

"Race" in European Law - An Analysis of Council Directive 2000/43/EC

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In June 2000, the EU's Council of Ministers adopted a new directive "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin." [1] This legislation was part of a package of anti-discrimination measures introduced on the basis of 1998 amendments to the Treaty Establishing the European Community (TEC). Article 13 TEC, while groundbreaking, hardly facilitated the adoption of new measures, given the breadth of manoeuvre it allowed the EU's executive trio. The Commission is permitted, but not obliged, to act; measures require unanimity in the Council, difficult to reach at the best of times; and the Parliament, traditionally keen on minority rights, has only a consultative role in implementing Article 13. [2] Nevertheless, the "Race Directive" was adopted swiftly, as a Community response to the electoral success of the right-wing Freedom Party in Austria that year. Unsurprisingly, the adopted directive makes no mention of minorities, and incorporates few of the several amendments and supplements proposed by the European Parliament. It nevertheless marks a major advance in providing a framework for protection against ethnic discrimination across the EU.

In an explanatory note, the Commission explains its rationale for taking action at the Community level. Although most Member States have ratified a number of international instruments combating racial discrimination, "none provides direct recourse to redress for individuals without further implementing action by the States which are party to them." [3] In addition, measures adopted by Member States to combat racial discrimination, vary significantly in their scope, contents and enforceability. [4] Finally, the Commission invokes European enlargement and the increased diversity it heralds, for which reason "it is essential to put in place a common European framework for the fight against racism." [5] The directive provides a minimum level of harmonization while respecting the principle of subsidiarity and the cultural diversity of States by allowing them to act in accordance with national traditions and practice.

Scope and innovation

The major innovation of the directive is the increased scope it allows for actions to be taken in cases of discrimination on the grounds of race or ethnicity. Article 3 states that the directive applies to *all persons*. This must be read in conjunction with paragraph 16 of the preamble, which stresses the protection of "all natural persons" and of "legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members". Therefore the term *all persons* refers to both natural persons and legal persons.

Although its scope is limited to the powers conferred upon the Community, [6] the directive nevertheless applies to a broad range of situations. Indeed, it covers employment *sensu lato*, social protection and security, social advantages and education, and access to, and the supply of, goods and services, including housing. This is very important since members of ethnic minorities are often marginalised in matters such as access to services, or decisions on scholarships and loans, etc. Nevertheless, Article 3 raises some questions of interpretation. [7] First, it is unclear whether volunteer work, internships and pensions fall within the scope of the directive. Second, the concept of "social protection" it invokes is not defined, and it is thus unclear whether the supply of services by the state is also covered, or to what extent. In addition certain activities, such as the exercise of public functions, participation in social, cultural life and in associations, are not covered by the directive. [8]

The directive does not prevent difference of treatment based on ethnic or racial characteristics if the latter "constitutes a genuine and determining occupational requirement, provided that the

objective is legitimate and the requirement is proportionate". [9] In its explanatory memorandum, the Commission states that this exception, inspired by similar clauses in national legislation, shall be highly exceptional and must be interpreted restrictively. Possible derogations could then include, for example, theatre roles, where, a person of a certain ethnic or racial origin is required for the sake of authenticity. Or, "where the provision of personal service promoting the welfare of a particular ethnic group can most effectively be provided by a person of that group". [10] Since fear of dismissal is one of the major obstacles to individual action, [11] the directive also calls upon Member States to protect plaintiffs from *victimisation*, i.e. "any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment" [12]. Member States are also obliged to disseminate information throughout their territory concerning anti-discrimination legislation. [13] In an interesting development, Article 11 of the directive provides that Member States must stimulate social dialogue - and even the conclusion of agreements - between "the two sides of industry with a view to fostering equal treatment". This "dialogue" is neither limited to social partners, nor does it solely concern employment - rather it concerns every area protected under Article 3. The Commission notes that the role of the social partners in combating racial discrimination was cemented in the social partners' joint declaration on racism and xenophobia in the workplace, adopted in Florence in 1995. Since then, social partners in several Member States have adopted framework agreements on combating ethnic and racial discrimination and codes of conduct at the national level. [14] This development is likely to be enhanced by the directive. Member States are also asked to encourage dialogue with non-governmental organizations to enhance equal treatment. [15]

Drawbacks and limitations

The notion of discrimination: The directive defines "discrimination" broadly, including both direct (i.e. overt) and indirect (i.e. covert) discrimination, as well as harassment. [16] It further includes within this definition, the "instruction to discriminate" - a curious formulation given that the more standard term, *incitement*, would also have been broader than the notion of *instruction*. [17] The directive does not provide any definition of the words *racial or ethnic origin*. A reference to the definition contained in Article 1 of the 1966 International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), [18] which includes colour, descent and national or ethnic origin within the concept of "race", could have sufficed. The case law of the European Courts of Human Rights also relies on this article for the purpose of defining "race". [19] Since a combination of both ethnic and religious characteristics can lead to discrimination against minorities, it is surprising and unsatisfactory that religion has not been mentioned distinctly as a prohibited ground in the directive. [20] Religion is specifically mentioned in another directive resulting from Article 13 TEC, addressing discrimination of all kinds in employment. [21] The result of this is that discrimination based on religion is only prohibited in this narrow area. This is the more surprising, as the case law of the UK's House of Lords, for example, had already judged discrimination of religious minorities to fall under the aegis of racial discrimination in the ICERD. [22] This interpretation is confirmed by the fact that the Convention was drafted as a direct result of increasing anti-Semitism after the Second World War. [23]

Positive action: The directive (Article 5) also allows for positive actions to prevent or compensate for disadvantages resulting from a racial or ethnic origin. [24] To undertake positive action, disadvantages must first be established and the means to eliminate them must be proportional - positive action is precluded as soon as the disadvantageous situation has disappeared. [25] The provision is similar to Article 2(4) of the 1976 Directive on Equal Treatment, [26] which provides that "provisions contrary to the principle of equal treatment, when the concern that originally inspired them is no longer well-founded, shall be

revised". [27] It is likely that the European Court of Justice (ECJ) will interpret the new directive similarly, that is, narrowly.

Thus, in *Kalanke* [28] the ECJ held that since Article 2(4) was an exception to the right to equal treatment, it must therefore be interpreted strictly. The ECJ consequently struck down a rule providing that priority must be given to women, as long as they were under-represented, among equally qualified candidates for promotion. In *Marshall*, [29] the ECJ refined its case law, upholding regulations which, by virtue of a so-called "saving clause", do *not* give automatic preference to the under-represented in cases of equal qualification. This clause obliges an "objective assessment which will take account of all criteria specific to the individual candidates and will override the priority [of addressing under-representation] where [...] those criteria tilt the balance". [30] The ECJ has also followed this restrictive approach in the interpretation of the new Article 141(4) TEC, where it also requires an "objective assessment which takes account of the specific personal situations of all the candidates". [31] It remains to be seen whether the ECJ will apply the same interpretation to Article 5 of the Race Directive.

Collective actions

The two possibilities for acting in defence of violated rights foreseen in Article 7 of the directive do not mark an advance on existing legislation in Member States. First, Member States must provide procedures allowing all persons to enforce their rights, even after the termination of a relationship in which discrimination has allegedly taken place. Second, legal persons with a legitimate interest in ensuring enforcement of the directive must be allowed to act on behalf of, or in support of a complainant. It has been argued that since both types of action already exist in all Member States, this provision does not go far enough. [32]

Thus, no provision is made for the collective right of action of organisations representing the interests of discriminated persons, so-called "class actions". Such actions have several advantages. First, since litigation can be launched independently of the specific circumstances of a particular case, class actions offer the possibility to combat *structural* discrimination. Second, since individual victims of discrimination are generally reluctant to go to court, this would provide a means to rule collectively on their rights. Third, organisations can act in place of individuals who fear reprisals.

Such a possibility is not unprecedented in European law. For example, inspiration could be drawn from directives concerning consumer protection, which grant the right of representation to consumer protection organisations. [33] Such a collective right of action would also be useful to combat cross-border discrimination by allowing organisations to ask for cross-border injunctions, as is already the case in laws for the protection of consumers. [34]

Nevertheless, in the context of enlargement, Article 7 undoubtedly provides a standard for new members on the basis of existing practice in Member States.

Independent bodies and the burden of proof

The directive obliges Member States to designate independent bodies for the promotion of equal treatment, whose competences include assisting victims in complaining, conducting surveys, publishing reports and making recommendations. [35] These bodies may be either specialized agencies or may form part of wider human rights bodies. The directive does not, however, foresee the institution of a national specialised body entrusted with the legal duty of investigating all complaints and ruling upon them or submitting them to judicial institutions. [36] Given the high procedural thresholds for victims of discrimination (time, money and effort) and the common reluctance to go to courts, these institutions could play a very important role, especially if they are granted legal investigation powers. Not only do they provide easier access to justice, but they can also act as a filter for the courts.

Article 8 eases the proof of discrimination by shifting the burden of proof to the defendant once the alleged victim has established "facts from which it may be presumed that there has been direct or indirect discrimination". The burden of proof is not entirely reversed, since a mere allegation of discrimination does not suffice to implement it. This measure does not prevent Member States from introducing rules of procedure for evidence that may be more favourable to plaintiffs. The "reversal" does not apply to procedures where the Court must investigate the facts of the case, nor to criminal procedures, where the principle of the *presumptio innocentia* applies.

Final provisions

Member States are required to ensure the compliance of national provisions - and of private sector regulations - with the directive, [37] and to adopt sanctions for infringement of the national provisions implementing the directive. [38] These sanctions must be effective, proportionate and dissuasive and they have to be notified to the Commission. Member States are also under an obligation to report every five years to the Commission. [39] Since the deadline for the implementation of the directive is 19 July 2003 [40], the directive will not confer any legally enforceable rights on individuals before this date, nor will the ECJ be able to control its implementation before mid-2003. Nevertheless, "during that period they [Member States] must refrain from taking any measures liable seriously to compromise the result prescribed." [41] Following that date, candidate countries too will be obliged to demonstrate compliance with the directive as a condition of entry. It is perhaps in those countries, where many of the directive's provisions are not standard, that the directive will have the most impact.

Footnotes

[1] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L 180, 19 July 2000, p. 22-26.

[2] Article 13 of the Treaty Establishing the European Community: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

[3] COM(1999) 566 final, "Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin", p.3. "Commission's anti-discrimination package", European Industrial Relations Review, 2000, No. 312, p. 13 and 15.

[4] "Commission's anti-discrimination package", p. 15.

[5] COM(1999) 566 final, p.4.

[6] Article 3 of Council Directive 2000/43/EC.

[7] Rodrigues, p. 282.

[8] Rodrigues, p. 282.

[9] Article 4 of Council Directive 2000/43/EC

[10] "Commission's anti-discrimination package", p. 16.

[11] "Commission's anti-discrimination package", p. 16.

[12] Article 9 of Council Directive 2000/43/EC.

[13] Article 10 of Council Directive 2000/43/EC.

[14] "Commission's anti-discrimination package", p. 16.

[15] Article 12 of Council Directive 2000/43/EC.

[16] Article 2 of Council Directive 2000/43/EC.

[17] Rodrigues, P.R., "De richtlijn tegen rassendiscriminatie bezien vanuit polderperspectief", Nederlands tijdschrift voor Europees recht, 2000, Vol. 6, No 11, p. 283-284.

- [18] International Convention on the Elimination of all Forms of Racial Discrimination (1966), Blackstone's International Law Documents (2d ed.), London, Blackstone Press Limited, 1994, p. 121-130.
- [19] *Jersild v Denmark*, 24/09/1994.
- [20] Rodrigues, p. 281.
- [21] Paragraph 24 of the preamble of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O. J. L 303, 2 December 2000 p. 16-22.
- [22] *Mandia v Dowell Lee*, All ER, p. 1062.
- [23] Rodrigues, p. 282.
- [24] Article 5 of Council Directive 2000/43/EC.
- [25] Rodrigues, p. 282
- [26] Council Directive 1976/207/EEC of 9 February 1976 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, (1976) O. J. L 39, p. 40.
- [27] Articles 3(2)(c) and 5(2)(c) Council Directive 1976/207/EEC.
- [28] C-450/93 *Kalanke v Freie Hansestadt Bremen*, (1995) ECR I-3051.
- [29] C-409/95 *Hellmut Marshall v Land Nordrhein Westfalen*, ruling of 11 November 1997, (1997) All ER (EC), p. 865.
- [30] *Marshall*, para. 33.
- [31] C-407/98 *Abrahamsson, Anderson and Fogelqvist*, ruling of 6 July 2000, para. 62, <http://europa.eu.int/cj/index.htm>
- [32] Rodrigues, p. 280.
- [33] Article 11(2)(b) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, O. J., L 144, 4 July 1997, p. 19-27.
- [34] Article 4(1) of Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, O. J., L 166, 11 June 1998, p. 51-55.
- [35] Article 13 of Council Directive 2000/43/EC.
- [36] Rodrigues, p. 281.
- [37] Article 14 of Council Directive 2000/43/EC.
- [38] Article 15 of Council Directive 2000/43/EC.
- [39] Article 17 of Council Directive 2000/43/EC.
- [40] Article 16 of Council Directive 2000/43/EC.
- [41] C-129/96 *Inter-Environnement Wallonie* (1997) ECR I-7411, paragraph 45.