

REFGOV

Reflexive Governance in the Public Interest

Fundamental Rights

Reflexive Governance in the Public Interest
Anti-discrimination

by Katrin Wladasch, Marta Hodasz and Barbara Liegl

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**REFLEXIVE GOVERNANCE IN THE PUBLIC INTEREST
ANTI-DISCRIMINATION**

Katrin Wladasch & Marta Hodasz & Barbara Liegl



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Introduction

The authors of the present study have been involved in national and European anti-discrimination research and policies for 10 years. Their knowledge is very much based on practical experience in various fields as co-founders, board members and employees of an NGO aiming at combating racist discrimination in Austria, as members of the Raxen Focal Point for Austria, as trainers and experts in trans-national European projects (most of them funded by the Community Action Programme to combat discrimination) and as participants of national and European working groups and networks aiming at the development of policy strategies. This background given the study is very much influenced by the very practical experiences the authors themselves have made during the period the study covers.

Aware of the difficulties stake holders with a non-scientific background face in trying to read and “use” scientific findings (the latter we consider a strategy that should be strengthened) we start our study with *general considerations with respect to the study and the hypothesis of reflexive governance* explaining the key concepts the research is based on in a non-academic way and our methodological approach.

This is followed by an overview on the history and the framework of *the EU Anti-Discrimination Regime*, the research field for our analysis.

Core part of the research is the *analysis of EU Anti-Discrimination Policies* in the light of the hypothesis of reflexive governance, which is divided in three chapters.

The first chapter identifies and describes *Actors of European Anti-Discrimination Policies*, who they are and who decides on who is to be considered as an actor, how they are structured, what their aims, motivations and their means of action look like, what they are doing and how they are integrated in decision-making procedures.

Next step was to have a look at the *Interaction between the Actors in the ‘Playing Field’ of Governance*. Various procedures of interaction between actors of EU-Anti-Discrimination Policies are described and analysed focusing on the different roles and weight of influence different actors have – depending on the topic and depending on who they are. And we have a

glance out of the arena of anti-discrimination policies framed by the directives and interaction procedures in policy fields with no legislative competence by the EU.

The role of the actors described as well as their ways of interaction very much influenced the European Union Anti-Discrimination *Policy Objectives and Policy Instruments, their Development and Implementation*. The dominant role of the Commission is highlighted, and we try to draw a picture on how policies are developed and changed, who is involved, where decision making takes place and how procedures are influenced.

Based on the analysis of the policy field in the previous chapters and on reports and suggestions by the different stakeholders themselves, the role of *Evaluation and Mutual Learning* is closely looked at. Are impact assessment and evaluation tools used and in what way? Do the results feed into the process again, do they lead to amendments and adaptations? Does mutual learning take place?

Based on all the findings, we try to answer the questions, if the hypothesis of reflexive governance is valid for European anti-discrimination policies by *Linking Practise and Theory of Governance* and conclude by summarizing our *Results* and by reflecting on *Future Challenges*.

Katrin Wladasch, Marta Hodasz, Barbara Liegl
Vienna, August 2008

General Considerations With Respect to the Study and the Hypothesis of Reflexive Governance

1. *New Forms of Governance in the European Union – an Introduction to the language of the academic debate*

Discussion on the evolvement of new forms of governance in European Union Policies has been going on for quite some years in the academic field. It is not really brought to the knowledge of the stakeholders involved in the governance procedures, however.

What we will be trying in this research would be to close this gap and to contribute to the academic discussion as to do this in a way that might be useful – and understandable – for the world of practise as well.

So before we start with exploring the hypothesis of “reflexive governance” we have to explain what “governance” in the context of European policy making means.

The term developed as a counterpart of government and very simply means the process of decision making and of implementation (or non-implementation) of these decisions, a process in which government usually makes up a part, namely the formal and legally defined one, whereas governance can include formal and informal structures and rules. What is a very important characteristic of governance procedures is the awareness that rules of decision-making procedures are underlying an ever-changing process. Governance theories try to describe the realities of decision-making procedures taking into account the factual relevance of all stakeholders and their interaction in decision making - being it formal or informal ones.

The concepts that try to explore “new governance” in European Union policies aim to combine descriptions of the legal and political system of the EU as “multi-level governance” and “network governance” as well as the more democracy-oriented “experimentalist governance” towards a “holistic panorama of policy dynamics in the Union.”¹

¹ Comella, Rosa (2006): *New Governance Fatigue? Administration and Democracy in the European Union*. Jean Monnet Working Paper 06/06, p. 3. <http://www.jeanmonnetprogram.org/papers/06/060601.pdf>, (02.09.2008).

2. New Forms of Governance – The Question of Accountability

When once having started to describe the governing reality and to recognise the EU as a polity, the question of legitimacy from a democratic point of view arises. How can decision-making that takes place outside of formally and legally defined structures be legitimized?

European Union policies face the phenomenon that they are neither created within a domestic political system nor by a traditional international organisation.² It is characterized by multilevel decision making and the implementation of these decisions in very different political systems, which makes governance on European level that complex and difficult to frame. Overlapping competences of supranational institutions of the Union, the central governments of the Member States and supranational as well as sub-national interest and expert groups have to be coped with – with the aim to involve all stakeholders needed and at the same time to fulfil the criteria of legitimacy and accountability.

Norms of representative democracy with its basic element of elected representatives do not really fit to this diverse picture of different stakeholders, different levels and different systems of policy making. All democratic systems have needed correctives, however, to guarantee minority rights and to assure the representation of groups that would not be heard by mere majority rulings. In the European context this means that national Member States, various interest groups, minority groups etc. have to be represented in policy making included in the formal policy making process as well as aside of this to guarantee democratic legitimacy.

From this – democratic – perspective new governance includes very many components that might even be more democratic than old concepts of representative government.

This is valid even more for the policy field of Human and Fundamental Rights and in here especially for the field of anti-discrimination as the involvement of NGOs and interest organisations of people at risk of discrimination guarantees representation of minorities to a higher extent than old concepts of representative democracy. So the problem of legitimacy might be even easier to solve for human rights issues than for mere technocratic ones given that the representation of minorities and of the ones that have no voice is one of the basic principles of democracy. The civil rights movement starting in the 1960ies extended these

² Pollack, Mark A. (2005): *Theorizing EU Policy Making*, in: Wallace, Helen/Wallace, William/Pollack, Mark. A. (eds.) (2005): *Policy Making in the European Union* (5th Ed.). Oxford University Press: Oxford, New York.

needs for representation even to the ones that are not born yet, that have not obtained citizenship yet etc. arguing that these groups can not vote, but decisions are influencing their lives, so their interests should be considered – which could be guaranteed by ways of representation by NGOs.

European political systems had experienced more or less extended versions of representation of interests in form of the social partnership system, which for a very long period has seemed to guarantee the representation of economy and labour force as the two diverging interests and as such served as a toll for social peace and welfare. The NGO movement as well as lobbying outside the rules that had developed within the social partnership system in most European countries developed only in the 90ies in terms of becoming a political factor and actor. The failures and shortcomings of the social partnership model are grounded inter alia in the fact that it is based on a concept of a duality of interests, which does not fit with the raising diversity of interest modern societies are facing. The need to represent this diversity forced European democracies and as such the European Union policy system to change and extend their set of actors and to change their system of dialogue from polarity towards multi-polarity. The need to represent diversity has legitimated new forms of governance characterized by multi level decision-making.

Old forms of government where characterized by the principles of stateness, publicity, legality and hierarchy. *Comella*³ recommends implementing the principles of partnership and flexibility for new modes of governance.

In its “White Paper on Governance⁴” the European Commission defines Governance as the “rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence.”

The White paper was a reaction to critics towards the European Commission that on the one hand it was a bureaucratic, formalistic body and on the other hand that it was influenced to a high extent by special interest.

³ Comella, Rosa (2006): *New Governance Fatigue? Administration and Democracy in the European Union*. Jean Monnet Working Paper 06/06, p. 4. <http://www.jeanmonnetprogram.org/papers/06/060601.pdf>, (02.09.2008).

⁴ Commission of the European Communities (2001): *European Governance. A White Paper*, COM(2001)428 final. Brussels, 25.07.2001, p. 10. http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf, (02.09.2008).

Some basic principles have been developed to compensate the problem of lack of democratic legitimacy. These principles included in the EC definition should ensure the establishment of more democratic governance – of “good governance.”

According to the White Paper, the “legitimacy (of the Union) today depends on involvement and participation. This means that the linear model of dispensing policies from above must be replaced by a virtuous circle, based on feedback, networks and involvement from policy creation to implementation at all levels.”⁵

Networks are defined as “interaction between individuals and/or organisations (communities, regional and local authorities, undertakings, administrations, research centres and so on) in a non-hierarchical way and where every participant is responsible for a part of the resources needed to achieve the common objective, electronic communication being their most preferred tool” in a Commission report on governance in 2003.⁶

The principles of partnership and flexibility mentioned above – the latter including an understanding of politics as “expert problem-solving through negotiation” goes in line with this process and stakeholder oriented approach.

This all sounds quite reasonable, but if it is implemented seriously and if we take into account the diversity of policy fields then we have to realize that each policy field needs it’s own rules, a variety of different stakeholders has to be taken into account, each promoting their own interests, approaching the field towards their different “lenses” and following their specific codes etc. That will be the real challenge for new governance structures in the EU.

And from the authors’ very practical point of view there is another set of open questions we would like to pose, which would be: What about the relevance of research on governance for the reality on governance? Does the description and it’s communication to stake holders change their attitude? Could, for example the awareness of non-governmental/civil society organisations on the factual input they had on certain procedures change their future strategies

⁵ Commission of the European Communities (2001): European Governance. A White Paper, COM(2001)428 final. Brussels, 25.07.2001, p. 11. http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf, (02.09.2008).

⁶ Commission of the European Communities (2003): Report from the Commission on European Governance (2003), p.17. http://ec.europa.eu/governance/docs/comm_rapport_en.pdf, (02.09.2008).

– and if so, what does that mean? Should we consider science and academic research as actor of governance? Or – if we leave science its tag of independency - how much is the system of politics influenced by the system of science and who is the path-maker?

3. The Hypothesis of Reflexive Governance – Defining the Key Concepts

Theoretic starting point for our research was the so-called hypothesis of **Reflexive Governance**,⁷ which can be characterised as follows:

If decision making is characterized by a procedural approach and a commitment to identify the conditions under which a deliberative process may succeed and to create these conditions in an affirmative way without taking them for granted it can be described as reflexive governance, if a common perception of the problem, a common redefinition of interests of different actors and a readiness to collective and mutual learning processes, in which the actors acknowledge that non one has privileged access to the best solution are inherent parts of the procedures as well.

Parameters of the hypothesis of Reflexive Governance

- *Procedural approach*
- *Mutual and collective learning process*
- *Common (re-)definition of interests*
- *Common perception of the problem*
- *Identification and Creation Conditions (Transparency)*
- *Awareness of diversity of solutions*
- *Commitment to a Readiness for change*

Learning for the context of our research was defined as an ongoing process of exchanging experiences, being open for diversity and for benefiting from diversity, which includes monitoring and evaluation procedures and involves actors ready to constantly adapt and

⁷ De Schutter, Olivier/Deakin, Simon (2005): *Reflexive Governance and the Dilemmas of Social Regulation*, in: De Schutter, Olivier/Deakin, Simon, (eds.) (2005): *Social Rights and Market Forces: is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Bruxelles: Bruylant.

change these processes when necessary. This commitment to learning has to be incorporated in all actors' strategic planning and activities and has to be "lived" by these actors in a reciprocal way.

Mutual learning includes the recognition of the fact that no single actor has the "one" solution, but that solutions are process and interaction based. Awareness that finding a solution is not the only aim of decision-making procedures is a basic element of this concept. Mutual learning consists in seeking the best decision making procedures and in acknowledging that even the aims of these decision-making procedures are open for change during the course of the process.

If this concept of learning is implemented at all levels of governance - including an ongoing reflection process on the content of the public interest definition - we could call that reflexive governance.

In our research study we describe how anti-discrimination legislation and policies have been developed, drafted and integrated into EU policies, what decision making procedures look like and if this – or parts of it – can be explained by the hypothesis of reflexive governance.

Identification of the „public interest“

One of the first questions that had to be tackled was the question, how anti-discrimination entered the agenda of European Union politics. We analysed the circumstances that led to the identification of anti-discrimination as a matter of public interest and the way to overcome the obstacles of European competence barriers, which resulted in the integration of Art. 13 in the Treaty Establishing the European Community (TEC), allowing the possibility for European Union legislation and policies to create a framework for combating discrimination on grounds of age, religion, belief, disability, sexual orientation and race. We have been working with the presumption that anti-discrimination had been declared a topic of "public interest." But who decided on this and how; when was it decided on and has the definition of this public interest topic changed over the years?

Furthermore, we tried to identify, which elements do not fit in with the idea of reflexive governance and why, if they could be changed to fit in and how and if this would make any sense for reaching the overall aim of combating discrimination. Our conclusions are summed

up in policy recommendations and proposals for enhancing conscious mutual learning processes.

4. Research Methodology – Questions to be asked

All this led us to formulating parameters/benchmarks, which were intended to help us in judging the legitimacy of European decision making processes and in formulating suggestions and policy proposals for optimising these processes from a democratic point of view.

We analysed various stages of the policy cycle⁸ and tried to find out, why and how anti-discrimination has been put on the policy agenda of the European Union and which actors were responsible for the tabling of this agenda item (agenda setting). We analysed documents drafted by EU institutions and commissions established by EU institutions such as the Consultative Commission on Racism and Xenophobia to find out which of the actors were the driving forces in establishing anti-discrimination as an EU policy issue and examined which formulations the Commission changed in its documents to trace back which players influenced the process at which points in time. Besides, we also looked into the proposals drafted by the Starting Line Group and the papers primarily written by members of the Migration Policy Group on how Art 13 and later on the Race Equality Directive and the Employment Equality Directive were developed. By looking at these papers we tried to figure out which grounds of discrimination were inserted in Art 13 at what time, who took the decisions and why the grounds were afforded different levels of protection (decision making/policy formulation).

Both the European Court of Justice and the European Court of Human Rights played an important role in promoting the issue of anti-discrimination within the Union. That is why we identified the most important decisions and judgments and tried to establish how they influenced agenda setting and policy formulation.

Less focus was put on how the anti-discrimination directives adopted at EU level and the Community Action Program complementing the legal measures were implemented by the individual Member States.

⁸ Windhoff-Héritier, Adrienne (1997): *Policy-Analyse. Eine Einführung*. Frankfurt, New York.

The Anti-Discrimination Directives were put into force in 2000, since then eight years have passed in which the anti-discrimination policy field has developed, grown and suffered setbacks. Have the relevant actors collected and documented their experiences, how have they done it (evaluation) and how have the results been integrated in further developing or redefining strategies or priorities (re-definition). Have these results mainly been used by single actors themselves or has cross-fertilisation taken place? To this end we screened EU documents, proposals and opinions released by European NGOs located in Brussels as well as evaluation reports published on various non-legislative measures in the policy field of anti-discrimination. Among them were evaluation reports on the Community initiative EQUAL, the publications of the Migration Policy Group, the studies issued by Equinet, the assessments of the Community Action Program, and the documents drafted by the European Union Agency of Fundamental Rights previously called European Monitoring Centre on Racism and Xenophobia.

These observations concerning the policy cycle were supplemented by almost 25 expert interviews. The interviewees were selected because they were stakeholders in relevant policy processes at the European level. Among them were officials of the European Commission (DG Employment, Social Affairs and Equal Opportunities, DG Education and Culture, DG Justice, Freedom and Security), representatives of European NGOs covering various grounds of discrimination (European Network Against Racism, European Disability Forum, European Older Persons Platform, European Roma Information Office, International Lesbian and Gay Association Europe, Platform of European Social NGOs), legal researchers of the Migration Policy Group, members of the European Convention and the Consultative Commission on Racism and Xenophobia, representatives of Equinet as well as officials of the European social partners. It was not possible to conduct interviews with members of the Management Board of the Fundamental Rights Agency, MEPs and experts from the European Policy Evaluation Forum.

We asked the experts about the roles of their own institutions in the formation of the policy field of anti-discrimination and how they perceived the role of other organisations deemed relevant in the process. Besides, we wanted to know which actors were involved in the implementation of the policies and how the impact was evaluated in general and by their own organisation. They were also prompted to make suggestions on how to improve mutual

learning among stakeholders in the anti-discrimination policy field and what they identified as the latest anti-discrimination developments.

The EU Anti-Discrimination Regime

1. *Introductory Remarks*

The Ludwig Boltzmann Institute of Human Rights (BIM) was tasked with analysing the EU policy field of anti-discrimination with a view to the hypothesis of reflexive governance. As regards discrimination grounds the policy field of anti-discrimination is a very broad field ranging from combating discrimination on grounds of gender to combating discrimination on grounds of age or sexual orientation. Each discrimination ground has a specific historical background and development within the anti-discrimination policy field entailing different actors and modes of interaction between the actors.

In the European Union a new starting point was introduced with the adoption of the Amsterdam Treaty giving those discrimination grounds contained in Art 13 – age, religion and belief, disability, sexual orientation and race – the legal basis for further action and a new fundament for EU policy development.

Only one year after the Amsterdam Treaty entered into force in May 1999 the Council adopted two directives. One directive provided a general framework for equal treatment in employment and occupation (Employment Equality Directive)⁹ embracing the grounds age, religion, belief, disability and sexual orientation. Racial discrimination was dealt with in a specific directive prohibiting racial discrimination not only in the employment area but also – and this is remarkably new – in areas such as social protection, social advantages, education, access to and supply of goods and services which are available to the public, including housing (Racial Equality Directive).¹⁰ This hierarchisation among the discrimination grounds has different reasons, which will be explored from different viewpoints in the following chapters, and has in some occasions, e.g. in cases of multiple discrimination, problematic implications. In its Work Programme 2008 the Commission¹¹ announced to level up the scope

⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF>, (02.09.2008).

¹⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:180:0022:0026:EN:PDF>, (02.09.2008).

¹¹ European Commission (2008): Commission Legislative and Work Programme 2008, COM (2007) 640 final (23.10.2007).

of protection for all discrimination grounds and thus establish a coherent framework for the fight against all forms of discrimination.

2. The development of the EC/EU anti-discrimination agenda

The European Union was initially designed to be purely an economic, rather than a political or even human rights organisation. However, in order to guarantee the freedom of movement and to promote free competition anti-discrimination provisions (concerning men and women and nationals of EC Member States) were part of its agenda from its very beginning. Already in the Treaty of Rome 1957, the first moves were undertaken to provide for equal pay between men and women. Thereby the states were not driven by social or equality motives but simply by economic reasons. France, which already had an equal pay law, could persuade the founding members of the European Economic Community (EEC) that it would be placed at an unfair competitive disadvantage if other Member States were permitted to pay women less for the same work. Not until the 1980s social issues were moved up on the policy agenda of the EC/EU: With the so-called ‘1992 operation’ the Council of Ministers in the early 1980s re-launched the idea of the internal market and charged the Commission with the design of a strategy on how to complete the internal market. This plan also allowed for opportunities to move social issues including anti-discrimination on the agenda of the – at that time – European Communities.¹²

A very important actor with regard to anti-discrimination issues in the initial times was the European Parliament. In 1984, a Parliamentary Inquiry Committee on the rise of racism in Europe was created, which issued the so-called *Evrigenis* Report in 1985. The report “lays emphasis on the fundamental importance of defending a democratic and pluralistic European society and respecting the dignity of men and women whatever their race, sexual orientation, religion, nationality or ethnic origin”.¹³ Following this report the European Parliament, the European Commission and the Council of Ministers adopted their first common declaration

¹² Chopin, Isabelle/Niessen, Jan (2004): *The Starting Line and the Racial Equality Directive*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden, p. 95.

¹³ European Parliament (1985): Committee of Inquiry into the Rise of Fascism and Racism in Europe, reports on the findings of the inquiry, December 1985, cited in: Chopin, Isabelle/Niessen, Jan (2004): *The Starting Line and the Racial Equality Directive*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden, p. 96.

“condemning all forms of intolerance, warning about the dangers of racism and insisting on the need to prevent all forms of discrimination.”¹⁴

However, when the 1989 Community Charter of Fundamental Social Rights of Workers was under debate the Council was reluctant to include a non-discrimination provision referring to the lack of EC competence in this field. Only after the European Parliament threatened to reject the Charter a compromise was found by moving a statement on the importance of combating all forms of discrimination to the preamble. Alongside, it was explicitly pointed out that the treatment of third country nationals was a matter for the Member States.¹⁵

In 1991, the European Parliament presented its second report on the rise of fascism and racism in Europe – the so-called *Ford Report*. Both the *Evrigenis* report and the *Ford* report called for the adoption of European legislative measures. The European Parliament argued that action in this field was rather a matter of political will and less a question of strict interpretation of the treaties. The Parliament thereby referred to Article 235 TEC (now Article 308).¹⁶ Art 308 TEC gives the possibility to take action, by unanimous vote in the Council, in fields, where the Community has no competence, if action is necessary in order to attain the objectives of the common market.

But progress in the fight against racism and discrimination was hindered due to the opposition of the Council who repeatedly reiterated the lack of competence. At the head of opposition was the UK arguing that the Community had no competence vis-à-vis third country nationals.

At the beginning of the 1990s the Council changed its attitude towards this issue. *Mark Bell* identified three reasons for this change: First, the development of cross-border racism; there existed significant differences in national laws as regards hate speech. For example, Ireland unlike Germany or Austria did not have any laws prohibiting hate speech, consequently right-wing extremist groups placed their activities (e.g. the production of racist materials) to Ireland. Differences in national laws have always been a classical justification for the EU to become active. Also with the emergence of the Internet cross-border regulation became

¹⁴ Chopin, Isabelle/Niessen, Jan (2004): *The Starting Line and the Racial Equality Directive*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden, p. 96.

¹⁵ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, p. 61.

¹⁶ For further details on the activities of the European Parliament see chapter 1.1. The European Parliament.

necessary. As a result a Joint Action concerning action to combat racism and xenophobia was adopted by the Council in 1996. The Joint Action requires Member States to “ensure effective judicial co-operation” with respect to incitement to discrimination, Holocaust denial, dissemination of racist material and establishment of racist organisations and “to take steps to see that such behaviour is punishable as a criminal offence”.¹⁷

Furthermore, there were arguments presented by civil society who was organised in the so-called Starting Line Group (see below) that in the single market discrimination would interfere with the free movement of persons and services, as persons likely to suffer discrimination would not move to States where there is (almost) no protection against discrimination or where they would not obtain jobs, housing or services on grounds of their colour of skin.¹⁸

As a second reason, *Bell* identified the spill-over effects from EU immigration and asylum policies. Increasing immigration and influx of refugees from the Balkan countries triggered restrictive immigration and asylum regulations. In consequence, concerns were raised in respect of the treatment accorded to third-country nationals as well towards ethnic minorities already present in the EU.

Third, an effective lobby against racism and discrimination was established at the beginning of the 1990s.¹⁹ National and European civil society became active on EU level lobbying for measures that according to their opinion had to be taken at EU level.

2.1. The Starting Line Group

Civil society organisations followed the initiatives and suggestions made by the European Parliament and drafted their own proposal. In 1991, the Starting Line Group was created on initiative of the British Council for Racial Equality, the Churches Committee for Migrants in Europe and the Dutch National Bureau against Racism. In the following years, the group was joined by the Commissioner for Foreigners of the Berlin Senate, the Belgian Centre for Equal

¹⁷ European Council (1996): Joint Action concerning action to combat racism and xenophobia, 15.06.1996, OJ 185/5, (24.07.1996).

¹⁸ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, p. 65.

¹⁹ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, pp. 63-69.

Opportunities and Opposition to Racism, the Dutch Centre for Foreigners, Caritas Europe, the European Jewish Information Centre and the European Anti-Poverty Network.

No Roma organisation had been directly involved in the Starting Line Group. Only from 1996 onwards, the director of the European Roma Rights Center (ERRC), who was not a member of any of the Roma communities, was in contact with the Starting Line Group and tried to bring in the perspective of a Roma organisation. The Roma Rights Center was mainly interested in discrimination on the grounds of ethnicity and race. It made efforts to include the concept of segregation, but the Commission was hesitant to adopt another definition of segregation than already provided by the UN and did not want to risk harming policies that are not intended to discriminate.²⁰

A group of experts including lawyers and anti-racism activists produced a draft directive presented in December 1992. The drafters relied upon international conventions and the existing case-law and legal framework with regard to gender discrimination to formulate the draft, which included the prohibition of direct and indirect discrimination on the grounds of race, colour, descent, nationality, national or ethnic origin in fields such as employment, social security, health, housing, goods and services and social, cultural and religious matters. The drafters preferred a directive because a directive prescribes the objectives but leaves it to the Member States to decide on how to achieve the goals; this would enable Member States to take measures, which are tailored to the specific national situation. Furthermore, a directive would trigger debate on national level involving the national parliaments and other relevant stakeholders during the transposition process. After an extensive information campaign among national NGOs in all Member States, the Starting Line Group received support of approx. 400 NGOs all over Europe. The European Parliament supported the initiative.²¹

The Commission – anticipating the Council’s attitude – argued that the necessary legal competence for the directive did not exist, and the proposal was not accepted. The Council rather opted for intergovernmental cooperation than adopting legislative measures at Community level. At the Corfu summit in 1994, the European Council decided to create a Consultative Commission on Racism and Xenophobia and tasked it with making recommendations on co-operation between the Member States and other relevant bodies to

²⁰ Interview with representative of the European Roma Information Office, Brussels, 24.10.2007.

²¹ See Chapter 1.1. The European Parliament.

encounter racism and racist discrimination.²² With a view to the upcoming Intergovernmental Conference (IGC) in 1996, the Starting Line changed its strategy and worked towards the amendment of the treaty to give the EU institutions a legal basis to act against racism – with a qualified majority voting in the Council and by means of the co-decision procedure. The proposal was given the name ‘Starting Point’.²³ For the purpose of lobbying the Starting Line Group organised numerous seminars and national conferences in various countries convening major stakeholders.

2.2. The inclusion of Art 13²⁴ with the Treaty of Amsterdam

In December 1995, the Council’s intergovernmental conference reflection group observed a ‘majority support’ for the introduction of a general prohibition on discrimination in the EC Treaty. The European Parliament, for example, “recommend[ed] that the Commission should introduce a proposal for an anti-discrimination directive” and “insist[ed] that after the revision of the treaties, the European Community should be entrusted with clear competencies which empower it to take action, since the problem of racism, xenophobia and anti-semitism, on account of its cross-border nature, cannot be combated efficiently at local level and by the Member States alone”.²⁵ With regard to disability and age discrimination, especially of older persons the Commission used, among others, the instruments of the European structural funds, especially the European Social Fund – under the umbrella of combating social exclusion – to support and promote disabled persons and older persons so as to enable them to enter or re-enter the labour market.²⁶ However, the Commission emphasised that “[t]he

²² Ch. 3 para 1, European Council (1994): European Council at Corfu, Presidency Conclusions, 24-25 June 1994. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00150.EN4.htm, (27.08.2008).

²³ Chopin, Isabelle/Niessen, Jan (2004): *The Starting Line and the Racial Equality Directive*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden, pp. 97-103.

²⁴ Treaty establishing the European Community, Article 13:

1. *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.*

2. *By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.*

http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html#anArt14

²⁵ Para 4 and 11, European Parliament (1995): Resolution on racism, xenophobia and anti-semitism (27.04.1995), OJ 126/75, 22.05.1995.

²⁶ Ch. VI para 23, European Commission (2007): European Social Fund, 50 years investing in people, Office for Official Publications of the European Communities: Luxembourg; Commission, European Commission (1994): White Paper on European Social Policy – A Way Forward for the Union, COM (1994) 333.

Union must act to provide a guarantee for all people against the fear of discrimination, if it is to make a reality of free movement within the single market. In addition to its existing work in these areas [...] the Commission therefore believes that, at the next opportunity to revise the treaties, serious consideration must be given to the introduction of a specific reference to combating discrimination on the grounds of race, religion, age and disability.”²⁷ It also pointed out the added value of Union level actions in this field, “as a natural complement to what can be achieved at national, regional or even local level.”²⁸ These plans were most vehemently objected by the United Kingdom arguing that discrimination is a very sensitive issue and best dealt with at national level.²⁹ Only two months before the Amsterdam Treaty was adopted, the Labour government was elected in the UK, which finally removed the final obstacle and common agreement was achieved on the introduction of Art 13 into the Treaty establishing the European Community. The discrimination ground sexual orientation was also subject to controversies. Under the Irish presidency in the second half of 1996, sexual orientation was not part of the draft anti-discrimination Art 13. Although the Irish asserted that it was a drafting mistake, it was no secret that the Irish bishop conference very much objected this matter. The Dutch presidency, under which the Treaty of Amsterdam was signed, introduced sexual orientation into Art 13.³⁰ Art 13 TEC has given the Council, acting unanimously and after consulting the European Parliament and based upon a proposal by the Commission, the opportunity, to adopt measures combating discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability and sexual orientation.

In November 1999, a few months after the Treaty of Amsterdam entered into force, the Commission presented a package consisting of three proposals, one directive prohibiting discrimination encompassing all discrimination grounds listed in Art 13 in the employment field³¹ and one prohibiting discrimination on grounds of race and ethnic origin in the employment field and in areas such as social protection, housing, education and goods and

²⁷ Ch. VI para 27, European Commission (1994): White Paper on European Social Policy – A Way Forward for the Union, COM (1994) 333.

²⁸ Ch. VI para 27, European Commission (1994): White Paper on European Social Policy – A Way Forward for the Union, COM (1994) 333.

²⁹ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, p. 72.

³⁰ Interview with EC official.

³¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF>, (02.09.2008).

services³² (for details see chapter 3.2. The Anti-Discrimination Directives). The third proposal concerned an action programme³³ to accompany and ensure effective implementation of the legislative measures through practical activities including awareness raising, networking and training activities. The Council adopted these three proposals within one year (see chapter 3.3. The Community Action Programme to Combat Discrimination).

2.3. The adoption of the open method of co-ordination (OMC)

The Treaty of Nice signed in February 2001 introduced paragraph 2 into Art 13 TEC³⁴, which allows for the possibility to adopt ‘incentive measures’ according to the co-decision procedure to support measures taken by a Member State in order to contribute to the achievement of the objectives laid down in Art 13 para 1 TEC³⁵ – provided that the laws or regulations of the Member States will not be harmonised.

The use of ‘incentive measures’ has so far been common within the framework of the European Employment Strategy and in the social policy field. Both fields have been areas where the EU has had no competence but some kind of common approach was deemed to be necessary in order to better address certain problems. The Amsterdam Treaty introduced a new title on employment into the Treaty establishing the European Community. With this the European Council acknowledged the fact that the high unemployment rates all over Europe were a matter of common concern. Since the European Employment Strategy (EES) was launched with the Amsterdam Treaty it has played a central role in co-ordinating the employment policies within the EU. The EES and the field of social protection and social

³² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF>, (02.09.2008).

³³ Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0750:EN:HTML>, (02.09.2008).

³⁴ Treaty establishing the European Community, Article 13:
2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.
http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html#anArt14

³⁵ Treaty establishing the European Community, Article 13:
1. 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.
http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html#anArt14

inclusion have been major fields of application of the open method of co-ordination (OMC). The goals, guidelines and timetables have been defined at EU level; the policies and specific targets have been identified and carried out at national level within the framework of the national action plans. Under the OMC, not binding rules but peer pressure constitutes the main incentive for Member States to participate in the process. Monitoring plays a central role when the OMC is applied. The monitoring relies upon pre-defined indicators and benchmarks. Also, mutual learning is a corner pillar of OMC. For the purpose of analysis, research, exchange of best practice and the promotion of incentive measures for employment, the Commission proposed a programme, the Employment Incentive Measures (EIM), which the Council together with the Parliament adopted in 2002.³⁶

The OMC has not been playing a very prominent role in Anti-Discrimination Policies until 2007 (for examples in the field of disability see chapter 2.2.2.5. Role of NGOs in implementation procedures – legislation), when the EIM was adapted to cover the five following years and rearranged, together with the above mentioned Community Action Programme to combat discrimination and other initiatives, under the Community Programme for Employment and Social Solidarity, called PROGRESS.³⁷ This programme provides for projects and activities to promote and enhance analysis, mutual learning, awareness and dissemination of information and to support main actors. (For more information on the future role of the OMC in the policy field of anti-discrimination see chapter 3.4.2. Integrating the topics of Immigration, Anti-Discrimination, Social Inclusion and Poverty Reduction)

³⁶ European Parliament and Council, Decision 1145/2002/EC, (10.06.2002), OJ L 170/1, 29.06.2002.

³⁷ European Parliament and Council, Decision 1672/2006/EC, (24.10.2006), OJ L 315/1, 15.11.2006.

Anti-Discrimination Policies – Analysis

1. *Actors of European Anti-Discrimination Policies*

In analysing literature on the development of anti-discrimination legislation and policies, internet sources mirroring recent developments and by simply putting forward the question, who would have been relevant actors in terms of development and implementation, to our interview partners, we identified European Institutions, national governments, regional and local authorities, social partners and civil society organisations as the relevant stakeholders for the development of European anti-discrimination policies.

In exploring the role and the interaction procedures of stakeholders with a high relevance for EU anti-discrimination policies - again based on our preliminary findings - we concentrated our research on:

The European Parliament

The European Commission

The European Court of Justice

The European Council, representing the Member States

European NGO networks

European Social Partners

Equinet – the Network of European Independent Bodies

The Fundamental Rights Agency/ European Monitoring Centre on Racism and Xenophobia

1.1. **The European Parliament**

The parliament has undergone a gradual transformation from a relatively powerless institution with a consultative role to a noticeably strengthened institution with co-decision competences in a wide range of policy fields in the decision-making process of the EU.³⁸

³⁸ For a detailed description of the decision-making procedures within the EU see, for example, Corbett, Ruichard/Jacobs, Francis/Shackleton, Michael (2005): *The European Parliament*. John Harper Publishing: London; Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford.

The legal basis for the European Parliament is to be found in Art 189 -202 TEC. The number of MEPs increased with each enlargement of the EC/EU. Since the accession of Romania and Bulgaria in January 2007, the EP has been consisting of 785 MEPs. The number of MEPs will be reduced to 732 again, as foreseen in the Treaty of Nice, after the next European parliamentary elections in 2009. Each Member State was allocated a certain amount of seats according to the respective Member State's population. Consequently, Germany is currently represented in the European Parliament with 99 seats and Malta with 5 seats.³⁹ At this time, the parties represented in the EP include the Group of the European People's Party and European Democrats (EPP-ED) with 288 seats, the Party of European Socialists (PES) with 215 seats, the Alliance of Liberals and Democrats for Europe (ALDE) with 101 seats, the Union for Europe of Nations Group (UEN) with 44 seats, the European Greens – European Free Alliance (Verts/ALE) with 42 seats, the European United Left – Nordic Green Left (EUL/NGL) with 41 seats, Independence/Democracy Group (ID) with 24 seats and the so-called "Non-Inscrits" (MEPs without a group affiliation) with 30 seats. Since 1979 the members have been elected in direct universal suffrage for a term of five years.⁴⁰ Ever since, the two largest political groups, the EPP-ED and the PES, have been continuously holding between 50 and 70 per cent of the seats.

As regards the anti-discrimination policy field the EP had no legislative competence at all before the introduction of Art 13 TEC. After its entry into force the legislative role of the EP is still reduced to a consultative one: As it is stated in Art 13 TEC, the Council shall act unanimously on a proposal from the Commission after *consulting* the European Parliament to take appropriate action to combat discrimination.

Although the EP has – in this field – always operated with non-binding resolutions and own-initiative reports, the EP has played a significant role in raising awareness and bringing the fight against various forms of discrimination on the agenda of the European Union.⁴¹

³⁹ Treaty of Nice, Declarations adopted by the Conference, Declaration 20 on the enlargement of the European Union, OJ C 80/81, 10.03.2001.

⁴⁰ Council Decision 76/787/ECSC, EEC, Euratom (20.09.1976), OJ L 278.
<http://www.legaltext.ee/text/en/T2132.htm>, (02.09.2008).

⁴¹ See also: Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, p. 62.

The European Parliament is not entitled to adopt legislative initiatives itself; it is only entitled to require the Commission to submit proposals for legislation by a majority of its members (Art 192 TEC).

1.1.1. Resolutions and own-initiative reports

Before the entry into force of the Amsterdam Treaty, the European Parliament adopted several resolutions on racism, xenophobia and anti-Semitism. Also, after the adoption of the Amsterdam Treaty the Parliament has drafted numerous resolutions. As already pointed out the resolutions have a non-binding nature, yet they have remarkably influenced the agenda-setting within the EU. As will be demonstrated below the Parliament repeatedly called upon the Commission as well as the Council to initiate and adopt respective measures to tackle discrimination.

The European Parliament started debates on anti-racism as early as in the 1980s. In 1984, a Parliamentary Inquiry Committee on the Rise of Racism in Europe was created, which drafted the so-called Evrigenis Report in 1985. In reaction to this report, the Council together with the Commission and the Parliament adopted a Joint Declaration against racism and xenophobia.⁴²

The Ford Report presented in 1991 resulted from the second parliamentary committee of inquiry into racism in Europe.

Both parliamentary reports called for legislative action by the EC institutions. However, the Council opposed the findings of the reports, arguing that Community competence was not given for further action and that the fight against racist discrimination was therefore a matter of national legislation.

In subsequent resolutions, in the mid 1990s, the Parliament raised concerns with regard to the electoral success of right-wing parties in European countries. It referred to the Freedom Party in Austria, to the Front National in France, the British National Party in the United Kingdom and the Vlaams Blok in Belgium. Furthermore, it condemned the restrictive immigration and asylum policies pursued by the EC Member States, which would “encourage xenophobic

⁴² Joint Declaration by the European Parliament, the Council and the Commission against racism and xenophobia (11.06.1986), OJ C 158, 25.06.1986.

feelings and extreme right-wing movements in the EU.”⁴³ The Parliament reiterated its demand to put forward a proposal for an anti-discrimination directive and in this respect strongly supported the ‘Starting Line’ proposal⁴⁴ which was drafted by a fistful of European NGO activists with the support of more than 400 NGOs. Moreover, the Council was requested to become active in order to curb racism, xenophobia and anti-Semitism in the European Union. Beside some vague commitments in conclusions of the Council presidencies,⁴⁵ the Council only adopted one legislative non-binding measure aimed at judicial cooperation in cases of criminal offences such as incitement to hatred or dissemination of racist or xenophobic material.⁴⁶

The Parliament had always strongly supported the establishment of an EU Observatory on Racism and Xenophobia which was proposed by the Kahn Commission.⁴⁷ The European Monitoring Centre on Racism and Xenophobia finally took up its activities in July 1998.

The issue of discrimination on grounds of sexual orientation was first raised within the European Parliament in the 1980s following the case-law of the European Court of Human Rights.⁴⁸ The ECtHR was one of the first major international human rights institutions to condemn homophobia. From the 1980s onwards, it has repeatedly ruled that the prohibition and the criminalisation of homosexual relations between adults violates the right to privacy (Art 8 ECHR).⁴⁹ Unlike debates concerning the fight against racism and racial discrimination, questions concerning sexual orientation discrimination and homophobia triggered

⁴³ Para 11, European Parliament (1994): Resolution on racism, xenophobia and anti-semitism (27.10.1994), OJ C 323/154, 20.11.1994; see also: para 11, European Parliament (1998): Resolution on racism, xenophobia and anti-Semitism and on further steps to combat racial discrimination (18.12.1998), OJ C 98/488, 09.04.1999.

⁴⁴ European Parliament (1995): Resolution racism, xenophobia and anti-Semitism (26.10.1995), OJ C 308/140, 20.11.1995; para 9, European Parliament (1994): Resolution on racism, xenophobia and anti-semitism (27.10.1994), OJ C 323/154, 20.11.1994.

⁴⁵ Corfu (24-25 June 1994), Essen (9-10 December 1994), Cannes (25-26 June 1995), Madrid (15-16 December 1995), Florence (21-22 June 1996) and Dublin (13-14 December 1996).

⁴⁶ Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (96/443/JHA), OJ L 185, 24.07.1996.

⁴⁷ European Parliament (1995): Resolution racism, xenophobia and anti-Semitism (26.10.1995), OJ C 308/140, 20.11.1995. The Kahn Commission was named after its chairmen, Jean Kahn, and was established following the Corfu European Council in June 1994, see: Sec III, 1, European Council (1994): European Council at Corfu, Presidency Conclusions, 24-25 June 1994.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00150.EN4.htm, (27.08.2008). The Cannes European Council one year later called on the Kahn Commission to consider the feasibility of a European Monitoring Centre on Racism and Xenophobia, see: sec III, 5, European Council (1995): Cannes European Council, Presidency Conclusions, 26 and 27 June 1995.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00211-C.EN5.htm, (27.08.2008).

⁴⁸ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, p. 90.

⁴⁹ *Dudgeon vs. UK*, 22 October 1981, Series A No. 142; *Norris vs. Ireland*, 26 October 1988, Series A. No. 45; *Modinos vs. Cyprus*, 22 April 1993, Series A No. 259.

controversial and heated debates in the European Parliament. The position of each MEP depended on his or her political and national affiliation. Nevertheless, the European Parliament adopted its first non-legislative resolution on sexual orientation at the workplace in 1984.⁵⁰ Ten years later, the European Parliament again attempted to bring this issue on the EU agenda through an own-initiative report, the so-called Roth report.⁵¹ Once again, the report and the subsequent resolution provoked contrary reactions within the European Parliament; once more the positions were determined by the MEP's national and party political backgrounds with the Greens and the Social Democrats in favour of and the Conservatives opposing the respective action.⁵² The adopted resolution on equal rights for homosexuals and lesbians in the EC called upon the Member States and the Commission to take action to combat discrimination on grounds of sexual orientation.⁵³

Although there was no explicit EC competence in the policy field of anti-discrimination, the efforts made by the European Parliament together with the endeavours of a coalition of NGOs, the so-called 'Starting Line Group' (see 2.1. The Starting Line Group), drew the attention of the Commission and the Council to racist and homophobic phenomena in Europe and without any doubt paved the way for the introduction of Art 13 into the EC Treaty.

Shortly after the adoption of the Amsterdam Treaty, the European Parliament called upon the Commission to propose "appropriate action" on the basis of the new Art 13 TEC "immediately after the entry into force of the Amsterdam Treaty".⁵⁴ In doing so, the Parliament prompted the Commission to take account of the Starting Line Group's proposal.⁵⁵

Following the entry into force of the Amsterdam Treaty in May 1999, the Parliament adopted further resolutions calling upon Member States and the EU institutions to take action in various policy fields (including education, media, justice and policing, immigration and

⁵⁰ European Parliament (1984): Resolution sexual discrimination at the workplace, OJ C 104/46, 16.04.1984.

⁵¹ European Parliament (1994): Report for the Committee on Internal Affairs and Citizens Rights on Equal Rights for Homosexuals and Lesbians in the European Community A3-28/94. The report was named after the rapporteur Claudia Roth, a German MEP, member of the Greens.

⁵² Bell, Mark (1998): *Sexual orientation and anti-discrimination policy*, in: Carver, Terrell/Mottier, Véronique (eds.): *Politics of Sexuality, Identity, Gender and Citizenship*. Routledge: London, p. 63.

⁵³ European Parliament (1994): Resolution on equal rights for homosexuals and lesbians in the EC, 08.02.1994, OJ C 61/40, 28.02.1994. However, it shall be mentioned at this stage that whenever non-binding resolutions were to be adopted it was easier to find a majority among the MEPs.

⁵⁴ European Parliament (1998): Resolution on racism, xenophobia and anti-Semitism and the results of the European Year Against Racism (29.01.1998), OJ C 56/35, 23.02.1998.

⁵⁵ Para 3, European Parliament (1998): Resolution on racism, xenophobia and anti-Semitism and on further steps to combat racial discrimination (18.12.1998), OJ C 98/488, 09.04.1999.

asylum, etc.) in order to effectively counter racism and racist discrimination.⁵⁶ By doing this, it referred to the reports of the, by that time already existing, European Monitoring Centre on Racism and Xenophobia (EUMC) several times. Moreover, it ascribed to the EUMC a “pro-active role in mainstreaming education and promoting good practice”.⁵⁷

Lately the Parliament has also been very active on issues regarding homophobia and sexual orientation discrimination. Especially the events in Poland in 2006 and 2007 triggered vehement reactions in the European Parliament. In its subsequent resolutions the Parliament referred to incidents such as the denial of fundings for projects organised by LGBT organisations in the framework of the European Youth Programme by the Polish authorities, or the dismissal of the head of the Polish Centre for Teacher Development because he distributed an official Council of Europe anti-discrimination manual in June 2006 which contained a chapter on sexual orientation; furthermore, the Parliament referred to the statement of the Polish Ombudsman for Children in June 2006 to prepare a list of jobs for which homosexuals would be ineligible, the proposal of the Polish Deputy Minister for Education to draft legislation prohibiting discussions on homosexuality in schools and education institutions in March 2007, and the homophobic statements uttered by leaders and MEPs of the Party of the League of Polish Families.⁵⁸

The European Parliament accordingly requested the Polish authorities to refrain from discriminatory activities and asked the Commission to verify whether the actions of the Polish government were in conformity with Article 6 of the EU Treaty.⁵⁹ Also, the ban of gay pride marches in various countries, especially in Poland and Russia, was subject of concern to the European Parliament. The Parliament repeatedly called upon the Commission to expand the scope of protection in case of discrimination on grounds of sexual orientation to all sectors and upon the Council to finally adopt the 2001 Council Framework Decision on combating racism and xenophobia and to extend the scope of the Framework Decision to homophobic,

⁵⁶ European Parliament (2000): Resolution on countering racism and xenophobia in the European Union (16.03.2000) OJ C 377/366, 29.12.2000; European Parliament (2000): Resolution on countering racism in the candidate countries (16.02.2000) OJ C 366/276, 29.12.2000; European Parliament (2005): Resolution on remembrance of the Holocaust, anti-semitism and racism (27.01.2005) PA_TA-PROV(2005)0018.

⁵⁷ European Parliament (2000): Resolution on countering racism and xenophobia in the European Union (16.03.2000) OJ C 377/366.

⁵⁸ The Guardian (20.03.2007), Poland to ban schools from discussing homosexuality; BBC News (10.06.2006), Fears of Poland's gay community.

⁵⁹ European Parliament (2007): Resolution of 26 April 2007 on homophobia in Europe, P6_TA(2007)0167.

anti-Semitic, Islamophobic and other types of offences motivated by biased hatred.⁶⁰ It is remarkable that these recent resolutions have been supported by a large majority of MEPs. The Resolution of 18 January 2006 on homophobia in Europe, for example, counted 468 votes in favour, 149 against and 41 abstentions.⁶¹ It received significant support among the representatives of both the Conservatives, the EPP-ED, on the one hand and the Socialists (PES), the Greens and the Liberals (ALDE) on the other.⁶² In contrast, the Resolution on equal rights for homosexuals and lesbians in the EC in 1994 counted 159 votes in favour and 96 against with a strong opposition of the Conservatives.⁶³

As it has been observed, in cases of consultations, resolutions and own-initiative reports it has been easier to achieve the required simple majority among the MEPs than in case of legislative resolutions in the co-decision and assent procedures, which require a qualified majority.⁶⁴ Following this, the conclusion might be drawn that MEPs are less cautious with their votes in situations of non-binding resolutions and consequently the resolutions have less weight and importance with regard to the agenda setting in the EU. Yet, this might be true in some instances, but evidence shows that in other occasions EP activity led to actions by the Council and the Commission, as has been the case when adopting the Joint Declaration against racism and xenophobia⁶⁵ in consequence of the *Evrigenis* Report or when referring to racism and xenophobia in the Presidency Conclusions by the Council.⁶⁶ Furthermore, non-binding resolutions sometimes receive extensive media and public attention. Finally – and this is striking – MEPs and the European Parliament are considered valuable partners for NGOs active in the fight against discrimination. MEPs have been targeted for lobbying purposes of

⁶⁰ European Parliament (2006): Resolution on homophobia in Europe, P6_TA_PROV(2006)0018; European Parliament (2007): Resolution of 13 December 2007 on combating the rise of extremism in Europe, P6_TA-PROV(2007)0623. The Council Framework Decision on combating racism and xenophobia 2001 is based upon the Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union (Maastricht Treaty).

⁶¹ ILGA Europe, International Lesbian and Gay Association (2006): '*ILGA-Europe welcomes Europarliament's resolution on homophobia in Europe*'. Press release. http://www.ilga-europe.org/europe/news/ilga_europe_welcomes_europarliament_s_resolution_on_homophobia_in_europe, (09.04.2008).

⁶² See: Results of the voting on the resolution on homophobia in Europe at the European Parliament, 18 January 2006, available at: http://www.ilga-europe.org/europe/news/ilga_europe_welcomes_europarliament_s_resolution_on_homophobia_in_europe/who_and_how_voted, (02.09.2008).

⁶³ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, p. 105.

⁶⁴ Rack, Reinhard/Lausegger, Stefan (1999): *The Role of the European Parliament: Past and Future*, in: Alston, Philip (ed.): *The EU and Human Rights*. Oxford University Press: New York, p. 824.

⁶⁵ Joint Declaration by the European Parliament, the Council and the Commission against racism and xenophobia (11.06.1986), OJ C 158, 25.06.1986.

⁶⁶ Corfu (24-25 June 1994), Essen (9-10 December 1994), Cannes (25-26 June 1995), Madrid (15-16 December 1995), Florence (21-22 June 1996) and Dublin (13-14 December 1996).

the civil society on a continuous basis. In this respect, inter-groups turned out to be a popular means of lobbying in order to influence MEPs. Inter-groups are cross-party groups facilitating dialogue on certain issues among MEPs irrespective of their political affiliation. As they closely work together with experts from the field, they serve as an important platform for spreading NGO interests. (see Chapter 2.2.2.3. NGOs lobbying at the European Parliament – the Inter-groups)

1.1.2. Parliamentary Committees and public hearings

Members are assigned to committees, subcommittees, inter-parliamentary delegations and delegations to joint parliamentary committees. As of February 2008, there are 20 standing committees and 2 subcommittees. The committees prepare the work for the plenary sessions; they consist of 28 to 86 MEPs. Responsible for the field of non-discrimination (including all discrimination grounds except gender) are the Committee on Employment and Social Affairs as well as the Committee on Civil Liberties, Justice and Home Affairs; the latter is responsible for non-discrimination issues falling outside the scope of employment. Likewise relevant are the Committee on Women's Rights and Gender Equality and the Subcommittee on Human Rights which is subordinated to the Committee on Foreign Affairs and therefore dealing with questions concerning third countries.

In December 2007, the Committee on Employment and Social Affairs presented a draft report with a motion for a resolution on the progress made in equal-opportunities and non-discrimination in the EU with regard to the transposition of Directives 2000/43/EC and 2000/78/EC. The draft report provided some substantive comments on issues such as the levelling up of the scope of protection for all discrimination grounds according to the Directive 2000/43/EC⁶⁷, the effective implementation of the Directives, the provision of effective, proportionate and dissuasive sanctions in cases of discrimination by the Member States, and the comprehensive review of the implementation of the Directives by the Commission. Furthermore, the draft report suggested to “ask for an annual evaluation of Member State implementation as part of the open method of co-ordination; [the Parliament] believes that non-governmental organisations representing potential victims of discrimination

⁶⁷ Directive 2000/78/EC prohibits discrimination on grounds of age, disability, religion, belief and sexual orientation in employment; directive 2000/43/EC prohibits discrimination on grounds of race and ethnic origin in employment and – this is remarkable – in social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing.

should be involved in that annual evaluation”.⁶⁸ The Committee on Civil Liberties, Justice and Home Affairs presented a draft opinion on the above draft report in February 2008 adding some suggestions and comments on substantial matters concerning the implementation of non-discrimination by referring to the possibility of applying positive action measures by the Member States or by suggesting to extend the protection against discrimination to all discrimination grounds included in Art 21 EU Fundamental Rights Charter (i.e. beyond gender, racial and ethnic origin, sexual orientation, age, religion, belief and disability which are contained in Art 13 TEC, colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth).⁶⁹

Once the amendments have been agreed on and a final vote taken in the Committee on Employment and Social Affairs, the report will be presented in the plenary session.

Committees may also organise public hearings in order to generate information and expertise on certain issues, which feed into their reports and motions for resolutions. For these purposes, the committees may invite experts. In the past, NGO representatives proved to be very valuable partners.⁷⁰ In March 2007, the Committee on Civil Liberties, Justice and Home Affairs invited representatives of ENAR, ECRI and the EUMC to elaborate on questions concerning the progress of the negotiations on the framework decision on action to combat racism and xenophobia.⁷¹

1.1.3. Parliamentary Questions

The European Parliament or MEPs not only rely upon non-binding resolutions to influence the EU agenda but also use other means. These include written and oral questions to the

⁶⁸ European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2007): Draft opinion on progress made in equal opportunities and non-discrimination in the EU (the transposition of Directives 2000/43/EC and 2000/78/EC), 15.02.2008, (2007/2202(INI)), PE 400.679v02-00, LIBE_PA(2008)400679. <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=INI/2007/2202>, (02.09.2008). See amended version from 04.02.2008: PE 400.598v01-00, EMPL_AM(2008)400598, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-400.598+01+DOC+PDF+V0//EN&language=EN>, (02.09.2008).

⁶⁹ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft opinion on progress made in equal opportunities and non-discrimination in the EU (the transposition of Directives 2000/43/EC and 2000/78/EC), 15.02.2008, (2007/2202(INI)), PE 400.679v02-00, LIBE_PA(2008)400679; available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-400.679+02+DOC+PDF+V0//EN&language=EN>, (02.09.2008).

⁷⁰ Rack, Reinhard/Lausegger, Stefan (1999): *The Role of the European Parliament: Past and Future*, in: Alston, Philip (ed.): *The EU and Human Rights*. Oxford University Press: New York, p. 814.

⁷¹ See: http://www.europarl.europa.eu/meetdocs/2004_2009/organes/libe/libe_20070319_1500_hearing.htm, (26.02.2008).

Council or the Commission who are both obliged to respond to these questions.⁷² The staff of the Commission is kept quite busy by answering questions of the MEPs and sometimes put under pressure; at the same time parliamentary questions make the Commission and its staff think about and reflect upon a variety of issues.⁷³ Furthermore, parliamentary questions have proved to be very beneficial in providing and securing information on EU policies.⁷⁴

The procedure concerning parliamentary questions is regulated under Title IV with the heading "Relations with other bodies" Articles 108 -111 Rules of Procedure.⁷⁵

Questions for oral answers with debate may be put to the Council or the Commission by a committee, a political group or at least forty Members with a request that they be placed on the agenda of Parliament (Art 108). Questions have to be submitted to the President who forwards them to the Conference of Presidents. The latter decides upon whether and in what order questions shall be put on the agenda. Questions to the Commission must be referred to it at least one week before the session in which the questions are to be discussed, questions to the Council have to be submitted at least three weeks ahead (Art 108 para 2). One of the questioners may elaborate on the question for five minutes. One member of the institution concerned shall answer (Art 108 para 4). Art 109 states that Question Time with the Council and Commission shall be held at each part-session at such times as may be decided by Parliament on a proposal from the Conference of Presidents. A specific period of time may be set aside for questions to the President and individual Members of the Commission. Written questions may be put by any MEP to the Council or the Commission (Art 110).

A considerable number of questions on non-discrimination and equal treatment in the years 2006 and 2007 concerned the appearance of gross homophobic attitudes and tendencies in Poland. At the same time questions referred to the situation of Roma and developments in the field of ethnic, religious and age discrimination as well as discrimination on grounds of disability. The answers of the responsible representatives of the Commission and Council sometimes reveal important information on their activities, which are not always made

⁷² Art 197 EC Treaty. A list of the current year's oral and written questions including the answers from the Council or Commission can be found on the internet: <http://www.europarl.europa.eu/OP-WEB/home.jsp>, (02.09.2008).

⁷³ Interview with an official of the European Commission, DG Employment, Social Affairs and Equal Opportunities, Unit Action against Discrimination, Civil Society, Brussels, 23.10.2007.

⁷⁴ See also: Rack, Reinhard/Lausegger, Stefan (1999): *The Role of the European Parliament: Past and Future*, in: Alston, Philip (ed.): *The EU and Human Rights*. Oxford University Press: New York, p. 810.

⁷⁵ As last amended in February 2008, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20080218+0+DOC+PDF+V0//EN&language=EN>, (02.09.2008).

available to other interested actors. For example, Michael Cashman, member of the PES and president of the European Parliament's Inter-group on Gay and Lesbian Rights⁷⁶, targeted a written question to the Commission drawing upon an information request by an NGO in. The original NGO request was addressed to the Commission, who allegedly denied giving the requested information to the NGO. It concerned the number of persons working in the Commission in the field of non-discrimination.⁷⁷

However, parliamentary questions also mirror the opposition to the fight against discrimination and the different interests, which have to be balanced. They reflect the fear that guaranteeing rights to a certain (minority) group might lead to restricted rights for another (majority) group in society. In this respect, an Italian MEP belonging to the Union for Europe of the Nations Group (UEN),⁷⁸ raised concerns with respect to a Scottish regulation, which according to the Italian press had banned the use of the words 'mum' and 'dad' in national health services. Nurses were forbidden to use these words in front of couples as these words were qualified as homophobic and therefore discriminating against homosexuals. The MEP found this regulation to be discriminating against heterosexuals.⁷⁹ The same line was taken by one of her party colleagues who got het up about the practice of Alitalia with regard to business-class meals. Allegedly, Alitalia considered dietary requirements of Jewish and Muslim passengers but did not show such respect for Catholic passengers, as meat was served on Fridays during Lent.⁸⁰ Both questions were refused by the Commission by arguing that these issues did not fall within the scope of Community law.

MEPs of the far-right keep the Commission busy with questions requiring justification for expenditures for NGOs, such as ENAR⁸¹, anti-discrimination campaigns⁸² and the reports of

⁷⁶ <http://www.lgbt-ep.eu/news.php>, (02.09.2008).

⁷⁷ Written question by Michael Cashman (PSE) to the Commission, Subject: Persons employed by the Commission in the field of non-discrimination (3 November 2005), E-4005/05.

⁷⁸ UEN is a national conservative political group with seats in the European Parliament since 1999.

⁷⁹ Written question by Cristiana Muscardini (UEN) to the Commission, Subject: Discrimination in Scotland (4 May 2007), E-2389/07.

⁸⁰ Oral Question for Question Time at the part-session in April 2005 pursuant to Rule 109 of the Rules of Procedure by Francesco Speroni to the Commission, Subject: Religious discrimination by Alitalia (17 March 2005), H-0220/05.

⁸¹ Written Question by Frank Vanhecke (NI) to the Commission, Subject: ENAR and MRAX terms of reference (12 December 2007), P-6349/07; Written Question by Philip Claeys (NI) to the Commission, Subject: ENAR and European immigration policy (6 December 2007), E-6049/07.

⁸² Oral Question for Question Time at the part-session in October 2005 pursuant to Rule 109 of the Rules of Procedure by Frank Vanhecke to the Commission, Subject: EU anti-discrimination campaign (13 October 2005), H-0888/05; Written Question by Frank Vanhecke (NI) to the Commission, Subject: Composition of the Programme Committee for EU's anti-discrimination campaign (25 October 2005), E-3911/05.

the former European Monitoring Centre on Racism and Xenophobia (EUMC) and its successor the European Union Agency on Fundamental Rights (FRA).⁸³

1.1.4. Budgetary Powers

The Parliament did not play a significant role in the past years in allocating financial means to the Commission to fulfil its duties in the anti-discrimination field. As a matter of fact, the role of the Parliament in the budgetary process is rather limited, although it shares the authority over the budget with the Council. This has different reasons: on the one hand the multi-annual financial perspectives are essentially negotiated between the Member States and there is little leeway left for relocation between the budget headings, on the other hand the Commission begins and sets the framework for the budgetary decision making process by issuing the preliminary draft budget. As a result, the institutions closely co-operate during the entire process. So, there are “informal ‘pre-proposal’ exchanges between leading members of EP committees and relevant Commission officials” before the Commission issues the preliminary draft budget.⁸⁴ For example, in the 2008 budget the Parliament agreed with the Commission's preliminary draft budget to appropriate 20,520,000 for commitments and 13,000,000 for payments. Whilst the Council wanted to reduce the amount to 19,900,000 for commitments (-620.000) and 12,139,000 for payments (-861.000), it finally adhered to the figures suggested in the preliminary draft budget by the Commission.⁸⁵

1.1.5. Other means of action

Beside the means of action available to the European Parliament mentioned above, there are other means of influencing the agenda of the EU. For example, the Parliament may ask the Commission or the Fundamental Rights Agency (the former EUMC) to issue reports on certain topics. In the past, it has done so on several occasions. Most recently, the Fundamental

⁸³ Written Question by Frank Vanhecke (NI) to the Commission, Subject: Annual report for 2005 of the European Monitoring Centre for Racism and Xenophobia (12 December 2005), E-4582/05; Written Question by Frank Vanhecke (ITS) to the Commission, Subject: Use of the undefined criterion ‘Islamophobia’ in the EUMC’s report on ‘Muslims in the European Union: discrimination and Islamophobia’ (23 January 2007), E-0115/07; Written Question by Philip Claeys (ITS) to the Commission, Subject: Cost of EUMC study of islamophobia (6 March 2007), E-1103/07

⁸⁴ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a, p. 190.

⁸⁵ By January 2008, the budget is only available online on the EUR-LEX database: <http://eur-lex.europa.eu/budget/www/index-en.htm>, (02.09.2008).

Rights Agency (FRA) was asked to deliver a report on sexual discrimination and homophobia in the EU following an initiative of the European Parliament.⁸⁶

1.1.6. Reflections upon the role of the EP in the anti-discrimination policy field

The European Parliament *per definitionem* represents the interests of the citizens of the EU Member States. Its members are directly elected by universal suffrage every five years. On the one hand the seats are allocated to the Member States according to their population; on the other hand the representation of political groups in the Parliament is the result of the voting behaviour of the citizens. Generally speaking, the Socialists and the Conservatives form the majority (64 per cent), the Greens, Liberals, other left-wing and right-wing parties and MEPs without a group affiliation form the minority (36 per cent).⁸⁷ The composition of the European Parliament reflects the wide range of interests existing in the EU – from those of governing parties to a broad variety of opposition parties and national interests. These different interests are most vividly demonstrated in the parliamentary questions posed by the MEPs to the Council or the Commission. They give an idea about the different positions and attitudes existing in the public when (anti-)discrimination issues are under debate. There is not only one approach to anti-discrimination policies but a wide range of sometimes completely contrary positions. However, as delineated above, the adopted resolutions of the EP illustrate that in many instances the fight against discrimination has been capable of winning the majority of the MEPs' votes.

The European Parliament is "the only non-governmental institution in the political structures of the Union", and as such "provides the principal counter-balance to the collective will of the governments".⁸⁸ Against this background, the EP had a significant role to play in bringing anti-discrimination issues on the EU agenda, although its legislative competence had never been more than a consultative one.⁸⁹ For a long time, the Council was reluctant to take any steps forward in the field of anti-discrimination in doing this it always referred to the absence

⁸⁶ Information provided upon request by a staff member of the Fundamental Rights Agency, Vienna, 07.04.2008.

⁸⁷ Parliamentary term 2004–2009.

⁸⁸ Bradley, Kieran St C. (1999): *Human Rights and the European Parliament*, in: Alston, Philip (ed.): *The EU and Human Rights*. Oxford University Press: New York, p. 845.

⁸⁹ Also the Commission acknowledges the "pivotal role" of the EP "in advancing the EU's anti-discrimination agenda to date". See: European Commission (2004): *Equality and non-discrimination in an enlarged European Union. Green Paper*. Office for Official Publications of the European Communities: Luxembourg. http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/grpap04_en.pdf, (02.09.2008).

of Community competence.⁹⁰ Nevertheless, the persistent efforts of individual MEPs, and in consequence the repeatedly achieved majority voting within the EP on several occasions contributed to continuous progress in the anti-discrimination policy field. As a matter of fact, the EU institutions could not ignore the voice of the European Parliament. The European Parliament has been the only institution representing the interests of the peoples of the European Union and the only institution not being subject to criticism for the lack of a legitimate democratic basis. Of course, the role of the MEP cannot be seen isolated from external developments, events and other actors. The perceived increase in racism, the success of extreme right-wing parties in the 1980s, the gross homophobic tendencies in Poland in the past years, and especially successful NGO lobbying (see 2.1. The Starting Line Group) without doubt influenced the activities of the EP.

1.2. The European Commission

In several documents the Commission itself acknowledged the “pivotal role” of the European Parliament and civil society organisations to push forward anti-discrimination on the EU’s agenda.⁹¹ But, having the right of initiative with regard to legislation and partly with regard to policies, it is the Commission who is responsible for formal agenda setting.

1.2.1. The organisation of the Commission with a view to anti-discrimination issues

When talking of the Commission one has to differentiate between the College of Commissioners and the Brussels bureaucracy.⁹² The first encompasses the total of Commissioners, the latter the permanent officials who work in the Commission and are organised into units, departments and directorates-general.

1.2.2. The political arm

⁹⁰ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, pp. 62, 63.

⁹¹ European Commission (2000): Commission report on the implementation of the Action Plan against Racism – Mainstreaming the fight against racism, p. 6; European Commission (2004): *Equality and non-discrimination in an enlarged European Union. Green Paper*. Office for Official Publications of the European Communities: Luxembourg. http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/grpap04_en.pdf, (02.09.2008), p. 7.

⁹² Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, p. 38.

The Commissioners and the College of Commissioners are referred to as the political arm of the Commission.

Commissioners are appointed according to the procedure prescribed in Art 214 para 2 TEC: The Council, meeting in the composition of Heads of State or Government and acting by a qualified majority, nominates the person it intends to appoint as President of the Commission. The nomination has to be approved by the European Parliament.

Then the Council, acting by a qualified majority and by common accord with the nominee for President, adopts the list of intended members of the Commission (Commissioners), which is drawn up in accordance with the proposals made by each Member State. Subsequently, the President and the other Commissioners are as a body subject to a vote of approval by the European Parliament. After approval by the European Parliament, the Council, acting by a qualified majority appoints the President and the other Members of the Commission.

At present, the Commission has 27 members (thereof 1 President and 5 Vice Presidents), one national of each Member State. The number of Commissioners can be altered by the Council by way of an unanimous act.⁹³ According to Art 213 para 2 the Commissioners must act completely independent in the performance of their duties and are not entitled to seek or take instructions from any other body, i.e. the Commission is the institution to represent solely Community interests. Nevertheless, the EC may be perceived as a kind of “mini version” of the Council.⁹⁴ The Commissioners – in most cases being former government officials or national civil servants – together with their cabinets are seen as representing national rather than Community interests.⁹⁵ As such, the College of Commissioners is also described as the political arm of the Commission.⁹⁶ As has been put by an EC official, the procedures and negotiations which have to be gone through within the Commission in decision-making processes (see below) are the preparation for, or in other words, iron the way to the debates within the Council.⁹⁷

⁹³ See: Art 213 as amended by the Treaty of Nice, Protocol on the enlargement of the European Union, Art 4 para 1, OJ C 80/51 (10.03.2001). Art 4 para 2 Protocol on the enlargement of the European Union further prescribes that when the Union consists of 27 Member States the number of Commissioners shall be less than the number of Member States. As from the date the following Commission will take up its duties in 2009, a rotation system will be introduced.

⁹⁴ Interview with an official of the Commission, Brussels, 23.10.2007.

⁹⁵ Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, p. 40.

⁹⁶ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., p. 8.

⁹⁷ Interview with an official of the Commission, Brussels, 23.10.2007.

The College of Commissioners acts in line with the principle of collegiality, which is based upon the equal participation of each Commissioner in institutional decision-making. The decisions of the Commission are deliberated collectively and are therefore subject to collective responsibility. As a consequence, the College of Commissioners is a collective decision-making body with a single voice.

The President has a significant position in so far as the Commission works under the political guidance of its President, who decides on the internal organisation in order to ensure that it acts consistently, efficiently and on the basis of collegiality (Art 217 TEC). The President represents the Commission,⁹⁸ negotiates with the Council and the Parliament.⁹⁹ He decides on special fields of activity with regard to which each Commissioner is specifically responsible for the preparation of the work of the Commission (portfolios) and the implementation of its decisions.¹⁰⁰ In practice, the allocation of responsibilities or portfolios is subject to vivid negotiations among the Member States.¹⁰¹

Beside the cabinets who assist the Commissioners in their daily work and in preparing Commission decisions, groups of Commissioners might be set up which shall contribute to the coordination and preparation of the work of the Commission within the context of the strategic objectives and priorities laid down by the Commission.¹⁰² Under the presidency of *Romano Prodi* five such groups were established – they are still operating under the *Barroso* Commission – responsible for the Lisbon agenda, external relations, communications, competitiveness and what is remarkable in the context of this study a group responsible for fundamental rights, anti-discrimination and equal opportunities.¹⁰³ As brought out by the Commission in the strategic objectives 2005 – 2009 the “[...] fight against discrimination must be put at the forefront of European action with new initiatives on anti-discrimination and

⁹⁸ Art 3 para 3, European Commission (2000): Rules of Procedure of the Commission, C (2000) 3614, OJ L 308/26, 8.12.2000, last consolidated version 15.12.2006.

⁹⁹ Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, p. 41. Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., p. 70.

¹⁰⁰ Art 3 para 1, European Commission (2000): Rules of Procedure of the Commission, C (2000) 3614, OJ L 308/26, 8.12.2000, last consolidated version 15.12.2006

¹⁰¹ Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, p. 41.

¹⁰² Art 18 and 19, European Commission (2000): Rules of Procedure of the Commission, C (2000) 3614, OJ L 308/26, 8.12.2000, last consolidated version 15.12.2006.

¹⁰³ Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, p. 40.

establishing a European Agency of Fundamental Rights. Ensuring equal rights to all citizens and fighting against discrimination, including gender equality, should be mainstreamed into all European action.”¹⁰⁴ The group is chaired by the President of the Commission and consists of 11 Commissioners. The members of the respective cabinets and the services or DGs of the Commissioners support and provide working time for the group in fulfilling its tasks.¹⁰⁵ The tasks encompass to drive policy in the areas of fundamental rights, anti-discrimination and equal opportunities by preparing initiatives for adoption by the College, giving guidelines for forthcoming actions and ensuring the coherence of ongoing work.¹⁰⁶ Among others, the Group steered the preparations for the anti-discrimination strategy and monitored the implementation of the non-discrimination directives in recent years.¹⁰⁷

The group has also a role to play with regard to the monitoring of compliance of Community legislative proposals with the Charter of Fundamental Rights.¹⁰⁸ In this regard, the group has to be kept informed by the Legal Service on proposals where fundamental rights have been subject to internal monitoring. In some cases, where a balance has to be found between conflicting fundamental rights contained in proposals, the Group may also make policy guidelines within the margins for political discretion afforded by the provisions of the Charter.¹⁰⁹

1.2.3. The administrative arm

For the performance of its tasks, the College of Commissioners receives assistance from an administrative apparatus, which is structured in different Directorates-General (DGs) or services.¹¹⁰ The DGs in turn are divided into directorates, and the latter into units.¹¹¹

¹⁰⁴ Para 2.3, European Commission (2005): Strategic Objectives 2005 – 2009, Europe 2010: A Partnership for European Renewal Prosperity, Solidarity and Security Communication from the President in agreement with Vice-President Wallström, COM (2005) 12, 26.1.2005.

¹⁰⁵ Written question by Michael Cashman (PSE) to the Commission, Subject: Persons employed by the Commission in the field of non-discrimination (3 November 2005), Answer given by Mr Kallas on behalf of the Commission (9 February 2006), E-4005/2005.

¹⁰⁶ Oral Question for Question Time at the part-session in December 2005 pursuant to Rule 109 of the Rules of Procedure by Sophia In't Veld to the Commission, Subject: Commissioners' Group on Fundamental Rights, Anti-discrimination and Equal Opportunities (17 November 2005), H-1020/05.

¹⁰⁷ Oral Question for Question Time at the part-session in May 2007 pursuant to Rule 109 of the Rules of Procedure by Baroness Sarah Ludford to the Commission, Subject: Commissioners' Group on Fundamental Rights, Anti-discrimination and Equal Opportunities (10. April 2007).

¹⁰⁸ European Commission (2005): Communication, Compliance with the Charter of Fundamental Rights in Commission legislative proposals, Methodology for systematic and rigorous monitoring, COM (2005) 17,.

¹⁰⁹ Para 25, Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals, Methodology for systematic and rigorous monitoring, COM (2005) 172, 27.4.2005.

¹¹⁰ E.g. the Legal Service, the Secretariat General, the Communication Service or the Translation Service.

These different organisational levels are headed by directors-general, directors and heads of unit respectively. In this hierarchical structure each level reports upwards to the next highest level, i.e. the staff of units report to heads of units (or deputy heads), heads of units report to directors, the latter to directors general who are expected to cooperate with the relevant Commissioners (the degree of cooperation varies largely in practice).¹¹²

Matters of anti-discrimination are currently (under the *Barroso* Commission)¹¹³ assigned to DG Employment, Social Affairs and Equal Opportunities, Directorate G responsible for Equality between Men and Women, Action against discrimination and Civil Society. Directorate G consists of four units:

- Unit G/1: Equality between Men and Women
- Unit G/2: Equality, Action against Discrimination: Legal Questions
- Unit G/3: Integration of People with Disabilities
- Unit G/4: Action against Discrimination, Civil Society

Splitting up policy matters and legal matters might have positive implications with regard to the legal developments as the lawyers specialising in gender are working together with the lawyers specialising in the other “new” discrimination grounds; at the same time there might be the risk of losing the linkage between legislative measures and policy initiatives, whereas gender as well as disability have own policy units and the other grounds (race, religion, belief, age and sexual orientation) are summarised in one unit. The different treatment between the discrimination grounds with respect to policy questions is due to the longstanding commitment towards equal treatment between women and men and towards equal opportunities for disabled persons within the EU. Personal or private contacts among the staff might bridge the gaps between the policy units and the legal unit temporarily but they cannot make up for a formalized system guaranteeing a coherent, common strategy.¹¹⁴ Also, interest lobbying groups need to cope with that situation and develop strategies to avoid the risk of legislation and policies falling apart.

¹¹¹ Art 21, European Commission (2000): Rules of Procedure of the Commission, C (2000) 3614, OJ L 308/26, 8.12.2000, last consolidated version 15.12.2006.

¹¹² See: Nugent, Neill (1999): *The government and politics of the European Union*, Duke University Press: Durham, N.C., pp. 142, 143.

¹¹³ The Barroso Commission followed the Prodi Commission and has been in office since 22 November 2004 for a five year term.

¹¹⁴ The separation of the policy units and the legal unit was undertaken in May 2006.

As of 15.12.2005, 54 persons were working within DG Employment and Social Affairs and 6 persons were working within DG Personnel and Administration allocated to the units specifically dealing with questions of non-discrimination and equal treatment.¹¹⁵ In addition, 19 persons were allocated to the Unit Citizenship and Fundamental Rights within DG Justice, Freedom and Security partly dealing with non-discrimination on grounds of Art 12 TEC which prohibits discrimination on grounds of nationality, and the Charter of Fundamental Rights. Altogether 140 staff members were either entirely working on non-discrimination and equal opportunities issues or were partly dealing with questions related to these areas.¹¹⁶ This has to be seen in relation to the approx. 30,000 employees at the Commission.

With regard to disability, a self-contained inter-service group on disability exists consisting of several DGs and services. This is due to the fact that disability issues are not only affecting questions of social policy. DGs involved are, for example, DG Internal Market and Services, DG Transport and DG Competition.

1.2.4. Decision-making procedure

1.2.4.1. Impact Assessment procedures

Since 2003, each proposal (any proposal not only in the field of anti-discrimination) issued by the Commission has to undergo an impact assessment procedure. Impact assessment applies to major initiatives; these are those presented by the Commission in its Annual Policy Strategy or its work programme for the forthcoming year. Impact assessment has been introduced by the Commission in order to improve the quality and coherence of the policy development process. As stated in the Communication from the Commission on Impact Assessment presented in May 2002 “[i]mpact assessment identifies the likely positive and negative impacts of proposed policy actions, enabling informed political judgements to be made about the proposal and identify trade-offs in achieving competing objectives. It also permits to complete the application of the subsidiarity and proportionality protocol annexed to

¹¹⁵ Matters of anti-discrimination were at that time dealt with Directorate D and G comprising four units: Unit D/3: Anti-discrimination and relations with civil society; Unit G/1: Equal opportunities for women and men – Strategy and programme; Unit G/2: Equal opportunities for women and men – Legal issues; Unit G/3: Integration of people with disabilities.

¹¹⁶ This information relies upon an answer given by the Vice President of the Commission, Mr Kallas, to a parliamentary question by Michael Cashman (subject: Persons employed by the Commission in the field of non-discrimination) on 09.02.2006, E-4005/2005.

the Amsterdam Treaty”.¹¹⁷ There are impact assessment guidelines, which give details on the procedures that have to be adhered to.¹¹⁸ If the outcome of the impact assessment is that there is no need for action at EU level, the EC cannot bring forward a proposal.

An evaluation has also been undertaken with respect to the Racial Equality Directive (2000/43/EC)¹¹⁹ and the Employment Equality Directive (2000/78/EC).¹²⁰ The Commission identified in the Annual Policy Strategy for 2008¹²¹ as well as in its Work Programme for 2008¹²² the need for further action against discrimination on grounds of age, disability, religion, belief and sexual orientation in the field outside employment (including social protection, social security, housing, access to and supply with goods and services and education; protection against discrimination in these fields is already afforded in the case of discrimination on grounds of race). In its Work Programme for 2008 the Commission argues that “[t]he consultation of European Business Test Panel shows that many businesses believe it matters if there are different levels of protection between the EU Member States against discrimination in access to goods, services and housing on grounds of age, disability, religion and sexual orientation (63%) and 26% believe that a difference in the level of protection would affect their ability to do business in another Member State.” Being mentioned in the Annual Policy Strategy as well as in the work programme this matter is a major initiative, in which case an impact assessment is obligatory.

1.2.4.2. *Drafting of a proposal*

Following the consultation procedure and the collection of expertise, a report is drafted by the staff of the Commission with contributions by the Member States. An impact assessment board, which is a high level board within the EC analyses whether all requirements of the

¹¹⁷ European Commission (2002): Communication from the Commission on Impact Assessment, COM(2002)276 final. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0276:FIN:EN:PDF>, (22.08.2008).

¹¹⁸ European Commission (2005): Impact Assessment Guidelines, SEC(2005) 791, June 2005. http://ec.europa.eu/governance/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf, (02.09.2008).

¹¹⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:180:0022:0026:EN:PDF>, (02.09.2008).

¹²⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF>, (02.09.2008).

¹²¹ Commission of the European Union (2007): Communication from the Commission to the Council, the European Parliament and Social Committee and the Committee of the Regions, Annual Policy Strategy for 2008, COM(2007) 65 final. http://ec.europa.eu/atwork/synthesis/doc/aps_2008_en.pdf, (02.09.2008), pp. 9-10.

¹²² European Commission (2008): Commission Legislative and Work Programme 2008, COM (2007) 640 final (23.10.2007), p. 25.

impact assessment have been met and comments on the impact assessment. Only after this review, the impact assessment together with the proposal will be subject to a formal inter-service consultation. Inter-service consultations (especially among those DGs whose responsibilities are concerned by a draft proposal) are in place in order to reduce the number of objections when adopting the proposal. One lead DG is responsible for the draft. All draft proposals must be referred to the Legal Service for an opinion on their legality. After passing the administrative level (services), the draft proposal requires the approval of the lead Commissioner. Usually, early reference is made to the Commissioners cabinet but also to the cabinets of other relevant or interested Commissioners are contacted and sounded out for their views. Only after all these procedures have been adhered to the draft is ready for formal adoption by the College of Commissioners.¹²³

1.2.4.3. *Adoption of a proposal by the College of Commissioners*

Pursuant to Art 219 TEC the College of Commissioners acts by a majority of the number of its Members. The Rules of Procedure lay down four ways of decision-making:¹²⁴

- Commission meetings by oral procedure: the Commissioners meet once a week in which more important issues are dealt with. The agenda is prepared by the Secretariat General. Usually, matters are already discussed by the *chefs de cabinet* beforehand, in order to clear out differences. If agreement can be achieved with the cabinets, the matters are designated as ‘A points’ which will be adopted by the College without discussion. In this procedure the above mentioned Commission groups play an important role.¹²⁵
- The written procedure applies “where discussions or deliberations in College meetings do not seem to be necessary because all points have been agreed by the relevant DGs and approval has been given by the Legal Service.”¹²⁶ In this procedure, draft proposals are sent to the concerned Commissioners cabinets. If there are no objections within a specific period of time, the proposal will be adopted. Commissioners having objections can request at any time to refer the matter to the College meeting for discussion.¹²⁷

¹²³ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., pp. 250-251.

¹²⁴ Art 4, European Commission (2000): Rules of Procedure of the Commission, C (2000) 3614, OJ L 308/26, 8.12.2000, last consolidated version 15.12.2006.

¹²⁵ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., p. 40.

¹²⁶ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., p. 94.

¹²⁷ Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, p. 40.

- The empowerment procedure, allows for decisions taken by one or more Commissioners respecting the principle of collective responsibility. This procedure is limited to administrative or management measures.¹²⁸
- The delegation procedure is made use of for routine business of the Commission. The Commissioners may, provided the principle of collective responsibility is fully respected, delegate the adoption of management or administrative measures to the Directors-General and Heads of Department.¹²⁹

1.2.5. The role of the Commission in anti-discrimination policies

1.2.5.1. Competence

The Commission is generally described as the “engine of European integration”. This is because the commission has, first and foremost, the right of initiative. The treaties stipulate that the Council and the European Parliament can only act upon a proposal from the Commission when drafting legislation. This procedure applies when the proposed measures fall under the first pillar; the right of initiative is less applicable in the second (Common Foreign and Security Policy) and third pillar (Police and Judicial Cooperation in Criminal Matters). However, the Commission also acts as a policy initiator. As such, the Commission “promotes and develops many of the policy initiatives that are launched at EU level.”¹³⁰ These encompass “proposals in respect of what may be thought of as grand and overarching policies, but in volume terms most of its initiatives are focused on detailed policies in particular sectors.”¹³¹

When initiating policies or legislative proposals, the Commission can only act within the scope and remit of the Treaties. Art 5 TEC clearly states: “The Community shall act within the limits of the powers conferred upon it by this Treaty [through the Member States] and of the objectives assigned to it therein.”

¹²⁸ Art 13, European Commission (2000): Rules of Procedure of the Commission, C (2000) 3614, OJ L 308/26, 8.12.2000, last consolidated version 15.12.2006.

¹²⁹ Art 14, European Commission (2000): Rules of Procedure of the Commission, C (2000) 3614, OJ L 308/26, 8.12.2000, last consolidated version 15.12.2006.

¹³⁰ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., p. 10.

¹³¹ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., p. 10.

Less clear are the following two sentences of Art 5 TEC, according to which the EU institutions have to take into account the principle of subsidiarity and proportionality when they take action in areas, which do not fall within the “exclusive competence” of the Community. The principle of subsidiarity entails that action shall only be taken “if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”¹³² Resulting from this stipulation, the question at issue is whether it is better for the action to be taken by the EU or the Member States.¹³³ As has been concluded by the commentator, *Antonio Estella*, “it will always be possible to argue that due to the close relationship between these areas and the development of the single market, some Community intervention will always be necessary.”¹³⁴

The principle of proportionality requires that “[a]ny action by the Community shall not go beyond what is necessary to achieve the objective”.¹³⁵

What is most contested in literature is the expression “exclusive competence”. There is no criterion contained in the Treaty for determining the “exclusive competence” of the Community. The discussion of this matter shall be left to other writers, experts or scholars;¹³⁶ within the framework of this study it shall suffice to point at this issue and to refer to the Protocol on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaty of Amsterdam,¹³⁷ which prescribes that any proposed legislation has to include a justification with a view to the principles of subsidiarity and proportionality. In order to ensure that decisions are taken as closely as possible to the citizens of the EU,¹³⁸ the form of action shall be as simple as possible. Thereby, the EU institutions shall preferably adopt directives,¹³⁹ which define the objectives to be achieved but leave it to the Member States on how to best achieve them.

¹³² Art 5 (2) TEC.

¹³³ Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, p. 103.

¹³⁴ Estella, Antonio (2002): *The EU Principle of Subsidiarity and its Critique*, Oxford University Press: New York, p. 114.

¹³⁵ Art 5 (3) TEC.

¹³⁶ An informative delineation of the existing approaches from different commentators, authors or writers is given by Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, pp. 101-103.

¹³⁷ Protocol (No 30) on the Application of the Principles of Subsidiarity and Proportionality, OJ C 340/105, (10.11.1997).

¹³⁸ Preamble of Protocol No 30, see footnote above.

¹³⁹ Para 6 Protocol No 30, see footnote above.

Besides acting as the “engine of European integration”, the Commission is also the “guardian of the treaties”. In the role of the latter the Commission has the power to bring action against Member States when they are in breach of Community law.

1.2.6. Actions taken by the Commission

1.2.6.1. Before the entry into force of Art 13 TEC

Already in 1985, the Commission presented a policy plan on migration.¹⁴⁰ The policy pursued a twofold approach: on the one hand immigration control, on the other hand integration of immigrants including guidelines on combating racism. For the reason that immigrants did not enjoy the right of freedom of movement they were not perceived as internal market actors. As a consequence, for most Member States “immigration issues”, which also concerned racist discrimination, did not justify Community intervention.¹⁴¹ The Commission repeatedly tried to include non-discrimination clauses in various directives¹⁴² but in most instances the Council did not accept these clauses and rather referred them into the respective preambles.¹⁴³

Changes in the point of view of the Council have been recognisable since the beginning of the 1990s, most evidently reflected in the Presidency Conclusions of European Council meetings beginning with the 1990 Dublin Council.¹⁴⁴ In this and following Presidency Conclusions,¹⁴⁵ the European Council referred to the manifestations of intolerance, racism and xenophobia and acknowledged the need to act against these phenomena. At the Corfu summit in 1994, the European Council initiated the constitution of the Consultative Commission on Racism and Xenophobia, which was charged with finding out the best way of cooperation between the governments and “various social bodies in favour of encouraging tolerance and understanding

¹⁴⁰ European Commission (1985): Guidelines for a Community policy on Migration, COM (85) 48.

¹⁴¹ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, pp. 59-63.

¹⁴² See, for example the Television Without Frontiers’ Directive from 1989, Council Directive 89/552/EEC (03.10.1989), OJ L 298/23, (17.10.1989). http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31989L0552&model=guichett, (02.09.2008), Art 22: Member States are obliged to “ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality”.

¹⁴³ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, pp. 96-97.

¹⁴⁴ Annex III, Declaration on anti-semitism, racism and xenophobia to the Presidency Conclusions of the European Council (Dublin, 25 and 26 June 1990).

¹⁴⁵ Maastricht Council in December 1991, Edinburgh Council in December 1992; Copenhagen Council in June 1993.

of foreigners”.¹⁴⁶ As depicted in Chapter 1.1. the European Parliament had already been a strong supporter of fighting racism at that time. Against this background, the Commission declared 1997 the European Year against Racism.¹⁴⁷ This year was a juncture in the long fight against racism within the European Union. The European Year among others aimed at disseminating information, exchanging good practices as well as encouraging reflection and discussion upon racism.¹⁴⁸ As a result of the European Year against Racism the need for legislation to combat racial discrimination was identified.¹⁴⁹ ENAR, the European Network Against Racism, has been a major outcome of the European Year. It was the Commission who started and strongly supported the networking process of NGOs in order to have contact organisations at European level.¹⁵⁰ Between March and September 1998, more than 600 NGOs were involved in national and European round table consultations to discuss viable structures.

As far as sexual orientation is concerned the Commission played a subtle role in expanding its competency. For example, the Commission supported EU lobbying by partly funding research and networking activities of ILGA-Europe starting with 1997.¹⁵¹ Moreover, the Commission also produced some soft law measures or non-discrimination clauses, e.g. the Code of Practice on sexual harassment in 1992 which for the first time considered gays and lesbians vulnerable to sexual harassment at work.¹⁵²

Besides, the Commission has used its powers and the treaties to take measures in the social field to combat discriminatory phenomena and to strive for anti-discrimination, for example, in the framework of the European Social Fund, the Social Action Programme¹⁵³ or the

¹⁴⁶ Ch. 3 para 1: European Council (1994): European Council at Corfu, Presidency Conclusions, 24-25 June 1994. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00150.EN4.htm, (27.08.2008).

¹⁴⁷ European Commission (1995): Communication on racism, xenophobia and anti-semitism and Proposal for a Council Decision designating 1997 as European Year against Racism, COM (1995) 653 final, OJ C 89/7, (26.03.1996).

¹⁴⁸ European Council (1996): Resolution of the Council and the representatives of the governments of the Member States, meeting within the Council of 23 July 1996 concerning the European Year against Racism (1997), (96/C 237/01), OJ C 237/1, (15.08.1996).

¹⁴⁹ European Commission (2000): Commission report on the implementation of the Action Plan against Racism – Mainstreaming the fight against racism, p. 6.

¹⁵⁰ Interview with a representative of ENAR by telephone, 22.05.2007.

¹⁵¹ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, p. 95.

¹⁵² European Commission (1992): Commission code of practice on sexual harassment, OJ L 49, (24.02.1992).

¹⁵³ European Commission (1995): Communication on racism, xenophobia and anti-semitism and Proposal for a Council Decision designating 1997 as European Year against Racism, COM (1995) 653 final, OJ C 89/7, (26.03.1996).

European Employment Strategy.¹⁵⁴ With these instruments the Commission aimed at implementing the “mainstreaming” approach, i.e. the integration of the fight against discrimination of ethnic minorities, disabled and other groups or individuals who may be disadvantaged “into all areas of activity which lend themselves to this” including among others employment, education, training and youth programmes and public procurement policy.¹⁵⁵

The Commission also supported the activities and initiatives of the Starting Line Group, especially the ‘Starting Point’ a draft proposal of introducing a legal basis into the EC Treaty to give the Community the power to adopt anti-discrimination legislation. It was not able to support the first draft directive presented by the Starting Line Group arguing that the EC had no competence to adopt legislation combating discrimination. But already at that time – encouraged by the European Year against Racism, the lobbying of the Starting Line Group and the European Parliament and before the signature of the Amsterdam Treaty – the Commission carried out extensive consultations with Member States, social partners and NGOs on possible measures to fight all forms of discrimination. In doing this, it organised seminars and conferences in several European cities to convene and meet with the above mentioned stakeholders.¹⁵⁶

1.2.6.2. After the entry into force of Art 13

The introduction of Art 13 into the Treaty establishing the European Community through the Treaty of Amsterdam put an end to the Community competence debate in anti-discrimination matters. Already in November 1999, the Commission presented a package of proposals based upon the new Treaty article. The package consisted of two directives and a separate proposal for an accompanying action programme to combat discrimination.¹⁵⁷

¹⁵⁴ European Commission (2000): Commission report on the implementation of the Action Plan against Racism – Mainstreaming the fight against racism, p. 7.

¹⁵⁵ European Commission (2000): Commission report on the implementation of the Action Plan against Racism – Mainstreaming the fight against racism, p. 7.

¹⁵⁶ European Commission (1999): Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination, COM (1999) 564 final, 25.11.1999.

¹⁵⁷ European Commission (1999): Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination, COM (1999) 564 final, 25.11.1999.

- A proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (RED).

This proposal entailed the prohibition of discrimination on grounds of race and ethnic origin in the employment sphere and is remarkably also in fields outside employment, including social protection, social advantages, education, access to and supply with goods and services and housing. Proposing an extended scope of protection was possible because the Commission built upon the perceived and as the Commission asserted “evidenced”¹⁵⁸ political will of the Member States to go further in the case of racial discrimination. Although the Commission did not want to establish a hierarchisation among the six grounds contained in Art 13 TEC, it did not want to limit the possibilities of protection against discrimination that seemed to exist in case of racial discrimination.¹⁵⁹ So, in consequence it proposed a second directive embracing all the other grounds:

- Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation.

This proposal contained all grounds of Art 13 TEC, namely race, ethnic origin, disability, age, sexual orientation, religion and belief, and prohibited discrimination in access to employment and occupation, promotion, vocational training, employment and working conditions and membership of trade unions and employers’ organisations.

Both proposals very much relied upon the case law of the European Court of Justice (for example, regarding the definition of indirect discrimination, the shift of the burden of proof and positive action measures), the experiences drawn from combating gender discrimination and on international conventions especially with regard to the RED.¹⁶⁰ The Commission integrated the necessity of establishing a dialogue with social partners and NGOs in both proposals. At the same time, it stipulated the establishment of independent bodies at national

¹⁵⁸ European Commission (1999): Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination, COM (1999) 564 final, 25.11.1999.

¹⁵⁹ Interview with Adam Tyson, EC official, Brussels, 24.10.2007.

¹⁶⁰ European Commission (1999a): Explanatory Memorandum, Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM (1999) 565 final; European Commission (1999b): Explanatory Memorandum, proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (1999) 566 final.

level responsible for dealing with equal treatment issues. Thus, transforming *de facto* actors into *de lege* stakeholders as well as introducing new ones.

With regard to the principles of subsidiarity and proportionality, the Commission argued that measures prohibiting discrimination existed in all Member States but varied significantly as regards the scope, content and enforceability. Therefore, the Commission considered action at Community level necessary in order to “constitute an unequivocal statement of public policy towards discrimination”¹⁶¹ and to contribute to the goals to be achieved by the Member States within the framework of the Employment Guidelines 1999 of the European Employment Strategy. The form of a directive would leave enough leeway to the Member States to transpose the directives according to the specific national situations.¹⁶²

In order to underpin the legislation with concrete action and to encourage the Member States to exchange good practices, the Commission proposed as the third part of the package

- a proposal for a Council Decision establishing a Community action programme to combat discrimination (2001 to 2006).

When designing the action programme, the Commission relied upon the experiences already made within the Social Action Programme and the European Social Fund. It primarily aimed at funding awareness raising, training and networking activities. For example, the European level civil society organisations such as the EDF or ENAR were partly funded by this programme. Among other things, the action programme was also intended, “to examine the need for and the effectiveness of legislation prohibiting discrimination on other grounds in the wider areas covered by the racial discrimination directive.”¹⁶³

Only seven months later after the Commission had presented its package, the Council adopted the first proposed measure, the Racial Equality Directive. This expeditious adoption of a piece

¹⁶¹ European Commission (1999a): Explanatory Memorandum, Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM (1999) 565 final; European Commission (1999b): Explanatory Memorandum, proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (1999) 566 final.

¹⁶² European Commission (1999a): Explanatory Memorandum, Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM (1999) 565 final; European Commission (1999b): Explanatory Memorandum, proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (1999) 566 final.

¹⁶³ Tyson, Adam (2004): *The Negotiation of the EC Directive on Racial Discrimination*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden, p. 112.

of legislation is not standard in decision-making procedures within the EU, especially if the measures require substantial legislative changes at national level. As remarked by an EC official, this was not least due to the concern about the involvement of the Austrian right-wing Freedom Party with its leader Jörg Haider in the governing coalition formed in February 2000 and the negative reaction of the, at that time, other 14 Member States.¹⁶⁴ The Employment Equality Directive and the Community action programme were passed one year later in November 2000. Remarkably, the Member States hardly demanded any changes to the original Commission proposals.¹⁶⁵

In 2004, the Commission presented its Green Paper on Equality and non-discrimination in an enlarged European Union¹⁶⁶ summarising the EU measures to combat discrimination and identifying the “challenges for the future” with a view to an enlarged EU. Doing this, it on the one hand referred to the difficult decision making in the Council because legislation in this area continued to require unanimity in the Council, i.e. after the most recent enlargement of the Union in January 2007, 27 Member States have to agree. On the other hand, it emphasised the importance of the implementation of the current legal framework, the improvement of data collection, monitoring and analysis and the cooperation among the relevant stakeholders.¹⁶⁷

The Green Paper was drafted in reaction to calls from the European Parliament to launch a public consultation on the future development of anti-discrimination policy. The Commission summarised the results of the consultation in its Communication on “Non-discrimination and equal opportunities for all – A framework strategy”.¹⁶⁸ The Communication takes account of comments and contributions by national authorities, regional and local authorities, specialised

¹⁶⁴ Tyson, Adam (2004): *The Negotiation of the EC Directive on Racial Discrimination*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden, p. 130.

¹⁶⁵ Tyson, Adam (2004): *The Negotiation of the EC Directive on Racial Discrimination*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden, p. 112.

¹⁶⁶ European Commission (2004): Green Paper: Equality and non-discrimination in an enlarged European Union, COM(2004)379 final. Employment & Social Affairs. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0379:FIN:EN:PDF>, (26.08.2008).

¹⁶⁷ The Commission identified following relevant stakeholders: National authorities, European Parliament, social partners and NGOs, Trade Unions, employers and specialised equality bodies, see: European Commission (2004): Green Paper: Equality and non-discrimination in an enlarged European Union, COM(2004)379 final. Employment & Social Affairs. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0379:FIN:EN:PDF>, (26.08.2008), pp. 25-26.

¹⁶⁸ European Commission (2005): Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Non-discrimination and equal opportunities for all – A framework strategy, COM(2005) 224 final. http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0224en01.pdf 26.08.2008, (26.08.2008).

equality bodies, NGOs, social partners and experts (in total approx. 1500 contributions). Pursuant to the Commission's assessment a major outcome of the consultation was that additional efforts should be put into the reinforcement and effective implementation of the existing legal framework, rather than proposing new legislative measures based on Art 13 – economic and political concerns were expressed by some respondents played a decisive role in this decision. However, it announced a feasibility study with respect to possible new initiatives. Furthermore, the Commission identified the promotion of learning from good practice, the cooperation of stakeholders, awareness raising, the social exclusion faced by disadvantaged ethnic minorities and relations with third countries as issues and areas where action was necessary.

A mapping study was commissioned in 2005 to give information on national measures aiming at combating discrimination outside the field of employment. Indeed, as a result of the consultation and the experiences made with the Community Action Programme to Combat Discrimination respective action-measures to prohibiting discrimination outside the field of employment were announced in the Annual Policy Strategy and work programme for 2008. Also, the mapping study showed that there was a wide variety among the Member States in the level of protection against discrimination that goes beyond the minimum required by the existing equality directives. This together with increasing calls from civil society as well as the European Parliament likewise made the Commission to announce the levelling up of the scope of protection for all discrimination grounds.¹⁶⁹

In its competence as the “guardian of the treaties” the Commission filed actions against a number of Member States with the European Court of Justice because of the failure to implement the Race Equality Directive and the Employment Equality Directive on time (see chapter 3.2.3. Formalized Interaction by Ways of Sanctions).

1.2.7. Reflections upon the role of the European Commission

Although acting hesitantly in the 1990s, the Commission continuously tried to bring the issue of equal treatment and anti-discrimination within the remit of the EU. It was rather unsuccessful when trying to include non-discrimination clauses into legislative measures (e.g. directives); the Council repeatedly refused respective proposals. However, the Commission is

¹⁶⁹ Information provided by an EC Official via e-mail, 16.04.2008.

obliged to maintain and foster good relationships with the Council, with the Permanent Representatives of the Council in Brussels and additionally with the national governments of the Member States who are the “voting units” in the European Council and the Council of Ministers because it needs their support – especially in politically sensitive issues – if its initiatives or proposals are to make progress.¹⁷⁰

More successfully, the Commission has used soft law measures to enhance some progress in the fight against discrimination in the EU, especially within the framework of the European Social Fund, the Employment Strategy and the Social Action Programme. Measures taken or supported within the first two instruments were tailored to target discrimination on grounds of gender, age, disability and ethnic origin in the field of employment. Objectives to be achieved included the increase of the share of women, older persons, the youth, disabled persons and migrants in the labour market. The Social Action Programme also encompassed actions in the field of education.

However, the role of the European Parliament and the effective lobbying of civil society organisations are not to be underestimated when looking at actions taken by the EC.

1.3. Council of the European Union/Member States

The Council of the European Union represents the interests of European Union Member States and the national governments in European policy making and is the main decision making body of the European Union.

Decisions on anti-discrimination issues have differed from other fundamental rights issues since Art 13 was included in the treaties and anti-discrimination was turned into EU competence. Still Art 13 had no direct effect but only set the ground for secondary legislation on European Union level, requiring unanimity within the Council of the European Union and merely allowing for a consultative role of the European Parliament. This framework given, the Council has been acting as the legislative body deciding on single acts of European anti-discrimination legislation (the two Anti-Discrimination Directives and Community Action Programme to Combat Discrimination) the on initiative of the European Commission and

¹⁷⁰ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., p. 196.

after formal and legally binding consultation of the European Parliament (Article 192 of the EC Treaty) and informal and legally non-binding consultation with civil society.

1.3.1. On the Way towards Article 13 and the AD-Directives

Political developments in the Member States initiated the debate within European institutions about the importance of acting against discrimination on EU level. Until 1995 European Union activities included common declarations of all EU institutions condemning all forms of intolerance, European Parliament reports that highlighted the importance of joint action to combat racism, European Commission statements and communications, conclusions and preambles of Directives including Anti-Discrimination clauses (see chapter 2. The Development of the EC/EU Anti-Discrimination Agenda) Political resolutions by the Council highlighted the political will of the Member States, but a legal basis for acting in terms of creating legally binding provisions on a European level was missing. Especially UK government very much opposed any steps towards creating a legal basis for non-discrimination legislation at European level arguing that this policy field was a clear case of national responsibility and there was no need for common ruling.

Racist incidents in various member states and the development of cross-border activities of racist and neo-nazi groups urged Member States Representatives to restart discussion on European Union regulations. In May 1996 the UK government changed from Tories to Labour Party, a development, which opened a window of opportunity for new activities. On 15th June 1996 a Joint Action concerning action to combat racism and xenophobia¹⁷¹ was adopted by the Council aiming at creating a common standard of rules to combat racism and xenophobia in order to hinder perpetrators from profiting of different rules in different European Union countries¹⁷².

Discussions on the scope of a potential provision on non-discrimination in the Treaties were again influenced by developments in the Member States and the presidencies.

¹⁷¹ Joint action/96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia.
<http://europa.eu/scadplus/leg/en/lvb/l33058.htm>, (02.09.2008).

¹⁷² Joint action/96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia.
<http://europa.eu/scadplus/leg/en/lvb/l33058.htm>, (02.09.2008), Objective: To adopt rules to combat racism and xenophobia in order to prevent the perpetrators of such offences from exploiting the fact that racist and xenophobic activities are classified differently in different states by moving from one country to another in order to escape criminal proceedings or avoid serving sentences and thus pursue their activities with impunity.

The inclusion of a non-discrimination clause for the ground of sexual orientation was opposed by the Irish, who were in trouble with the whole project, which was criticised by the Irish bishops' conference. Sexual Orientation was not included in the list of protected grounds under the Irish Presidency in the 2nd half of 1996 - and even if the Irish assured that this was a drafting mistake, it was no secret that the inclusion of sexual orientation was one of the key points of critics by the Irish bishop's conference.

The European Commission drafted Art 13 in close cooperation with civil society organisations in 1997, presented it to the European Council, which introduced the Art under the Dutch presidency, managing to include sexual orientation again.

Article 13 TEC¹⁷³ enabled the Council, acting unanimously based upon a proposal by the European Commission and after having consulted the European Parliament, the opportunity to adopt measures combating discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

During the first half of 1998, the UK presidency tried to shift the process towards directives based on Art 13. The British had by then realised that they could play a leading role in the area of anti-discrimination as they themselves already had quite progressive structures in place in their country. It was only under the Austrian presidency, however, in the 2nd half of 1998, when Commissioner Flynn announced that there would be two Directives. In November 1999 the European Commission presented proposals for three directives based upon the new competences and duties of Article 13.¹⁷⁴ The development of the draft directives concerning the scope and the hierarchy of the grounds was very much influenced by the reaction of the Member States to the presentation of the basic concepts and ideas. Here again the Irish

¹⁷³ Treaty establishing the European Community, Article 13:

1. 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.

http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html#anArt14

¹⁷⁴ Proposals for

- one directive prohibiting discrimination encompassing all discrimination grounds listed in Art 13 in the employment field
- one directive prohibiting discrimination on grounds of race and ethnic origin in the employment field and in areas such as social protection, housing, education and goods and services
- an action programme to accompany and ensure effective implementation of the legislative measures through practical activities including awareness raising, networking and training activities

bishops' conference played an important role. The exceptions for religious institutions, the whole concept of the “ethos of the organisation¹⁷⁵”, which then entered the text of the directives was designed by the Irish Catholic Church, their proposal entered the directives word by word.¹⁷⁶

Furthermore, it became quite clear that a race directive could go further in material scope as far reaching provisions for the grounds of age and disability would put too much financial pressure on the Member States and “would therefore not sell”. Reactions of the Member States revealed the need for policy action and for raising awareness in addition to legislation and that in principle legislation should be established for all the grounds included in Art 13.

When in February 2000 Jörg Haider's Freedom Party (FPÖ) became part of the Austrian Government the floor was open for action in the field of racism, which caused a change in time management. Pressure by France and Belgium, who feared similar political developments like in Austria, motivated the European Parliament to quickly make up its mind on the Race Directive and the political situation was used to speed up the decision on Directive 2000/43 within the European Council under the Portuguese Presidency. The decision making by the Council was done in seven months from the date of its proposal by the Commission, which was a record for a piece of Community law, which requires substantial changes of legislation on the national level.¹⁷⁷ Directive 2000/73 was passed under French Presidency in December of the very same year.

¹⁷⁵ Article 4/2. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation establishes that: „Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, **in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief**, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to **require individuals working for them to act in good faith and with loyalty to the organisation's ethos**.

¹⁷⁶ Interview with European Commission Official.

¹⁷⁷ Tyson, Adam (2004): The Negotiation of the EC Directive on Racial Discrimination, in: Chopin, Isabelle/Niessen, Jan (eds.): The Development of Legal Instruments to Combat Racism in a Diverse Europe. Martinus Nijhoff Publishers: Leiden, p.112.

Table 1: EU Activities and corresponding developments in the Member States

Year	Presidency	EU Activities	Developments in Member States
1995/1	France	Combating Discrimination on grounds of race brought to the agenda of the Council by France and Germany	Right Wing Activities in Germany and in Denmark
1995/2	Spain	UK opposing European Level legislation	
		Reflection Group for preparation of Intergovernmental Conference on amendments of the Treaties acknowledges that the Treaties should provide 'a general clause prohibiting discrimination on the grounds of gender, race, religion, disability, age and sexual orientation'.	
1996/1	Italy	Council, Joint Action concerning action to combat racism and xenophobia Discussion on scope, content and groups that should be considered	Change of UK government from Tories to Labour
1996/2	Ireland	Irish government paper on foreign policy with non-discrimination clause as a priority	
		Commission communication ¹⁷⁸ and the Council resolution ¹⁷⁹ on equality of opportunity for people with disabilities	
		Sexual orientation out	Irish Bishops Conference opposing developments
1997/1	Netherlands	Disability in and out again	
		Sexual orientation in again Treaty of Amsterdam/ Art 13 signed	Labour spokesman on foreign affairs in the UK states that position of a labour government would be inclusion of the social protocol of the treaty with protection of groups discriminated against
1997/2	Luxembourg		
1998/1	United Kingdom	Process towards directives for implementing Art 13 was started	

¹⁷⁸ European Commission (1996): Communication of the Commission on Equality of Opportunity for People with Disabilities - A New European Community Disability Strategy - European Union, COM (96)406, (30 July 1996).

¹⁷⁹ European Council (1996): Resolution of the Council and of the representatives of the member states meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities. http://ec.europa.eu/employment_social/soc-prot/disable/com406/res_en.htm, (02.09.2008).

1998/2	Austria	Announcement that there would be 2 Directives by Commissioner Flynn	
1999/1	Germany	Treaty of Amsterdam/ Article 13 entered into force	
1999/2	Finland		
2000/1	Portugal	Directive 43/2000	Austrian Freedom Party became part of government in Austria
2000/2	France	Directive 78/2000	

1.3.2. The Role of Member States in the Implementation of the Directives into National Legislation

The implementation of Directives 43/2000/EC and 78/200/EC into national legislation confronted several Member States with problems and opened up new questions. Some concepts within the Directives, which had been influenced by examples from national legislation or by judgements of the European Court of Justice like the shift of the burden of proof¹⁸⁰ or non-pecuniary damages were new or at least uncommon for the legal systems of some Member States. Moreover the concept of “genuine occupational requirements” that had been taken over from national law from some Member States caused some confusion in others as the concept was neither clear nor easy even to translate¹⁸¹.

Recent developments have shown that presidencies and political developments in Member States are still pushing and/or slowing down developments in anti-discrimination policies and as such influence strategies of other actors, especially the European Commission and European NGOs.

¹⁸⁰ Basis for the Burden of Proof Provisions of the Anti-Discrimination Directives was the Burden of Proof Directive (Council Directive 1997/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1997&nu_doc=80, (02.09.2008)). The concept can be traced back to cases such as *Enderby* (*Enderby v Frenchay Health Authority and Secretary of State for Health*, 1993 ECR I-5535), where the Court stated that ‘where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay’, see also: Parmar, Sejal (2004): *The European Court of Justice and Anti-Discrimination Law*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden. pp. 131-154.

¹⁸¹ Tyson, Adam (2004): *The Negotiation of the EC Directive on Racial Discrimination*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden, p.122.

1.3.3. Homophobia in Poland causes action by European Parliament¹⁸²

The political situation in Poland in 2006/2007, when homophobia was openly tolerated and even supported by the Polish government, led to protests by European NGOs and caused pressure by the European Parliament, which led to contracting the Fundamental Rights Agency to analyse homophobic tendencies in Member States¹⁸³.

1.3.4. Member States Concerns jeopardize Commission's plans to harmonise AD legislation

The process towards a European Commission proposal of a new initiative to strengthen current anti-discrimination legislation, which had been characterized by strong efforts of NGOs to go for a horizontal directive ensuring that future anti-discrimination legislation covers all discrimination grounds equally, has been influenced by Member States concerns to a high extent in the final phase of the drafting process. In March 2008 the until then relatively clear commitments of the European Council¹⁸⁴ that were in line with the statements of the European Commission to bring forward legislation which would ensure that discrimination in access to goods and services would be prohibited for all grounds to achieve the necessary harmonisation, faltered, and there were mixed rumours spreading about plans to propose a Directive only on disability, which would have closed the door for a 'levelling up' of protection for the other grounds for ages, or to exclude sexual orientation or religion and belief. The causes for these "steps out of the line" included in these rumours were that there were concerns in several Member States on how "to sell" the new obligations and prohibitions to their voters. Poland was said to find arguments against the inclusion of sexual orientation as was Germany to oppose the rise of protection for discrimination on grounds of religion and belief. More details of rumours would be out of proportion for a research study, we decided to include these recent developments because they are necessary to complete the picture of what is going on and how.

¹⁸² For more information see: Single case example: Homophobic events in Poland 2006/2007.

¹⁸³ The first (legal) part of the report was completed in June 2008 and published on the Website of the Fundamental Rights Agency. De Schutter, Olivier (2008): *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States. Part I – Legal Analysis*. European Union Agency for Fundamental Rights. http://fra.europa.eu/fra/material/pub/comparativestudy/FRA_hdgso_part1_en.pdf, (02.09.2008).

¹⁸⁴ European Council (2007): Council Resolution on the Follow-up of the European Year of Equal Opportunities for all (2007); Brussels, 5 December 2007. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:308:0001:0005:EN:PDF>, (02.09.2008).

1.3.5. Reflections upon the Role of the Council of the European Union and the Member States in Anti-Discrimination Policies

The respective presidency of the Council has been a very determining factor for the development of anti-discrimination policies. The Member States, respectively the governments, holding their six months' presidencies are the agenda setters defining priorities during their presidencies, therefore the attitude of the respective national governments towards combating discrimination has been of high relevance for what was decided and when. This structural setting and the tensions between the changing interests of the national states depending on political developments within the Member States and the political will of the European Commission to develop a strong anti-discrimination regime have been characterising the development of anti-discrimination policies over the last 10 years.

With the implementation of the Treaty of Lisbon the high impact of the presidencies on developments and decisions might change. This will depend very much on the factual role of the then installed president of the Commission. If this position is going to be structured as a strong one the presidencies of the Member States might lose their dominant roles. This would make the development of strategies as well as the ways of cooperation easier as decisions might be more predictable. On the other hand it could build a barrier for years, if the president is not in favour of further improvements of the policy field anti-discrimination.

1.4. European Court of Justice

Art 119 of the Treaty establishing the European Economic Community (EEC) hardly generating any impact for almost 20 years was resurrected by the landmark decision of the European Court of Justice (ECJ) in giving the Treaty provision direct effect and hence ensuring the right to equal pay for men and women within the European Communities.¹⁸⁵ Consequently, women – as being the mainly affected group – could turn to domestic courts and claim for their right of equal pay according to Art 119, later Art 141 TEC, even if there existed no respective domestic legislation. In other words, the first individual right to non-discrimination was established within Community law. Only two years later, in *Defrenne III*, the court for the first time ruled that the elimination of discrimination on grounds of sex was part of the fundamental personal human rights, which must be protected within Community

¹⁸⁵ ECJ, *Defrenne vs. Sabena*, C-43/75, 08.04.1976 (ECR [1976] 004559).

law.¹⁸⁶ This was reiterated by the Court in following rulings, e.g. in *Razzouk and Beydoun vs. Commission*,¹⁸⁷ *P vs. S*¹⁸⁸ and *Schröder*.¹⁸⁹ There is no doubt that the principle of equal treatment between men and women – as shaped by the ECJ – has developed into a core element of the Community’s social policy.¹⁹⁰

When analysing the policy field of anti-discrimination it is not only those EU institutions who are involved in the relevant legislative and policy-making procedures but also the European Court of Justice who played and plays a policy role comparable to the above described EU institutions.¹⁹¹ This can be asserted not least due to the fact that its case-law on sex equality has significantly influenced the content and wording of subsequent EC legislative acts.¹⁹²

1.4.1. Composition and organisation

The composition, organisation and procedure are governed in the Treaties,¹⁹³ the Protocols annexed to the Treaties on the Statute of the Court of Justice¹⁹⁴ and the Rules of Procedure.¹⁹⁵ The Court consists of one judge from each Member State and receives assistance from eight advocate-generals whose duty is “to make, in open court, reasoned submissions on cases” (Art 222 TEC). Currently, the ECJ counts 35 members, 27 judges and 8 advocate-generals coming from different judiciary systems. According to Art 223 TEC “[t]he Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial

¹⁸⁶ ECJ, *Defrenne vs. Sabena*, C-149/77, 15.06.1978 (ECR [1978] 01365), paras. 26-27.

¹⁸⁷ ECJ, C-117/82, 20.03.1984 (ECR [1984] 01509), para. 4.

¹⁸⁸ ECJ, *P vs. S and Cornwall County Council*, C-13/94, 30.04.1996 (ECR [1996] I-02143), para 19.

¹⁸⁹ ECJ, *Deutsche Telekom vs. Schröder*, 10.02.2000 (ECR [2000]I-00743), para. 56.

¹⁹⁰ Parmar, Sejal (2004): *The European Court of Justice and Anti-Discrimination Law*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden, p. 132.

¹⁹¹ De Búrca, Gráinne (1998): *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, *Journal of Common Market Studies*, Vol. 38, No. 2, p. 218.

¹⁹² Council Directive 1997/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1997&nu_doc=80, (02.09.2008).

¹⁹³ Art 220-245 TEC.

¹⁹⁴ Protocol on Statute of the Court of Justice annexed to the Treaty of Nice (OJ C 80, 10.03.2001) as amended by Council Decision of 15 July 2003 (OJ L 188, 26.07.2003, p. 1), by Article 13(2) of the Act concerning the conditions of accession of 16 April 2003 (OJ L 236, 23.09.2003, p. 37), Council Decisions of 19 and 26 April 2004 (OJ L 132, 29.04.2004, pp 1 and 5, and OJ L 194, 02.06.2004, p. 3 (corrigendum)), Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal (OJ L 333, 09.11.2004, p. 7), by Council Decision of 3 October 2005 (OJ L 266 of 11.10.2005, p. 60) and by Article 11 of the Act concerning the conditions of accession of 25 April 2005 (OJ L 157 of 21.06.2005, p. 207).

¹⁹⁵ Rules of Procedure of the Court of Justice of 19 June 1991, consolidated version 2008: Court of Justice of the European Communities, 01.03.2008, available at: <http://curia.europa.eu/en/instit/txt/doc/fr/txtsenvigueur/txt5.pdf>, (10.04.2008).

offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years.” Every three years a part of judges and advocate-generals are replaced. The judges elect the President from amongst them and appoint their own Registrar. Furthermore, the Court adopts the Rules of Procedure which needs to be approved by the Council acting by a qualified majority.

In order to cope with the increased number of judges – due to the enlargement of the EU – several procedural improvements had to be implemented. For example, time limits were set for internal workflows and the number of chambers was increased. Currently, there are nine chambers, the Grand Chamber (13 judges, presided over by the President of the Court), four chambers consisting of 3 judges and four chambers consisting of 5 judges. Most of the proceedings are dealt with by chambers consisting of either three or five judges. It is incumbent upon the presidents of the chambers to ensure the coherence of the jurisprudence.¹⁹⁶

Among the different actions to initiate proceedings with the ECJ, the most important is the reference for preliminary rulings. Art 234 allows national courts to refer questions to the ECJ concerning the „validity and interpretation of acts of the institutions of the Community”. Constitutional standard setting rulings (direct effect and supremacy of EC law) were results of preliminary rulings, i.e. also national judges had a significant role to play in shaping the EU by asking the “right” questions.

1.4.2. The role of the ECJ in the anti-discrimination policy field

According to Art 220 the Court of Justice¹⁹⁷ shall ensure that in the interpretation and application of this Treaty the law is observed. This is one of the core provisions regarding the Court’s competence since this provision has been especially significant “in shaping the Court’s sphere of influence”.¹⁹⁸ The Court has developed principles of constitutional nature (direct effect, supremacy and state liability) which are binding for the EU institutions as well as the Member States. In this regard, the Court played a “‘political’ role”, as it revived the

¹⁹⁶ See: Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, pp. 66-76; Stix-Hackl, Christine (2007) *Neue Herausforderungen für den EuGH*, in: Die Presse, 15.01.2007. <http://diepresse.com/home/recht/rechtspanorama/56923/print.do>, (10.04.2008).

¹⁹⁷ Together with the Court of First Instance, each within its jurisdiction.

¹⁹⁸ Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, p. 72.

effectiveness of the Treaties in times of stagnation and rendered secondary legislation effective when the Member States did not transpose or adhere to them properly.¹⁹⁹

The Court's approach to interpretation is generally described as purposive or teleological, although this is not to be understood in a way that it considers the purpose or aim of the authors of the text but rather it examines "the whole context in which a particular provision is situated, and gives the interpretation most likely to further what the Court considers that provision sought to achieve".²⁰⁰

Against this background and as will be explored in the following it is self-explanatory that different national perceptions of moral or cultural values among the judges sometimes render it difficult in finding a consensus on what constitutes fundamental human and social rights.

Although the European Union was initially designed to be purely an economic organisation rather than a political or even human rights organisation, the ECJ dealt with matters of human and fundamental rights very early. Already in the year of 1969 the ECJ ruled that „[...] fundamental human rights are enshrined in the general principles of Community law and protected by the Court”²⁰¹ In following cases the ECJ based its fundamental rights standards – which is accordingly inherent to the law of the Communities – on the constitutional traditions common to the Member States and the European Convention on Human Rights.²⁰² This practice by the ECJ was incorporated in the Treaty on the European Union with the Treaty of Maastricht: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”²⁰³ Moreover, the Court drew its inspiration from ‘international treaties on which the Member States have collaborated or of

¹⁹⁹ Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, p. 73.

²⁰⁰ Craig, Paul/De Búrca, Gráinne (2007): *EU Law, Text, Cases and Materials*, Oxford University Press: Oxford, p. 74.

²⁰¹ ECJ, *Stauder vs. City of Ulm*, C-29/69, 12.11.1969 (ECR [1969] 00419), para 7.

²⁰² ECJ, *Internationale Handelsgesellschaft*, C-11/70, 17.12.1970 (ECR [1970] 01125), paras. 3-4. In most of the cases in which human rights were at issue they stood opposite the freedoms of the internal market. On how the Court balanced these two approaches, see: De Búrca, Grainne (2006): *The Monitoring of Fundamental Rights in the Union as a Contribution to the European Legal Space (IV): The role of the European Court of Justice in balancing economic freedoms and fundamental rights*. Working Paper Series, REFGOV-FR-8. Download: <http://refgov.cpdr.ucl.ac.be/?go=publications>, (02.09.2008).

²⁰³ Art 6 para. 2 TEU.

which they are signatories'.²⁰⁴ In this context, “[t]he Court has consistently held that all the sources of fundamental rights support the existence of a strong principle of equality and non-discrimination.”²⁰⁵

The legal and policy framework of the field of anti-discrimination in the EU today cannot be seen without the jurisprudence of the ECJ on sex equality. Not only in one instance have the Court rulings significantly affected policy contexts and understandings and prompted – sometimes reluctantly, but also willingly – the Commission into legislative action.²⁰⁶ The Burden of Proof Directive²⁰⁷ and certain concepts, such as the concept of indirect discrimination, included in the Equal Treatment Directive²⁰⁸ as well as – in a modified way – in the Racial Equality Directive and Equality Employment Directive were direct results of ECJ jurisprudence.²⁰⁹

Often it has not been predictable in which directions the ECJ would interpret Community law and thus in which directions the EU would develop. Nobody would have thought that sex discrimination would include discrimination on grounds of transsexuality or gender reassignment. In *P vs. S and Cornwall County Council*²¹⁰ the ECJ held that the applicant was basically if not exclusively dismissed from work because of the new gender the person had after a surgery. “Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. [...] To tolerate such discrimination would be tantamount, as regards such a

²⁰⁴ Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, p. 20. Fundamental rights protection by the Court is guaranteed as long as the matter falls within the scope of Community law.

²⁰⁵ Docksey, Chris (1991): *The Principle of Equality between Men and Women as a Fundamental Right under Community Law*, in: *Industrial Law Journal*, 1991 20(4), p. 258, cited in: Bell, Mark (2002): *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford, reprinted in 2004, p. 20.

²⁰⁶ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., p. 240.

²⁰⁷ Council Directive 1997/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1997&nu_doc=80, (02.09.2008).

²⁰⁸ Council Directive 76/207/EEC, 09.02.197, OJ L 39/40 (14.02.1975) on equal treatment in access to employment etc. amended by Council Directive 2002/73/EC, 23.09.2002, OJ L 269/15 (05.10.2002). http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31976L0207&model=guichett, (02.09.2008).

²⁰⁹ See on how far the jurisprudence on sex equality might influence the interpretation of the EU anti-discrimination directives: Parmar, Sejal (2004): *The European Court of Justice and Anti-Discrimination Law*, in: Chopin, Isabelle/Niessen, Jan (eds.): *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. Martinus Nijhoff Publishers: Leiden, pp. 131-154.

²¹⁰ ECJ, C-13/94, 30.04.1996 (ECR [1996] I-02143).

person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”²¹¹

On the other hand, the Court was quite clear in separating discrimination on grounds of sexual discrimination from sex discrimination. In the case *Grant vs. South-West Trains*²¹² the Court declared that the refusal to allow travel concessions to the same-sex partner of an employee, where such concessions were granted to opposite-sex partners, irrespective of being married or unmarried, was not discrimination prohibited under Article 119. The travel concessions were refused to male workers having a same-sex partnership as well as to female workers living in a same-sex partnership. In other words, the rule applied to male as well as to female workers and therefore did not amount to discrimination directly based on sex.

In *D and Sweden vs. Council*²¹³ the Court held that the difference in treatment – according to the EC Staff Regulation household allowances were granted to marital but not to registered partnerships (the applicant had a same-sex registered partnership in Sweden) – was not based on sexual orientation, but on the legal distinction between a registered partnership and a marital partnership. In its reasoning, the Court referred to the “great diversity of laws [...] in the Member States [...] as regards recognition of partnerships between persons of the same sex or of the opposite sex [...]”.²¹⁴ This case of evident indirect discrimination reveals how difficult it can be to find consensus on a certain right especially where the right in question is closely linked to different national perceptions of moral or cultural values. This situation is sharpened through the fact that according to the principle of subsidiarity the diverse national identities have to be respected within the EU.²¹⁵

Following this case-law, it was essential to realize that sexual orientation had to be included as a separate discrimination ground in the Equality Employment Directive.

Excursus: The case-law of the European Court of Human Rights

At this stage, short reference shall be made to the case-law of the European Court of Human Rights (ECHR). In *P vs. S and Cornwall County Council* (para. 16) as well as in *Grant vs.*

²¹¹ ECJ, *P vs. S and Cornwall County Council*, C-13/94, 30.04.1996 (ECR [1996] I-02143), paras. 21-22.

²¹² ECJ, *Lisa Jacqueline Grant v South-West Trains Ltd*, C-249/96, 17.02.1998 (ECR [1998] I-00621), paras. 25-28.

²¹³ ECJ, C-122/99 P and C-125/99 P, 31.05.2001 (ECR [2001] I-04319), paras. 48-51.

²¹⁴ Para 50.

²¹⁵ For the relationship between the Principle of Subsidiarity and the ECJ see: De Búrca, Gráinne (1998): *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, Journal of Common Market Studies, Vol. 38, No. 2, pp. 217-235.

South-West Trains (paras. 33-34) the ECJ referred in its judgements to jurisprudence of the ECHR.

The ECHR was one of the first major international human rights institutions to condemn homophobia. As from the 1980s, it repeatedly ruled that the prohibition and the criminalisation of homosexual relations between adults violated the right to privacy and rejected arguments of Governments, such as Ireland, that this prohibition was necessary for the protection of (Catholic) morals.²¹⁶ In subsequent judgements the ECHR reiterated that there was no objective and reasonable justification for protecting young men against sexual relationships with adult men, while young women of the same age would not need any such protection against relations with either adult men or women. Although the ECHR was – for a long time – reluctant to recognize same-sex marriage²¹⁷ it brought early progress concerning certain rights of same-sex couples.²¹⁸ In *Salguero da Silva Mouta vs. Portugal* the Court held it to be a violation of the Convention for a court to refuse to give custody to the father of the children after divorce solely on grounds of his homosexuality.²¹⁹ Moreover, the Court played a pioneer role in eliminating the policy in many European countries to exclude homosexuals from military service.²²⁰

In contrast, the Court had long been refusing to decide in favour of transsexual complainants because it could not identify a sufficient consensus among the States parties concerning the moral, social and legal issues raised in respect of transsexuality. Contrary to the ECJ ruling *P vs. S and Cornwall County Council* in which the Court even referred to ECHR findings with regard to transsexuals,²²¹ the ECHR ruled that the refusal to recognise the new sex after a surgery by British authorities did not amount to discrimination.²²² Remarkably, this case-law changed only 4 years later with *Goodwin vs. UK*²²³ and *I vs. UK*,²²⁴ in which the Court

²¹⁶ ECHR, *Norris vs. Ireland*, 26 October 1988, Series A. No. 45; *Dudgeon vs. UK*, 22 October 1981, Series A No. 142; *Modinos vs. Cyprus*, 22 April 1993, Series A No. 259.

²¹⁷ ECHR, *Rees vs. UK*, 17 October 1986, Series A No. 106 and *Cossey vs. UK*, 27 October 1990, Series A No. 184.

²¹⁸ ECHR, *Karner vs. Austria*, 24 July 2003. In this judgement, the Court overruled a judgement of the Austrian Supreme Court which declared that the notion “life companion” employed in the Rent Act (*Mietrechtsgesetz*) was not to include persons of the same sex according to the legislature’s intention in 1974. As a consequence, a homosexual “life companion” could not succeed to a tenancy when his or her partner died. The Court found this narrow interpretation in breach of the right to private life in conjunction with the right to non-discrimination.

²¹⁹ ECHR, *Salguero da Silva Mouta vs. Portugal*, 21 December 1999.

²²⁰ ECHR, *Smith and Grady vs. United Kingdom*, 27 September 1999.

²²¹ ECJ, *P vs. S and Cornwall County Council*, C-13/94, 30.04.1996 (ECR [1996] I-02143), para. 16.

²²² ECHR, *Sheffield and Horsham vs. United Kingdom*, 30 July 1998.

²²³ ECHR, *Goodwin vs. UK*, 11 July 2002.

²²⁴ ECHR, *I vs. UK*, 11 July 2002.

acknowledged the right to amend civil status registration after an operative gender reassignment and to marry a person of the sex the transsexual had before its operation. The Court argued that “there was clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but also of legal recognition of the new sexual identity of post-operative transsexuals.”²²⁵

This shows that although the ECJ in its judgements has drawn its inspiration from and repeatedly referred to the ECHR, in some instances it guaranteed even a higher standard of human rights protection. In the future, these instances might be increasingly encouraged due to the fact that the Court counts several members with a human rights background (at least four of them had been judges at the European Court of Human Rights).²²⁶

Continuation of the role of the ECJ in the anti-discrimination policy field

Since the implementation of the two Anti-Discrimination-Directives of 2000, the Court has already rendered a number of judgements by way of preliminary rulings and contributed to the clarification of concepts contained in the Directives.²²⁷ In the following a selection of the findings will be presented:

In *Mangold* the Court ruled that “the Member State, which [...] exceptionally enjoys an extended period for transposition [of Employment Equality Directive] is progressively to take concrete measures [...]” to implement the directive. But this obligation would be rendered “redundant” if the Member State were permitted, during the transposition period, to adopt measures contrary to the objectives of the directive.²²⁸ In other words, this ruling strengthens the legal effect of directives before the expiry of the transposition period and clarifies in particular the legal effect of Directive 2000/78/EC.²²⁹ But above all, this ruling declares the

²²⁵ ECHR, *Goodwin vs. UK*, 11 July 2002, para. 85.

²²⁶ Stix-Hackl, Christine (2007) *Neue Herausforderungen für den EuGH*, in: Die Presse, 15.01.2007. <http://diepresse.com/home/recht/rechtspanorama/56923/print.do>, (10.04.2008).

²²⁷ Age discrimination: ECJ, *Mangold vs. Rüdiger Helm*, C-144/04, 22.11.2005 (ECR [2005] I-9981); *Félix Palacios de la Villa vs. Cortefiel Servicios SA*, C-411/05, 16.10.2007 (ECR [2007] I-8531). Disability: *Sonia Chacón Navas vs. Eurest*, C-13/05, 11.07.2006 (ECR [2006] I-6467); *Coleman vs. Attridge Law and Steve Law*, C-303/06, 17.07.2008.

Ethnic origin: *Centrum voor gelijkheid von kansen en voor racismebestrijding vs. Firma Feryn*, C-54/07, 10.07.2008.

²²⁸ See Fn above, para. 72.

²²⁹ European Network of Legal Experts in the Non-discrimination Field (ed.) (2006): European Anti-Discrimination Law Review, No. 3/2006. http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/legal/06lawrev3_en.pdf, (02.09.2008).

prohibition of age discrimination – and the proscription of the other discrimination grounds contained in Directive 2000/78/EC – to be a general principle of Community law.²³⁰

As regards the prohibition of discrimination on grounds of disability the Court clarified in *Sonia Chacón Navas vs. Eurest* the concept of disability which is not defined in Directive 2000/78/EC. It argued that “Directive 2000/78 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. [...] However, by using the concept of ‘disability’ in Article 1 of that directive, the legislature deliberately chose a term which differs from ‘sickness’. The two concepts cannot therefore simply be treated as being the same.”²³¹ Therefore, it declared that dismissal from employment on grounds of sickness does not constitute discrimination under the Directive at issue.

In *Coleman*, the Court ruled ‘discrimination by association’ to be prohibited under Directive 2000/78/EC. As found by the Court the prohibition of harassment laid down by the Directive is not limited only to people who are themselves disabled but also to those who are related to a disabled person.²³²

With the first ruling based upon the Racial Equality Directive, the Court clarified that “statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy.”²³³ It is therefore incumbent upon the employer to produce evidence that he/she has not breached the principle of non-discrimination as laid down in Directive 2000/43/EC.

1.4.3. Reflections upon the role of the European Court of Justice

The case-law outlined above gives evidence of the vital role performed by the ECJ – and national courts by referring questions to the ECJ for preliminary rulings – in developing and shaping the policy field of anti-discrimination within the EU.

²³⁰ Paras. 74 and 75.

²³¹ *Sonia Chacón Navas vs. Eurest*, C-13/05, 11.07.2006 (ECR [2006] I-6467), paras 43 and 44.

²³² *Coleman vs. Attridge Law and Steve Law*, C-303/06, 17.07.2008, para. 63. Mrs. Coleman was treated less favourably compared to her colleagues and harassed by her employer because of the disability of her son.

²³³ *Feryn*, C-54/07, 10.07.2008, para. 31.

In some instances it acted as an engine in guaranteeing a high level of human rights protection and thus supporting victims of discrimination to receive redress for injustice. In other instances – e.g. in cases of discrimination on grounds of sexual orientation – the Court rather acted as a brake and hence displayed the different legal, moral and cultural values which are represented by the judges of the Court with respect to certain rights at issue.

Although the Court repeatedly drew inspiration from the European Court of Human Rights it did not necessarily follow its direction.²³⁴ One could never know in which direction the Community law would develop, as the development that sex discrimination includes discrimination on grounds of gender-reassignment shows.

Case-law in general constitutes a well-established mechanism for monitoring State performance in relation to the protection of human rights. Case-law “assembles comprehensive qualitative events-based data, identifies right-holders and duty bearers, elaborates on the specific content of rights and the corresponding State obligations.”²³⁵ As has been demonstrated above – case-law prompts decision and policy makers to reconsider their policies.

Eventually, it must be concluded that the ECJ proved to be “an institutional actor with a considerable degree of autonomy and normative influence, which plays a significant role in the Community’s policy-making process.”²³⁶

1.5. European NGOs

European NGOs have become very important and acknowledged actors in designing as well as implementing and further developing anti-discrimination policies on European Union level. Their organisational structure, their interactions with their members and with European institutions as well as their financial basis have been subject to severe changes since the launch of the directives in 2000. At that time the political decision was taken to find one European Umbrella NGO for each ground protected by the directives representing the

²³⁴ See: ECJ, *Grant vs. South-West Trains*, C-13/94, 30.04.1996 (ECR [1996] I-02143) and *P vs. S and Cornwall County Council*, C-13/94, 30.04.1996 (ECR [1996] I-02143).

²³⁵ Nowak, Manfred/Wagner, Viktoria (2006): *The Monitoring of Fundamental Rights in the Union as a Contribution to the European Legal Space (V): Monitoring the protection of Human Rights in the Union: a evaluation of mechanisms and tools*. Working Paper Series, REFGOV-FR-9. Download: <http://refgov.cpdr.ucl.ac.be/?go=publications>, (02.09.2008), p. 35.

²³⁶ De Búrca, Gráinne (1998): *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, *Journal of Common Market Studies*, Vol. 38, No. 2, p. 231.

respective European interests. There had been European NGOs before but the pressure by the European Commission to decide on one NGO per ground and to provide funds for the running of these single-ground NGOs changed the scene.

We will concentrate our actors' analysis on the "group" of civil society organisations in the field of anti-discrimination – i.e., European level Umbrella NGOs – as their roles are to a large extent formalized and they are very influential. We will come back to the overall target group in the chapter on recommendations.

European Umbrella NGOs try to unite the interests of their national members, most of them national coordinating and/or umbrella organisations. National Members on the other hand should unite and represent the interests of national NGOs and interest groups. Various European NGOs are active in the field of anti-discrimination. We tried to focus on the ones that are recognised as European representatives for each ground of discrimination by the European Commission, in addition we tried to analyse to what extent networking of European NGOs within the European Social Platform would be relevant for influencing anti-discrimination policies. Furthermore, we tried to identify organisations not recognised as actors, who would nevertheless be relevant in the field of anti-discrimination, if they should become formally and/or informally integrated and if so, how should they become players in the field.

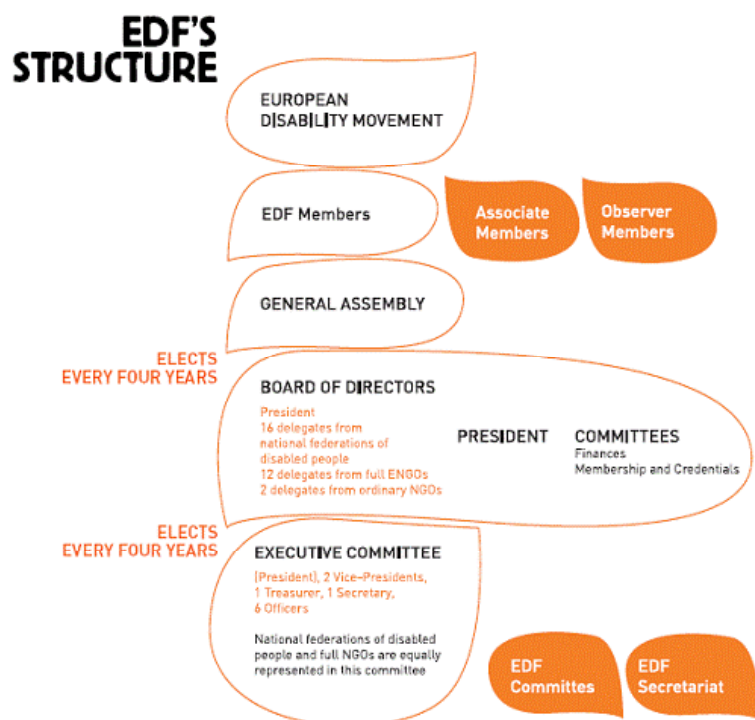
1.5.1. European Disability Forum

There has been a long standing history of joining efforts on combating discrimination on grounds of disability and on promoting inclusion of people with disabilities on European Union level within the European Disability Forum (EDF).²³⁷

In 1996, the European Disability Forum (EDF) was established by European and national organisations of disabled persons as their European umbrella organisation, representing the interests of 50 million disabled citizens in Europe.

²³⁷ <http://www.edf-feph.org/>

Table 2: EDF's Structure



http://www.edf-feph.org/page_generale.asp?docid=13843

The mission of the European Disability Forum is to ensure disabled people full access to fundamental and human rights through their active involvement in policy development and implementation in Europe. This includes dialogue with European decision makers and institutions, offering expertise, views and proposals. EDF is adopting annual work-programmes, which are drafted by the Annual General Assembly, following a democratic process that aims to ensure its “greater ownership by the membership.”²³⁸ EDF does not limit its working field to anti-discrimination policies but is working in all fields of EU competence, as it considers each decision or initiative taken by the EU as having an impact on the daily lives of disabled citizens. This means that EDF does not only interact with institutions explicitly responsible for anti-discrimination policies but with any institution that seems relevant for a specific aim or case or topic, which is set as priority in the valid work

²³⁸ EDF About Us, Our Work Strategy, http://www.edf-feph.org/Page_Generale.asp?DocID=10907%20&%20id=1%20&%20namePage=, 16.01.2008

programme. And it is trying to intervene in fields of social policy, where EU competence is very restricted and common decision-making is limited to the Open method of Coordination (for examples see chapter 2.2.2.5. Role of NGOs in Implementation Procedures - Legislation).

The European Disability Forum and its predecessors (informal networks of national disability organisations) had been lobbying since 1977 at European Parliament and European Commission for the implementation of non-discrimination provisions in EU legislation. In each Member State civil servants were targeted by lobbyists to raise the importance of the topic, to put it on the policy agenda with the aim to get the European Council interested as well.

The dynamics were enforced very much in the middle of the 1990s, when e-mail strengthened the possibilities to communicate between the national interest groups. National umbrella organisations from all (then) 15 Member States were involved in the development of strategies and the drafting of proposals, motivated by the new potential for united action²³⁹.

In 1993, on occasion of the first European Day of Disabled Persons, a resolution for a general anti-discrimination provision to be included in the Treaties was adopted by 518 disabled representatives of the first European Disabled People's Parliament hosted by the European Parliament. The content of this resolution found its way into the European Commission's White paper on Social Policy in 1994 and in various resolutions of the European Parliament²⁴⁰. Events in the framework of the EC action programmes promoting equality of opportunity for people with disabilities²⁴¹ provided opportunities for NGO representatives to meet and to continue working on joint strategies²⁴².

²³⁹ Information provided by an interview with EDF longstanding board member Anthony Williams, May 2007.

²⁴⁰ Gubbels, Andre (2006): *The Evolution of EU Disability Policy: from Charity towards Rights*. Summary outline of the presentation. Disability Discrimination Law Summer School: Comparative Perspectives on Effective Test Case Strategies under the EU Framework Directive. National University of Ireland: Galway, Ireland. http://www.nuigalway.ie/law/Disability_summer_school/Docs/2006/Andre%20Gubbels%201%20-%20Teaching%20summary.pdf, (02.09.2008).

²⁴¹ There had been three action programmes disabled people before the adoption of Article 13. The first was adopted by the Council in 1974. The second (HELIOS I) ran for four years from 1988 to 1991. It was followed after some delay by the third (HELIOS II), which also ran for four years from 1993 until the end of 1996 with a budget of ECU 37 million. The main outcomes of these action programmes had been exchange of information and experience of measures at national level, between the Member States and with non-governmental organisations. See: European Parliament Fact sheet. 4.8.8. Disabled persons, the elderly and the excluded. http://www.europarl.europa.eu/factsheets/4_8_8_en.htm, (02.09.2008).

²⁴² EDF, European Disability Forum (1998): *Guide to the Amsterdam Treaty*. EDF: Brussels. http://www.nuigalway.ie/law/Disability_summer_school/Docs/2006/Andre%20Gubbels%206%20-%20EDF%20Guide%20to%20the%20Amsterdam%20Treaty.pdf, (02.09.2008).

First success of these joint efforts was a meeting between the network and the Chair of the Reflection Group installed for the preparation of an intergovernmental conference on amendments of the Treaties in June 1995. In its final report the Reflection Group acknowledges that the Treaties should provide ‘a general clause prohibiting discrimination on the grounds of gender, race, religion, disability, age and sexual orientation’²⁴³.

Before the intergovernmental conference took place in March 1996, both the European Parliament²⁴⁴ and the European Commission²⁴⁵ published their final positions expressing commitment to a reference within the amended Treaties to discrimination. Lobbying was targeted at national government delegates in the intergovernmental conference, providing them with expert opinions and keeping up negotiations. The Irish government had published a White paper on Foreign Policy, stressing the importance of the non-discrimination clause, before the Intergovernmental Conference. During the Irish presidency (1 July – 31 December 1996) Disability organisations in Ireland secured the commitment of relevant ministers to pay attention to the inclusion of the ground of disability in the negotiations. The Irish presidency saw the adoption of disability relevant key documents on European level, as were the Commission communication²⁴⁶ and the Council resolution²⁴⁷ on equality of opportunity for people with disabilities.

Lobbying for an inclusion of the ground of disability continued during the Dutch presidency (1 January – 30 June 1997), engagement was motivated exceptionally by the Founding General Meeting of EDF in March 1997, which was of high importance as the Dutch

²⁴³ On 5 December 1995, the Reflection Group established by the Corfu European Council of 24 and 25 June 1994 and chaired since June 1995 by Carlos Westendorp y Cabeza, Spanish Junior Minister for European Affairs, submits to the Brussels European Council its final report on the challenges that need to be addressed at the 1996 Intergovernmental Conference (IGC) in order to bring the European Union up to date and to prepare it for the next enlargement. Reflection Group’s Report. A Strategy for Europe (Brussels, 5 December 1995). Download: www.europarl.eu.int/enlargement/cu/agreements/reflex1_en.htm, (02.09.2008).

²⁴⁴ European Parliament, Resolution on Parliament’s opinion on the convening of the Intergovernmental Conference; and evaluation of the work of the Reflection Group and definition of the political priorities of the European Parliament with a view to the Intergovernmental Conference, in Bulletin of the European Union. March 1996, No 3, pp. 136-146.

²⁴⁵ On 28 February 1996, with a view to the Intergovernmental Conference (IGC) on the reform of the Treaty on European Union scheduled to be held on 29 March 1996 in Turin, the European Commission publishes its priorities for strengthening political union in the European Union and for making preparations for the forthcoming enlargement.

European Commission (1996): Commission Opinion – Reinforcing political union and preparing for enlargement, COM (96) 90 final. Brussels, 28.02.1996. http://aei.pitt.edu/4412/01/002307_1.pdf, (02.09.2008).

²⁴⁶ European Commission (1996): Communication of the Commission on Equality of Opportunity for People with Disabilities - A New European Community Disability Strategy - European Union, COM (96)406, (30 July 1996).

²⁴⁷ European Council (1996): Resolution of the Council and of the representatives of the member states meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities. http://ec.europa.eu/employment_social/soc-prot/disable/com406/res_en.htm, (02.09.2008).

presidency had dropped the reference to disability proposed in the Irish draft text²⁴⁸. Dutch NGOs and EDF representatives supported by several MEPs active in the Disability Inter-group arranged a meeting with the Dutch minister for foreign affairs, in which the need to include a disability clause in setting new EU legislative standards was agreed on. French and UK national elections took place within this period, bringing a change of government in the UK, which very much favoured the situation for the anti-discrimination community (see chapter 1.3.1. Council of the European Union/Member States – On the way towards Article 13 and the AD-Directives).

Concerted action with specific target groups in the Member States – like ministers of the new government in the U.K., training sessions for German disability organisations (as there were rumours that the German government was opposing the non-discrimination clause), etc. – took place and EDF started to cooperate with other members of the Platform of European Social NGOs towards the inclusion of a non-discrimination clause and of an equal status for civil dialogue with NGOs alongside social dialogue within the Treaties to be amended²⁴⁹.

After the adoption of the Directives with their different levels of protection EDF and its member organisations continued to work towards meliorating the legal provisions.²⁵⁰

In 2003 – the European Year of People with Disabilities - EDF drafted a proposal for a disability specific directive, which went beyond employment after an extensive consultation procedure with its members and legal experts that had lasted 24 months and presented it to the European Commission. The idea behind the draft was the need for a comprehensive Directive prohibiting discrimination on grounds of disability in most areas of life including social protection and security, health care, education, access to and supply with services, facilities and goods, which are available to the public, access to information and procedures, access to buildings, telecommunication, transport and other public spaces and facilities. The Directive should furthermore address remedies and enforcement – it had already become clear that the procedures to reach the right of non-discrimination had to be strengthened – and provide for

²⁴⁸ EDF, European Disability Forum (1998): *Guide to the Amsterdam Treaty*. EDF: Brussels, p.19. http://www.nuigalway.ie/law/Disability_summer_school/Docs/2006/Andre%20Gubbels%206%20-%20EDF%20Guide%20to%20the%20Amsterdam%20Treaty.pdf, (02.09.2008)

²⁴⁹ EDF, European Disability Forum (1998): *Guide to the Amsterdam Treaty*. EDF: Brussels, p.20. http://www.nuigalway.ie/law/Disability_summer_school/Docs/2006/Andre%20Gubbels%206%20-%20EDF%20Guide%20to%20the%20Amsterdam%20Treaty.pdf, (02.09.2008)

²⁵⁰ Interview with Anthony Williams, May 2007.

the establishment of independent bodies for the promotion of equal treatment with regard to disability²⁵¹.

The echo was not outstanding, neither by the European institutions nor by the public. Even if the need for a horizontal approach seemed to be obvious, 2003 was not ready for thinking further, the Employment Equality Directive prohibiting discrimination in the employment field not being thoroughly implemented, yet²⁵².

Since 2005 permanent evaluation of disability legislation and its implementation is becoming one of the central tasks of EDF, with a formal consultation responsibility towards the European Commission.

The EDF work programme for 2006-2007 focussed on nine main priority areas:

1. Actions towards the full employment of people with disabilities
2. Obtaining a comprehensive EU law that will fight discrimination against disabled people in all fields of life;
3. Promoting the recognition of human rights of people with disabilities
4. Promoting and achieving access for all, particularly in the field of transports, built environment, information and communication technologies
5. Promoting full participation in society by access user-led, quality and affordable personal and social services
6. Playing an active role in the debate on the future of Europe
7. Mainstreaming disability in development cooperation and EU pre-accession process
8. Building up a stronger and unified European disability movement
9. Ensuring the diversity of all impairment groups in EDF work and priorities

These priorities were pursued by various initiatives, campaigns, by networking, publications etc.

²⁵¹ Interview with NGO representative, October 2007.

²⁵² For the recent developments towards a horizontal directive see chapter 3.4.1. Recent Developments - Draft Proposal for a new horizontal Directive.

EDF is running the office of the European Parliament Inter-group for Disability, which is very active as a watchdog of the implementation of the directives and of the anti-discrimination policy activities of the European Commission.

1.5.2. ENAR - Race and Ethnic Origin

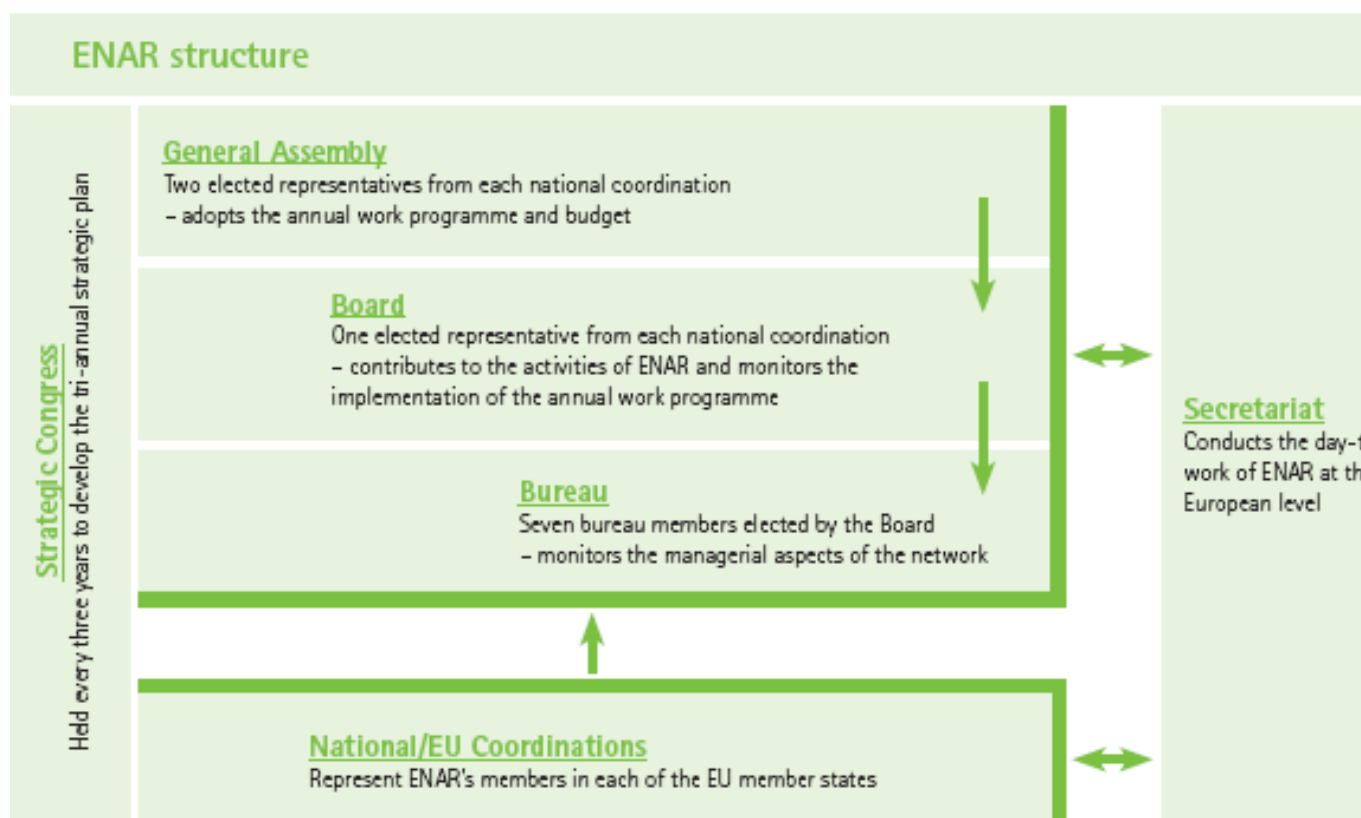
Political Agreement that non-discrimination on grounds of race and ethnic origin should be on the agenda of European Union policies was the first that was reached given political developments in some European states and an up-rise of racist incidents in the early 1990ies. There had been networking initiatives on European and international level on the topic of anti-racism before 2000.

The European Network Against Racism (ENAR) was founded in 1997, the European Year Against Racism and initiated networking of national anti-racism NGOs as well as dialogue with different stakeholders. The European Commission signalled that it was interested in creating one European contact organisation representing the interests of organisations working in the field of anti-racism, race and ethnic origin to lead a structured dialogue and consultation process. Between March and September 1998, more than 600 NGOs were involved in national and European round table consultations to set up a European networking structure.

In 1998, ENAR had its constitutive conference bringing together more than 200 representatives of national organisations and creating a common programme of action.

ENAR is operating Brussels based by its secretariat, this in permanent exchange with its 27 national coordination organisations, which represent all member organisations. Each national coordination organisation regularly elects one board member and one substitute, of which one should belong to an ethnic minority and which constitute the link between the national members and the secretariat in Brussels.

Table 3: ENAR Structure



http://www.enar-eu.org/Page_Generale.asp?DocID=15280&la=1&langue=EN

ENAR's scope is the fight against racism, xenophobia, anti-Semitism and Islamophobia, the promotion of equality of treatment between EU citizens and third country nationals and the linking of local/regional/national initiatives with European ones. ENAR is not in general responsible for discrimination on grounds of religion or belief but is trying to represent the interests of religious communities most vulnerable to discrimination and who face discrimination because of their religion and/or their ethnic origin. In its 2006 shadow report²⁵³ ENAR identified communities most vulnerable to racism in Europe – amongst them were Roma, Sinti and Travellers, migrants including EU nationals and third country nationals, particularly undocumented migrants and asylum seekers, the Jewish community and the Muslim community.

The network acknowledges the high potential of influencing European policies on anti-racism, equal rights and equal opportunities for national and local policies and for the life of single citizens or groups of people with a risk of being discriminated against because of their

²⁵³ ENAR, European Network Against Racism (2007): *Racism in Europe. Enar Shadow Report 2006*. Brussels, p. 3. http://www.enar-eu.org/en/publication/shadow_reports/europe2006_EN.pdf, (15.01.2008).

ethnic background.

Based on this presumption ENARs aims on European level are to monitor the European political agenda, take position on EU initiatives, lobby EU institutions and to establish advocacy coalitions and partnerships with other European networks and organisations; whereas at national level ENAR aims to inform its member associations about political developments and to encourage dialogue between civil society and governments concerning the European Agenda

In order to come closer to these aims ENAR is involved in projects, funded by the European Commission under the Community Action Programme, is organising round tables, is taking part in networking activities within the Social Platform, is publishing Policy papers and yearly Shadow Reports on Racism in Europe and is distributing information on current developments and funding possibilities for its member organisations and interested people via a weekly mail service.

To empower its members ENAR furthermore is organising conferences and trainings and publishing fact sheets to topics of relevance.

ENAR Shadow reports are a comparative analysis of national shadow reports produced by ENAR members, national coordinating organisations for each Member State, and very important source of information for national actors as well as for European institutions as they entail a comprehensive NGO assessment of the political and legal context in the Member states and on EU level with regard to anti-discrimination, migration and integration, criminal justice and social inclusion.²⁵⁴ The reports intend to bring together facts and developments from across the EU on matters pertaining to racism and anti-racism and building a perspective on racism that reflects the views of NGOs and vulnerable communities. As such the reports serve as a major and recurrent tool of the network for communication and advocacy purposes towards relevant stakeholders including policy makers and the media and do build a documented starting point for future and coordinated action.²⁵⁵

²⁵⁴ ENAR, European Network Against Racism (2007): *Racism in Europe. Enar Shadow Report 2006*. Brussels, p. 4. http://www.enar-eu.org/en/publication/shadow_reports/europe2006_EN.pdf, (15.01.2008).

²⁵⁵ ENAR, European Network Against Racism (2007): *Racism in Europe. Enar Shadow Report 2006*. Brussels, p. 6. http://www.enar-eu.org/en/publication/shadow_reports/europe2006_EN.pdf, (15.01.2008).

Aiming to influence European Union policies in anti-discrimination issues generates a variety of activities that are set as a reaction to policies in place, towards tendencies in policy development on European level or in the Member States and/or when gaps or deficiencies are being monitored by ENAR or by its national member organisations. These activities include responses to the Commission on policy papers or legislative proposals, press releases, open letters to the Commissioner for Employment, Social Affairs and Equal Opportunities, Vladimir Spidla in January 2007²⁵⁶ in response to the impact assessment of the Race Directive and to the presidencies of the European Council requesting signals and commitments to the fight against discrimination, the publication of general policy papers to issues at stake²⁵⁷, empowerment initiatives for member NGOs to equip them with knowledge on rights/anti-discrimination legislation and keeping them up with policy developments²⁵⁸, participation in European wide projects with the purpose of capacity building for NGOs (e.g. Capacity Building on strategic litigation SOLID(see chapter 3.3.2. Community Action Programme – Implementation of Policies), etc.

Since 2005 ENAR sees an increased involvement in giving a civil society prospective in evaluation of EU anti-discrimination policies on a structured basis, being asked to feed back on the assessment of the implementation of directives in the member states. This goes in line with the institutionalised impact assessment procedures that were put in place for European Union policy strategies, see chapter Evaluation and Mutual Learning.

ENAR's policy priorities have been changing over the last 10 years, extending their scope from the core task of lobbying for the factual implementation of the anti-discrimination directives in the Member States towards a clear focus on combating institutional and multiple discrimination and fighting for inclusion of ethnic and religious minorities in society. Equal access to health care and to education, the extension of its mandate to the area of migration

²⁵⁶ see: Letter to Commissioner Spidla in response to the European Commission Communication on the Application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, published on 30 October 2006.

http://cms.horus.be/files/99935/MediaArchive/pdf/RD_5YR_report_response.pdf, (02.09.2008).

²⁵⁷ Fact Sheet N34 from October 2007 was on „Religious Discrimination and Legal Protection in the European Union“, see: http://cms.horus.be/files/99935/MediaArchive/pdf/fs34_religiousdiscrimination_oct2007_en.pdf, (02.09.2008), and mirrors the difficulties of one single legislation for various religious communities and for different countries with different traditions towards non-discrimination on grounds of religion and the level of guarantee of freedom of religion.

²⁵⁸ In October 2007 ENAR was organising a training seminar aiming at making its national member organisations familiar with the new policy tools they will have to handle with by the tendency to mainstream anti-racism in social-inclusion policies. „Mainstreaming anti-racism in social inclusion: Engaging with the National Action Plans on Strategies for Social Protection and Social Inclusion under the EU Lisbon strategy OMC.“ <http://www.enar-eu.org/Page.asp?docid=16111&langue=EN>, (05.04.2008)

and integration in line with the mainstreaming of anti-racism in European social policies will be core topics for the next some years. Efforts to meliorate the legal provisions and the access to victim's rights especially concerning the topics of racist violence and crime, which are not being addressed by European legislation by ways of EC Directives yet are kept up on the agenda.²⁵⁹

1.5.3. ILGA - Sexual Orientation

Including non-discrimination on grounds of sexual orientation has been a topic of changing commitment in European Union policies. Interest Groups for European citizens with a non-heterosexual orientation had been providing counselling, assistance and had been worked together across the borders of the iron fence for years before Art. 13 and the inclusion of sexual orientation in the European Union's non-discrimination clause were decided on.

The European region of the International Lesbian and Gay Association (ILGA Europe) was founded in 1996, when Article 13 was integrated in the EC Treaties with the Treaty of Amsterdam, it's vision being a "world free from discrimination on the grounds of sexual orientation and gender identity or expression, a world in which the human rights of all are respected and everyone can live in equality."²⁶⁰

The European Commission started to provide core funding in 2000, which meant a budgetary increase from 8.000 EUR to 800.000 EUR per year.

ILGA Europe has more than 200 member organisations in over 40 European countries. It is not organized via national umbrella organisations but by membership of a variety of different and multilevel national and local organisations, trade union based groups political party based groups, women's groups, etc. In most nations states national umbrella networks do exist, however, trying to coordinate lobbying activities. Responsibility for the main policies and strategic direction of the organisation lies with the member organisations and the board of directors elected by the members at the annual conference. The day-to-day operations of the

²⁵⁹ Information on future priorities was provided by the interview with Pascale Carhon, May 2007, and by having a look at ENARs strategic plan for 2007-2010, 'Driving the future of the European Anti-Racist Movement.' April 2007. http://cms.horus.be/files/99935/MediaArchive/pdf/strategic_plan_20072010_EN.pdf, (02.09.2008)

²⁶⁰ www.ilga-europe.org, (02.09.2008)

organisation are managed by the Executive Director, the Programmes Director, and supporting staff.

The time before the successful inclusion of sexual orientation in Article 13 in 1999 was characterized by lobbying activities of several NGOs on European and on National level coordinated on an activities centred basis. Phases of success and/or defeat on the way towards Article 13 were very much influenced by who held presidency: under Irish presidency in the second half of 1996 sexual orientation was dismissed from the agenda to be included again under the – following - Dutch presidency in 1997.

With the adoption of the directives in 2000 lobbying was increased in the Nation States as well.

There are strong new members in new EU countries, where transposition of the directives sometimes does go beyond the minimum standards of the directives and is done in a more effective way than in some of the old European member states. Cooperation is intense and had been already before the fall of the iron fence (before 1989). All Eastern European members had been working with the Human Rights Approach for years. There are differences concerning the core topics, however, e.g. the issue of fighting for the right of freedom of assembly is a very important aspect in many Eastern European Countries.²⁶¹

ILGA Europe's mission is to act as a voice at European level for the rights of those who face discrimination on the grounds of sexual orientation, gender identity, or gender expression, to promote the right to equality and freedom from discrimination by lobbying and advocacy, and educating and information European institutions, media and civil society and to strengthen the capacity of European human rights organisations fighting against sexual orientation, gender identity, or gender expression discrimination to work for equality through their involvement in advocacy campaigns and networking, the exchange of best practise, the dissemination of information and capacity building programmes.

²⁶¹ information provided by NGO representative

In its Strategic Plan for ILGA-Europe 2008-2011²⁶² ILGA has defined 6 strategic objectives (which basically had already been included in the Strategic Plan 2005-2008)

1. Increased recognition of fundamental human rights.
2. Working towards full integration in employment.
3. Working towards full social inclusion
4. Working towards full recognition and equality of the diversity of families and family relationships.
5. Strengthened capacity of member organisations.
6. Strengthened capacity of ILGA- Europe to achieve its mission.

For coming closer to these objectives ILGA Europe sets a variety of activities aiming at raising awareness in society, enforcing capacities of its member organisations and advocating European policies towards more affective tools against discrimination on grounds of sexual orientation. As such ILGA has been active in lobbying for a Framework Decision on Homophobic Crimes, which inter alia led to the decision of the European Parliament to task the recently founded Fundamental Rights Agency in Vienna with conducting a research on homophobia in all European Member States. (see chapter 2.3.1 Informal Interaction – Single Case Example – Homophobic Events in Poland 2005-2007). Core attention since the entry into force of the anti-discrimination Directives 43/2000 and 78/2000 has been set on lobbying for a horizontal Directive on Goods and Services, levelling up the scope of protection for the ground of sexual orientation towards the level of race and ethnic origin.

Moreover ILGA has been supporting test cases,²⁶³ has been intervening in specific cases on European and National Level see chapter 2.3.1 Informal Interaction – Single Case Example – Homophobic Events in Poland 2005-2007) and has been cooperating with other organisations within the Platform of European Social NGOs.

At the time of this research ILGA Europe had to face the back-draft that the plan for editing a horizontal directive on Goods and Services was at a high risk of being given up by the Commission in favour of a Directive extending the scope of protection merely on

²⁶² ILGA Europe, International Lesbian and Gay Association (2005): *Strategic Plan for ILGA Europe 2005-2008*. www.ilga-europe.org/content/download/2458/15377/version/3/file/Strategic+Plan+FINAL.pdf, (02.09.2008).

²⁶³ e.g. the case of *Tadao Maruko v. Versorgungswerk der deutschen Bühnen* on pension rights for registered same-sex partners, http://www.ilga-europe.org/europe/news/european_court_of_justice_denying_same_sex_partners_pension_rights_is_unjustifiable_direct_discrimination, (02.09.2008).

discrimination on grounds of disability. As in former stages of the anti-discrimination policy making process it was again some member states who opposed the inclusion of – inter alia the ground of sexual orientation arguing that we would face troubles in their countries (see chapter 3.4.1. Draft Proposal for New Horizontal Directive). ILGA Europe launched a campaign to “sign a petition to stop discrimination²⁶⁴” to ensure that a new directive would be a comprehensive one covering the grounds of disability, sexual orientation, age and religion or belief, levelling up their fields of protection. This campaign shows the close interaction between ILGA Europe and European Parliament Inter-groups and Committees as the campaign is based on and aiming to support a resolution by UK MEP Liz Lynne, Vice President of the Employment and Social Affairs Committee, Vice President of the All Party Disability Inter-group, Co-Chair of the Inter-group on Ageing and member of the also the Human Rights Subcommittee, calling for a comprehensive new anti-discrimination directive. (see chapter 2.2.2.3. NGOs lobbying at the European Parliament – Inter-groups)

1.5.4. AGE

The idea to include age discrimination to the list of ground protected from discrimination on a European Union level was not very prominent at the beginning of EU anti-discrimination policies. Nonetheless, efforts to increase employment of elderly people had been tackled in the field of social policy already for a long time. It was lobbying by interest organisations and NGOs, which led to the 1993 European Year for Older People, which again opened the path to inclusion of Age as a ground of discrimination in Art.13.

Members of Parliament, Members of the Inter-group on Ageing, were actively lobbying at the Commission to include Age in Directives. What age discrimination really meant, what scope should be enclosed, was quite unclear at that time, however, which lead to very many exceptions²⁶⁵ in the directives and the extra 3 years for implementation for the Member

²⁶⁴ <http://www.signtostopdiscrimination.org/>, (02.09.2008)

²⁶⁵ Article 6 Council Directive 78/2000/EC foresees:

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are **objectively and reasonably justified by a legitimate aim**, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

This inter alia concerns pension status or benefits, age-related disabilities, proximity to retirement, or high salary, early retirement plans, etc.

States²⁶⁶. This reluctance has changed over the years, and age has been included in a variety of statements and documents published by the European Commission by now. Structural conditions are the main barriers withstanding equality for European elder people for the time being²⁶⁷.

There were 6 networks on age until the year 2000, which used to meet twice a year to exchange experience but without the aim to develop a common strategy or rules of coordination. When the European Commission decided to open consultation with civil society and anti-discrimination interest groups in a formalized way and communicated the wish that they should “get together and form one organisation,” three networks joined to form AGE²⁶⁸ - the European Older People’s Platform, which finally was set up in January 2001. Subsequently several national organisations joined, making the network a body representing over 25 million older people in the European Union via about 150 organisations.

Membership is open to non-profit organisations of older people and organisations for older people on European, national and regional level. The annually General Assembly is the governing body adopting the work programme, the budget and applications for membership and electing the President. Majority of the votes have to be with organisations of older people and the President has to come from an organisation of older people as well. An Executive Committee is responsible for providing policy guidance and ensuring that the statutes and internal rules are adhered to. Connection to the national members is organized via the Council twice a year, where European networks are participating, national representatives are elected and where responsibility for the overall implementation of the work programme and for policy decisions is positioned. The day-to-day management is done by the Secretariat, including the dialogue with the EU institutions and with the other European NGO networks and relevant stakeholders.

AGE’s vision is of a European society of all ages where individuals enjoy equal rights in terms of their living conditions, their economic situation, their participation as citizens and

²⁶⁶ Article 18 Council Directive 78/2000/EC regulates the implementation procedures, obligating Member States to ‘adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 at the latest’, but: ‘In order to take account of particular conditions, Member States may, if necessary, have an **additional period of 3 years from 2 December 2003**, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination.’

²⁶⁷ Interview with NGO representative October 2007.

²⁶⁸ <http://www.age-platform.org/EN/>, (02.09.2008)

their access to fundamental goods and services. Furthermore Age stresses the interest not only of older individuals as citizens but of society in general in the achievement of age equality.

AGE in its policies is governed by the guiding principles of promoting greater solidarity between and within generations, the recognition of older and retired people as a resource and the commitment to older people as self-advocates, which are underlying its core strategies:

- Combating Age discrimination
- Promoting the employment of older workers
- Ensuring adequate income in old age
- Promoting social inclusion
- Ensuring healthy ageing of older people
- Promoting universal accessibility and independent living

This leads to a variety of activities on European Union as well as on National level. Like EDF in the field of disability AGE is not limiting its policy action to the anti-discrimination field but tries to influence political decisions in every field that is relevant for the group of ageing people in Europe. This means being active in the field of social policy, to get involved in anything tangling insurance industry etc.

There is cooperation with the networks representing the other grounds in the framework of the Social Platform, AGE has been involved in the consultation process for a new horizontal directive on non-discrimination in access to goods and services by submitting an own draft proposal²⁶⁹ and conducted a study and published an expert report,²⁷⁰ which presents main areas where older people face discrimination in Europe. Aim of this report was to support the European Commission with arguments on why more action is needed at European Union level to combat age discrimination.

Age is not only lobbying at European institutions but is trying to build up dialogue with the business world as well. Direct contact with single companies showed to be more successful than cooperation with Business Europe, who deny the existence of age discrimination (see chapter 1.7. European Social Partners).

²⁶⁹ Addressing age discrimination in goods, facilities and services: Working document.

²⁷⁰ AGE, European Older People's Platform (2007b): *Building the case for more action at European level to combat age discrimination in access to goods, facilities and services*. http://www.age-platform.org/EN/IMG/pdf_Building_the_case_for_more_action_to_combat_age_discrimination_in_access_to_GFS_October_2007.pdf, (02.09.2008).

Recently AGE conducted and published a study on ‘Building the case for more action at European level to combat age discrimination in access to goods, facilities and services.’ It is based on detailed examples of some of the main areas where older people face discrimination. Examples were provided by national member organisations, by collecting cases that had been communicated to AGE and by testing the attitudes of companies towards elderly people. The study findings show that more action is needed to combat age discrimination and provide arguments for new and broader legislation on European level.²⁷¹

Discrimination on grounds of age is not only prohibited, if elderly people are targeted by discriminatory acts and/or institutional barriers but if it is young people as well. Age restrictions in employment are illegal regardless if they are directed towards ‘too old ones’ or ‘too young ones,’ if the provision is not objectively and reasonably justified by a legitimate aim.

Combating age discrimination on ground of being too young is not part of the European Older People’s Platform’s work plan. Given the fact that there is no European organisation, funded by the Action Programme to combat discrimination, representing the interests of young people, the European Youth Forum,²⁷² funded by the European Commission DG Education and Youth and the Council of Europe, is increasingly involved in activities of the “classic” anti-discrimination umbrella networks (funded via the Action Programme to combat discrimination). Within the European Year for Equal Opportunities it was invited to the meetings aiming at coordinated European NGO policies. Furthermore the Forum amongst other activities is involved in the Council of Europe “All different-all equal” campaign²⁷³.

1.5.5. Religion

There is no European networking NGO representing the interests of European citizen’s rights not to be discriminated because of their religion or belief. ENAR is including the fight against

²⁷¹ AGE, European Older People’s Platform (2007b): *Building the case for more action at European level to combat age discrimination in access to goods, facilities and services*. http://www.age-platform.org/EN/IMG/pdf_Building_the_case_for_more_action_to_combat_age_discrimination_in_access_to_GFS_October_2007.pdf, (02.09.2008).

²⁷² <http://www.youthforum.org/>, (02.09.2008)

²⁷³ <http://alldifferent-allegal.info/>, (02.09.2008)

discrimination on grounds of religion or belief, if it is connected to ethnic origin, in its work programme as the correlation is very intense.

The involvement of religious communities in the development of European level legislation on anti-discrimination was very defensive. The Christians churches in Germany and in Ireland did their best to act against the inclusion of religion and belief in the list of the grounds protected. They very much represented the employer's perspective stressing their concerns that they would lose their privileges in employing people belonging to their faith. The directives exclusions on genuine occupational requirements are fruit of their successful resistance. Only the ones who were really aware of the importance of fighting discrimination were cooperating, which included Jewish organisations and the church affiliated organisations, which were the strongest promoters of the starting line proposal. (See chapter 2.1. The Starting Line Group)

Efforts of the European Commission to create a European NGO representing the interest of religious communities were not successful until now.

Given the raising number islamophobic incidents in Europe the Federation of Islamic Organisations in Europe²⁷⁴ decided to draft a charter that “would set the general principles for a better understanding of Islam by non-Muslim Europeans and the bases for integration of Muslims in Europe” a decision which was enhanced by the reactions to the attacks of 11 September 2001. After six years of drafting process aiming at incorporating the opinions of as many organisations as possible the Muslims of Europe Charta²⁷⁵ was signed on 10th January 2008 in Brussels by 400 Muslim groups²⁷⁶. This could be the starting point for a more intensive dialogue between European Commission Officials and the Federation of Islamic Organisations in Europe.

Other faiths are running European based offices taking part in conferences, joint statements and other activities organised by the “Anti-Discrimination” Umbrella organisations and/or by the European Commission.

²⁷⁴ <http://www.euro-muslim.net/>, (02.09.2008).

²⁷⁵ Muslims of Europe Charta. http://www.euro-muslim.net/English/index.php?option=com_content&view=article&id=39:muslims-of-europe-charter&catid=17:articles&Itemid=110, (02.09.2008).

²⁷⁶ 400 groups sign charter for European Muslims. www.euobserver.com, (02.09.2008).

CEJI – A Jewish Contribution to an Inclusive Europe²⁷⁷ is trying to influence policy-making processes dealing with Anti-Semitism, racism, xenophobia, discrimination and diversity education at the institutions of the European Union, the OSCE, the Council of Europe and within the wider spectrum of European organisations and networks active in these areas, is running awareness raising programmes and offering trainings.

The European Council of Jewish Communities²⁷⁸ represents Jewish national communal organisations from over 40 countries in Europe and has NGO status with the Council of Europe and the European Union. It is acting as a network organisation providing its members with information and strengthening their capacities in community building.

Caritas is running a Brussels based European organisation, representing 48 national member organisations. Caritas Europa²⁷⁹ has been one of the most important social actors in European Union social policies since its origin in 1971. In anti-discrimination policies its involvement can be traced back to the starting line group proposal.

1.5.6. Cooperation between the different grounds

Cooperation between the different grounds has been enforced during the last 15 years. The recognition of the fact that cooperating for certain issues does make the lobbies stronger was the most convincing argument.

Specific interests of organisations representing different groups of society at risk of being discriminated against had and still are intervening common aims from time to time. The European Women Lobby for example was quite reluctant to cooperate until the mid 1990ies as there was a certain fear that women's rights would be levelled down. It was lesbian women, who convinced the others in the end by arguing that black men were discriminated against as much as white women.²⁸⁰

Over the years it became evident that it is not only the matter of joint efforts, but the phenomenon of multiple discrimination as well that does make cooperation necessary.

²⁷⁷ <http://www.ceji.org/>, (02.09.2008)

²⁷⁸ <http://www.ecjc.org/>, (02.09.2008)

²⁷⁹ <http://www.caritas-europa.org/>, (02.09.2008)

²⁸⁰ Information provided by NGO representative, May 2007.

Strategies for the needs of older migrant workers against the discrimination of Muslim women etc. can only be developed and brought forward together.

At the time of writing this report the specific interests of organisations representing the interests of disabled people (EDF et al.) have been formulated aside joint efforts to reach a harmonisation of protection for all grounds in contributing to the procedures towards new EU legislation broadening the scope of the prohibition of discrimination. This dual way of political activity is pursued in spite of its difficulties and risks and with understanding and approval by NGOs going for a harmonization of EU anti-discrimination legislation. This following the argument of the disability lobby that specific interests need to be represented and should not get lost in joint actions that because of their necessarily more pragmatic attitude might entail a levelling of aims.

The interests of all grounds are coordinated in the framework of the **Platform of European Social NGOs**²⁸¹, who is partner of a civil dialogue with the European Institutions. The Social Platform is representing 40 NGOs, who are member organisations and is recognised as representative and legitimate to represent civil society in social issues on the level of European Union politics.

Civil dialogue with the Social Platform is organized by ways of an institutionalised dialogue, which is made up by:

- Biannual meetings with the European Commission:

The agenda of these meetings is made up together, the Social Platform can propose, whom to invite, be it the Commissioner, the head of the unit within the Commission responsible or whoever is necessary for the topic at stake.

- Biannual meetings with Employment Committee of European Parliament
- Biannual meetings with European Council at the beginning of each presidency

All three are symbolic meetings, where topics at stake are talked about, and they are important for visualizing the representation of civil society.

The formal meetings are complemented with many informal meetings during campaigns and conferences. ILGA, EDF and AGE are cooperating in finding common positions within the structures of the European Social Platform by meeting on a regularly basis. Lobbying for the

²⁸¹ <http://www.socialplatform.org/>, (02.09.2008)

new Directive on Goods and Services has been coordinated taking part in the working group on anti-discrimination and Social Platform Members have been supporting efforts to claim for an extension of list of the grounds by ways of a change of Article 13. The focus of the working group activities as a matter of fact lies on awareness raising on multiple and horizontal discrimination and on developing strategies of “ground-overarching” interest.

1.5.7. Reflections on the Role of NGOs

Non-Governmental Organisations on European level are on their way to gain ever more importance in influencing European Union anti-discrimination policies. Informal communication and lobbying activities towards MEPs and European Commission bureaucracy had been a starting point to nowadays procedures with a high amount of formalized ways of being heard (see chapter 2.2.2. Interaction between European Union Institutions and Civil Society).

The acknowledgement of NGO expertise and the involvement of NGOs by ways of consultation procedures went in line with a rising professionalization of NGOs – especially of European Umbrella NGOs. This not the least caused by the funding provided by the European Commission within the Community Action Programme to Combat Discrimination followed by PROGRESS. The funding enabled European NGOs to build up (in case of ENAR) or to extend and to consolidate (in case of ILGA and EDF) their structures. NGO representatives frankly admitted that the rise in budget from 2000 on in line with the easing of Europe-wide communication via e-mail were the basis for the increase in lobbying and the increase in influence and successful intervention. Funding by ways of Community Programmes on the other hand forces NGOs to fulfil certain criteria (see chapter 2.2.2.1. What is a Civil Society Organisation?), to coordinate their annual work-programme with the European Commission, to deliver work-packages agreed as well as to provide expertise.

General remarks:

Even if the Commission needs this expertise and the readiness to deliver expert opinions as part of the Dialogue with civil society; and even if this dialogue is considered as important to give European Union policy – often criticised as being non-democratic – a participatory touch, still the NGO dependency of Brussels subvention funds is stronger. This unbalanced proportion of power is not in line with the requirements of the reflexive governance concept that all actors should be free, independent and equal.

Nonetheless the role of NGOs as actors in European anti-discrimination policies has been a lot more than a fig leaf involvement, and the high level expertise NGOs can provide policy with, the professionalization of networking structures on European level as well as between organisations in the Member States are developments that have strengthened the self-image and the public perception of NGOs as political actors.

1.6. Equinet

Equinet is the network of specialised national bodies for the promotion of equal treatment. Article 13 of Council Directive 2000/43/EC obliges Member States to designate an independent body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of ethnic origin. This obligation was fulfilled in different ways by the Member States, some establishing new bodies, others handing over the tasks foreseen by the directives to institutions already working in the field of anti-discrimination. Most of the Member States set up bodies for all the grounds, which goes beyond the provisions of the Directive. Some decided to establish one body for each ground, others to have a multiple body responsible for all the grounds tackled by the Directives or covering even more than specified in the Directives. There are differences concerning the scope, the tasks, the independence as well as the resources. The Directives set the minimum standards, which most of the Member States fulfilled – even if compliance with the notion of independence seems doubtful in quite some cases. Still the structures and competences of the bodies in the Member States differ to a large extent, in many Member States they go beyond the specifications in the Directives in one way or the other.

The bodies should be responsible for providing assistance to victims of discrimination in pursuing their complaints, conducting independent surveys on discrimination, publishing independent reports and making recommendations on issues relating to discrimination. The level of knowledge, the approach to the tasks and the understanding of responsibility differed to a high extent at the time most of the newly created bodies were set up, which happened between 2003 and 2005.²⁸²

²⁸² For an overview of the structures and competences of Equality Bodies in place in 2002 see: European Commission (2003): *Promoting Diversity-21 Bodies Promoting Diversity and Combating Discrimination in the European Union-Executive Summary*. Office for Official Publications of the European Communities: Luxembourg. http://ec.europa.eu/employment_social/publications/2003/ke4702705_en.pdf, (16.01.2008).

In order to explore how Article 13 of the Directive could be best implemented seven equality bodies and the Migration Policy Group (MPG) started a cooperation of specialised bodies across Europe. They were the pioneers in establishing a network of equality bodies.

In the course of the project „Towards the Uniform and Dynamic Implementation of EU Anti-Discrimination Legislation: the Role of Specialised Bodies“ (2002-2004), which was conducted by the Dutch Equal Treatment Commission and funded by the European Commission under the *Community Action Programme to Combat Discrimination*²⁸³, experiences of the existing equality bodies were evaluated to identify the type of body that would be most effective.

Equinet was funded by the *Community Action Programme to Combat Discrimination* and is now funded by *PROGRESS*²⁸⁴. It dedicates its efforts to develop cooperation and facilitate information exchange between equality bodies across Europe to support the consistent implementation of EU anti-discrimination law and the levelling-up of legal protection for victims of discrimination.

The network aims to build a resource base for the exchange of legal and non-legal expertise, enforcement strategies, training, best practice and to establish a platform for dialogue with the European institutions.

Equinet consists of 28 organisations from 23 Member States, two equality bodies with observer status and MPG as international partner, which has run the secretariat for Equinet until 2007, when Equinet changed its structure from a mere network to an association with legal personality run by its own secretariat in Brussels.

Requirements to become member of Equinet are limited to:

- being a specialised body in the meaning of the directives
- being independent
- having legal competence

²⁸³ Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0750:EN:HTML>, (02.09.2008).

²⁸⁴ Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress. http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_315/l_31520061115en00010008.pdf, (02.09.2008).

There are countries with more than one member like Sweden. As long as the criteria cited above are fulfilled, any body can apply to join the network. Few bodies do show deficiencies in fulfilling these criteria, still they join the network aiming at levelling up in their concrete problematic fields.

In Austria the national equality body for example cannot be considered as fully independent. The Austrian Ombud for Equal Treatment is a governmental authority, established within the Federal Ministry for Women, Media and Public Service. The authority consists of three different units: Ombud for Gender Equality in Employment, Ombud for Equal Treatment on the grounds of Ethnic Belonging, Religion or Belief, Age or Sexual Orientation in Employment and Ombud for Ethnic Equality in Goods and Services. All the ombudspersons are ‘independent’ officers within the ministry, who are appointed by and directly responsible to the Minister for Health and Women. Its employees are legal experts working as civil servants, who are autonomous and independent within the Ministry. They are independent in their content and their appointment carries no limitations. They can be discharged again under certain circumstances. However, the body’s independence is not secured by a constitutional provision as required by art 20 of the Austrian Constitution: Administrative bodies are bound by instructions (*weisunggebunden*) as long as they are not explicitly freed from this obligation by a constitutional provision or law. The ministry has discretion over the OET’s budget and recruitment procedures, which are basic conditions not really promoting independence. With regard to victim support the Ombudspersons are independent due to their expert status (*Sachverständigeneigenschaft*) and the confidentiality of the counselling process. Nevertheless, practice will show if there is full de facto independence.

The German Federal Anti-Discrimination Agency on the other hand has no legal competence, but is merely responsible for – amongst other duties – „providing information concerning claims and possible legal action based on legal provisions providing protection against discrimination.”²⁸⁵

Equinet has from its very beginning until the time of this analysis been quite successful in terms of knowledge transfer between well and recently established bodies, in creating a more

²⁸⁵ Equinet Member Profile: German Anti-Discrimination authority.
<http://www.equineteurope.org/infopages/2588.html>, (02.09.2008).

uniform approach to the topic of anti-discrimination, in establishing a working system of exchange of experiences and of strategies on how to act in specific cases of discrimination. Furthermore, the network and its working groups extensively contribute to the enhancement of anti-discrimination legislation: They are the ones „using the law“, exchanging experiences on implementation helps them to be creative and to apply arguments used in one country to cases in another countries. These practices promote more coherent implementation strategies of anti-discrimination legislation in Europe and make case law more comparable.²⁸⁶

Equinet runs 4 working groups:

Working Group 1 on information exchange consists of contact persons who provide information on a regular basis to be shared with the Equinet partners, which is consulted by a management group on technical, operational or substantive issues. The Working Group has decided on a list of topics of prior relevance, which is open for change. Exchange is structured by formal procedures, providing templates for sharing cases and a mailing list for open questions or information, which is managed by the Equinet secretariat.

Working Group 2 on Strategic Enforcement aims at ‘contributing to the effective implementation of the Racial Equality Directive and the Employment Equality Directive’ focussing on the competences and powers the Equality Bodies can use for the effective enforcement of these Directives.²⁸⁷ Based on the competences and powers listed in the Directives, such as providing assistance to victims, conducting surveys, and issuing reports and recommendations, Working Group 2 tries to figure out how these powers can be used best strategically and how these powers would have to be further developed for effectively enforcing anti-discrimination legislation. This was done by a comparison of competences and powers in the Member States and reflexion about what worked best. This led inter alia to a specific focus on the potential role of mediation and alternative dispute resolution as a tool for equality bodies.

Working Group 3 on Dynamic Interpretation „focuses on how to interpret legal concepts and

²⁸⁶ Information provided by a Board Member of Equinet and by interviews conducted by one of the authors in developing a training strategy for Equinet.

²⁸⁷ Focus and aim defined in Obura, Soraya/Palmer, Fiona (2006): *Strategic Enforcement: Powers and Competences of Equality Bodies*. Equinet: Brussels, p. 6.
http://www.equineteurope.org/multiattachments/2204/DocumentName/EQUINET_REPORT_JAN_2006.pdf, (15.01.2008).

issues in anti-discrimination law with a view to harmonised implementation of EU law in this area in order to secure equality at the highest possible level²⁸⁸. In 2006, the group decided to analyse the differences in implementation by creating five hypothetical cases based on real ones. The cases were selected with the aim to tackle key legal concepts, such as direct and indirect discrimination, the shift of the burden of proof, positive action, occupational requirements and reasonable accommodation, multiple discrimination and various fields of discrimination. The findings showed that although the implementation of the directives had almost been completed in all the Member States and similarities in the approach of Equinet partners in dealing with cases were evident, there were differences among the Member States in the way of implementation of EU law, in the degree of protection and the possibilities to gain rights. The analysis might be a very helpful basis for the process of harmonizing the implementation.

Working Group 4 on Policy Formation focuses on building dialogue between the specialised equality bodies and the European institutions with a view to contributing to the inclusion of an effective equality focus in EU policies and programmes. It aims at collecting experience of equality bodies to develop opinions on the further development of anti-discrimination and equality policies and communicate these opinions to the European institutions as well as to the public. Until January 2008, two opinions were published, stressing the importance of Equality Mainstreaming²⁸⁹ and formulating recommendations on how to secure the legacy of the European Year of Equal Opportunities for all.²⁹⁰ In the latter opinion the high potential of equality bodies as key actors in equality policies and the need for acknowledging this fact in a structural way is stressed.

Furthermore, Equinet is trying to provide its members with trainings to fill gaps in competences, to provide assistance in fulfilling their duties and in exchange of experience to enable equality bodies to act as an ‘engine’ for anti-discrimination policies. This is done by operating an internet platform, where cases can be discussed, political developments and high

²⁸⁸ Working definition in Equinet, European Network of Equality Bodies (2007b): *Dynamic Interpretation-European Anti-Discrimination Law in Practice*, p. 5.
http://www.equineteurope.org/multiattachments/2536/DocumentName/Dynamic_Interpretation_2007_FINAL.pdf, (15.01.2008).

²⁸⁹ Equinet, European Network of Equality Bodies (2007a): *Equality Mainstreaming: A Perspective from the Equality Bodies*. http://www.equineteurope.org/multiattachments/2513/DocumentName/Opinions_en.pdf, (15.01.2008).

²⁹⁰ Equinet, European Network of Equality Bodies (2007c): *Securing a Lasting Legacy at European Level. Making the Most of the European Year of Equal Opportunities for All*.
http://www.equineteurope.org/multiattachments/2615/DocumentName/Equinet_Opinion_Final_081107.pdf, (16.01.2008).

court decisions in the Member States are brought to each other's attention.

1.6.1. Reflections upon the Role of Equinet

Equinet's role can be considered as very special and high-potential. The characteristics making the role of Equinet so very special having a high potential in becoming the above cited 'engine' for anti-discrimination policies is on the one hand the members' high degree of institutional legitimation and on the other hand their close link to victims of discrimination. There are no other institutions that are both legitimized by directives on a European level as well as by legislation on the national level, which make them official actors in the Member States. The independent bodies not only have an official role in legal procedures but due to their institutional anchoring are political actors as well. The exchange of best practise and the commitment to mutual learning institutionalised with the Working Groups would be the basis for gaining a lot more political impact than Equinet is facing today. Questions of unification and comparability, of non-legal ways of conciliation, of best practise in combating discrimination, all these key informations are flowing together within Equinet's structures. They could form a basis for 'framing' national anti-discrimination policies and strengthening the impact of Equinet on European Union level policies.

The years of setting up the network were characterized by levelling up less experienced bodies, comparing different legal and political systems and trying to cope with differences in implementation of the Directives in the Member States. They were characterized by developing a common understanding of independent bodies' role and tasks and the creation of networking structures. With the process of establishing equality bodies and setting up a formal framework for networking among these bodies, Equinet has moved in the direction of seriously taking on its high-potential role. The publishing of 'perspectives for policy processes'²⁹¹ is an important step towards becoming taking up a more pro-active role in the anti-discrimination policy field.

1.7. European social partners

²⁹¹ Equinet, European Network of Equality Bodies (2007a): *Equality Mainstreaming: A Perspective from the Equality Bodies*. http://www.equineteurope.org/multiattachments/2513/DocumentName/Opinions_en.pdf, (15.01.2008).

The European social partners have for a long time been active players in the field of social policy. However their role has only recently been explicitly defined and specified in the treaties of the Union as their autonomy has been better safeguarded. The European social partners unite management and labour, organisations which have quite opposing aims and do not always concur on the measures taken to reach the goals they have agreed on. Besides, each of the social partner organisations is an umbrella for organisations with different national, sectoral or ideological affiliations. They have to take this heterogeneity into account when participating in policy consultations and development. As players in the field of social policy they would be predestined for a mainstreaming approach to anti-discrimination. It is more difficult for them to find their role in fields outside employment which go beyond access to services and goods.

1.7.1. Role of the European social partners

Social policy as specified in Art 153 (ex Art 137 TEC)²⁹² encompasses many fields relevant for anti-discrimination – working conditions, social security and social protection of workers, protection of workers whose employment contract is terminated, conditions of employment for third-country nationals legally residing in the Union and combating of social exclusion. This broad range of issues allows for consultations and activities by the social partner organisations falling within the scope of the Racial Equality Directive as well as the Employment Equality Directive. The European social partner organisations can also play an important role in raising awareness and promoting exchange of good practices relating to equality, anti-discrimination and diversity issues among their member organisations at national level, many of whom are involved in EQUAL initiatives.

The European Union has only explicitly committed itself to promoting the role of the social partners at EU level and to “facilitate dialog between the social partners, respecting their autonomy²⁹³” since the Lisbon Treaty signed in 2007. The treaties do not specify which organisations are to be seen as social partner organisations. In 1993, the Commission set out

²⁹² Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union, in: Official Journal of the European Union, 2008/C 115/01, 09.05.2008. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>, (28.08.2008).

²⁹³ Art 152, Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union, in: Official Journal of the European Union, 2008/C 115/01, 09.05.2008. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>, (28.08.2008).

criteria for identifying the relevant organisations of management and labour²⁹⁴, which clearly aim at the organisations' representativeness²⁹⁵. Among the organisations listed as general cross-industry organisations²⁹⁶ are the Union of Industrial and Employers' Confederation of Europe (UNICE) – now called BusinessEurope, the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC). The most important structure for joint involvement of these organisations in European policy making is the European social dialog as specified in Art 155 (ex Art 139 TEC)²⁹⁷, which has been formally recognised since 1986²⁹⁸. In its broadest sense social dialog can mean both tripartite consultations involving Community institutions and allowing for the social partners to ask the Commission to adopt a decision in form of a directive as well as bipartite dialog either initiated by or independently of Community institutions²⁹⁹. In 1998, a “Proposal for a cooperation agreement between UNICE and UEAPME” was concluded to ensure that the positions and views of the European Association of Craft, Small and Medium-sized Enterprises (UEAPME) are integrated in the social dialog.

1.7.2. Activities in the field of anti-discrimination

The European social partners signed a “Joint declaration on the prevention of racial Discrimination and xenophobia and promotion of equal treatment at the workplace³⁰⁰” at Florence in October 1995. The signatories committed themselves to taking “an active part in a common endeavour to prevent racial discrimination and to act jointly” against racism and xenophobia “in their own sphere of influence, the workplace”. It aims at joint and active involvement of individuals and organisations in the field of employment to implement

²⁹⁴ Para 24, European Commission (1993): Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and the European Parliament, COM (93) 600 final, 14 December 1993. http://aei.pitt.edu/5194/01/001653_1.pdf, (28.08.2008).

²⁹⁵ See: http://ec.europa.eu/employment_social/social_dialogue/represent_en.htm, (28.08.2008).

²⁹⁶ European Commission (1993): Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and the European Parliament, COM (93) 600 final, 14 December 1993. http://aei.pitt.edu/5194/01/001653_1.pdf, (28.08.2008).

²⁹⁷ Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union, in: Official Journal of the European Union, 2008/C 115/01, 09.05.2008. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>, (28.08.2008).

²⁹⁸ Single European Act 1986, Art 118B EC (now Art 154 (1) and 155 (1)), see: http://europa.eu/scadplus/treaties/singleact_en.htm, (28.08.2008).

²⁹⁹ Art 154 (ex Art 138 TEC) and Art 155 (ex Art 139 TEC), Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union, in: Official Journal of the European Union, 2008/C 115/01, 09.05.2008. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>, (28.08.2008).

³⁰⁰ UNICE/ETUC/CEEP (1995): Joint declaration of the European Social Partners on the Prevention of Racial Discrimination and Xenophobia and Promotion of Equal Treatment at the Workplace. <http://www.erc-online.eu/content/default.asp?PageName=OpenFile&DocID=19177>, (29.08.2008).

specific actions to promote equal treatment and to prevent discrimination based on race, colour, ethnic or national origin, or religion. Whether this joint declaration had an impact at national level³⁰¹ very much depended on the social partners' history of addressing racial discrimination in the respective member states. Especially trade unions in Belgium, Denmark, Germany, the Netherlands, Spain and the United Kingdom had implemented policy and actions prior to the declaration. The dissemination of the joint declaration among relevant actors at national level was also influenced by membership in the three organisations at EU level.³⁰² ETUC analysed how their member organisations tried to incorporate the concerns of migrant and ethnic minority workers into their policies and how they were integrated in organisational structures. The study found out that the development of policies on discrimination and integration was one of the most important issues. Many trade unions conducted anti-discrimination trainings, published information material on discrimination and undertook anti-discrimination campaigns. Besides, providing legal advice on discrimination at work was of utmost importance and necessity.³⁰³

The European social partners strove for an autonomous and more proactive strategy by adopting work programs building on a spectrum of diversified instruments such as framework agreements or awareness raising campaigns for their bipartite work. The first work program (2003-2005)³⁰⁴ contained t actions with an anti-discrimination focus: seminars on the ageing workforce and harassment as well as updating the Florence joint declaration and the joint declaration dating from 1999 on disability. The latter aim was reached during the European Year of People with Disabilities in 2003. The declaration³⁰⁵ aims at awareness raising and the involvement of stakeholders including social partners, public authorities and NGOs. Employers are called on to develop equal opportunity policies for people with disabilities, who bring added value to the company and increase its potential for innovation, and inform all players about these measures. The Florence declaration has not been updated yet. The

³⁰¹ Carley, Mark (1997): *Social partners and racism: the impact of the European joint declaration*. <http://www.eiro.eurofound.eu.int/1997/06/study/tn9706201s.html>, (29.08.2008).

³⁰² Liegl, Barbara/Perchinig, Bernhard/Weyss, Birgit (2004): *Combating Religious and Ethnic Discrimination in Employment*. ENAR. http://cms.horus.be/files/99935/MediaArchive/pdf/discrim_employ_04_en.pdf, (23.08.2008).

³⁰³ Fulton, Lionel (2003): *Migrant and ethnic minority workers: Challenging trade unions*. ETUC. <http://www.etuc.org/IMG/zip/migrant.zip>, (29.08.2008).

³⁰⁴ ETUC/CEEP/UNICE/UEAPME (2002): *Work Programme of the European Social Partners 2003-2005*. <http://www.erc-online.eu/content/default.asp?PageName=OpenFile&DocID=14690>, (29.08.2008).

³⁰⁵ UNICE/UEAPME/CEEP/ETUC (2003): *Declaration of the Social Partners for the European Year of People with Disabilities: Promoting equal opportunities an access to employment for people with disabilities*. <http://www.erc-online.eu/content/default.asp?PageName=OpenFile&DocID=14706>, (29.08.2008).

second work program³⁰⁶ promised that the social partners would undertake a closer look at active ageing and at the integration of disadvantaged groups on the labour market. The social partners managed to issue a framework agreement on harassment and violence³⁰⁷, which does not explicitly mention the grounds of discrimination specified in the Racial Equality and Employment Equality Directive, but links harassment to these legislative provisions. The agreement sees raising awareness and training of managers and workers as appropriate measures reducing the likelihood of harassment and violence at the workplace. Enterprises should have a clear statement declaring that neither harassment nor violence would be tolerated and outlining procedures to be followed should they occur. Member organisations will have to report to the Social Dialogue Committee on the implementation of the agreement.

Organisations participating in the European social dialog for Commerce, like EuroCommerce and UNI-Europe Commerce, have also issued joint statements combating racism³⁰⁸, promoting age diversity³⁰⁹ and encouraging employment and integration of disabled people³¹⁰. All these statements make explicit that discrimination on the relevant grounds is prohibited, aim at raising awareness for the issues at stake and at the exchange of good practices. The latter is also aimed for by UEAPME who published a compendium on good practices of diversity³¹¹ during the European Year of Equal Opportunities for All.

1.7.3. Participation in consultations and relations with NGOs

³⁰⁶ UNICE/UEAPME/CEEP/ETUC (2006): Work Programme of the European Social Partners 2006-2008. <http://www.erc-online.eu/content/default.asp?PageName=OpenFile&DocID=16577>, (29.08.2008).

³⁰⁷ European Social Dialogue (2007): Framework Agreement on harassment and violence. <http://www.erc-online.eu/content/default.asp?PageName=OpenFile&DocID=18774> 29.08.2008).

³⁰⁸ EuroCommerce/UNI-Europa Commerce (2000): EuroCommerce and Uni-Europa Commerce joint statement on combating racism & xenophobia. http://www.union-network.org/UNISite/Sectors/Commerce/Social%20dialogue%20agreements/Racism_and_xenophobia_English.htm, (29.08.2008).

³⁰⁹ EuroCommerce/UNI-Europa Commerce (2002): EuroCommerce and Uni-Europa Commerce voluntary guidelines supporting age diversity in Commerce. http://www.union-network.org/UNISite/Sectors/Commerce/Social%20dialogue%20agreements/Guidelines_supporting_age_diversity_English.doc, (29.08.2008).

³¹⁰ UNI-Europa Commerce/EuroCommerce (2004): UNI-Europa Commerce and EuroCommerce statement on promoting employment and integration of disabled people in the European commerce and distribution sector. <http://www.union-network.org/UNISite/Sectors/Commerce/Social%20dialogue%20agreements/Disability%20joint%20statement%20English.pdf>, (29.08.2008).

³¹¹ UEAPME (2007a): *UEAPME Compendium of good practices of diversity and non-discrimination initiatives in European Crafts, SMEs and their organisations*. http://www.ueapme.com/docs/compendium/compendium_light.pdf, (28.08.2008).

In general consultations are less often initiated in the policy field of anti-discrimination than in other fields.³¹² In 2000, the ETUC³¹³ and UNICE³¹⁴ issued position papers on the implementation of Art 13. The employees' organisation called for legislative provisions supplementing the Employment Equality Directive dealing in a comprehensive way with different forms of discrimination. Beyond that, the ETUC called on the European social partners to supplement the Employment Equality Directive by an agreement based on the Florence joint declaration. The trade unions were very favourable of positive action measures, the shift in the burden of proof and the creation of independent equality bodies. The ETUC stressed that these special bodies should function as watchdogs, which should involve social partners when dealing with employment and working conditions. As regards multiple discrimination, especially on the grounds of gender, race or ethnic origin, the employees' organisation feared problems of hierarch and inconsistency. Although UNICE reaffirmed its attachment to the objective of combating discrimination, it was far more critical of the two directives than the ETUC. It emphasised that racial and ethnic discrimination are better understood than discrimination based on the grounds of disability and age, which they saw more as a remit of active labour market policies. The employers' organisation wanted one directive prohibiting discrimination in employment and was strongly opposed to the suggested definition of indirect discrimination and of subsuming harassment under the notion of discrimination. The shift in the burden of proof was seen as creating a financial risk, as it would lead to the proliferation of court cases. UNICE rejected the establishment of indicators or benchmarks at the European level, which would clash with the existing national statistics. However, both organisations were of the opinion that information and awareness raising activities were important.

In 2004, the Commission launched a public consultation on equality and non-discrimination in an enlarged European Union. None of the employers' organisations responded to the Commission's Green Paper. The ETUC welcomed the Commission's commitment to further

³¹² Interview with representative of UEAPME, Brussels, 23.10.2007.

³¹³ ETUC (2000): Legislation Combating Discrimination (art. 13), ETUC Resolution, Executive Committee, 21-22/3/2000, in: ETUC (ed.): Our priorities: ETUC Resolutions 2000. http://www.etuc.org/IMG/pdf/doc_en.pdf, (29.08.2008).

³¹⁴ UNICE (2000): UNICE position paper on implementation of article 13 of the Amsterdam Treaty [COM (99) 565,566,567]. <http://www.buinesseurope.eu/DocShareNoFrame/docs/2/HLEIKPNCKCFHFALLEODHBLBOPDBY9DAK2D9LTE4Q/UNICE/docs/DLS/2002-03450-E.pdf>, (28.08.2008).

efforts, which would be needed to ensure effective implementation of the current directives.³¹⁵ Beyond that, the employees' organisation assessed non-binding instruments and/or soft law as not sufficient to bring about non-discrimination and therefore saw a need for a more coherent legal strategy, for the inclusion of further grounds, the broadening the scope of grounds outside employment and the improvement of existing legislation. The trade unions also broached the issue of exceptions to the application of non-discrimination provisions based on nationality, which would hinder labour market access also of third country nationals. Specific attention should be paid to the situation of ethnic minorities, including the Roma in both new and old Member States. It is quite surprising that the issue of Roma was taken up by the ETUC, as one representative of the European Roma Information Office (EIRO) explained that they would only send information to trade unions and had no official relationships with them, as they lacked interest in the Roma issue.³¹⁶ UNICE was more favourable of promoting the employability of marginalised target groups by accompanying measures³¹⁷, which is oriented towards the alleged deficits of members of marginalised groups rather than complying with an anti-discrimination approach.

The ETUC asked the commission to pay more attention to the involvement of social partners in defining policies and developing legislation. It emphasised that combating gender discrimination was still of paramount importance including the protection against multiple discrimination of women and the promotion of gender mainstreaming. Equality mainstreaming should be actively applied to look both at existing and potential discrimination in all relevant policy areas. Clear links were identified with the European Employment Strategy and the Social Inclusion Process. However, mainstreaming should pay attention to the diverse causes, problems and needs in connection with the different grounds of discrimination³¹⁸. The ETUC criticised that the transposition of the directives has not been properly evaluated. It wanted social partners to be more involved in the implementation and monitoring of directives and that NGOs should mainly participate in these process in

³¹⁵ ETUC (2004): ETUC's Observations on the Commission's Green paper 'Equality and non-discrimination in an enlarged European Union' COM(2004)379 final (28/05/2004). http://ec.europa.eu/employment_social/fundamental_rights/pdf/greencon/etuc.pdf, (30.08.2008).

³¹⁶ Interview with NGO-representative, Brussels, 24.10.2007.

³¹⁷ UNICE (2005): UNICE Position Paper on the European Commission framework strategy "non-discrimination and equal opportunities for all". <http://www.businesseurope.eu/DocShareNoFrame/docs/1/HLEIKPNCKCFHFALLEODHBLBOPDB19DW3WN9LI71KM/UNICE/docs/DLS/2005-01716-EN.pdf>, (28.08.2008).

³¹⁸ In 2008, the ETUC published a compendium on activities combating discrimination on the grounds of sexual orientation and gender identity: Pillinger, Jane (2008): *Extending Equality – trade union actions to organise and promote equal rights, respect and dignity for workers regardless of their sexual orientation and gender identity. Report of ETUC conference.* http://www.etuc.org/IMG/pdf_ETUC_inside-2.pdf, (28.08.2008).

cooperation with social partners. Data collection was seen as an important factor promoting not only monitoring but also awareness raising. The ETUC suggested the establishment of a public information system on anti-discrimination jurisprudence as well as testing in specifically problematic areas. Furthermore, it recommended evaluating the impact of the quite expensive anti-discrimination campaigns and considering the development of action plans which would be more focussed. The employers' side was quite explicit in its rejection of proposals for increased monitoring and data collection at the level of individual companies.³¹⁹

The public consultation on the necessity of new legislation extending the protection against discrimination outside employment to the grounds of age, disability, religion and sexual orientation started by the Commission in 2007 prompted reactions by both management and labour. The questionnaire was heavily criticised by Businesseurope as “biased” to “the need for further EU legislation³²⁰”. The employers' organisations³²¹ agreed on seeing no need for new legislation as non-legislative measures were seen as the best way of easing the access to goods and services. They feared disproportionate burdens on the side of the service providers. UEAPME was a little less precise and explicit about these issues of concern than Businesseurope and CEEP. The latter two were concerned about how to deal with legitimate differences made between different categories of clients and reminded the Commission to concentrate on organising exchanges of experiences and the promotion of good practices. Management had already stressed before that diversity management was a preferred instrument as it took into account all the facets of individuals and could be tailored to individual needs.³²² Some organisations representing the interest of service providers³²³ were convinced that discrimination with regard to access to goods and services would not exist.

³¹⁹ UNICE (2005): UNICE Position Paper on the European Commission framework strategy “non-discrimination and equal opportunities for all”.

<http://www.businesseurope.eu/DocShareNoFrame/docs/1/HLEIKPNCKCFHFALLEODHBLBOPDB19DW3WN9LI71KM/UNICE/docs/DLS/2005-01716-EN.pdf>, (28.08.2008).

³²⁰ Businesseurope (2007): Response to consultation ‘Discrimination – Does it matter?’.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/be_en.pdf, (30.08.2008).

³²¹ Businesseurope (2007): Response to consultation ‘Discrimination – Does it matter?’.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/be_en.pdf, (30.08.2008), CEEP (2007):

CEEP response to Commission consultation on Discrimination – Does it matter?

http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/ceep_en.pdf, (30.08.2008) and UEAPME

(2007b): UEAPME response to the Commission’s consultation of the European Social Partner on possible new initiative to prevent and combat discrimination outside employment.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/ueapme_en.pdf, (30.08.2008).

³²² UNICE (2005): UNICE Position Paper on the European Commission framework strategy “non-discrimination and equal opportunities for all”.

<http://www.businesseurope.eu/DocShareNoFrame/docs/1/HLEIKPNCKCFHFALLEODHBLBOPDB19DW3WN9LI71KM/UNICE/docs/DLS/2005-01716-EN.pdf>, (28.08.2008).

The ETUC was convinced that discrimination outside employment on the grounds of age, disability, religion and sexual orientation was sufficiently evidenced.³²⁴ It emphasised the strong link between non discrimination outside employment and at the workplace, which makes the social partners important actors. New legislation prohibiting discrimination outside employment on the grounds not yet covered is needed. Going beyond that is the trade unions' demand that discrimination on the grounds of nationality and trade union membership needed to be tackled. The ETUC called on the Commission to draft a single instrument protecting all grounds of discrimination outside employment which would facilitate combating multiple discrimination. Like the employers' organisations, ETUC wanted the new directive to allow for positive action in order to address the specific disadvantages some groups face.

The observations described above were confirmed by an official of DG Employment. At a workshop on the new directive, organised by the Commission and involving both social partners and NGOs, the social partners were not very well prepared, especially Businesseurope and CEEP tended to trivialise the situation by negating the existence of discrimination.³²⁵ UEAPME admitted that discrimination occurred. The Commission was therefore thinking about providing the social partners with the written contributions of the NGOs showing them the extent of discrimination and the need to act. Maybe there is a need to change the strategy towards employers' organisations from concentrating on benefits of diversity for employers to arguing with benefits for business³²⁶ by increasing the number of customers/clients as well as their satisfaction, which would result in more profits.

³²³ European Banking Industry Committee, EBIC (2008): EBIC Comments on the European Commission's initiative in the area of Anti-Discrimination.
http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/ebic_en.pdf, (30.08.2008); Hotels, Restaurants & Cafés in Europe, HOTREC (2008): HOTREC reply to the European Commission's consultation concerning a possible new initiative to prevent and combat discrimination outside employment (EMPL7G2/FK/sk D (2007) 29000).

http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/hotrec_en.pdf, (30.08.2008); Specialised Consumer Credit Providers in Europe, EUROFINAS (s.a.): Reply to EC Anti-discrimination Initiative.
http://ec.europa.eu/employment_social/fundamental_rights/org/imass_en.htm, (30.08.2008) and The European Travel Agents' and Tour Operators' Associations, ECTAA (2008): Reply to public consultation on 'Non-discrimination outside the labor market'.
http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/ectaa_en.pdf, (30.08.2008).

³²⁴ ETUC (2007): ETUC's observations on the Commission's consultation concerning a new initiative to prevent and combat discrimination outside employment.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/etucprep_en.pdf, (29.08.2008).

³²⁵ Interview with representative of DG Employment, Social Affairs & Equal Opportunities, Brussels, 23.10.2007.

³²⁶ Interview with representative of DG Employment, Social Affairs & Equal Opportunities, Brussels, 23.10.2007.

According to representatives of the employers' organisations interaction and exchange of information, experiences and good practices primarily took place at events organised by the Commission. DG Employment would promote this exchange of information focusing on what the relevant actors such as the Commission, the European Parliament, the social partners and the NGOs were working on at the moment. European employers were very clear in their rejection of the introduction of additional consultation structures, which they rated useless and burdensome.³²⁷ For the European Year of Equal Opportunities for All a steering committee was established, in which social partners and European NGOs were represented. It was a platform for exchanging experiences and views as well as for gaining information. UEAPME was almost always present, the EUTC every once in a while and Businesseurope and CEEP hardly ever attended these meetings.³²⁸ Businesseurope and ETUC seem to be more involved in activities relating to gender discrimination.

Direct contacts between employers and NGOs did not take place very often³²⁹, most of the time these exchanges were structured by the Commission. Companies were not interested in exchange of information and experiences with NGOs, they were more open towards anti-discrimination when they were approached by professional organisations.³³⁰ Scepticism by employers was experienced by all the European Umbrella NGOs.³³¹ Trying to start cooperation with employers in general, who had no understanding of the issues of discrimination and with whom no structured dialog existed, was experienced as very difficult. There was a preference for working with the CSR "tag" noticed, which is considered as more useful in terms of public relations and less risky in terms of change. The situation with individual employers who showed an interest in the topic was experienced differently. Their interest opened a window of opportunity for establishing relationships.

Businesseurope³³² was keener on cooperating with trade unions than with NGOs. NGOs do not have a good understanding of how companies work. They are political organisations with a fighting spirit vis-à-vis the Commission and other EU institutions and not in a cooperative

³²⁷ UNICE (2005): UNICE Position Paper on the European Commission framework strategy "non-discrimination and equal opportunities for all".
<http://www.businesseurope.eu/DocShareNoFrame/docs/1/HLEIKPNCKCFHFALLEODHBLBOPDB19DW3WN9LI71KM/UNICE/docs/DLS/2005-01716-EN.pdf>, (28.08.2008).

³²⁸ Interview with representative of UEAPME, Brussels, 23.10.2007.

³²⁹ Interview with representative of Businesseurope, Brussels, 24.10.2007 and interview with representative of UEAPME, Brussels, 23.10.2007.

³³⁰ Interview with representative of UEAPME, Brussels, 23.10.2007.

³³¹ Interviews with NGO-representatives, May-October 2007.

³³² The following paragraph is based on an interview with a representative of Businesseurope, Brussels, 24.10.2007.

mood with the business side. Although both social partners and NGOs fight for their members' interests, they have a totally different culture and tradition. Social partner organisations are representational and commit themselves and their members to a specific aim. With NGOs it would be extremely difficult to decide which of the civil society organisations to address. Anti-discrimination would be an issue of extreme fragmentation and there would be many NGOs covering for instance the grounds of ethnicity. Ethnicity must not be confused with race however and not all grounds of discrimination were represented by NGOs. Concerns of civil society of the EU 15 are very often more present, as it has only started to grow in the new Member States.

According to a representative from an employers' organisation, trade unions were in touch with NGOs more frequently.³³³ The ETUC involved EDF in its preparation of the European Year of People with Disabilities and ETUC has started some work on preparing a disability specific directive in cooperation with EDF.³³⁴ The loose cooperation resulted in a joint declaration in 2007, which aims at raising awareness among trade union and workers' representative bodies for the needs of disabled workers, ensuring total implementation of the Employment Equality Directive and achieving a specific disability directive.³³⁵ In its opinion on the new directive the ETUC³³⁶ therefore stated that in a common approach the particular nature of the discrimination that some groups suffered might be overlooked and that an initiative targeted on one discrimination ground could be attractive when it could be expected to get wide support. ETUC and EDF agreed on promoting disability mainstreaming especially in 2010 the European Year of Combating Poverty. Campaigning seems to be a method often used by trade unions when working together with NGOs.³³⁷

³³³ Interview with representative of UEAPME, Brussels, 23.10.2007.

³³⁴ EDF (2002): *European Trade Union Confederation becomes involved in the year 2003*, in: European Union of the Deaf, EUD (ed.): *EUD Update: What's up for Deaf People in the European Union??*, Volume 6, Number 1, September 2002. <http://www.eudnet.org/update/archive/2002/092002.doc>, (30.08.2008).

³³⁵ ETUC/EDF (2007): ETUC-EDF Joint Declaration.

<http://cms.horus.be/files/99909/MediaArchive/pdf/Microsoft%20Word%20-%20Projet%20de%20d%C3%83%C2%A9claration%20commune%20de%20la%20CES%20et%20du%20FEHP%20EN%20FINAL.pdf>, (29.09.2008).

³³⁶ ETUC (2007): ETUC's observations on the Commission's consultation concerning a new initiative to prevent and combat discrimination outside employment.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/etucrep_en.pdf, (29.08.2008).

³³⁷ Fulton, Lionel (2003): *Migrant and ethnic minority workers: Challenging trade unions*. ETUC. <http://www.etuc.org/IMG/zip/migrant.zip>, (29.08.2008).

1.7.4. Reflexions on the role of the social partners

The European social partners have primarily involved themselves in non-discrimination activities related to grounds such as race and disability, which have been chosen as European Year issues. These activities included joint declarations supporting the goal of the European Years against Racism and Xenophobia (1997) and of People with Disabilities (2003) namely to raise public awareness and draw the Member States' attention to these specific issues. During the European Year of Equal Opportunities for All (2007) the social partners worked out a Framework Agreement on harassment and violence and UEAPME published a compendium of good practices.

There is agreement that combating discrimination is a necessity. Perceptions on where discrimination occurs however diverge. Especially service providers advanced their view that discrimination was non-existent in access to goods and services. In general, labour seems to be more in favour of providing for protection against discrimination by legislation and therefore welcome the Commission's proposal for a directive encompassing all the grounds not yet covered outside employment. Employers' organisations oppose an increase in regulation; they are of the opinion that soft law such as codes of conduct are more effective in preventing discrimination. Both are in favour of positive actions, although management wants to achieve tailor made solutions rather for individuals than for whole disadvantaged groups. This is why they also prefer diversity management to anti-discrimination. Their approach is more deficit oriented and aiming at ameliorating alleged deficits of employees. Labour originally saw people with disabilities and the issue of age better tackled by active labour market policies, but has developed an understanding of the concept of mainstreaming which aims at preventing discrimination but also keeping effects on various marginalised groups in mind when developing new policies and legislation.

Overall, anti-discrimination seems to be one policy issue among many others, which is not ranked as top priority on the social policy agenda of the social partners. Exchanging views and experiences with stakeholders like the Commission but also NGOs in a formal setting is not always seen as an opportunity but rather as an additional burden. The position papers and opinions drafted by the social partners have improved over the years, showing more understanding of the concepts used and the relevant mechanisms in preventing and combating

discrimination. A wider understanding of what implications discrimination has for (potential) victims and society as a whole still needs to grow.

Interaction between the social partners and EU institutions takes place via consultations, lobbying and probably in a more informal way. The employers are rather sceptical towards cooperation with NGOs, the trade unions have less reservations towards civil society organisations. They have worked together with the European Disability Forum to raise awareness among their members for the needs of workers with disabilities. NGOs often mention the social partners as important stakeholders in the promotion of anti-discrimination policies (see chapter on Evaluation and Mutual Learning).

The role of the social partners in the field outside employment is rather restricted to goods and services. It remains to be seen which other well-established public organisations could represent the interests of victims of discrimination in areas such as education, health care, social advantages and protection not relating to employment.

1.8. European Monitoring Centre on Racism and Xenophobia (EUMC)/ Fundamental Rights Agency (FRA)

The EUMC was established with the aim of providing the Community institutions and the Member States with data on racism, xenophobia and Anti-Semitism to make better informed policy decisions possible. It had the potential of becoming an important actor in the policy-field of anti-discrimination concerning the grounds of race, ethnic origin and religion. The setting up of an agency concentrating on certain grounds of discrimination reinforced the original focus of the anti-discrimination policy field on race and ethnic origin. Critical analysis of data collection seems to be more concerned with migrants and ethnic minorities than with other marginalised and victimised groups. It remains to be seen whether the broadening of the scope of the EUMC to include all other grounds of discrimination will heighten the attention on data evidencing discrimination on all grounds and will result in an exchange of experiences and therefore in mutual learning. The following sections deal with the establishment of the EUMC and how it has developed over time into a more visible player in the field of anti-discrimination.

1.8.1. Consultative Commission on Racism and Xenophobia

The European Council at Corfu decided to constitute a Consultative Commission on Racism and Xenophobia (Jean Kahn Commission) composed of eminent personalities, which should suggest measures “encouraging tolerance and understanding of foreigners”. The measures should be geared to “national and local circumstances”, aim at the “co-operation between governments and various social bodies” and should contribute to an “overall Union strategy aimed at combating racist and xenophobic acts of violence³³⁸”. Anton Pelinka, one of the members of the Commission, referred to the German Chancellor Helmut Kohl and the French President Francois Mitterrand as “fathers³³⁹” of the Commission. They reacted to arson attacks on asylum homes in Germany and riots in France. The future chair of the Commission, Jean Kahn, then director of the Central Consistory of the Jews of France and president of the European Jewish Congress, may have played a pivotal role in suggesting his ideas to the two statesmen³⁴⁰.

The Commission consisted of 16 members, which were nominated by the Member States and the four Candidate Countries (including Norway). It was co-ordinated by the General Secretariat of the European Council. All the members of the Commission were involved in and committed to anti-racism, Anti-Semitism was treated as a form of racism³⁴¹. The Commission proposed the establishment of a “European Observatory on Racism and Xenophobia”, which should be given a “broad mandate to supply objective, reliable and comparable information as well as research results at European level³⁴²” to provide the Community and the Member States with data on the extent, manifestations, causes and consequences of the phenomena. The Observatory should not provide information on individual cases but should use them as illustrators.

The body should fulfil four main tasks: (1) collection and analysis of existing data by way of a European Information Network on Racism and Xenophobia linking national information networks, specialist centres and universities in the Member States to the European and international level, (2) improving data comparability by developing indicators and criteria, (3)

³³⁸ European Council (1994): European Council at Corfu, Presidency Conclusions, 24-25 June 1994. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00150.EN4.htm, (27.08.2008).

³³⁹ Interview with Anton Pelinka, Vienna, 02.07.2007.

³⁴⁰ Interview with Anton Pelinka, Vienna, 02.07.2007.

³⁴¹ Interview with Anton Pelinka, Vienna, 02.07.2007.

³⁴² Consultative Commission on Racism and Xenophobia (1995): *Final Report on the activities of the Consultative Commission on Racism and Xenophobia*. http://aei.pitt.edu/1588/01/Kahn_report.pdf, (27.08.2008).

highlighting gaps in research and conduct surveys, preparatory and feasibility studies, (4) disseminate data and research results in order to promote the exchange of information between decision-makers, researchers and social bodies concerned with combating racism and xenophobia and to directly address policy-makers with recommendations and (5) closely cooperate with national, European and international organisations – especially the Council of Europe. The structure of the envisaged Observatory was rather slim. It should consist of an Executive Board headed by a Director, which should be assisted by a Scientific Committee comprised of the directors of research institutes in individual Member States dealing with racism and xenophobia.

The Jean Kahn Commission made recommendations³⁴³ going beyond the establishment of an Observatory, which are reflected in the early thematic focus of the EUMC, to some extent by the Race Equality Directive and other policy developments at EU level. Among them are the Commission's special attention paid to the role of the media and to educational requirements of Roma and Travellers. The Commission proposes amending the Treaty of Amsterdam with the aim of eliminating all forms of discrimination against person or groups of persons - no matter whether they are EU citizens or not – on the grounds of race, skin colour, birth, religion, language, or national, social or ethnic origin. They would like to see equal access to employment, equal pay and fair treatment by employers guaranteed, which would mean the prohibition of direct and indirect discrimination as well as victimisation. In order to achieve proper victim support the Commission suggest a shift in the burden of proof and widely available remedies including compensation. Furthermore, the Commission identified the role of the police and the judiciary as crucial in combating racism and xenophobia. They strongly recommended harmonising legislation as regards the prohibition of incitement to hatred, racist violence, Holocaust denial as well as the enhancement of penalties for racially motivated crimes. Some of these recommendations were later on integrated into the Proposal for a Council Framework Decision on combating racism and xenophobia³⁴⁴.

Anton Pelinka described the work of the Commission as centred on discussing individual manifestations of racism and on moral outrage. The representative of the UK government was

³⁴³ Consultative Commission on Racism and Xenophobia (1995): *Final Report on the activities of the Consultative Commission on Racism and Xenophobia*. http://aei.pitt.edu/1588/01/Kahn_report.pdf, (27.08.2008).

³⁴⁴ European Commission (2001): Proposal for a Council Framework Decision on combating racism and xenophobia, COM(2001) 664 final. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0664:FIN:EN:PDF>, (25.08.2008).

an antagonist of Jean Kahn. She was in favour of affirmative action³⁴⁵ and strongly opposed the establishment of an agency, which would not result in “any immediate or possible even long-term benefit³⁴⁶” for members of minority communities. Two more lines of conflict emerged. The European Commission was neither in favour of the Commission nor of the establishment of an agency conceptualised by or even partly consisting of the Jean Kahn Commission. The European Commission feared that such an institution would be strongly influenced and shaped by the Member States. The Council of Europe rejected the suggested agency as it would interfere with and duplicate their work³⁴⁷.

1.8.2. Establishment of the EUMC

The European Council at Cannes asked the Jean Kahn Commission to “extend its work in order to study, in close cooperation with the Council of Europe, the feasibility of a European Monitoring Centre on Racism and Xenophobia³⁴⁸”. One year later, the Council approved “the principle underlying the establishment of a European Monitoring Centre” and to “mandate the Consultative Commission on Racism and Xenophobia to continue its work until the Monitoring Centre is set up³⁴⁹”. It took another year until the Regulation³⁵⁰ establishing the EUMC was passed. The Regulation pretty much corresponded to the original suggestions by the Consultative Commission. In order to achieve a better understanding of how to effectively fight the phenomena of racism, Xenophobia and Anti-Semitism an additional element was inserted: The EUMC should examine examples of “good practice”. The Regulation considered the fears of the Council of Europe that its’ work might be duplicated by ensuring close cooperation of the EUMC. The cooperation and exchange of information and data was further guaranteed and specified in an Agreement³⁵¹ between the European Community and the Council of Europe, which was decided on by the European Council³⁵² in December 1998.

³⁴⁵ Interview with Anton Pelinka, Vienna, 02.07.2007

³⁴⁶ Statement by Baroness Flather, representative from the United Kingdom, in: Consultative Commission on Racism and Xenophobia (1995): *Final Report on the activities of the Consultative Commission on Racism and Xenophobia*. http://aei.pitt.edu/1588/01/Kahn_report.pdf, (27.08.2008).

³⁴⁷ Interview with Anton Pelinka, Vienna, 02.07.2007

³⁴⁸ European Council (1995): Cannes European Council, Presidency Conclusions, 26 and 27 June 1995. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00211-C.EN5.htm, (27.08.2008).

³⁴⁹ European Council (1996): Florence European Council, Presidency Conclusions, 21 and 22 June 1996. http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/032a0002.htm, (27.08.2008).

³⁵⁰ European Council (1997): Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997R1035:EN:HTML>, (27.08.2008).

³⁵¹ Agreement between the European Community and the Council of Europe for the purpose of establishing, in accordance with Article 7(3) of Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European

Jean Kahn was especially appreciative of the “special commitment of the European Parliament³⁵³” and many diverse initiatives that coincided and had therefore reinforced the work of the Consultative Commission. The Commission had triggered other initiatives like the European Year against Racism and the drafting of the Charter of the European Political Parties for a non-racist Society. Jean Kahn hoped for the EUMC, which was finally established in Vienna during the European Year against Racism of 1997, to become a “think tank³⁵⁴” for Europe. The official opening took place on April 2000; it was overshadowed by the conflict between the Austrian Government and the other 14 Member States, who had decided on imposing bilateral measures against Austria following the formation of the coalition government including the Freedom Party at the end of January 2000.

As already mentioned before, the European Commission was not very much in favour of the establishment of an agency, following the guidelines set out by the Consultative Commission. Jean Kahn was a persistent networker and was very successful in lobbying. He supported one candidate to become the first director of the EUMC who the Commission strongly opposed. The first three years after the establishment of the agency were rather difficult in terms of output and establishing relations with EU institutions and the Member States. It took until 2000 to establish the Racism and Xenophobia Information Network (RAXEN), which consists of Focal Points in all Member States. The Focal Points are set up by calls for tender and are made up of a broad range of different organisations – among the most important are research institutions, governmental bodies, NGOs and social partner organisations. They collect data from official and unofficial sources on anti-discrimination legislation, racial violence, employment, education, housing and since 2007 on health and social services. They process this data according to detailed guidelines provided by the EUMC, which feeds the

Monitoring Centre on Racism and Xenophobia, close cooperation between the Centre and the Council of Europe. [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21999A0218\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21999A0218(01):EN:HTML), (27.08.2008).

³⁵² European Council (1999): Council Decision of 21 December 1998 relating to the conclusion of an Agreement between the European Community and the Council of Europe for the purpose of establishing, in accordance with Article 7(3) of Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, close cooperation between the Centre and the Council of Europe, 1999/132/EC. http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31999D0132&model=guichett, (27.08.2008).

³⁵³ EUMC (1999): *Giving Europe a Soul. Setting up the European Monitoring Centre on Racism and Xenophobia, Annual Report on the Activities 1998, Part I*. http://fra.europa.eu/fra/material/pub/ar98/AR_1998_part1-en.pdf, (27.08.2008).

³⁵⁴ EUMC (1999): *Giving Europe a Soul. Setting up the European Monitoring Centre on Racism and Xenophobia, Annual Report on the Activities 1998, Part I*. http://fra.europa.eu/fra/material/pub/ar98/AR_1998_part1-en.pdf, (27.08.2008).

information into the annual report and comparative studies. The Management Board, which was responsible for determining the annual program of activities and for adopting the annual report and its conclusions and opinions, was composed of independent persons appointed by each Member State, one independent person appointed by the European Parliament and the Council of Europe respectively and a representative of the Commission.. Although independent the board members chosen by the Member States tried to influence the substance of the annual reports. In 2003, the Regulation establishing the EUMC was amended and obliged the agency to highlight examples of good practice³⁵⁵ in its annual report. On the one hand side a useful tool to exchange information on successful initiatives, on the other hand an opportunity for the Member States to also present projects tackling racism and xenophobia to a wider audience often financed by the European Union, undertaken by civil society organisations and of small scale.

1.8.3. Major issues of concern³⁵⁶

At the outset, the most important partners for the EUMC in promoting anti-racism as an important element in EU policies were the European Parliament and DG Employment and Social Affairs. In 2001, a Memorandum of Understanding between the European Commission and the agency was signed. It sets a framework for direct contacts and identifies areas of concrete cooperation such as comprehensive exchange of information, support in respective

³⁵⁵ Council Regulation (EC) No 1652/2003 of 18 June 2003 amending Regulation (EC) No 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia. http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003R1652&model=guichett, (27.08.2008).

³⁵⁶ This section is based on the Annual Reports published by the EUMC/FRA since 1999: EUMC (1999): *Giving Europe a Soul. Setting up the European Monitoring Centre on Racism and Xenophobia, Annual Report on the Activities 1998, Part I*. http://fra.europa.eu/fra/material/pub/ar98/AR_1998_part1-en.pdf, (27.08.2008); EUMC (2000): *Annual Report 1999*. http://fra.europa.eu/fra/material/pub/ar99/AR_1999-EN.pdf, (27.08.2008); EUMC (2001): *Diversity and equality for Europe, Annual Report 2000*. http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=45b09ec1c30c8, (27.08.2008); EUMC (2002): *Diversity and equality for Europe, Annual Report 2001*. http://fra.europa.eu/fra/material/pub/ar01/AR_2001-EN.pdf, (27.08.2008); EUMC (2003): *Activities of the European Monitoring Centre on Racism and Xenophobia, Annual Report 2002*. <http://fra.europa.eu/fra/material/pub/ar02/AR2002-EN.PDF>, (27.08.2008); EUMC (2004a): *Activities of the European Monitoring Centre on Racism and Xenophobia, Annual report 2003, Part I*. <http://fra.europa.eu/fra/material/pub/ar03/AR03-EN.pdf>, (27.08.2008); EUMC (2005): *Activities of the European Monitoring Centre on Racism and Xenophobia, EUMC Annual Report 2004/2005 – Part I*. http://fra.europa.eu/fra/material/pub/ar05/AR05_p1_EN.pdf, (27.08.2008); EUMC (2006a): *European Monitoring Centre on Racism and Xenophobia, Activities of the EUMC in 2005*. <http://fra.europa.eu/fra/material/pub/ar06/EUMC-AR-06-p1-EN.pdf>, (27.08.2008); FRA (2007): *Activities of the European Monitoring Centre on Racism and Xenophobia in 2006*. http://fra.europa.eu/fra/material/pub/ar07/EUMC-AR-07-p1_en.pdf, (27.08.2008) and FRA (2008): *European Union Agency for Fundamental Rights, Activities in 2007*. http://fra.europa.eu/fra/material/pub/ar08/ar-activity_en.pdf, (27.08.2008).

areas of expertise and continuing participation in common activities. Representatives of the European Commission had quite dissenting opinions on the role of the EUMC/FRA in the anti-discrimination policy field. One interviewee said that the work of the Commission and the agency would be complementary, as the Commission could not launch studies on certain issues and in the same way as the agency.³⁵⁷ Another employee of the Commission rated it important that the Commission was represented on the Management Board and could therefore influence the work program. Nevertheless, s/he criticised that the work of the two institutions was overlapping and lacked strategic coordination.³⁵⁸

It was difficult for the EUMC to balance its primary objective of providing the EU and the Member States with objective, reliable and comparable data with the efforts it devoted to developing expertise in areas like the implementation of the Race equality Directive, racial violence, the connection between integration and anti-discrimination policies and the inclusion of Roma. The evaluation of the EUMC published in 2002³⁵⁹ recommended a clearer focus on the provision of data by developing a long-term strategy to define what data sets are required, which would make a gap analysis necessary. Following this recommendation to EUMC put a lot of efforts into in-house capacity building on data comparability and later on participated in a Working Group on Data Collection to Measure the Extent and Impact of Discrimination set up by the Commission as well as the Reference Group on the European Handbook on Equality Data. The EUMC contributed to the EU Commission's first report on the implementation of the Race Equality Directive, which echoed its concerns for the scarcity of data and emphasised positive action as an instrument to compensate disadvantages. The agency started cooperating with EUROSTAT and liaising with the Member States in order to raise awareness for the data gaps. RAXEN is pivotal in this awareness raising process as it annually addresses public authorities to provide data on racial violence and crime, on incidents of discrimination and on justice data highlighting crimes with a racist motivation. The EUMC also urged the Commission to examine the possibility of using legislation to harmonise monitoring and data collection.³⁶⁰

³⁵⁷ Interview with representative of DG Employment, Social Affairs & Equal Opportunities, Brussels 24.10.2007.

³⁵⁸ Interview with official of the European Commission, Brussels 24.10.2007

³⁵⁹ European Commission (2002): *Final Report – Evaluation of the European Monitoring Centre on Racism and Xenophobia*, Centre for Strategy & Evaluation Services.
http://ec.europa.eu/employment_social/fundamental_rights/pdf/arc/eval/eumceval2002_en.pdf, (28.08.2008).

³⁶⁰ EUMC (2004b): Position Paper of the European Monitoring Centre on Racism and Xenophobia on the Green Paper – Equality and non-discrimination in an enlarged European Union of the European Commission.
http://ec.europa.eu/employment_social/fundamental_rights/pdf/greencon/eumc.pdf, (30.08.2008).

The EUMC participated in meetings by the Commission to support the implementation of the Art 13 Directives and later on in a legal working group on the transposition of the directives. Its annual reports were presented to the European Parliament and it contributed to the Parliamentary Report on the Situation of Fundamental Rights in the EU. Since 2005, the cooperation between the EUMC and the European Parliament was expanded both in structural but also in thematic terms. The EUMC participated in the Inter-service Group on Racism and Xenophobia and the Inter-service Group on Roma. The European Parliament tries to make use of the expertise of the EUMC and at the same time to reinforce certain thematic aspects it would like the agency to put more focus on. In its Resolution on the situation of Roma³⁶¹, which reflected preliminary results of a later published EUMC report on Roma and Travellers in Public Education³⁶², it urged the agency to devote more attention to Anti-Gypsyism and Romanophobia. In its resolution on the application of the Racial Equality Directive³⁶³ it called on the Member States to collect and provide the agency with relevant and reliable and comparable information and data. The Parliament³⁶⁴ also reinforced the continuous EUMC's efforts to push for agreement on the proposed Framework Decision on Combating Racism and Xenophobia.

Together with the Committee of the Regions the EUMC initiated the Local Communities Network project to address the contribution of local and regional authorities in delivering non-discrimination. The project focused on communities with a large proportion of Muslim communities to exchange good practices on Muslim integration at local level. Integration of migrants and ethnic minorities in the labour market was an issue discussed with the European Economic and Social Committee.

Cooperation between civil society organisations and the EUMC were restricted to RAXEN. The RAXEN Focal Points in the Member States depend on information provided by civil

³⁶¹ European Parliament (2005): Roma in the European Union. European Parliament resolution on the situation of the Roma in the European Union. Brussels. 28.04.2005, P6_TA(2005)0151. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0151+0+DOC+XML+V0//EN>, (28.08.2008).

³⁶² EUMC (2006b): *Roma and Travellers in Public Education: An overview of the situation in the EU Member States*. http://ec.europa.eu/employment_social/fundamental_rights/roma/romtrav_en.pdf, (28.08.2008).

³⁶³ European Parliament (2007): European Parliament resolution on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 27.09.2007, P6-TA-PROV(2007)0422. http://www.europarl.europa.eu/oeil/DownloadSP.do?id=13845&num_rep=6857&language=en, (28.08.2008).

³⁶⁴ European Parliament (2007): European Parliament recommendation to the Council of 21 June 2007 concerning the progress of the negotiations on the framework decision on action to combat racism and xenophobia (2007/2067(INI)), P6_TA(2007)0285. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0285+0+DOC+XML+V0//EN>, (28.08.2008).

society organisations. It has been quite a challenge to motivate NGOs to provide this kind of information due to lack in resources and doubts about the benefits deriving from supplying this data to the EUMC. The agency drew attention to the activities by small NGOs at the local level and asked the Commission for a more creative and flexible approach to support their engagement in EU work and cases to EU funding.³⁶⁵ In 2006, the agency started to expand its activities with civil society, although it had always called for stakeholder involvement and dialog between GOs and NGOs in its reports, by launching consultations on how to best integrate their concerns.

The EUMC has tried to mainstream the fight against racism by sharing its expertise with DG Employment and Social Affairs, DG Justice and Home Affairs, DG Education and Culture, DG Research and DG Enlargement. Effectiveness of anti-discrimination policies will be measured in the definition and execution of policies in general which contribute to tackling racism, delivering the benefits of social inclusion and strengthening community cohesion. A periodic non-discrimination and equality plan indicating the relevant Community policies, instruments and actions and employing a set of indicators which demonstrate complementarity in design, planning and implementation would make mainstreaming more visible and anti-discrimination policies more coherent. Besides, more emphasis should be put on sustainability of EU funded projects and stakeholders should get more feedback on how the results are mainstreamed into EU policies and activities across EU institutions.³⁶⁶

In 2005, the responsibility for the EUMC shifted from DG Employment, Social Affairs and Equal Opportunities to DG Justice, Freedom and Security. This was due to the fact that the mandate of DG Justice was extended to fundamental rights and that a proposal for changing the EUMC into a European Union Agency for Fundamental Rights had already been tabled. Besides, the EUMC had developed a strong focus on racist violence and crime, an issue falling within the competence of DG Justice. The right to non-discrimination has been gradually turned into an item on the fundamental rights agenda. The position of the anti-discrimination directives in relation to other fundamental rights issues was discussed. The debate on balancing freedom of opinion and freedom of religion with the respect for diversity

³⁶⁵ EUMC (2004b): Position Paper of the European Monitoring Centre on Racism and Xenophobia on the Green Paper – Equality and non-discrimination in an enlarged European Union of the European Commission. http://ec.europa.eu/employment_social/fundamental_rights/pdf/greencon/eumc.pdf, (30.08.2008).

³⁶⁶ EUMC (2004b): Position Paper of the European Monitoring Centre on Racism and Xenophobia on the Green Paper – Equality and non-discrimination in an enlarged European Union of the European Commission. http://ec.europa.eu/employment_social/fundamental_rights/pdf/greencon/eumc.pdf, (30.08.2008).

was fed by the killing of the Dutch film maker Theo van Gogh and the controversy on the Mohamed cartoons published in the Danish daily Jyllands-Posten. However, the transfer of responsibility to DG Justice also symbolised a connection between the fight against racism and terrorism.

1.8.4. Establishment of the FRA

In 2003, when the Charter of Fundamental Rights was presented to the European Council of Thessaloniki, the Council agreed on extending the mandate of the EUMC “to make it Human Rights Agency³⁶⁷”. It had taken quite a while to convince all Member States of the benefits of such an agency, especially Austria who had never been especially happy about the name of the EUMC welcomed the decision to extending the scope of the agency which would also entail renaming it. In 2002, the evaluators of the EUMC did not see any need to change its scope to encompassing a human rights agency or an agency covering all grounds of discrimination. There would be a continuing need of specialists on the field of racism and xenophobia and some of the key partners might be alienated by an even broader policy scope. They suggested the sharing of administrative systems. The European Commission launched a public consultation³⁶⁸ on the establishment of a Fundamental Rights Agency in 2004. Member States, EU institutions, National Human Rights Institutions and NGOs agreed that combating racism and xenophobia should be maintained as a focus of activity.³⁶⁹ The Chair of the Management Board of the EUMC saw an urgent need for the EU to “tackle racism and discrimination” and to commit itself to “develop and maintain proper procedures³⁷⁰” such as RAXEN to achieve this aim. The Director of the EUMC stressed that the agency was “highly

³⁶⁷ European Council (2003): Conclusions of the Representatives of the Member States, Meeting at Head of State or Government Level in Brussels on 13 December 2003.

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/78364.pdf, (28.08.2008).

³⁶⁸ European Commission (2004): Communication from the Commission, The Fundamental Rights Agency, Public consultation document, COM(2004) 693 final.

http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/communication_com2004_693_en.pdf, (28.08.2008).

³⁶⁹ European Policy Evaluation Consortium (2005): *Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency, Analysis of Responses to Public Consultation.*

http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/analysis_written_contributions_en.pdf, (28.08.2008).

³⁷⁰ European Policy Evaluation Consortium (2005): *Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency, Public Hearing Report.*

http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/report_public_hearing_en.pdf, (28.08.2008).

committed to share its knowledge and expertise it had acquired so that they could be used in the setting up of the Agency³⁷¹”.

The Impact Assessment conducted by the European Commission touched upon many challenges already identified in relation to the mandate and tasks of the EUMC. The availability, comparability and quality of fundamental rights data was assessed as rather low, which made close cooperation with national statistical institutes and other governmental departments necessary. Currently the potential for sharing of experiences and good practises as well as mutual learning is not met.³⁷² The Regulation establishing the FRA³⁷³, issued in 2005, tasked the agency with collecting, recording, analysing and disseminating relevant, objective, reliable and comparable information and data, including results from research and monitoring. This should be done for the purpose of assisting and providing expertise relating to fundamental rights to EU institutions and Member States when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights. The fight against racism, xenophobia and related intolerance was included as a permanent area of activity. Closer cooperation with NGOs is also foreseen in the Regulation and it especially highlights civil society organisations involved in combating racism and xenophobia. The FRA is to establish a cooperation network - Fundamental Rights Platform – composed of NGOs, social partner organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and other qualified experts of European and international bodies and organisations. The Regulation remains silent on how these organisations should be selected, whom they should represent and what capacities and capabilities they should possess.

The FRA was established in 2007, the new Director only began his work in June 2008. Therefore, it cannot be assessed at this point in time, what impact the broadening of the mandate of the agency will have on the visibility of the issue of discrimination on the grounds of race, ethnic origin and religion and on the promotion of the core issues of the EUMC –

³⁷¹ European Policy Evaluation Consortium (2005): *Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency, Public Hearing Report*. http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/report_public_hearing_en.pdf, (28.08.2008).

³⁷² European Commission (2005): Annex to the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, and to the Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, Impact Assessment Report. http://ec.europa.eu/justice_home/doc_centre/rights/doc/sec_2005_849_en.pdf, (28.08.2008).

³⁷³ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights. http://fra.europa.eu/fra/material/pub/FRA/reg_168-2007_en.pdf, (25.08.2008).

namely the improvement of data collection, the inclusion of Roma and the fight against racist violence and crime.

1.8.5. Reflexions on the role of the EUMC/FRA

The EUMC has for a long time been the only European Union player concentrating on the issue of discrimination and on specific grounds – race, ethnic origin and religion. It was also endowed with a clear mandate of providing EU institutions and the Member States with objective, reliable and comparable data on racism, xenophobia and Anti-Semitism. The first reports drafted and published made clear that not only definitions and concepts used in the Member States were quite diverse but also that data collection as regards the socio-economic situation of migrants and ethnic minorities as well as incidents of racist discrimination, violence and crime was too fragmentary and incomplete to make meaningful comparisons on the extent of discrimination and on the effectiveness of anti-discrimination policies.

Therefore, the agency had to first of all deal with the problem of not being able to deliver comparable data on these social phenomena. This challenge could not alone be overcome by changing the agency's own methods of data collection but only by trying to convince both the Member States and EU institutions to change their attitudes towards and systems of data collection. The EUMC was established in 1997; so far the agency together with the RAXEN focal points has been able to raise awareness for the necessity of collecting certain data among public authorities in the Member States and at EU level. It has been able to mobilise the Commission and other relevant actors at EU level like EUROSTAT to trigger a discussion process, but only minor measures have been taken until now to improve data collection. The EUMC itself has begun to take steps to improve the availability of data on racist violence and crime by launching a victim survey in all EU Member States.

The EUMC realised over time that the problem of data availability could only be tackled by involving relevant stakeholders at the EU and national levels. Beyond that the agency had to liaise with the European Parliament, many different DGs and EU committees in order to make the challenges of racism, xenophobia and Anti-Semitism faced in many different policy areas more visible and to promote the development of anti-discriminatory policies in all these fields. Besides, right from the beginning the EUMC was confronted with the phenomenon of Islamophobia, a form of discrimination, which has been around for quite a while, but a concept neither present in the Member States nor explicitly mentioned in the regulation

establishing the agency. Another group severely affected by discrimination – the Roma – was added to the EUMC agenda in the wake of enlargement. The agency had to balance a group approach especially looking at disadvantages and discriminations faced by Muslims, Roma and Jews with a more general approach trying to establish which forms of discrimination occurred in which areas, who were the people most often affected and why. It was difficult for the agency to set priorities and strategically choose which stakeholders and challenges should be focused.

Especially with regard to Muslims and Jews the EUMC tried to involve organisations representing their interests. Beyond that, it was more difficult for the agency to reach out to relevant NGOs except for those present in RAXEN. If the newly founded successor organisation, the FRA, wants to function as a “platform of networks³⁷⁴”, it will have to be more active in making use of NGOs as the eyes and ears of human rights developments and as messengers making the agency more visible to the people living in the European Union.

Overall, the EUMC has become more visible at the EU and Member State level as within a well informed community of anti-discrimination experts over the years. As the FRA now has a much broader mandate regarding the issues it has to deal with, strategic coordination will be necessary to become a stronger actor in the field of anti-discrimination as the agency can now gain experience on all the grounds of discrimination and can deal more easily with the issue of multiple discrimination. The FRA can try to apply their experiences gained on racist discrimination to all the other grounds and specify which aspects are comparable and which are not. Furthermore, it can put discrimination better into the overall context of fundamental rights and deal with conflicting rights such as freedom of opinion, freedom of religion or freedom of contract.

2. Interaction between actors in the ‘playing field’ of Governance

The European Commission was identified as the pivotal point for European anti-discrimination policies, where information is collected and redistributed and where strategic planning is initiated and bundled. The European Commission on the one hand is contacted by NGOs very actively lobbying for their interests and on the other hand it aims at collecting expertise from different actors, trying to involve all relevant stakeholders like national

³⁷⁴ Vision of Morten Kjaerum for the FRA, Vienna, 07.07.2008.

Member States, the European Parliament, civil society interest groups, social partners, independent bodies, courts etc.

Interaction between European institutions is formalized by legislative procedures and sharing of competences between the European Commission, the Council of Ministers and the European Parliament. There are different legislative and policy-making procedures with regard to concrete anti-discrimination issues. In some areas European Union legislative as well as policy competences are available, decision making on issues connected for instance to poverty reduction or on social issues however is restricted to the procedures of the Open Method of Coordination (OMC). The latter leaves the European Court of Justice as well as the European Parliament with very limited competences. The role of the European Commission is limited to a monitoring one.³⁷⁵

When we were drafting this report, the European Commission was urging stakeholders to provide it with arguments on why a new horizontal directive harmonizing the level of protection of the various grounds was needed. The Commission in this case was facing the problem that NGOs and the European Parliament were providing many arguments in favour of this harmonization. National Governments on the other hand were quite ready to deliver arguments showing that there was no need to extend the scope of the European legislation. European Social partners turned out to be less interested to involve themselves at all.

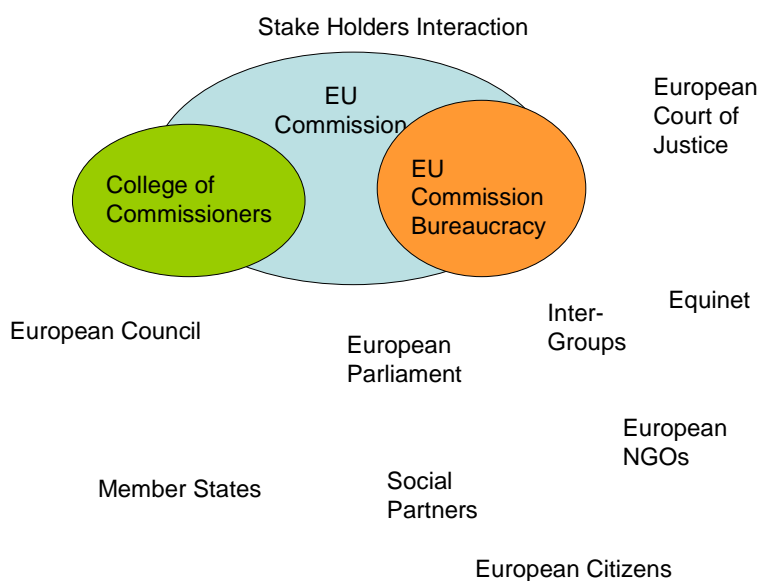
2.1. Relationships between actors

The relationships between actors in the “playing field” of governance are determined by formal and informal interaction procedures, by interests and by different grades of affiliation towards the topic anti-discrimination. Given the information on the actors and their roles laid down in the first chapter, a snap-shot on their relationship could look as follows:

³⁷⁵ Under the Open Method of Coordination, the Council of Ministers pre-define policy goals and leave it to the Member States to choose the way – e.g. via national action plans – on how to achieve them best. Benchmarks and indicators are developed in order to measure progress and development and to identify best practices. The OMC rather relies upon peer pressure than on sanctions.

Stakeholders Interaction

Table 4: Stakeholder Interaction



What is really interesting is the fact that the European Commission not only builds the driving force and the main decision making body in terms of factual outcomes, but that the hardest part of unification processes might lie within the European Commission itself.

Whilst the European Commission bureaucracy has developed a high grade of affiliation towards the topic of anti-discrimination and has been bringing forward the relevance of European NGOs in terms of expertise and consultation procedures, the College of the Commissioners has been building a barrier in certain cases in terms of the promotion of a more effective anti-discrimination regime.

The picture aims to show the experienced ally building between stakeholders leaving European NGOs, the European Parliament and the European Commission bureaucracy on one side – close to the European Citizens – and the College of the Commissioners with the European Council and the Member States on the other. This does not mean that the latter side has not been given a certain commitment to the importance of anti-discrimination issues on the European Union policy agenda. It does show the where the hurdles on the way to more effective legislation and policy means are located, and that one of the most important lines that have to be crossed is located directly within the European Commission, which does explain the need for tactical thinking and acting.

2.1.1. Interaction

Interaction between European institutions is formalized by legislative procedures and sharing of competences between the European Commission, the European Council and the European Parliament. There are different procedures in legislation and policy making in concrete anti-discrimination issues, where European Union competence is available and in issues very much connected to poverty reduction and social issues, where decision making is limited to the procedures of the Open Method of Coordination. The latter leaves very limited competences to the European Commission as well as the European Parliament.

For our analysis we will concentrate on anti-discrimination and equality legislation as well as policies in the framework of Art 13. In chapter 3.4. Recent Developments we will take a look at how procedures and strategies might be changing by the tendency to extend the policy field towards positive measures and social inclusion.

2.2. Formal interaction procedures

Interplay of different actors in anti-discrimination policies is characterized by formalized decision making procedures, which are supplemented by consultation of interested parties, which are less formalized but nonetheless are based on general principles and standards. The need of ensuring democratic legitimacy leaves formal decision making to the Council and the Parliament as co-legislators.

2.2.1. Institutionalised Advisory Bodies

There are three institutionalised advisory bodies established especially to assist the Commission, the Parliament and the Council in issues with relevance to the topic of anti-discrimination. The Committee of the Community action programme to encourage co-operation between Member States to combat social exclusion, the Committee of the Community Action Programme to combat discrimination and the Disability Advisory Committee (established within the framework of the European Year of People with Disabilities). Their task is to advise and consult the EU institutions in the run of the programmes resp. in their policy towards persons with disabilities; this in developing strategies as well as in the course of implementation of those.

Furthermore the Commission runs three expert groups on anti-discrimination or so-called social integration issues: one informal group on data collection in discrimination matters in order to facilitate the exchange of information, experiences and good practices in the area of the measurement of discrimination;³⁷⁶ on formal High Level Group on Disability and a High Level Group on Minorities.³⁷⁷

Expert groups are set up by the Commission to provide it with expert advice. Their main task is to advise the Commission and its services in the preparation of legislative proposals and policy initiatives (Commission's right of initiative) as well as in its tasks of monitoring and coordination or cooperation with the Member States. These groups can be either permanent or temporary. Participating experts are unpaid but their expenses are reimbursed by the Commission. The selection depends on the type and scope of expertise sought but the members are invited based on their specialist knowledge and skills in the fields concerned. Members are nominated either as representatives of a public authority (national, regional or local), as representatives of civil society or as interested parties. They are appointed by the Commission or its departments or the Commission may leave it to the authorities or organisations concerned to nominate the experts, particularly where the composition of the group is likely to vary; or nominated in a personal capacity. They are then appointed by the Commission or its departments and act completely independently.³⁷⁸

On its homepage the Commission runs a Register of Expert Groups, which contains a list of all expert groups (advisory bodies) to the Commission, which assist it and its departments in preparing legislative proposals and policy initiatives. The Register has been introduced in order to meet the requirements of the European Transparency Initiative.³⁷⁹ The register gives information on the lead department in the Commission, on the group's tasks and the category of participants.

³⁷⁶ See: Register of Expert Groups on the Commission homepage, <http://ec.europa.eu/transparency/regexpert/detail.cfm?ref=1200&l=all>, (28.03.2008).

³⁷⁷ Based upon European Commission (2006): Decision of 20 January 2006 establishing a high-level advisory group on social integration of ethnic minorities and their full participation in the labour market, 2006/33/EC, OJ L 21/20, (25.01.2006). http://ec.europa.eu/employment_social/fundamental_rights/pdf/hlg/jo21_en.pdf, (02.09.2008).

³⁷⁸ See: Register of Expert Groups on the Commission homepage, Expert Groups explained, <http://ec.europa.eu/transparency/regexpert/faq/faq.cfm?aide=2>, (28.03.2008).

³⁷⁹ Commission of the European Communities, Governance Statement of the European Commission, 30.05.2007, available at: http://ec.europa.eu/atwork/synthesis/doc/governance_statement_20070530_en.pdf, (28.03.2008).

The High Level Group of Experts on the social and labour market inclusion of ethnic minorities for example is responsible for examining “which obstacles prevent the integration of members of ethnic minorities into the labour market and into society and to identify best practice to overcome these difficulties”.³⁸⁰ The expert Group met several times in 2007, conducted interviews with a variety of stakeholders and drafted a report in the end of 2007. Aim of the report was to define minorities in Europe, to bring together information on their status of disadvantages and structural discrimination, to analyse policy responses that took place as well as their impact and to draft recommendations for new policy approaches.

What has been identified and made public during the process of working in 2007 was that a focus should be laid on the inclusion of Roma and an analysis of different approaches in different countries, capacity building for and active involvement of NGOs representing ethnic minorities and good practise developed by public policy, by enterprises and by civil society.³⁸¹

The report was based on a Study on the Social and Labour Market Integration of Ethnic Minorities by the IZA (Institut für die Zukunft der Arbeit) providing data on the level of integration as well as an analysis of mechanisms to overcome barriers hindering integration³⁸² and on interviews and hearings with a variety of stake holders, like the Committees on Civil Liberties and on Employment of the European Parliament, representatives of independent bodies and with social partners.

Preliminary outcomes reported in three progress reports by the High Level Expert Group inter alia where that improvements in data collection were necessary and would be helpful in developing better targeted policy initiatives, that the integration of Roma citizens is a process, which must take into account the diversity of Roma people and that social partners would be important partners in building an inclusive and open society. Diversity Management and the implementation of positive action measures were highlighted as useful tools on this way.³⁸³

³⁸⁰ High Level Advisory Group on the Social Integration of Ethnic Minorities and their full Participation in the Labour Market, Information Note by the Secretary, Brussels, February 8, 2007.

³⁸¹ High Level Advisory Group on the Social Integration of Ethnic Minorities and their full Participation in the Labour Market, Progress Report on the Work of High Level Group Spring 2007, March 6, 2007, http://ec.europa.eu/employment_social/fundamental_rights/pdf/hlg/progrep1_en.pdf, (02.09.2008).

³⁸² Institut für die Zukunft der Arbeit (2007): *Study on the Social and Labour Market Integration of Ethnic Minorities*. http://www.iza.org/downloads/IZA_Report_Minorities_10-2007_final_sw.pdf, (02.09.2008).

³⁸³ Progress Reports of the High Level Advisory Group on the Social Integration of Ethnic Minorities and their full Participation in the Labour Market, http://ec.europa.eu/employment_social/fundamental_rights/policy/hlg_en.htm#up, (02.09.2008).

The final report as well as the study findings were presented at a final conference of the High Level Expert group on 3-4 December 2007 in Brussels. It entails a substantial analysis of the current challenges for integration of ethnic minorities in Europe and a variety of recommendations addressed at European institutions, Member States and the business.³⁸⁴

Core findings are that non-discrimination activities are an important tool for more equality in societies that it needs much more however to reach more equality in opportunities.

Participation of ethnic minorities in the development, the design and the implementation of any kind of policy - not limited to the topics of integration, anti-discrimination and "intercultural dialogue" - would be one of the most important steps to take in the near future. The acknowledgement of the benefits of diversity, the necessity for case-to-case/ country-to-country tailored solutions and concepts as a result of the given diversity is stressed as well. Another key result is that high level commitment of political and business leaders to place the inclusion of members of ethnic minorities in society a priority of the political agenda is needed. Furthermore a multilevel approach involving all relevant stakeholders is considered as the right one for a successful process towards integration.

These findings do mirror the process the European Union Anti-Discrimination policy field has undergone over the last years. The High Level Expert Groups recommendations take into account the whole society developments in the field of migration and integration as well as the developments in approach and strategies of anti-discrimination policies. They reflect the development towards a closer connection of the policy fields in the future, towards a multi-targeted (more groups in society have to be taken into account), multi-levelled, multi-actor (stakeholders from each sector and branch in society have to be involved) and multi-strategic (a variety of strategies has to be implemented for an integration process of societies) approach.

2.2.2. Interaction between European Union Institutions and Civil Society

In general, it can be said that a central reason why interest groups and the Commission interact so much is that they are in a classic situation of resource interdependency. On the one

³⁸⁴ High Level Advisory Group of Experts on the Social Integration of Ethnic Minorities and their Full Participation in the Labour Market (2007): *Ethnic Minorities in the Labour Market. An urgent Call for Better Social Inclusion*. Presented at the Final Conference of the High Level Expert Group. Brussels, 3-4 December 2007. http://www.iza.org/downloads/Ethnic_Minorities_in_the_Labour_Market.pdf, (16.05.2008).

hand, interest groups wish for access to the Commission because it takes measures that directly affect them. On the other hand, the Commission wishes for relationships with interest groups because – as delineated above – they often are sources of information and support which the Commission needs or can use.³⁸⁵ As pointed out by *Neill Nugent*, the more influential interest groups are those that have some of the following qualities: “control of information and expertise that the Commission needs or would like; the ability, when necessary, to provide that information and expertise quickly and concisely; resources sufficient to permit well organised lobbying; economic and political weight, convincing representational claims; internal cohesion and associated clear and consistent views; and access to relevant Commission representatives”³⁸⁶

Relations between European Institutions and Civil Society started informally by lobbying for the interests of groups being discriminated against (see Chapter 2. The Development of the EC/EU Anti-Discrimination Agenda, especially 2.1. The Starting Line Group).

By cooperating with NGOs the European institutions have always aimed at receiving input, expertise and legitimisation by civil society. The need to involve civil society actors and their importance as facilitators for a broad policy dialogue was stressed in the “White paper on Governance.” In its “Communication towards a reinforced culture of consultation and dialogue”³⁸⁷ the Commission links the specific role of civil society organisations in Europe with the fundamental rights for citizens to form associations in order to pursue a common purpose, as highlighted in Article 12 of the European Charter of Fundamental Rights.³⁸⁸ According to the Commission belonging to an association is another way for citizens to actively participate, in addition to involvement in political parties or through elections. In the White paper on European Governance the Commission acknowledges that “Civil Society plays an important role in giving voice to the concerns of the citizens and delivering services that meet people’s needs. . . .Civil Society increasingly sees Europe as offering a good platform to change policy orientations and society. . . .It is a real chance to get citizens more

³⁸⁵ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., p. 241.

³⁸⁶ Nugent, Neill (1999): *The government and politics of the European Union*, Duke University Press: Durham, N.C., pp. 313-315.

³⁸⁷ European Commission (2002): Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final. Brussels, 11.12.2002. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:EN:PDF>, (02.09.2008), for a summary see <http://europa.eu/scadplus/leg/en/cha/c10717.htm>, (02.09.2008).

³⁸⁸ „Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters . . .“

actively involved in achieving the Union's objectives and to offer them a structured channel for feed back, criticism and protest.”

European Union Anti-Discrimination legislation followed this path by including specific Articles on the involvement of civil society in the text of the directives³⁸⁹.

2.2.2.1. *What is a civil society organisation?*

As there is no commonly agreed or legally determined definition of civil society the Commission is facing the problem on how to decide, who should be representative of European Civil Society and who should be consulted. The Commission Communication³⁹⁰ considers social partners, who do have a special and formal role within the formal dialogue, as well as NGOs as the “principal structure of society outside of government and public administration” – as civil society.

However, this definition does not specify how a civil society organisation becomes a relevant stakeholder, which is regularly consulted. In its opinion on “European Governance – a White Paper” of 20 March 2002, the Economic and Social Committee has come up with a set of eligibility criteria for the so-called “civil dialogue.”

“In order to be eligible, a European organisation must:

³⁸⁹ *Article 11 resp. 13*

Social dialogue

1. Member States shall, in accordance with national traditions and practice, 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. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate 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.

Article 12 resp 14

Dialogue with non-governmental organisations Member States shall encourage dialogue with appropriate nongovernmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

³⁹⁰ European Commission (2002): Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final. Brussels, 11.12.2002. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:EN:PDF>, (02.09.2008), for a summary see <http://europa.eu/scadplus/leg/en/cha/c10717.htm>, (02.09.2008).

- exist permanently at Community level
- provide direct access to its members' expertise and hence rapid and constructive consultation
- represent general concerns that tally with the interest of the European society
- comprise bodies that are recognised at Member State level as representative of particular interests
- have member organisations in most of the EU Member States
- provide for accountability to its members
- have authority to represent and act at European level
- be independent and mandatory, not bound to instructions from outside bodies
- be transparent, especially financially and in its decision-making structures³⁹¹”

The Commission itself aims at actively involving interested parties organized at European level and at ensuring that these organisations properly reflect the sector they represent or - if this is not the case – at ensuring that all interests are taken into account by either involving more actors or other forms of consultation.

Data on civil society organisations had been collected in the database CONECCS, which had been run by the European Commission on a voluntary basis as a source of information for European institutions as well as for civil society and/or Member States, not as a means of accreditation. Nonetheless at the time of this study the database had been put out of order because of the need to react to the results of the Commission Communication on the Green Paper “European Transparency Initiative.”

Following its Communication the Commission drafted a Code of Conduct, which will have to be undersigned by interest representatives that want to be listed in the public register for interest, which was launched on June 23rd 2008. There was a public consultation on this draft open from 10/12/2007 until 15/02/2008, within which a total of 61 contributions were received from the corporate sector (40), NGOs (16), think-tanks, (1) the public sector (1) and individual citizens (3). In line with the Commission consultation standards, all contributions have been published on the Europe website³⁹².

³⁹¹ Opinion of the Economic and Social Committee on European Governance - a White Paper (COM(2001) 428 final), http://eesc.europa.eu/sco/docs/ces357-2002_ac_en.pdf

³⁹² for reading the contributions see: http://ec.europa.eu/transparency/consultation_code/contributions_en.htm, (02.09.2008).

Out from the 16 NGOs that contributed to the consultation it was 4 out from the sector of European anti-discrimination Umbrella NGOs. The results were published in a Commission Staff Working Document³⁹³ and were incorporated in the final version of the Code of Conduct for interest representatives,³⁹⁴ which was made public on 28th of May by way of a Communication from the Commission and determines rules and procedures for representing interests at European Union level.

The new register of Interest Representatives was opened on June 23rd 2008 and can be accessed via Internet.³⁹⁵ Registration is open to entities (no single persons) engaged in interest representation activities, defined as “activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions.”

2.2.2.2. *Consultation Procedures*

In its Communication “towards a reinforced culture of consultation and dialogue”³⁹⁶ the Commission obliged itself to “ensure that relevant parties have an opportunity to express their opinion, when defining the target group of a consultation process.” Adequate coverage of those affected by the policy, those who would be involved in implementing of the policy, or bodies that had stated objectives giving them direct interest in the policy should be ensured. Furthermore in determining the relevant parties for consultation, the Commission recommended itself to take into account the wider impact of the policy on other policy areas (e.g. environmental interests or consumer policy), the need for specific experience, expertise or technical knowledge (where applicable), the need to involve non-organised interests (where appropriate), the track record of participants in previous consultations, the need for a proper balance between the representatives of social and economic bodies, large and small organisations and companies, wider constituencies (e.g. Churches and religious communities)

³⁹³Commission of the European Communities (2007): Commission Staff Working Document accompanying document to the Communication from the Commission Follow-up to the Green Paper “European Transparency Initiative”. Results of the Commission consultation on the Green Paper “European Transparency Initiative”, Brussels, 21.03.2007. http://ec.europa.eu/civil_society/docs/DTS_360_EN.pdf, (02.09.2008).

³⁹⁴ Commission of the European Communities (2007): Communication from the Commission Follow-up to the Green Paper “European Transparency Initiative”, Brussels, 21.03.2007. http://ec.europa.eu/civil_society/docs/com_2007_127_final_en.pdf, (02.09.2008).

³⁹⁵ <http://ec.europa.eu/transparency/regrin/>, (02.09.2008).

³⁹⁶ European Commission (2002): Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final. Brussels, 11.12.2002. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:EN:PDF>, (02.09.2008), for a summary see <http://europa.eu/scadplus/leg/en/cha/c10717.htm>, (02.09.2008).

and specific target groups (e.g. women, the elderly, the unemployed, or ethnic minorities) and organisations in the European Union and those in non-member countries (e.g. in the candidate or developing countries or in countries that are major trading partners for the European Union).

Contributions from interested parties organised at European level should be encouraged when appropriate.

In December 2002 the European Commission established a consultation process with “external interested parties” as part of the European legislative procedure “to complement the work of the European Parliament and the Council of the European Union in the development of policy” and which ended up in a European Commission Communication “towards a reinforced culture of consultation and dialogue.”³⁹⁷ In this communication “general principles and minimum standards for consultation of interested parties by the Commission” were laid down.

This was based on the recognition of the benefits of being open to outside input and the need to standardize mechanisms and methods for consultation of various interest groups, which were already used by different departments of the European Commission on an informal basis on the one hand and the maintenance of the limitation of legislation to the Council and the Parliament on the other hand. The guiding principle for the Commission according to the Communication is therefore “to give interested parties a voice, but not a vote.”³⁹⁸

Principle aims of the standardisation were summarized as *transparency and accountability*, encouraging more involvement of interested parties through a more transparent consultation process, which will enhance the Commission’s accountability, *rationalisation*, providing general principles and minimum standards for consultation that would help the Commission to rationalise its consultation procedures and to carry them out in a meaningful and systematic

³⁹⁷ European Commission (2002): Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final. Brussels, 11.12.2002. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:EN:PDF>, (02.09.2008), for a summary see <http://europa.eu/scadplus/leg/en/cha/c10717.htm>, (02.09.2008).

³⁹⁸ European Commission (2002): Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final. Brussels, 11.12.2002, p. 5. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:EN:PDF>, (02.09.2008), for a summary see <http://europa.eu/scadplus/leg/en/cha/c10717.htm>, (02.09.2008).

way, *coherency and specificity*, building of a framework for consultation that is coherent, yet flexible enough to take account of the specific requirements of all the diverse interests, and of the need to design appropriate consultation strategies for each policy proposal, and *mutual learning*, promotion of mutual learning and exchange of good practises within the Commission.

The legal basis for consultation with Civil Society is laid down in the Treaties, stating that the “Commission should . . . consult widely before proposing legislation and, wherever appropriate, publish consultation documents.”³⁹⁹

2.2.2.3. *NGOs lobbying at the European Parliament – Inter-groups*

In general, inter-groups are cross-party groups bringing together MEPs who share similar interests on specific issues. Among others, these coalitions can serve as platforms to foster a broader consensus within the European Parliament.⁴⁰⁰ For the parliamentary term 2004 – 2009 there are 25 officially recognised inter-groups. The inter-groups deal with issues ranging from bioethics to globalisation and tourism. Further inter-groups cover issues concerning specific national and political issues, such as Tibet or the Baltic Europe, others focus on questions of anti-discrimination and diversity (see below).⁴⁰¹ Inter-groups can make use of technical facilities, conference rooms and interpretation provided by the European Parliament. They are not organs of the Parliament. They are not to be confused with committees, subcommittees, inter-parliamentary delegations and delegations to joint parliamentary committees.⁴⁰² Beside officially recognised inter-groups a range of cross-party groups of MEPs exist who call themselves inter-groups or are referred to as ‘MEP-industry forums’.⁴⁰³

³⁹⁹ Protocol N7 on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty.

⁴⁰⁰ Corbett, Ruichard/Jacobs, Francis/Shackleton, Michael (2005): *The European Parliament*. John Harper Publishing: London, p. 177.

⁴⁰¹ A list of the recognised Inter-groups is contained in: Corporate Europe Observatory (2006): *Transparency Boost Needed for European Parliament Cross-Party Groups*, p. 9. <http://www.corporateeurope.org/crosspartygroups.pdf>, (02.09.2008). The Health and Consumer Inter-group is not contained on the list. Although approved by the Secretaries General of the Political Groups the list is not available on the homepage of the European Parliament.

⁴⁰² European Parliament (2004): Rules governing the establishment of inter-groups, Decision of the Conference of Presidents of 16th December 1999 (consolidated May 2004).

⁴⁰³ Corporate Europe Observatory (2006): *Transparency Boost Needed for European Parliament Cross-Party Groups*, p. 1. <http://www.corporateeurope.org/crosspartygroups.pdf>, (02.09.2008).

Inter-groups provide not only a platform for cross-party collaboration but also a platform for experts and interest groups. As the European Parliament and its Members do not have the resources to generate expertise, independent assessment and research themselves they are dependent upon external expertise. As such, inter-groups are perceived to be a particularly valuable lobbying option as “[t]hey save time. Instead of going to one MEP at a time, we can hit a whole group at once with our arguments” as stated by a Brussels-based lobbyist.⁴⁰⁴ The missing transparency of membership and activities of inter-groups and the occult but unquestionable influence of industry lobbyists raised concerns about the potential and role of inter-groups.⁴⁰⁵ As a reaction, the European Parliament adopted Rules governing the establishment of inter-groups in 1999, which have been revised in 2004 for the new parliamentary term.⁴⁰⁶ As prescribed in the Rules at least three political groups represented in the European Parliament must apply for the establishment of an inter-group. The number of memberships in inter-groups is limited for each political party. Therefore, the number of registered inter-groups for the parliamentary term 2004 – 2009 is limited to 25. Furthermore, members are obliged to declare all direct or indirect financial support offered to them as individuals. According to Art 7 of the Rules “[t]he quaestors shall keep a register of the declarations of financial interests submitted by the Inter-group Chairmen. That register shall be open to the public for inspection.” The Rules might have brought advantages regarding the allocation of European Parliament conference rooms or technical facilities but hardly came up against transparency concerns. The European Parliament’s website does not contain any information on inter-groups. Neither a list of the officially recognised inter-groups, nor a register displaying information and data on the recorded inter-groups can be found on the Internet.

However, the concerns mentioned above such as lacking transparency with regard to inter-group membership, activities and finance might be true with regard to industry lobbyists; in a much less extent are these concerns valid with regard to civil society lobbyists active in the field of anti-discrimination.

⁴⁰⁴ Mahony, Honor (2006): *Consumer and food lobbies continue old EU dance*, in: EUobserver.com, 06.06.2006. <http://euobserver.com/9/21700>, (16.02.2008).

⁴⁰⁵ Corporate Europe Observatory (2006): *Transparency Boost Needed for European Parliament Cross-Party Groups*, p. 2. <http://www.corporateeurope.org/crosspartygroups.pdf>, (02.09.2008).

⁴⁰⁶ European Parliament (2004): Rules governing the establishment of inter-groups, Decision of the Conference of Presidents of 16th December 1999 (consolidated May 2004).

There exists an Inter-group on Ageing,⁴⁰⁷ an Inter-group on Disability,⁴⁰⁸ an Inter-group on Anti-Racism and Diversity⁴⁰⁹ and an Inter-group on Gay and Lesbian Rights.⁴¹⁰ Contrary to other registered inter-groups such as the Sky and Space Inter-group,⁴¹¹ inter-groups relevant in the policy field of anti-discrimination present themselves in a transparent and informative manner. All of them have websites revealing information on the history, members and activities of each inter-group. The secretariat of the Inter-group on Disability is run by the European Disability Forum, the one of the Inter-group on Anti-Racism and Diversity by the European Network Against Racism and the one by the Inter-group on Ageing by the European Older People's Platform. The fact, that the secretariats of the inter-groups are run by NGOs already give evidence of the close cooperation between the EP and the NGOs in the field of anti-discrimination. The Inter-group on Ageing is composed of members of the EPP-ED (20), the PES (9), the UEN (1), the ID (1), ALDE (3) and the Greens (2) (total: 36). The Inter-group on Disability consists of members of the PES (47), the EPP-ED (28), the ALDE (16) the UEN (2), the GUE (7), the Greens (6), ID (1) and the NI (2) (total: 109).⁴¹² The Inter-group on Anti-Racism and Diversity counts altogether 67 members, thereof 29 members of the PES, 13 ALDE members, 16 Greens, 5 members of the EPP-ED, 2 member of GUE and 2 of ID. They come from 15 different Member States including Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, the Netherlands, Spain, Sweden and the United Kingdom.⁴¹³ Inter-group on Gay and Lesbian rights: Socialists (57% of our membership), the Liberals and Democrats for Europe (17%), the Greens (16%), the European People's Party (6%), and the Nordic Left (3%). They represent the views of 11 out of 25 Member States with the following countries represented: Austria, Belgium, Finland, France, Germany, Hungary, Italy, the Netherlands, Spain, Sweden, and the United Kingdom.⁴¹⁴

Although inter-groups are not something specific for the policy field of anti-discrimination but are relevant in a whole range of EU policy fields they play a particular important role in the lobbying activities of NGOs. They provide for regular meetings and seminars where views

⁴⁰⁷ See: <http://www.age-platform.org/EN/spip.php?rubrique50>, (16.02.2008).

⁴⁰⁸ See: <http://www.disabilityinter-group.eu/>, (16.02.2008).

⁴⁰⁹ See: <http://www.enar-eu.org/anti-racism-diversity-inter-group/index2.html>, (18.01.2008).

⁴¹⁰ See: <http://www.lgbt-ep.eu/news.php>, (18.01.2008).

⁴¹¹ The Sky and Space Inter-group was nominated for the Worst EU Lobby Award in 2006. See: <http://www.worstlobby.eu/2006/showinfo.php?id=5>, (16.02.2008).

⁴¹² See: <http://www.age-platform.org/EN/z-AGEMembers.htm>, (27.06.2008).

⁴¹³ List provided by a representative of ENAR.

⁴¹⁴ See: <http://www.lgbt-ep.eu/plugins/content/content.php?content.17>, (27.06.2008).

and opinions on current problems are exchanged and possible strategies debated on an official basis.

2.2.2.4. *Role of NGOs in implementation Procedures - Legislation*

The role of NGOs in the procedures of implementing the legal terms and conditions foreseen by the Anti-Discrimination Directives in the Member States was differing very much according to the country. In the old Member States involvement of NGOs was generally very low. In eastern European states the implementation of the anti-discrimination directives was part of the *aquis communautaire*, which had to be transformed and integrated in national legislation as a precondition for accession to the European Union.

In 6 Eastern European countries this meant the elimination of penal code regulations with a discriminatory content regarding sexual orientation. NGOs active in the field of sexual orientation got involved in the implementation by lobbying, providing information and expertise to European Commission on legal and factual situation and implementation procedures. After accession the control of legislation and the possibilities for NGO consultation was minimized, this was valid especially for Poland.

Lobbying for more equality for people with a non-heterosexual orientation has not been limited to the anti-discrimination directives. The topic of non-discrimination on grounds of sexual orientation has been relevant in discussions on the Charta on Fundamental Rights as in the negotiation of all legal initiatives, where family status is of relevance, e.g. with regard to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification or Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection. In all these cases ILGA Europe was publishing statements and was involved by ways of consultation.⁴¹⁵

And there is a broad variety of policy fields and topics of legal relevance, where the rights and needs of people with disabilities are affected by. EDF and the more specialised European

⁴¹⁵ Information provided by NGO-representative.

Disability Organisations have been fighting for years to be involved in negotiations by being consulted. And they are increasingly successful.

Many directly applicable directives on the topic of non-discrimination on grounds of disability have been launched within the last some years, this on pressure by European disability organisations and with support by the parliamentary inter-group on disability. The readiness to involve EDF (and AGE) via consultation in legislation procedures that might affect people with disabilities has been raised to an appreciable extent.

Successful intervention resulted in a regulation on Air Carriers, obliging airlines to care for the rights of disabled persons and persons with reduced mobility when travelling by air⁴¹⁶. The accessibility of public websites was regulated in 2002 and obliged public authorities Europe-wide to make their websites accessible for anyone⁴¹⁷. And another victory in terms of augmenting the mobility of people with reduced mobility was the obligation implemented by EU Legislation for train⁴¹⁸, bus and public transport to provide accessibility of their services for people irrespective of their individual mobility. Railway companies have to be made obliged by national law to establish non-discriminatory access 'with the active involvement of representative organisations of disabled persons.'⁴¹⁹ This has to include equal access to information and assistance provided by personnel of the railway company without any additional costs for the customer. Lobbying by the Union of the Blind led to Braille texts on packages of medicines and on the Euro Coins.

With the ongoing development towards a more inclusive approach in terms of anti-discrimination and more general social policy issues the need for NGOs to get involved in

⁴¹⁶ Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_204/l_20420060726en00010009.pdf, (02.09.2008).

⁴¹⁷ European Council (2002): Resolution of 25 March 2002 on the eEurope Action Plan 2002: accessibility of public websites and their content. ftp://ftp2.christopher-jablonski.com/christopj/EU_Council_Resolution_eEurope_Action_2002.pdf, (02.09.2008).

⁴¹⁸ Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:315:0014:0041:EN:PDF>, (02.09.2008).

⁴¹⁹ Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:315:0014:0041:EN:PDF>, (02.09.2008).

Right to transport

1. Railway undertakings and station managers shall, with the active involvement of representative organisations of disabled persons and persons with reduced mobility, establish, or shall have in place, non-discriminatory access rules for the transport of disabled persons and persons with reduced mobility.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:315:0014:0041:EN:PDF>

other than specific anti-discrimination legislation is evident. Single ground European Umbrella NGOs have been extending their lobbying targets as well as their strategies already and have intensified their efforts within the Platform of European. AGE for example has published a “Tool Kit to improve civil dialogue in the Open Method of Coordination on Social Protection and Social Inclusion.”

Involvement of NGOs in legislative procedures in the Member States is still low and shows that the understanding of what “civil dialogue” might mean does not go that far. Still, the practise of consultation in form of invitations to deliver statements on draft legislation and some attempts to set up structures of dialogue are disseminating⁴²⁰.

2.2.2.5. *Role of NGOs in implementation procedures – awareness raising*

The Role of NGOs in awareness raising activities has been a very prominent one, especially by ways of involvement in projects funded by the Community Action Programme to Combat Discrimination. (see chapter 3.3.2. The Community Action Programme – Implementation of Policies) and the EQUAL⁴²¹ initiative. On initiative of EDF an Extraordinary Professor in European Disability Law was appointed at the University of Maastricht in December 2004.

NGOs on European level as well as on national one have been acting as contracting partners for private companies, scientific institutions and public bodies tasked with providing trainings, developing strategies for the fight against discrimination and the promotion of equality, they were invited to the annual conferences that took place in the framework of the Community Action Programme etc. The changing role from petitioners to acknowledged experts can be traced back according to their role within these projects and events. If in the initial years NGOs were reduced to their role as representing the interests of people with a higher risk to be discriminated against and victims of discrimination, the potential of NGOs to transfer knowledge beyond experience based information and to implement their knowledge and their experience with concrete discrimination cases in the development of political strategies, has been increasingly recognised.

⁴²⁰ see: Country reports from the Network of Independent Legal Experts on the implementation of anti-discrimination legislation - state of affairs January 2007. Download:

http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm#leg, (02.09.2008).

⁴²¹ The community initiative EQUAL was aiming at promoting ‘a better model for working life by fighting discrimination and exclusion on the basis of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. It was funded through the European Social Fund (ESF), and has been implemented in two phases from 2002 until 2008. http://ec.europa.eu/employment_social/equal/index_en.cfm, (02.09.2008).

2.2.3. The relevance of the European Court of Justice and the European Court of Human Rights

Interpretations of legal terms by the European Court of Justice and by the European Court of Human Rights have always contributed very much to the clarification of definitions and concepts. (see chapter 1.4. European Court of Justice) Amendments in legislation and jurisprudence became necessary on grounds of judgements by the judicial power. The inclusion of the shift of the burden of proof⁴²² in the AD Directives and the practise to acknowledge statistics as evidence in cases of indirect discrimination⁴²³ to name the most prominent examples were grounded on judgements of the ECJ in gender discrimination cases.

Recent rulings by the European Court of Justice clarified the question, if discrimination on grounds of association (in the case of the ruling parents being harassed because of disability of their child) should be covered by national legislation on grounds of Directive 2000/78/EC⁴²⁴ and a question on matters of evidence⁴²⁵.

Given the many open questions the framework character of the Directives and the short reference period of the topic are leaving to the practitioners to answer, which means to try out, ECJ rulings will continue to influence the development of the Anti-Discrimination policy field as an important actor with a high level of impact.

2.3. Informal interaction

Anti-Discrimination policy development has been characterised much more by informal interaction procedures much more than by formal ones. And even by now formalized procedures of cooperation/consultation and interaction have been based on former informal ones.

European Commission's corridors, informal meetings of European Commission officials, Members of Parliament, members of the Council and NGO representatives etc. have been the places, where dialogue was held and where decisions were prepared. Beside formal – Treaty

⁴²² ECJ, *Enderby v Frenchay Health Authority* Case 127/92 [1994], 1 All ER 495.

⁴²³ ECJ, *O'Flynn v Adjudication Officer* [1996] ECR I-2617.

⁴²⁴ ECJ, *Colemen vs. Attridge Law and Steve Law*, C-303/06, 17.07.2008.

⁴²⁵ ECJ, *Centrum voor gelijkheid von kansen en voor racismebestrijding vs. Firma Feryn*, C-54/07, 10.07.2008.

based – interaction the individual members of the Council and the EP attempt to exert influence through informal contacts with Commissioners and Commission officials. Also, personal relationships between permanent representatives of the national governments in Brussels and Commission officials especially between fellow nationals are used to exert influence.⁴²⁶

Informal interaction between European Commission, MEPs and Civil Society had its first culminating point in the preparation of Article 13 and the subsumption of a non-discrimination clause into European Union public interest issues, which was continued in drafting the Directives text. (see chapter 2.1. The Starting Line Group)

Still, what discrimination really meant, how the concepts laid down in the Directives could be implemented in practise were open questions. There were differences in the understanding of the definitions of discrimination, of contents and scope, of the concepts of anti-discrimination, equality, equal opportunities etc., differences between the approach of European Commission officials and NGOs, differences between single ground NGOs, differences between the Member States in implementation of the Directives. The readiness to communicate in formal as well as informal settings and ways contributed very much to a development of a more similar understanding.

Implementation of the Directives in the Member States differed according to the national legal systems and still is not unified. Communication of the level of implementation to the European Commission by the national experts of the Network of Independent Legal Experts and European NGOs showed deficiencies and common gaps in transposition and have contributed to suggestions for amendments to the Directives and the drafting of a new Directive on Goods and Services and inspired European Commission strategies within the Community Action Programme and in setting priorities. These information completed by informal dialogue during these conferences and events influenced the focus of up-coming conferences and research.

Reporting by the Network of Independent Legal Experts resulting in comparative reports, exchange of best practise and networking of NGOs and within Equinet have contributed to creating common approaches on the way from principle to practice. Trans-national exchange

⁴²⁶ Nugent, Neill (2001): *The European Commission*. Palgrave Macmillan: Basingstoke, Hampshire u.a., p. 240.

via informal networks has been leading to the development of common strategies of litigation, of common lines of arguing in specific cases of legal unclarity. These procedures are still in their phase of establishment, in full working force they could lead to harmonization without regulation by EU institutions

2.3.1. Single Case Example - Homophobic events in Poland 2005 - 2007

During the years 2005-2007 a variety of homophobic events were brought to the attention of NGOs and European Institutions.

The 2005 Equality Parade in Warsaw had been banned by the Warsaw municipality, arguing that a 'traffic organisation scheme' had not been presented. The mayor of Warsaw had admitted already before that he would ban the demonstration in any case as he was against any public propaganda of homosexuality. The parade was conducted slightly modified but still illegally and was followed by an appeal regarding the ban. The case was brought up to the Constitutional Court and ended in a judgement of 18 January 2006 reaffirming the principles of the freedom of assembly⁴²⁷. The organizers of the Equality Parade submitted the case to the European Court of Human Rights as well claiming violation of Articles 11, 13 and 14 of the European Convention of Human Rights⁴²⁸. The ECtHR in its judgement *Baczkowski v. Poland*⁴²⁹ gave general statements according to the right of assembly and the need of representing minorities and the recognition of diversity and the active participation of varied

⁴²⁷ Judgement of the Polish Constitutional Court of 18 January 2008, K 21/05, English Summary. Download: http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm, (02.09.2008)

⁴²⁸ Article 11 – Freedom of assembly and association

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 – Prohibition of discrimination

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

<http://conventions.coe.int/treaty/EN/Treaties/html/005.htm>

⁴²⁹ Case of *Baczkowski and others v. Poland*, Application no. 1543/06.

<http://cmiskp.echr.coe.int/tkp197/viewbkm.asp?sessionId=1556139&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=62205>, (02.09.2008).

identities for a democratic society. The Court ruled that, even though the march still took place, the fact that it was banned by the city authorities represented an infringement of freedom of assembly under Article 11 of the European Convention for Human Rights. Additionally, the ruling affirmed that: ‘The positive obligation of a State to secure genuine and effective respect for freedom of association and assembly was of particular importance to those with unpopular views or belonging to minorities, because they were more vulnerable to victimisation.’ Violation of Article 14 of the Convention was established as well, because other marches which had taken place on the same day had not been not subject to the same conditions as the gay rights march and were allowed to take place. The ruling furthermore assessed a violation of Article 13 guaranteeing the right to an effective remedy, as the organisers of the parade had no had any legal possibility to appeal the negative decision in time (before the Parade was set to take place).

The ECtHR furthermore set new standards concerning the freedom of expression of politicians referring to their responsibility towards people working in administration and the public and by this referred to the statements expressed by the Mayor of Warsaw before the ban of the Equality Parade.

Since these rulings the organisation of assemblies, parades or marches by the LGBT community has not faced any administrative problems. Harassment and violent attacks of activists are still taking place, however, connected with difficulties to protect participants of assemblies against the risk of attacks⁴³⁰.

In 2006 the League of Polish Families (LPR) Deputy Wojciech Wierzejski wrote a letter to Poland’s Minister of Internal Affairs, in which he accused gays of ties to criminal and paedophile circles, of links to the Mafia and attempts to penetrate Polish schools and suggested the government to place gay circles under surveillance.

⁴³⁰ Rzeplinski, Andrzej (2008): *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Poland*. National Report Poland. Fundamental Rights Agency: Vienna. Download: http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=3fb38ad3e22bb&contentid=4868b375493cf, (02.09.2008).

LGBT activists had been put on the website of Redwatch⁴³¹, a fascist website which had been operating since January 2006 and which presents materials of fascist and racist nature, with full name, telephone number and photos to present them openly for harassment.⁴³²

The Warsaw Equality Parade 2006 took place, in course of the decision making process were intervened by efforts by the League of Polish Families (LPR) Deputy Wojciech Wierzejski to anticipate the decision, encouraging inter alia the use of force towards gay activists: „If deviants begin to demonstrate, they should be hit with batons”⁴³³.

An international project "Do we need gender?" that was organized by Campaign Against Homophobia⁴³⁴, co-organized by BGO Gemini⁴³⁵ (Bulgaria), Diversity (Estonia), Bost Axola⁴³⁶ (Spain) and financially supported by the European Commission Youth Programme, was characterized as a "depravation of young people" by the vice-minister of education. Amongst other extremely homophobic and seriously misleading statements, the vice-minister also said that "the rules and priorities of the programme under which such projects get money, need to be changed in order to prevent such organisations to get money in the future.”

Furthermore a tolerance march in Krakow had been attacked with three people injured and the League of Polish Families as well as Radio Marija had been promoting homophobic propaganda without any attempts by Polish government to stop them⁴³⁷.

⁴³¹ <http://www.redwatch.info>, (02.09.2008). In May 2006 a Polish political activist was attacked and stabbed, requiring surgery. He stated that he believed the attack was linked to his recent listing on the site.

⁴³² Rzeplinski, Andrzej (2008): *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Poland*. National Report Poland. Fundamental Rights Agency: Vienna. Download: http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=3fb38ad3e22bb&contentid=4868b375493cf, (02.09.2008).

⁴³³ Source: Press Cutting: on the equality march. Polish original: <http://wiadomosci.gazeta.pl/wiadomosci/1,53600,3337662.html>, (02.09.2008).

⁴³⁴ Campaign Against Homophobia (KPH) is a nation-wide LGBT organisation with branches in 7 cities over Poland. KPH has been actively involved in anti-discrimination work since 2001, and has mainly been focusing on public opinion, political advocacy and policy development work in relation to LGBT matters in Poland. <http://www.kampania.org.pl/english.php>, (02.09.2008).

⁴³⁵ BGO is a Bulgarian gay advocacy organisation. The mission of the organisation is to reach inclusive social environment for homosexual, bisexual and transgender people in Bulgaria. <http://www.bgogemini.org/eng/>, (02.09.2008).

⁴³⁶ Association of young gays and lesbians of the basque country, whose aim is to work together on the erasement of homophobia. <http://www.bostaxola.com/>, (02.09.2008).

⁴³⁷ Rzeplinski, Andrzej (2008): *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Poland*. National Report Poland. Fundamental Rights Agency: Vienna. Download: http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=3fb38ad3e22bb&contentid=4868b375493cf, (02.09.2008).

ILGA Europe wrote a letter to the EU presidency to express its concern on what was happening in an EU Member country. They asked HOSI Vienna, an Austrian National NGO fighting for the rights of homosexuals, to put pressure on the Austrian Government to act. ILGA Europe furthermore met with European Commission representatives and raised the question of a potential use of Article 7 to agree on sanctions for violating the principle of non-discrimination. Finally it was the close cooperation with the European Parliament and the MEPs positive attitude towards the fight against discrimination that opened the path for concrete action.⁴³⁸ The Fundamental Rights Agency was assigned with conducting a survey on homophobic tendencies in Europe⁴³⁹. There was no common condemnation by the European Council, however.

3. Policy Objectives and Policy Instruments – Development and Implementation

European Union Anti-Discrimination policies from the very beginning not only concentrated on producing legislative means to combat discrimination but recognised that political action beyond that had to be taken. The definition of the aims of anti-discrimination policies, however, as well as decisions on most useful means to reach these aims have been changed over the period analysed.-

3.1. The Development of Policy Objectives

Policy objectives of European Community's Equality and non-discrimination legislation as well as policies have been changing as part of the described organic development characterized by changing influence of certain actors and different concepts towards the topic.

The European Court of Justice has defined discrimination for over forty years as the *application of different rules to comparable situations or the application of same rule to different situations*⁴⁴⁰. This definition merges two different models of equality. The formal "liberal" approach based on the right of the individual to be free of discrimination is enshrined

⁴³⁸ Information provided by NGO representative

⁴³⁹ FRA, European Union Agency for Fundamental Rights (2008): *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis*. Vienna.

http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=3fb38ad3e22bb&contentid=4868b375493cf, (02.09.2008).

⁴⁴⁰ De Vos, Marc (2007): *Beyond Formal Equality: Positive Action under Directives 200/43/EC and 2000/78/EC*. European Commission: Directorate General Social Affairs and Equal Opportunities. http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/bfe07_en.pdf, (02.09.2008).

in the first part of the definition promoting formally equal treatment in comparable situations, irrespective of the outcome. The second part of the definition on the other hand is based on the “group based” approach questioning the effects of formally equal rules for groups lacking the same opportunities as others in society.

The Directives take up this integrating approach and do develop it further towards a multidimensional one, which has been continued by anti-discrimination policies and future legislation plans.

This development is mirrored in the wording used for legislation on European Union as well as on national level and by the concrete topics anti-discrimination policies, including awareness raising, tenders and expert opinions, are focussed on – and not to forget the changes in the name of the DG responsible for the topic. The DG Employment and Social Affairs was changed in to DG Employment, Social Affairs & Equal Opportunities in 2006 in preparation of the 2007 Year for Equal Opportunities, which can not be taken other than as a sign for a clear commitment to the aim of promoting Equal Opportunities in Europe.

In drafting the Directives the definition of discrimination, the scope of the prohibition of discrimination and the procedural provisions all were subject of a multi-actor influenced process. The concepts of direct and indirect discrimination were based on the EU Gender Legislation⁴⁴¹ as was the concept of harassment.

The recent anti-discrimination Directives go much further – especially regarding race discrimination – than the underlying equal treatment concepts providing provisions for the non-discrimination of women and men in the work-place. Even if the Race Directive still is headed “Council Directive 2000/43/EC of 29 June 2000 implementing the principle of **equal treatment** between persons irrespective of racial or ethnic origin“ in entails a variety of elements going further than a mere ‘equal treatment’ obligation. In drafting the Directives the awareness that procedural provisions have to be stressed and that victims of discrimination would need support by independent institutions and civil society was there already. This was due to experience in the practise of putting gender equality into place on the one hand but was

⁴⁴¹ Council Directive 76/207/EEC, 09.02.1975, OJ L 39/40 (14.02.1975) on equal treatment in access to employment etc. amended by Council Directive 2002/73/EC, 23.09.2002, OJ L 269/15 (05.10.2002). http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31976L0207&model=guichett, (02.09.2008).

very much influenced by examples in the Member States with anti-discrimination legislation in place and by civil society initiatives like the Starting Line group.

Nonetheless, the first years of the transposition process core policy objectives of the European Commission as the “policy making” engine were the transposition of the Directives into national legislation as such and the scattering of information that there was new legislation in place to European Citizens and relevant stake holders.

Meeting the formal requirements of the Directives text did not change the situation very much, however. Dialogue with European and National NGOs, the European Network of Legal Experts in the Non-Discrimination Field enabled the European Commission to adapt its policy objectives. It had become evident that there was an enormous lack of awareness on what discrimination really meant and that given structures in many Member States did not guarantee for a successful access to justice. So the need to raise awareness on discrimination, the need to deal with ones prejudices via trainings sessions for key actors as well as for groups with a high risk of being discriminated against was put on the list of policy objectives.

When difficulties members of discriminated groups faced in access to their rights became even more obvious especially after the enlargement of 2004, when the number of Roma citizens raised, the need for positive measures to combat discrimination strategically was given more priority.

Challenging for Equal Treatment of people irrespective of their gender opened the process towards a permanent redefinition of policy objectives, which currently could be described as aiming at mainstreaming equal opportunities and equality for all irrespective of their background. And the process is in progress towards the aim of an inclusive society.

Table 5: Development of Policy Goals - Overview

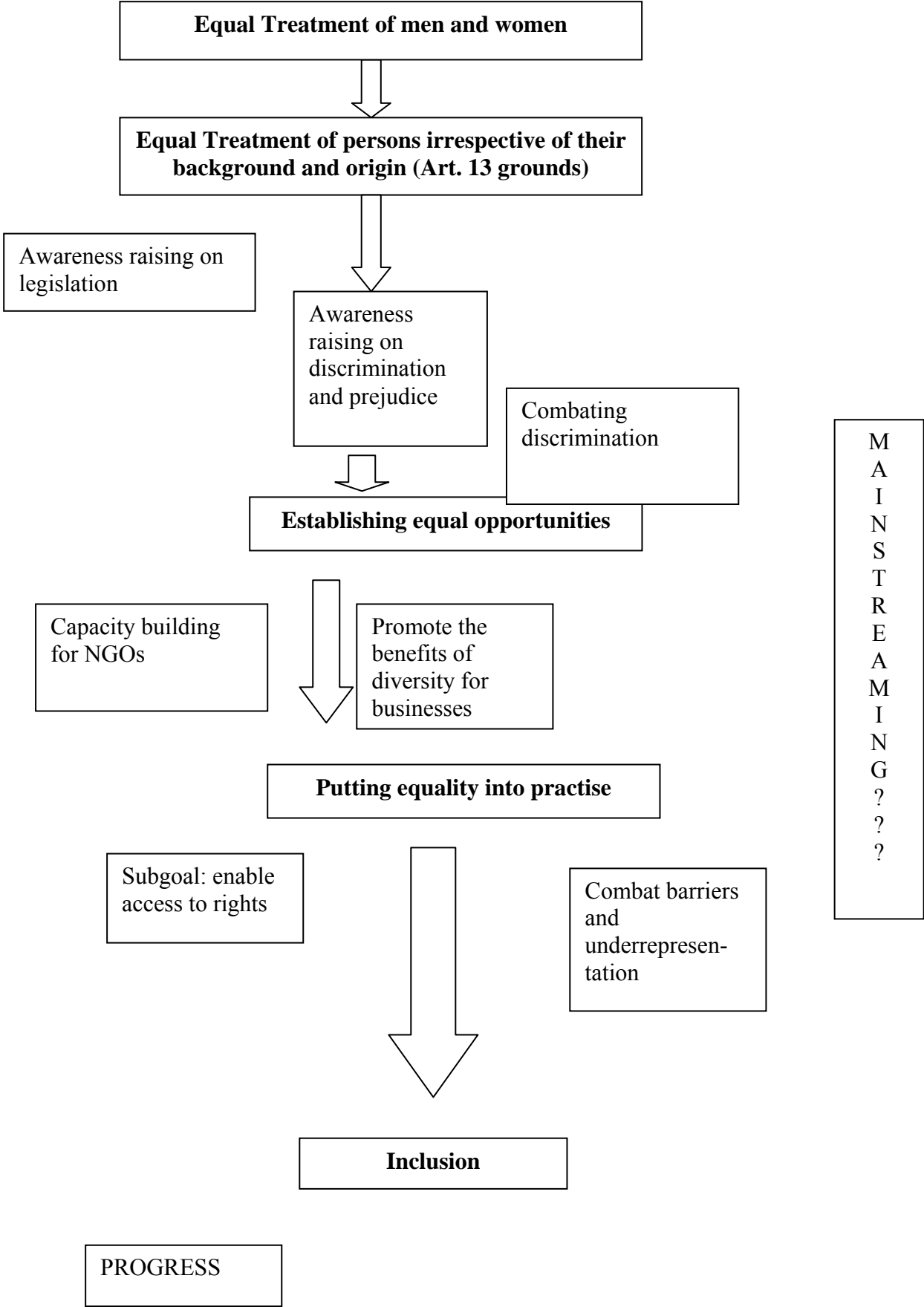


Table 6: Policy Goals and corresponding Activities

Overall Goal	Subgoal	Activities
Equal Treatment of Men and Women	Awareness Raising on Legislation	Information on Legal Remedies
	Combating Discrimination	Bring Cases to Court
Equal Treatment of persons irrespective of their race, ethnic origin, religion & belief, disability, sexual orientation and age	Awareness Raising on Legislation	Training on Legislation and Legal Remedies
	Awareness Raising on Discrimination and Prejudice	Training on Discrimination and Prejudice
	Combating Discrimination	Bring cases to Court
Establishing Equal Opportunities	Enforce Capacities of Interest Organisations	Capacity Building for NGOs
	Promote the Benefits of Diversity for the Business	The Business Case for Diversity
Putting Equality into Practise	Enable Access to Rights	Strategic Litigation
	Combat Barriers and underrepresentation	Positive Action Measures
Inclusion		Progress

3.2. Anti-Discrimination – Directives

We set our starting point in 2000, when the Anti-Discrimination-Directives were released. Their aim was to combat discrimination and to provide members of groups at risk of discrimination with the legal means to fight being discriminated against. The Directives set a material scope and required implementation of the prohibition of discrimination in all Member State's national legislation. Being aware of the difficulties of members of minority groups on the ways to their rights, the Directives aside of the defining the material scope obliged Member States to provide for procedural remedies and to foresee effective, proportionate and dissuasive sanctions⁴⁴².

⁴⁴² Directives 2000/43/EC (Article 15) and 2000/78/EC (Article 17):

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The

The scope and content of the Directives was based on legislation already in place at Community level on gender equality defining general objectives and setting minimum standards. The Directives were inspired additionally by resolutions and recommendations on sexual harassment, by concepts found in international treaties and in the national legislation of member states.

3.2.1. Implementation in the Member States

The approach of the anti-discrimination Directives is based on setting general objectives and minimum standards. This and the differences in legal systems of the Member States led to differences in transposition of the Directives, different problems in making theory reality and differing topics facing resistance. This heterogeneity in transposition broadened the hierarchisation of the grounds laid down in the Directives onto a hierarchisation of protection according to the place of residence in Europe. This phenomenon is not an unusual one in Europe – still for the policy field of non-discrimination and equality it adds another dimension.

The first phase of implementation was characterized by a focus on meeting the formal requirements concerning the creation and/or amendment of legal and administrative procedures. The question of how to guarantee the access to the rights, for which legal protection was put in place, was dealt with lesser attention. The obligation to promote dialogue with social partners and NGOs⁴⁴³ was not given a lot of concern especially in the first years of the implementation process.⁴⁴⁴

Most of the Member States in one way or the other went beyond the minimal requirements of the Directives, when transposing them to national law.⁴⁴⁵ Most of the Member States took over the definition given by the Directives, many of them literally reproducing the text of the Directives. There were troubles with the implementation of a protection against

sanctions, which may comprise the payment of compensation to the victim, must be **effective, proportionate and dissuasive**.

⁴⁴³ Art. 11/12 EC Directive 2000/43/EC resp. Art. 13/14 EC Directive 2000/78/EC

⁴⁴⁴ See: European Commission (2004): *Equal Rights in Practise. Key Voices 2004*. Office for Official Publications of the European Communities: Luxembourg, p. 6.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/broch/thembroch04_en.pdf, (02.09.2008).

⁴⁴⁵ For a comprehensive overview on the implementation of the Anti-Discrimination Directives 2000/43/EC and 2000/78/EC see: European Network of Legal Experts in the Non-Discrimination Field (2006): *Developing Anti-Discrimination Law in Europe – The 25 EU Member States compared*. November 2006.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07compan_en.pdf, (02.09.2008).

discrimination on the ground of sexual orientation, with the concepts of reasonable accommodation and genuine and determining occupational requirements.

Most Member States implemented with slight delays. Transposition across all of Member States' territorial had been reason for more extended delays, which was the case in the UK (delays concerning Gibraltar), Finland (delays concerning the Aland Islands) and Austria, where federal legislation entered into force on 1 July 2004, whilst one of the nine provinces still failed in enacting legislation. Belgium had implemented in time, its legislation was characterised by several gaps because of un-clarities in competencies in adopting procedural rules, however. Luxembourg and Germany simply did not transpose legal remedies against discrimination within the time schedule provided. For the way of the infringement procedures and its outcomes see chapter 3.2.3. Formalized Interaction by Ways of Sanctions.

In Germany church affiliated organisations were opposing the inclusion of sexual orientation in the list of protected grounds. There were difficulties in Poland as well, where a first draft legislation providing wide protection ended up in the drawer after a change of government in 2004, and the new government was reluctant to transpose properly, members of government openly admitting their animosity towards homosexuality.

In negotiating the German draft legislation the discussion on the level of protection regarding discrimination on grounds of sexual orientation was transferred to the provisions allowing for specific exceptions. The exception of Article 4/2 Employment Directive⁴⁴⁶ enabling churches or organisations the ethos of which is based on religion or belief to employ people according to their fate, *if religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos*, was subject to discussions on how wide this exception should be interpreted. One of the open questions was if for example being of homosexual identity can cause an exception because the ethos of the organisation (like the one of the Catholic Church) does not go in line with sexual orientations that differ from the heterosexual one. According to the authors of the National Report for Germany on

⁴⁴⁶ Article 4 Directive 2000/78/EC

Occupational requirements

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations **the ethos of which is based on religion or belief**, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a **genuine, legitimate and justified occupational requirement**, having regard to the organisation's ethos.

Homophobia⁴⁴⁷ as well as to the legal expert on non-discrimination responsible for Germany⁴⁴⁸ Article 9 of the AGG⁴⁴⁹ appears to be particularly problematic establishing a broad right of self-determination for religious communities, allowing for differential treatment within their own institutions on the basis of religion or belief. The main difference to the Directives is that the AGG regulation opts for giving the possibility to chose, if unequal treatment on grounds of religion is undertaken because of the right of self-determination or to the kind of work concerned whereas according to the Directive a combination of both is necessary. This is enforced by a jurisprudence interpreting the right in a wide form.

In Hungary the same issue lead to a court case starting by the theological faculty of the Karoly Gaspar Calvinist University issuing a declaration of non-approval of the education or recruitment of pastors or religion teachers after having dismissed a theology student who had confessed his homosexuality to one of his professors in October 2003. An application by the student claiming a withdrawal of the declaration as well as punitive damages because of a violation of the principle of equal treatment was rejected by the Supreme Court in June 2005⁴⁵⁰ arguing that it was reasonable to exclude homosexuals from theological education, taking in consideration the fact that later on they may become pastors. This decision is in line with the Hungarian Equal Treatment Legislation, which in this regard might be failing

⁴⁴⁷ FRA, European Union Agency for Fundamental Rights (ed.) (2008): *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Germany*. National Report Germany. Vienna. http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=3fb38ad3e22bb&contentid=4868b375493cf, (02.09.2008).

⁴⁴⁸ Mahlmann, Matthias (2007): *Report on Measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country report update 2006. Germany*. Report for the European Network of Legal Experts in the non-discrimination Field. Migration Policy Group/Human European Consultancy. Download: http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm#leg, (02.09.2008).

⁴⁴⁹ Article 9 Common Anti-Discrimination-Act (Allgemeines Antidiskriminierungsgesetz): Zulässige unterschiedliche Behandlung wegen der Religion oder Weltanschauung

(1) Ungeachtet des § 8 ist eine unterschiedliche Behandlung wegen der Religion oder der Weltanschauung bei der Beschäftigung durch Religionsgemeinschaften, die ihnen zugeordneten Einrichtungen ohne Rücksicht auf ihre Rechtsform oder durch Vereinigungen, die sich die gemeinschaftliche Pflege einer Religion oder Weltanschauung zur Aufgabe machen, auch zulässig, wenn eine bestimmte Religion oder Weltanschauung unter Beachtung des Selbstverständnisses der jeweiligen Religionsgemeinschaft oder Vereinigung im Hinblick auf ihr Selbstbestimmungsrecht oder nach der Art der Tätigkeit eine gerechtfertigte berufliche Anforderung darstellt. (2) Das Verbot unterschiedlicher Behandlung wegen der Religion oder der Weltanschauung berührt nicht das Recht der in Absatz 1 genannten Religionsgemeinschaften, der ihnen zugeordneten Einrichtungen ohne Rücksicht auf ihre Rechtsform oder der Vereinigungen, die sich die gemeinschaftliche Pflege einer Religion oder Weltanschauung zur Aufgabe machen, von ihren Beschäftigten ein loyales und aufrichtiges Verhalten im Sinne ihres jeweiligen Selbstverständnisses verlangen zu können. <http://bundesrecht.juris.de/agg/index.html>, (02.09.2008).

⁴⁵⁰ Háttér Társaság a Melegekért [Háttér Support Society for Gays and Lesbians] v. Károli Gáspár Református Egyetem [Gáspár Károli Calvinist University] Legfelsőbb Bíróság [Supreme Court] acting as extraordinary review court, 08.06.2005.

transposition of the Directives aims⁴⁵¹. In difference to Article 4 of the Employment Directive the resp. Article 22/1 ETA does not specify the need for a ‘specific aim’ nor does it limit the possibility of a differentiation based on the religious ethos of an organisation to the religion or belief of a person⁴⁵².

Article 5 of the Employment Directive⁴⁵³ obliges employers to *take appropriate measures, where needed in a particular case, to enable a person with a 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*. This duty represented a novelty for the legal systems of the majority of the Member States and as such caused problems in implementation due to un-clarities what it really meant. The possibility provided by the Directive to limit the duty to cases, which do not constitute a disproportionate burden for the employer, was commonly adopted, the ability to estimate the reasonableness due to lack of case law is very low in most countries, however⁴⁵⁴.

Enforcements procedures were implemented very diverse as well due to the existing legislation in the Member States. All States did combine judicial proceedings with non judicial ones, the latter ones in general offering easier access and lower – if any – cost risks. Established enforcement and conflict resolution systems were used and complemented with new and extended duties. This goes for labour inspectorates, Equal Treatment and/or Human

⁴⁵¹ Kadar, Andras (2007): *Report on Measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country report update 2006. Hungary*. Report for the European Network of Legal Experts in the non-discrimination Field. Migration Policy Group/Human European Consultancy. Download: http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm#leg, (02.09.2008).

⁴⁵² Article 22 of the ETA (Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities) runs as follows:

‘(1) The principle of equal treatment is not violated if

a) the differentiation is proportionate, justified by the characteristics or nature of the job and is based on all relevant and legitimate terms and conditions that may be taken in consideration in the course of recruitment; or
b) The differentiation arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.’

download: <http://www.egyenlobanasmod.hu/index.php?g=english.htm>, (02.09.2008)

⁴⁵³ Article 5 Directive 78/2000/EC

Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a 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. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

http://ec.europa.eu/employment_social/news/2001/jul/dir200078_en.html, (02.09.2008)

⁴⁵⁴ European Network of Legal Experts in the Non-Discrimination Field (2006): *Developing Anti-Discrimination Law in Europe – The 25 EU Member States compared*. November 2006, p. 36f.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07compan_en.pdf, (02.09.2008).

Rights Bodies, Employment Commissions etc. The procedures as well as the character of the findings are very different and difficult to compare. So finding the ways to successful litigation is determined very much by the national possibilities and help and information has to be provided on national level as well.

What is similar in most Member States is that access to victims' rights is difficult due to factual inequalities in societal power and information. Being aware of this specific problem that is valid for the policy field of anti-discrimination more than for others the Directives did foresee specific provisions to milder this situation. And that is where most Member States are failing in implementing properly.

Both Directives oblige Member States to create the possibility for associations that do have *a legitimate interest in ensuring that the provisions of the Directives are complied with* to engage either on behalf or in support of the complainant in the procedures provided for the enforcement of the obligations imposed by those⁴⁵⁵. Conceding the possibility to support a victim is quite common, whereas the power to engage on behalf of the victim is very rare and - in the rare cases – limited to specific organisations or facing barriers. The latter is the case in Malta, where legislation is enabling any legal entity with a legitimate interest to engage on behalf of or in support of a victim; NGOs however are still not recognised as legal entities in Malta⁴⁵⁶. Class action enabling organisations to bring in a claim for a unidentifiable group of affected people, if the outcome is of interest for the whole group, is not possible in most of the Member States, with the exception of Slovakia and Austria, in the latter case limited to one single NGO (the Austrian National Council of Disabled Persons) restricted to disability cases and the approval of the Federal Advisory Board on Disability⁴⁵⁷.

⁴⁵⁵ Article 7/2 Directive 2000/43/EC and Article 9/2 Directive 2000/78/EC: **Defence of rights**

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

⁴⁵⁶ European Network of Legal Experts in the Non-Discrimination Field (2006): *Developing Anti-Discrimination Law in Europe – The 25 EU Member States compared*. November 2006, p. 71.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07compan_en.pdf, (02.09.2008).

⁴⁵⁷ Article 13 Disability Equality Act (Bundes-Behindertengleichstellungsgesetz) **Verbandsklage**

(1) Wird gegen die in diesem Bundesgesetz geregelten gesetzlichen Gebote oder Verbote verstoßen, und werden dadurch die allgemeinen Interessen des durch dieses Gesetz geschützten Personenkreises wesentlich und dauerhaft beeinträchtigt, kann die Österreichische Arbeitsgemeinschaft für Rehabilitation eine Klage auf Feststellung einer Diskriminierung aus dem Grund einer Behinderung einbringen.

(2) Die Klage kann nur auf Grund einer Empfehlung des Bundesbehindertenbeirats (§ 8 des Bundesbehindertengesetzes, BGBl. Nr. 283/1990) eingebracht werden. Der diesbezügliche Beschluss ist mit einer Mehrheit von zwei Dritteln der abgegebenen Stimmen zu fassen.

The low level of acknowledged significance of NGOs and interest organisations is reflected by the very low formal implementation level of the requirement to provide for dialogue with non-governmental organisations.⁴⁵⁸ *Bell/Chopin/Palmer*⁴⁵⁹ estimate the reason for this to lie to some extent grounded in the vagueness of the Articles and in the assumed interpretation of some governments that the Articles did not oblige them to transpose the provisions into law but that taking some policy steps would fulfil their duty. Dialogue was started by positive information dissemination activities via media and/or targeted support, awareness raising activities and the establishment of national networks or working groups of NGOs. In some Member States consultation of NGOs and social partners in transposing the Directives was gathered, if not in the initial transposition period at least in further amendment procedures. Most of the activities were put in place in the framework and with the financial resources of the Community Action Programme to Combat Discrimination.

Another obligation, which caused difficulties due to its novelty for many national legislative systems, was the highly important provision in terms of access to justice for victims of discrimination to shift the burden of proof⁴⁶⁰. Most Member States on grounds of the *in dubio pro reo* rule used the possibility not to apply it in criminal cases and in cases in which courts have an investigative role. Several states (e.g. Austria, Hungary and Estonia) however failed in transposing properly concerning the definition of the turning point that constitutes the shifting procedure, which led to lowering the burden of proof, but not shifting it in the sense

⁴⁵⁸ Article 12 Directive 43/2000/EC and Article 14 Directive 78/2000/EC:

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate nongovernmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on any of the grounds referred to in Article 1 with a view to promoting the principle of equal treatment.

⁴⁵⁹ European Network of Legal Experts in the Non-Discrimination Field (2006): *Developing Anti-Discrimination Law in Europe – The 25 EU Member States compared*. November 2006, p. 94.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07compan_en.pdf, (02.09.2008).

⁴⁶⁰ Article 8 Directive 43/2000/EC and Article 10 Directive 78/2000/EC:

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.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

of the Directives. Others are foreseeing the shift only for the employment field (Latvia, Poland and Estonia) or only for disability cases (Germany)⁴⁶¹.

In unifying the level of legal standard and of the ways to ones rights the role of Equinet might be a crucial one. Given the problems in understanding some of the concepts implemented by the Directives, especially with estimating the proportionality, due to the lack of Case law, the institutionalised exchange of experience and of cases in the framework of Equinet might be of great help.

Capacity Building for NGOs and enabling them to change experience to learn from each other, how to best possible make use of the potentials the EU Directives as well as the national legislation do offer, will be and has been another instrument to put the Directive's intention into practise and to reach more equality across the Member States' borders.

3.2.2. Monitoring the Implementation

The level of implementation of the Directives is controlled by reporting by the Member States, by consultation of the European NGO Networks and by consulting the so-called LegalNet, a network of legal experts on anti-discrimination in all member states⁴⁶².

The expert network, which had been operated by the Migration Policy Group until 2006 and since then is managed by Human European Consultancy together with Migration Policy Group, receives its mandate directly by the European Commission, which had realised that monitoring the implementation of the anti-discrimination directives could not be done from Brussels only. Reports form Member States differed a lot in terms of accuracy and honesty. Furthermore it had become obvious that the different legal traditions in the member states, which in fact made implementation difficult in some member states, made comparison and assessment nearly impossible with a mere centralized approach.

The idea was to gather around independent experts from all Member States to monitor the implementation of anti-discrimination legislation in the specific member states and to use the

⁴⁶¹ European Network of Legal Experts in the Non-Discrimination Field (2006): *Developing Anti-Discrimination Law in Europe – The 25 EU Member States compared*. November 2006, p. 73.
http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07compan_en.pdf, (02.09.2008).

⁴⁶² Information on structure and function of the legal expert network provided by interviews with a member of LegalNet and with a representative of the coordinating organisations.

information provided by these experts for the decision, if infringement procedures should be started or not. The group of experts was based on an informal network that MPG was in contact with originating from the Starting Line Group period. This was completed by searching for experts especially at universities to best possible guarantee their independency and by “word-of-mouth recommendations”.

At the beginning the network was formed by one expert per country and per ground, a structure, which was changed in 2004 when the accession of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia enlarged the group significantly and only one expert per country was assigned, who since then has to report on the status of implementation regarding all grounds in his/her country. It was not only a process of trying to spare money facing the higher number of countries and experts that would have had to be contracted. The process was symptomatic for a development towards a more horizontal approach. The decision on who should be the experts to remain turned out to be quite difficult. There were certain criteria like gender balance and competence for and /or experience with all discrimination grounds (ground balance), which determined the decisions. The national experts in this new structure are supervised by so-called ground coordinators, installed as a consequence of the first evaluation of the Community Action Programme to Combat Discrimination⁴⁶³. They are in charge for one specific ground of discrimination for all Member States and responsible for cross-reading the national experts reports, making their comments and in case asking for changes or explanations. This centralized checking system sometimes confronts the network with different legal systems and legal traditions again.

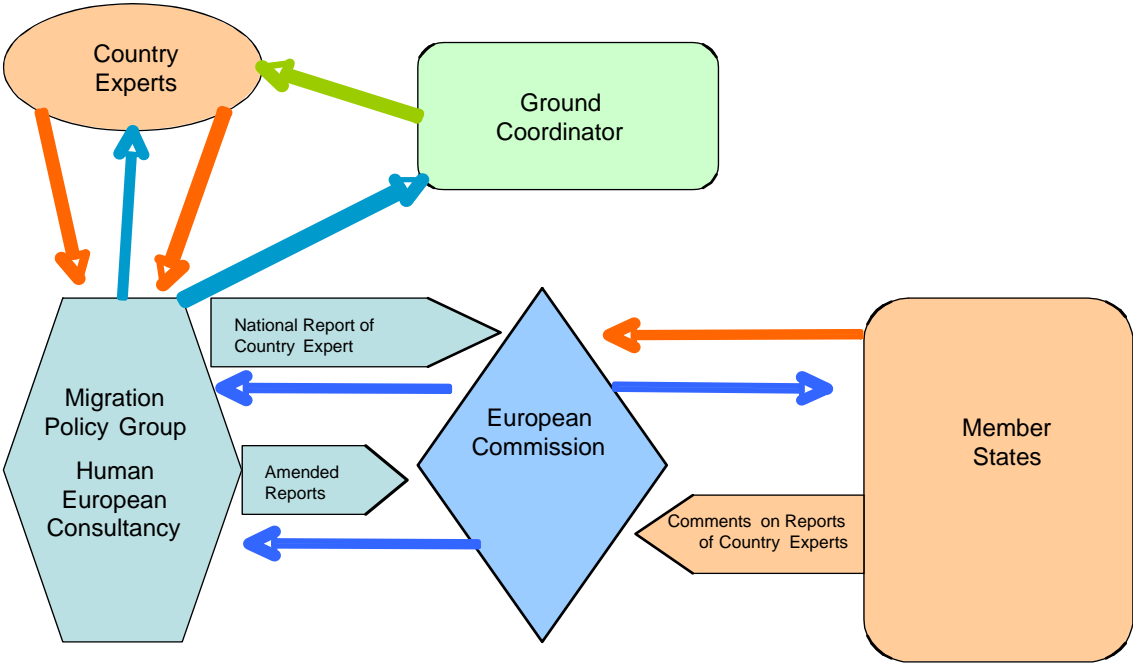
The legal experts are not really acting as a network but as a pool of experts and resources of information, of which information is extracted centrally. Contact and networking in between the pool is not intended by the European Commission and has not developed informally to a high extent. The new managing organisation, the Human European Consultancy, has been using the experts as a pool for trainers, resp. resources for information on who could be trainers for an Anti-Discrimination Training Programme they were running, but there is no formalized interaction in place. And the development is even enhancing this as the process of delivery of information is being formalised by having created an electronic data system,

⁴⁶³ Legal Net was funded within the Community Action Programme to combat discrimination, evaluation by Ernst & Young (2004): *Ongoing evaluation of the Community Action Programme to combat discrimination (2001 - 2006) – 2004 synthesis report*. European Commission Government Services. http://ec.europa.eu/employment_social/fundamental_rights/pdf/eval/grepexsum_en.pdf, (02.09.2008) and http://ec.europa.eu/employment_social/fundamental_rights/pdf/eval/casestudta_en.pdf, (02.09.2008).

which can be read by the Commission only until the official last version of the reports is agreed upon.

Table 6: Interaction Procedures Network of Independent Legal Experts

Interaction Procedures LegalNet



The information is gathered by templates designed by the Commission in cooperation with Human European Consultancy, which facing the need of comparability are forcing experts to answer questions, which not always do ‘fit’ to their national situation as they e.g. address (legal) structures that do not exist in one specific country or do not cover specific circumstances that would be of relevance in another one.

The group of legal experts are not only asked about gaps in implementation of anti-discrimination legislation, but they do report on political developments as well and they are expected to make suggestions for change.

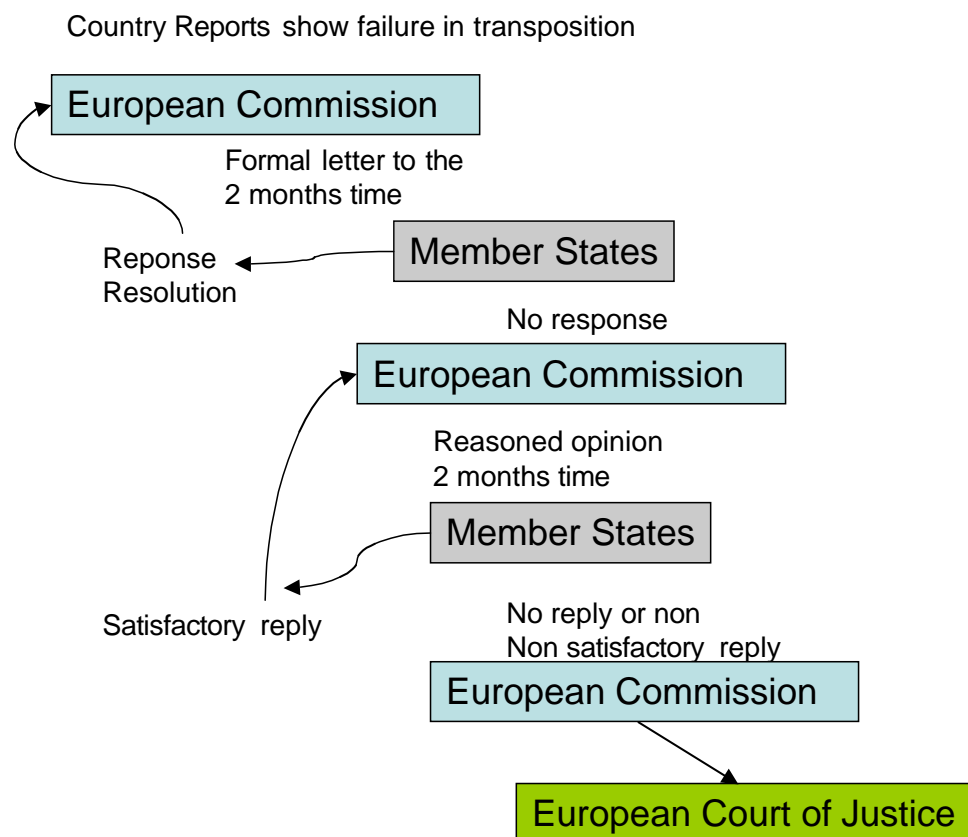
3.2.3. Formalized interaction by ways of sanctions

Furthermore the European Commission can launch enforcement proceedings against Member States failing to meet the requirements of the Directives (Article 226 TEC), which can include not having transposed or for not having transposed completely or in a correct way.

Proceedings start with a formal letter from the Commission to the Member State outlining why it believes the State has failed to meet its obligations with two months time limit to reply. In case the failure has not been resolved or clarified until then, the Commission delivers a “reasoned opinion” with again two months time to reply. If the State does not reply or does not reply satisfactorily, the Commission can refer the Member State to the European Court of Justice.

Table 7: Interaction Procedures Sanctions

Interaction Procedures Sanctions



If the court finds that the Member State has failed to fulfil its obligations, the State must take the necessary measures to comply with the Court's judgement. It is then again task of the European Commission to consider if the obligations have been fulfilled or not, in the latter case there is the opportunity for the state to submit its observations, and then for the Commission to issue a reasoned opinion pointing out the deficits in complying with a limited amount of time to fit in their measures in order to comply properly. If it still fails to comply the Commission can bring the Member State to the European Court of Justice again and specify the amount of penalty it should pay. The Court then decides on compliance or not and can include a lump sum or a penalty payment in its judgement.

In July 2004, five Member States (Austria, Finland, Germany, Greece and Luxembourg) were referred to the European Court of Justice for having failed to fulfil its obligation under the Racial Equality Directive in time.⁴⁶⁴ Previous stages of the infringement procedures had not brought a solution. With respect to the Employment Equality Directive again Austria, Finland, Germany and Luxembourg were referred to the ECJ.⁴⁶⁵ The Commission also initiated infringement procedures against Belgium, Denmark, Ireland, the Netherlands, Portugal and the UK; in these cases earlier communication with the Commission had solved the matter.

Austria,⁴⁶⁶ Germany,⁴⁶⁷ Finland⁴⁶⁸ and Luxembourg⁴⁶⁹ were condemned by the Court for having failed to adopt the necessary legislation to fully transpose the Racial Equality Directive.⁴⁷⁰ Austria,⁴⁷¹ Germany⁴⁷² and Luxembourg⁴⁷³ were also condemned for not having fulfilled their obligations under the Employment Equality Directive.

The question of (non-)conformity with the directives has entered the formal stages of infringement procedures 'fed' by the work of the European Network of Independent Legal Experts in the Non-Discrimination Field (see above).

⁴⁶⁴ ECJ, *Commission vs. Luxembourg*, C-320/04 (OJ C 228/69, 11.09.2004); *Commission vs. Greece*, C-326/04 (OJ C 239/11, 25.09.2004), *Commission vs. Finland*, C-327/04 (OJ C 239/12, 25.09.2004); *Commission vs. Germany*, C-329/04 (OJ C 239/13, 25.09.2004); *Commission vs. Austria*, C-335/04 (OJ C 239/15, 25.09.2004).

⁴⁶⁵ ECJ, *Commission vs. Germany*, C-43/05 (OJ C 82/14, 02.04.2005); *Commission vs. Luxemburg*, C-70/05 (OJ C 83/23, 02.04.2005); *Commission vs. Finland*, C-99/05 (OJ C 93/21, 16.04.2005); *Commission vs. Austria*, C-133/05 (OJ C 143/05, 11.06.2005).

⁴⁶⁶ ECJ, *Commission vs. Austria*, C-335/04, 04.05.2005 (OJ C 171/5, 09.07.2005).

⁴⁶⁷ ECJ, *Commission vs. Germany*, C-329/04, 28.04.2005 (OJ C 143/13, 11.06.2005).

⁴⁶⁸ ECJ, *Commission vs. Finland*, C-327/04, 24.02.2005 (OJ C 93/3, 16.04.2005).

⁴⁶⁹ ECJ, *Commission vs. Luxembourg*, C-320/04, 24.02.2005 (OJ C 93/2, 16.04.2005).

⁴⁷⁰ Greece adopted the respective legislation shortly after the Commission instigated the infringement procedure. Hence, the Commission withdrew the procedure from the Court.

⁴⁷¹ ECJ, *Commission vs. Austria*, C-133/05, 23.02.2006 (ECR [2006] I-00036).

⁴⁷² ECJ, *Commission vs. Germany*, C-43/05, 23.02.2006 (ECR [2006] I-00033).

⁴⁷³ ECJ, *Commission vs. Luxembourg*, C-70/05, 20.10.2005 (OJ C 315/7, 10.12.2005).

3.2.4. Interaction and Mutual Learning:

The creation of the pool of experts was a consequence of realising that centralised monitoring of implementation did not work only with relying on what Member States representatives reported back.

The European Commission learnt about the different legal traditions in the Member States and the difficulties in implementation not only from a formal legistic but also from a very practically orientated point of view taking into account the national legal framework and the different structures of the procedural systems in the Member States. The Member States learnt that they really had to implement or to find good arguments, they changed their attitude towards legal experts and NGOs in more and more acknowledging their expertise and the fact that their opinion is of relevance. The first evaluation of the Community Action Programme assessed the communication between the different groups of experts (especially between members of the legal expert network and civil servants representing the national Member States) was considered as low, which led to amendments in the structure of the network, see chapter 3.2.2. Monitoring the implementation. The Legal Experts learnt from each other, about the different traditions, about what works elsewhere and what does not, and even if they did not create a network they established contacts they used of other projects.

There is permanent mutual exchange of different views on the status of implementation and this already led to changes in approach of member states towards the need for effective legislation.

3.3. Community Action Programme

The Community Action Programme to Combat Discrimination was running from 2001-2006. It had its legal basis in a Decision of the Council of the European Union⁴⁷⁴ passed in 2000 and was endowed with a budget of 100 million EUR. The programme was designed to support the implementation of the anti-discrimination directives this with a special emphasis on the involvement of discriminated groups and on strengthening organisations in the anti-discrimination field.

⁴⁷⁴ Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0750:EN:HTML>, (02.09.2008).

An external Programme Committee made up of government representatives of the EU Member States was assisting the implementation.

3.3.1. Policy aims

The Community Action Programme had three core policy objectives to follow, made up of the improvement of understanding issues relating to discrimination through *analysis and evaluation*, *capacity building* for organisations in combating and preventing discrimination and *awareness raising* on discrimination. The policy aims the Programme set its' focus in its' annual activities were changing in line with the general policy objectives of European Anti-Discrimination policies described above. They ranged from fighting discrimination, onto awareness raising on the benefits of diversity, providing information on European legislation, improving the understanding of discrimination, promoting equal opportunities and putting equality into practise.

3.3.2. Implementation of Policies

The activities that were undertaken directly by the European Commission as well as by other European and national institutions, funded by ways of the Community Action Programme Combat Discrimination are nearly countless. They represent a variety of different approaches towards the policy field and mirror the very many different ways on the way to more equality. We will limit our analysis on some selected examples to show the process the policy field has undergone for the time of the programme period.

Policy tools of the Community Action Programme to fight Discrimination can be summed up as follows:

- Funding of NGO Networks
- EU Information Campaign
- Funding of trainings
- Analysis and Evaluation
- Annual Conferences
- National Awareness Raising Projects

All these policy tools were carried out over the whole period of the action programme in place. It was the policy objectives that changed within the period, which can be followed by looking at the documentation of Calls for tenders on the Website of the (now-called) DG Employment, Social Affairs & Equal Opportunities. We tried to follow these developments by having a closer look at some selected activities and events.

3.3.2.1. *Funding of NGO Networks*

One of the first and most important tasks of the Community Action Programme was the consolidation of European level Umbrella NGOs devoted to the fights against discrimination. All European level Umbrella NGOs we were describing above as crucial actors of European Union anti-discrimination policies have been funded via and according to the rules of the Community Action Programme from the very beginning.

3.3.2.2. *EU Information Campaign*

The Pan-European information campaign “For Diversity. Against Discrimination.” was launched in 2003 and as integral part of the Community Action Programme was aiming at informing people about their rights and obligations and at promoting the positive benefits of diversity⁴⁷⁵. The idea was to involve as many stake holders as possible to provide dialogue and to reach potential victims of discrimination as well as to raise awareness on where discrimination starts and where it ends. People should gain interest in obtaining more knowledge on their rights and obligations. A public relations agency (Media Consulta, Berlin) was contracted to carry out a European-wide campaign in cooperation with national institutions including ministries, trade unions, NGOs, employer associations and equality bodies. “National Working Groups” were established with the aim to tailor the campaign’s activities for the country specific needs. What had not been considered in designing and budgeting the campaign was, that audiences indeed were very different according to these national actors. The first campaign brochures had been presented to the national working groups at a very late state of development and in a variety of countries were not considered as adequate for carrying the message they should. The campaigners had to realise that they

⁴⁷⁵ Media Consulta (2008): *The “For Diversity. Against Discrimination.” information campaign. 5 years of raising awareness in the European Union.* Media Consulta/European Commission: Brussels. Download: <http://www.stop-discrimination.info/29.0.html>, (02.09.2008).

needed the expertise concerning the content of the campaign provided by NGOs – and there was the next aspect that had not been considered: there was no budget for expertise in content.

The campaign used a variety of channels to bring its message to the public as well as to selected target groups like the business, the media and young people. A branding for the twofold message “Against Discrimination” and “For Diversity” was created, logos and key messages were developed and translated into all European languages. A Truck Tour was crossing all Europe, which provided a platform for discussion, exchange of information, workshops etc. according to the place where it stopped. T-Shirts were designed and distributed to athletes, who could then spread the message to “run for diversity.” Competitions for posters and photos inspired by the concept of ‘breaking stereotypes’ and for spots on “diversity” aimed at reaching young people. 500 photos and 750 posters were submitted, the award winning products being published in the Internet, on post cards, calendars and on MTV. Targeting the press was another important element of the campaign being aware of its’ key role as multiplier and opinion maker. Diversity Ambassadors were providing the campaign with popular faces and a yearly journalist award was launched to draw attention on articles about discrimination and diversity. The campaign furthermore was caring about the design and publication of various brochures, leaflets, posters, calendars, tool boxes and other “give-aways” to be distributed at conferences, workshops etc. carried out in the framework of the Community Action Programme with the aim to reach the common public. And last but not least the campaign has been running the ‘stop discrimination’ website⁴⁷⁶ providing information on the European Legislation, including a basic glossary of the key terms, information on the campaign’s activities and events, publications on various topics for different target groups, a ‘stop-discrimination guide’ and national sites with country specific information and events.

3.3.2.3. *Funding of Awareness Raising and Training Seminars*

The fights against discrimination in daily practise
European Law Academy, Trier

⁴⁷⁶ www.stop-discrimination.info, (02.09.2008).

The European Law Academy in Trier has been organizing seminars on anti-discrimination legislation funded by the Community Action Programme for several years⁴⁷⁷. The seminars over the years have tackled the basics on the anti-discrimination directives, its scope and content, and all the core concepts entailed in the Directives. The aims of the seminars that are addressing legal practitioners all over Europe (here the target group changed from addressing this groups ‘exclusively’ towards ‘primarily’) developed from presenting the basic topics essential to the understanding of the directives to presenting and reviewing current and new issues onto more focus on giving practical tools to practitioners. This ranged from the transposition in the Member States to procedural issues onto prevention and enforcement.

More recent seminars were titled ‘The fights against discrimination in daily practise,’ or ‘Litigating Community Law’ and more and more embodied perspectives like the role of NGOs in combating discrimination.

Towards Effective Test Case Strategies

Summer School on Race, Maastricht University

A Summer School on race was organised by the Faculty of Law at Maastricht University in co-operation with the European Institute of Public Administration (EIPA), Maastricht and the Centre for European Policy Studies (CEPS) in Brussels in 2005.⁴⁷⁸ The Summer School was divided in two parts, with the first part intended to give a general overview on the scope and content of the directives and their practical implementation. The second part was a two day intensive advanced seminar for practitioners already familiar with the content and concepts of the Race Directive and the Employment Equality Directive. The aims were to provide participants with a profound knowledge of the concepts and the working of the Race Directive and the Employment Equality Directive regarding grounds of discrimination related to race, ethnic origin, religion and belief, to stimulate the development of case strategies before national courts in the different Member States and at the European level and to make participants more aware of the practical potential for litigations in the field of Race Discrimination and Discrimination on grounds of Religion and Belief. It was targeted at

⁴⁷⁷ For detailed information on the trainings and seminars organised by the ERA on the topic of anti-discrimination see: http://www.era.int/web/en/html/nodes_main/4_1649_490/4_1087_539/5_1070_66.htm, (15.05.2008).

⁴⁷⁸ <http://www.rechten.unimaas.nl/micalumni/news.htm>, (15.05.2008).

lawyers, legal advisors to NGOs, judges and members of specialized independent Equality Bodies.

An introduction to the Race Directive and the Employment Directive was followed by bringing in an NGO Perspective and the Relevance of Civil Society, Case Studies and Strategies from various European Countries with a comparative approach and a lecture on the specific situation regarding the Roma population.

Empowerment for effective use of AD Legislation

Training Project on Non-Discrimination Law, Interrights⁴⁷⁹

A Training project by Interrights (in cooperation with Helsinki Federation of Human Rights Poland) was targeting barristers, lawyers and trade union representatives in Poland, Lithuania, Latvia and Estonia to empower them to make effective use of European anti-discrimination legislation and to train their professional colleagues. The training sessions aimed at raising awareness on discrimination issues, transferring knowledge on anti-discrimination legislation in its practical implementation, developing (strategic) litigation capacities and developing training capacities. The trainings were very practically orientated and did not stop at transferring knowledge on a theoretical level but left the participants developing concrete litigation procedures with concrete cases (including a Moot Court Exercise). Another interesting part of the training was the train the trainers aspect, enabling participants to train their proper colleagues and to work as multipliers within their professional field.⁴⁸⁰

Strategic Litigation and Capacity Building for NGOs

SOLID project on national litigation strategies to tackle discrimination⁴⁸¹

The SOLID project was designed to support the effective implementation of anti-discrimination legislation in the nation countries and with this aim has organised several training sessions for NGO representatives, lawyers and solicitors from all 25 member states on the topic of strategic litigation. It explicitly aimed at building national and trans-national

⁴⁷⁹ http://europa.eu.int/comm/employment_social/fundamental_rights/policy/capac/prodet2/int_en.htm, (15.05.2008).

⁴⁸⁰ The training concept as well as materials for the trainings sessions were made public after the training project in form of a manual: Interrights/MPG/ERRC (eds.) (2004): *Strategic Litigation of race discrimination in Europe: from principle to practice. A manual on the theory and practice of strategic litigation*. Nottingham. <http://www.migpolgroup.com/multiattachments/2497/DocumentName/litigation.pdf>, (02.09.2008).

⁴⁸¹ For general information on the project see: <http://www.solid-eu.org/>, (02.09.2008).

networks of NGO representatives and lawyers, finding a common understanding of what discrimination as well as strategic litigation means, developing national strategies to combat discrimination as well as developing and strengthening capacities to fight against discrimination strategically. The SOLID trainings went further than many others presented in this research as they did not just stick to the presentation of the content of the directives and their practical implementation but focused intensely on both strategic thinking and action planning.

Reflections about potentials and roles as actors of anti-discrimination policies

Anti-Discrimination and Diversity Trainings

Organised by a consortium of Human European Consultancy (leading organisation), Migration Policy Group (anti-discrimination component) and The International Society for Diversity Management (diversity management component) a new series of anti-discrimination and diversity training activities was conducted in 2007/2008. The anti-discrimination trainings were targeting participants from NGOs and trade unions and aimed at developing participants' knowledge of EU and national anti-discrimination legislation, civil society dialogue and the role they can play within this. The training sessions on diversity management were provided for employers' organisations, business leaders and company representatives, their goals were to raise awareness on the opportunities and challenges of diversity management and to give practical and concrete tools to put diversity management into practice.

3.3.2.4. Analysis and Evaluation

Essential part of the Community Action Programmes activities and one of the drivers in terms of development of its policy objectives was the contracting of research and the publication of studies on a variety of topics.

For the **European anti-discrimination law review** the Network of Independent Legal Experts has been monitoring the implementation of the anti-discrimination directives in the Member States. Their findings were made public by ways of comparative studies, which were supplemented by articles on differing focus topics each year.

Several studies were conducted on upcoming questions of relevance, when the need to conduct research on these very topics became evident by political developments, by reports on gaps in bringing equality into practise etc.

Just as examples we would like to mention a report on Age Discrimination and European Law, published 2005,⁴⁸² a report on the situation of Roma⁴⁸³, looking in particular at policy issues and Roma key areas, such as education, employment and health care, a comparative study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great Britain and the Netherlands,⁴⁸⁴ a compendium of good practices in the workplace, addressing ‘the business case for diversity’⁴⁸⁵ and a study on positive action measures and their role on the way ‘beyond formal equality’⁴⁸⁶.

3.3.2.5. Annual Conferences

In the framework of the Community Action Programme to Combat Discrimination annual conferences were held on different places and on different topics. The titles and the topics of the conferences do show the changing focus of the Commissions policy priorities once again.⁴⁸⁷

The first European Conference on Anti-Discrimination was organised by the Commission on 18/19 October 2001 in Belgium (under Belgian Presidency) with the main aim to **bring together the main actors involved in the fight against discrimination** at the grassroots level. Topics were the horizontal approach of the Action Programme – dealing with all new grounds

⁴⁸² O’Cinneide, Colm (2005): *Age discrimination and European Law*. European Commission: Employment & social affairs, fundamental rights and anti-discrimination.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/05agedis_en.pdf, (02.09.2008).

⁴⁸³ European Commission (2004): *The situation of Roma in an enlarged European Union*. Employment & social affairs, fundamental rights and anti-discrimination.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/roma04_en.pdf, (24.08.2008).

⁴⁸⁴ Simon, Patrick (2004): *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Greta-Britain and the Netherlands*. European Commission: DG for Employment, Social Affairs and Equal Opportunities.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/compstud04_en.pdf, (02.09.2008).

⁴⁸⁵ European Commission (2005): *The Business Case for Diversity. Good Practises in the Workplace*. Produced by Focus Consultancy/The Conference Board. Office for Official Publications of the European Communities: Luxembourg. http://ec.europa.eu/employment_social/fundamental_rights/pdf/events/busicase_en.pdf, (02.09.2008).

⁴⁸⁶ De Vos, Marc (2007): *Beyond Formal Equality: Positive Action under Directives 200/43/EC and 2000/78/EC*. European Commission: Directorate General Social Affairs and Equal Opportunities.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/bfe07_en.pdf, (02.09.2008).

⁴⁸⁷ For an overview on the key events carried though in the framework of the Community Action Programme to Combat Discrimination see: http://ec.europa.eu/employment_social/fundamental_rights/events/events_en.htm, (02.09.2008).

at once, presentations of projects funded by the first year period, future priorities in terms of analysing discrimination and the key elements required for the establishment of effective equality bodies in the Member States.

The second Conference was hosted by the Danish Presidency on 14/15 November 2002 and as a main topic had the **implementation of the anti-discrimination directives into national law**.

2003 faced an Italian Presidency Conference on Anti-Discrimination: **'Fighting Discrimination: From Theory to Practise'** an Italian Presidency Conference on Disability and a Conference on **Civil Dialogue and Social Policy in an Enlarged European Union** in Hungary.

The 2004 Conference took place in Prague (the recent enlargement from 15 to 25 Programme participating countries made an Eastern European place adequate) on 5/6 July and was **'on equal rights in an enlarged European Union.'** An Irish Presidency Conference was dedicated to the topic of **'Implementing Equality: Planned and Systematic Approaches to Policy Development.'** Furthermore enlargement had brought discrimination of the Roma in the focus of Community Policies and a conference on **Roma in an enlarged European Union** took place in Belgium.

In 2005 the Annual Conference of the Action Programme was dedicated to the **Access to Justice**. There was a variety of conferences taking place in this year, to mention explicitly the British Presidency Conference: **'The Business Case for Diversity - Good practices at the Workplace,'** which brought together people from business and from NGOs, from trade unions and from consultancies to present their projects and strategies to implement Diversity Management approaches in the workplace.

The 2006 Annual Conference took up the question of **'Anti-Discrimination & Diversity Training: Good Practices & Future Needs'** taking into account that unclarities about what anti-discrimination trainings should focus on – be it capacity building on legal issues and it's practical implementations and/or awareness raising on discrimination and prejudice and what was the difference according to Diversity Trainings. Furthermore the Conference was about the role of training in anti-discrimination policies as such. A conference on the **'Benefits of**

Diversity and Inclusion for Small Businesses' in Limassol, Cyprus reflects the problems the Commission was facing in attracting small and medium sized enterprises for the ideas of diversity and inclusion. Here again the key role of training was acknowledged by running awareness raising training sessions as part of the conference programme. And as 2006 was the last year of the Action Programme a closing conference took place in Brussels in November.

The Conference machine went on with the 2007 Year of Equal Opportunities for all and with the new Community Action Programme track, PROGREE. Aside of a launching and a closing conference, the European Commission Conference on **'Equal Opportunities for all: What role for positive action?'** was held in Rome in April bearing the core policy objectives of 2007 in its title.

3.3.2.6. National Awareness Raising Projects

The awareness raising activities funded by the Community Action Programme were completed by a variety of national awareness raising projects. National Agencies (in some cases public authorities or ministries in other national NGOs) were entitled to propose projects for funding and did care about the national co-financing. Activities included trainings for various target groups, the organisation of events and conferences, national truck tours etc. Due to the great number of projects an analysis of their impact and of the policies implemented in their development would go beyond the scope of this research. Generally it has to be stated that the quality of the initiatives was very different and did improve during the run of the funding period starting from different levels. Involvement of civil society organisations was generally high, which made the national awareness raising projects to the same with the closest link to people inclined to discrimination and to people in charge with discrimination cases.

3.3.3. Interaction and Mutual Learning

By type of programme the Community Action Programme did involve a high variety of stakeholders and a very high number of people, be it legal experts on anti-discrimination, representatives of equality bodies, public administrators and judges responsible for discrimination issues, diversity consultants, NGO activists, public relation agencies, etc. Interaction was very vivid made up of cooperation within single projects and trainings,

evaluation and feed-back reports of all the single projects and informal interaction during the annual conferences, where people from all stake holders came together, talking about future challenges and brainstorming about the upcoming topics for the next year funding period.

Official evaluation was conducted twice by Earnest and Young.⁴⁸⁸ The first evaluation report⁴⁸⁹ highlighted particularly the mobilisation of the civil society sector by the funding of umbrella networks, increasing NGO capacities in the field of anti-discrimination. Still, the difficulties to analyse quality and impact of networking activities, because of the lack of a ‘result-based culture’⁴⁹⁰, and the reluctance of some networks to amend their work programmes in order to comply with Community requirements were stressed as problematic (for the point of view of the networks see chapter 1.5.7. Reflections on the Role of NGOs). Reaching key players like judges and legal practitioners, transferring information on the concepts of discrimination and mobilisation of member States to organise national awareness raising activities were considered as less successful. This analysis is valid for the first phase of the programme period from 2001-2003, in which high amounts of funding budgets simply were not used by the Member States due to a lack of interest and of knowledge on how to use the money.

According to the second report⁴⁹¹ published in 2006 the awareness of key players could be strengthened and the Programme’s visibility could be improved gradually. A key role in terms of awareness raising was ascribed to European conferences and seminars (see above), assembling targeted players from all Member States, where exchange of best practise and tools developed within the various projects took place and discussion of the main players in the fights against discrimination was promoted. Furthermore a high potential of trainings and trans-national activities to improve the homogenization of practise in combating discrimination was identified.

⁴⁸⁸ For information on evaluation of EC anti-discrimination policies see:

http://ec.europa.eu/employment_social/evaluation/inclusive_en.html, (02.09.2008).

⁴⁸⁹ Ernst & Young (2004): *Ongoing evaluation of the Community Action Programme to combat discrimination (2001 - 2006) – 2004 synthesis report*. European Commission Government Services.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/eval/grepexsum_en.pdf, (02.09.2008) and

http://ec.europa.eu/employment_social/fundamental_rights/pdf/eval/casestudta_en.pdf, (02.09.2008).

⁴⁹⁰ Ernst & Young (2004): *Ongoing evaluation of the Community Action Programme to combat discrimination (2001 - 2006) – 2004 synthesis report*. European Commission Government Services, p. 5.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/eval/grepexsum_en.pdf, (02.09.2008) and

http://ec.europa.eu/employment_social/fundamental_rights/pdf/eval/casestudta_en.pdf, (02.09.2008).

⁴⁹¹ Ernst & Young (2006): *2005 Evaluation of the Community Action programme to Combat Discrimination – Executive Summary*. European Commission Government Services.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/eval/eval05_en.pdf, (02.09.2008).

General remarks:

Strands of the Programme that involved all relevant stake holders with the same level of experience and appreciation (like the conferences and in the second phase some of the training projects) were that ones that worked best. Their influence can be traced in having a look at the setting of policy priorities (see chapter 3.1. The Development of Policy Objectives). Projects that were carried out more centralised or left to the Member States administrations (like the awareness raising activities and the information campaign) were less successful even if they improved in the run of the Programme period. And even here, improvements in most cases were caused by the increased acknowledgement of e.g. NGO expertise and the need to involve all stake holders. Mutual learning had been omnipresent with the Programme period, even if a certain reluctance to learn from each other was very present at the start. The very nature of funding does include a unequal distribution of power of course, interaction, however improved the readiness to change attitudes and to rethink given concepts and contributed to levelling hierarchies between the key actors.

3.4. Recent Developments

3.4.1. Draft Proposal for new Horizontal Directive

The Racial Equality Directive and the Employment Equality Directive had been implemented to a high extent in most European Member States including the new member states in 2004 – at least formally. Aside of the acknowledgement that the practical implementation and the elimination of structural barriers on the way to equality needed more efforts, it had become evident that the lack of protection for the grounds of religion, belief, disability, age or sexual orientation taking place outside the labour market should be “repaired.”

In May 2004 the Commission began a process of consultation on future policy priorities with the publication of a Green Paper on equality and non-discrimination in an enlarged EU⁴⁹², which was followed by a communication setting out proposals for action, including the organisation of e European Year of Equal Opportunities in 2007.

⁴⁹² European Commission (2004): *Equality and non-discrimination in an enlarged European Union. Green Paper*. Office for Official Publications of the European Communities: Luxembourg.
http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/grpap04_en.pdf, (02.09.2008).

The publication of the Green Paper initiated a consultation process on further steps that should be taken to extend and to strengthen protection against discrimination and which was directed towards Member States, national, regional and local authorities, equality bodies, NGOs, social partners, experts and individual members of the public. There was a high level of participation in the consultation of Germany and other large member states and a low level of interest from the new member states. Furthermore the high rate of response from national and European NGOs was remarkable. In total a number of 88% were suggesting an enforcement of EU efforts to combat discrimination, while 49 % at the time of the 2004 consultation thought that the Directives had very limited or no impact.⁴⁹³

The main results of some 1443 responses to an online questionnaire and 150 written contributions were presented at the “Equality in a future Europe” conference in the Netherlands in November 2004.

One of the main conclusions of the consultation and the conference⁴⁹⁴ was that there was a strong demand to increase protection on all grounds to the level under the Racial Equality Directive without losing attention for the specificities of every single ground.⁴⁹⁵ This was stressed especially by NGOs and Equality Authority Bodies - and was on the other hand considered as premature by several national authorities. In his concluding remarks the General Rapporteur of the Conference Alex Geert Castermans, cited the Irish Equality Authority Representative, Niall Crowley, having put forward:

⁴⁹³ EU Presidency Conference, Equality in a future Europe, Scheveningen (The Hague) – 22 & 23 November 2004, Conclusions of the General Rapporteur, http://ec.europa.eu/employment_social/fundamental_rights/pdf/past/nl04concl.pdf, (02.09.2008).

⁴⁹⁴ EU Presidency Conference, Equality in a future Europe, Scheveningen (The Hague) – 22 & 23 November 2004, Conclusions of the General Rapporteur, http://ec.europa.eu/employment_social/fundamental_rights/pdf/past/nl04concl.pdf, (02.09.2008).

⁴⁹⁵ Other conclusions of the consultation were amongst other:

- The EU should increase efforts to combat discrimination following enlargement (according to 88% of respondents).
- The need for specific action for Roma in all Member States.
- The need for stepping up EU fight against prejudice and discrimination on grounds of sexual orientation.
- The need for further efforts to ensure practical implementation.
- The need for increased awareness raising.
- The need for improved data collection considering the protection of personal privacy.
- The need for more consideration on multiple discrimination.
- Non-discrimination and equality should be mainstreamed across all EU policies.
- The involvement of all stakeholders in the fight against discrimination.

All of these recommendations were implemented in the upcoming years.

See: European Commission (2005): *Equality and non-discrimination. Annual Report 2005*. Office for Official Publications of the European Communities: Luxembourg. http://ec.europa.eu/employment_social/publications/2005/keam05001_en.pdf, (02.09.2008).

Why not apply the provisions of reasonable accommodation of people with disabilities to all grounds covered by the directive? Why not apply the provisions to gender mainstreaming to all grounds? Why not make the new approach on the definition of discrimination, made by the Advisory Committee on Equal Opportunities between Women and Men, also applicable to the other grounds?

Pressure by some European Member States who feared the costs of extending protection to all grounds and the need to “cross” the subsidiarity clause hurdles built barriers on the way to a comprehensive European Equality legislation and implied intensive efforts within the formal impact assessment procedures of the Directives 43/2000 and 78/2000.

A mapping study giving information on national measures to combat discrimination in the field outside employment (including goods and services, housing, social protection and education) and on the impact of existing anti-discrimination legislation⁴⁹⁶ had been ordered in 2005.

In April 2007 the European Commission in its Annual Policy Strategy for 2008⁴⁹⁷ stated that it planned to "... propose new initiatives designed to prevent and combat discrimination outside the labour market – based on gender, religion, belief, disability, age or sexual orientation".

In addition, public online consultations⁴⁹⁸ and target consultations with civil society organisations and social partners⁴⁹⁹ were carried out. The public consultations aiming at collecting public opinion on possible new initiatives in the field of anti-discrimination was carried out between April and November 2007. It generated more than 5000 answers by individuals (4881) as well as organisations (497). Among the individuals, around 90% of the respondents opted for the levelling up of the scope of protection for all discrimination grounds

⁴⁹⁶ Information given by an EC official in an interview, Brussels, (24.10.2007). The European Human Consultancy has been charged with the mapping study in 2005. By the time of writing this Study (spring 2008), the mapping study was not published, yet.

⁴⁹⁷ Commission of the European Union (2007): Communication from the Commission to the Council, the European Parliament and Social Committee and the Committee of the Regions, Annual Policy Strategy for 2008, COM(2007) 65 final, p. 9. http://ec.europa.eu/atwork/synthesis/doc/aps_2008_en.pdf, (02.09.2008).

⁴⁹⁸ See: Commission homepage, Closed consultations, Discrimination – does it matter?, http://ec.europa.eu/employment_social/consultation_en.html, (29.03.2008).

⁴⁹⁹ Meetings with NGOs and Social Partners took place in October 2007.

(to the fields outside employment),⁵⁰⁰ among the organisations between 75 and 80% (depending on the specific area: education, social protection and health 80%; housing, goods and services 75%).⁵⁰¹ The majority of both groups supported the option of legislative measures, as a means to best achieve the goal.⁵⁰²

The NGOs invited for the target group consultation meeting in October 2007 were very well prepared. ILGA,⁵⁰³ ENAR (for religion)⁵⁰⁴ and AGE⁵⁰⁵ took the opportunity to move on the debate on filling the gaps in protection under European anti-discrimination legislation and on developing strategies on how to take further action to reach more equality. They presented cases, which indicated the need for actions to provide for protection against discrimination also outside the scope of employment and they drafted proposals for ground specific Directives. In terms of strategy however all three are going for a single directive for all grounds - on the basis that it takes on board the specifications for each single ground.⁵⁰⁶

Unlike the organisations mentioned above, which lobby for a horizontal directive – although rather based on rational reasons – the European Disability Forum (EDF)⁵⁰⁷ argued for a separate disability directive. As has been commented by an EC official this demand could make sense from the point of view of EDF as there is common agreement that discrimination on grounds of disability is frowned upon. Therefore, although financial burdens might be great, the chances for a separate disability directive to pass the College of the Commissioners and the Council of Ministers were high. But, as has been pointed out by the EC official, passing a separate directive on disability and not a horizontal one would close the possibilities to extend the scope of protection for the other grounds for a long time.⁵⁰⁸ The social partners, in contrast, were less prepared and were rather less supportive with regard to further EU

⁵⁰⁰ Response statistics for Discrimination – Does it matter?, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/news/ripc_en.pdf, (29.03.2008).

⁵⁰¹ Response statistics for Discrimination – Does it matter?, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/news/ropc_en.pdf, (29.03.2008).

⁵⁰² As pointed out by an EC official in an interview, one has to be very cautious about the representative nature of public consultations, but they are one element influencing decision making within the EU. Brussels, (23.10.2007).

⁵⁰³ International Lesbian and Gay Association, see chapter 1.5.3. European NGOs – ILGA - Sexual Orientation
⁵⁰⁴ Commission Consultation concerning a possible new initiative to prevent and combat discrimination outside employment. Response of the European Network Against Racism (ENAR) October 2007.

http://cms.horus.be/files/99935/MediaArchive/pdf/oct07_antidiscrimination_measures.pdf, (02.09.2008).

European Network Against Racism, see chapter 1.5.2. European NGOs – ENAR – Race and Ethnic Origin.

⁵⁰⁵ European Platform on Age, see chapter 1.5.4. European NGOs – AGE.

⁵⁰⁶ Information provided by interviews with NGO-representatives.

⁵⁰⁷ European Disability Forum, see chapter 1.5.1. European NGOs – European Disability Forum.

⁵⁰⁸ Interview with an EC official, Brussels (23.10.2007).

action in this field (except the European Trade Union Congress, ETUC) arguing that the existing anti-discrimination legislation should at first be efficiently implemented.⁵⁰⁹

3.4.1.1. *1million4disability campaign*

On 23 January the European Disability Forum launched a campaign⁵¹⁰ to mobilize people in the European Union to make use of the new provisions on participatory democracy of the draft Constitutional Treaty⁵¹¹, which stipulates that a petition with at least one million signatures of European Union nationals obtained from a number of member states may be submitted to the European Commission with the invitation to take legislative initiative, for a stronger anti-discrimination legislation for people with disabilities in Europe.

The million was completed after 9 months and the petition was posted to the Commission on 22 November 2007.

EDF delivered a draft directive for a vertical directive on disability rights in December, which was based on the draft text they had drafted in 2003. It was adapted to the current situation, including the developments in approach, taking into account the UN Convention on Disability, which in some points goes further than the EU regulations. EDF is aware of the fact that the European Commission is in favour of a horizontal directive, which aims at levelling up all the grounds but non-withstanding wants to lobby for a vertical directive for disability. It plays a double strategy, supporting NGOs like ILGA and AGE in their aims to reach new anti-discrimination legislation concerning their grounds in the framework of the Social Platform and on the other hand themselves aiming at a specific directive on disability. In their opinion a horizontal directive would run the risk of levelling down and limiting the level of protection to a minimum. There is awareness that fighting together generates more political pressure, but still fighting for one single ground is important to keep the level of protection wanted.

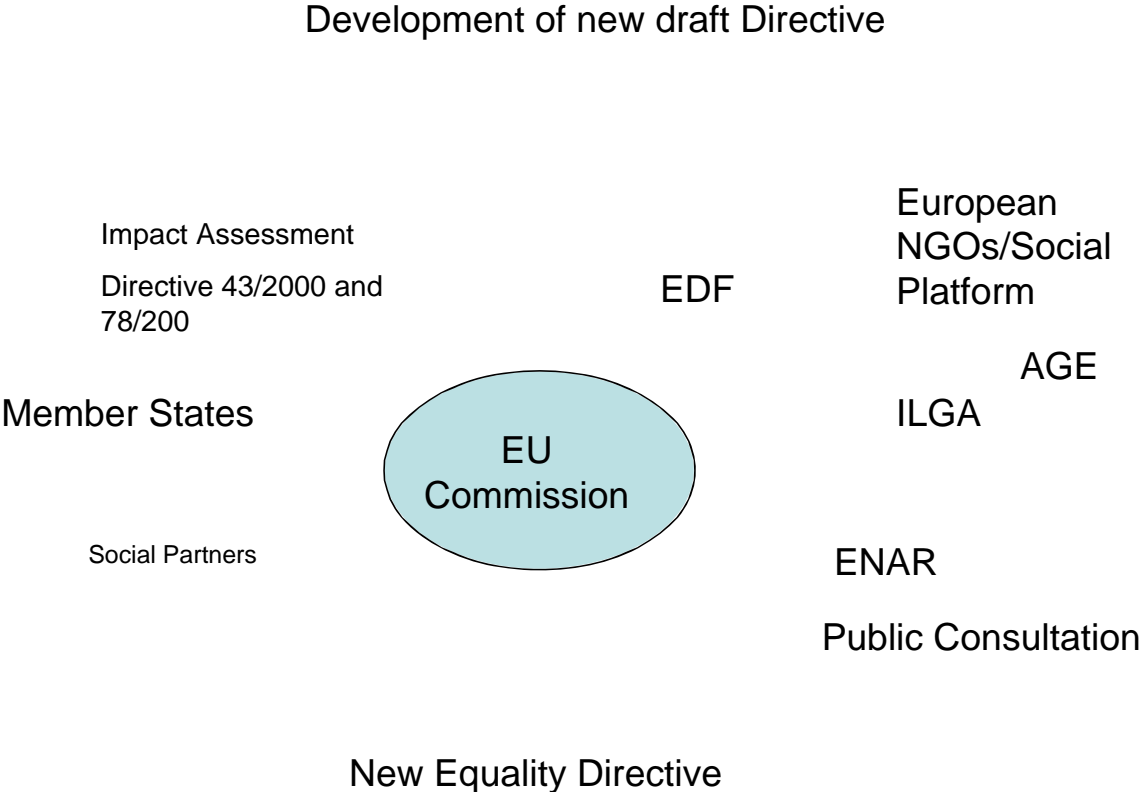
⁵⁰⁹ Present at the meeting with Social Partners were among others ETUC, UEAPME and BusinessEurope, Information given by an EC official during an interview.

⁵¹⁰ The campaign website not only intended to reach the aim of the one million signatures but to reach awareness on the need to act against discrimination on grounds of disability as well and provides information on how to adopt a disability attitude. <http://www.1million4disability.eu/>, (02.09.2008).

⁵¹¹ Now agreed on in the Treaty of Lissabon in Article 8b(4) citing: Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0010:0041:EN:PDF>, (10.01.2008).

The European Commission in its Work Programme for 2008, launched in October 2007 is foreseeing a proposal for a new directive to level up the scope of protection for all discrimination grounds contained in Art 13 TEC; i.e. to go beyond employment and include areas such as social protection, education, access to and supply with goods and services and housing.

Table 8: Development of the new Directive on Equal Treatment beyond the workplace



The open question is, if this proposal will be including a levelling up for all grounds with a protection restricted to the labour market and how the scope of the draft proposal will look like on the one hand, and if the Commission’s proposal will be agreed on by the Council on the other hand. Concern is given to the fact that adoption of legislative measures in an enlarged Europe with 27 Member States became even more difficult since 2000, especially as long as actions in the field of non-discrimination still require unanimity.

At the time of this study rumours tell us that the Commission's proposal might be limited to disability as the Commission can't reach the political will in the Member States to agree on stronger common legislation for the other grounds. Should this become truth, Art 13 para 2 could serve as a useful tool for progress in this field allowing for qualified majority voting within the Council and the stronger involvement of the European Parliament when adopting "incentive measures" to animate Member States in taking measures to achieve the objective laid down in Art 13 para 1, i.e. the combat against discrimination. Furthermore, limited budgetary freedoms available to the Commission – as has already been practised by it – provides for opportunities to proceed forward with other means, such as the support and empowering of NGOs, certain projects or the commissioning of studies and reports. This way would also open the possibility to extend the protection to all the grounds contained in Art 21 EU Fundamental Rights Charter,⁵¹² which means coverage of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation and 'within the scope of application of the treaty' nationality.

3.4.2. Integrating the topics of Immigration, Integration, Anti-Discrimination, social inclusion and poverty reduction,

Anti-Discrimination policies had been limited to prohibiting discrimination as laid down in the directives and setting up policy initiatives to raise awareness and to show the benefits of non-discrimination and of diversity in society and for the business world since the inclusion of Article 13 into the treaties. Aspects founded in immigration policy and its consequences were neglected and left to other fora as a matter of EU competences, which had been subject to criticism especially by the NGO community for years⁵¹³.

The European Union extension process, European societies struggling with population changes and not the least the findings within European funded projects on aiming at combating discrimination themselves made clear that discrimination in its structural

⁵¹²Charter of Fundamental Rights of the European Union, Art 21, Non-Discrimination:

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

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited. http://www.europarl.europa.eu/comparl/libe/elsj/charter/art21/default_en.htm, (02.09.2008).

⁵¹³ Interview with Brussels based NGO-representative.

dimension is too much connected to the topics of social exclusion and poverty to keep this social dimension out of the debate and of policy action.

In a 2006 Communication⁵¹⁴ the European Commission committed itself to strengthen its efforts to ‘promote the active inclusion of the people furthest from the labour market’ acknowledging the risks exclusion from equal access to the labour market do entail for societies and what loss the “waste” of the important resource human capital does mean.

Social protection as a matter of EU policies is not new, what is new is the more prominent focus on exclusion/inclusion and on the relevance of discrimination for unequal access to the labour market, to education and to services provided to the public. It is the necessity of mainstreaming anti-discrimination in other policies – a long standing aim of anti-discrimination organisations – that is acknowledged and implemented partially.

This is strengthened even more within the renewed social agenda that was communicated in July 2008⁵¹⁵ and that clearly takes reference to the challenges changes in society are imposing for the European Member States and that entails a commitment to mainstreaming equality of opportunities and solidarity. In its communication the Commission admits its limited responsibilities and resources in social policies and refers to the unique potential of developing common solutions and strategies for whole Europe stressing the importance of interaction of various stakeholders. The core goals of creating opportunities, providing access and demonstrating solidarity are to be aimed at by a bundle of policy tools that inter alia and explicitly should be composed by EU legislation (prohibiting discrimination outside the workplace), social dialogue, cooperation between Member States (reinforcing open method of cooperation in the area of social protection and social inclusion), EU funding (PROGRESS), involvement of civil society and ‘ensuring that all EU policies promote opportunities, access and solidarity’. This list comprises all the experience that had been made in 10 years of anti-discrimination policies and opens the routine interaction framework to the challenges of the OMC.

⁵¹⁴ Commission of the European Communities (2006): Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Concerning a consultation on action at EU level to promote the active inclusion of the people furthest from the labour market, Brussels, 8.2.2006.

http://ec.europa.eu/employment_social/social_inclusion/docs/com_2006_0044_f_acte_en.pdf, (02.09.2008).

⁵¹⁵ Commission of the European Communities (2008): Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Renewed social agenda: Opportunities, access and solidarity in 21st century Europe, COM(2008) 0412 final. <http://ec.europa.eu/social/BlobServlet?docId=453&langId=en>, (02.09.2008).

The so-called Open Method of Coordination was incorporated in the European Union framework of policy making by the Treaty of Nice signed in February 2001 with a specific reference to anti-discrimination introducing a new paragraph 2 in Article 13 TEC.⁵¹⁶ The OMC is applied in fields where the EU has no legislative competence but some kind of common approach is agreed upon to be necessary. (see chapter 2.3. The adoption of the open method of co-ordination).

With the re-launch of the DG for Employment, Social Affairs and Equal Opportunities' website⁵¹⁷ in summer 2008, the new agenda is presented in a much more comprehensive way than it was before, when anti-discrimination had its own site. Focus of interest that is served by now are the topics of Employment, Pensions, Discrimination, Poverty, Safe and healthy workplaces, Mobility, Equal opportunities for all, Healthcare, Social Services and EU Funding.

In terms of policy instruments the launch of the PROGRESS⁵¹⁸ programme might impose the first challenges for stakeholders of the changed approach. It was launched for the period 2007-2013 and aims at reducing poverty and social exclusion and promoting inclusion and non-discrimination. It succeeds the Community Action Programme to Combat Discrimination but explicitly goes beyond that in terms of scope and target groups. It continues to fund the European Umbrella Networks as well as national and European projects aiming at combating discrimination and promoting the benefits of diversity but it extends the focus on the topics of inclusion and poverty reduction. And this connexion might be crucial in terms of access to information and to one's rights for people facing barriers on grounds of discriminatory structures in society. The Programme incorporates the experience made within its predecessors and sets a focus on mutual learning and exchange of experience as a motor of change. Furthermore it aims at strengthening the willingness of Member States to use the potentials of the OMC.

⁵¹⁶ Treaty establishing the European Community, Article 13:

2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html#anArt14, (02.09.2008).

⁵¹⁷ DG for Employment, Social Affairs and Equal Opportunities <http://ec.europa.eu/social/home.jsp?langId=en>, (02.09.2008).

⁵¹⁸ Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress. http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_315/l_31520061115en00010008.pdf, (02.09.2008).

These policy developments were necessary in terms of developing coherent strategies in combating discrimination and exclusion. They will change the process of policy-making and governance however as Community competence is not available for all areas of social policies. The use of OMC procedures will have to play a greater role for anti-discrimination policies in the future. This brings more flexibility on the one hand, but less binding rules, promoters of anti-discrimination policies can rely on. And it will change the scene of interaction between stakeholders and the way of decision making. European Umbrella NGOs, who had been lobbying for topics “outside” of the scope of the AD-Directives before (see chapter 2.2.2.4. Role of NGOs in implementation Procedures – Legislation), have reacted to these developments and do strengthen their efforts to gain a more important role in OMC procedures as well. This via involvement in the Social Platform of NGOs and by strengthening the capacities of their members under changing circumstances. ENAR organised a seminar on „Mainstreaming anti-racism in social inclusion: Engaging with the National Action Plans on Strategies for Social Protection and Social Inclusion under the EU Lisbon strategy OMC“ in October 2007. AGE published a „Toolkit to improve civil dialogue in the Open Method of Coordination on Social Protection and Social Inclusion“ clearly indicating what national NGOs can contribute to National Strategy reports that are prepared by national governments as part of the OMC on SPSI.

Ten years of building up a governance framework for the development and implementation of policy strategies specifically for anti-discrimination issues has strengthened the status of civil society stakeholders, has contributed to their acknowledgement as experts and has levelled the hierarchies between the various stakeholders. This strength as well as the lessons learnt regarding the importance of mutual learning and the commitment to a process based approach that are incorporated in the recent EU documents do build a strong basis for building up new structures of interaction and of learning within OMC procedures. Still, what remains is the risk of levelling of the policy field with the lack of binding obligations for Member States and the less institutionalised role of non-state actors.

What had worked well in terms of reflectivity and mutual learning was very much due to the interaction between the European Commission, the European Parliament and Civil Society Organisations. Member States’ role was characterized by above all casualty, taking up what happened in single states either to give impulses for improvement of European anti-discrimination policies or to pace down the process.

Balancing the interests of single Member States in the very emotional field of social inclusion, immigration and anti-discrimination and the need to develop a comprehensive Europe wide policy will be a big challenge for the years to come. The outcomes of the mid-term review of the Lisbon Strategy on growth and employment⁵¹⁹ in spring 2005 revealed important shortcomings of the OMC. According to the mid-term reviews' findings, the Member States refused to share information, refused to name and shame peers, both core mechanisms that should guarantee enforcement of policy strategies agreed on. The indicators established at EU level were lowest common standard and shortcomings concerning debating and networking were identified.⁵²⁰

These findings do not give reason to a very optimistic status of expectations for the development and implementation of policies that are not within the mandate of the European Union. Experience with the policy field of anti-discrimination did prove that a shift of competence does improve governance structures in terms of reliability, mutual learning, readiness for change within a process based approach and involvement of most relevant stake holders.

⁵¹⁹ The OMC was introduced with the Lisbon strategy in 2000.

⁵²⁰ Nowak, Manfred/Wagner, Viktoria (2006): The Monitoring of Fundamental Rights in the Union as a Contribution to the European Legal Space (V): Monitoring the protection of Human Rights in the Union: a evaluation of mechanisms and tools. Working Paper Series, REFGOV-FR-9. Download: <http://refgov.cpdr.ucl.ac.be/?go=publications>, (02.09.2008).

Evaluation and Mutual Learning

Substantial evaluation was introduced by the European Commission in the 1990ies. Then it primarily concentrated on expenditure programs and therefore on activities. The European Commission defines evaluation as “judgement of interventions according to their results, impacts and the needs they aim to satisfy”.⁵²¹ General interest in evaluation grew due to an increasing focus on accountability, budgetary stringency and effective programme execution.⁵²² In 2000, it was acknowledged that progress was needed concerning the quality and use of evaluation and its relevance for decision-making.⁵²³ The principle of regular evaluation was expanded from expenditure programs to policy development and legislative activities.⁵²⁴ However one of our interview partners stated that evaluation was still limited to the question whether money was used in the right way or not.⁵²⁵

Evaluation should become a tool to inform decision making as regards priority setting and resource allocation, which had to result in the development of new evaluation instruments and practices. One of these new practices is the introduction of an ex ante evaluation of new proposals or renewals of legislative measures. Such an assessment has to match the proposed level of funding and resources with the expected impact and results. It leads to a better preparation of the intervention, the early development of indicators and establishes the necessary pre-requisites for monitoring during the course of the intervention. All these measures taken make reliable ex post evaluation possible. However, it has to be guaranteed that the results of the ex ante and ex post evaluations are integrated into the decision-making

⁵²¹ European Commission (2000): *Focus on results: Strengthening Evaluation of Commission Activities*, Communication to the Commission from Mrs. Schreyer in agreement with Mr. Kinnock and the President, SEC (2000)1051 – 26/07/2000.
http://ec.europa.eu/dgs/information_society/evaluation/data/pdf/lib_master/sec2000_1051_strengthening_eval.pdf, (22.08.2008).

⁵²² European Commission (2007): *Responding to Strategic Needs: Reinforcing the use of evaluation*, Communication to the Commission from Ms Grybauskaitė in Agreement with the President, SEC(2007)213.
http://ec.europa.eu/budget/library/documents/evaluation/communication/eval_comm_sec_2007_213_en.pdf, (22.08.2008).

⁵²³ European Commission (2000): *Focus on results: Strengthening Evaluation of Commission Activities*, Communication to the Commission from Mrs. Schreyer in agreement with Mr. Kinnock and the President, SEC (2000)1051 – 26/07/2000.
http://ec.europa.eu/dgs/information_society/evaluation/data/pdf/lib_master/sec2000_1051_strengthening_eval.pdf, (22.08.2008).

⁵²⁴ European Commission (2000): *Focus on results: Strengthening Evaluation of Commission Activities*, Communication to the Commission from Mrs. Schreyer in agreement with Mr. Kinnock and the President, SEC (2000)1051 – 26/07/2000.
http://ec.europa.eu/dgs/information_society/evaluation/data/pdf/lib_master/sec2000_1051_strengthening_eval.pdf, (22.08.2008).

⁵²⁵ Interview with NGO-representative, Vienna, 08.05.2007.

procedures. Evaluation was de-centralised making DGs and Services responsible for organising an evaluation function and giving them the opportunity to organise these processes according to the political context they are acting in, the time constraints they are subjected to and their decision makers' need for information. Three years after these new evaluation measures had been introduced, the European Policy Evaluation Consortium showed that "evaluation results are mainly used for improving preparation, implementation and performance of individual policy instruments and are therefore used less as input for setting political priorities". Besides, the role of evaluation should "be further developed to help communicate the achievement of policy objectives to decision-makers and stakeholders, as well as the challenges faced in achieving them".⁵²⁶

In 2002, a new evaluation tool was established – it is called impact assessment and should be fully operational until 2004/2005. The impact assessment is intended "to improve the quality and coherence of the policy development process" by identifying "the likely positive and negative impacts of proposed policy actions".⁵²⁷ These assessments are policy driven; they should be applied to major policy initiatives (those presented by the EC in its Annual Policy Strategy or its work program) in order to evaluate their potential impact on society and to effectively balance the available policy instruments. The Policy Strategy for 2008 announces new initiatives designed to prevent and combat discrimination outside the labour market.⁵²⁸ A serious and effective anti-discrimination policy would demand that impact assessments in all policy fields look at policy effects on groups marginalised or vulnerable to discrimination. The Commission decides when a preliminary impact assessment has to be complemented by an extended impact assessment, which has to include consultations with interested parties and relevant experts.⁵²⁹ These consultation processes are of pivotal interest in the policy-field of anti-discrimination, as the questions of who the interested parties are and who can represent

⁵²⁶ European Commission (2007): Responding to Strategic Needs: Reinforcing the use of evaluation, Communication to the Commission from Ms Grybauskaitė in Agreement with the President, SEC(2007)213. http://ec.europa.eu/budget/library/documents/evaluation/communication/eval_comm_sec_2007_213_en.pdf, (22.08.2008).

⁵²⁷ European Commission (2002): Communication from the Commission on Impact Assessment, COM(2002)276 final. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0276:FIN:EN:PDF>, (22.08.2008).

⁵²⁸ European Commission (2007): Annual Policy Strategy for 2008. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. COM(2007) 65 final. http://ec.europa.eu/atwork/synthesis/doc/aps_2008_en.pdf, (22.08.2008).

⁵²⁹ See: European Commission (2005): Impact Assessment Guidelines, SEC(2005) 791. http://ec.europa.eu/governance/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf, (22.08.2008) and European Commission (2005): Annexes to Impact Assessment Guidelines. http://ec.europa.eu/governance/impact/docs/key_docs/sec_2005_0791_anx_en.pdf, (22.08.2008).

the interests of those affected by discrimination are especially sensitive (see 3.4. Recent Developments).

An essential basis for evaluation as well as impact assessments in the area of fundamental rights and especially in the field of anti-discrimination is monitoring. Monitoring is a systematic and continuous long-term observation of incidents, processes and structures and has to be done by a network of governmental and non-governmental organisations.⁵³⁰ At the EU level there are several organisations besides the European Commission⁵³¹ that are involved in monitoring of the policy field of anti-discrimination: Among them are the Network of Legal Experts in the Non-Discrimination Field (see 3.2.2. Monitoring the Implementation), which is co-ordinated by the Human European Consultancy and the MPG, RAXEN and FRALEX, both established by the FRA (former EUMC, see 1.8. Fundamental Rights Agency)⁵³², the European NGOs AGE, EDF, ENAR and ILGA Europe (see 1.5. European NGOs), Equinet (see 1.6. Equinet) and the ECJ (see 1.5. European Court of Justice). By analysing the conclusions, recommendations and opinions presented in about 90 reports published by all these institutions and organisations⁵³³, we tried to bring to light what issues are covered and emphasised by what actors and to what extent are recommendations of different actors integrated into communications and proposals by the European Commission. This kind of monitoring as well as (in)formal interactions between all these actors (see 2. Interaction between actors) are different kinds of input for DG Employment, Social Affairs & Equal Opportunities its representatives can take advantage of or not when they evaluate policy development and legislative activities and undertake impact assessments of new policy initiatives.

1. Recommendations found on the website of DG Employment

⁵³⁰ Galizia, Michele (2007): *Monitoring als Frühwarn- und Evaluationsinstrument*. Fachstelle für Rassismusbekämpfung. <http://www.edi.admin.ch/frb/00538/00560/index.html>, (22.08.2008).

⁵³¹ The European Commission, DG Employment Social Affairs & Equal Opportunities launches calls for tender for studies on certain issues they deem relevant.

⁵³² The FRA (EUMC) set up these structures following calls for tender. They consist of consortia or individual experts in the 27 Member States. Annual and thematic reports are drafted according to detailed guidelines specified by the FRA (EUMC). Data collection is not a tool in itself but contributes to awareness raising among governmental and non-governmental organisations that are asked to provide data on racism, xenophobia, Antisemitism, Islamophobia and since 2007 also on all the other grounds covered by the Employment Equality Directive.

⁵³³ 20 reports by the EUMC and 4 by the FRA, 24 by the European NGOs (AGE: 3, EDF: 5, ENAR: 9, ILGA: 7), 15 by DG Employment, Social Affairs & Equal Opportunities, 12 by the Network of Legal Experts in the Non-Discrimination Field and 11 by Equinet.

Most of the publications available on the website of DG Employment, Social Affairs & Equal Opportunities – starting in 2004 – deal with all grounds of discrimination. The only exceptions are publications on age, religion and belief and on Roma. Overall they focus on the enforcement of the anti-discrimination legislation and on the impact of anti-discrimination and equal opportunities policies as well as on measure promoting the participation of those affected. Enforcement of legislation heavily depends on the establishment of independent, effective, adequately mandated and resourced equality bodies. Monitoring and the availability of relevant data (socio-demographic statistics, discrimination testing, etc) to prove discrimination are essential pre-requisites. These kinds of evidence are however only allowed in courts of very few Member States. The generation of case law and the establishment of positive duties for key actors like public authorities and employers are other important aspects supporting the enforcement of anti-discrimination legislation.

The publications analysed emphasise the importance of measuring the impact of anti-discrimination policies. Exchange of information and good practices, stakeholder involvement as well as participation of those (potentially) affected by discrimination were identified as essential elements of evaluation. Many shortcomings are identified by the authors of the studies: National action plans do neither set adequate aims nor provide indicators, socio-demographic and incident statistics, monitoring and research do not make available the necessary data, and equality bodies rarely have enough resources and competent staff to conduct surveys. Trainings on monitoring and data collection are seen as a necessary step in providing better data to assess the impact of policies and legislation. The European Commission reacted to these gaps by establishing a Working Group on Data Collection to measure the extent and impact of discrimination⁵³⁴ and by publishing a handbook on equality data⁵³⁵. The Commission itself and other EU institution are however rather reluctant to collect data on the ethnic origin of their employees. The EUMC suggested in two of its Annual Reports that the feasibility of collecting data on the composition of the workforce of all Community institution and bodies according to ethnicity, race and religion should be

⁵³⁴ European Commission (2005): Community Action Programme to Combat Discrimination (2001 – 2006), Minutes of the thirteenth meeting of the Programme Committee. DG Employment, Social Affairs and Equal Opportunities: Brussels, 24 May 2005.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/min/minutes13_en.pdf, (25.08.2008).

⁵³⁵ European Commission (2006): *European handbook on equality data*. DG Employment, Social Affairs and Equal Opportunities: Brussels. http://ec.europa.eu/employment_social/publications/2007/ke7606381_en.pdf, (24.08.2008).

examined.⁵³⁶ Another report suggested that the EC should examine its internal procedures of personnel data collection and on recruitment to EU structures of ethnic minority representatives including Roma.⁵³⁷ Claude Moraes revealed that only about a dozen of the more than 700 MEPs have an ethnic minority background, a fact that should definitely change as EU institutions should reflect the make up of wider society.⁵³⁸

Although the EU institutions themselves are only slowly changing their approach to staff members vulnerable to discrimination – only in 2007 was EGALITÉ, an organisation founded in 1993 with the aim of achieving equal rights for straight, gay and lesbian employees in all EU institutions, recognised as an organisation and allowed to be present on the intranet⁵³⁹ – they seem to acknowledge that measures like positive action, positive duties, mainstreaming and stakeholder involvement are crucial in promoting the participation of those potentially affected by discrimination in policy development, formulation, monitoring and evaluation.

Actions enhancing the situation and opportunities of victims of discrimination like disseminating information on the rights and obligations under anti-discrimination legislation, adequately resourcing equality bodies as well as measures additionally aiming at the improvement of the current anti-discrimination directives such as defining the grounds of discrimination, removing the hierarchy of the grounds, including nationality among the grounds, integrating multiple discrimination and accept different kinds of statistical evidence in legal proceedings are less often highlighted. In order to analyse the relevance and feasibility of possible new measures to complement the current legal framework, the Commission has conducted an in-depth study on measures to combat discrimination outside employment and occupation in Member States and some third countries. The study consisted of two reports⁵⁴⁰ published by the Human European Consultancy and the MPG. They found

⁵³⁶ EUMC (2003): *Racism and Xenophobia in the EU Members States: Trends, developments and good practice in 2002, Annual Report – Part 2*. http://fra.europa.eu/fra/material/pub/ar02/AR_trends_2002-EN.pdf, (24.08.2008) and EUMC (2004): *Racism and Xenophobia in the EU Members States: Trends, developments and good practice, Annual Report 2003/2004 – Part 2*. <http://fra.europa.eu/fra/material/pub/ar03/AR0304p2-EN.pdf>, (24.08.2008).

⁵³⁷ European Commission (2004): *The situation of Roma in an enlarged European Union*. Employment & social affairs, fundamental rights and anti-discrimination. http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/roma04_en.pdf, (24.08.2008).

⁵³⁸ Moraes, Claude (2006): *Challenges for Anti-discrimination Law and Policy in the 2007 Year of Equal Opportunities*, in: *European Anti-Discrimination Law Review*, No. 4/2006, pp. 31-35. http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/06lawrev4_en.pdf, (24.08.2008).

⁵³⁹ Interview with a representative of EGALITÉ, Brussels, 23.10.2007.

⁵⁴⁰ McColgan, Aileen/ Niessen, Jan (2006): *Comparative analyses on national measures to combat discrimination outside employment and occupation*. human european consultancy and Migration Policy Group. http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand1_en.pdf, (26.08.2008) and

no clear hierarchies of protection against discrimination in the areas outside employment and made quite clear that non-action of the EU would further substantiate the message that the fundamental right to non-discrimination would be acceptable in some areas but not in others and would therefore reinforce discriminatory practices. Society would continue to lose out on all the human potential available and there would be no adequate support for the social integration of citizens in the EU. New legislative measures would have to be accompanied by a comprehensive financial and awareness raising package and adequate public funding for the implementation of strong enforcement mechanism and equality bodies.

2. Recommendations by the EUMC/FRA

The reports launched by the EUMC/FRA concentrate on the Racial Equality Directive. From 2008 onwards this scope will be extended to other grounds of discrimination⁵⁴¹ as specified in Art 2 (b) of the Council's Multi-annual Framework Program (MAF)⁵⁴². The EUMC published its first report in 2001, which traced to the development of Islamophobia in the wake of 9/11. Most of the publications relate to the issues of racism and xenophobia also analysing the situation of migrants, ethnic and religious minorities as regards education, employment, housing and since 2007 health and social services. Several publications specifically address the challenges of Islamophobia, Anti-Semitism as well as racist violence and crime, one report looks at Roma and Travellers in public education. These documents try to combine observations on the legal development in the Member States with analysis of data on the socio-demographic situation of minorities, on discrimination on the grounds of ethnic origin, race and religion as well as on racist violence and crimes.

Taking the EUMC's prime objective of providing the Community and its Member States with objective, reliable and comparable data on racism, xenophobia and Antisemitism in order to

Masselot, Annick/Niessen, Jan (2006): *Comparative analyses of existing impact assessments of anti-discrimination legislation*. human european consultancy and Migration Policy Group. http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand2_en.pdf, (26.08.2008).

⁵⁴¹ "... based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination)".

⁵⁴² Council Decision of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012 (2008/203/EC). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:063:0014:0015:EN:PDF>, (25.08.2008)

help them when they take measures or formulate courses of action⁵⁴³ into account, it is of no surprise that the reports have an even stronger focus on the aspects of impact and enforcement of anti-discrimination policies than the publications by the European Commission. The EUMC started out by stressing the importance of monitoring the representation of ethnic/religious minorities in the media and by calling on Member States to establish a consistent and accessible reporting and monitoring system on racist crime (including Anti-Semitism and Islamophobia). The Agency further emphasised that research on evidence of and factors responsible for discrimination as well as on the impact of attitudes and the media were rather scarce. Crime and victim surveys and discrimination testing are mentioned as important tools in evidencing discrimination. Research on ethnic, religious and racial discrimination should inform social, economic and political integration policies. The EUMC pointed quite early to the possibility of setting targets and developing indicators for measuring progress on equality and anti-discrimination within the framework of national action plans on employment or for social inclusion.

Having to judge the impact of anti-discrimination policies by comparing data collected in all the Member States the EUMC very quickly realised the huge differences in how data is collected, what kind of data is collected and what data is publicly available. Therefore, it has been the EUMC which most strongly and explicitly asked the Commission and the Member States to collect, compile and publish annually statistics broken down by race/ethnicity and religion relating to the labour market, housing, education and training, health and social benefits, public access to goods and services, and civic and political participation as well as criminal justice data which can be disaggregated to reveal information about victims' ethnicity, race and religion. After identifying these gaps the EUMC started cooperating with EUROSTAT in the development of a EU regulation on migration statistics.⁵⁴⁴ In 2005, the European Commission submitted a proposal for a regulation on community statistics on migration and international protection, which encompassed statistics on international migration providing information on citizenship/country of birth broken down by age and gender and on occupation, level of education and training and year of first arrival.⁵⁴⁵

⁵⁴³ Art 2 (1), Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997R1035:EN:HTML>, (25.08.2008).

⁵⁴⁴ EUMC (2004): Minutes RAXEN NFP Meeting, 24-25 June 2004, Vienna.

⁵⁴⁵ European Commission (2005): Proposal for a Regulation of the European Parliament and of the Council on Community statistics on migration and international protection, COM(2005) 375 final. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0375:FIN:EN:PDF>, (25.08.2008).

Unfortunately, the regulation put in force in 2007⁵⁴⁶ no longer included data on educational and occupational attainments of migrants.

Exchange of good practices among various actors relevant in the policy field of anti-discrimination is rather often identified as a good way of learning from successful initiatives, however failed practices should also be analysed to avoid duplication under similar circumstances. Gaining experience the EUMC started asking for standardised EU good practice criteria to measure the success of initiatives.

In relation to enforcement the reports highlight awareness raising, public authorities as role models, trainings for media professionals, teachers, police forces, judges, prosecutors, civil servants and other persons working with areas influenced by policies and legislation on integration, immigration and discrimination as well as continuous consultations and structured dialog between GOs, NGOs, social partners and other civil society representatives. Equality bodies are seen as important enforcement structures but only when endowed with sufficient resources, meaningful independence and adequate competencies. Besides, their staff should reflect the composition of society.

The EUMC has always been in favour of promoting the participation of those (potentially) affected by discrimination in institutionalised procedures but also informal structures of policy-making. Consequently, it has always encouraged positive action, the support of self-organisation of ethnic minorities and capacity building. Measures aiming at direct victim support or improvement of the current anti-discrimination directives are not core recommendations of the EUMC/FRA. However, the EUMC has regularly called on the Member States to move towards agreement of the Commission's Proposal for a Council Framework decision on Combating Racism and Xenophobia dating from 2001⁵⁴⁷ in order effectively combat racist crime and to transpose Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents⁵⁴⁸ as well as on political

⁵⁴⁶ Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0023:0029:EN:PDF>, (25.08.2008).

⁵⁴⁷ European Commission (2001): Proposal for a Council Framework Decision on combating racism and xenophobia, COM(2001) 664 final. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0664:FIN:EN:PDF>, (25.08.2008).

⁵⁴⁸ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:016:0044:0053:EN:PDF>, (25.08.2008).

parties to sign and implement the Charter of European Political Parties for a Non-Racist Society⁵⁴⁹ to improve their legal status.

3. Recommendations by European NGOs

The publications drafted by the four European umbrella NGOs, funded by the European Commission, cover age, disability, sexual orientation as well as ethnic origin, race and religion. These NGOs are stakeholders representing the interests of those (potentially) affected by discrimination; they are involved in formal and informal consultations with EU institutions, which they suggest to intensify. The NGOs primarily focus on the enforcement of the current legislation followed by measuring its impact and victim support. The demand most often articulated by the NGOs is awareness raising.

Major instruments of enforcement are independent and adequately resourced equality bodies, which should cover all grounds of discrimination. The NGOs also emphasise measures like positive duties, effective, proportionate and dissuasive sanctions, contract compliance, trainings as well as including the concept of accessibility in impact assessments by the European Commission. The NGOs more often stress the role of trade unions and employers in enforcement procedures. Monitoring, data collection, research, discrimination testing and peer review are described as important instruments in assessing the impact of equality and anti-discrimination policies.

Victim support is another major concern of the NGOs. They would like to see (potential) victims informed about their rights and would like to have equal access to justice for them. The inclusion of the grounds of nationality, transgender and trans-sexuality would guarantee legal protection to a wider range of people whose interests are represented by these NGOs. Victims should be able to use the results of discrimination testing in legal proceedings. Furthermore, it should be possible to fight barriers not identified by individuals, this would result in policies preventing discrimination rather than having to deal with it after somebody had been affected.

The NGOs more readily promote concepts like multiple discrimination, mainstreaming and diversity. This may result from their exchange of practical experiences and their closer

⁵⁴⁹ Democratic Political Parties of Europe (1998): Charter of European Parties for a Non-Racist Society. http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=3ef0500f9e0c5&contentid=3ef0568924fa5, (25.08.2008).

relationship with victims of discrimination. AGE, EDF and ILGA have a rather broad scope of policies they are working on, which encompasses e.g. social policies, social inclusion and family law, ENAR demands elimination of discrimination in aliens' legislation. They seem to have a better understanding of what additional measures would be necessary to develop a more comprehensive anti-discrimination policy taking impacts of a wider range of policies on marginalised or discriminated groups in to account.

4. Recommendations by Equinet

The publications by Equinet cover all grounds of discrimination, and the network is of the opinion that equality bodies should offer services to victims of all grounds of discrimination. Victim support is not surprisingly the greatest concern of Equinet. In order to be able to provide optimal support to victims equality bodies would have to be independent and adequately resourced. Furthermore, they should be able to take cases to court and be party in court proceedings. If this is not the case, the special bodies should be able to issue legally binding decisions. However, Equinet has not reached agreement on whether the bodies should have quasi judicial powers and should be (im)partial. The bodies agree that they must be free in deciding on the selection criteria of the cases, in order to be able to act strategically. They are quite aware of the shortcomings as regards the publication of reports and the conduction of surveys.

Nevertheless, they see monitoring and data collection as essential tools in measuring the impact of policies. Abolition of hierarchies concerning the grounds of discrimination and a real shift in the burden of proof would enhance the rights of victims.

Trainings for police tribunal members, judges and public prosecutors are seen as a prerequisite for enforcement. Equinet, like the NGOs, stresses the importance of trade unions and employers in the promotion of equality and non-discrimination. One aspect relevant for the improvement of the current legislation that has not been mentioned in any other publications is the prohibition of stereotyping in education and commercial advertising.⁵⁵⁰

⁵⁵⁰ Equinet (2008): *Beyond the Labour Market: New Initiatives to Prevent and Combat Discrimination*. http://www.equineteurope.org/multiattachments/2678/DocumentName/Beyond_Labour_online_v1.pdf (23.08.2008).

5. Reception of recommendations

The activities of the above mentioned organisations are not limited to the publication of reports and recommendations, but also include formal and informal contacts with the Commission and exchange of experience among each other. Therefore, the written documents only give a partial insight in the interaction of stakeholders with the Commission. However, these reports give a good overview about what the stakeholders identify as progress, improvements, shortcomings and pitfalls of the current anti-discrimination legislation and what they describe as the major future challenges. In order to see whether the views and opinions of relevant stakeholders are taken into consideration by EU institutions, we analysed five key documents relevant for policy development drafted by the Commission⁵⁵¹. Besides, we also integrate statements of several interview partners on evaluation and impact assessment in the policy field of anti-discrimination.

In 2004, the Commission focused on the exchange of information and good practice, awareness raising campaigns and trainings, measures which had been proposed by the European NGOs, the EUMC and Equinet in earlier publications. Exchange of good practices was a major focus in the Community action program, but there were no mechanisms or structures such as peer review to provide for mutual learning among the Member States.⁵⁵² Youth, education, training and research programs were highlighted as opportunities in further promoting equality and non-discrimination, within the European Employment and the EU Social Inclusion Strategy needs of certain disadvantaged groups were specified and could be

⁵⁵¹ European Commission (2004): *Equality and non-discrimination in an enlarged European Union. Green Paper*. Office for Official Publications of the European Communities: Luxembourg. http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/grpap04_en.pdf, (02.09.2008); European Commission (2005): Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Non-discrimination and equal opportunities for all – A framework strategy, COM(2005) 224 final. http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0224en01.pdf 26.08.2008, (26.08.2008); European Commission (2006): Communication from the Commission to the Council and the European Parliament: The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(2006) 643 final. http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/racerep_en.pdf 26.08.2008, (26.08.2008); European Commission (2008): Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, COM(2008) 225/2 final. http://www.retepariopportunita.it/Rete_Pari_Opportunita/UserFiles/Commissione_europea/ST11047-RE01.EN08.def.rtf 26.08.2008, (26.08.2008) and European Commission (2008): Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Non-discrimination and equal opportunities: A renewed commitment, COM(2008) 420 final. <http://ec.europa.eu/social/BlobServlet?docId=475&langId=en>, (26.08.2008).

⁵⁵² Interview with a representative of DG Employment, Social Affairs & Equal Opportunities, Brussels, 24.10.2007

linked to the fight against discrimination. The EUMC had identified the need of addressing marginalisation and segregation and pointed out the gaps in national action plans on employment and for social inclusion as regards migrants and ethnic minorities. The Commission suggested integrating the principle of non-discrimination in other police areas. Another aspect that was found in documents by the EUMC, the European NGOs and Equinet before publication of the Green Paper was the improvement of data collection and monitoring, in order to make possible the assessment of the impact of policies and programs.

After the consultation on the Green Paper of 2004, the documents drafted by the Commission show a shift in the terms used and a broadening of the focus of attention. A representative of DG Employment stated that the Commission had to be very cautious about the representative nature of public consultations, but nevertheless their results were one element influencing decision-making.⁵⁵³ In 2005, the Commission saw fundamental European values as equality and the rule of law challenged by discrimination and wanted anti-discrimination policies to go beyond the prevention of unequal treatment of individuals in order to tackle structural barriers, an aim that had been articulated by NGOs long before. Enforcement of current legislation was seen as a major concern by stakeholders participating in the consultation. The lack of attention paid to the dissemination of information on the new legislation, the development of positive measures and properly resourcing equality bodies to be effective were highlighted as major challenges. All these issues had been touched upon by relevant stakeholders like the EUMC, the NGOs and Equinet. Although the Green Paper already spoke about integrating the principle of non-discrimination in other police areas, the term mainstreaming was only used in the Communication dating from 2005. NGOs already used to concept in recommendations published in 2003; the EUMC suggested improving the legal situation of long-term residents in order to improve their labour market and social integration. The idea of multiple discrimination was seen as a major obstacle to promoting equal opportunities and non-discrimination for all. NGOs, especially AGE and ILGA Europe, and the EUMC only referred to this phenomenon in later publications.

ENAR and ILGA were tagged as the Commission's eyes and ears on the ground.⁵⁵⁴ NGOs described themselves as involved in the assessment of implementation of the directives in the

⁵⁵³ Interview with a representative of DG Employment, Social Affairs & Equal Opportunities, Brussels, 23.10.2007.

⁵⁵⁴ Interview with an official of the European Commission, Brussels, 24.10.2007.

Member States.⁵⁵⁵ ENAR stressed that this kind of feedback has been increasingly asked for by the Commission on a structured basis since 2005. A representative of the Commission described the reports by the Network of Legal Experts in the Non-Discrimination Field as feeding the debate within the Commission. The issues the Commission focused on were not always chosen by the officials but sometimes in bottom-up procedures.⁵⁵⁶ This perception was supported by a representative of the MPG, who said that the thematic reports were proposed by the MPG and the Commission decided on the subjects. However, the MPG was not totally happy with the way in which the information provided to the Commission was processed by the officials.⁵⁵⁷ The Commission would not let them know how they would use the information provided. This situation has worsened since DG Employment has separated the policy and legal unit. MPG saw more opportunities for the Commission to use the Network, but conceded that the EC might not have enough resources to do so. EDF was also a little disappointed that the Commission did not always take the opportunity to ask them how they assessed certain activities or policies. It was conceded that the Commission's approach has been slightly changing.⁵⁵⁸

The two Communications on the implementation of the two anti-discrimination directives did not display any brand new or groundbreaking results. Access to justice was recognised as a particular problem, a shortcoming identified by NGOs even before the directives had been decided on. Hardly any discrimination cases were referred to the courts in the Member States, which prevented interpretations of the concepts of discrimination and the grounds. Access to legal aid, short time limits, victimisation, costs, length and complexity of proceedings were evaluated as barriers to justice. In 2006, the Commission wanted to put its focus on ensuring full and effective transposition of the anti-discrimination directives and saw no need for further legislation, opposing requests uttered by Equinet and some of the European NGOs.

In 2008, the Commission proposed a new directive although enforcement of the two anti-discrimination directives is still incomplete and their impact cannot really be assessed due to gaps in data collection. The European Commission was urging stakeholders to provide it with arguments on why a new horizontal directive harmonising the level of protection of the

⁵⁵⁵ Telephone interviews with NGO representatives, 11.09.2007 and 22.05.2007.

⁵⁵⁶ Interview with an official of the European Commission, Brussels, 24.10.2007.

⁵⁵⁷ Interview with NGO representative, Brussels, 23.10.2007.

⁵⁵⁸ Interview with NGO representative, Brussels, 24.10.2007.

various grounds was needed. The Commission was facing the problem that there were many arguments provided by NGOs but none by any other relevant stakeholders.

In addition to the policy tool already specified in previous Communications, the Commission mentions diversity management, an instrument already embraced by NGOs and the EUMC, concrete actions as regards measuring discrimination and evaluating processes as well as the establishment of a non-discrimination governmental expert group, which should validate good practice through peer learning and develop benchmarks to evaluate the effectiveness of policies. The concept of peer review has been mentioned by European NGOs in connection with the OMC before. A representative of UEAPME⁵⁵⁹ also saw peer reviews as valuable tools of learning, which are successfully applied in areas like gender equality or education/training.

Concerns about the participation of those potentially affected by discrimination and suggestions how their participation in policy development, implementation and evaluation could be promoted, were not integrated into the policy papers of the Commission. Only with regard to Roma the latest policy document talks about capacity building and promoting their involvement at all levels of policy development and implementation. Another aspect missing was the problem of generating statistical evidence in legal proceedings due to the gap in statistics and the refusal in many Member States to accept the result of discrimination testing as evidence.

It is not clear which ideas have entered the Commission's policy papers due to internal learning processes and which have been influenced by recommendations issued by stakeholders, (in)formal consultation processes and lobbying efforts. A representative of the Social Platform was of the opinion that meetings forming part of the institutionalised dialog between the Commission, social partners and NGOs were rather of symbolic character. Informal meetings during campaigns were much more effective, which resulted in a process oriented approach.⁵⁶⁰

6. Roma – a discriminated minority without a strong lobby

⁵⁵⁹ Interview with representative of UEAPME, Brussels, 23.10.2007.

⁵⁶⁰ Interview with NGO-representative, 08.05.2007.

Although some of the studies published by the Commission and the EUMC point at the challenges faced by Roma, hardly any concrete suggestions regarding the improvement of the situation of Roma entered the policy documents of the Commission. 2003 and 2004 Roma issues were higher on the agenda; the EU was more dynamic due to the accession procedures. Before that Roma were not an EU-issue, in Western Europe their situation was seen as a social issue. DG Enlargement has Roma high on the agenda, DG Employment is also interested in Roma issues, but DG Education does not have an open ear for Roma issues, especially segregation. Currently the interest is slowing down again.⁵⁶¹

Some of the weak points identified in connection with the Racial Equality Directive would either call for the improvement of the current legislation or the drafting of new legislation: The Directive was not made to protect traditionally excluded groups. It does not take into account segregation, language and different lifestyles. It does not cover nationality and many of the Roma in the EU are third country nationals. It does not effectively cover discrimination in administration, as administration often refuse to issue documents for Roma who are then excluded from social benefits (e.g. pensions), the health system and access to goods and services.⁵⁶²

The “Network of Legal Experts in the field of non-discrimination” drafted a Roma Anti-Discrimination Directive and lobbied with the Commission. The lobbying was done too early, as the Commission rejected to review the recently adopted directives. It suggested waiting and seeing how the implementation was going and whether there was any need for reviewing. Other suggestions included the establishment of a coordination structure on Roma issues at EU level, a special monitoring body and recognising Roma as an ethnic minority.

This weaker influence on EU policy development might be connected to the fact that the European Roma Information Office (EIRO), an advocacy organisation providing information on Roma to the EU institutions, does not get core funding by the Commission like AGE, EDF, ENAR or ILGA Europe. The Commission does not know who to accept as representatives of the Roma. There will never be an organisation that will be accepted by all Roma. The Commission should choose an organisation that works effectively and is capable or it could set up an umbrella organisation consisting of networks of Roma organisations. EIRO is a member of ENAR and of the Social Platform. ENAR always asks for the

⁵⁶¹ Interview with NGO-representative, Brussels, 24.10.2007.

⁵⁶² Interview with NGO-representative, Brussels, 24.10.2007.

participation and involvement of Roma organisations and invites them to seminars for capacity building. EIRO contributed to the ENAR Shadow Report on Roma in 2005. The Commission reads everything that is financed by the Commission, but it is not clear to what extent the Commission takes these reports into consideration. EIRO has no official working relationships with trade unions; they show more interest in policy fields than in specific groups.⁵⁶³

The Commission has promised to hold an EU Roma Summit for all stakeholders in September 2008 and to conduct an in-depth study on existing policies and institutional mechanisms in the Member States. It remains to be seen whether these activities result in better informed policies and legislation targeting Roma by involving them in planning, implementation and evaluation.

7. Conclusions

The EU has stepped up its evaluation efforts in all policy fields over the last decade. It has broadened its strategy from a mere value for money assessment to making evaluation results utilisable for policy development. This has resulted in establishing an ex-ante impact assessment to find out whether there is need for new policies or the adaptation of those already in place. Besides all the reports analysed above, which provide essential information to the Commission on how the directives and accompanying measures are assessed by experts from different organisational backgrounds, the Commission evaluated EQUAL, the Community Action Programme and the work of the EUMC. A feasibility study was done on the establishment of the EUMC and ex-ante impact assessments on setting up the FRA and on issuing a new horizontal anti-discrimination directive outside employment. Two aspects are essential for evaluation: Define aims at the very beginning of policy development and identify indicators in order to be able to measure whether the goals have been achieved or not. The availability of data matching the requirements of the indicators is an indispensable prerequisite.

Evaluation in the anti-discrimination policy encounters two challenges. What are the aims of an effective and efficient EU anti-discrimination policy and how do we measure its effects? One integral part is the establishment of an anti-discrimination legislation complying with the anti-discrimination directives. However, not all of the provisions in the directives are concrete

⁵⁶³ Interview with NGO-representative, Brussels, 24.10.2007.

enough to make a judgment about compliance. Therefore, many of the assessments focus on the issue of compliance and make suggestions on improving the directives in order to be more precise. Among these essentially contested concepts are the prohibited grounds of discrimination, direct discrimination, harassment, effective, proportionate and dissuasive sanctions, shift of the burden of proof, positive action and independent specialised bodies. The national courts and the ECJ could play important roles in clarifying some of these uncertainties. Would more complaints or court cases relating to equal treatment issues be signs of an efficient anti-discrimination policy? This question is difficult to answer, because we do not know how many complaints and court cases are registered all over the EU and we know even less about how many complaints are not reported or how many victims of discrimination do not take their cases to court.

Besides, most of the reports cited above emphasise that legislation alone will not be sufficient to implement an effective anti-discrimination policy. What would these measures have to look like in order to effectively support anti-discrimination legislation? This question could be answered by documenting good and bad practice examples and by analysing why they have been successful or not. Based on this analysis, criteria for assessing an activity as good practice could be developed. The issue of exchanging experiences and information on activities has often been mentioned as essential in the reports analysed. Although Community initiatives have put much emphasis on the trans-national dimension of projects, the outcomes of these activities have not met the expectations. Exchanging experiences is a process that may not immediately result in changes or learning and its success might depend very much on the framework conditions under which it takes place. Are the projects very similar or totally different? What about the context? How much do the participants know about context and projects? How is the exchange structured? There seem to be more opportunities for face-to-face exchange at events, seminars and consultations among actors with different organisational backgrounds at EU level than among actors from the Member States.

The Commission, especially DG Employment, Social Affairs and Equal Opportunities, acts as central player, who organises and structures the dialog between NGOs, social partner organisations and Equinet. Exchange without DG Employment as facilitator only seems to take place among organisations sharing the same background. Organisations with different backgrounds rather react to documents published by the Commission, which contain elements found in reports or policy papers of NGOs, social partner organisations or Equinet, but do not

necessarily reflect each others' ideas. Keeping the definition of mutual learning in mind (see chapter The hypothesis of Reflexive Governance – Defining the Key Concepts), it becomes quite clear that each organisation sees itself as important actor but does not to the same extent realise the others as essential players. The Commission seems to be the player that has realised that no single actor has the perfect solution and therefore consults with different kinds of organisations. Mutual learning consists in seeking the best decision making procedures and in acknowledging that even the aims of these decision-making procedures are open for change during the course of the process. The different NGOs have by identified the pros and cons of exchanging experiences and pooling ideas during the Starting Line group phase, they have also learned that this strategy can lead to success although not all the NGOs were equally satisfied with the outcome of the process. Cooperation has strengthened them and strategic considerations seem to convince them of bonding during decision-making procedures. Equinet has the potential of formalising and structuring the mutual exchange of experiences, which may have a bigger spill over effect on the Member States than resulting from the European umbrella NGOs.

The documents drafted by each organisation show that they have both developed a better understanding of the issue of non-discrimination and of processes they should get involved in to be able to influence the results. They have gained experience in dealing with non-discrimination issues and they have contributed to the formalisation of informal processes by jumping at the chances of involving themselves in decision-making procedures. Some employers' organisations have become more explicit in their rejection of new legislation. To what extent the organisations themselves have developed strategies to promote anti-discrimination and equality within their structures varies. The Commission has especially been criticised for not having an anti-discriminatory employment strategy. Many of the reports demanded that specialised bodies should reflect the composition of society.

When looking at the publications and the actors involved there has been a clear focus on discrimination on the grounds of ethnic origin and race, religion only plays a role when it is closely linked to ethnicity. Organisations concentrating on anti-racism are rooted in the policy field of anti-discrimination. Many studies have been conducted showing the data gaps in this sector of anti-discrimination. Monitoring concentrates on racism and xenophobia, which is not surprising as the EU has established an agency concentrating on this issue and has restricted the obligation for Member States to set up a specialised body to the scope of the Race

Equality Directive. NGOs working on the grounds of age and disability have a stronger affiliation to the concept of social inclusion. Although the Commission has been talking about social inclusion and mainstreaming of anti-discrimination for several years now and has therefore redefined or broadened its anti-discrimination strategy – without providing the adequate aims and indicators for evaluation – mutual learning among the different grounds has still an enormous potential for development.

Linking Practise and Theory of Governance

There is a multitude of relevant actors – formal and informal – participating in decision making in the European Union policy field of anti-discrimination. They do not only take part in formalised decision making procedures, but they also get involved via informal channels. Decision making has very often been characterised as incidental and as driven by individuals caring about the topic. This is valid for all EU institutions as well as for NGOs, NGO networks or Member States' initiatives.

Besides, decision making has been characterised by reciprocity between the actors, which can be illustrated by the development of the topics focussed on in the framework of the Community Action Programme to Combat Discrimination. Permanent exchange between the different actors led to an ever-changing approach towards concepts of discrimination, relevance and methods of awareness raising and training, developments of strategies to fight discrimination, creating openness to promoting equality etc. This changing approach is visible in the modifications of the wording, in the chronology of topics of the yearly conferences organised within the action programme and in the focus of the tenders that have been launched by the Commission since the year 2000.

An important aspect – especially when decision making procedures are to a high degree influenced by coincidence – in this regard is the question on how it can be guaranteed that the aim of creating a European society without discrimination but with high standards of equality will ever be reached. One answer might be that the aim of European anti-discrimination policies has not been clearly defined over the past 15 years. Even lobbying organisations have been changing their sub-goals during the last 15 years – from prohibiting discrimination towards acknowledging diversity in society. They have also shifted their roles and their status; they have turned from organisations receiving orders into stakeholders who are acknowledged as experts on their interests and on strategies transforming society.

So this process based approach, with its merits of “ongoing revisability, corrigibility, flexibility and change”⁵⁶⁴, might be the only one enabling mutual learning and enabling stakeholders to test what works best, which paths should be taken and what could be skipped.

⁵⁶⁴ De Búrca, Gráinne (2007): *Stumbling into experimentalism: the EU anti-discrimination regime*. Working paper presented at a conference on Experimentalist Governance, Brussels, October 2007, p.3. <http://www.europeanstudiesalliance.org/calendar/fall07events/EventDetails/de%20Burca.pdf>, (02.09.2008).

Ongoing readiness for change allows for enough pragmatism to bring things forward. Before European institutions started their dialog with civil society organisations they had very often stuck to their initial ideas, and only then realised that they didn't reach their target group. Readiness to communicate with an increasingly broader range of actors opened the path for compromise and the development of strategies with a practical relevance. This exchange among various actors at the European level was an essential element in triggering civil society dialogue in many Member States, where it opened a window of opportunity for more inclusive forms of governance. The inclusion of social dialogue and NGO dialogue in the provisions of the Anti-Discrimination Directives made these new forms of interaction even legally binding, and even if these provisions have been implemented only gradually, they contributed to a process of change in terms of cooperation and dialogue with civil society.

But let us recall the hypothesis of “reflexive governance” we planned on analysing in the context of the policy field of anti-discrimination and have a look at the parameters that have been specified at the beginning of the study and if they are fulfilled in the governance processes we have described:

– *procedural approach to questions of governance*

Governance structures in the field of Anti-Discrimination policies have been developing towards a procedural approach over the last 15 years. The procedural approach has not originally been defined as an aim but has become part of the decision making procedure more as a result of hazard than strategy. Over the last 10 years, the readiness of decision makers to see a procedural approach as an essential element in strategic political planning has definitely increased, which can be traced back in looking at the development of policy objectives for the policy field of anti-discrimination. Political targets are gradually being changed, at least those actors with the highest level of involvement are more open towards such changes and are more likely to concentrate on “the way towards” reaching the targets than on the targets themselves.

- *identification of conditions under which a deliberative process may succeed and creation of these conditions in an affirmative way and not taken for granted*

The conditions for the development of decision making in EU anti-discrimination policies have not been shaped in an affirmative way, especially not in the initial phase of policy development. As pointed out in various examples included in the research, governance structures had been characterised by an inter-play of formalised procedures and mere coincidence. However, there has been a certain tendency and willingness at the level of European Commission bureaucracy towards formalizing procedures that have developed without planning, like the involvement of and close cooperation with European NGOs. Furthermore, there is a certain readiness with the actors with the highest level of involvement to continuously question the structures and procedures put in place and to adapt them if necessary. Final decision on how the structure looks like and what parts of informal procedures are transformed into a formalised structure of cooperation and dialogue has been left to the centre of the procedures, to the Commission.

The authors are not sure if the creation of conditions in an affirmative way are a pivotal pre-requisite for a model of reflexive governance as it could be an obstacle to the procedural approach we consider a core requirement. As long as there is readiness to guarantee conditions assuring collective learning, transparency etc. they need not be created in an affirmative way but can develop by way of self-reflective approaches.

- *needs a process of collective learning*

Many examples do show collective learning processes between a variety of stakeholders. This is not valid for all actors however. Some Member States and the employers' side of the European social partners are quite reluctant to involve themselves in collective learning processes. The reluctance by some of these actors to acknowledge the fact of discrimination forms a barrier for plunging into the process of learning. Most of the stakeholders scrutinised in the research have found their own ways of developing strategies in a permanent process of exchange with the others, learning from their experience and from their ways of coping with barriers.

Especially in the development of anti-discrimination policy priorities we have identified collective learning procedures.

- *needs a common redefinition of interest of different actors*

The interaction of civil society organisations representing different grounds of discrimination has from the very beginning been characterised by a continuous and deliberate common redefinition of interest. There had been single interest activities that were joined together when lobbying for Art.13 and for the directives. Each of the European NGOs is still fighting for specific rights and needs of the people they are representing and the specific ground(s) it is responsible for. This is especially true for the ground of disability and the European Disability Forum. Common interests have been developed and redefined and are promoted altogether in the framework of the Social Platform and in joining efforts whenever necessary.

The European Commission bureaucracy has developed a readiness to redefine policy objectives on a permanent basis by ways of consultation with various stakeholders.

- *mutual learning by an ongoing deliberative process, in which the actors acknowledge that no one has privileged access to the best solution*

The Commission, especially DG Employment, Social Affairs and Equal Opportunities, acts as central player, who organises and structures the dialogue between NGOs, social partner organisations and Equinet. Exchange without DG Employment as facilitator only seems to take place among organisations sharing the same background. Organisations with different backgrounds rather react to documents published by the Commission, which contain elements found in reports or policy papers of NGOs, social partner organisations or Equinet, but do not necessarily reflect each others' ideas. The Commission seems to be the player that has realised that no single actor has the perfect solution and therefore consults with different kinds of organisations. Mutual learning consists in seeking the best decision making procedures and in acknowledging that even the aims of these decision-making procedures are open for change during the course of the process. The different NGOs have by identified the pros and cons of exchanging experiences and pooling ideas during the Starting Line group phase, they have also learned that this strategy can lead to success although not all the NGOs were equally satisfied with the outcome of the process. Cooperation has strengthened them and strategic

considerations seem to convince them of bonding during decision-making procedures. Equinet has the potential of formalising and structuring the mutual exchange of experiences, which may have a bigger spill over effect on the Member States than resulting from the European umbrella NGOs.

– **common perception of the problem**

A common perception among the actors involved has definitely been developing over the last 15 years. Many different stakeholders have been involved in choosing and shaping the approach which is considered best for developing effective policies and legislation for the fight against discrimination and for more equality.

1. Resume

The process based approach that has developed over the years and the readiness of quite a few stakeholders to enter collective and mutual learning processes show that governance structures in the policy field of anti-discrimination have a high potential for being reflective. However, the rather high degree of coincidence and the varying intensity of involvement of the relevant stakeholders together with the reluctance of some of the actors, especially those that should be actors, to get involved in collective and mutual learning do not fit in with the hypothesis of reflexive governance laid down in the introductory remarks. Nonetheless we do have the impression that the development of EU anti-discrimination policies is on the way to a structure that could be defined as very close to the reflexive governance model. The tendency to formalise the involvement of stakeholders in a similar way to the “organic” one that has accidentally developed, the openness of many relevant stakeholders to redefine their interests, find a common understanding and the readiness to get involved into a process based approach including a commitment to mutual learning do form a model of governance that we would consider as “on the way to reflexivity.”

Results and Future Prospects

European anti-discrimination policies have changed a lot regarding the creation of legal standards to combat discrimination over the last 10 years. By forming a legal framework gaps in implementation became visible, which influenced the initial approach towards methods and measures of implementation. Among other things it highlighted the fact that structural discrimination and discrimination mechanisms in society are still in place and difficult to overcome and that new strategies had to be developed to combat them. European anti-discrimination policies have reacted to these findings by focussing on awareness raising and on training to a higher extent when planning the tenders in the framework of the Community Action Programme and by targeting the groups at risk of discrimination as well as the ones that are responsible for implementing legislation. On the other hand the recognition of the relevance of structural discrimination has changed the approach insofar as combating discrimination and fighting for equality is more and more connected with aspects of inclusion and poverty reduction. This development brings about new challenges as these policy fields are not covered by Art. 13 TEC and do not fall under the competence of the European Union. New methods and possibilities of reflexive governance and mutual learning, e.g. within the Open Method of Coordination, will have to be developed.

1. Conclusions

European anti-discrimination legislation and policies have been determined very much by the potentials the inclusion of Article 13 had provided and which made the policy field very different from other areas of human rights. The legislative competence that was put in place to create legally binding provisions for the Member States to implement anti-discrimination legislation and policies influenced the approach of lobby organisations as well as that of European Commission officials and of Member States and their representatives.

The second most relevant characteristic we have detected are the actors, their level of involvement in developing and implementing policies and the high potential of newly established actors. The creation and funding of European umbrella NGOs, representing the target group of Anti-Discrimination legislation and policies, enabled the establishment of a fruitful dialog between civil society organisations and European institutions. Dialog and

readiness to enter a process of collective learning is very much focussed on the European Commission, forming the centre, which organises and structures this dialog. Most players are still acting according to a dual concept of dialog neglecting the high number of stakeholders. This is especially valid for the employers' side of the social partners, some of which do not acknowledge the fact that discrimination occurs, and the Member States, who have only gradually started implementing dialog with civil society on the national level.

Equinet, the network of independent equality bodies, can be considered to have a high potential of taking on a leading role in terms of influencing European anti-discrimination policies in the future. This potential relates to the history of the establishment of the specialised bodies, most of them have been installed as a result of transposing the Directives. Furthermore, the members of Equinet fulfil a very specific role, they are legitimised by national legislation and by their duty to support and represent victims of discrimination. The joint experience and competence of its members could form a unique centre of knowledge in terms of legislation as well as in terms of practical implications.

Interaction and decision making has been characterised by reciprocity between the actors, which is best illustrated by the development of the topics focussed on in the framework of the Community Action Programme to Combat Discrimination. Permanent formal and informal exchange between the different actors has led to an ever-changing approach towards concepts of discrimination, relevance and methods of awareness raising and training, developments of strategies to fight discrimination and creating openness to promoting equality.

Given these findings, a process-based approach is an essential feature of the development of the policy field of anti-discrimination; it is determined by ongoing flexibility and change. It does show aspects of mutual learning. However, decision making is characterised by a high level of coincidence and governance structures have developed more in an organic than a strategic way.

Many actors are not aware of their roles and the potential they have in these processes. Some of them face the problem that they are not acknowledged as legitimate actors by all the others. This is especially true for NGOs who are not taken seriously as experts by employers' organisations or within some Member States. Besides, some players do not consider the policy field as such as adequate for problem solving. Historical developments and approaches

anchored in European societies had resulted in unequal “standings” of NGOs representing different grounds. The need to tackle the topics of ageing societies and the needs of people with disabilities as part of the social policy agenda opened bilateral dialog with civil society organisations active in these fields with employers’ organisations on e.g. questions of equality of access, even if the latter were opposed to the idea of acting against discrimination.

What had worked well in terms of reflectivity and mutual learning was closely related to the interaction between the European Commission, the European Parliament and civil society organisations. Member States’ roles were characterised by above all coincidence; taking up what happened in single states either gave impulses for the improvement of European anti-discrimination policies or slowed down the process.

If the present structures are used as a basis for a more strategic approach including ongoing readiness for change, for a continuous redefinition of policy objectives, enabling stakeholders to test what works best, which paths should be taken and what should be skipped, if the role of monitoring and evaluation is strengthened, the policy field of anti-discrimination might serve as a model for a governance structure with a high degree of reflexivity and involvement of relevant stakeholders, a model of governance that we would consider as “on the way to reflexivity.”

2. *Upcoming challenges and proposals*

The acknowledgement that structural discrimination is in place in all Member States and that it forms a barrier to equality of opportunities, even limiting the possibilities of simply enforcing one’s right not to be discriminated against, has changed policy priorities of the last 5 years. This change was very much due to the discriminatory structures the Roma population is facing in many European countries. Still, even if dialog has started on this issue, representation of Roma themselves – a group with a high risk of being discriminated against – is only slowly developing. This example given, it seems important to state that the process based approach of EU anti-discrimination policies should not be limited to policy objectives and tools, but should be extended towards potential stakeholders and partners of dialog.

In the upcoming years it will be essential to develop policy strategies to get the business involved. Even if bilateral dialog with representatives of certain branches is quite successful,

clear action and readiness to enter multi-lateral dialog is still missing. A change in wording from anti-discrimination to inclusion might improve co-operation, nevertheless policy objectives developed within a process of collectives learning should not be dropped for the sake of dialog with one single actor.

Mainstreaming anti-discrimination has developed into a policy target which has not been successfully achieved yet. It was set on the agenda of the European Commission years ago, but nothing had really been done to realise this aim. In this case the transfer of anti-discrimination issues into the field of social policies might be supportive. European Union institutions have been criticised for several years that their commitment to diversity and anti-discrimination has not been reflected in their own organisational structures and by other European policies. We would suggest that European institutions should undergo a diversity management audit and change management procedures to gain credibility and to profit from the diversity of all living within the territory of the European Union. Monitoring at European level should be done by a group of independent legal and socio-economic experts, whose opinions would have to be binding; the same should be done at Member State level.

Although implementation of anti-discrimination legislation in the European Union Member States has been quite successful and civil dialog and the high reflexivity of governance structures have resulted in improvements of this specific policy field, the European anti-discrimination system is quite powerless when it comes to political developments in the Member States. The homophobic incidents in Poland in the years 2005-2007 saw only very slow and careful reactions by the Community institutions. Even if resolutions and expert opinions as well as reports will be of a certain influence in the future, the only relevant actors able to really lead to change are the courts. The European Union was not very loud in reacting to racist incidents and negative political attitudes towards Roma in Italy, which resulted in the implementation of discriminatory practises in summer 2008⁵⁶⁵.

What remains to be said is that dialog still has to be intensified, stakeholders reluctant to co-operate have to be taken on board, a strategy which could work at the European level. When it

⁵⁶⁵ For more information on what happened in Italy see: FRA, European Agency of Fundamental Rights (2008): Incident Report – Violent attacks against Roma in the Ponticelli district of Naples, Italy. http://fra.europa.eu/fra/material/pub/ROMA/Incid-Report-Italy-08_en.pdf, (02.09.2008).

has successfully been put in place, experience shows that it might influence traditions of governance in the Member States as well.

Even if connecting the field of anti-discrimination with the topics of poverty reduction and equal access to opportunities for all, might open the path for lowering barriers and promoting more equality in society, a strong eye should be kept on anti-discrimination as a policy field of its own. Otherwise it might be absorbed by the wider topic of social inclusion with its limited potential for creating legally binding provisions for all Member States. Experience with the policy field of anti-discrimination did prove that a shift of competence does improve governance structures in terms of reliability, mutual learning, readiness for change within a process based approach and involvement of most relevant stake holders.

This strength as well as the lessons learnt regarding the importance of mutual learning and the commitment to a process based approach that are incorporated in the recent EU documents form a strong basis for establishing new structures of interaction and of learning within OMC procedures. Still, the risk remains that the policy field will be diluted and its standards will be lowered due to the lack in binding obligations for Member States and the less institutionalised role of non-state actors.

Balancing the interests of single Member States in the very emotional field of social inclusion, immigration and anti-discrimination and the need to develop a comprehensive Europe wide policy will be a big challenge for the years to come, a challenge for which a high level of reflexivity in governance structures, a high grade of commitments towards a process based approach and mutual learning will be of major relevance.

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1. 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.

2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

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BusinessEurope (former UNICE)

<http://www.business europe.eu>

Equinet, European Network of Equality Bodies

<http://www.equineteurope.org/>

European Association of Craft, Small and Medium-sized Enterprises

<http://www.ueapme.com/>

European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest

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