

1. INTENTION & GOALS OF PEER

It is widely recognised and accepted that many people and groups of people living in the EU suffer from direct and indirect discrimination. It is the EU's intention to combat such discrimination and promote racial equality, gender equality and freedom from discrimination based on race, gender, age, religious belief, physical ability or sexual orientation. Combating such discrimination will take place on many fronts and will be taken by many governmental and non - governmental agencies. Recognising that those who experience discrimination have a key role to play in this struggle has led the EU to conclude that:

Community Groups and Non Governmental Organisations fighting against discrimination are an extraordinarily rich resource.

They have a deep and often first hand knowledge of the real problems discriminated against persons have to face. They are fully aware of the needs and goals of the struggle against discrimination. They have valuable knowledge and experience in how to fight and defeat discrimination. They know the real consequences of actual policies in a number of fields; they are able to suggest modification and re-orientation of policies as well as setting priorities and issuing guidelines. They have the will and commitment to this struggle; they are the ones who actually fight the discrimination that they face in every day life; they have a clear vision.

On the other hand their actual influence on policies, political agendas, legislation, media, administrative measures, as well as their public profile, are weaker than we might expect. Furthermore, too often, discriminated against persons are not able to directly advocate for themselves, often relying on some other person or organisation to speak on their behalf.

The PEER project has been established and launched to help change this situation.

Those who have become involved in PEER did not expect to deal with all the challenges that face those who face discrimination. We are nonetheless convinced that a part of the problem is the lack (or insufficient level) of specific competences and skills in influencing political decisions, establishing effective relationships with the media, fund raising, and exchanging information and experiences (i.e. establishing networks) among different groups. Furthermore, many immigrants lack an in-depth knowledge of the working of the democratic and representative institutions, which are found in Western Europe.

As a consequence, discriminated against groups are excluded from full access to, and participation in, political and social life and democratic decision making process.

This is not only a limitation of their rights: it's also a weakness of European democracy, a waste of precious resources and an obstacle to social inclusion.

The goals of PEER are based on these considerations. PEER has aimed to help in providing the basis for a permanent and EU-wide set of self-empowerment activities for ethnic and religious minorities and persons affected by discrimination on the ground of age, implementing a network of trained persons and drafting a program of self-empowerment activities.

The final goal is to create the conditions for discriminated against persons to speak for themselves, advocate for their needs and rights, and take their rightful place in the public sphere.

It is hoped that this publication will inform and assist those facing discrimination. It outlines briefly, the background to and the intention of EU anti discrimination legislation looks at different aspects of discrimination and suggests practical measures groups can take to become more effective. It is hoped that members of such groups can learn from the examples given, which describe the experience of others in fighting discrimination through campaigning, lobbying, fundraising, using new technology, managing finances, negotiating, using the media and strengthening and building the groups they represent.

Luciano Scagliotti, CIE



2. WHAT IS “DISCRIMINATION”?

Art. 21

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Art. 22

The Union shall respect cultural, religious and linguistic diversity.

Art. 25

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

(Charter of Fundamental Rights of the European Union)

The Charter of Fundamental Rights clearly confirms the rejection of any kind of discrimination. Moreover, it prescribes full respect for, among others, religious diversity and elderly dignity.

But what do we think discrimination is?

A number of answers can be found to this question. In a dictionary, for example, one will find a neutral definition such as the act of discriminating, distinguishing or noting and marking differences; the state of being discriminated, distinguished, or set apart. But in the scope of this project we did not intend to be neutral: actually, we wanted to be proactive and positive.

Our definition of discrimination should probably start from discriminated against persons' history. From this point of view you could describe, if not define, discrimination as the whole process (legal, social, economical, ideological, philosophical, political, educational) or actions (even physical) a group uses, being either aware or not, to deny, directly or indirectly, equality of dignity, rights and opportunities to other groups. But victims of discrimination often cannot write definitions: neither in dictionaries nor in laws, not yet.

Nevertheless, since 2000, the European Union has a common legal definition of both direct and indirect discrimination that can form the basis for anti-discrimination struggle.

Directives 2000/43 and 2000/78 state that 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”, ...; and indirect discrimination “where an apparently neutral provision, criterion or practice would put persons ... at a particular disadvantage compared with other persons”.

Furthermore, harassment “shall be deemed to be

a form of discrimination ... when unwanted conduct ... 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”.

It is worth highlighting, that although both directives apply to any person who happens to be in the territory of a member state (therefore neither directive excludes third-country nationals from protection) both directives, however, plainly state that *discrimination based on nationality is outside their scope.*

In simple words: conditions that a member state applies to the entry or residence of immigrants as a result of their being third-country nationals, are not legally recognised as discrimination, even though there is evidence that they provide a “less favourable treatment” and fully fit our description of discrimination.

The roots of this exclusion are in the EU Treaties. A confirmation, somehow, of the need for empowerment: governments effectively influenced by discriminated against groups would probably have written those treaties in a different way.

Luciano Scagliotti, CIE



3. FROM STARTING LINE TO ARTICLE 13

The Starting Line Group's experience

The Starting Line Group (SLG) was formed in 1991, in the wake of a series of racist and xenophobic incidents across Europe, at the initiative of the British Commission for Racial Equality, the Dutch National Bureau against Racism and the Church' Commission for Migrants in Europe. These organisations were very concerned by growing racism, violence, immobility from public authorities, lack of political will and resurgence of some extremist political parties and were soon joined by other organisations such as the Commissioner for Foreigners of the Berlin Senate, the Belgian Centre for Equal Opportunities and against Racism, Caritas Europa, the European Jewish Information Centre, the Migrants Forum and the European Anti-Poverty Network.

The Starting Line Group's aim was to raise awareness of persistent racism in Europe and focused its activities on promoting concrete legal measures to combat it and securing support for such measures. These organisations were convinced of the need of European legislation in order to ensure a harmonised approach and minimum standards throughout the European Union as the level of protection varied drastically among the Member States. It was also crucial for the Group to guarantee the same level of protection to European citizens and Third Country nationals. The Group felt necessary to table the issue on the political agenda in all the Member States.

A group of lawyers and experts was brought together in order to draft a legislative proposal. This proposal for a Council directive on the elimination of racial discrimination was called *the Starting Line*. The authors were very much aware of the compromised character of their proposal but wanted to provoke reaction, using the Starting Line as a basis for discussion.

Why was a European measure, a directive, considered as the best way to ensure effective protection against racism and xenophobia?

In the first place, the current level of protection in each Member State is very different and creates a lack of balance within the EU. While several Member States have constitutional provisions, or in some cases, more specific provisions included within their civil, administrative or penal systems, only a small number of states possessed at that time specific legislation to combat racism. In addition, the scope and implementation of these diverse laws or provisions varies significantly from one Member State to another.

Secondly, the Starting Line Group has always maintained that the lack of harmonised protection poses an impediment to free movement. Why would peo-


ple who receive national protection move to another Member State that did not ensure their protection?

Finally, the absence of an effective and concerted fight against the rise of racism and xenophobia seriously destabilises and undermines the different social integration processes set up in the Union Member States. For these reasons, the SLG believed that it was absolutely crucial to ensure minimum standards providing the same level of protection to all persons on the territory of the EU whether EU citizens or third country nationals, and considered essential that this European measure should be adopted before any further enlargement of the EU in order to become part of the 'acquis communautaire'. All candidate countries do not necessarily share the same tradition of human rights, protection of minorities or fighting racism, and adoption of a European directive before enlargement would make its incorporation into the national legal systems of all new member countries mandatory.

The directive was chosen as the appropriate European instrument in order to fight discrimination and appeared to be the most efficient way to achieve a harmonised level of protection. A directive defines the goals to be achieved, but allows for certain flexibility on the part of Member States to decide how they will incorporate the measures into their national legal systems. Furthermore, the creation of a directive involves both the European and the national Parliaments, and therefore helps to maintain and promote public debate on this issue at both levels. A directive also allows Member States that already have more advanced national legislation to maintain such favourable measures. The aim of a directive is to harmonise minimum standards and not to diminish existing levels of protection. Finally, a directive in this area would parallel current Community legislation on equal opportunities for men and woman.

The Starting Line proposal was officially launched in 1992, prior to the Edinburgh Summit, and likely contributed to the adoption of the Declaration on Racism and Xenophobia (specifying the need to adopt European legal measures). The proposal generated significant interest and immediately met with widespread support. Subsequent intensive consultations in Brussels with the institutions of the European Union led to the European Parliament's adoption of two resolutions (December 1993 and October 1994) entreating the European Commission to use the Starting Line proposal as a basis for drawing up a directive aimed at the harmonisation of Member States' varying legal measures to eliminate racial discrimination.

Despite these repeated calls from the European



Parliament, the European Commission remained divided as to whether the Treaty provided the necessary basis granting the Commission authority to act on racial issues, with some Member States insisting that such a legal basis was lacking. A majority of Member States invoked the subsidiarity principle and their preference for better intergovernmental co-operation. Consequently, the latter view prevailed in the political discussions. As the political will was lacking, the legal services of the European Commission maintained that Article 235 (actual article 308) did not constitute a proper legal basis for expanding the Commission's mandate in racist matters.

As a consequence, the Starting Line Group decided to change its campaign strategy by drafting a proposal to amend the Treaty of the European Union, granting European competencies to act on racial, ethnic and religious discrimination. This proposal, known as the 'Starting Point' gave rise to a campaign launched in 1994 preparing for the 1996 Intergovernmental Conference (IGC), the conference designed to review and amend as necessary the Treaty establishing the European Community. In the months leading up to the IGC, the SLG focused its activities on campaigning for the Starting Point, with the aim of provoking discussion on the race issue and maintaining its key focus on the political agenda. In recognition of the importance of acting at both the national and European levels, the Group's strategy involved actions at both.

At the European level, the Starting Line Group stepped up its close consultations with the European Parliament and Commission in an effort to inform these institutions of the widespread and continuing support for European anti-discrimination legislation. At the national level, because the final decision on possible actions or legislation will fall to national governments, meeting as the European Council, the SLG campaign sought to win support for the proposal from a majority of national governments so that they could, in turn, wield influence on the European institutions.

The Starting Line Group also recognised the importance of a sectoral approach aimed at both governmental and non-governmental organisations. Particularly, although not exclusively, in those countries where racism is not considered to be a prominent issue, the need to inform national governments of the NGO Community's work and aspirations for a European directive was thought to be of principal importance. As a consequence of this strategy, the SLG has been able to identify countries in which it could expect opposition and for which reasons, as well as those in which the proposal is likely to receive support and how. The longer-term strategy was


to provoke discussion and collaboration between EU Member States on this issue. By utilising both a geographical and sectoral approach, it was hoped that pressures for adoption of the measure would emerge from a broad base.

The campaign involved a series of consultations convened by the SLG in each of the EU Member States to inform the NGO community and build support for the Starting Point. These seminars or conferences, co-organised with a national NGO, contributed to heightened awareness of and interest in the IGC. They also contributed to the creation of an informal network of information exchange on developments in policy making in the field of anti-discrimination, with particular emphasis on the positions taken by governments towards the forthcoming IGC.

This well-functioning network of almost 400 organisations - including NGOs ranging from grassroots to think-tank, quasi-governmental organisations, trade unions, churches, academics and other experts - has allowed for work at all levels of society, from the local grass roots to national and European fora. In addition, the inclusion of academics has provided the Group with necessary and valuable expertise. Moreover, because of its composition and the way in which it functions as a coalition, the SLG was able to be present at both national and European levels. And perhaps most important, serious consideration has been given to this proposal by European institutions, several Member State governments and the Consultative Commission on Racism and Xenophobia. Co-operation was also established with the Reflection Group and the various presidencies of the Union.

The conclusion of the intergovernmental conference under the Dutch presidency in Amsterdam in June 1997, led to the adoption of an anti-discrimination clause in the European Treaty, empowering the Commission to act on this important issue: article 13 EC Treaty. Article 13 reads as follows: *'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'*

Article 13 is a general anti-discrimination clause covering different grounds of discrimination, it has no direct effect, requires unanimity and limits its scope to community powers: it is the clear result of a political compromise. Furthermore Article 13 can only



be used in the respect of the subsidiarity principle: the Commission has to prove the added value of community action or input towards the national level. The adoption of measures based on Article 13 follow the consultation procedure. The Commission presents a proposal, the European Parliament is consulted and the Council of Ministers, on a unanimity basis, accepts or rejects the proposal and the Parliament's amendments.

Without waiting for the final ratification of the Amsterdam Treaty, the Starting Line Group convened an experts group meeting to begin revision of the original proposal for a directive (the Starting Line), while maintaining its specificity on racism and xenophobia. In order to avoid useless discussion on terminology or concepts, the drafters looked very carefully at European gender legislation and used the same concepts in their proposal (notably the 1976 directive on the principle of equal treatment for men and women and the 1997 directive on the burden of proof in cases of discrimination based on sex). The New Starting Line benefited very much from the gender experience and went beyond this existing legislation, hoping to set up the right basis and a precedent for the other grounds of discrimination.

The revised version is called the *New Starting Line* and aims at fighting racial, ethnic and religious discrimination. It is intended to serve as a basis for discussion, to provoke debate and thereby maintain this issue on the political agenda. The new Starting Line was officially presented in June 1998 during the British presidency conference «Europe against racism» and immediately met with great support. A campaign around this new text was launched in the 15 Member States, following its successful earlier strategy at the national and European levels, and with both the governmental and non-governmental sectors.

Not long thereafter, in November 1999, the European Commission issued its proposals based on the new article 13. At record speed, in June 2000, the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive) was adopted. Both the directive establishing a general framework for equal treatment in employment and occupation and the Community Action programme against discrimination, also based on article 13, were subsequently adopted in November 2000.

The Racial Equality Directive constitutes a landmark in Europe's legal development. Within three years, all EU member states must conform their legislation to implement its principles. Moreover, the Directive is now part of the 'acquis communautaire', the body of law which all states wishing to join the

Union must adopt. Hence, each of the EU candidate countries will have to enact legislation.

The Racial Equality Directive establishes the principle of equal treatment, and applies to all persons, EU citizens and third country nationals while racial or ethnic discrimination takes place. It has to be noted that discrimination on the basis of nationality is not covered. Looking at the adopted text of the Racial Equality Directive, it is obvious that the European Commission has been looking at and taking into account the New Starting Line proposal.

The Racial Equality Directive provides for:

- Prohibition of both direct and indirect discrimination, victimisation, harassment and instruction to discrimination. The latter was not in the Commission's proposal and has been added after pressure from the NGO community to have "incitement" included as the new Starting Line did,
- Application to both the public and private sectors, including public bodies,
- An extended material scope including: access to employment, including self-employment and occupation, selection criteria, recruitment conditions and promotion, vocational guidance and training, working conditions; membership of and involvement in an organisation of workers or employers, to social security and healthcare; to social advantages; to education; and to the provision of goods and services including housing. Housing is also an example of success from the NGO community pressure as it was not present in the first text.
- The possibility for the Member States to adopt or maintain positive action ("specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin"),
- Exemption (genuine and determining occupational requirements) which justifies differential treatment where the nature of a particular activity requires this differential treatment,
- Access for the victims to judicial and or administrative procedures, including conciliation procedures and effective, proportionate and dissuasive sanctions including the payment of compensation for the victim,
- The possibility for associations, organisations or other legal entities to start legal action with the consent of the victim,
- The shift of the burden of proof: The victim has to establish the facts that will justify the complain and then the defendant has to show convincing evi-

dence that he or she is not guilty of discrimination,

- The requirement made to the Member States to promote social dialogue between the two sides of the industry and due to constant NGO pressure a new article was added seeking to encourage dialogue with the NGO community,
- The designation of a body for the promotion of equal treatment, providing independent assistance to victims, conducting independent reports and making recommendations.

The Member States will have to comply with the Directive in July 2003 and will start reporting to the Commission in July 2005. It is interesting to note that in order to report to the European Parliament and Council, the Commission will also take into account the views of the relevant NGOs.

The Starting Line Group campaign and strategy designed to promote the Starting Point (proposal for an amendment to the European Treaty) and the new Starting Line (proposal for a European Directive) has proved to be very effective. Working at both European and national level involving key officials from both the European institutions and the national governments, as well as the NGO community. Consultation with civil society and the governments has led to increased awareness of racism as a possible political issue and the need to act from a legal perspective. It has also allowed the identification of potential opposition or support in the Member States, and permitted the concentration of efforts and the benefiting from the exchange of experiences and good practices of the Member States.

The Starting Line Group's aim was the adoption of a European Directive aiming at protecting victims of racial, ethnic and religious discrimination, prohibiting discrimination and implementing the principle of equal treatment. This goal has been achieved in 2001, the Group decided to dissolve. The Network still exists in a different way and, individuals and organisations continue monitoring the issue and the implementation of the Racial Equality Directive, being involved in various projects.

Despite the major step forward and the essential tool the Directive represents in the fight against racism and xenophobia, civil society actors will need to ensure its effective implementation in the EU. It remains crucial for the non-governmental community to remain vigilant and involved in the monitoring process, to highlight the nature of the legal and institutional changes required, to assist and support lawyers, magistrates, other advocates and government officials in making use of this new legal tool in

their anti-discrimination work. Independent legal and advocacy expertise from the NGO sector will be needed to ensure that the Directive's provisions are applied in the most favourable way.

The Starting Line Group has been able to put and maintain the issue on the political agenda. It was instrumental in developing and raising a high level debate in the Member States and on the European level, and through its informal working methods and strategies and diversified and effective network could ensure the adoption of harmonized minimum standards within the EU. The Racial Equality Directive's transposition must set up high standards on the national level in order to establish a precedent enabling victims of other grounds of discrimination to benefit from equal protection.

Isabelle Chopin, MPG

Isabelle Chopin is the Programme Director from the Migration Policy Group, which served as the secretariat of the Starting Line Group. She was also the Director of the Starting Line Group.