



Response of the European Network against Racism (ENAR)

Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000/43/EC

*Five year report on the application of the Directive:
Overview of ENAR's initial assessment*

October 2005

Table of Contents

INTRODUCTION	2
A. IMPLEMENTATION OF DIRECTIVE 2000/43/EC	2
B. PROPOSALS TO UPDATE THE DIRECTIVE	3
CONCLUSION.....	4

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

Introduction

In August 2005 ENAR¹ submitted a brief document to the Commission outlining the views of NGOs in some member states concerning their experience of the transposition of the anti-discrimination legislation. Building on this earlier submission, ENAR welcomes the opportunity to contribute to the assessment of Directive 2000/43/EC by providing the Commission with an overview of the analysis of the network.

Considering ENAR's experience of working in the context of the Directive over the last five years, these comments are divided into two broad sections. Section A examines issues relating to the implementation of the Directive, while section B highlights some of the gaps which have emerged in the legislative framework.

A. Implementation of Directive 2000/43/EC

The adoption of Directive 2000/43/EC was a milestone in the fight against racism in Europe, and ENAR is concerned that the significance of this instrument is not undermined by the debate that has accompanied its implementation. The Directive is an essential, if young, tool that needs to be supported and strengthened. Nonetheless a number of trends have emerged that warrant further attention.

(1) ENAR is concerned that in many contexts the Directive is not being implemented as a '**minimum requirement**' (Article 6), but rather as an end goal in itself, which can be achieved incrementally. In its five year report on the implementation of the Directive, the Commission should remind member states that:

Implementation of the Directive represents a crucial step towards securing effective protections against racial discrimination across the European Union, but it is not an end in itself. As a minimum standard Directive 2000/43/EC acts as the foundations upon which a comprehensive anti-discrimination framework can be built.

(2) Feedback from ENAR National Coordinations suggests that the Directive is failing to make a substantial difference to the experiences of the **most vulnerable** ethnic minority communities in Europe, including Roma and Traveller communities, and undocumented workers. In some cases this can be due to individual national contexts, but others highlight concerns relating directly to the implementation of the Directive. Problems include difficulties in responding within designated time limits (Article 7.3), and the inability of governmental and non-governmental organisations (including equality bodies) to respond to the needs of those who experience discrimination (Article 7.2; Article 13). Evidence has emerged that despite the provisions on victimisation (Article 9), fear of the implications of taking a complaint seems to be one of the biggest hurdles facing vulnerable groups. Awareness raising initiatives can be undermined if victims are not empowered to use this information to access redress (Article 10). In its report the Commission should recommend that:

Member states undertake independent reviews of the impact of national time limits and the effectiveness of protections against victimisation; and ensure that statutory and non-statutory organisations that support the victims of discrimination are adequately resourced.

¹ ENAR is a network of European NGOs working to combat racism in all the EU member states, for further information see: www.enar-eu.org

In order to support the effective implementation of these provisions, activities under Article need to be substantially enhanced for the Directive to be effective.

(3) ENAR shadow reports and feedback from the National Coordinations, highlight the challenges facing some jurisdictions in implementing the shift in **burden of proof** (Article 8), particularly in the context of indirect discrimination. The absence of data collection and monitoring is undermining the implementation of both Directive 2000/43/EC and Directive 2000/78/EC. This issue was raised in a recently published French report, which examined the integration of Directive 2000/78/EC.² In its five year report it is important that the Commission:

Stress the significance of adequate and comparable data collection in all member states in order to enhance the provisions of the Directive relating the shift in the burden of proof, and demonstrating indirect discrimination.

(4) The implementation of the Directive has had a significant **impact on the work of NGOs** and Civil Society more generally. Particularly in the context of the Community Action Programme, NGO activity has made a valuable contribution to the initial process of transposing the Directive. NGOs have been active across a range of areas including awareness raising and promoting strategic litigation.

ENAR is committed to ensuring that the Directive reaches its full potential in terms of the protection that it offers 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.³ 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 litigation information leaflets in Spring 2006.

‘Anti-discrimination training measures in public authorities’ is an example of a two year project funded by the Action Programme and implemented by two ENAR members: CEJI, the European Jewish Information Centre, and NICEM, the Northern Ireland Council for Ethnic Minorities. The project demonstrated that the international exchange of good practice and the contributions of NGOs was a valuable and efficient way to give a concrete meaning to the equality principles sustained and pursued by the Directive 2000/43/EC.

B. Proposals to update the Directive

As noted above, ENAR recognises that Directive 2000/43/EC is intended to provide a common ‘minimum standard’. However at this early stage in the life of the Directive,

² Report submitted in September 2005 by M. Roger Fauroux in the framework of a specific study on ethnic discrimination in the employment sector commissioned by French minister for social cohesion Jean-Louis Borloo (*la lutte contre les discrimination ethniques dans le domaine de l’emploi –juillet 2005*)

³ SOLID aims at the achievement of effective transposition and implementation of the Race Equality and Framework Directives through empowerment, capacity building and partnership, promoting equality for Ethnic and Racial Minority groups across the European Union, for further information see: <http://www.solid-eu.org/>

ENAR would argue that its contribution to the fight against discrimination will always be limited by the nature of its approach and its exemptions.

(1) Without **mandatory positive action** the anti-discrimination model espoused by the Directive will never be fully effective, particularly for the most vulnerable groups in society. ENAR believes that additional legislative action must be taken at a European level to promote positive action. Allowing positive action is insufficient in ensuring that member states undertake 'specific measures to prevent or compensate for disadvantage'. In the context of its five-year report on Directive 2000/43/EC, the Commission should recommend that:

The Directive be enhanced through the promotion of mandatory positive action, which is responsive to individual national contexts.

(2) The **exemption** for treatment based on nationality (Article 3.2) undermines the effectiveness of the Directive. In recent years ENAR has raised serious and emerging concerns with regard to discrimination based on nationality, particularly addressed towards migrant communities. In addition race and nationality discrimination are often interlinked, thus the nationality exemption can serve to undermine access to effective redress for individuals who experience discrimination either on the basis of race or nationality. ENAR acknowledges the legitimate interest of States to manage migration policy, however the implementation of migration policy should not serve to undermine the principle of non-discrimination. The Commission should recommend that:

Given the changing nature of European society, and the need to safeguard the rights of migrant communities, the exemption for treatment based on nationality should be removed from the Directive.

Conclusion

ENAR believes that Directive 2000/43/EC is an essential tool in the fight against racism and discrimination in Europe. The experiences of ENAR National Coordinations have been very mixed in terms of the implementation of the Directive over the last five years, though it is fair to say that there has been some level of disappointment in all contexts. It is too early to make substantive conclusions about the implementation of the Directive, however there are concerns that member states are not approaching implementation in the spirit in which the Directive was intended. This is illustrated by the reality that the Directive has yet to have a significant impact on the lives of the most vulnerable ethnic minority communities. Overall it appears that to date the Directive has had limited impact for many NGOs working in the field of anti-racism, this is due to delays in transposition, gaps in implementation, and weaknesses in the Directive itself.

ENAR is concerned that the Directive fails to protect against all forms of racism, in particular racism that is interlinked with discrimination on the grounds of nationality and/or religion or belief. The current legislative approach fails to address the complexity of how individuals experience discrimination. Consequently ENAR strongly supports proposals to 'level up' the European anti-discrimination framework.

ENAR is optimistic that through comprehensive transposition and implementation the Directive will, in time, fulfil its potential contribution to the wider fight against

racism. However by removing the nationality exemption and strengthening the mandate for positive action the Directive could play an even bigger part in that battle.

For further information contact: Anna Visser, Policy Officer, ENAR, Tel: +32 (0)2 2293570, Email: anna@enar-eu.org.