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Campaigning against racism and xenophobia: from a legislative perspective at European level

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Preface

The European Network Against Racism was founded in October 1998. In the brief period between its foundation and official installation of the secretariat in September 1999, the Network succeeded in implementing a number of projects and objectives. In each Member State of the European Union, round tables met and formed permanent national networks. The secretariat maintains intensive correspondence with representatives of these national round tables about the measures and projects in each of the countries involved. The Constitutional Conference debated an action programme that forms the guidelines for ENAR's information, campaigning and lobbying work. These activities aim to implement measures and legal regulations on both European and national level and ultimately to ensure equality for ethnic minorities and an end to racism. In the past, much has been achieved through the work of European lobbying organisations. The work of the "Starting Line Group" deserves a special mention here: their intensive lobbying work ensured in the inclusion of an anti-discrimination clause in the Amsterdam Treaty.

The present document often refers to proposals drawn up by the "Starting Line Group". As we see it, there is no point in repeating good work which has already been done.

Although the work of the "Starting Line Group" has been a great success, it will remain largely ineffective so long as the European Council of Ministers does not decide on a Directive against racism. Only then can corresponding legal frameworks be implemented at national level.

In 2000, the European Network Against Racism plans to carry out a campaign together with the associated partners at national, regional and local level and with other European networks working to prevent discrimination against disabled people, elderly, homosexuals, migrants, minorities and women. It is essential to provide information about what has already been achieved, about what guidelines are currently being prepared by the European Commission and about what specific actions are necessary, in order to influence key people and organisations. This publication is intended as a tool for this, to serve as a basis for discussion and action for ENAR's existing partners. Other organisations are most welcome to participate in this campaign.

It is important to have united actions. We should make use of the strengths of individual organisations and existing access routes to institutions, in order to come closer to the goal we have set ourselves.

This publication is intended to form the start of this process and is presented to you with the aim that we shall be able to enter into a discussion with you as soon as possible.

Vera Egenberger
Director of ENAR

Introduction

The Treaty of Amsterdam, signed on 2 October 1997, ratified by all the countries of the European Union and finally came into force on 1 May 1999, includes an anti-discrimination clause, inserted in the First Pillar (Community area), which enables the European institutions to take measures in order to combat discrimination based on certain criteria. Article 13 of the Treaty of Amsterdam reads as follows: “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Commission, 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.”

Such an anti-discrimination clause did not previously exist in the treaties, so Article 13 gives the European institutions a significant opportunity to take “appropriate action” in order to combat certain types of discrimination. Within the framework of the fight against racism, xenophobia and anti-Semitism (to which we restrict ourselves), this means that Member States can propose and adopt binding measures in order to combat all forms of discrimination based on racial or ethnic origin, religion or belief.

Non-governmental organisations have been an influential factor in the adoption of such a clause. Long before the beginning of the Intergovernmental Conference a number of them had already been campaigning for a (more or less specific) anti-discrimination clause to be inserted into the treaties. Their demands and their work in the form of constructive lobbying have led to a greater awareness at European and national level of the necessity of action in this field. Equal recognition should be given here on the work carried out by the Consultative Commission on Racism and Xenophobia, the Reflection Group (which is known as the Westendorp Group and had the task of stimulating discussion and putting forward recommendations before the Intergovernmental Conference) and the European Parliament. The two successive campaigns to raise awareness of the problems of racism, that of the Council of Europe and then the European Year against Racism, were also important in contributing to this increased awareness. Although at the time of the Intergovernmental Conference negotiations no country opposed the inclusion of such a clause, it is, however, important to emphasise that no country assumed a leading role in persuading the other countries to adopt the clause.

Since Article 13 allows for the adoption of legislative measures, it is useful to examine in detail both the proposal for a draft Directive by the Starting Line Group, which brings together the aims of the European Network against Racism, and the available information on how the European Commission plans to use Article 13 (two proposals for Directives and an action programme).

Article 13 offers various possibilities and types of actions which will be evoked below as well as the political will of the Member States. Finally, since the adoption of Article 13 comes as a result of a campaign led principally by non-governmental organisations, a new campaign is necessary in order to ensure the adoption of legislative measures aimed at combating racism, xenophobia and anti-Semitism.

1. The "Starting Line" proposal[1]

1.1 Background

The Starting Line Group is an informal network of around 400 organisations in the 15 Member States of the European Union, which has been working since the beginning of the 1990s to promote the idea of a Directive aimed at combating racism. Originally the founding organisations were convinced of the need to combat racism by means of binding legal measures including enforceable sanctions, that is by legislative means. They were also convinced of the necessity of action at European level in this area. There was clear evidence that, in order to realise the set by the Group, the only solution was the harmonisation at European level of legislation aimed at combating discrimination.

The level of protection varies considerably in the different Member States, depending on their history, traditions and their judicial systems. Consequently the Group decided to concentrate its efforts on a proposal for a draft Directive. This is not to say that the only way to combat racism and xenophobia is by legislative means; information, prevention and education are equally necessary. These different methods of promoting equal treatment are complementary. The Group was also of the opinion that the lack of united and effective action against racism and xenophobia resulted in a serious and worrying destabilisation of the process of social integration taking place in the Member States of the European Union.

[1]Proposals for legislative measures to combat racism and to promote equal rights in the European Union, Isabelle Chopin and Jan Niessen, Starting Line Group and the Commission for Racial Equality, 1998.

1.1.1 Choice of a Directive

Why a Directive? Because the Directive seemed to be the most certain and effective method of achieving a harmonisation of legislation aimed at combating discrimination based on racial or ethnic origin, religion or belief, which would guarantee the same degree of protection at European level. The aim of a Directive on this issue is to achieve the adoption of common criteria. The Directive defines the goals to be achieved but allows the Member States a certain amount of flexibility regarding the way in which they wish to incorporate it into their national judicial system, taking into account the specific situation in each country and the relevant legal traditions. On the other hand, the adoption and implementation of a Directive involves the European Parliament and the national parliaments, thereby promoting and maintaining public debate on the subject. It is fundamental that national parliaments have a role to play in provoking discussion at national level. A Directive also allows those countries, which benefit from better protection at national level to maintain these provisions. Finally, the adoption of a Directive to combat racial and religious discrimination would highlight certain parallels in the Directives, which already exist to ensure equal opportunities for men and women.[2] This would create a precedent, which could be used during the discussion and the adoption of subsequent Directives based on the other forms of discrimination listed in Article 13.

In conclusion, it is essential that the

[2]Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.

implementation of Article 13, by the adoption of a Directive aimed at combating racism, take place before any enlargement of the Union. If such a Directive were adopted it would become part of what is known as the *acquis communautaire* which the new arrivals are obliged to integrate into their own legal systems. The countries which will join the Union in the near future do not necessarily have the same traditions in terms of human rights in general and the protection of minorities, nor in terms of the campaign against racism and xenophobia.

The first version of the "Starting Line" was officially launched in 1992 and was favourably received. In a number of resolutions the European Parliament appealed to the Commission to use the proposal for a Directive as the basis for discussions, to put forward a draft Directive and to take inspiration from the Starting Line for the drafting of its own proposal.[3]

The aim of this proposal was to provoke discussion and to maintain a certain level of dialogue on the subject, while ensuring that it becomes and remains part of the political agenda. The Group aimed to make as much use as possible of existing material and to share the experiences of other organisations and of the various Member States.

1.1.2 Legal basis

Given the lack of political will to use Article 308 (formerly Article 235)[4] as the legal basis of such a proposal for a Directive (on which the Starting Line proposal was based), the Starting Line Group focused its work from 1993 onwards on promoting an amendment to the treaty which could act as a clear legal basis for a Directive on this issue. This proposed amendment was known as the "Starting Point". The Starting Point was drawn up after consulting the formulations traditionally used in international conventions, such as the United Nations Convention on the Elimination of all Forms of Racial Discrimination.[5] If the Starting Point had been adopted as it was initially formulated, it would have provided direct effect and would have given the European institutions a clear mandate on which to act. Any legislative measure would have been adopted following the co-decision procedure (qualified majority voting).

The Starting Line Group, as from 1994, began its campaign for the adoption of a legal basis in the Treaty establishing the European Communities (TEC), which would allow the adoption of legislative measures. This campaign involved lobbying of the European institutions, the Consultative Commission on Racism and Xenophobia[6], and the Reflection Group and the Italian, Irish and Dutch

[3] European Parliament, resolution on racism and xenophobia, 2 December 1993
European Parliament, resolution on racism, xenophobia and anti-Semitism, 27 October 1994
European Parliament, resolution on racism, xenophobia and anti-Semitism, 27 April 1995
European Parliament, resolution on racism, xenophobia and anti-Semitism, 26 October 1996
European Parliament, report of the Committee of civil liberties and internal affairs on the Communication of the Commission on Racism, Xenophobia and anti-Semitism and on the proposal for a Council decision designating 1997 as European Year against Racism, 26 April 1996.

[4] Article 308 (ex Article 235):
If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

[5] International Convention on the Elimination of All Forms of Racial Discrimination, adopted and put to signature and ratification by the General Assembly of the United Nations in its resolution 2106A (XX) of 21 December 1965, came into effect 4 January 1969.

[6] The Consultative Commission on Racism and Xenophobia was established in 1994 at the Corfu summit, following a Franco-German initiative. This commission (also known by the name of its president, Jean Kahn) had the goal of defining a global strategy at European Union level aimed at combating the acts of racist or xenophobic violence. This Commission led to the creation of the European Monitoring Centre on Racism and Xenophobia, situated in Vienna.

presidencies responsible for the preparation of, and negotiations on, the Treaty of Amsterdam. During this campaign, the Starting Line Group was also active at national level. The original membership of the Group (400 organisations, including non-governmental organisations, quasi-governmental organisations, churches, unions, academics and experts etc.) led to the creation of a highly effective informal network. In this way it was possible to establish and share contacts and be active in all the Member States and in many different sectors of society (i.e. in the voluntary, political and academic sectors).

This information campaign, raising awareness of the lack of a legal basis to take action against racism and xenophobia at European Union level and in support of the Starting Point proposal, was active at European level as much as at national, governmental, institutional and non-governmental level, both before and after the 1996 Intergovernmental Conference. The years of campaigning and constant pressure bore fruit when Article 13 was adopted.

The Starting Line Group then reworked its initial proposal and in June 1998, during the Manchester conference on racism organised by the British presidency, the new Starting Line was officially presented and was very well received.

1.2 Contents of the proposal

In order to avoid pointless discussions about terminology, this new proposal followed the formulations of various Directives that had already been adopted, concerning the equal treatment of men and women[7] and the burden of proof in cases of discrimination based on sex[8]. This terminology has already been discussed in great detail both at European Parliament and Council level. The Member States cannot then backtrack by reneging on these principles which have already been agreed, refusing victims of racism the protection accorded to women. Moreover, concerning the implementation at national level, as national parliaments have already been involved, this debate has already also taken place in the Member States.

1.2.1 Combating discrimination based on religion and belief

The Starting Line chose to campaign against racial and religious discrimination, as defined by Article 13. This is mainly due to the fact that the word “racism” is interpreted and understood differently in the various Member States. In some countries anti-Semitism can be considered as racism while in other countries a distinction is made between the two concepts. Moreover, it is very difficult to distinguish between racial and religious discrimination which are often very closely linked. This is even more significant today, with the increasing prevalence of what may be described as “Islamophobia”.

Different churches were consulted on this particular point and this soon sparked a strong opposition to the linking of the campaigns against racial and religious discrimination. Some churches called for the inclusion clauses exempting the principle of equal treatment. The Group approached this problem by examining the way in which this issue had been tackled in Northern Ireland (where the question of religious discrimination is a highly sensitive one and a serious political issue) at the level of national legislation. In addition the Group looked at European legislation on the equal treatment of men and women. These two sets of legislation were chosen because they had both allowed for a certain number of exemptions.

In order to avoid strong opposition and in a spirit of compromise (but without being

[7] See Footnote 2 first line.

[8] See Footnote 2 second line.

compromised), Article 1.5 of the Starting Line authorises certain exemptions to the principle of equal treatment, where the determining factor is the consideration of racial or ethnic origin, religion or belief. This exemption applies in particular to religious schools and to other religious institutions such as hospitals and homes for the elderly, etc. The Starting Line Group is well aware that this exemption clause will not necessarily convince all the opposing parties. Nevertheless, it was decided on the one hand to maintain the inclusion of religious discrimination and on the other hand to include the exemption clause. The Starting Line also encompasses "the absence or supposed absence of any particular religion or belief" (Article 2.4), when it refers to religion or belief.

1.2.2 Definition of discrimination and scope of application of the Starting Line

Racial and religious discrimination is defined in Article 1.1 as, "any distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms or participation in the political, economic, social, cultural, religious life or any other public field on grounds of racial or ethnic origin or religion or belief".

The scope of the Starting Line is not restricted merely to the field of employment, although this would certainly render the task much simpler, since the majority of Member States have statutes which cover this area at national level. Racism and xenophobia are part of the everyday lives of people who experience this sort of discrimination and it thus seemed important to the Starting Line Group that protection should be made available for them in all areas of their lives, while taking into account the restrictions imposed by Article 13: "within the limits of the powers conferred by it upon the Community". Consequently, the Starting Line covers the following areas (Article 1.2):

- the exercise of a professional activity, whether salaried or self-employed;
- access to any job or post, dismissals and other working conditions;
- social security;
- health and welfare benefits;
- education;
- vocational guidance and vocational training;
- housing;
- provision of goods, facilities and services;
- the exercise of its functions by any public body;
- participation in political, economic, social, cultural, religious life or any other public field.

The principles contained in the Starting Line are intended to ensure the same protection for all people (European citizens and third country nationals), that is protection against direct or indirect discrimination. The definition of direct discrimination (Article 2.1) was drawn from the legislation on the equal treatment of men and women. Direct discrimination is said to exist when "a person receives less favourable treatment on grounds of racial or ethnic origin or religion or belief than other persons receive or would receive in any situation where the relevant circumstances of those other persons are the same or not materially different". The definition of indirect discrimination (Article 2.2) was inspired by Article 2 of the 1997 Directive on the burden of proof. Indirect discrimination is said to exist when "an apparently neutral provision, criterion or practice disproportionately disadvantages persons of particular racial or ethnic origins or religion or belief" and when it cannot be justified by objective factors.

The Member States are bound to prohibit by legal sanction (Article 4.1):

- any discrimination of any kind mentioned in Articles 2.1, 2.2 and 2.3 practised by any natural or legal person and group or organisation;
- incitement or pressure to racial or religious discrimination;
- the establishment or operation of any organisation which promotes such incitement or pressure together with the membership of any such organisation and the giving of aid, financial or otherwise, to any such organisation;
- any act or practice by a public authority or public institution of racial or religious discrimination against persons, groups of persons or institutions;
- the financing, defence or support by any public authority or public institution of racial or religious discrimination by any person, group or organisation.

Article 4.1 could lead to the prohibition of certain racist political parties or the withdrawal of their financing. Though this issue may be the subject of debate, the Starting Line Group decided, after lengthy discussion, to retain these provisions, drawing on Articles 4.a, 4.b and 4.c of the United Nations Convention on the Elimination of all Forms of Racial Discrimination.

At the same time, Articles 4.2 and 4.3 require the Member States to ensure that all officials and other representatives of public authorities refrain in the exercise of their functions from any discriminatory speech or behaviour and to take any measures necessary to ensure that educators and persons working in the mass media are aware of the responsibility they bear in the field of education and that they behave accordingly.

This proposal for a Directive obliges the Member States to ensure that potential victims may have recourse to judicial remedy (Article 4.4.a), the right to compensation for both pecuniary and non-pecuniary damages (Article 4.4.b), access to adequate information on existing procedures and remedies, and the right to receive financial support in respect of legal costs (Article 4.4.c). The plaintiff should be entitled to an effective investigation and fair adjudication (Article 6.a). The parties concerned may also obtain all the relevant information on the condition that it does not interfere with the interests of either party (Article 6.b).

In addition, organisations concerned with the defence of human rights, and in particular with the combating of racism and xenophobia, shall be able to institute or support legal actions in civil, administrative and criminal courts (Article 4.4.d). Not all the Member States make provision for organisations to bring or support legal actions so it is essential that standard legislation according this right is introduced. The Member States will have to make provision for the establishment of appropriate conciliation procedures which allow solutions to particular conflicts to be found. These procedures must in no case hinder the victim from subsequently having recourse to judicial remedies (Article 4.4.f). The Starting Line also makes provision for the establishment of appropriate bodies to receive complaints, to investigate these complaints and to reach conclusions on them (Article 4.4.e).

1.2.3 Reversal of the burden of proof

In the same way, the reversal of the burden of proof might also cause problems in some Member States. During the drafting of the Starting Line Group's Article 5, great attention was given to the above-mentioned 1997 Directive on the burden of proof in cases of discrimination based on sex. It was decided to maintain this principle in the proposal as it had already been adopted at European level and should then be introduced at national level. One of the reasons for many people not lodging complaints in incidences of racism and for legal proceedings often being

unsuccessful is that it is often extremely difficult for the victim to prove that he or she has been discriminated against. In the case of a Directive similar to the Starting Line being adopted, the defendant (the person supposed to have discriminated against the victim) will then have to prove that the discrimination has not taken place.

1.2.4 Victimisation

Another reason for victims not coming forward to lodge a complaint is the fear of victimisation (or secondary discrimination). The Starting Line includes victimisation in its definition of discrimination (Articles 2.3.a and 2.3.b). This is a concept which does not exist in all the Member States, except in regard to protection against victimisation for trade unionists in the event of their suffering reprisals from their employers.

1.2.5 Role of the European Monitoring Centre

The Starting Line Group decided that the European Monitoring Centre on Racism and Xenophobia, which had been set up in 1997 and which is located in Vienna, should be involved in the following ways. In Articles 11.1 and 11.2 the Starting Line states that the Monitoring Centre should specify "standard criteria for annual monitoring of the performance by Member States of their obligations under this Directive". Furthermore, on the basis of the criteria identified by the Monitoring Centre, the Member States "shall submit annual monitoring returns to the European Monitoring Centre". It is not entirely clear whether the mandate which was given to the Monitoring Centre actually authorises a role of this kind. However, the Starting Line Group felt that it was important for this body to participate in the implementation of the Directive and its application at national level.

The Starting Line Group judged it to be necessary to establish a system of monitoring. It was for this reason that such a role was given to the European Monitoring Centre. They also included the requirement that the Member States should submit a report to the

European Commission on the measures that they had adopted at national level (Article 10.1). This would happen after a period of two years, to allow Member States to adapt the Directive to their national legislation (Article 9). On the basis of this report, the Commission will, in turn, draw up a report for the Council and the European Parliament. While this report is in the process of being compiled, the Commission will be able to request further information from the Member States and from non-governmental organisations. In drawing up the report, the Commission will also be able to make suggestions and recommendations (Article 10).

1.2.6 Affirmative action and quotas

Many Member States fear that Article 13 may force them to act in a manner contrary to their national traditions by obliging them to adopt measures such as affirmative action or quotas. The Starting Line, observing the jurisprudence of the European Court of Justice, does not authorise quotas but does authorise affirmative action, without actually making it a requirement (compare Article 1.4 of the Starting Line and Article 2 of the 1976 Directive on the equal treatment of men and women).

The Starting Line does not affect in any way more favourable provisions which already exist at national level or which are contained in the relevant international treaties (Article 7).

2. The proposals of the European Commission[9]

The question may arise as to whether, by choosing to propose a horizontal Directive and a more specific Directive, the European Commission might fail to follow the principles stated in Article 13 itself which is a general clause. The whole field of anti-racism is highly sensitive and depends to a great extent on the political will of the Member States and the compromises they are able to make in order to fulfil the objectives which they have set.

The European Commission chose to propose these Directives because of the flexibility they allow the Member States in terms of implementation, as stated below. These two directives will be submitted to the approval of the Member States.

Measures in the field of employment have been fairly well accepted by the Member States. This is due in part to the fact that legislation aimed at combating discrimination in this field (although not necessarily all the forms of discrimination listed in Article 13) already exists at national level in the majority of Member States. Certain reservations, or even strong opposition, have been voiced regarding the inclusion of certain forms of discrimination, such as that based on disability or age. In particular, the requirements demanded of companies to provide access could place a heavy financial burden on small and medium-sized businesses. In the case of age, the concerns are financial ones. There are age limits in all the states, especially regarding retirement pensions or the payment of certain welfare benefits.

[9]See discussion paper of the European Commission on the possible contents of the two legislative proposals to implement Article 13, and that of a framework programme to combat discrimination.

This horizontal Directive leaves open the possibility for the subsequent development of more specific Directives relating only to certain forms of discrimination. This development takes the form of a Directive which aims initially to combat discrimination based on racial or ethnic origin.

While the political will to adopt such a horizontal Directive appears to exist, does it also exist in regard to a Directive which addresses the problem of discrimination based on racial or ethnic origin? As Commissioner Flynn expounded in Vienna, there is a momentum which should be utilised. This momentum was created by a series of events, including the Council of Europe's "All different, all equal" campaign, the European Year Against Racism, the campaign which has been led by the Starting Line Group since the beginning of the 1990s, the various joint declarations of the European institutions and the numerous resolutions of the European Parliament. This level of pressure did not exist for the other forms of discrimination, apart for discrimination based on sex.

What do other anti-discrimination organisations in general think about the Commission's choice to take action in the first place against discrimination based on racial and ethnic origin, even though it has made a number of assurances that it would never prioritise or have any kind of order of preference among the various forms of discrimination? These organisations approve of the idea of a specific Directive linked to racial or ethnic origin, as this will allow them to secure a Directive aimed at combating discrimination based on sex, religion or belief, disability, age or sexual orientation, in other areas apart from that of employment.

However, they are very exacting regarding the quality of the European Commission's proposal, since this proposal will determine to a certain extent the potential protection available at European level.

There are a great number of similarities in the two proposals for Directives. The Member States will have to ensure that adequate information is available regarding the provisions which they adopt, and that the appropriate procedures (providing for the application of sanctions which are effective, appropriate and dissuasive) exist in order to allow the victims the possibility of applying for compensation. All laws, regulations or administrative provisions which contravene the principle of equal treatment as it is defined in the two Directives will have to be abolished.

2.1 A Directive aimed at combating the forms of discrimination which are listed in Article 13 in the field of employment.

The material scope of this Directive is limited to the field of employment, but it covers all the forms of discrimination outlined in Article 13, with the exception of sex. This exception is justified by Article 141 of the Treaty[10] and by the Directive 76/207/CEE and the subsequent Directives which deal with the principle of equal opportunities for men and women in the field of employment.

The definitions will be drawn from the Directive 76/207/CEE and its successors and from the interpretation, which was given by the European Court of Justice. Harassment will be considered as discrimination and the adoption or maintenance of affirmative action at national level will be authorised. The Directive will respect the principle of subsidiarity while aiming to guarantee a minimum degree of protection at European level. The Member States having or wishing to have more favourable measures at national level will be free to retain these provisions or to adopt new ones.

However, the proposal will contain one exemption. Differences in the treatment of groups or individuals that can be objectively and reasonably justified are not considered to constitute discrimination. This will only apply when the provision, criteria or practice involved is justified and necessary in order to achieve a legitimate aim that is not connected to discrimination. This provision is included in response to the concerns of some Member States regarding, for example, the taking into account of age for the allocation of certain welfare benefits and the calculation of retirement pensions, etc.

The burden of proof rests with the defendant (the person who is accused of discrimination) who will have to prove that he or she has not violated the principle of equal treatment. The plaintiffs will be protected from victimisation

[10]Article 141:

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the workers receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means:
   a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
   b) that pay for work at time rates shall be the same for the same job.
3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.
4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

that can occur after a complaint. Furthermore the Member States will have to allow groups or organisations the opportunity to institute judicial or administrative proceedings on the basis of a violation of the obligations of the Directive.

The Directive will cover the following areas:

- access to employment, self-employment and occupation, including selection criteria and recruitment conditions and at all levels of the professional hierarchy, including promotion;
- access to vocational guidance and occupation;
- employment and working conditions, including dismissals and pay;
- membership of professional or trade-union organisations

2.2 A Directive aimed at combating discrimination based on racial or ethnic origin

This Directive is modelled on the previous one as regards the principles, definitions and part of its implementation.

The aim of this Directive is to put in place and to maintain a common minimum level of protection and to apply the principle of equal treatment to individuals irrespective of their racial or ethnic origin. The Member States are free to introduce or to maintain provisions which are more favourable than those contained in the Directive. This Directive will contain a number of definitions. These definitions, like those given by the Starting Line Group, are inspired by the definitions contained in the two Directives of 1976 and 1997 which relate to the equal treatment of men and women in the area of employment and to the burden of proof in cases of discrimination based on sex. The definition given of discrimination will include harassment. The Commission will not oblige the Member States to introduce affirmative action but neither will it prohibit such action (as in the case of discrimination based on sex). The Member States, which have already established affirmative action at national level, will be able to retain it and those who wish to introduce it will be able to do so.

As in the case of the Starting Line and the 1997 Directive mentioned above, the burden of proof rests with the defendant, with the exception of criminal proceedings. As with the Starting Line, the Member States will have to ensure protection from victimisation and allow groups and organisations to institute judicial or administrative proceedings on the basis of violations of the obligations of the Directive. Furthermore, for countries, which do not already have them, the Directive will provide for the establishment of independent bodies with the task of combating racism and more generally for the protection of human rights. These independent national bodies will have a twofold task: on the one hand to monitor the implementation of the new legislation and make recommendations on its implementation and on the other hand the opportunity to receive and deal with complaints.

The international conventions (of the United Nations and the Council of Europe) which relate to the combating of racial discrimination will be expressly mentioned in the preamble. However, this proposal for a Directive aims to protect only persons or groups of persons who experience discrimination based on racial or ethnic origin, even though it is sometimes very difficult to distinguish between racial and religious discrimination. When the Starting Line Group was developing its proposal for a Directive, “Starting Line”, it also ran into this issue of terminology. How should racism and xenophobia be defined? In some Member States, religious discrimination would be included in the term “racism”. In the United Kingdom, for example, the “Race Relations

Act" covers discrimination against Jews or Hindus but does not offer any protection to Sikhs and Muslims who represent two important communities. The United Kingdom is currently in the process of remedying this situation.

ENAR believes it to be important that religious discrimination is included in the European Commission's proposal for a Directive. However, in the countries where some churches enjoy a privileged status, the inclusion of discrimination based on religion or belief could seriously and inevitably endanger the chances of success for this Directive during the negotiations within the European Council. Rather than drastically delaying the project and risking the rejection of the proposal, ENAR will support the Commission's proposal, if it contains the principles set out by the Starting Line, and will continue to campaign for the inclusion of the missing principles (in particular the prohibition of incitement or pressure to racial or religious discrimination).

In accordance with Article 13 and the general principles of the treaty, this Directive will respect the limits of the Community powers as well as the subsidiarity principle. The scope of this proposal has been extended in comparison with the previous proposal and does not apply only to employment but also to:

- access to employment, to self-employment and to any profession;
- access to vocational guidance and training;
- working conditions, including dismissals and pay;
- membership of professional trade unions or organisations;
- social protection and social security;
- welfare advantages;
- education;
- access to - and the supply of - goods and services;
- cultural activities and sports.

Complementary measures will also have to be taken at national level to supplement this proposal for a Directive.

2.3 Framework programme to combat discrimination

While legislation is one of the ways of campaigning against discrimination, it is not the only one. There is a great deal of work to be done in the areas of information and education. This is the reason why the European Commission wishes to propose a framework programme, valid for several years, which would include accompanying measures to European Union policies in the following areas:

- improvement of the understanding of problems related to discrimination through improved knowledge and measurements;
- improvement of the effectiveness of policies and practices;
- encouragement of non-discrimination in the media;
- improvement of the capacity of the target actors by promoting exchange of best practices.

The adoption of this framework programme is of great significance to supplement the existence and implementation of the two Directives.

Although the European Commission is firmly committed to seeing these two proposals for Directives and the framework programme succeed, it is important to remember that the Commission plays no role in the decision-making process. It is the European Council, that is the governments of the Member States, who will decide whether or not these proposals will be adopted. This is why it is essential that we, as the European Network Against Racism, should maintain a certain amount of pressure at European level, but concentrate on working at national level.

Although the NGO community was worried that the European Year Against Racism was only a one-off event to raise awareness, it gave rise to some very positive results. The European Commission is currently putting the finishing touches to several proposals. It has initiated a process of consultation with non-governmental organisations and is keen to take their opinions into consideration. According to the information available to date, the European Commission's proposals, while they may not fully uphold the principles and measures outlined in the Starting Line proposal, seem nevertheless to be along the same lines.

ENAR is pleased with the way in which the European Commission has proceeded following the European Year Against Racism in 1997, the generally encouraging approach it has used and the fact that a number of our demands have been retained (such as the reversal of the burden of proof). However, religious discrimination was only taken into consideration in the proposal for a horizontal Directive concerning employment. We feel that this approach is not entirely satisfactory, given that in some countries religious discrimination will still be covered by the term "racism". This will lead to inequality in the treatment of people living within the European Union. Consequently, we will have to persist in our efforts to ensure that people who are discriminated against on the basis of their religion or their beliefs are protected equally in all the Member States and in all the different aspects of their everyday life. This protection is now possible, thanks to Article 13.

3. Opportunities provided by Article 13[11]

From its formulation it is clear that Article 13 is a clause based on political compromise. In fact, Article 13 has no direct effect (direct effect is the possibility for citizens to invoke Community rules directly from national instances), requires unanimity and is restricted in its scope to Community powers, that is the areas which are set out in the Treaty establishing the European Communities as areas in which the Community can act.

Opinion concerning the scope of article 13 is divided. We are convinced that by amending the Treaty in order to include Article 13, giving the European institutions the power to adopt measures aimed at combating discrimination, the Community powers have de facto been extended. With the inclusion of Article 13 in the TEC, new opportunities and powers have thus been conferred on the European Community. However, some Member States (such as Germany) take a completely different approach and are of the opinion that Article 13 does not confer any new powers and that its application is strictly limited to the existing powers of the TEC. The official translation of Article 13 runs the risk of necessitating a more exhaustive legal clarification of this issue: while the French and German versions use the word “competencies”, the English version uses the word “powers”.

The Member States are very insistent that Article 13 only means that the European institutions are able to take action and that it does not impose any obligations to act whatsoever. Furthermore, any action taken must comply with Article 5[12], which establishes the principle of subsidiarity. A number of Member States take refuge in this principle of dividing up the powers (European and national), conferred by the treaty at the heart of the European Union. The European institutions can only act, according to the principle of subsidiarity, when action at national level is insufficient or when it fails to achieve the necessary level of effectiveness.

However, Article 13 concerns both citizens of the European Union and third country nationals, if the latter are discriminated against on the basis of their racial or ethnic origin, their religion or beliefs. Notwithstanding this, some Portuguese officials are of the opinion that the rights enjoyed by citizens of the European Union should only be accorded gradually to third country nationals.

The implementation of Article 13 is viewed by senior civil servants in some Member States as primarily dependent on the political will of the Member States to act in this area, rather than being a purely legal matter. It is important to remember that it was this strong political will which was missing during the negotiations on the Treaty of Amsterdam. The use of Article 13 as a legal basis for European legislation may well be postponed by Member States, on the pretext of awaiting a clearer justification

[11]The information contained in points 3, 4 and 5 is based on the document, “Article 13: a new challenge for European institutions”, Migration Policy Group, 1999.

[12]Article 5 of the Treaty establishing the European Community:

"The Community shall act within the limits of the powers conferred upon it by this Treaty and the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”.

of the nature of Community powers and the principle of subsidiarity by the European institutions. Thus, the Member States are waiting for the European Commission to provide an interpretation as well as a definition of the Community powers regarding this matter.

In some countries, the question of the penal chapter has been widely raised. These Member States are doubtful about the feasibility of these prohibitions being included in all legislation based on Article 13. Prohibition always implies criminal sanctions and the penal chapter is not part of the Community powers. According to these Member States, Article 13 can only lead to the adoption of measures which are of a purely civil and preventative nature. Even though it is not entirely clear whether criminal sanctions would be authorised in the First Pillar, we are of the opinion that they would nevertheless not fall completely outside the Community powers. A discussion is currently in progress regarding the subject of competition, as it is governed by Articles 81 and 82 of the Treaty (previously Articles 85 and 86), which is also dependent on the First Pillar (Community powers). If it transpires that no criminal sanctions are possible in the community area, then the following solution might be conceivable: the development of guidelines which are non-binding but to which the national courts of justice would have to refer.

However, in the majority of countries, the governments categorically refuse to see the implementation of Article 13 as an obligation to adopt affirmative action measures.

Nevertheless, it is quite clear that the will to make use of Article 13 as well as the necessity of adopting European measures is understood very differently by the 15 Member States of the European Union.

4. The political will of the Member States

With the adoption of Article 13, while all the Member States were pleased for such a clause to be inserted into the treaty, some of them expressed reservations about the urgency of its implementation or admitted to having an order of preference regarding which grounds of discrimination should be protected first. The Member States have fallen back on the "may take action" from the European Commission which is in no way an obligation, and on the respect of the principle of subsidiarity.

In addition, some Member States are concerned about the increase in the number of instruments aimed at combating discrimination, given the existence of international agreements. They are not convinced of the absolute necessity of new regulations at European level. In contrast, other Member States are surprised by the reluctance of some governments to adopt measures at European level, given the existence of these international legal agreements (such as the United Nations International Convention on the Elimination of All Forms of Racial Discrimination). These states recognise that these international agreements are not always respected or are applied incorrectly.

The same rationale applies to the countries which already have legislation aimed at combating racism or racial and/or religious discrimination at national level. Some states do not wish to see binding measures adopted at European level, since legislative measures already exist at national level. Other states recognise that their own legislation may no longer be appropriate, may be wrongly applied or may even be rarely used. In some Member States where there are no national measures, some governments hope, by means of a European measure, to be able to benefit from the experience of other countries. However, other governments use their own lack of national legislation and, again, the existence of international legal instruments to justify their opposition.

The use of the instruments which were established as part of the Third Pillar (joint actions concerning the fight against international crime, of which racism is a part) is invoked by some Member States as a possible alternative to measures adopted on the basis of Article 13. Article 29[13] of the Treaty on European Union identifies the need for, and necessity of, reinforcing co-operation between the Member States and recognises racism as a criminal act or offence. This is a significant step forward. We are of the opinion that while the joint actions existing in the Third Pillar are important and should be applied, they are nevertheless not sufficient and that a binding measure, such as the Directive, at community level is essential in order to guarantee the same level of protection in each of the 15 Member States. Racism is not only a criminal act but is also, above all, an issue of social behaviour.

The Member States question the financial costs of implementing Article 13, especially in terms of welfare benefits.

A large majority of Member States would prefer that Article 13 be used in a sectoral

[13]Article 29 of the Treaty on European Union (previous Article K.1): "Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia...".

manner (that is according to form of discrimination and not as a whole). Although the various Member States each have their own priorities, the campaign against racism seems to be able to achieve consensus. A horizontal measure in the field of employment seems, a priori, to meet with the approval of the Member States because the majority of states already have similar measures at national level. However, reservations have been voiced regarding some forms of discrimination. The Member States fear that the necessity of unanimity might slow down the decision-making process and lower the level of protection. In fact, the Member States have high demands relating to the quality of the measure (superior to existing national legislation) as well as to its application. They also have great expectations of the interpretation of the European Court of Justice.

In addition, the Member States have high expectations of the European Commission in terms of definition and interpretation, but they also expect to be consulted and that a full survey of existing measures at national level be undertaken. This consultation, which has already begun, includes non-governmental organisations and social partners as well as the Member States.

5. What action is possible at European level based on Article 13?

There are various measures aimed at combating racism and xenophobia which can be adopted on the basis of Article 13, including regulations, Directives, recommendations, green papers and action plans. It is clear that we are campaigning for the adoption of a binding measure. The only binding instruments are regulations or Directives.

Regulations, which become part of national legislation, do not allow the Member States any flexibility and so do not seem to us to be the most appropriate instrument. This is first and foremost because numerous compromises are necessary in order to succeed in the adoption of a regulation and this risks a dramatic lowering of the level of protection which we wish to see applied in all the Member States of the Union. At the same time, by denying the direct effect of Article 13, the Member States have implicitly rejected the possibility of a regulation.

During the closing ceremony for the European Year Against Racism in Luxembourg in December 1997, Commissioner Flynn, responsible for Social Affairs, announced his intention of proposing a Directive aimed at combating racism. A year later, in Vienna, he gave precise details of the measures which the Commission intended to propose for the implementation of Article 13:

- a framework Directive dealing on a general basis with all grounds of discrimination in employment;
- a Directive dealing specifically with the fight against discrimination based on racial or ethnic origin;
- a programme of action aimed at reinforcing co-operation between the Member States and civil society, based on partnership and networking, as well as the sharing of best practices.

These proposals are still in the development stage. Some details, regarding the content of the various proposals, have been given by the European Commission through various consultation processes with government representatives, social partners, and non-governmental organisations (for details see point 2).

6. Strategy and campaign

A genuine co-ordinated campaign must exist from this point onwards, even though the European Commission's proposals have not yet been made public and the date of their official release is still uncertain (November 1999 to January 2000). From now on the European Network Against Racism must position itself as a valuable interlocutor both at European level and at national level, in the governmental and non-governmental sectors. In Point III of our action programme, "Lobbying and campaigning", it is written that we "should not only direct the policies of the European Union" but also "try to influence the decision-making process and lead European campaigns in the following areas", followed by a list of areas in which we have a role to play. The following points are those which are directly linked to the European Commission's proposals for directives:

- anti-discrimination legislation and the establishment of supervisory mechanisms to secure the full implementation of existing and future legislation;
- the elimination of all aspects of structural and institutional racism;
- measures to bring about equality of access to services, decision-making structures, labour-markets, education, housing and leisure;
- preventive and educational measures to combat racism, xenophobia, anti-Semitism and Islamophobia;
- ensure that the European Union adopts adequate equality measures in its legislation (regulations, directives etc.) so that they do not have a discriminatory or racist effect;
- the introduction of positive action measures across all European Union institutions to ensure adequate representation and participation by those directly affected by racism. This should take place at all levels and in all arenas, for example the political machinery, employment and service delivery. Ensure effective monitoring mechanisms are put in place to secure the implementation of these measures.

In order to optimise the realisation of these objectives, concerted action is very important. It is necessary to be constructive and clear and to have precise proposals. It is essential to encourage debate and then to make sure that this debate remains in the political agenda. It is well known that the various Member States do not share the same conceptions of the fight against racism or the same level of understanding regarding the means of implementing it.

6.1 Clear proposals

The proposals must be acceptable and well-worked out so as to fulfil the criteria laid out by non-governmental organisations. However, in order to be considered at the level of the European institutions and governments, they must be sufficiently realistic. Essentially, they must constitute a compromise between the various organisations in the various countries.

For some years now, the governments in most of the Member States have realised that the non-governmental organisations are able to formulate good proposals and provide an interesting analysis of the situation. At the same time, the non-governmental organisations are increasingly working on a European level and have partners in other Member States. This enables them to develop a much more global view of the issues than

that of some governments who concentrate on their own national level.

Furthermore, it is absolutely essential to be able to explain our proposals and to be able to justify each aspect in relation to our objectives and to the current political and legislative situation.

In order to fulfil these criteria, it is imperative to have consulted with other organisations in other countries and also with academic experts in the field who have wide-ranging experiences to contribute. This was done in the Starting Line Group and was probably one of the reasons for its success. At the time that the Directive was being developed, a number of organisations were consulted. It is very important not to lose contact with these grassroots organisations which describe in very concrete terms the problems which they encounter on the ground. It is essential to take these problems into consideration during the drafting process in order to provide solutions.

It is also very useful, indeed imperative, to consult with other players in civil society, such as trade unions and social partners, who can bring their expertise and experience in fighting against discrimination in the workplace. Churches should also be involved with this work (not forgetting that religious intolerance can itself be a form of racism). As has been explained above, the contacts which were made by the Starting Line Group with various churches has been very beneficial, since they revealed the very strong opposition from some churches to the idea of associating the fight against discrimination based on religion or beliefs with the fight against discrimination based on racial or ethnic origin together in one Directive. This opposition has compelled the members of the Group to find a compromise which all parties find satisfactory, by drawing on the experience of other countries.

In the case of the "Starting Line" proposal, this consultation process has already taken place and the proposal has been drawn up and officially presented. The aim of the process here is to achieve the objectives which we have set, that is the adoption of a Directive (or of two Directives) aimed at ensuring equal treatment. However, it is important to be aware that a text is rarely perfect and that its primary aim is to serve as the basis for discussion. In fact, it is easier to start discussion with a concrete proposal. As has been discussed above, several of the points included in the "Starting Line" have been taken up by the European Commission in its own proposals, which proves the effectiveness of genuine dialogue.

6.2 Leading a campaign at European level

Leading a campaign at European level means establishing contacts and initiating dialogue with the various European institutions.

6.2.1 The legislative procedure

The consultation procedure which will be employed for the adoption of all legislation based on Article 13 will develop as follows:

- the Commission presents a legislative proposal,
- the European Parliament must express an opinion on the proposal. The opinion of the Parliament takes the form of a resolution, including amendments;
- the Council of Ministers can accept or reject the Commission's proposal as well as the Parliament's amendments. In no case is the Council obliged to adopt the amendments of the Parliament or to follow its recommendations. However, the Council is obliged to wait for the European Parliament to have expressed its opinion in order to make a decision on the Commission's proposal. The Council makes its decision on the basis of unanimity.

6.2.2 The European organisations

Organisations exist at European level which, while their principle aim may not be the campaign against racism, nevertheless include it in their action programme. It is important to establish contact with these organisations, in order to study the potential for joint actions. It is also important to establish relationships with other lobbies (for example, the women's lobby, the disabled lobby, the homosexual lobby, etc.), to study the two different European Commission proposals. The first proposal concerns all forms of discrimination and the second may potentially be able to serve as an example for subsequent Directives aimed at ensuring equality of treatment in spheres other than that of racial or ethnic origin.

6.2.3 The European Parliament

It is relatively simple to establish contact with the Member of the European Parliament (MEP) who represents the constituency in which organisations associated with ENAR are located. Meeting an MEP is an opportunity not only to present the proposal, but also to demonstrate that non-governmental organisations, and particularly the members of the Network, follow closely the developments linked to the European initiatives in the sphere of the campaign against racism. The new Members of the European Parliament are unlikely to be familiar with the subject and will need the information we can provide. However, it is useful to check on which parliamentary committee they sit.

It is also important to contact the different parliamentary committees concerned, as well as the various political groups. Some organisations are based a long way away from Brussels and do not have the opportunity to go there. In this case, contacts may still be established by post or by telephone.

The European Parliament has always shown great support for the fight against racism and constitutes a real ally that it is important to keep informed.

6.2.4 The European Commission

As for the European Parliament, it is useful to keep the Commission informed of our various projects, of our discussions on the subject and to meet or contact the various responsible people. The aim is to provoke debate and to keep this debate open. In recent years, the European Commission has demonstrated a clear will to act in the sphere of the campaign against racism and xenophobia and has initiated a process of consultation and discussion with non-governmental organisations, which is important to continue.

6.2.5 The Council of Ministers

To work at the level of the Council of Ministers is effectively to work at national level, since it is those ministers at the heart of the Council who have the power to make decisions.

6.3 Leading a campaign at national level

6.3.1 The governments

In order to do this it is essential to meet and convince national governments, since we need them in order to succeed in combating racism, xenophobia and anti-Semitism in an effective manner. The governments are a target which we must reach in order to be able to consider them either as allies, or partners with whom it is possible to work and communicate. Thus it is necessary to make contact with the various ministries concerned with Article 13 (depending on the country, this may be the Ministry of European Affairs, Ministry of Justice, Ministry of Social Affairs, Ministry of Employment, Ministry of Home Affairs, etc.). In order to be able to target the campaign better, it is useful to know their positions and motivation. In this way it is possible to

identify and locate the potential support from which we might benefit and to be aware of particular points which might give rise to problems.

6.3.2 Non-governmental organisations

The national organisations must also be involved in the processes of information, consultation and action. The dissemination of information is important because some national organisations do not always have the means to keep themselves informed about European policies and they sometimes experience difficulty in appreciating the importance of working at national level, in order to be able to reach the European level. At national level it is also essential to ensure that a single voice is heard and to lead united action.

Conclusions

The inclusion of an anti-discrimination clause (Article 13) in the treaty is a big step forward because it is the indispensable legal basis to enable action against racism and xenophobia at European level. The insertion of this clause is the result of years of effort, concrete constructive work and concerted action from the NGOs. But the actual formulation of this clause leaves its eventual application up to the discretion of the Member States as any measure based on Article 13 requires unanimity. If no compromise or agreement between the Member States is reached, article 13 could remain unused. ENAR will do its best to ensure that this does not come to pass.

Because the two proposals for a directive and the programme of action will be the first measures to be adopted on the basis of Article 13, it is essential that the level of protection to be accorded is high and guarantees the same rights to everyone.

The texts of these proposals have not yet been published. ENAR has been working on the basis of the discussion paper published by the European Commission and different interviews with civil servants of the Directorate General Employment and Social Affairs responsible until now for the fight against racism. Apparently, the DG Employment and Social Affairs will no longer be the only Directorate involved in the fight against racism, as the DG Justice and Home Affairs will have been nominated co-author of these proposals. The NGOs need to know to whom they should refer to and who is responsible for these proposals.

Concerning the proposal for a directive aimed at fighting racial and ethnic discrimination, to be presented in the near future, ENAR feels nevertheless that some reservations should be expressed. Even though the content of this directive includes a certain number of principles and definitions as enumerated in the Starting Line proposal, other equally important principles have been excluded. For instance, what is the status of the fight against discrimination based on religion and belief? We are very much aware of the element of compromise present in such a proposal as expressed above in point 1.2.a, but certain points and principles remain to be defined and specified. Why has institutional (and sometimes institutionalised) racism not been included in the proposal of the European Commission ?

It is fundamental that the text of a directive aimed at fighting racial and ethnic discrimination defines and includes discriminatory acts or practices exercised by public authorities. In this context it is absolutely necessary to mention obligations as well as responsibilities of public institutions and services. What reprehensible acts are going to be included in these proposals ? It is of primary importance to define the crimes which could lead to a sanction. The recognition of incitation or pressure aimed at racial or ethnic origin as a characterised crime which could be sanctioned is the keystone of the fight against racial and ethnic discrimination. Otherwise how will it be possible to sanction or even to prohibit, for example (as recommended by the Starting Line Group), the establishment or activities of organisations encouraging discrimination ?

It is undeniable that today the working tools of racist organisations include, among other means, written propaganda (revisionist or other literature, tracts, memoranda etc.), music

(extremist groups popular among the younger generation) and internet (specialised Websites, games, networks etc.). It is essential to be able to fight against such acts or practices that are too often neglected under cover of the respect of freedom of expression.

It would be unacceptable for certain principles not to be included in the European Commission's proposal. Although ENAR is necessarily in a waiting position with regard to the different proposals from the European Commission, we will scrutinise the content of the proposal for the directive fighting racial and ethnic discrimination with utmost attention, to ensure that the right *not* to be discriminated against becomes a complete part of fundamental rights of the European Union and that the implementation of these rights (after adoption of this directive) is carried out in a satisfactory way in the 15 Member States.

More than ever today, it is necessary to continue to work together to intensify lobbying both at national and European level to further the fight against racism, condition sine qua non to achieve real equal treatment.

During the printing of the publication, the European Commission released the package of the two directives and the action plan. They are available at ENAR upon request.

The New Starting Line
Proposal

To the European Parlament, Council & Commission
and Member States of the European Community

for a
Draft Council Directive concerning
the Elimination of Racial and Religious Discrimination

(Text prepared by the Starting Line Group)

The Council of the European Economic Community, having regard to the Treaty establishing the European Community and in particular Article 13 thereof;

Having regard to the proposal from the Commission,
Having regard to the opinion of the European Parliament,
Having regard to the opinion of the Economic and Social Committee,

Whereas the Member States, in the preamble to the Single European Act, declared their determination to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice, and acknowledged the responsibility incumbent upon Europe to manifest in every regard the principles of democracy, the rule of law and human rights obligations to which they have adhered;

Whereas the European Convention on the protection of Human Rights and Fundamental Freedoms safeguards such rights as freedom of expression, it also recognises the limits on such rights "as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder and crime, for the protection of health and morals, and for the protection of the reputation or rights of others (…)"[1];

Whereas the Presidents of the Parliament and the Council, the Representatives of the Member States meeting within the Council and the President of the Commission signed on 11 June 1986 the Declaration against Racism and Xenophobia[2], affirming their resolve to protect the individuality and dignity of every member of society;

Whereas the European Council at Maastricht in December 1991 asked Ministers and the Commission to increase their efforts to combat discrimination and xenophobia, and to strengthen the legal protection for third country nationals present on the territory of Member States[3];

Whereas the European Council at Edinburgh in December 1992[4] reaffirmed its conviction that vigorous and effective measures must be taken, throughout Europe, to combat racist attacks both through education and legislation, and to implement fully policies for integrating legal immigrants.

Whereas the Council of Ministers, in its Resolution of October 1995[5] on the fight against racism and xenophobia in the fields of employment and social affairs called for fighting all forms of labour discrimination against workers legally resident in each Member State and promoting equal opportunities for the groups most vulnerable to discrimination, in particular women, young people and children;

Whereas the European Council at Corfu in June 1994[6] proposed to develop a global strategy at the European Union level aimed at combatting acts of racist and xenophobic violence, and constituted

[1] Article 10-2 ECHR
[2] OJ C 158, 25.6.1986
[3] Bulletin of the EU, December 1991
[4] Bulletin of the EU, December 1992
[5] OJ C 296,5.10.1995
[6] Bulletin of the EU, June 1994

the Consultative Commission on Racism and Xenophobia;

Whereas the Consultative Commission on Racism and Xenophobia proposed, in its final report[7], to amend the Treaty establishing the European Community so as to empower the European Union's institutions to act against discrimination based on race, ethnic origin or religion, and recommended the establishment of a European Monitoring Centre;

Whereas the European Council at Florence in June 1996[8], determined to combat racism and xenophobia with utmost resolve, decided to establish the European Monitoring Centre;

Whereas the Council of Ministers, in its Resolution of July 1996 on the European Year against Racism[9], decided to encourage reflection and discussion on the measures required to combat racism, xenophobia and anti-Semitism in Europe;

Whereas discrimination between human beings on grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations, and is capable of disturbing the peace and security of persons living side by side in the European Union;

Whereas the elimination of all forms of racial discrimination, whether direct or indirect, and of attitudes and behaviour inspired by racism and xenophobia require the adoption of strict standards and measures of control, to be applied by national, regional and local authorities;

Considering that it is the primary responsibility of the mass media and of education in eliminating social prejudices among young people and in public opinion generally and in the promotion of harmonious relations between different groups, particularly in avoiding sensationalist treatment of the differences which from time to time create opposition between these groups;

Whereas, these diverse groups cannot coexist successfully without the equal enjoyment and exercise of human rights and fundamental freedoms; whereas none should be marginalised or left out of account, and whereas all should benefit equally from measures, including positive action, to be adopted within the framework of an effective equal opportunities policy;

has adopted this Directive:

Article 1

1. In this Directive racial and religious discrimination shall mean any distinction, exclusion, restriction or preference which has the purpose or the effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms or participation in the political, economic, social, cultural, religious life or any other public field on grounds of racial or ethnic origin or religion or belief.
2. In this Directive the term "equal treatment" shall mean there shall be no discrimination whatsoever, direct or indirect, based on racial or ethnic origin, or religion or belief in particular

[7] Raxen 6871/1/96
[8] Bulletin of the EU, June 1996
[9] OJ C 237,15.8.1996

in the following areas:

- the exercise of a professional activity, whether salaried or self-employed;
- access to any job or post, dismissals and other working conditions;
- social security;
- health and welfare benefits;
- education;
- vocational guidance and vocational training;
- housing;
- provision of goods, facilities and services;
- the exercise of its functions by any public body;
- participation in political, economic, social, cultural, religious life or any other public field.

This principle is hereinafter referred to as "the principle of equal treatment".

3. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment.
4. This Directive shall be without prejudice to national laws, regulations and administrative provisions favouring certain disadvantaged groups defined by racial or ethnic origin or religion or belief with the aim of removing existing inequalities affecting them or promoting effective equality of opportunity between members of society.
   a) This Directive shall be without prejudice to the right of Member States to exclude from its field of application any occupational activities, (and where appropriate the training leading thereto) and any other activities for which by virtue of their nature or the context in which they are carried out the racial or ethnic origin or religion or belief of the person is an essential determining factor.
   b) Member States shall periodically assess any such exclusions in order to decide, in the light of social or other developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.

Article 2

1. For the purposes of the following provisions direct discrimination exists where in respect of any of the areas in Article 1(2) a person receives less favourable treatment on grounds of racial or ethnic origin or religion or belief than other persons receive or would receive in any situation where the relevant circumstances of those other persons are the same or not materially different.
2. For the purposes of the following provisions indirect discrimination exists where in respect of any of the areas in Article 1(2) an apparently neutral provision, criterion or practice disproportionately disadvantages persons of particular racial or ethnic origins or religion or belief, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to race, ethnic origin or religion or belief.
3. a) For the purposes of the following provisions discrimination shall include victimisation.
   b) Victimisation occurs where in respect of any of the areas in Article 1(2) a person or group of

persons is subject to any detriment by reason of that person or group of persons being involved in or suspected of being involved in making a complaint or assisting a complaint alleging racial or religious discrimination, provided the allegation was not false and was made in good faith.

4. In this Directive any reference to a person's religion or belief includes reference to his supposed religion or belief and to the absence or supposed absence of any particular religion or belief

Article 3

1. Member States shall take the measures necessary to ensure that laws, regulations and administrative provisions and practices relating to the areas listed in Article 1(2), shall confirm to the principle of equal treatment defined in that Article.
2. The obligation to comply with Article 1(2) to ensure the principle of equal treatment is a duty of Member States, owed to any person who may be adversely affected by a contravention of that Article, and any breach of the duty is actionable accordingly.

Article 4

1. Member States shall take the necessary measures, in conformity with their legal systems, to prohibit by legal sanction
   a) any discrimination of the kind mentioned in Article 2(1), 2(2) and 2(3) practised by any natural or legal person and group or organisation;
   b) incitement or pressure to racial or religious discrimination;
   c) the establishment or operation of any organisation which promotes such incitement or pressure together with membership of any such organisation and the giving of aid, financial or otherwise to any such organisation.
   d) any act or practice by a public authority or public institution of racial or religious discrimination against persons, groups of persons or institutions;
   e) the financing, defence or support by any public authority or public institution of racial or religious discrimination by any person, group or organisation.
2. Member States shall ensure, by means of information and training and where need arises by appropriate sanctions that all officials and other representatives of the public authorities at every level abstain in the exercise of their functions from any racially or religiously discriminatory speech or behaviour.
3. Member States shall take the necessary measures to ensure that educators and persons working in the mass media are aware that they bear responsibility for an educational role in combating racial and religious discrimination, and that they behave accordingly.
4. Member States shall ensure that:
   a) their legal systems provide appropriate and effective measures whereby all persons who consider themselves to haven been wronged by failure to apply to them the principle of equal treatment as set out in this Directive may have recourse to a judicial remedy, in accordance

with the most effective national procedures, after possible recourse to other competent authorities where appropriate;

b) any judicial remedy in respect of a complaint of racial or religious discrimination shall include adequate compensation for both pecuniary and non-pecuniary damages; there shall be no limitations on the ability of the court or other competent authority to award compensation or such other remedy as is provided for by national law;

c) an effective judicial remedy shall enable persons who consider themselves wronged to defend their rights; the State shall provide for adequate information on procedures and remedies and shall provide support in respect of legal costs in accordance with the most favourable provisions of national law;

d) organisations concerned with the defence of human rights and in particular with the combatting of racism and xenophobia shall be able to institute or support legal actions in civil, administrative and criminal courts enforcing the rights granted under this Directive and provisions in national law granting protection against racial and religious discrimination in areas mentioned in Article 1(2);

e) In each Member State appropriate bodies shall be established to which complaints of any activities which are contrary to the principle of equal treatment as set out in Article 1(2) may be submitted; such bodies shall be required to investigate all complaints made to them and shall be granted all necessary powers to investigate any complaint. such bodies shall reach conclusions on all complaints, which conclusions shall be public, save that where appropriate the body may exclude from any public document information enabling identification of a complainant.

f) Appropriate conciliation procedures are made available which are capable of resolving difficulties between various individuals; such conciliation procedures shall not be mandatory; this shall be without prejudice to the right of the complainant to have recourse to judicial remedies in accordance with Article 4 (4)(a).

Article 5

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged, because discrimination of the kind referred to in Article 2(1) 2(2) or 2(3) has occurred, establish, before a court or other competent authority, facts from which may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that no such discrimination has occurred. The plaintiff shall benefit from any doubt that may remain.

Article 6

Member States shall introduce into their national legal systems such measures as are necessary to ensure that:

a) the courts and other competent authorities may give such directions as are necessary for an effective investigation and fair adjudication of any complaint relating to racial or religious

discrimination;

b) the parties concerned each have all the relevant information in the possession of the other party or which may reasonably be assumed to be in its possession and which is necessary for them to exercise their rights. Parties shall not be required to disclose information the disclosure of which would substantially damage their interests in connection with matters other than the litigation concerned.

Article 7

The provisions of the present Directive do not affect national legislation or applicable international treaties granting more favorable guarantees against racial or religious discrimination.

Article 8

Member States shall ensure that the provisions adopted pursuant to this Directive together with the relevant provisions already in force, are brought to the attention of the public by all appropriate means.

Article 9

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than two years after the adoption of the Directive. They shall forthwith inform the Commission thereof
2. When Member States adopt the provisions referred to in paragraph 1, such provisions shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate to the Commission the texts of the provisions of national law already adopted or being adopted in the field governed by this Directive.

Article 10

1. Member States undertake to submit to the Commission a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Directive to enable the Commission to draw up a report for the Council and the European Parliament:
   a) within one year following the expiration of the period of two years provided for in Article 9(1); and
   b) thereafter every two years.
2. To assist the Commission in drawing up the report for the purposes of paragraph 1, the Commission may request further information from Member States and may receive information

from non-governmental organisations.

3. In drawing up the report for the purposes of paragraph 1, the Commission may make suggestions and general recommendations based on the examination of the reports and information received from Member States.

Article 11

1. Within one year after the adoption of this Directive the European Monitoring Centre shall specify standard criteria for annual monitoring of the performance by Member States of their obligations under this Directive;
2. Member States shall submit annual monitoring returns based on the specified criteria to the European Monitoring Centre, the first to be submitted one year after the expiration of the period of two years provided for in Article 9(1).