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.

## **2. Multiple discrimination must be provided for**

In recent years, research has increasingly recognised the phenomenon of multiple discrimination. The structure of anti-discrimination legislation often creates barriers to dealing with this in a comprehensive fashion. EU legislation has created separate rules for race and ethnicity, religion and belief, age, disability, sexual orientation and gender even though these are frequently intertwined. Having the same level of legal protection as the Racial Equality Directive, but covering the grounds of religion or belief, disability, age and sexual orientation is therefore an essential starting point for addressing multiple discrimination.

Alongside the overlap between religion and ethnicity, it is also evident that religion is closely connected to nationality. Many Muslim, Sikh, Hindu and other religious minority communities in Europe are composed of third country nationals or their descendents. Therefore, discrimination on grounds of nationality may be difficult to disentangle from discrimination based on religion or ethnicity. This has been recognised in ECRI's recommendation on national legislation to combat racism; it calls for comprehensive laws prohibiting discrimination on ethnic origin, religion and nationality.

While essential, simply having a new Directive on all four grounds will not be sufficient. Difficulties can arise with the manner in which EU Directives are transposed into national legislation. Member States remain free to implement the Directives via separate legislation for each discrimination ground, or to create different avenues for enforcement. For example, in Austria, the Equal Treatment Commission is divided into three 'senates': one dealing with gender discrimination in employment; one dealing with discrimination in employment on grounds of racial or ethnic origin, religion or belief, age and sexual orientation; and one dealing with discrimination outside employment on grounds of racial or ethnic origin. Separate institutional structures exist in relation to disability.

It is therefore essential that the Directive explicitly confronts the issue of multiple discrimination and requires Member States to address this in their national legal frameworks.

The current legal framework is necessarily somewhat fragmented. The proposal below aims to provide an effective and coherent approach to providing protection against multiple

discrimination outside employment, while respecting the legal framework within which it must operate. As such it bring the grounds of Race and ethnicity into the application of this directive, but in a way that is consistent with and does not affect the existing provisions.

#### **New Recital 7 b**

***Effective legal procedures must be available to deal with situations of multiple discrimination, that is where discrimination occurs on two or more grounds listed in Articles 12 and 13 EC. In particular national legal procedures shall ensure that a complainant can raise all aspects of a multiple discrimination claim in a single procedure.***

#### **Amend Article 1**

1. This Directive lays down a framework for combating discrimination, ***including multiple discrimination***, on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.

***2. Multiple discrimination occurs when discrimination is***

***(a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or***

***(b) any one or more of the grounds set out in Article 1(1), and also on the ground of any one or more of***

***(i) sex (in so far as the matter complained of is within the material scope of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services as well as this Directive),***

***(ii) racial or ethnic origin (in so far as the matter complained of is within the material scope of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin as well as this Directive), or***

***(iii) nationality (in so far as the matter complained of is within the scope of Article 12 EC).***

***3. In this Directive multiple discrimination and multiple grounds shall be construed accordingly***

#### **Amend Article 2.1, 2.2, 2.3 & 2.4**

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination ***whatsoever based*** on any of the grounds or ***multiple grounds*** referred to in Article 1.

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 any of the grounds ***or multiple grounds*** referred to in Article 1;

b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation, **or any combination of characteristics based on multiple grounds referred to in Article 1 or persons who are associated with such persons**, 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 a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds **or multiple grounds** referred to in Article 1 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.

4. An instruction to discriminate against persons on any of the grounds **or multiple grounds** referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

#### **New Article 2.5a**

***Member States shall provide that where multiple grounds are established a claim can only be defeated by reason of a justification or other defence which is applicable to all of those grounds on which the claim is made. However if only one ground is established then the claim may be defeated by any justification or defence relevant to that ground.***

#### **New Article 7.1a**

***Member States shall ensure that the means of enforcement of obligations under this Directive are available to all persons who consider themselves to be victims of multiple discrimination.***

### **3. Discrimination by association and by assumption should be explicitly covered**

Discrimination may happen not only on the basis of a person's own characteristics, but also due to either their association with someone who belongs to a protected ground (such as a child, parent, partner or spouse) or because it is assumed that they belong to a particular ground. A person could face discrimination because of their partner's religious belief or a person could face discrimination because of a mistaken assumption on the part of a discriminator; for instance, where a man is harassed because he is believed to be Muslim, even though he is actually Hindu. Such assumptions can relate both to the person's characteristics and what the discriminator assumes to be the consequences of those characteristics. A Muslim man might, for example, be treated less favourably based on a mistaken assumption that he will have a negative attitude towards women.

There is an argument that such situations are already covered by the concept of discrimination, and indeed in some countries this has been found to be the case. However, in the interests of legal certainty and clarity a provision in the proposed directive is important.

## **New Article 2.4.a**

***Discrimination within the meaning of paragraph 1 include discrimination on the grounds that a person is assumed to have a, or associates with or is assumed to associate with a person who has a, particular religion or belief, disability, age, or sexual orientation.***

### **4. The use of ‘Blanket’ Exceptions should be avoided**

ENAR is concerned that the proposal contains exceptions relating to access to education on ground of religion or belief, the status of churches and other religious organisations, nationality and legal status, public security and ‘Commercial activity’ that go beyond what is necessary and proportionate.

Recitals provide important interpretative tools that can add clarity to the interpretation of the law. ENAR believes that unless there is very clear and specific justification, the appropriate place to clarify the dividing line between EU and National competences is in the recitals. To include such provisions in the enforceable articles introduces additional complications and contributes to legal uncertainty.

Legitimate, necessary and proportionate restrictions may be permissible. However, these need to be framed in accordance with the principles of human rights law and must not be allowed to lead to a denial of rights.

#### ***4.1 Religion or Belief in the Public Sphere and Access to Education on grounds of Religion or Belief***

*Please note: The proposals for amendment in this section are preliminary proposals and are under discussion with legal experts. ENAR welcomes the opportunity to discuss the appropriate form of wording that will achieve the aims set out here.*

The balance between the right to freedom of religion and the right to non-discrimination on grounds of religion or belief is a delicate one, and the discretion of the Member State in responding to this balance must be exercised with full respect for all fundamental human rights. In education, this brings some specific challenges.

In some (mostly rural) areas of a number of EU Member States, the only school in the vicinity is a religious school, often a Christian one. In this situation, where there is no local alternative for the religious school, that school must be obliged to take all local pupils, without consideration of their religion. In these cases it is important that the right to an education takes precedence over the school’s right to choose its pupils.

On the other hand, there is a strong argument that minority religious schools serve an important purpose in protecting the heritage of those groups. Some, though not all, religious schools prefer to create a supportive school-wide atmosphere by admitting only students of

the same faith. This does not allow religious schools to discriminate against people in any other way: these schools cannot exclude students based on their sexual orientation, skin colour etc.

It is essential to find alternative wording, to avoid opening for discrimination based on religion in non-religious schools (which can hardly be the purpose of the provision) or discrimination based on the other grounds in religious schools – which should not be allowed, in conformity with the provision of the Employment directive, which allows for religion (but not other grounds) to sometimes be considered a genuine occupational requirement with faith based employers.

**The proposed amendment would acknowledge the fact that the content of teaching and the organisation of education systems (EC treaty, Art 149(1)) are the responsibility of member states but in the exercise of this competence, member states must comply with the provisions relating to the principle of non-discrimination and must ensure that any restriction is subject to the test of proportionality, does not lead to the denial of the right to education and does not lead to discrimination on any other ground.**

**ENAR proposes the following amendments to combine more effectively the important interpretive role of the recitals and the operative clauses so that the appropriate and proportionate balance can be achieved between the range of interests.**

## **Recitals**

### **Recitals 18 & 19**

#### **Proposed Recital 18:**

***Member States, being responsible for the organisation and content of education, should ensure effective protection against discrimination on the ground of religion or belief, disability, age or sexual orientation in the field of education.***

The Commission Communication on Competences for the 21st Century: An Agenda for European Cooperation on Schools draws attention to the need for special attention to be paid to disadvantaged children and those with special educational needs.

***In the exercise of their discretion, in the area of equal treatment in education, on grounds of religion and belief, Member States must ensure that this does not lead to a denial of the right to education nor to discrimination on any other ground.***

#### **Proposed Recital 19 (a):**

***Prohibiting discrimination is an important part for the respect of fundamental rights and freedom*** including the protection of private and family life, the freedom of religion, and the freedom of association.

The European Union in its Declaration No 11 on the status of churches and nonconfessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it

equally respects the status of philosophical and non-confessional organisations. ***The directive respects the ability of Member States to use national legislation to ensure the secular nature of the state.***

## **Operative Clauses**

### **Amend Article 3.3: Scope**

3. This Directive is without prejudice to the responsibilities of Member States for the content of teaching and the organisation of their educational systems. Member States may provide ***for necessary and proportionate differences in treatment based on a person's religion or belief in access to educational institutions whose ethos is based on religion or belief where this is necessary to protect the religious ethos of the educational institution and does not lead to a violation of the right to education or discrimination on any other ground.***

### **Delete Article 3.4**

**Delete** "This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status of churches and other organisations based on religion or belief. It is equally without prejudice to national legislation promoting equality between men and women."

## **4.2 'Commercial Activity' Exceptions**

The text proposed as an amendment to Recital 16 is taken from the Race Directive (2000/43, recital 4). It would arguably allow for the protection of private and family life in relation to transactions carried out in the provisions of goods and services, while limiting the scope of exemptions to this Directive. This text would also contribute to consistency of interpretation between EU directives on equal treatment.

The inclusion in the operative text of a 'double limitation' on the right to equal treatment in access to and supply of goods and services introduces an unnecessary element of confusion, leading to uncertainty and ambiguity in the text. The Race Equality Directive already provides for the goal sought (to protect private and family life) through the limitation of application to goods and other services which are "available to the public". This is also in the current text and sufficiently addresses the legitimate concerns while ensuring legal certainty.

### **Amend Recital 16**

***It is 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.***

### **Amend Article 3.1 (d)**

**Delete** "shall apply to individuals only insofar as they are performing their commercial activity" from sub-paragraph (d).

### **4.3 Nationality and legal status**

While the Race Equality Directive made important steps forward in protection against discrimination by applying the principle of non-discrimination on grounds of race and ethnic origin to third country nationals, the ENAR Shadow Reports demonstrate that the lack of protection against nationality discrimination on the one hand and the exclusion of immigration matters on the other have left third country nationals unprotected from much discrimination. They also demonstrate that this “sends a message that discrimination against third country nationals is acceptable”.

Derogations and exemptions allowed under existing anti-discrimination legislation have been mis-used by Member States to evade their obligation to ensure that asylum and immigration laws are neither discriminatory nor have discriminatory effects. It has also been used to evade political commitment to ensure fair treatment of third country nationals, for example regarding access to jobs, social housing criteria, welfare limitations, discretionary controls and detention centres.

#### **Delete Article 3.5**

**Delete** “This Directive does not cover differences 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 in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.”

### **4.4 Public Security**

It is clearly important to question whether there is a legitimate need for such a blanket exception. It should be done by keeping in mind that this clause is based on ECHR language, and that it may bear significance for other grounds of discrimination. But if this clause is kept, we call on the introduction of a proportionality test. This would ensure that states would have to show that measures do not go beyond what is necessary in order to achieve this objective.

In addition, ENAR recognises that consistency with national legislation promoting equality between women and men will enhance the ability of the Directive to meet its objective of promoting the principle of equal treatment, particularly as regards multiple discrimination. This would be the appropriate place to have this recognition, as this would place it into the context of the ECHR language and enable its interpretation in the context of the protection of the rights and freedoms of all.

#### **Amend Article 2.8**

This Directive shall be without prejudice to general measures laid down in national law which, in a democratic society, are necessary **and proportionate for** public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others. **It is equally without prejudice to national legislation promoting equality between men and women.** (last sentence moved from current Article 3.4)

## 5. Positive Action needs to be recognized as a vital tool in securing the right to equal treatment

The existing anti-discrimination Directives permit Member States to allow positive action within their national legal frameworks, but there is no obligation either to take positive action or to permit it in relation to public or private organisations. In some countries (for example the Netherlands) voluntary policies adopted by employers have not been considered as justified. Differences of treatment included in policies undertaken by the private sector are important to compensate for disadvantages. A small step forward would be to require states to allow public or private organisations to take positive action.

### Amend Article 5

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any **public, private or voluntary organisation** from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to religion or belief, disability, age, or sexual orientation.

## 6. Effective access to justice for victims of discrimination requires independent legal standing for NGOs and independent National Equality Bodies

ENAR's experience of monitoring the transposition and implementation of the Race Equality Directive has provided us with evidence that effective access to justice for victims of racial or ethnic discrimination requires support to victims through NGOs and independent national equality bodies. This is equally true for the grounds of religion or belief, age, disability and sexual orientation. Similarly, there are clearly situations where expecting an individual to bring litigation is either inappropriate or ineffective, such as in the case of instructions to discriminate or discriminatory advertisements. In such cases the principle of equal treatment is best achieved through enabling NGOs and others with a legitimate interest to bring legal cases to challenge discriminatory acts.<sup>1</sup> Article 7 (2) currently fails to ensure full legal standing to organizations by restricting their role to acting on behalf or in support of individual litigants.

Regarding the role of national equality bodies, explicit reference in the legislation to international standards for assessing the independence of equality bodies, such as the UN Paris Principles, would establish a framework to improve independence of equality bodies, while not being overly prescriptive on the internal structures of equality bodies and leaving sufficient discretion to Member States to decide on the most appropriate form for their national context. However, the importance of having equality bodies independent from Governments is at the core of these Principles and as such should also be stressed in the text.

A final requirement for effective access to justice is the guarantee of an effective remedy. The proposed directive requires that sanctions be effective, proportionate and dissuasive.

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<sup>1</sup> See recent ECJ case "Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn" NV (C-54/07)" which addresses litigation in the absence of an individual complainant.

Evidence from the transposition and implementation of the “Race Equality directive” (200/43/EC) demonstrates that the fixing of upper limits for compensation violates this principle. This is supported by case law of the ECJ under sex discrimination law.

#### **Recital 21**

Retain as essential to ensuring equality.

#### **Recital 23**

Retain as essential for access to justice.

#### **Recital 28**

Retain as essential for access to justice.

#### **Amend Article 7.2:**

Member States shall ensure that associations, organisations or other legal entities, which have a legitimate interest in ensuring that the provisions of this Directive are complied with, ***are empowered to engage in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive, including on behalf of, or in support of, any victim.***

#### **Amend Article 12. 2**

Member States shall designate a body or bodies for the promotion of equal treatment of all persons irrespective of their religion or belief, disability, age, or sexual orientation. These bodies may form part of ***independent*** agencies charged at national level with the defence of human rights or the safeguard of individuals' rights, including rights under other Community acts including Directives 2000/43/EC and 2004/113/EC.

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

- without prejudice to the right of victims and of associations, organizations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, ***including engaging in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive, including on behalf of, or in support of, any victim.***

#### **Amend Recital 29**

Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive. ***In implementing this obligation, Member States must ensure national provisions are in line with Community law which expressly prohibits the setting of a fixed upper limit to financial compensation in discrimination cases.*** Member States should also have regard to the fact that effective protection can require the possibility of recourse to pre-emptive judicial procedures where urgency is required.

**If you require further information on this position or wish to discuss its contents please contact:**

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