

Fact Sheet

The EU Anti-discrimination legislation

This fact sheet is developed under the Project for Promoting EU Citizenship Among Roma People, supported by the European Commission, DG Education and Culture. The purpose of the fact sheet is to provide the targeted audience of the project with an overview of the European anti-discrimination legislations without going into deep legal and comparative analyses, something which will make the content of the fact sheet more accessible and understandable. The fact sheet also aims at raising awareness among Roma and other vulnerable groups about the existence of European anti-discrimination instruments which they could use to redress discrimination to which they are often subjected

The principle of equality and non-discrimination is underlined as priority legislation in all human rights treaties and declarations. Non-discrimination is both a human right of its own and a constitutive element of all human rights.

Council of Europe and lately the European Union have in a considerably way contributed to the legal guarantees against discrimination. Despite the strong position of the general non-discrimination principle, guaranteeing the same rights for all on equal footing, it has been found necessary that vulnerable groups are afforded also added protection in order to address concerns that are specific to them.

The Historical Context

The 1980's was a period of increase of violent racism and intolerance, re-appearance of ultra rights wing extremist parties, ethnic tension and persistence of discrimination. In addition the electoral developments in Austria in the end of 1999 prompted some EU states to offer a tangible evidence of their commitment to fight discrimination and racism. The Starting Line Group, a network of about 500 NGOs marked the beginning of Civil society call for the adoption of European anti-discrimination legislation. The aim of the group was to raise awareness of persistent racism in Europe. Its activities focused on promoting concrete legal measure to combat racism and discrimination. This group rapidly gained the support of the European Parliament and from national and European level NGOs. In 1994 A large campaign was launched around the Starting Line

proposal for the adoption of an equality directive. In June 1997 the outcome of Intergovernmental Conference in Amsterdam was the signing of the Amsterdam Treaty which called for adoption of general anti-discrimination clause, the Article 13 of the European Treaty. Later in December 1998 in Vienna, The Commission officially announced the measure to be adopted under Article 13, the so called "Article 13 package"

1) Directive aiming at the fight against racism in all areas of life (The Race Equality Directive), 2) Directive aiming at the fight against discrimination on the grounds in the employment field (the Framework Directive) and 3) a five year Community action program to combat discrimination.

In 1999 based on the new Article 13 the Commission presented proposal for a directive aiming at implementing the principle of equal treatment between person irrespective of racial or ethnic origin.

The Directive was adopted on June 29, 2000 and Member States were given a period of three years to transpose the directive into their domestic law. In November the same year the Directive establishing a general framework for equal treatment in employment and occupation and the Community action program against discrimination were subsequently adopted.

Besides discrimination on racial and ethnic ground, discrimination based on sex has been addressed by the EU law .

Initially the focus was on equal pay for women and men, guaranteed in Article 119 of the Treaty of Rome. This guarantee was supplemented in 1975 by Directive (EEC) 75/117 concerning equal pay for men and women. This Directive was followed in 1976 by the **Equal Treatment Directive (ETD)**, which provided for equal treatment in all aspects of employment relationship, including access to employment, vocational training, promotion and working conditions. In 1997 the Council issued a specific directive on the burden of proof in case of discrimination based on sex. Finally in September 2002 the Council adopted a new directive amending the 1976 Equal Treatment, the member state of the EU were obliged to transpose this directive by October 2005.

On December 7, 2000, the European Council, European Commission and the European Parliament solemnly proclaimed the Charter of Fundamental Rights of the European Union.

It should be stressed the importance of Council of Europe's parallel actions to the European Union regarding racial discrimination. In October 1993, the Vienna Summit of Heads of States and governments of the Council of Europe decided in the framework of the Council of Europe's Action Plan against Racism and intolerance to create the European Commission against Racism and Intolerance (ECRI).

The Committee of Ministers of the Council of Europe adopted Protocol 12 to the European Convention on Human Rights. The Protocol broadens the scope of the

Article 14 of the convention, which prohibits discrimination but only in conjunction of the rights already enshrined in the Convention. Protocol 12 was opened for signature in Roma on November 4, 2000 with the condition that it will enter into force only after ten Council of Europe Member States have ratified it.

1. European Union Law

The well established EU law on gender discrimination provided a good base for further development of mechanisms to regulate discrimination on other grounds. This progress was evident in the adoption of Charter of Fundamental Rights, and the adoption of Article 13 of the Treaty of Amsterdam, when created the legal basis for the adoption of the two Directives on equal treatment irrespective of racial or ethnic origin, religion or belief, disability, age and sexual orientation.

The Charter of Fundamental Rights sets out a wide range of rights, clarifying to an extent which fundamental rights are protected in the context of the EU.

Article 21 (1) of the Charter provides for sweeping prohibition of all forms of discrimination:

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

The Article presents an extensive list of seventeen expressly prohibited grounds.

Article 13 of the EC Treaty

Article 13 of the EC Treaty, as amended in Amsterdam, provides:

“ Without prejudices to the provision 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.”

The wording in Article 13 makes clear that it is an enabling provision and can not be applied directly. Its significance lies in providing the ground for the adoption of further EU anti- discrimination legislation.

Race Equality Directive 2000/43/EC

The Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin was adopted by Council on June 2006. The

Member States had to transpose the directive into national legislation by mid-2003. In addition as part of the *acquis communautaire*, the Directive had to be transposed by all candidate countries to the EU.

The directive defines as discrimination on grounds of racial or ethnic origin:

- a) direct discrimination, b) indirect discrimination, c) harassment and d) instruction to discriminate.

For the purpose of the Directive **direct discrimination** is defined as having occurred “where one person is treated less favorably than another is, has been or would be treated in comparable situation on grounds of racial or ethnic origin”. An example for direct discrimination might be company, which as a matter of policy, refuses to accept Roma job applicants, or a housing office which by intention and design assigns Roma to sub-standard housing.

Indirect discrimination shall be taken to occur “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by legitimate aim and the means of achieving that aim are appropriate and necessary.”

Examples could be a department store which states that no persons with long skirts may enter the store, or governmental office which prohibits entry by persons with covered heads. These internal policies although neutral on their face as to ethnicity, in fact may disproportionately disadvantage members of certain ethnic groups, who have tendency to wear long skirts or head scarves.

According to the Directive, **harassment** takes place,

“ when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment”. This could range from physical violence to racist remarks, jokes or ostracism.

An **instruction to discriminate** constitutes discrimination in itself. In cases where an employer instructs its staff responsible for selection of employees, not to select people with a particular ethnic background, and a person is therefore rejected, both the employer and the staff member made the selection are liable.

The Race Equality Directive 2000/43 EC has a strong focus on remedies and enforcement.

First, it provides for a shifted burden of proof. The Directive foresees a shift of the burden of proof in favor of the person who wants to enforce his or her right to non-discrimination. If the complainant presents facts from which discrimination

can be presumed, the respondent has to prove that he or she has not discriminated on one of the grounds listed in the Directive.

The shifting of the burden of proof does not apply to criminal procedures.

Second, organizations with “legitimate interest”, associations and other legal entities concerned with the defense of human rights should be allowed to institute, support, and or represent victims in legal actions to enforce the rights granting protection against discrimination.

Third, Member States have to adopt into their legislation measures necessary to protect individuals from victimization, i.e. adverse treatment or adverse consequence as a reaction to a complaint of discrimination.

Forth, Member States are obliged to “take all measures necessary” to ensure that sanctions applicable to discrimination are applied. Furthermore, such sanctions must be effective, proportionate and dissuasive.

Fifth, Member States designate body or bodies for promotion of equal treatment of all persons irrespective of racial or ethnic origin. These bodies are to provide independent assistance to the victims of discrimination, conduct surveys concerning discrimination and to take recommendations on any issues relating to discrimination.

Framework Employment Directive 2000/78/EC

In 27 November 2000 the EU Council adopted Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Framework Employment Directive). This Directive had to be transposed into national law by December 2, 2003.

The scope of the Framework Employment Directive provides for combating discrimination on the grounds of religion or belief, disability, age and sexual orientation

Most of the key definitions and features of the Racial Equality Directive have been transposed into the Framework Directive. The provisions of the two Directives are materially the same as regards the states purpose of the Directive, definition of discrimination, exception made for genuine and determining occupational requirements, positive action, minimum requirements, and provision concerning remedies and enforcement, including the rights of organizations to engage in judicial or administrative proceedings and the provision on the burden of proof.

Both directives provide for an exception regarding discrimination the ground of nationality. The exception of genuine occupational requirements on the grounds of both directives is considered as not discriminatory if it is justifiable by certain characteristics related to the job. The exception might apply to any job that involves a person's authenticity like in the case of actor, or model or a waiter in a restaurant that serves food from a particular country or culture.

The major differences between the two directives lie in the grounds protected and in the material scope of the respective Directives.

The Framework Directive also provides for several grounds specific restrictions. According to Article 3(4), the Directive does not apply to the armed forces as regards discrimination on the grounds of disability and age. Article 6 provides a justification for different treatment on the basis of age; such treatment shall not be taken to constitute discrimination if it is "objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

On the positive side the Directive requires employers to provide reasonable accommodation for persons with disability. This means that employers must take appropriate measures to enable a person with disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

Both of the Directives discussed, the Framework Directive in Particular, leave considerable room for interpretation. In the end of the day, the ECJ will have the last word in providing the rules with greater detail.

2. Council of Europe Law

2.1 European Convention on Human Rights and Fundamental Freedoms

The European Convention on Human Rights and Fundamental Freedoms was signed in Rome on November 1950. The Convention lays down a list of mostly civil and political rights and freedoms. An individual claiming to be a victim of violation of the Convention, may lodge directly with the European Court of Human Rights in Strasbourg an application alleging a violation by state of one of the Convention rights.

Article 14 of the European Convention states

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, color, language, religion, political or other opinion, national and social origin, association with a national minority, property, birth or other status.

As the wording of the Article 14 indicates, it is not an independent prohibition of all kinds of discrimination, but is limited to the enjoyment of the rights and freedoms set forth in the Convention including all protocols as well. Article 14 is therefore complimentary to the other substantive provisions in the sense that it can be applied only where the facts at issue fall within the ambit of one or more of the substantive provisions of the Convention.

In order to establish discrimination, a comparator is often needed. It has to be noted, though, that not just differential treatment of persons similarly situated may constitute discrimination, but also similar treatment of persons in dissimilar situations may constitute discrimination.

A difference of treatment is thus discriminatory if it has no 1 a) objective and reasonable justification, that is, if it does not pursue a “legitimate aim” or b) if the requirements of the proportionately principle are not fulfilled, and c) the difference is not within the remit of the margin of appreciation. The applicant has the burden of establishing a difference in treatment (or the failure to ensure different treatment) and the state must then establish objective and reasonable justification, including the requirement of proportionality.

A special importance should be attached to discrimination based on race; that publicly to single out a group of persons for differential treatment on the basis of race might in certain circumstance constitute a special form of affront to the human dignity; that the differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.

2.1.2 Protocol No 12 of the European Convention

Protocol No 12 was adopted in November 2000 in Rome. It entered into force following the expiration period of three months after the date of ten Member States of the Council of Europe have expressed their consent to be bound to the Protocol.

Article 1 of the protocol contains a general prohibition of discrimination:

1. The enjoyment of any right set forth by law shall be secured without any discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Protocol 12 does thus not amend or abrogate Article 14, which will continue to apply in respect of state parties to the Protocol. Any question regarding the relationship between these two provisions will be within the Court's jurisdiction.

The list of grounds is identical with Article 14. The additional grounds was considered, but deemed unnecessary since the list is not exhaustive and the explicit inclusion of some grounds could have led to *e contrario* – arguments that some other grounds were thus implicitly excluded.

The protective scope of Article 1 of Protocol 12 is much broader than that of Article 14 because it is not limited to the enjoyment of the rights and freedoms set forth in the Convention, but extends to “all rights set forth by law” may be taken to cover not just national law but also international law. The Court would those have jurisdiction to examine whether a right emanating from another international instrument is applied in a discriminatory manner, but it would not have jurisdiction to examine the compliance of the state with that rights in any other respect.

According to the Explanatory

Report, the Protocol provides added protection, in comparison on Article 14, where the person is discriminated against:

- in the enjoyment of any rights specifically granted to an individual under national law;
- in the enjoyment of a rights which may be inferred from a public authority's clear obligation under national law to behave in a particular manner;
- by a public authority in the exercise of discretionary power (for example, granting subsidies);
- or by any other act or mission of a public authority (for example, behavior of police officers when controlling a riot)

The principle objective of Article 1 is to protect individuals from discrimination by public authorities, including the courts, legislative bodies and administrative bodies. The article is not intended to impose positive obligation on the parties to take measures or prevent or remedy all instances of discrimination in relation between private persons. In some instances however the failure of a state to provide protection from discrimination in private relations may be considered to violate the Protocol, if this failure results in a situation in which a right set forth by law can not be enjoyed on an equal basis.

The operative paragraph of Protocol 12, do not expressly refer to positive measures. While the taking positive measures to remedy existing discrimination in fact is not required, it is allowed, as is clear from the practice of the Court as regards the interpretation of the concept of “discrimination” under Article 14. This

is also underlined in the preamble to Protocol 12, which reaffirms that: The principle of non-discrimination does not prevent State Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.

2.1.3 European Commission on Racism and Intolerance – General Policy Recommendations

Apart from these legal instruments the framework of the Council of Europe also includes a special body to combat racial discrimination; the European Commission on Racism and Intolerance (ECRI). ECRI, which was established in 1993 has the mandate to review Member States' legislation, policies and other measures to combat racism, xenophobia, antisemitism and intolerance as well as their effectiveness.

One of the pillars of the ECRI's statutory activities is the preparation of General Policy recommendations, which are addressed to all Member States and provide guidelines which policy makers are invited to use when drawing up national strategies and policies in various areas. ECRI has so far adopted the following eleven General Policy Recommendations (GPR):

- 1) GPR No: 1 contains a number of guidelines for national measures concerned with legal and policy aspects of the fight against racism and intolerance
- 2) GPR No: 2 concerns specialized bodies to combat racism and discrimination at national level
- 3) GPR No: 3 relates to combating racism, discrimination and intolerance against Roma/Gypsies
- 4) GPR No: 4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims.
- 5) GPR No: 5 deals with combating intolerance and discrimination against Muslims
- 6) GPR No: 6 concerns the dissemination of racist material via internet.
- 7) GRP No: 7 sets out the key elements which should feature in comprehensive national legislation to effectively combat racism and racial discrimination
- 8) GPR No: 8 focuses on how to ensure that the fight against terrorism does not infringe upon the rights of persons to be free from racism and racial discrimination
- 9) GPR No: 9 is devoted to the fight against anti-Semitism
- 10) GPR No: 10 on combating racism and racial discrimination in and through school education
- 11) GPR No: 11 on combating racism and racial discrimination in policing

The Commission furthermore conducts country-by-country monitoring visits, meeting key actors in the fights against racism and discrimination in the

country concerned in order to obtain as detailed and comprehensive a picture as possible of the situation as regards racism and intolerance in each country. The findings are summarized in country-specific reports.

2.1.4. Framework Convention for the Protection of National Minorities

The Framework Convention for Protection of National Minorities entered into force on February 01, 1998. This was an important milestone because the convention because the Convention is the first legally binding multilateral instrument devoted to the protection of minorities in general. Its effectiveness, however, is likely to depend on whether it is taken seriously by governments and the strength of the Council of Europe's monitoring mechanisms to oversee its implementation.

The use of the term "framework" refers to the fact that the Convention contains "program-type" provisions. The convention creates legal obligation to the State Parties and obliges them to realize the principles of the Convention by taking special measures, refraining from certain practices and guaranteeing specific rights. However, its provisions are worded as state obligations and are not couched in terms of specific rights for individuals belonging to minorities as in the ECHR.

Article 4 specifies the obligation of State Parties to guarantee the right of equality before law and equal protection by law. It also obliges state to take "adequate measures" to promote "full and effective equality" in all areas of life and determines that these measures shall not be considered acts of discrimination.

Article 4

The Parties undertake to guarantee to persons belonging to national minorities the rights to equality before the law and equal protection of the law. **In this respect, any discrimination based on belonging to a national minority shall be prohibited.**

The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political, and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.