



## **Legal Seminar 25 November 2008 on the implementation of EU law on equal opportunities and anti-discrimination**

### **DISCUSSION PAPER ENFORCEMENT AND ROLE OF EQUALITY BODIES: BEST PRACTICES?**

*The content of this discussion paper has been drafted by the European Network of Legal Experts in the non-discrimination field and does not necessarily reflect the opinion or position of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities*

#### **General**

Recital 24 of the Preamble of the Racial Equality Directive (2000/43/EC)<sup>1</sup> stresses the need for national equality body or bodies in each Member State, performing certain functions independently, which will strengthen the protection against discrimination by providing concrete assistance to the victims. Accordingly, Article 13 of the Racial Equality Directive (RED), Article 20 of the Recast Directive (2006/54/EC)<sup>2</sup> and Article 12 of (the Services Directive) (2004/113/EC)<sup>3</sup>, provide for the designation of bodies responsible for the promotion of equal treatment on the grounds of racial and ethnic origin. The three directives set out three main functions, which are as follows:

- To provide independent assistance to victims of discrimination in pursuing their complaints about discrimination;
- To conduct independent surveys on discrimination
- To publish independent reports

Article 20 of the Recast Directive adds the exchange of available information with corresponding European bodies such as any future European Institute for Gender Equality. Article 13 of the Racial Equality Directive adds the issuing of recommendations on any issue relating to such discrimination.

Under the law, these bodies do not need to have as a single mandate the promotion of equality, but can be part of entrenched institutions acting for the protection of human rights or the safeguarding of individual rights. Unfortunately, the requirement for designation of equality bodies was not included in the Employment Framework Directive and therefore, not all grounds of discrimination mentioned in Article 13 of the EC Treaty are covered. However, a high number of Member States exceeded the competences set by the Racial Equality Directive, not only regarding the grounds of discrimination they cover, but also concerning the mandates and tools they have in order to combat discrimination.<sup>4</sup>

<sup>1</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

<sup>2</sup> Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

<sup>3</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

<sup>4</sup> Rikki Holtmaat, European Network of Legal Experts in the non-discrimination field, *Catalysts for Change? Equality bodies according to Directive 2000/43/EC*, MPG, HEC, European Commission, 2006, pages 21-22.



Equality bodies are extremely important for the implementation of anti-discrimination legislation on all grounds, given the role they can play in supporting victims of discrimination, giving guidance to government and other public and private bodies on how to work towards equality, providing other stakeholders and the public with information on anti-discrimination rights, and conducting specialised surveys and research into discrimination and ways of eradicating it.<sup>5</sup> According to the European Commission against Racism and Intolerance (ECRI), national specialised bodies can make a concrete contribution to protecting individuals and groups against racial discrimination, through, *inter alia*:<sup>6</sup>

- monitoring the content and effect of national legislation and policies intended to combat racial discrimination and making proposals for possible modifications;
- raising public awareness at these issues;
- providing aid and assistance to victims, including legal aid;
- to promote and contribute to the training of certain key groups;
- providing advice and information to national authorities.

### **Different types of equality bodies**

There are different models of equality bodies established by the Member States, such as single equality bodies that have as a specific mandate to promote equality and non-discrimination, and general human rights' commissions or ombudsmen that use a holistic approach and address equality as a part of other duties relating to the protection of human rights and fundamental freedoms. In addition, some equality bodies are awarded quasi-judicial status and effective legal powers, mandated to examine complaints, require the production of evidence initiate conciliation/mediation proceedings or litigation, or form an opinion that is binding for the stakeholders concerned, while others have a consultative role that is limited to examination of complaints and adoption of opinions that cannot be enforced to the public or private institution that is responsible for the discriminatory treatment.

### **Effectiveness of the equality bodies**

Many different factors can have an impact on the effectiveness of the equality bodies. The independence or not of the equality bodies against political intervention and influence is an important aspect of their actual effectiveness. Serious hindrances to their independence would be, for instance, the nomination of the senior staff of the equality body by the government, the affiliation of the senior staff members with political parties, the accountability of the equality bodies to any public organisation or judiciary. Another factor is the limited financial and human resources that are allocated to many equality bodies<sup>7</sup>, which clearly limits their ability to fulfil their tasks. Restricted financial means has as an impact that the equality body cannot recruit the number of experts and staff that is necessary to better fulfil its competences, and most important, cannot provide assistance to all victims of discrimination, but only to a limited number of cases.

<sup>5</sup> Jan Niessen and Janet Cormack, "National specialised equality bodies in the wake of EC antidiscrimination Directives", in J. Cormack (ed.) "Considerations for establishing single equality bodies and integrated equality legislation", MPG, 2004, p. 21.

<sup>6</sup> ECRI, General Policy Recommendation No 2 on Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level, 1997.

<sup>7</sup> Rikki Holtmaat, European Network of Legal Experts in the non-discrimination field, *Catalysts for Change? Equality bodies according to Directive 2000/43/EC*, MPG, HEC, European Commission, 2006, page 48.

In order to enhance their effectiveness, the equality bodies should provide regular reports for their actions and the outcome of their work, if possible to the national parliament.<sup>8</sup>

A strategic enforcement policy contributes to establishing precedence and can play an important role to the success of the equality bodies' mission. The fact, though, that most of the equality bodies are burdened with a surplus of complaints to be addressed, can lead to prioritizing the examination of the individual complaints above the proactive strategic litigation approach, which in the long term is more effective in tackling discrimination, as many victims are hesitant to initiate legal proceedings. However, the targeted litigation policy of the US Equal Employment Opportunity Commission in the early 1970s demonstrates the potential of this approach, as it had a significant result in "identifying and breaking down patterns of systemic race and sex discrimination and shaping much of the core legal concepts in discrimination law".<sup>9</sup>

In addition, enforcement tools that are set aside for the equality bodies to use are a significant feature for their overall effectiveness. However, some equality bodies do not have investigative powers and this poses difficulties in gathering the necessary evidence. In addition, most equality bodies that have the power to investigate a complaint do not have the authority to give binding decisions, and this results that the victim of discrimination needs to continue the case to courts.<sup>10</sup> Moreover, the mandate of the equality bodies should encompass the necessary power to assist victims of discrimination through effective representation to courts.

Nevertheless, apart from securing justice, the promotion of the principles of diversity and equality through good practise measures and awareness policies is essential in preventing or exposing discriminatory tactics.

**Questions:**

- *How are the equality body/bodies in your country dealing in terms of strategic enforcement of the Directive?*
- *Do they adjudicate all complaints and assist all victims of discrimination, or have they adopted a selective approach to the cases, based on specific criteria that they have set?*
- *Do they follow-up at the cases they have dealt with, in order to check if their recommendations have been adopted by the public/private institutions? Are the complaints adjudicated within a reasonable amount of time or there are unjustifiable delays that render impossible the reward of justice?*
- *Do they pursue any awareness-raising or training activities or try to reach out to the most vulnerable groups?*
- *Does law in your country foresees that the equality body/bodies are accountable to public scrutiny?*
- *Are they obliged to publish independent reports and/or surveys about their performance? If yes, do they have the right to choose the issue of their surveys/reports or is it selected upon government's recommendations?*
- *Are these reports publicly presented to the national parliament and/or to government officials? What impact do they have in general?*

<sup>8</sup> This requirement is also included in the ECRI General Policy Recommendation No 2, at Chapter D, Principle 5 (3).

<sup>9</sup> Colm O'Cinneide, *A Single Equality Body: Lessons from Abroad*, Equal Opportunities Commission, 2002, p. 19.

<sup>10</sup> Rikki Holtmaat, European Network of Legal Experts in the non-discrimination field, *Catalysts for Change? Equality bodies according to Directive 2000/43/EC*, MPG, HEC, European Commission, 2006, page 55.