Com 074

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.11.1999
COM(1999) 566 final

1999/0253 (CNS)

Proposal for a

COUNCIL DIRECTIVE

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. Introduction

The aim of this proposal is to implement the principle of equal treatment between people of different racial or ethnic origins in the European Union.

The proposal sets a minimum framework for the prohibition of discrimination based on racial or ethnic origin and establishes a minimum level of legal protection within the European Union for persons who have suffered from discrimination. It provides a common definition for unlawful discrimination and a common minimum level of legal redress within the European Union.

The proposal is based on Article 13 of the Treaty establishing the European Community and forms part of the wider package of action including a Directive to prohibit discrimination in the labour market on grounds of racial and ethnic origin, religion and belief, disability, age and sexual orientation and an Action Programme to support practical efforts in the Member States to combat discrimination.

II. Context

The fight against racism is a major concern of the international community and has been at the heart of international cooperation in recent decades.

Europe's experiences of wars and conflicts throughout the 20th century – and even at its close – have brought to the fore the dangers of racism and the dramatic attacks on human dignity that have ensued. Yet, at the end of the century, racial discrimination is still not eradicated from everyday life in Europe.

It is widely acknowledged that legal measures are of paramount importance for combating racism and intolerance. The law not only protects victims and gives them a remedy, but also demonstrates society's firm opposition to racism and the genuine commitment of the authorities to curb discrimination. The enforcement of anti-racist laws can have a significant effect on the shaping of attitudes.

For this reason, the international community and the Member States of the European Union have strengthened their legal instruments against racism during recent decades. A large number of international legal texts deal with the issue of racism either specifically or within other instruments on the protection of human rights[1].

The European institutions have on many occasions, and as early as 1977[2], declared their commitment to the defence of human rights and fundamental freedoms and condemned intolerance, racism, xenophobia and anti-Semitism.

---

[1] See Annex for a list of the relevant International Treaties and Covenants.

[2] Joint Declaration by the European Parliament, the Council and the Commission on fundamental rights, 5 April 1977 (OJ C 103, 27.4.1977, p. 1).

Continuing its efforts to fight racism and following the Commission Communication[3] of 13 December 1995, the Council and the representatives of the governments of the Member States adopted on 23 July 1996 a resolution proclaiming 1997 European Year against Racism[4].

Following the European Year and building on the lessons learned, the Commission adopted, on 25 March 1998, a Communication containing an Action Plan on the Fight against Racism[5]. The Action Plan adopts a comprehensive approach, highlighting the importance of mainstreaming the fight against racism in all European policies and underlining the need to promote partnership between European institutions and all relevant actors, both governmental and non-governmental.

In this context, European institutions and civil society have consistently called for legislative action in the area of racism.

III. Subsidiarity and proportionality: The need for European intervention in the field of racism

As was underlined by the European Parliament in its Resolution on the resurgence of racism and xenophobia in Europe, dated 21 April, 1993, racism and xenophobia "undermine the principles of democracy, the protection of human rights and the fundamental freedoms and the constitutional traditions common to all Member States"[6].

The commitment to human rights and fundamental freedoms by the European Union has been reinforced by the Treaty of Amsterdam. Articles 6 and 7 of the Treaty strengthen the protection of human rights as a basic principle on which the European Union is founded. Article 13 provides the specific power to take action to give effect to measures to combat discrimination. Moreover, the Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice. At its extraordinary meeting in Tampere on 15 and 16 October 1999, the European Council invited the Commission to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty on the fight against racism and xenophobia as a contribution to this objective.

A number of international instruments exist to support the fight against racism. These range from general affirmations of human rights (Universal Declaration of Human Rights, European Convention on Human Rights) to specific texts dealing exclusively with racism and xenophobia (International Convention on the Elimination of all forms of Racial Discrimination, ILO Convention 111, new draft protocol to the ECHR). While these instruments lay down general principles for combating discrimination, none provides direct recourse to redress for individuals without further implementing action by the States which are party to them.

---

3 COM(95) 653 final of 13 December 1995.
4 OJ C 237, 15.8.1996, p. 1.
5 COM(1998) 183 final of 25 March 1998.
6 OJ C 150, 31.5.1993, p. 127.

The Member States have themselves introduced a range of measures to assert the right of individuals not to be discriminated against on grounds of racial or ethnic origin. All Member States have introduced laws to combat racist violence and the incitement of racial hatred, in particular following the Joint Action concerning racism and xenophobia of 15 July 1996. Some Member States have also introduced non-discrimination clauses in their constitutions, which may or may not provide individuals with a right of redress. A large number of Member States have in addition enacted specific legislation, underpinned by access to redress through the Courts for victims, to outlaw racial discrimination in certain aspects of employment, while others, such as Ireland, the Netherlands and the United Kingdom, have covered other areas of everyday life such as access to goods and services and education.

The prohibition of discrimination on grounds of racial or ethnic origin therefore exists in all Member States but its scope, contents and enforceability vary significantly. However, the existence of legal powers and evidence of the political will to act do not in themselves justify Community legislation. The Protocol to the Amsterdam Treaty on the application of the principles of subsidiarity and proportionality (1997) justifies Community action when:

> *"action at Community level would produce clear benefits by reason of its scale or effect compared with action at the level of the Member States"*

The adoption of a Directive at Community level will constitute an unequivocal statement of public policy towards discrimination. It will lay down common protections against racial discrimination to be enjoyed by citizens all over the Union, reinforcing and supplementing the protections which currently exist in the Member States, either by widening the material scope of such protections or by providing or strengthening access to redress. In doing so, it will reinforce the fundamental values on which the Union is founded – liberty, democracy, the respect for human rights and fundamental freedoms and the rule of law – and contribute to the development of the Union as an area of freedom, security and justice. And it will help to strengthen economic and social cohesion by ensuring that people in all Member States enjoy a basic level of protection against discrimination, with comparable rights to redress, while taking account of the cultural diversity of Member States.

The Directive will also underpin Member States' efforts to achieve other goals laid down at European level, in particular in the context of the coordinated strategy for employment (especially Guideline 9) and in developing a wide access to education and training of quality.

Finally, the Directive will provide a solid basis for the enlargement of the European Union, which must be founded on the full and effective respect of human rights. The process of enlargement will bring into the EU new and different cultures and ethnic minorities. To avoid social strains in both existing and new Member States and to create a common Community of respect and tolerance for racial and ethnic diversity, it is essential to put in place a common European framework for the fight against racism.

IV. The Commission's approach to Community action

In proposing a Directive to combat discrimination on grounds of racial and ethnic origin, the Commission has taken account of experience at national and international levels and the views expressed in the various consultations which it has carried out. The European Parliament in its resolution of 29 January 1998[7] argued that the Directive should cover "the fields of employment, education, health care, social security, housing and public and private services".

The Commission agrees that a comprehensive coverage is necessary to make a serious contribution to curbing racism and xenophobia in Europe. The European Union has recognised, not least in the context of the coordinated strategy for employment, that participation in economic life is often a pre-requisite for successful social integration more widely. Equally, social protection systems play a fundamental role in ensuring social cohesion, and in maintaining political stability and economic progress across the Union. Discrimination in access to benefits and other forms of support from the social protection system contributes to and compounds the marginalization of individuals from ethnic minority and immigrant backgrounds. The same is true of social advantages, which are often discretionary, with a character or purpose similar to social protection.

Other areas are more indirectly linked to the world of work but nevertheless contribute significantly to social and economic integration. High quality education is, for example, a pre-requisite for successful integration into society. Therefore attention must be paid to equal treatment in selection procedures, taking account of different cultural backgrounds.

Discrimination in access to goods and services also limits social and economic integration, especially in access to finance, but also more widely. Decisions on loans to small companies, for example, or on mortgages to individuals, which are based on or influenced by the real or presumed racial or ethnic origin of the applicant are not only contrary to the basic principles of human rights, but are in practice extremely damaging to the ability of large sections of society to provide for themselves and for others. Equally, the exclusion of individuals from access to the goods or services of their choice is at best damaging to their self-esteem and may lead in the worst cases to compounding social exclusion.

The Community is a strong defender of the human rights of women and girls as an inalienable, integral and indivisible part of universal human rights. It recognises that discrimination on the grounds of racial or ethnic origin may affect women and men differently. The structural inequalities linked to sex and gender roles of women and men are frequently even more important in the context of such double discrimination. In accordance with the principle that is laid down in Articles 2 and 3 of the Treaty, equality between women and men is an explicit objective of the EC and the Community should aim in all its activities to eliminate gender inequalities and promote equality. The principle of gender mainstreaming should therefore apply to

---

[7] Resolution of 29 January 1998 (OJ C 56, 23.2.1998).

the Directive to ensure that due consideration is taken of the gender dimension in its application.

The Commission has therefore proposed a Directive with a broad scope while respecting the limits of the powers conferred on the Community by the Treaty. The Commission also believes, however, that it is necessary to allow the Member States flexibility in applying Community rules in order to take account of their own particular circumstances based on their history and traditions. The proposed Directive therefore lays down only broad objectives to ensure that discrimination is prohibited and that the victims of discrimination enjoy a basic minimum entitlement to redress. Together with the proposals for a Directive outlawing discrimination on other grounds in employment and the Action Programme to support the development of practical measures to combat discrimination, the specific Directive on discrimination on grounds of racial and ethnic origin will constitute a major step towards a comprehensive framework for the implementation of the principle of equal treatment in economic and social life.

V. Commentary on the Articles

The proposal for a Directive comprises four Chapters: General provisions (Chapter I), Remedies and enforcement (Chapter II), Independent bodies for the promotion of equal treatment (Chapter III) and Final provisions (Chapter IV).

Chapter I: General provisions

This Chapter deals with the purpose of the Directive and the concept of discrimination.

Article 1: Purpose

Article 1 sets out the main objective of the Directive which is the respect of the principle of equal treatment in all the Member States of the European Union. It should be noted that the Directive does not prohibit differences of treatment based on nationality, which is dealt with by separate Articles of the Treaty (in particular Articles 12 and 39) and by existing secondary legislation.

Article 2: Concept of discrimination

The definition of the principle of equal treatment contained in this Article is consistent with the definition provided by Directive 76/207/EEC of 9 February 1976 (Equal Treatment Directive), Directive 97/80/EC of 15 December 1997 (Burden of Proof) and with the case law of the Court[8] on indirect discrimination in the fields of equal treatment for women and men and the free movement of workers. The definition of indirect discrimination should be read in conjunction with the general rules on the burden of proof set out in Article 8. The principle of equal treatment must apply irrespective of whether the racial or ethnic origin is real or presumed.

---

[8] Judgment of 23 May 1996 in Case C-237/94, *O'Flynn* v *Adjudication Officer* [1996] ECR 2417.

Paragraph 3 deals with the notion of harassment. Such conduct can take different forms, ranging from spoken words and gestures to the production, display or circulation of written words, pictures or other material and, to be caught by the Directive, must be of a serious nature, creating a generally disturbing or hostile working environment. Harassment on grounds of racial or ethnic origin seriously undermines people's rights in professional, economic and social spheres and should be deemed to constitute discrimination.

Article 3: Material scope

Article 3 defines the areas where discrimination based on racial and ethnic origin is forbidden. In all cases, these areas are covered in so far as they fall within the limits of the powers conferred by the Treaty upon the Community.

1. Access to employed and self-employed activities and working conditions.

Subparagraphs (a) to (c) define the scope of application to the employment field and are identical to Directive 76/207/EEC on Equal Treatment for Men and Women.

2. Membership of organisations

Subparagraph (d) deals with membership of and involvement in organisations of workers or employers or any other organisation whose members carry on a particular profession. It ensures that there is no discrimination concerning either the membership or the benefits provided by these kinds of bodies.

3. Social protection and social security

While the design and delivery of social protection and social security are clearly the responsibility of the Member States, subparagraph (e) requires Member States to ensure that there is no discrimination based on racial or ethnic origin when implementing that responsibility.

4. Social advantages

Regulation (EEC) No 1612/68 on freedom of movement for migrant workers, requires Member States to grant social advantages without regard to nationality. In this context, social advantages have been defined by the European Court of Justice as benefits of an economic or cultural nature which are granted within the Member States either by public authorities or private organisations. The same concept is applied here. Examples include concessionary travel on public transport, reduced prices for access to cultural or other events and subsidised meals in schools for children from low income families. Subparagraph (f) requires that, where such advantages are granted, it must be done without discrimination on grounds of racial or ethnic origin.

5. Education, including grants and scholarships

Subparagraph (g) requires Member States to ensure that there is no discrimination on grounds of racial or ethnic origin in the field of education, including in terms of access based on the award of grants and scholarships. The requirement fully respects the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

6. Access to and the supply of goods and services

Subparagraph (h) requires that decisions about providing access to goods and services, or about the supply of goods and services, are not based on racial or ethnic origin.

Article 4: Genuine Occupational Qualifications

Based on similar provisions in national legislation (DK, IRL, NL, UK) and in the Equal Treatment Directive of 1976, Article 4 provides that differences of treatment based on racial or ethnic origin which are related to a genuine occupational qualification are not to be considered as discrimination. The term 'genuine occupational qualification' should be construed narrowly to cover only those occupational requirements which are strictly necessary for the performance of the activities concerned. In the case of differences of treatment based on racial and ethnic origin, such cases will be highly exceptional. Examples of such differences might, for example, be found where a person of a particular racial or ethnic origin is required for reasons of authenticity in a dramatic performance or where the holder of a particular job provides persons of a particular ethnic group with personal services promoting their welfare and those services can most effectively be provided by a person of that ethnic group.

Article 5: Positive action

Equal treatment by itself may not be enough if it does not overcome the weight of accumulated disadvantage suffered by discriminated groups. Article 4 allows Member States to authorise legislative or administrative measures which are necessary to prevent and correct situations of inequality.

Article 6: Minimum requirements

This is a standard "non-regression" provision that affects Member States which have, or may wish to adopt, legislation providing for a higher level of protection than that guaranteed by the framework Directive. It provides that there should be no lowering of the level of protection against discrimination already afforded by Member States when implementing the Community Directive.

Chapter II: Remedies and enforcement

This Chapter deals with the two main conditions for effective legislation against discrimination: the right of victims to a personal remedy against the person or body who has perpetrated the discrimination; and the existence of an appropriate mechanism in each Member State to ensure adequate levels of enforcement.

Article 7: Defence of rights

Article 7 relates to enforcement procedures (access to justice) to enable the obligations deriving from this Directive to be enforced. In particular, it provides people who believe they have been the victim of discrimination with the possibility to pursue their claims through an administrative and/or a judicial procedure to enforce their right to equal treatment. National time-limits for initiating action are not affected by this provision.

The right to legal protection is further reinforced by the possibility of allowing organisations to exercise such rights on behalf of a victim[9].

Article 8: Burden of proof

Normally, the legal burden of proving a case rests on the plaintiff. However, obtaining evidence in discrimination cases, where the relevant information is often in the hands of the defendant, can be very problematic. The Commission therefore proposes to shift the burden of proof to the defendant in certain circumstances, as has already been done in the case of sex discrimination. The wording of Article 7 is based on that of Articles 3 and 4 of the Council Directive 97/80/EC[10]. The Commission proposes that the burden of proof reverts to the defendant once the plaintiff has established factual evidence of less favourable treatment caused by apparent discrimination.

Article 9: Victimisation

Effective legal protection must include protection against retaliation. Victims may be deterred from exercising their rights due to the risk of retaliation. Since fear of dismissal, for example, is generally one of the major obstacles to individual action, it is necessary to protect individuals against dismissal or other adverse treatment (for instance down-grading or any other coercive measure due to such action).

Article 10: Dissemination of information

Article 10 provides for appropriate dissemination of information about rights to equality of opportunity and treatment. The more effective the system of public information and prevention, the less need for individual remedies.

---

[9] See for instance UN Model law against racial discrimination (Third Decade Action Program).

[10] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

Article 11: Social dialogue

The role of the social partners in the fight against discrimination was first embodied at European level in the Social Partners' Joint Declaration on Racism and Xenophobia in the Workplace adopted in Florence in 1995. The Social Partners at national level in some Member States (Belgium, France) have also adopted framework agreements on combating racial and ethnic discrimination in companies and codes of conduct have been agreed at national and local level in some other Member States (UK, Netherlands). A number of these include provisions to resolve disputes about discrimination through, for example, the establishment of complaints points or nominated mediators within the company which can have a positive effect on the elimination of discrimination.

The Commission is committed to strengthening the role of the social partners. The proposed Directive therefore recognises that the social partners can contribute to its implementation by adopting anti-discrimination agreements and by monitoring the implementation of equal treatment in the workplace. It requires Member States to encourage the social partners to conclude agreements in this field.

Chapter III: Independent bodies for the promotion of equal treatment

Article 12: Independent bodies

Article 12 of the Directive provides for a framework applicable to independent bodies at national level which would contribute to the promotion of the principle of equal treatment. A Member State may also decide that such bodies should be established on a regional or local level, on condition that the entire territory of the Member State is covered by such arrangements.

The proposed Directive establishes a number of minimum requirements for such independent bodies in the Member States. Member States are free to decide on the structure and functioning of such bodies in accordance with their legal traditions and policy choices. The independent bodies may be specialised agencies or may form part of wider human rights bodies, whether pre-existing or newly established.

Chapter IV: Final provisions

The provisions contained in Chapter IV are mainly standard provisions which appear in most Community Directives in the social field.

Article 13: Compliance

Article 13 concerns the compliance with the Directive by Member States. Equality of treatment involves the elimination of discrimination arising from any legal or administrative provisions as well as from collective agreements or individual contracts of employment. Without questioning the general freedom of both sides of industry to negotiate contracts, it is clear that any provisions of a contract or agreement which are contrary to the principle of equality of treatment must be rendered null and void.

Article 14: Penalties

Article 15: Implementation

Article 16: Report

Article 17: Entry into force

Article 18: Addressees

These are standard provisions which do not call for any comments.

VI. Application to the European Economic Area

This is a text of relevance to the European Economic Area and the Directive will be applicable to the non-EU Member States of the European Economic Area following a decision of the EEA Joint Committee.

Proposal for a

COUNCIL DIRECTIVE

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular to Article 13 thereof,

Having regard to the proposal from the Commission[1],

Having regard to the Opinion of the European Parliament[2],

Having regard to the Opinion of the Economic and Social Committee[3],

Having regard to the Opinion of the Committee of the Regions[4],

Whereas:

(1) The Treaty on European Union marks a new stage in the process of creating an ever closer union among the peoples of Europe.

(2) The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States. In accordance with Article 6(2) of the Treaty on European Union, the Union should respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms, as general principles of Community Law.

(3) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, of which all Member States are signatories.

1
2
3
4

(4) Article 13 of the Treaty establishing the European Community empowers the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

(5) The European Council, at its extraordinary meeting in Tampere, on 15 and 16 October 1999, invited the Commission to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty as regards the fight against racism and xenophobia.

(6) The 1999 Employment Guidelines agreed by the European Council in Vienna on 11 December 1998 stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.

(7) Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice.

(8) The Commission presented a Communication[5] on Racism, Xenophobia and Anti-Semitism in December 1995.

(9) To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self employed activities and cover areas such as education, social protection and social security, social advantages and access to and supply of goods and services.

(10) To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries. This prohibition does not apply to differences of treatment based on nationality.

(11) Harassment on grounds of racial or ethnic origin of a person or group of persons which produces an intimidating, hostile, offensive or disturbing environment should be deemed to be discrimination.

(12) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin.

(13) A difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine occupational qualification.

---

[5] COM(95) 653 final.

(14) Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to exercise the rights of defence on behalf of any victim.

(15) The effective implementation of the principle of equality requires adequate judicial protection in civil matters against victimisation and an adjustment of the general rules on the burden of proof.

(16) Member States should provide adequate information on the provisions adopted pursuant to this Directive.

(17) Member States should take the necessary measures to ensure that any laws, regulations, administrative provisions, collective agreements, internal rules of undertakings or rules governing independent occupations, professions, or trade organisations which are contrary to the principle of equal treatment should be declared null and void or should be amended.

(18) Member States should promote social dialogue between the social partners to address different forms of discrimination and to combat them.

(19) Protection against discrimination based on racial or ethnic origin would itself be strengthened by the existence of an independent body in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.

(20) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(21) Member States should provide for effective, proportionate and dissuasive penalties in case of breaches of the obligations under this Directive.

(22) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty establishing the European Community, the objective of this Directive, namely ensuring a common high level of protection against discrimination in all the Member States of the European Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community. This Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I: GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to put into effect in the Member States the principle of equal treatment between individuals irrespective of racial or ethnic origin.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

   (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated on grounds of racial or ethnic origin;

   (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to affect adversely a person or a group of persons of a particular racial or ethnic origin, unless that provision, criterion or practice is objectively justified by a legitimate aim which is unrelated to the racial or ethnic origin of a person or group of persons and the means of achieving that aim are appropriate and necessary.

3. Harassment of a person or group of persons related to racial or ethnic origin, which has the purpose or effect of creating an intimidating, hostile, offensive or disturbing environment in any of the areas covered in Article 3, shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3

Material scope

Within the limits of the powers conferred upon the Community, this Directive shall apply to:

(a) the conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions, whatever the sector or branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining;

(c) employment and working conditions, including dismissals and pay;

(d) membership of and involvement in an organisation of workers or employers, or any other organisation whose members carry on a particular profession, including the benefits provided for by such organisations;

(e) social protection and social security;

(f) social advantages;

(g) education, including grants and scholarships, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity;

(h) access to and supply of goods and services.

Article 4

Genuine occupational qualifications

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine occupational qualification.

Article 5

Positive action

This Directive shall be without prejudice to the right of the Member States to maintain or adopt measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin.

Article 6

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II: REMEDIES AND ENFORCEMENT

Article 7

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities may pursue, on behalf of the complainant with his or her approval, any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

Article 8

Burden of proof

1. 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 the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures, unless otherwise provided by the Member States.

4. Paragraphs 1, 2 and 3 shall apply to any legal proceedings commenced in accordance with Article 7(2).

Article 9

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 10

Dissemination of information

1. Member States shall ensure that adequate information on the provisions adopted pursuant to this Directive is provided throughout their territory, and in particular in vocational training and educational bodies and in the workplace.

2. Member States shall ensure that competent public authorities are informed by appropriate means as regards all national measures taken pursuant to this Directive.

Article 11

Social dialogue

1. Member States shall take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.

2. Member States shall encourage the two sides of the industry to conclude, at the appropriate level, including at undertaking level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

CHAPTER III: INDEPENDENT BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 12

Independent bodies

1. Member States shall provide for an independent body or bodies for the promotion of equal treatment of persons of different racial or ethnic origin. These bodies may form part of independent agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the functions of these independent bodies include receiving and pursuing complaints from individuals about discrimination on grounds of racial or ethnic origin, commencing investigations or surveys concerning discrimination based on racial or ethnic origin and publishing reports and making recommendations on issues relating to discrimination based on racial or ethnic origin.

CHAPTER IV: FINAL PROVISIONS

Article 13

Compliance

Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

(b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing lucrative or non-lucrative associations, and rules governing the independent professions and workers' and employers' organisations, are declared null and void or are amended.

Article 14

Penalties

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by the date specified in Article 15 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 15

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2002. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 16

Report

Member States shall communicate to the Commission, within two years of the date mentioned in Article 15, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

Article 17

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

Article 18

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

IMPACT ASSESSMENT FORM

IMPACT OF THE PROPOSAL ON COMPANIES AND IN PARTICULAR ON SMALL AND MEDIUM SIZED ENTERPRISES (SMEs)

Title of the proposal

Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Document Reference Number: 99010

Proposal

1. ***Taking account of the principle of subsidiarity, why is Community legislation necessary in this field and what are its principal objectives?***

The European Union is founded on the principles of human rights and fundamental freedoms. Its commitment in this field has been reinforced by the Treaty of Amsterdam, in particular through amendments to Articles 6, 7 of the TEU and the introduction of Article 13 of the TEC, the last of which provides a specific power to take action to combat discrimination on the grounds of, *inter alia*, racial and ethnic origin.

The prime responsibility for combating racism lies with the Member States. As noted in the Explanatory Memorandum, most Member States have included in their constitutional and/or legal order provisions which assert the right not to be discriminated against on grounds of racial or ethnic origin. However, the scope and the enforceability of such provisions – and the ease of access to redress – vary greatly from one Member State to another. European legislation is required to ensure a common minimum level of legal protection, including rights to redress, for the fundamental right not to be discriminated against on grounds of racial or ethnic origin.

European legislation must, of course, respect the limits of the powers conferred on the Community by the Treaty. The proposed Directive therefore lays down general principles, providing a common minimum level of protection within the limits of Community competence, while allowing Member States to maintain a higher standard of protection in accordance with their political and historical choices and traditions.

The choice of a Directive strikes a balance between the need for European intervention and the need to respect the differences between the existing Constitutions, laws and legal procedures of the Member States. It sets common goals to be achieved while allowing the flexibility needed by the different Member States to achieve them. The legislative intervention is therefore limited to a number of general principles that do not go beyond a minimum level of protection.

The principal objectives of the proposal are:

- to provide a Community-wide definition of discrimination on grounds of racial and ethnic origin on the basis of which equal treatment can be assured;
- to define a minimum number of areas of life, within the scope of the Treaty, in which the principle of equal treatment must be ensured;
- to provide for a minimum level of protection and rights to redress for people who believe they have suffered discrimination;
- to ensure appropriate arrangements for the monitoring of discrimination in enterprises and in society more widely.

Impact on enterprises

2. *Who will be affected by the proposal?*

All enterprises will be subject to the national legislation required by the Directive.

3. *What steps will enterprises have to take to comply with the proposal?*

Enterprises will need to ensure that decisions on recruitment, promotion, access to training, working conditions including dismissals and pay and membership of workers' and employers' organisations and professional bodies are taken in conformity with the principle of equal treatment on grounds of racial and ethnic origin. In principle, this is already the case in all Member States. The Directive will therefore reinforce existing requirements rather than introduce entirely new provisions.

4. *What economic effects is the proposal likely to have?*

In the field of employment, legislation protecting individuals from discrimination on arbitrary grounds has three main effects. First, it contributes to securing social participation and avoiding social exclusion by ensuring that people have the opportunity to fulfil their potential in economic terms, thus being able to provide for themselves and their dependants to best effect and to reduce their dependence on the state. Secondly, it ensures that enterprises have at their disposal the best qualified employees, thus contributing to the competitiveness and the strength of the firm and of the economy more widely. Third, it requires employers to justify their decisions about matters such as recruitment, promotion, access to training and other working conditions.

Evidence[1] from the Member States shows that unemployment among communities of different racial and ethnic origins varies by a factor of up to 2 to 3 times the average for the labour market as a whole.

---

[1] Not available for all Member States: some Member States collect data only on the basis of nationality, not racial or ethnic origin.

Discrimination on racial or ethnic grounds - particularly when it is cumulative – can lead to a cycle of disadvantage which is frequently passed from one generation to the next. For example, if educational facilities, housing, health services, environmental conditions and job opportunities for a particular group are all poor, the next generation will grow up less well equipped to deal with the difficulties facing them and will find themselves trapped in poor jobs, in poor housing and with poor health.

This proposal, by **discouraging discrimination,** will lead to greater economic and social participation and a reduction in social exclusion. This will have direct benefits for economic growth by reducing public expenditure on social security and assistance, by improving the purchasing power of individual households and by promoting the competitiveness of companies by ensuring that they make the best use of all the resources available in the labour market.

(a) What will be the impact

- on employment?

The Directive will contribute to the promotion of employability of workers of all racial and ethnic origins, as required by the European Employment Strategy. As a result, it will contribute to the improvement of the quality of employment and, in the medium term, may be expected to lead to increased levels of employment resulting from the improved competitiveness of European companies.

- on investment and the creation of new businesses?

The Directive will ease the conditions for the creation of businesses by people of different racial and/or ethnic origins.

- on the competitive position of companies?

As noted above, the Directive will strengthen the competitiveness of European companies by ensuring that they have at their disposal a wider pool of skills and resources than at present and that use is made of those skills without distinction on the basis of racial or ethnic origin.

(b) Do any new administrative procedures have to be put in place?

Companies will need to be able to justify decisions on subjects such as recruitment, promotion, access to training and other working conditions to show that they have not been made on the basis of racial or ethnic origin. This is already the case in about half of the Member States. It will be in the interest of companies to keep limited records on these decisions where this is not currently existing practice.

(c) *Costs and benefits in quantitative and/or qualitative terms?*

Some limited short-term costs will fall to companies both in terms of the training required for decision-makers within the company on the implementation of the principle of equal treatment where this is not already done and in terms of contesting complaints about discrimination. Adaptation to the new requirements in those Member States where equivalent provisions to combat racial and ethnic discrimination do not yet exist will be eased by the familiarity of companies with the Community framework for equal opportunities between women and men, which has been in existence for over twenty years.

In the medium term, companies will benefit from the increased commitment of employees of all racial and ethnic origins and from increased competitiveness flowing from an improved use of resources (see above).

(d) *What costs will flow from theDirective?*

The Directive fixes a flexible, general framework for the implementation of the principle of equal treatment on grounds of racial and ethnic origin and it will be for the Member States and the social partners to fix the precise means of putting this into practice. The costs however will be limited (see above).

(e) *What will companies be required to do in terms of monitoring and evaluation?*

The Directive does not directly require companies to monitor and evaluate their compliance with the Directive. However, it would be in the interest of companies to keep records of decisions about recruitment, promotion, access to training and other working conditions to show that they were taken without reference to racial and/or ethnic origin. Larger companies may wish to carry out more structured monitoring to ensure that the principle of equal treatment is applied at all levels.

5. **Does the proposal contain measures to take account of the specific situation of small and medium sized enterprises (reduced or different requirements etc.)?**

The proposal makes no distinction based on company size, given that discrimination on grounds of racial and ethnic origin exists across all companies, regardless of the number of employees. However, the Directive lays down only minimum standards based on a flexible framework of principles. It is therefore open to the Member States and the social partners to vary the requirements on firms of different sizes, while respecting the requirements of the Directive.

Consultation

6. List of the organisations which have been consulted and presentation of the principal elements of their position

The Commission has consulted the representative organisations of the European level social partners[2] and the European Platform of social non-governmental organisations in the framework of a series of meetings at Community level.

All the organisations consulted recognised the importance of the issue and the value of laying down standards at Community level. However, there were different points of view on some elements of the proposal.

The NGO and trade union representatives welcomed the proposal, but regretted that the scope was not wider, wanting to tackle the full range of economic, social, cultural and political fields. They insisted on the maintenance of the provisions on the burden of proof and on representative actions, believing these to be essential to the defence of the rights of the victims of discrimination.

Representatives of the employer organisations expressed doubts, however, about the shifting of the burden of proof, believing that this would create difficulties for employers by encouraging frivolous claims. The Commission notes that the proposed provision is based on that already adopted at Community level, and already implemented by many Member States, with regard to discrimination on grounds of sex (Council Directive 97/80/EC on the Burden of Proof in Sex Discrimination Cases) and that identical rules have already been applied without apparent difficulty to cases of race discrimination in some Member States. The Commission believes, therefore, that the employers concerns on this point are not founded.

---

[2] The Commission consulted a range of organisations, including representatives of small and medium-sized enterprises, in accordance with the Commission Communications on the implementation of the Social Protocol (COM(93) 600 of 14 December 1993) and on adapting and promoting the Social Dialogue (COM(1998) 322 final of 20 May 1998).