



European Network Against Racism
Réseau européen contre le racisme
Europäisches Netz gegen Rassismus

Extending EU Anti-Discrimination Law:

Report of an ENAR Ad Hoc Expert Group on Anti-Discrimination Law

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By Professor Mark Bell*

* Centre for European Law and Integration, University of Leicester, United Kingdom.

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Foreword

On 26 March 2008, ENAR convened a meeting of an ad hoc expert group on anti-discrimination. This gathered together legal experts on equality, anti-discrimination and human rights law from a wide variety of Member States, as well as representatives from a range of European NGO networks working on equality issues. This report was informed by the discussions at that meeting. The author wishes to thank the participants for their constructive and valuable contributions in the meeting, as well as comments on a draft version of this report.

Summary of key recommendations

1. EU law must ensure effective protection from discrimination for all persons in all areas of life. This requires the same level of protection with no hierarchy of rights between different grounds, including gender, race or ethnic origin, religion or belief, age, disability or sexual orientation.
2. As a priority, a single Directive should be adopted combating discrimination on grounds of religion or belief, disability, age and sexual orientation.
3. The grounds of discrimination should not be further defined in the Directive, however, a statement should be included in its preamble requiring courts and tribunals to take into account international human rights instruments, including the case-law of the European Court of Human Rights, when interpreting the grounds.
4. The Directive should clarify that discrimination based on an assumption about a person's characteristics or because of association with persons of a particular religion or belief, disability, age or sexual orientation is prohibited by Community law.
5. The Directive should explicitly prohibit discrimination on more than one ground (multiple discrimination) and should require specific measures to ensure that this is dealt with effectively by national law (e.g. in relation to equality bodies and legal procedure).
6. No exception for difference of treatment based on immigration status or nationality should be included in the Directive.
7. The definition of discrimination (direct, indirect, harassment, instructions) should be consistent with that already existing in the Racial Equality Directive and the Directives on gender equality.
8. The Directive should cover all of the areas outside employment which are already included in the material scope of the Racial Equality Directive.
9. A narrowly defined exception should be included for situations where being of a particular religion or belief, disability, age or sexual orientation is a genuine service requirement because of the nature of the service or the context in which it is provided.
10. The Directive should include measures designed to promote equality. There should be an obligation on all Member States to permit positive action and to mainstream the promotion of equality in the areas covered by this Directive. Service providers should be under a duty to take steps to prevent discrimination and harassment.
11. The Directive should clarify that Community law prohibits fixed limits on the amount of financial compensation available in discrimination cases. Where the matter is urgent, pre-emptive judicial procedures should be available.
12. National equality bodies and organisations with a legitimate interest in enforcing the Directive should enjoy independent legal standing to bring a complaint.
13. Member States should be required to establish bodies for the promotion of equal treatment with a mandate for the discrimination grounds covered by this Directive.

Introduction: the legal context and policy developments

In 2000, the European Union adopted two Directives on combating discrimination:

- Directive 2000/43¹ (hereafter called the Racial Equality Directive). This prohibits discrimination on grounds of racial or ethnic origin both within the labour market and in other important aspects of social life such as housing, healthcare, education, social protection and access to goods and services.
- Directive 2000/78² (hereafter called the Employment Equality Directive). This prohibits discrimination on grounds of religion or belief, disability, age and sexual orientation in employment and vocational training.

These Directives sit alongside other EU legislation which deals with discrimination on grounds of sex.³ The gap in the material scope between the two Directives, as well as in relation to the Directives on sex discrimination, gives rise to obvious difficulties. It would, for example, be unlawful to refuse to rent an apartment to a Muslim woman from North Africa because of her ethnic origin, but it would not be unlawful to make this refusal on grounds of her religion. In 2004, the President of the European Commission, José Manuel Barroso, committed himself to extending the existing legislation. Speaking to the European Parliament, he stated:

I also intend to initiate work with a view to a framework directive on the basis of Article 13 of the European Community Treaty, which will replace the directives adopted in 2000 and extend them to all forms of discrimination. Currently, these directives have a limited scope. With the framework directive, Community action will cover all areas of discrimination, including discrimination on the grounds of gender or sexual orientation.⁴

Following a comparative legal study and a public consultation, the Commission announced in its 2008 Work Programme that it would make a ‘proposal for a Directive implementing the principle of equal treatment outside employment’.⁵ It explained that given the incomplete coverage of the existing Directives:

the most efficient and effective approach would appear to be a new Directive prohibiting discrimination on grounds of religion and belief, sexual orientation, age and disability outside of the employment sphere (for example social protection, health care, education, access to goods and services).⁶

Drawing on significant legal expertise, this report seeks to contribute to the ongoing technical work of bringing forward a new Directive as well as the public and political debate around its most appropriate contents. Drawing on the experience of implementing the EU’s existing anti-discrimination legislation, it examines how to ensure that the most effective measures are taken to promote equality.

¹ [2000] OJ L180/22.

² [2000] OJ L 303/16.

³ Principally, Directive 2004/113 [2004] OJ L373/37 on access to goods and services and Directive 2006/54 [2006] OJ L204/23 on equal treatment in employment.

⁴ European Parliament Debates, 26 October 2004.

⁵ Commission, ‘Commission Legislative and Work Programme 2008’ COM (2007) 640, p. 25.

⁶ Commission, ‘Roadmaps 2008: Priority initiatives’:
http://ec.europa.eu/atwork/programmes/index_en.htm

Within the ENAR Ad Hoc Experts Group, there was consensus that EU law should provide a high level of protection against discrimination in respect of all grounds of discrimination. Overall, the discussion in the working group tended to favour a single Directive covering all of the four grounds currently found in the Employment Equality Directive as the best option, although the view was put forward that this could also be achieved through ground-specific legislation. There was also recognition that failing to include sex discrimination within the future Directive will imply that the existing shortcomings in the material scope of the EU gender equality legislation (e.g. on health, education, media) will remain, as would gaps and unjustified exceptions in the Race Equality Directive. This is a matter of concern which would require future legislative intervention.

The choice to favour a single Directive covering all of the four grounds currently found in the Employment Equality Directive flows from the declared policy objective of the Commission: ‘to provide a uniform level of protection’⁷ and from a range of factors that are explored in more detail later in the report, including that a single directive could better facilitate multiple discrimination claims and provide a more effective framework for the balancing of potentially conflicting or competing rights. Moreover, one of the main flaws with the existing legal framework is the artificial separation of discrimination on grounds of religion or belief from discrimination on grounds of racial or ethnic origin. This fails to recognise that religious minorities, such as Muslim and Jewish communities, are amongst those who are most vulnerable to racism in Europe.⁸ Thus effective legal protection requires all grounds but also greater uniformity in the scope and mechanisms to link new and existing protections, issues that are explored further below.

In light of the overlap between religion and ethnic origin, this report begins by devoting special attention to why discrimination on grounds of religion or belief should be included in a future Directive.

1. Discrimination on grounds of religion or belief

There is a strong case for including religion or belief in the forthcoming Directive. Five main reasons for taking this step can be highlighted:

a. Non-discrimination on grounds of religion is a fundamental right

ENAR’s fact sheet ‘Religious discrimination and legal protection in the European Union’⁹ provides a detailed inventory of the wide range of international and European human rights instruments which all include the right to non-discrimination on grounds of religion. The international consensus that this is a fundamental right is reiterated in

⁷ *ibid.*

⁸ Fundamental Rights Agency, ‘Trends and developments 1997-2005 – combating ethnic and racial discrimination and promoting equality in the European Union’ (Hungary: Printer Elanders Hungary, 2007) p. 42.

⁹ Available from: <http://www.enar-eu.org/>

the EU Charter of Fundamental Rights: Article 21 prohibits discrimination on grounds of religion or belief, whilst Article 22 obliges the Union to respect religious diversity.

b. The need to ensure a uniform level of protection against discrimination

Article 26 of the International Covenant on Civil and Political Rights obliges states to ‘guarantee to all persons equal and effective protection against discrimination on any ground such as ... religion’. The current divergence in the material scope of the various EU anti-discrimination Directives sends out a signal that some forms of discrimination are viewed as less important than others, sometimes referred to as an ‘equality hierarchy’. The UN Human Rights Committee has expressed concern over such ‘hierarchisation of discrimination grounds’ and it has requested consideration of amendments to anti-discrimination legislation with a view to ‘levelling up and ensuring equal substantive and procedural protection against discrimination with regard to all prohibited grounds of discrimination’.¹⁰ The forthcoming Directive is the ideal opportunity to redress the present inconsistencies in the level of protection.

c. Combating multiple discrimination

Research for the European Commission has illustrated how discrimination often occurs on more than one ground;¹¹ for example, Muslim women may encounter a mixture of sex, ethnic and religious discrimination. The first step to tackling multiple discrimination is to ensure that an equal level of protection is available for all discrimination grounds. The European Commission on Racism and Intolerance (ECRI) has emphasized that effective legislation against racism needs to include a range of grounds, including religion.¹²

d. Providing coherent and consistent protection across the EU

In preparing this Directive, a ‘mapping study’ of the legislation which already existed in the Member States was compiled.¹³ This confirmed that religion was more commonly included in existing national laws than disability, sexual orientation or age.¹⁴ At the same time, the precise contents of this legislation varied greatly, especially around the range of permitted exceptions. As the Commission states in its 2008 work plan, variation in the level of protection against discrimination affects people’s choices about moving within the EU internal market, whether for work, study or to access services.¹⁵ Including religion in an EU-level Directive is not a radical departure from most existing national law; rather it simply seeks to establish a shared benchmark of minimum standards.

¹⁰ Concluding observations of the Human Rights Committee on Austria, October 2007.

¹¹ Commission, ‘Tackling multiple discrimination – practices, policies and laws’ (Luxembourg: Office for Official Publications of the European Communities, 2007).

¹² ECRI general policy recommendation no. 7 on national legislation to combat racism and racial discrimination, CRI (2002) 41, 13 December 2002.

¹³ A McColgan, J Niessen and F Palmer, ‘Comparative analyses on national measures to combat discrimination outside employment and occupation’ (Brussels: Migration Policy Group and Human European Consultancy, 2006).

¹⁴ *ibid* p. 58.

¹⁵ Commission (n 5 above).

e. Evidence of rising religious discrimination and intolerance in the EU

In January 2007, a Eurobarometer survey recorded that 44% of Europeans felt that discrimination on grounds of religion or belief is widespread.¹⁶ This reinforces findings from ENAR's surveys of its member organisations which have regularly highlighted growing problems of religious discrimination, in particular in relation to Muslim and Jewish communities.¹⁷ Research published by the EU Fundamental Rights Agency has also provided evidence of this trend,¹⁸ whilst the UN Rapporteur on contemporary forms of racism has drawn attention to the rise of Islamophobia.¹⁹

The five reasons set out above explain why it is essential that discrimination on grounds of religion or belief is included within the forthcoming Directive on discrimination outside employment. The remainder of this report examines in more detail how to make the Directive effective in combating discrimination and promoting equality, taking a multi-ground approach.

2. Defining the grounds of unlawful discrimination

An issue which arises for all of the four grounds is whether there should be a definition of what is meant by 'religion or belief', 'disability', 'sexual orientation' and 'age'. The Employment Equality Directive does not include any definition of these grounds. Nevertheless, in *Chacón Navas*,²⁰ the Court of Justice held that 'disability' should be given a 'uniform interpretation', rather than being a matter of national discretion.²¹ The Court's reasoning in that case would seem equally applicable to the other grounds.

On the one hand, including a definition of the discrimination grounds could provide greater clarity on how the law is meant to be applied. On the other, any definition may prove to be unduly restrictive. This issue is particularly live in relation to religious discrimination. Religious beliefs vary greatly in their contents and it is difficult to find a single, all-embracing definition. Moreover, the separate reference to 'belief' in Article 13 EC indicates that protection from discrimination should also apply to certain non-religious beliefs of a fundamental nature: pacifism is a typical example.

On balance, it is better to continue the approach adopted in the Employment Equality Directive and not to provide any definition of the grounds. This will provide flexibility for the legislation to evolve and respond to changing social circumstances. In order to assist national courts in the interpretation of the discrimination grounds, two recommendations are made.

¹⁶ Commission, 'Discrimination in the European Union' Special Eurobarometer 263, p. 14.

¹⁷ See further, the annual ENAR Shadow Reports: <http://www.enar-eu.org/>

¹⁸ Fundamental Rights Agency (n 8 above).

¹⁹ D Diène, 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, on the manifestations of defamation of religions and in particular on the serious implications of Islamophobia on the enjoyment of all rights' A/HRC/6/6, 21 August 2007.

²⁰ Case C-13/05 [2006] ECR I-6467.

²¹ *ibid* para 42.

a. Referring to international human rights instruments in the preamble

The meaning of the grounds of discrimination has often already been the subject of analysis and litigation in the context of international and European human rights instruments. Specifically, the European Court of Human Rights has a rich body of case-law on religious beliefs under Article 9 ECHR. This should be referred to in the preamble through a statement such as the following:

‘In interpreting the meaning of the grounds of discrimination, international and European human rights instruments shall be taken into account by courts and tribunals, including the recommendations and case-law of their supervisory organs, such as the European Court of Human Rights’.

In relation to disability, the definition of disability is particularly important, not least because it may determine when the duty to make a reasonable accommodation is triggered. Guidance on the meaning of disability can be found in the UN Convention on the rights of persons with disabilities²² and it would be helpful to include express reference to this in the forthcoming Directive.

b. Specifically including discrimination by association or due to perceived characteristics

The *Coleman*²³ case, which is currently pending before the Court of Justice, has highlighted the situation of persons who face discrimination even though it is not because of their personal characteristics. That case concerns a woman who encountered discrimination at work because her son was disabled. Similarly, a person could face discrimination because of their partner’s religious belief. Another situation which arises in this context is where a person faces 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.

In *Coleman*, Advocate-General Maduro makes a powerful argument that the purpose of anti-discrimination legislation is to ensure human dignity and personal autonomy. At its core, he concludes that these goals mean that individuals should not have their choices in life constrained by factors such as religion, age, disability or sexual orientation.²⁴ Applied more generally, this principle implies that where a person encounters discrimination it is not relevant whether this is directly due to their actual personal characteristics or indirectly because of association or assumption.

In order to clarify the law in this area, a provision should be included in the Directive stating:

The concept of discrimination under Community law includes discrimination based on assumptions about a person’s religion or belief, disability, age or sexual

²² eg para E in the preamble of the Convention.

²³ Case C-303/06 *Coleman v Attridge Law and Steve Law*, Advocate-General Opinion 31 January 2008.

²⁴ *ibid* para 11.

orientation or because of association with persons of a particular religion or belief, disability, age or sexual orientation.

3. Multiple discrimination

In recent years, research has increasingly recognised the phenomenon of multiple discrimination.²⁵ The structure of anti-discrimination legislation often creates barriers to dealing with multiple discrimination in a comprehensive fashion. As mentioned earlier, EU legislation has created separate rules for race and religious discrimination, even though the two are frequently intertwined. Having a Directive with the same material scope 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.

At the same time, 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.²⁶ Separate institutional structures exist in relation to disability.

Any future Directive cannot be overly prescriptive on how Member States implement its provisions into national law. Nevertheless, it is essential that the Directive explicitly confronts the issue of multiple discrimination and requires Member States to address this in their national legal frameworks. The following steps should be taken:

- The Directive should contain an express statement clarifying that discrimination is unlawful when it takes place on ‘one or more grounds or a combination of grounds’;
- Equality bodies should be required to combat multiple discrimination as part of their mandate;
- An individual complainant should be able to raise a complaint of multiple discrimination in a single legal procedure (ie they should not be obliged to split their case and bring complaints relating to different grounds to separate adjudicatory bodies);
- In the award of remedies, national courts and tribunals should treat as an aggravating factor evidence that discrimination occurred on more than one ground.

²⁵ See further ENAR Fact Sheet on Multiple Discrimination (2007).

²⁶ D Schindlauer, ‘Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC: Austria’ (2007), para 7, available at: http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

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.²⁷

The structure of the EC Treaty makes it difficult to address discrimination based on nationality, ethnic origin and religion in a single legal instrument. Nationality discrimination is dealt with in Article 12 EC, whereas ethnic origin and religion are covered by the separate legal competence found in Article 13 EC. This dichotomy was, though, exacerbated by the insertion in the Racial Equality Directive of a broad exception:

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.²⁸

ENAR's member organisations have reported that this exception is highly problematic and seriously weakens the effectiveness of the legislation.²⁹ Consequently, the forthcoming Directive should learn the lessons from the 2000 Directives and not include any such exception. Indeed, a good example is already provided in Directive 2004/113 on gender equality in access to goods and services, which does not include any such exception.

The absence of such an exception does not mean that Member States will be required to prohibit discrimination on grounds of nationality or immigration status, desirable though this would be. It will simply ensure that where discrimination based on nationality or immigration status is closely connected to discrimination on grounds of religion, then this can be addressed, for example, as a possible instance of indirect discrimination without the additional complexity of potential interaction with the exception clause.

4. The definition of discrimination

A consistent definition of discrimination can be found which runs across all of the existing EU anti-discrimination Directives. This identifies four forms of unlawful discrimination: direct and indirect discrimination; harassment; and instructions to discriminate. The definitions attached to these concepts are relatively consistent between the various Directives and this coherency on what constitutes discrimination can be identified as a core strength of the existing legislation. As a consequence, it is

²⁷ ECRI (n 12 above).

²⁸ Art 3(2), Directive 2000/43.

²⁹ See further: ENAR response to the Commission consultation concerning a possible new initiative to prevent and combat discrimination outside employment, October 2007, p. 4.

vital that any future Directive retains all of the four forms of unlawful discrimination. Having an equivalent definition of discrimination between the Directives will assist in dealing with cases of multiple discrimination that involve more than one Directive (eg religion and sex discrimination).

In relation to religious discrimination, incitement to hatred is a particular problem. At this point in time, it seems more appropriate to deal with that issue in the context of the EU's legislation on criminal matters. A first step will be the adoption of the EU's Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.³⁰

5. The material scope of the prohibition of discrimination

One of the main rationales for the forthcoming Directive is to 'level-up' protection in line with the wider material scope of the Racial Equality Directive. In addition to employment and vocational training, it applies to the following areas:

- 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.³¹

In order to achieve the Commission's stated aim of providing a uniform level of protection, it will be essential for the full material scope of the Racial Equality Directive to be incorporated in the Directive. In that respect, the model provided in the 2004 Directive on gender equality in access to goods and services should not be copied. That Directive specifically excludes education and the content of media and advertising from its scope.³² The objective of a uniform level of protection also implies a need to level-up the material scope of EU gender equality legislation.

The evidence gathered from ENAR's member organisations shows that immigration and policing are areas where ethnic and religious minorities commonly experience discrimination.³³ It would, therefore, be desirable that discrimination in these fields is forbidden by the European Union. In relation to policing, the EU's competence in this field is currently located in the EU Treaty, whereas the powers to combat discrimination are found in the EC Treaty. This creates a serious legal obstacle to using Article 13 EC in order to combat discrimination in policing.

If the Treaty of Lisbon is ratified, EU powers in relation to policing and criminal justice will be located in the same Treaty as its competence to combat discrimination (the new

³⁰ For the latest text, see Council document DROIPEN 127, no. 16771/07, 26 February 2008.

³¹ Art 3(1), Directive 2000/43.

³² Art 3(3), Directive 2004/113.

³³ eg ENAR, 'Racism in Europe – Shadow Report 2006', pp. 29-30.

Treaty on the Functioning of the European Union). At that point in time, legislation should be introduced to combat discrimination in this area.³⁴

Whilst Article 13 EC could already be used to prohibit ethnic and religious discrimination in the fields of immigration and asylum, it must be recognised that such a discussion departs from the ‘levelling-up’ rationale which forms the basis for the forthcoming Directive. Consequently, the best course of action will be to have separate legislation in the future, which could deal together with immigration and policing in relation to all Article 13 grounds.

6. Balancing competing rights and interests

In relation to all four discrimination grounds there will be a need for a limited range of exceptions to the principle of equal treatment. The issues which arise are rather diverse in nature, ranging from age restrictions on access to alcohol and tobacco, to the scope for religious organisations to impose requirements relating to other grounds, such as sexual orientation or disability. In seeking to find a common approach to these challenges, it is helpful to establish a number of guiding principles.

a. Any departure from equal treatment should be evaluated against human rights principles

Some of the disputes which emerge involve conflicts of rights, for example, where the right to non-discrimination collides with freedom of religion, freedom of expression, women’s rights or property rights. It is therefore desirable to encourage courts and tribunals to take into account human rights instruments when seeking to resolve such tensions. Notably, the EU Charter of Fundamental Rights commences by declaring: ‘human dignity is inviolable. It must be respected and protected.’³⁵ Elsewhere the ‘equality’ and ‘solidarity’ chapters of the Charter are underpinned by the goal of promoting social inclusion. These values provide a framework against which claims for exceptions can be assessed. For example, insurance companies are very likely to request an exception from the Directive; such a campaign was already partially successful in the Directive on gender equality in goods and services.³⁶ Yet, if a situation arises where older persons or disabled persons are routinely excluded from access to certain forms of insurance, then this cannot be squared with the goal of promoting social inclusion.

b. Any exceptions should be within a carefully circumscribed framework

It is clear that the Directive will include some provision(s) providing a framework for exceptions to the principle of equal treatment. This needs to be sufficiently flexible to accommodate the diverse situations which arise in a Directive covering four discrimination grounds, whilst not being so open-ended that the basic prohibition of discrimination is called into question. One option is an exception based on the idea of a ‘genuine service requirement’. This would borrow from the model of a ‘genuine

³⁴ A starting point should be ECRI’s general policy recommendation no. 11 on combating racism and racial discrimination in policing, CRI (2007) 39, 29 June 2007.

³⁵ Art 1.

³⁶ Art 5, Directive 2004/113.

occupational requirement' which is already found in EU anti-discrimination legislation. It could be worded as follows:

Member States may provide that a difference of treatment which is based on religion or belief, disability, age or sexual orientation shall not constitute discrimination where, by reason of the nature of the service concerned or of the context in which it is provided, such a characteristic constitutes a genuine and determining service requirement, provided that the objective is legitimate and the requirement is proportionate.

In interpreting this provision, specific regard shall be had to international and European human rights instruments, including the Charter of Fundamental Rights.

In order to function as a general exception, the concept of 'service' in this clause would have to be applied to all aspects of the material scope of the Directive, such as education or the provision of social security. Whilst this could form the main avenue through which exceptions are considered, additional clauses might also be required. For example, it seems appropriate to include a 'preferential treatment' exception in relation to age and disability. This would protect the wide range of social benefits and advantages that are provided to persons because of their age or disability, for example, free or discounted access to public transport.

In relation to discrimination on grounds of religion or belief, one of the main concerns will be how the Directive will apply to situations where services are provided by an organised religion (eg the Catholic Church) or by an organisation with a religious ethos (eg a healthcare facility managed by a Jewish charity). The relationship between the state and organised religions differs greatly across the Member States. There are some states where social services, such as education and healthcare, are generally provided directly by the state, whilst there are others where organised religions have a strong input into the management of these services. There are also mixed situations; for example, where the state provides education, but religious education is entrusted to representatives of the dominant national religion.

It is important to stress that this Directive will not require states to change the way in which their systems of healthcare and education are organised. Article 149 EC states that EU policy in education shall reflect 'the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'. Similarly, Article 152(5) EC states that 'Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care'. In practice, this means that those Member States who accord a major role to organised religions for the delivery of healthcare and education can continue to do so.

In order to understand the contribution of the Directive, it is important to bear in mind that its goal is to combat discrimination and promote social inclusion. This means that, however the national system is organised, all children, regardless of religious belief, must have equal access to the education system. Therefore, a state which relies on the dominant religious faith to deliver education must ensure that children from religious minorities can still have access to schools. In addition, all children within the educational system are entitled to receive equal treatment. There would be no

justification for practices such as the harassment of a Muslim child in a Protestant school.

As the national context varies, it is not possible for the Directive to be prescriptive in advance as to how individual situations will be resolved. For example, it may not be proportionate for a Catholic school to exclude a non-Catholic child if this leaves children from minority religions with no suitable alternative school (ie where all schools in the local district are Catholic in ethos). In contrast, if the school system is predominantly secular, and a Catholic school wishes to give preference to Catholic children in order to ensure that its Catholic ethos is maintained, then this may be proportionate where there is a wide choice of other schools in the locality. For this reason, the genuine service requirement emphasizes the *context* in which the service is provided as a factor for courts and tribunals to consider.

7. Promoting equality

One of the lessons from the existing EU anti-discrimination legislation is that simply prohibiting discrimination is not a sufficient means of achieving full equality in practice. This has been acknowledged by the Commission:

It is clear that implementation and enforcement of anti-discrimination legislation on an individual level is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups.³⁷

The forthcoming Directive needs to complement new rights for individuals to challenge discrimination with wider measures designed to promote equality. There are several ways in which this agenda can be advanced within the Directive:

a. Ensuring that positive action is possible under national law

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. The Slovak Constitutional Court, for example, annulled a provision in domestic anti-discrimination law which merely incorporated almost identical language to Article 5 of the Racial Equality Directive.³⁸ A small step forward would be to require states to allow public or private organisations to take positive action. The following wording could be adopted:

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.

³⁷ Commission, 'Non-discrimination and equal opportunities for all – a framework strategy' COM (2005) 224, p. 2.

³⁸ O de Schutter, 'Positive action' in D Schiek, L Waddington and M Bell (eds), *Cases, materials and text on national, supranational and international non-discrimination law* (Oxford: Hart Publishing, 2007) p. 830.

b. Mainstreaming and promoting equality

EU gender equality legislation already includes a duty on states to ‘actively take into account the objective of equality between men and women’ when adopting laws or policies falling within the scope of the legislation.³⁹ This requirement fits with the philosophy of mainstreaming. It rejects the notion that equality can be confined to specific instruments, such as anti-discrimination legislation, and instead views equality as a cross-cutting objective to be woven into all areas of law and policy. A similar provision should be included in the forthcoming Directive. The following text is suggested:

Member States shall actively promote equality between persons irrespective of religion or belief, disability, age or sexual orientation when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

It is also important that duties to mainstream and promote equality apply not only to the Member States, but also to the EU institutions. If EU efforts to promote mainstreaming are to be credible, then its own institutions must lead by example. While this would not be appropriate in a Directive addressed to Member States, future developments in EU law and policy should take this need into account.

c. Preventing discrimination and harassment

Another element of EU gender equality legislation is a duty on Member States to encourage employers and providers of vocational training to prevent discrimination and harassment.⁴⁰ The preventative approach makes sense both for individuals and organisations. The current wording of this duty is rather weak; it is not clear what actions Member States need to take in order to fulfil their duty and employers remain free to disregard this encouragement. A stronger wording is proposed for the forthcoming Directive:

Public, private and voluntary organisations shall take steps to prevent discrimination, harassment and victimisation. In considering a complaint of discrimination, courts and tribunals shall take into account evidence of the steps taken by the respondent to prevent discrimination, harassment and victimisation.

8. Making the legislation effective

The existing anti-discrimination Directives contain a number of provisions designed to facilitate individual litigation, such as protection for complainants from victimisation or provision for a shift in the burden of proof where a complainant establishes facts from which it may be presumed that discrimination has occurred. Whilst it is important to carry over such provisions into the forthcoming Directive, additional steps are needed to promote the effectiveness of the legislation. Experience with the Racial Equality and Employment Equality Directives indicates that despite evidence of discrimination, levels of individual litigation remain low in many states. The UN Committee on the

³⁹ Art 29, Directive 2006/54.

⁴⁰ Art 26, Directive 2006/54.

Elimination of Racial Discrimination recently reminded a Member State that ‘the mere absence of complaints and legal action by victims of racial discrimination may be mainly an indication of the absence of relevant specific legislation, or of a lack of awareness of the availability of legal remedies, or of insufficient will on the part of the authorities to prosecute.’⁴¹

Three steps are recommended to ensure that the forthcoming Directive will be effective in practice.

a. Improving the effectiveness of remedies

The existing Directives require sanctions which are ‘effective, proportionate and dissuasive’.⁴² Yet, national implementation of this provision is highly variable.⁴³ Notwithstanding clear case-law from the Court of Justice indicating that a fixed maximum level of financial compensation is not compatible with the principle of effectiveness (in relation to gender equality),⁴⁴ this remains a feature of some national legislation applying to other discrimination grounds.⁴⁵

It must also be recognised that financial compensation is not always the most appropriate remedy. In some situations, the only truly effective remedy will be an interim order, such as an injunction. Consider the example of a religious group that wants to organise a festival in a park owned by the municipality. The group knows that festivals of other faiths are permitted, but its application for permission is refused. Whilst the group could challenge this as discrimination, financial compensation after the date of the event has passed will be an inadequate remedy. Instead, it would be more effective if the group could seek an interim remedy, ordering the municipality to permit the festival.

In some member states the right to compensation for non-pecuniary damage is not well established in law or in court practices. Furthermore, in discrimination cases there might be objective difficulties to prove/estimate pecuniary damage. As a result, an explicit reference to the right of compensation for non-pecuniary damages for a victim of discrimination might be crucial in the context of effective remedies. This has been recognised by the UN CERD Committee in General Recommendation Number 26.⁴⁶

In relation to remedies, the Directive should:

- clarify that Community law expressly prohibits the setting of a fixed upper limit to financial compensation in discrimination cases;
- include a provision requiring Member States to introduce into their national legal systems the possibility of recourse to pre-emptive judicial procedures where urgency is required;

⁴¹ Committee on the Elimination of Racial Discrimination, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination: Estonia, Sixty-ninth Session, 31 July to 18 August 2006’, CERD/C/EST/CO/7, section 19.

⁴² eg Art 15, Directive 2000/43.

⁴³ C Tobler, ‘Remedies and sanctions in EC non-discrimination law’ (Luxembourg: Office for Official Publications of the European Communities, 2005).

⁴⁴ para 30, Case C-271/91 *Marshall* [1993] ECR I-4367.

⁴⁵ Tobler (n 43 above) 37.

⁴⁶ General Recommendation No. 26: Article 6 of the Convention, 24/03/2000.

- include a provision requiring Member States to allow for the award compensation for non-pecuniary damages to victims of discrimination.

b. Extending legal standing

Even with effective procedures and remedies, many individuals will be deterred from litigation because of the financial and emotional costs which this entails, or simply because of a lack of familiarity with their legal entitlements. Moreover, there are some situations where discrimination occurs, but it does not lend itself to challenge via individual complaint. A good example is *Firma Feryn*,⁴⁷ where the director of a Belgian company stated in a newspaper interview that he did not recruit Moroccans because of the views of his customers. Whilst the case is still pending a decision from the Court of Justice, Advocate-General Maduro has held that such a statement constitutes direct discrimination contrary to the Racial Equality Directive.⁴⁸ At the same time, his opinion recognises that few individuals will bring a case in such a scenario; the statement is abstract and does not involve the rejection of a specific job applicant.⁴⁹ In that case, the Belgian Centre for Equal Opportunities enjoyed legal standing under national legislation, so it was able to initiate legal proceedings. Extending legal standing to equality bodies is not, though, required by the existing Directives; this is clarified in Advocate-General Maduro's Opinion.⁵⁰ Had the Belgian Centre not enjoyed legal standing under domestic legislation, there might have been no way, in practice, to challenge such discriminatory behaviour.

If the Directive is to be fully effective in practice, the possibility must be granted for complaints of discrimination to be brought, even in the absence of an individual complainant. This should be done through two changes from the existing Directives:

- first, granting legal standing to bring a complaint of discrimination to national equality bodies;
- second, granting such legal standing to organisations with a legitimate interest in enforcing the Directive.

c. Guaranteeing the independence of equality bodies

As a minimum, it is essential that the new Directive requires Member States to establish national equality bodies with a mandate to promote equality on the grounds of religion or belief, disability, age and sexual orientation. Currently, EU anti-discrimination legislation only creates this obligation in relation to discrimination on grounds of sex and racial or ethnic origin. This is an obvious lacuna which weakens the enforcement of the legislation on other grounds. Indeed, the majority of Member States have already chosen to create equality bodies with a mandate that extends to all of the Article 13 EC discrimination grounds.

A common concern of ENAR's member organisations is the effectiveness in practice of the national equality bodies which already exist.⁵¹ These concerns range from the

⁴⁷ Case C-54/07, Advocate-General Opinion of 12 March 2008.

⁴⁸ para 19.

⁴⁹ paras 15-16.

⁵⁰ para 13.

⁵¹ ENAR (n 29 above) 14.

financial and human resources enjoyed by equality bodies, through to their independence from central government. Some equality bodies, such as the Italian National Office Against Racial Discrimination, are located within Ministries; this raises serious questions surrounding their capacity to adopt a critical stance if government policies are having a discriminatory effect.

Given that national equality bodies vary greatly in their mandate and structure, EU legislation cannot be too prescriptive with regard to how independence and effectiveness are secured. To this end, it is recommended that express reference is made in the Directive to the international standards which already exist in this area, in particular the UN 'Paris Principles'. For example, the following statement could be included in the provision on equality bodies:

In exercising their powers and fulfilling their responsibilities under this Directive, bodies for the promotion of equal treatment shall operate in a manner consistent with the United Nations Paris Principles relating to the status and functioning of national institutions for protection and promotion of human rights.

9. The relationship with the existing Directives

If all of the recommendations made above were adopted, then the forthcoming Directive would 'level-up' to the standards found in the Racial Equality Directive, as well as instituting some concrete improvements on its provisions. This raises the question of the relationship between this Directive and those which already exist. For example, if provision is made for pre-emptive judicial remedies in this Directive, should this not also be incorporated into all the other EU anti-discrimination Directives?

On balance, it seems preferable not to open a simultaneous debate on amending the existing legislation. On the one hand, this would add a further level of complexity to the public and political debate; on the other, there is a concrete risk that this opportunity could be misused to dilute some of the strong features of the Racial Equality Directive. Once the forthcoming Directive is adopted, it will then be appropriate to take stock of how it compares to the existing Directives and whether there is a need for an alignment or consolidation of their provisions.⁵²

Where possible, it is logical to seek to extend the application of certain provisions to the Employment Equality Directive. This would not involve any amendment of that Directive, but it would ensure consistency. The prime example of where this should be done is in relation to the mandate of equality bodies. The forthcoming Directive should make it clear that equality bodies should have a mandate which covers the material scope of both this Directive and the matters falling within the scope of the Employment Equality Directive. It would be an odd situation if individuals were entitled to assistance in relation to complaints of discrimination in access to services, but not in relation to discrimination in employment.

⁵² This was the process that was followed in relation to the gender equality legislation where a 'recast' Directive was adopted in 2006.

Annex 1: List of participants

Name	First name	Organisation	Country
Agius	Silvan	ILGA - Europe	Belgium
Bach	Amandine	European Women's Lobby	Belgium
Baussand	Pierre	Social Platform	Belgium
Bell	Mark	University of Leicester	United Kingdom
Busch	Sebastian	ENAR Germany	Germany
Cernilogar	Klavdija	European Youth Form	Belgium
Charhon	Pascale	ENAR	Belgium
Charalambidou	Nicoletta	KISA	Cyprus
Ferschtman	Maxim	OSI	Belgium
Gebroval	Cécile	European Women's Lobby	Belgium
Gerards	Janneke	Universiteit Leiden	The Netherlands
Halasz	Katalin	ENAR	Belgium
Hutchinson	Tansy	ENAR	Belgium
Kaoiss	Najatte	FEMYSO	Belgium
Kadar	Andras	Helsinki Foundation	Hungary
Moon	Gay	Equality and Diversity Forum	United Kingdom
Nools	Rüdiger	CCME	Belgium
Poleshtsttuk	Vadim	Tallinn Centre for Human Rights Information	Estonia
Privot	Michael	ENAR	Belgium
Samuels	Shimon	Simon Wiesenthal Centre Europe	France
Scagliotti	Luciano	CIE - Centro di Iniziativa per l'Europa	Italy
Van Emden	Gidon	CEJI	Belgium
Waddington	Lisa	Universiteit Maastricht	The Netherlands
Yu	Patrick	NICEM	United Kingdom