

# **European Union Anti-Discrimination Policy: FROM EQUAL OPPORTUNITIES BETWEEN WOMEN AND MEN TO COMBATING RACISM**

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#### **Executive Summary:**

#### **EU anti-discrimination policy - from equal opportunities between women and men to combating racism**

Racial discrimination remains an everyday challenge to millions of people living in the European Union. This takes a variety of forms, from racist remarks and stereotyping in the workplace to extreme instances of physical assault and even murder. Such discrimination is experienced by both citizens and non-citizens of the Union, from permanent residents to newly-arrived asylum-seekers. Racism occurs in both the public and the private sphere, be it in the harassment of ethnic minorities by the police and immigration authorities, or the refusal of a job on the basis of an individual's colour, race or nationality. Furthermore, the legacy of both past and present racism results in social and economic disadvantage to ethnic minorities, which is plain to see in many cities throughout the European Union.

The issue is not one which the European Union can afford to ignore. The EU has a well-established commitment to combating discrimination against women. Given this commitment, the question of the EU's position on other forms of discrimination logically arises. At the most fundamental level, the Union was born out of a conflict based on ethnic hatred and has a duty to ensure such discrimination does not go unchallenged. Furthermore,

the Parliament has pointed out the dangers to the whole integration project from racism. Racism strikes at the heart of what has been described as the "European Idea, namely that harmonious societies characterized by ethnic and cultural diversity are an expression of civilisation and that the diversity of the various cultures and traditions constitutes a positive and enriching factor." (1) Combating racism also forms part of the EU's responsibility for human rights. This includes human rights both inside and outside the Union. The 1997 Treaty of Amsterdam enhances the importance of human rights within the EU legal order, even providing for the possible suspension of a state where there is "a serious and persistent breach" of human rights. (2) Thus, respect for human rights in the Member States, including the right to non-discrimination is of genuine concern to the Union as a whole. Finally, racial discrimination undermines one of the central objectives of the integration process; the right to free movement of persons. Where individuals fear discrimination in another Member State, or where they will enjoy less protection against discrimination in Member States other than their own, they are likely to be deterred from exercising their right to free movement. More fundamentally, the absence of any right to free movement for the 13 million third-country nationals resident in the EU demonstrates that the Union has yet to ensure equal treatment for ethnic minorities even within its own jurisdiction.

The European Union has been involved in combating racism since the mid-1980s. The issue was first raised through a 1985 Committee of Inquiry by the European Parliament. The growing evidence of racial discrimination, racist violence and the increased popularity of the parties of the extreme-right have underlined the need for more effective action in this sphere. During the 1990s, the commitment of the EU to the fight against racism has been significantly strengthened, culminating in 1997, European Year against Racism. During the course of the Year, the Council agreed to establish a permanent Monitoring Centre on Racism and Xenophobia, and the Treaty of Amsterdam inserted a new Article 6a which will provide the EU with the option of adopting binding legislation against racial discrimination. In the light of the revision of the Treaty, and the general anticipation of an anti-discrimination directive against racial, and possibly religious, discrimination, this paper examines the options open to the EU in preparing new legislation in this field.

Drawing on the experience of sexual equality legislation at both the European and national level, we will examine both the strengths and weaknesses of the existing anti-discrimination legislation. In particular, difficulties have been found in the practical implementation of the legislation, most especially in relation to successfully pursuing an individual case of discrimination. Taking into account the variety of national legislation on racial discrimination which is already in place, the paper focuses on the potential contribution to combating discrimination which may be made through the existence of specialised agencies charged with assisting individual victims of discrimination. The paper also points out the importance of a combination of criminal and civil law remedies. This paper also considers the need for measures specifically designed to tackle institutionalised forms of discrimination, which are less amenable to correction through an individual complaint procedure. The options of contract compliance, ethnic monitoring and positive action are examined in more detail.

Specific action against discrimination is unlikely to be sufficient unless complemented by measures to promote equal opportunities for ethnic minorities in all aspects of EU policies. The need to 'mainstream' anti-discrimination objectives has already been recognised in the field of sexual equality. The document examines the relevance of anti-discrimination to foreign policy, and the enlargement of the Union, but specifically focuses on the need to incorporate equal opportunities for ethnic minorities into immigration and asylum policy. In

particular, we propose that there is a need for a greater emphasis on protecting the fundamental rights of asylum-seekers and guaranteeing equal rights for resident immigrants, and a shift away from the concern with migration control which has hitherto dominated EU policy on immigration and asylum.

Racial discrimination remains an everyday challenge to millions of people living in the European Union. This takes a variety of forms, from extreme instances of physical assault and even murder, to racist remarks and stereotyping in the workplace and beyond. Such discrimination is experienced by both citizens and non-citizens of the Union, from permanent residents to newly-arrived asylum-seekers. Racism occurs in both the public and the private sphere, be it in the harassment of ethnic minorities by the police and immigration authorities, or the refusal of a job on the basis of an individual's colour, race or nationality. Furthermore, the legacy of both past and present racism results in social and economic disadvantage to ethnic minorities, which is plain to see in many cities throughout the European Union. Ample evidence of the persistent need to challenge racism was recently provided in the results of a Eurobarometer survey; one European in three (33%), declared themselves 'very' or 'quite' racist. [\(3\)](#)

The issue is not one which the European Union can afford to ignore. The EU has a well-established commitment to combating discrimination against women. Given this commitment, the question of the EU's position on other forms of discrimination logically arises. Since the mid-1980s, the Parliament has been pressing the Commission and the Council to take more effective action against racism. At the most fundamental level, the Union was born out of a conflict based on ethnic hatred and has a duty to ensure such discrimination does not go unchallenged. Furthermore, the Parliament has pointed out the dangers to the whole integration project from racism. Racism strikes at the heart of what has been described as the "European Idea, namely that harmonious societies characterized by ethnic and cultural diversity are an expression of civilisation and that the diversity of the various cultures and traditions constitutes a positive and enriching factor." [\(4\)](#) Combating racism also forms part of the EU's responsibility for human rights. This includes human rights both inside and outside the Union. The 1997 Treaty of Amsterdam enhances the importance of human rights within the EU legal order, even providing for the possible suspension of a state where there is "a serious and persistent breach" of human rights. [\(5\)](#) Thus, respect for human rights in the Member States, including the right to non-discrimination is of genuine concern to the Union as a whole. Finally, racial discrimination undermines one of the central objectives of the integration process; the right to free movement of persons. Where individuals fear discrimination in another Member State, or where they will enjoy less protection against discrimination in Member States other than their own, they are likely to be deterred from exercising their right to free movement. More fundamentally, the absence of any right to free movement for the 13 million third-country nationals resident in the EU demonstrates that the Union has yet to ensure equal treatment for ethnic minorities even within its own jurisdiction.

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[1.](#) Recital Q, Resolution on racism, xenophobia and anti-semitism and the European Year against Racism (1997) [Ford, G & Oostlander, A] 30 January 1997 (OJC 55/17, 24.2.97) *See*: Annex 5

[2.](#) Article F.1(1), EU (1997) " *Treaty of Amsterdam*" Luxembourg: OOPEC

3. *Le Soir* (21.12.97) "55% des Belges se disent racistes"; *Agence Europe* (24.12.97) "Fight against racism" No. 7128, p. 3

4. Recital Q, Resolution on racism, xenophobia and anti-semitism and the European Year against Racism (1997) [Ford, G & Oostlander, A] 30 January 1997 (OJC 55/17, 24.2.97) *See*: Annex 5

5. Article F.1(1), EU (1997) " *Treaty of Amsterdam*" Luxembourg: OOPEC



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### **1. Racism and the European Union**

Non-discrimination is a fundamental principle of the EC legal order. The European Court of Justice (ECJ) has articulated the underlying logic: "similar situations shall not be treated differently unless differentiation is objectively justified". (1) Notwithstanding the centrality of the principle of non-discrimination in the EC legal order, the Community has concentrated its equal opportunities policy on discrimination between women and men. The principle of sexual equality as encapsulated in Article 119 (equal pay between women and men) has been progressively consolidated and expanded upon; a variety of secondary legislation has sought to produce a comprehensive right to non-

discrimination in the workplace between women and men. (2) Yet the role of the EU in combating other forms of discrimination remains much more ambiguous, not least in relation to racial discrimination. Despite numerous resolutions, reports and recommendations, the EU has yet to adopt any binding legislation in this sphere. The absence of any protective legislation has been a matter of some controversy in the past decade. The European Parliament has repeatedly requested that the Council of Ministers enact new anti-discrimination legislation covering racial discrimination, but the Council has demonstrated great reluctance to accede to these demands. Rather the emphasis has been on non-binding agreements exhorting national governments to take further action against racism.

This paper will provide a brief overview of policy action by the EU to date, and a consideration of how effective these measures have been. The second part of the paper turns to future developments. The Amsterdam Treaty provides the EU with the power to adopt binding legislation on, *inter alia*, racial discrimination. However, as the paper will detail, there are a number of unresolved questions concerning the content of any future anti-discrimination legislation. These revolve around three themes: the scope of any new legislation; the procedures established therein to challenge and remedy discrimination; and measures to combat institutionalised forms of discrimination. Part III starts from the premise that whilst anti-discrimination legislation at the EU level is a necessary element to the fight against racism, it will not, on its own, be sufficient. Action must also be taken to ensure that equal opportunities for ethnic minorities are promoted through non-legislative means, such as media and educational initiatives. Building on the experience in sexual equality, the paper also argues that the EU must scrutinise its own actions for latent discrimination, and must ensure that all areas of EU policy are consistent with the goal of non-discrimination. This is particularly relevant to immigration and asylum policy.



### ***1.1. From the Joint Declaration to the Treaty of Amsterdam***

Whilst the EU has not issued directives or regulations on combating racism, its institutions have regularly expressed their concern at evidence of racial discrimination in the Member States, and their commitment to fighting the spread of racist and xenophobic attitudes. For reasons of space, this paper will not consider in detail the contents of the various reports and resolutions adopted, but seeks to provide a summary of the developing policies of the EU institutions. Most of the documents referred to have been recently published by the Commission in one volume, *The European institutions in the fight against racism: selected texts*. (3)

The issue of racism, and the response of the European Union, first came to the fore in the early 1980s. The policy debate initiated in the European Parliament, following the 1984 elections in which the parties of the extreme right-wing

recorded notable successes, most especially in France, where the *Front National* won 10 of the 80 seats available. The Parliament agreed to establish a Committee of Inquiry into the rise of racism and fascism in Europe, and this delivered its report in December 1985. Known as the Evrigenis report, it provided comprehensive evidence of the growing problems in the Member States, and concluded that xenophobia was rising with "alarming intensity". (4) The report recommended a wide range of measures which could be adopted to combat this trend, and in particular concluded that measures taken at the national level should be supplemented by European-level action. As a starting point, the report proposed that the institutions agree a Joint Declaration, which could form a basis for EC policy in this field. To this end, the Commission, Council and the European Parliament signed the *Joint Declaration against racism and xenophobia* in June 1986. This expressed "the need to ensure that all acts or forms of discrimination are prevented or curbed." (5)

In retrospect, the Joint Declaration turned out to be something of a false dawn in policy on racial discrimination. In the years which followed, the determination signified in the declaration was lost amidst wrangling over the legal competence of the Community. The Parliament requested the adoption of anti-discrimination legislation by the EC (6), however, this was rejected by the Commission on the grounds that there was no appropriate legal base. As an alternative to binding legislation, the Commission submitted a proposal to the Council for a resolution on racism in 1988. (7) Whilst non-binding, it sought to move forward from the general principles expressed in the 1986 Joint Declaration and specifies a number of legal developments to be encouraged in the Member States. In particular, the Member States were urged to adopt anti-discrimination legislation where it did not already exist, and to enhance the effectiveness of existing legislation, through closing loopholes in the definition of discrimination, and in improving access to justice.

However, even this non-binding measure proved divisive within the Council of Ministers, and it was not until two years had passed that agreement was reached on a considerably diluted version of the original proposal. (8) Whilst all the Member States, and all the institutions, could agree to the principle that racial discrimination was impermissible and must be countered, there was a significant divergence of opinion on the question of the appropriate contribution the Community should make in this sphere. The Parliament reexamined the issue in depth with a second Committee of Inquiry in 1990. This produced the Ford report, which again highlighted the need for action, given evidence of rising racism and electoral advances for the extreme right-wing. (9)

The Ford report produced a total of 77 recommendations for action, several of which focused on the contribution which could be made by European legislation to combat racism. However, the proposals were not acted upon; the Commission stressed it was powerless in the face of the opposition in the Council, and that, in its opinion, the Community lacked the necessary legal competence to intervene in this area. The report itself had acknowledged the difficulty of the Commission's position: "the Commission has, in fact, been putting forward proposals and taking initiatives to combat racism and xenophobia ... [but] initiatives are either subject to long delays in the Council of Ministers or they

are watered down, if not completely abandoned, by the Commission on the grounds of political necessities, believing that unanimous approval will not be obtained." (10) **Undeterred, the Parliament kept up the pressure for action throughout the 1990s. For example, based on a proposal in the Ford report, an annual Parliamentary debate on racism was instituted, ensuring ongoing attention to this issue. Consistently, the Parliament has stressed the need for legislative action at the European level, to add substance to the numerous declarations of good intent.**

The Parliament's lobbying has dovetailed with an increasingly well-organised NGO lobby on racism. The turning point in this respect may be identified as the creation in 1991 of the Starting Line Group. Based on an initiative from the UK Commission for Racial Equality (CRE), the Dutch National Bureau against Racism and the Churches Committee on Migrants in Europe (CCME), a group of legal experts from across the Member States were organised to prepare a draft directive for the elimination of racial discrimination. This was submitted in 1993 and has received the endorsement of more than 200 NGOs and the explicit approval of the European Parliament. (11) This was rapidly followed by the submission of the 'Starting Point', a proposal for an amendment of the Treaty to provide the EU with the competence to enact the Starting Line directive.

For its part, the European Council has regularly acknowledged the seriousness of this issue and the need for a more resolute policy response. Since 1991, the Presidency has regularly referred to racism in the conclusions issued after the biannual meetings of the Heads of State and Government of the Member States. (12) However, it has been largely unwilling to move beyond such symbolic declarations. On a number of occasions, the Council has issued more detailed recommendations to the Member States with regard to the policies to be adopted in the fight against racism. For instance, in 1995, the Council agreed two resolutions on the fight against racism, one regarding discrimination in employment, and the other relating to the contribution which can be made through educational policies. (13) In 1997, a further declaration on the fight against racism in the education field was agreed. (14)

In recent years though, there has been a discernible shift in the approach of the Council, and a new preparedness to consider substantive policy commitments at the EU level. The origins of this change in attitude lie in the 1994 decision at the Corfu European Council to establish a Consultative Commission on Racism and Xenophobia "to formulate recommendations, geared to national and local circumstances, on cooperation between governments and the various social players to promote tolerance, understanding and harmony in relations with foreigners." (15) The Kahn Commission (as it was to become known, after its chair, Jean Kahn, President of the European Jewish Congress) consisted of a representative from each of the Member States, two MEPs (16), a representative from the Commission and an observer from the Council of Europe. The Commission's findings were unequivocal about the need to adopt binding legislation combating racial discrimination at the European level.

*"The Community has already shown how effective it can be in combating discrimination on the basis of sex; it is appropriate that it should be given a*

*similar mandate, and that it should adopt similar measures, to combating [sic] discrimination on grounds of race, religion or ethnic or national origins." (17)*

To this end, the Kahn Commission concluded that an essential prerequisite to effective action by the Community would be the amendment of the Treaty to insert a specific reference to combating racial discrimination.

This message was endorsed by both Parliament and Commission; in December 1995, the Commission published a *Communication on racism, xenophobia and anti-semitism* (18) in which it stated its belief that the Treaties should be amended in the 1996 intergovernmental conference (IGC) to provide competence for the Community in this sphere. Furthermore, it indicated that this amendment should be with a view to the subsequent enactment of EC legislation on racial discrimination. (19) This view echoed the well-established position of the Parliament, which restated its view in November 1995 that Article 6 of the EC Treaty should be extended "to prohibit all forms of discrimination." (20)

The recommendations of the Commission, Parliament, Economic and Social Committee, the Kahn Commission, and several hundred NGOs (including churches, trades unions and migrants' rights groups) did not go unheeded, and the Member States were largely in agreement from the outset of the IGC as to the need for such an amendment. The Treaty of Amsterdam provides for a new Article 6a (21) in the Treaty establishing the European Community:

*"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." (22)*

The decision to extend the EU's competence has obviously been welcomed by those NGOs who have been campaigning for such a change. However, disappointment has been expressed at a number of aspects of the new article. First, the article requires unanimity in the Council to adopt legislation. Thus, even only one recalcitrant state could block further progress. Second, the Parliament has been assigned a relatively marginal role in the decision-making process. Whilst the general trend in the Treaty was to extend to the Parliament the right of codecision on legislation, Article 6a only provides for consultation of the Parliament. This is surprising given that this is a field in which the Parliament has taken a particular interest. Indeed, the Parliament, more than any other institution, was the driving force behind the Amsterdam amendment. The Starting Line Group had specifically expressed the hope that the article would possess direct effect, as is the case with Article 119 requiring equal pay between men and women. The significance of 'direct effect' is that individuals may then rely on the provisions of the article in national legal proceedings, with the ultimate sanction of recourse to the European Court of Justice to ensure that this is upheld. Thus, the article could provide practical and immediate benefit to victims of discrimination throughout the EU. However, this is not the case with the final article, which simply provides a discretionary power to the Council to

adopt measures as they see fit.

Elsewhere, it is worth noting that the Treaty also enhances provisions concerning police and judicial cooperation on racism. A new Article K.1 states:

*" Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia."*

Whilst the inclusion of an explicit reference to racism under Title VI should assist in raising the priority of this issue, one should not over-estimate the importance of this amendment. Even without a specific reference to racism in Title VI, the Justice and Home Affairs Council demonstrated that it was possible to adopt measures on racism. (23)

Perhaps in anticipation of Treaty amendment, there has been a heightened level of activity on racism within the institutions since 1995. In particular, the Commission submitted proposals to the Council for two initiatives. First, building on a proposal from the Parliament for a "European Year of Harmony among Peoples" (24), in 1995 the Commission proposed the specification of 1997 as 'European Year against Racism'. Second, in 1996, the Commission proposed the creation of a European Monitoring Centre on Racism (25). Again this may be traced back to an earlier proposal from the Parliament; in 1993 it called on the Commission "to set up a data bank and a system for monitoring activities in the field of racism, anti-Semitism and xenophobia." (26) Both of these proposals were subsequently approved by the Council of Ministers. (27) The Monitoring Centre has been established with the prime objective of supplying the "the European Community institutions and the Member States with objective, reliable and comparable data on racism, xenophobia and anti-semitism." (28) The Monitoring Centre is though limited to collecting information on racism in areas related to the competence of the EC, for example, employment and education. (29) Thus, it seems probable that the Centre will be less concerned with discrimination in other areas, such as the criminal law and policing, which lie outside the scope of the EC Treaty.

Thus, assuming the ratification of the Amsterdam Treaty, the EU will soon have the necessary powers to change the direction of policy, away from exhortatory declarations and towards the provision of directly enforceable individual rights to equal treatment. Certainly, the lengthy process involved in reaching agreement on amending the Treaty will appear rather futile if there is no utilisation of the additional powers now provided. The Parliament has called for "an anti-discrimination Directive" (30) and the Council has committed itself to building "on the achievements of the European Year [against racism] and to take steps to ensure an appropriate follow-up after 1997." (31) To this end, the Council has decided that henceforth the Member States and the Commission should endeavour to support specific initiatives against discrimination on 21 March each year. (32) However, before considering other future measures which may be adopted, it is necessary to reflect on that which has already been

accomplished.

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## 1.2. The contribution of the EU to combating racism

As has been demonstrated, even in the absence of an express legal competence, the EU has been quite active during the past decade on the subject of racism. The most notable characteristic of the various initiatives taken has been the focus on *symbolism*. In this respect, it is relatively easy to criticise the efforts of the European institutions. A familiar complaint has been that the EU is "long on rhetoric, but short on action" when it comes to anti-discrimination policy. (33) Before proceeding to consider this critique, it is only fair to highlight the important contribution made by the non-binding, or 'soft law' measures which have been adopted.

Soft law may serve three functions:

- awareness-raising
- anticipating future developments
- stimulating national policy initiatives

*Awareness-raising*: one of the most obvious functions of the Joint Declarations, Parliamentary reports, etc. is to create a consciousness of the problem. As with the fight against sexual discrimination, the first step is to combat the invisibility of many forms of discrimination; to demonstrate the prevalence of discrimination throughout society and the urgent need for action to promote equality. The target audience varies: for example, measures such as the European Year against Racism are clearly aimed at the general public, reminding them of the seriousness of the issue, challenging them to examine their own attitudes towards racism. Other measures have a narrower audience, but are no less significant. In particular, many of the EU reports and recommendations have contributed to raising awareness of the problem amongst policy-makers both inside and outside the European institutions. In particular, the various soft law measures have played a central role in legitimising this as an appropriate issue for EU intervention. Symbolic measures are easy to criticise because it is difficult to point to any direct impact they have on the situation on the ground. This is especially true when these measures are adopted at the European, or international level. However, to the extent that they form part of the incremental process of changing the attitudes of the responsible authorities, they make a significant and indispensable contribution.

*Anticipating future developments*: Partly because of its awareness-raising role, soft law may contribute to future legal developments. In the first place, declarations, etc. may commit the EU to achieving a specific policy objective. For example, the 1986 Joint Declaration made an initial commitment on the behalf of the institutions to combat racial discrimination. Thereafter it was

difficult to argue that fighting racism was not a policy objective of the EU. Not only does soft law develop new goals for the EU, but it creates an expectation that the EU will take further and more effective action if these goals are not realised. Taking an example from sexual equality policy, in 1991 the Commission issued a non-binding Recommendation on dignity in the workplace between women and men. (34) The Recommendation was an attempt to tackle the problem of sexual harassment through an approach based on voluntary compliance by the Member States and employers. However, when a Commission report in 1996 concluded that progress since the Recommendation had been insufficient, the Commission was able to argue that it was justified in now seeking to have recourse to binding legislation. The soft law measures created an expectation that if they failed to prove sufficiently effective, binding legislation would follow. This process is in evidence vis-à-vis racism. Non-binding measures, such as the 1990 Council Resolution, have been tried and tested and have not proven sufficiently effective. That is the implicit conclusion of the Kahn Commission, and is supported by evidence of weak implementation by the Member States of the 1990 Resolution, discussed more fully in the next section. Therefore, a legitimate expectation has been created that the EU will now progress to the adoption of binding legislation to give force to its earlier undertakings.

*Stimulating national policy initiatives:* Aside from the preparatory role soft law may play, it is important not to overlook its most immediate objective, which is to encourage the voluntary adoption of measures at the national level. The recourse to voluntary mechanisms is consistent with the Commission's broader interpretation of the principle of subsidiarity. (35) The Commission has indicated that this should be taken to imply a preference for non-binding, and less intrusive forms of regulation, with binding EU legislation a last resort option. The preference for soft law reflects a desire to ensure flexibility for Member States in the implementation of EC policies. Certainly it is true that soft law provides Member States with more discretion to tailor policies to specific national legal and cultural traditions. Whilst this may be beneficial, flexibility must be balanced against efficacy; there is an ever-present danger that Member States may rely on the non-enforceability of soft law measures to avoid taking the necessary measures. Indeed, at times NGOs have complained that soft law is employed merely to deflect attention from the lack of more substantive action by the EU institutions.

Some soft law measures are successful in provoking relevant national legal developments. Returning to the example of the Commission's Recommendation on Dignity at Work, subsequent research concluded that it did give rise to some additional legislative action in the Member States. In several Member States where legislation was already under consideration, the Recommendation helped shape the final content of new measures at the national level. This may not have been regarded as sufficient, but it did nonetheless provide some practical benefit in promoting the need to tackle sexual harassment. (36) However, anti-racism measures appear to have had less impact. For example, two years after the Joint Declaration, a Parliamentary Committee concluded: "there is little evidence of a generally favourable trend in the wake of the Joint Declaration. The spectre of xenophobia continues to haunt the political stage of Europe. No drop in the

number of attacks on immigrants by right-wing extremists has been registered. The electoral success of racist slogans, confirms that there is cause for concern." (37) The 1990 Council Resolution also proved to be relatively ineffectual. No evidence has been adduced of subsequent implementing action in the Member States to meet the recommendations contained therein. To the contrary, many of the proposals have still not been complied with. For example, Article 2(b) of the 1990 Resolution proposed the acceptance by the Member States of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), including Article 14 which allows for an individual complaint procedure. Despite its weaknesses, this would have at least provided individuals with an alternative means of challenging discrimination from those procedures which already exist in national law. However, the majority of the Member States have still not accepted Article 14, and Ireland has not yet even ratified the CERD, although it signed the Convention in 1968.

More fundamentally, Article 2(c) of the 1990 Resolution requests the "resolute application of laws aimed at preventing or curbing discrimination or xenophobic acts and the preparation of such laws by those Member States which have not yet done so." Again the evidence suggests a significant degree of non-compliance by the Member States. In 1996, the European Foundation for the Improvement of Living and Working Conditions completed a major study into national legislation governing racial discrimination in the workplace. (38) The report recorded that "measures to combat discrimination are variable in their scope and effectiveness, and in some cases hardly exist." (39) Even in those states where legislative protection against discrimination did exist, serious barriers remained to the practical utilisation of the legislation. For example, in Greece, no specific legislative protection against racial discrimination in employment exists. Theoretically, it would be possible for an individual to utilise the CERD to challenge discrimination in employment, as the Greek Constitution provides that international conventions adopted by law, and which have entered into force, become an "integral part of Greek domestic law and shall prevail over any contrary provision of law." (40) Unsurprisingly though, this a cumbersome means of recourse and there is no apparent evidence of any case having been brought via this route.

As stated earlier, soft law is a legitimate strategy, but its effectiveness is significantly reduced where there is not a preparedness to go further if non-binding measures prove inadequate to meet the stated objectives. There is little purpose in repeatedly returning to the same approach where past experience has demonstrated that it is insufficient. Soft law tends to be at its most effective when it is founded on an already existing legal instrument. This assists in understanding why the Dignity at Work Recommendation did have an impact in the Member States, whereas other measures not underpinned by directives or regulations have been largely ignored. (41) It has been evident for some time that a more effective EU policy on racism must contemplate the introduction of binding legislation providing practically enforceable protection against discrimination. This was the conclusion of the report for the European Foundation for the Improvement of Living and Working Conditions, it has been the opinion of the European Parliament for many years now, and more recently was endorsed by the Kahn Commission. The support of the Kahn Commission

is particularly significant as this body was mainly composed of representatives of the Member States, indicating some recognition within the national governments of the need for further action. The Commission has also signalled support for new legislation; its 1995 Communication states:

" *The Commission believes that Community legislation designed to guarantee minimum levels of protection against discrimination throughout the Community would constitute a highly significant step towards full achievement of the Treaty objectives.*" [\(42\)](#)

The Amsterdam amendment provides the EU with a clear legal base for such action, and there must now be a legitimate expectation that the Commission will propose an anti-discrimination directive following the ratification of the new Treaty. However, many issues remain unresolved concerning the contents of such a directive; will it simply replicate the existing sexual equality legislation or will it seek to bring a more innovative approach to realising equal opportunities? The choices facing the EU in preparing an anti-discrimination directive are the focus of section 2 of this paper.

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### Footnotes

- [1.](#) Ruckdeschel & Co. and Hansa-Lagehaus Stroh & Co. V Hauptzollamt Hamburg-St. Annen [1977] ECR 1753 at para. 16-17
- [2.](#) For example, Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions; OJL 39, 9.2.76
- [3.](#) European Commission (1997) Luxembourg: OOPEC
- [4.](#) European Parliament (1985) " *Committee of Inquiry into the rise of fascism and racism in Europe*" Luxembourg; at p. 67
- [5.](#) OJ 1986 C 158/1, 11.6.86. See: Annex 1
- [6.](#) Resolution on the Joint Declaration against racism and xenophobia and an action programme by the Council of Ministers, OJC 69/12, 13.2.89.
- [7.](#) European Commission (1988) " *Communication from the Commission to the Council on the fight against racism and xenophobia*" OJ 1988 C 214/32, 29.6.88
- [8.](#) OJC 157, 27.6.1990.
- [9.](#) European Parliament (1991) " *Report of the Committee of Inquiry on Racism*

*and Xenophobia*" Luxembourg: European Parliament

[10.](#) *Ibid.*, at p. 99

[11.](#) In two separate resolutions, in 1993 and 1994, the Parliament urged the Commission to take the Starting Line proposal as a basis for the preparation of a directive to be submitted to the Council of Ministers. (1993 resolution, OJ 1993 C 342/19, 20.12.93; 1994 resolution, para. 9, OJ 1994 C 323/154, 20.11.94. *See*: Annex 2)

[12.](#) For example, at the Copenhagen meeting of the European Council, the conclusions stated that "the Member States will do the utmost to protect immigrants, refugees and others against expressions and manifestations of racism and intolerance". (21-22 June 1993, Presidency Conclusions)

[13.](#) Resolution on the Fight against Racism and Xenophobia in the fields of Employment and Social Affairs (OJ 1995 C 296/13), Resolution on the Response of Educational Systems to the Problems of Racism and Xenophobia (OJ 1995 C 312/1).

[14.](#) Declaration by the Council and the Representatives of the Governments of the Member States, meeting within the Council of 24 November 1997 on the fight against racism, xenophobia and anti-semitism in the youth field, OJC 368/1, 5.12.97

[15.](#) Bulletin of the European Union (6-1994) point I.29

[16.](#) Glyn Ford (Socialist, UK) and Arie Oostlander (EPP, Netherlands)

[17.](#) European Council Consultative Commission on Racism and Xenophobia (1995) "*Final Report*" Ref. 6906/1/95 Rev 1 Limite RAXEN 24 Brussels: General Secretariat of the Council of the European Union, at p. 59

[18.](#) European Commission (1995) "*Communication from the Commission on racism, xenophobia and anti-semitism and Proposal for a Council Decision designating 1997 as European Year against Racism*" COM (95) 653, 13.12.95

[19.](#) *Ibid.*, at p. 19

[20.](#) Resolution of the European Parliament on racism, xenophobia and anti-semitism, 26 October 1995. (OJC 308/140, 20.11.95) *See*: Annex 3

[21.](#) The Treaty of Amsterdam provides for the renumbering of the articles of the Treaty. Following this process, Article 6a shall become Article 13. However, for reasons of consistency this paper shall use the article numbers prior to renumbering.

[22.](#) EU (1997) "*Treaty of Amsterdam*" Luxembourg: OOPEC

[23.](#) In July 1996, the Council adopted a Joint Action concerning action to

combat racism and xenophobia. (OJ 1996 L 185/5) *See*: Annex 4.

[24.](#) Para. 20, Resolution of the European Parliament on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremist violence, 21 April 1993. (OJC 150/127, 31.5.1993).

[25.](#) European Commission (1996) "*Proposal for a Council Regulation (EC) establishing a European Monitoring Centre for Racism and Xenophobia*" COM (96) 615, 27.11.96

[26.](#) Para. 14, Resolution of the European Parliament on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremist violence, 21 April 1993. (OJC 150/127, 31.5.1993).

[27.](#) Resolution of the Council and the representatives of the governments of the Member States, meeting within the Council concerning the European Year against Racism (1997) OJ 1996 C 237/1, 23.7.96; Regulation 1035/97 establishing a European Monitoring Centre for Racism and Xenophobia OJ 1997 L 151, 10.6.97

[28.](#) European Commission (1996) "*Proposal for a Council Regulation (EC) establishing a European Monitoring Centre for Racism and Xenophobia*", at p. 3

[29.](#) Article 3(3)

[30.](#) Para. 14, Resolution on racism, xenophobia and anti-Semitism and the European Year against Racism (1997) [Ford, G & Oostlander, A] 30.1.97 OJC 55/17, 24.2.97. *See*: Annex 5.

[31.](#) Declaration by the Council and the Representatives of the Governments of the Member States, meeting within the Council of 24 November 1997 on the fight against racism, xenophobia and anti-semitism in the youth field, OJC 368/1, 5.12.97

[32.](#) *ibid.*

[33.](#) Lomas, *Debates of the European Parliament*, No. 2-374/56, 14.2.89

[34.](#) OJ 1992 L, 49/1, adopted 27.11.91

[35.](#) *See further*: European Commission (1993) "*Commission report to the European Council on the adaptation of existing Community legislation to the subsidiarity principle*" COM (93) 595

[36.](#) New legislation on sexual harassment was introduced or under preparation in 7 Member States, and additional measures were taken in several other Member States, for example, through collective agreements. (European Commission (1996) "*Consultation of management and labour on the prevention of sexual harassment at work*" COM (96) 373, 24.7.96)

[37.](#) European Parliament (1988) "Report of the Political Affairs Committee on the Joint Declaration against racism and xenophobia and an action programme by the Council of Ministers" A2-0261/88, 11.11.88, at p. 11

[38.](#) European Foundation for the Improvement of Living and Working Conditions (1996) "*Preventing racism at the workplace - a report on 16 European countries*" (Report by Wrench, J) Luxembourg: OOOPEC

[39.](#) *Ibid.*, at p. 147

[40.](#) Article 28(1), cited in Forbes, I & Mead, G (1992) "*Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community*" Equal Opportunities Study Group, University of Southampton. Research Series No. 1. London: Department of Employment

[41.](#) The Recommendation was supported by the pre-existence of the 1976 Equal Treatment Directive. (Kenner, J (1995) "*Trends in European Social Policy. Essays in memory of Malcolm Mead*" Aldershot: Dartmouth)

[42.](#) Commission (1995) "*Communication from the Commission on racism, xenophobia and anti-semitism and Proposal for a Council Decision designating 1997 as European Year against Racism*" COM (95) 653, 13.12.95, at p. 19

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# European Union Anti-Discrimination Policy: FROM EQUAL OPPORTUNITIES BETWEEN WOMEN AND MEN TO COMBATING RACISM

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## 2. Towards an anti-discrimination directive?

Naturally, the EU faces numerous policy choices in the move towards the introduction of binding legislation. Inevitably though, the model which has been most frequently cited is the EU's pre-existing equal opportunities legislation, most notably the 1976 Equal Treatment Directive. The Kahn Commission called for action to enshrine in EU law the principle that "all individuals, regardless of their colour, race, nationality, ethnic or national origins or religion should have the right of equal access to employment, equal pay and fair treatment from an employer." (1) It suggested this could be achieved through directives with "the same potential effect as the existing Equal Pay and Equal Treatment Directives in terms of providing widely available remedies, including compensation, to the victims of discrimination, that can be enforced in national courts throughout the Community." (2) The temptation to replicate the sexual equality legislation is understandable. Certainly, it is a most useful reference point in preparing further anti-discrimination legislation. However, what is required is a *learning process*, whereby the weaknesses inherent in the existing sexual equality legislation are not reproduced in a new anti-discrimination legislation. As a result, there must also be consideration of the range of alternative sources of inspiration, specifically relevant to combating racial discrimination.

An important source will naturally be the variety of anti-discrimination strategies in the national legislation of the Member States. (3) However, it will also be important not to overlook to lessons which may be learn from the experience in non-Member States. The considerable history of action to combat racial discrimination in the USA is perhaps the example which springs most readily to mind. However, it is worth considering non-Member States closer to the EU, in particular, the applicant states, who in any case should eventually be full Member States. Often the approach taken to the applicant states focuses on the export of anti-discrimination norms from the existing Member States as part of the process of preparing for accession. Whilst this is valuable, and is discussed at more length in chapter III, there is an argument that accession

should also include an exchange of expertise in combating racism, most especially given the very significant national minorities which many applicant states have to accommodate on a daily basis. Particularly interesting will be the experience of the innovative mechanisms for political representation of minorities in several applicant states. For example, in Romania, Hungarian and Roma minorities enjoy a special right to representation in Parliament, and in 1993, a National Council was established to receive complaints concerning the treatment of minorities. (4) In Slovenia, Hungarian and Italian minorities are also represented in Parliament, and their respective deputies have the right to block legislation which concerns the exercise of the specific rights of these communities or the status. Furthermore, since 1995 gypsies have been entitled to representation on municipal councils in towns where they live. (5) Slovenia also possesses an anti-discrimination statute, including protection against discrimination on grounds of nationality, race, religion or ethnic origin. (6) It remains to be seen how effective these institutional innovations will be in protecting the rights of national minorities in these states, but it is important to recognise that in some applicant states the problems appear to lie not so much in the absence of any anti-discrimination provisions, but in their practical application, a problem shared by many of the Member States.

There also exists a range of international and non-governmental sources of inspiration. At the European level, the Council of Europe has extensively examined this subject, be it through the reports and resolutions of the Parliamentary Assembly, or the work of the European Commission against Racism and Intolerance. The UN has also much experience in this field, through the work of the Committee on the Elimination of Racial Discrimination established under the CERD. In 1996, the UN published a model statute against racial discrimination. (7) Finally, a number of proposals have been submitted by NGOs working in this field, such as the Starting Line directive.

A point of departure must be the principle of effectiveness. A weakness frequently identified in existing EU equal opportunities legislation is that it has not produced genuine improvements in Member States domestic legislation. More fundamentally, the legislation has in many cases not provided individuals with practical protection against discrimination. As the Commission stated in 1996; *"although the legal framework is fairly comprehensive, equality is still not accessible to everyone in the European Union"* (8). It is not simply a question of requiring the enactment of additional legislation by the Member States, but it must be legislation which will be actively utilised. There are numerous examples in the Member States of well-intentioned legislation which has fallen down at the implementation stage. For instance, the Swedish Law against ethnic discrimination in working life entered into force in 1994, but the Ombudsman for Ethnic Discrimination recently reported that not one complaint has yet led to any legal action. (9) Similarly, even though Ireland prohibited dismissal from employment on racial grounds in the 1977 Unfair Dismissals Act (Section 6(2)(e)), there is no record of any case being taken under this provision in the twenty years since its enactment. (10)

This section of the paper will provide an overview of the main legislative options for a future anti-discrimination directive. In particular, there are three

central issues to be addressed: the scope of the legislation; enforcement procedures and remedies; and combating institutionalised discrimination.

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## 2.1 *The scope of the legislation*

The sphere of application of any anti-discrimination directive is of central importance to its effectiveness. There are a number of aspects to this question: the fields of unlawful discrimination; the position of non-EU nationals; and the status of religious discrimination.

### 2.1.1. The fields of unlawful discrimination

One of the weaknesses which has been identified in EU equal opportunities legislation has been the almost exclusive focus on employment-related discrimination. Whilst this reflected the limitations imposed by the Treaty, it failed to recognise that the realisation of equality for women in the labour market is contingent on simultaneous advances in equal opportunities in other spheres of life, in particular, the distribution of family responsibilities. Similarly, ethnic minorities will find it difficult to achieve equal opportunities in the labour market if discrimination persists in areas such as housing, social security, and education. Indeed, in 1996, the Parliament called on the Commission "to develop an anti-discrimination policy in many other fields (health care, education, etc.) and, on the basis of the experience gained with policies and legislative practices in the Member States, to lay down anti-discrimination rules." (11) The barrier to the EU extending its equal opportunities policies beyond the workplace has traditionally been the legal constraints imposed by the Treaty. The Treaty originally only addressed the issue of unequal pay between women and men (Article 119), but even after the addition of the Social Protocol, the explicit competence remained limited to "equality between men and women *with regard to labour market opportunities and treatment at work*". (Article 2, Agreement on Social Policy; emphasis added) The Treaty of Amsterdam would appear to provide a more wide-ranging competence; Article 6a does not limit the anti-discrimination measures adopted thereto to any particular field. Indeed, the fact that sexual discrimination is included logically implies that Article 6a covers more than employment discrimination, as otherwise the reference to sex would be superfluous, and merely a duplication of the competence already provided in Article 118(1), as amended by the Treaty of Amsterdam.

Nonetheless, Article 6a does not provide an unlimited competency for the Community to combat racism. It is significant that it is prefixed by the phrase: "*without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community ...*". There appear to be two possible interpretations of this phrase; one expansive, and one more modest. An expansive approach to Article 6a assumes that the phrase "within the limits of

the powers" [of the Community] simply refers to the fundamental rules regulating the limits of the powers of the institutions *vis-à-vis* each other, and the limits of the Community with regard to fields reserved for the European Union, that is, the third pillar. Thus, this reading of the Treaty would accept that matters relating to racial discrimination and the criminal law are mainly to be dealt with through third pillar mechanisms, as provided for in the new Article K.1. However, Article 6a is otherwise regarded as providing the Community with the competency to combat racism wherever it may arise. An alternative approach to Article 6a views the phrase "within the limits of the powers conferred by it [the Treaty] upon the Community ..." as constraining the Community to combating racism in those areas already within the competence of the EU. Thus, the true extent of Article 6a could only be discovered by reading it in conjunction with the rest of the Treaty. For example, given that Article 118 already provides the Community with significant powers to regulate working conditions, this would permit the Community to combat racial discrimination in the workplace. Similarly, the existing competencies for the Community in the fields of vocational training and education could be interpreted as a sufficient basis for extending any new anti-discrimination legislation to these spheres, but the absence of any explicit EC competence for housing makes it questionable whether Article 6a alone could be relied upon to prohibit racial discrimination in this field. On the other hand, given that the Community has already adopted legislation in respect of the housing of EC migrant workers, this may be regarded as sufficient justification for including a prohibition on discrimination in housing within any legislation adopted under Article 6a. (12)

How the institutions, and in particular, the Council and the ECJ choose to interpret Article 6a remains to be seen. Nonetheless, where the legal base is contestable, the political will of the Member States may ultimately prove the most decisive factor. Normally, Member States' existing national legislation may provide an indication of the most likely format for new EU measures. However, with regard to the scope of non-discrimination legislation, Member States' practice varies considerably. Few, if any, can claim to have comprehensive protection against discrimination. For example, in Austria, there is specific legislation prohibiting incitement to hatred on racial or religious grounds, but no protection against other manifestations of racial discrimination, save for the general principle enunciated in the Constitution that there should be no discrimination on grounds of race, colour, descent or national or ethnic origin. (13) Alternatively, in Great Britain, the 1976 Race Relations Act is considerably broader, forbidding discrimination in employment, training and education, housing and the provision of goods, services and planning. Separate legislation makes incitement to racial hatred a criminal offence.

In contrast, the Starting Line's 1993 draft directive would appear to go even further than both of the aforementioned examples, requiring the prohibition of discrimination in employment, social security, health, welfare, education, vocational training, housing, provision of goods and services and participation in political, economic, social, cultural, religious and public life. (14) Similarly, the UN model legislation on racial discrimination foresees a wide-ranging application:

" 1. The purpose of this Act is to prohibit and bring to an end any racial discrimination ... in the civil, political, economic, social and cultural sphere, inter alia in employment, education, housing, and the provision of goods, facilities and services." (15)

EU anti-discrimination legislation will naturally start from employment discrimination, if only because this is historically the most developed area of European social policy. Which other fields the new legislation should cover will be one of the first items which the institutions will need to address.

### 2.1.2. The position of non-EU nationals

This is potentially the most controversial question surrounding an anti-discrimination directive. In many Member States, but most notably Germany and Austria, it is not regarded as racially discriminatory to draw a clear distinction between EU nationals and non-EU nationals, including permanently resident third country nationals. In other Member States, such as the UK and the Netherlands, there is less differentiation on grounds of nationality. The differences in approach are manifested in issues such as access to employment in the public sector. In those states which permit discrimination against non-EU nationals, access to public sector employment is often subject to serious restrictions based on nationality. For example, in Greece, the public sector is also not formally open to non-EU nationals, even extending to the teaching profession. (16) In some cases, the problems extend beyond the public sector; in Germany, labour market legislation formally extends priority in employment to certain national groups, in particular, EU nationals over non-EU nationals (17), and work permits are only to be provided where the employer cannot find an employee from amongst the prioritised groups. In Portugal, a company with more than 5 employees can only employ foreign nationals as long as 90% of the workforce remains Portuguese. (18) Yet there is little consensus as to the legitimacy of such practices. Dummett highlights how for many Member States it seems only natural and wholly justified to distinguish between citizens and non-citizens, but for others, such as the UK, these measures are regarded as barely concealed examples of overt discrimination. (19)

Other international legal sources reflect the differences between the Member States on this question. For example, Article 1(2) of the CERD states:

*"This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."* However, the UN model legislation on racial discrimination states in Article 2 that:

*"racial discrimination shall mean any distinction, exclusion, restriction, preference or omission based on race, colour, descent, **nationality** or ethnic origin which has the purpose or effect of nullifying or impairing, directly or indirectly, the recognition, equal enjoyment or exercise of human rights and fundamental freedoms recognised in international law."* (Emphasis added)

EU law includes elements of both approaches. For example, the concept of

'Community employment preference', that is, priority for EU nationals in the Community labour market, is incorporated into the basic legislation governing the free movement of workers. (20) Indeed, the right to free movement itself is only extended to the citizens of the Member States. Alternatively, other areas of EU law offer equal rights to all individuals resident in the EU; for example, the right to equal pay between women and men applies regardless of the nationality of the worker. (21)

The issue is further complicated by the thorny question of EU legal competency for non-EU nationals. Certain Member States have maintained the position that the EU does not enjoy legal competence to regulate the position of non-EU nationals. Indeed, it was based on this argument that several Member States (but most notably the UK) insisted on the deletion of a provision in the preamble of the 1990 Council Resolution on racism, which declared that protection against discrimination would apply to all individuals in the EU, irrespective of nationality. The new Article 6a does not provide any specific guidance on this point, despite the fact that the Kahn Commission had recommended the amendment explicitly provide for the elimination of discrimination against persons, "whether citizens of the European Union or not". (22) However, an analysis of the social policy provisions supports the argument that there is no particular *legal* barrier to the inclusion of non-EU nationals under the aegis of an anti-discrimination directive. In particular, Art 118(3), as amended by the Treaty of Amsterdam, provides the Community with competence to adopt measures relating to the "conditions of employment of third country nationals legally residing in Community territory". There seems little reason why this could not be invoked in conjunction with Article 6a to extend protection against discrimination to non-EU nationals, at least in relation to employment discrimination.

Assuming the legal barriers are surmountable, the political objections remain to be addressed. All states distinguish to some extent between citizens and non-citizens, and these distinctions are not inherently racially discriminatory, because they apply to all non-citizens, irrespective of ethnic origin. However, such distinctions clearly affect a disproportionate number of resident ethnic minorities, at least two-thirds of resident non-EU citizens being visible minorities. (23) Therefore, in some cases, discrimination on the basis of nationality, may be regarded as a form of indirect racial discrimination. This is especially true in those Member States where there are few opportunities for naturalisation. In these states, nearly all ethnic minorities resident in the state, irrespective of the length of residence, will be non-EU citizens, thus, any measures which discriminate between citizens and non-citizens will have a particularly negative impact on ethnic minorities. Ironically, those states where rights are most contingent on citizenship are often also those states where it is least possible for resident non-EU nationals to acquire citizenship. Precisely because of this state of affairs, Wrench concludes that in many Member States addressing the differential treatment of foreign nationals is a prerequisite to combating racial discrimination in general:

*"German and Austrian legal and administrative barriers to the equal treatment of migrant workers are perhaps the most visible and extreme examples of a*

*more general point which is applicable to many other countries. Where rules exist which make it difficult for migrants - including 'second generation' migrants - to be regarded as equal in the labour market, then these legal discriminations would need to be removed before other anti-discrimination measures become fully effective." (24)*

The Commission has also recognised on several occasions the links between the treatment of third country nationals and the fight against racism. Combating racism is an essential part of promoting the integration of third country nationals, and conversely, promoting the integration of third country nationals contributes to the fight against racism. The importance of integration was stressed recently in the Commission's *proposal for a Convention on rules for the admission of third country nationals to the Member States*.

*"The integration of migrants is an imperative dictated by the democratic and humanitarian tradition of the Member States and constitutes a fundamental aspect of any immigration policy. The integration of immigrants is essential to safeguard equilibrium in our societies." (25)*

The inclusion of non-EU nationals would not imply that all distinctions between citizens and non-citizens would have to be abolished. First, it would only apply within those fields covered by the directive. Second, even within those spheres to which the directive is applicable, the measures in question would be open to objective justification, as with all cases of indirect discrimination. The German Commissioner for Foreigners' Affairs has suggested creating a record of "all instances where laws provide for the unequal treatment of foreigners, and as a second step, to examine whether there are sound reasons for such treatment." (26) Such an exercise has already been initiated in the Netherlands. (27) The importance of such measures to creating equal opportunities for ethnic minorities cannot be under-estimated. This is especially true when there is evidence that in some states the barriers to non-EU nationals are actually increasing. (28) The objective of non-discrimination against workers from other states underpinned the foundation of the European Community. Extending this principle to workers from outside the Community was explicitly approved by the Social Partners in 1995:

*"equal rights and the equal application of laws and agreements to **all** workers are the fundamental principles of any policy to combat racism and xenophobia in the workplace." (29)*

Moreover, this would not be a new undertaking by the Member States, but merely the fulfilment of a prior commitment. It is important to recall that in 1974, in the first social action programme, the Council set itself the objective of: *"equality of treatment for Community and non-Community workers and members of their families in respect of living and working conditions, wages and economic rights, taking into account the Community provisions in force."* (30)

### 2.1.3. Religious Discrimination

There has been an increasing awareness in the last decade that the problem of racial discrimination extends beyond unjustified differential treatment on the basis of skin colour. In particular, it has been argued that there is a growing phenomenon of 'Islamophobia', or 'anti-Muslim' discrimination, and that this has rapidly risen since the late 1980s. (31) The problem is recognised in the Social Partners' Declaration. This defines racial discrimination as:

*"any distinction, exclusion, restriction or preference based on a person's real or perceived race, **religion**, ethnic or national origin or colour, which has the effect of nullifying or impairing equal treatment in employment or occupation."* (32) (Emphasis added)

Another example of the growing inclusion of 'religion' may be found in the decision of the Starting Line Group, to revise their original proposal for a draft directive on the elimination of racial discrimination to include religion as a prohibited category of discrimination. (33) Other sources do not specifically include religious status under the aegis of racial discrimination. For example, there is no mention of religion as a category of unlawful discrimination in the CERD. It may be argued that religious discrimination raises qualitatively different issues, and as such should be addressed through separate legislative provision. The types of issues in question when addressing religious discrimination were recently highlighted by the Association of Moroccan workers in Italy. The Association presented a request to the commune of Varese (Lombardia) for one paid holiday during Ramadan and the incorporation of prayer times into working hours. In return, the Association offered to work on Christmas Day and Easter, taking their holidays during Muslim religious festivals. (34) Alternatively, the European Foundation for the Improvement of Living and Working Conditions identified examples of good practice concerning the religious needs of employees in its 1997 *European Compendium of Good Practice for the Prevention of Racism at the Workplace*. (35) In Modena, the *Cooperativa Fonderie di Modena* ensures that alternatives to pork are always available in the works canteen (36), and in Helsinki, the Mail Centre allows workers breaks for praying. (37)

Despite the different issues raised by religious and racial discrimination, problems are likely to be encountered in restricting legislation to either religious or racial discrimination. For example, in Great Britain, Section 3 of the 1976 Race Relations Act forbids discrimination on grounds of "colour, race, nationality, and ethnic or national origin"; thus, the Act does not, *prima facie*, prohibit religion discrimination. However, in **Mandla v Dowell Lee** (38), the House of Lords held that Sikhs constituted both a religious and an ethnic group. As a result, religious discrimination against Sikhs was simultaneously regarded as racial discrimination. The unsatisfactory nature of this state of affairs lies in the fact that not all religious groups are regarded as simultaneously being an ethnic group, and thus, not all religious groups enjoy the same protection against discrimination as Sikhs. For example, in **Tariq v Young** (39), an industrial tribunal held that Muslims were not capable of being regarded as constituting an ethnic group, and were only a religious grouping and thus, outside the protection of the Race Relations Act. (40)

Furthermore, it is arguable that most religious discrimination amounts to indirect racial discrimination. This is a view which has been supported by both the Dutch Equal Treatment Commission and the UK Commission for Racial Equality (CRE). (41) Were religious discrimination excluded from the terms of a future directive, litigation similar to that described above would be an inevitable side-effect. Moreover, there is the danger that employers could try to defend discrimination by emphasizing that it was based on religious status, not race or ethnicity. Finally, the Treaty of Amsterdam clearly provides in Article 6a for measures to combat religious discrimination, thus, it would seem natural to address both racial and religious discrimination within the context of the same legislative instrument, given the evident links between the two issues.

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## 2.2. Enforcement procedures and remedies

It is not just a question though of the definition of discrimination, and the groups and sectors to which it applies. Also fundamental to the success of any legislation is the enforcement of the provisions therein. As indicated earlier, this has proven particularly difficult in the case of sex discrimination. The Women's Rights Committee of the European Parliament recently noted that while "a firm legal basis for equal pay and equal treatment between women and men has been well established ... it is extremely difficult for women to prove they have suffered discrimination". (42) This was acknowledged by the Commission in its first annual report on equal opportunities which noted that "there remain a number of outstanding problems in the application of Community law: time limits, the effectiveness of legal remedies and sanctions, and access to justice are some of the problematic areas facing women and men seeking to enforce their rights." (43) This issue was examined in considerable depth in a 1995 report to the Equal Opportunities Unit of the European Commission. (44) The study, based on national reports on the situation in each of the Member States, concluded that there were indeed grave obstacles to the utilisation of the sexual equality legislation. Problems were identified at every stage of the litigation process: difficulties in evidence-gathering, insufficient protection against victimisation, a lack of legal and financial assistance for victims of discrimination, a poor understanding of equality concepts amongst the judiciary, inadequate and inappropriate remedies. Lorraine Fletcher of the GB Equal Opportunities Commission (EOC) provides a picture of the array of barriers to bringing a case:

*" claimants may find themselves in a hostile environment; they can face opposition from employers, sometimes fellow-workers, and occasionally trade unions. In addition, where they wish to invoke rights under the Treaty of Rome they must, under the formal procedures of the Court, be prepared to respond to the representations of their own government, the European Commission, and the governments of other Member States of the European Union. A daunting task to say the least, and not a choice which many people would relish if they*

*had to deal with it (and pay for it) alone."* (45)

Unsurprisingly then the number of cases brought under the legislation in the Member States has been relatively low. (46) As Dickens comments, the legislation is "difficult to use, is little used and used with limited success." (47)

The fundamental problem identified with the existing sex equality legislation is its reliance on what may be described as the "**individual justice**" model. (48) The legislation is predicated on the notion that the main enforcers of equality will be individual litigants. On the one hand, it is true that many women have successfully used the legislation to enforce the right to non-discrimination, in a number of instances pursuing their claims through to the European Court of Justice. Yet, as has been outlined above, there are numerous factors deterring individuals from enforcing their rights. Thus, whilst the right to enforce equality through individual legal proceedings remains a cornerstone of equal opportunities law, it must also be recognised that there are certain forms of discrimination which are not amenable to correction through individual complaint. In particular, *structural* or *institutionalised* discriminations usually operate through processes and procedures, not obvious to the individuals disadvantaged as a result. For example, firms which recruit through personal contacts will, perhaps unwittingly, tend to perpetuate the existing ethnic profile of their workforce. Similarly, a reliance on culturally insensitive selection criteria can prevent the realisation of genuine equal opportunities for ethnic minority candidates. (49) It is these forms of discrimination which have the widest implications for the socio-economic position of either women or ethnic minorities, yet it is these discriminations which are least vulnerable to challenge through individual complaint procedures, the dominant model for anti-discrimination legislation in the Member States.

Therefore, in drafting a new anti-discrimination directive careful consideration must be given to means of moving away from the current undue reliance on individual complainants. On the one hand, this demands new initiatives, specifically to challenge institutionalised forms of discrimination, which are unlikely to be disclosed through an individual complaint procedure. Such measures will be addressed in the next section, 'Challenging Institutionalised Discrimination'. Naturally though, provision for individual enforcement of the right to equal opportunities should remain. To this end, where possible, the provisions surrounding the exercise of this right should be enhanced, to genuinely provide a practical avenue of recourse for victims of discrimination. There exist a variety of measures which could be adopted in this respect and this paper does not purport to provide an exhaustive examination of the options available to the Member States in assisting individual plaintiffs. Two issues though which seem central to the ultimate effectiveness of any new anti-discrimination legislation are the existence of institutionalised legal and financial assistance to individuals, and the availability of civil law remedies.

### 2.2.1. Specialised Equality Agencies

Perhaps the most practical step the Member States could take for the utilisation of equal opportunities legislation is the creation of an independent public body,

in each state, specifically responsible for the provision of legal and financial assistance to individuals who feel they have been the victim of discrimination. Such specialised equality agencies have been proven through the experience of a number of Member States to play an crucial role in the realisation of equal opportunities. (50) These institutions have assumed a variety of forms, and a variety of responsibilities, according to the particular national legal context. However, what distinguishes their contribution from institutions in other Member States is their specificity. In Italy, victims of discrimination may have recourse to the labour inspectorate. However, the Inspectorate is responsible for the general application of labour law, and as such lacks any particular expertise in matters pertaining to racial discrimination. (51) Similarly, whilst the Danish Ombudsman has dealt with at least one case of employment discrimination, this is incidental to a much wider remit. (52) Alternatively, the Finnish Ombudsman for Aliens does have more specialist expertise in the rights of non-nationals, but is primarily concerned with migration-related matters, such as residence permits and family reunion, although clearly these are closely associated with the fight against discrimination. (53)

The most established example of a specialised equality agency is the **Commission for Racial Equality** (CRE) in Great Britain. (54) Created as an independent government agency, it is charged with eliminating discrimination, promoting equal opportunities and good community relations, and keeping the legislation under review. Thus, it may support individual litigants, initiate litigation on its own behalf, or investigations into possible instances of unlawful discrimination. (55) The CRE provides a direct point of reference for individuals who feel they have been victims of discrimination. Each year the CRE receives 1 500-2 000 applications for assistance, and provides legal representation in around 150-200 cases. (56) Whilst such numbers provide a reminder of the scale of the challenge, they testify to the practical contribution of the CRE to the fight against discrimination. Above all, it exists as an essential source of advice and assistance to individuals who believe they have been victims of racial discrimination. Its work is complemented by the existence of Racial Equality Councils at a local and regional level which also provide practical assistance to individuals, and assist in initiatives to combat discrimination, such as the Bradford alliance against racial harassment, sponsored by the Community through the Eurocities programme.

Alternatively, the 1994 Act on Equal Treatment in the Netherlands expanded the responsibilities of the **Equal Treatment Commission**, which existed since 1980 with responsibility for sexual discrimination. Unlike the CRE, the Equal Treatment Commission is now responsible for all forms of unlawful discrimination, such as discrimination based on sex, race and sexual orientation. This differs from the UK approach, which has established separate institutions for each group enjoying legal protection against discrimination. Furthermore, it enjoys adjudicatory responsibilities alongside its information, investigation and advisory duties. The Dutch model was broadly also the model foreseen under the Employment Equality Bill approved by the Irish Parliament in 1997, which anticipates the creation of an Equality Authority, with adjudicatory Equality Officers. (57) The Dutch model may be further distinguished from the UK framework by the significant role attached to the non-governmental sector for

the enforcement of the legislation. Prior to the creation of the Equal Treatment Commission, the legislation was primarily enforced through the National Bureau for Combatting Discrimination (Landelijk Bureau Racismebestrijding). The Bureau did not have any statutory powers of enforcement, but received subsidies from the government to enable it to continue its work. It provides legal assistance to individual complainants, and also conducts its own legal actions and research into discrimination. Like the CRE, the Dutch Equal Treatment Commission has proven a valuable source of advice for individuals; in 1996, it received 421 complaints, 53% of which were justified. It issued a ruling on 119 complaints, of which about a quarter concerned nationality/racial discrimination. [\(58\)](#)

Yet another variation is the **Ombudsman for Ethnic Discrimination (DO)** in Sweden. Although created in 1986, the office has taken on a much greater significance since the 1994 Law against Ethnic Discrimination in Working Life. The DO is charged with ensuring that discrimination does not occur in employment and any other area of society, with the exception of private life. To this end, the DO provides information and advice in general, but also assists with individual complaints of discrimination. The DO assesses the substance of the complaint and if there is sufficient evidence, the case is referred to the complainant's trade union, which the DO then assists in raising the matter with the employer. Where no agreement may be reached, the DO may then take the case to a work tribunal. The high prestige of the Ombudsman institution in Sweden plays a crucial role in enhancing its informal influence. In Denmark, the institution of the Ombudsman has also been received complaints of racial discrimination, and has pursued at least one case of employment discrimination. However, unlike in Sweden, there is not a specific Ombudsman for Ethnic Discrimination, and racial discrimination cases are incidental to a much wider remit.

Finally, in Belgium there exists the **Centre pour l'Egalité des chances et la Lutte contre le Racisme**, which was created within the Prime Minister's Office in 1993. The Centre combines both the function of a policy advisory service, through conducting relevant research and issuing opinions and recommendations, with the provision of direct assistance to individual victims of discrimination through its complaints office. Moreover, the Centre also enjoys the right to be a party to legal proceedings under the 1981 Law against racism, thus, it may provide practical legal support to individual plaintiffs [\(59\)](#). By 1995, the Centre was receiving an average of 64 complaints each month, demonstrating the important role it plays in providing an access point for victims of discrimination. [\(60\)](#) In 1996, this figure rose yet further to an average of 90 complaints per month. [\(61\)](#)

The effectiveness of equality agencies is that they can contribute to both individual and collective enforcement of the legislation. Naturally, they can assist individual litigants, but through this function wider goals may be pursued. In particular, **strategic litigation** has been identified as a useful approach to maximise the impact of individual cases. The equality agency is clearly in a position to identify the areas where the law lacks clarity, and where through selectively and systematically supporting test-cases, the full implications of the

law may be revealed. Notably, the Swedish legislation specifically calls for the DO to prosecute cases likely to have significant legal consequences. (62) In Britain, the CRE has recently focused more attention on following up respondents after the conclusion of individual cases of racial discrimination. This has sought to ensure that employment practices do change in the wake of a discrimination case, so as to avoid the need for any further litigation. This work has produced encouraging results; in 1996, 64 follow-up initiatives were concluded and in 58% of cases all or most of the objectives of the CRE were met. For instance, the supermarket chain *Sainsbury's* agreed, on the advice of the CRE, to establish a national hotline for victims of racial harassment and to create a special panel to receive complaints of racism. (63) This is a clear example of how a specialised agency may translate the results of an individual case into wider benefits for the workforce as a whole.

Following on from this point, an even more effective means to challenging institutionalised forms of discrimination is through the provision of **legal standing** to equality agencies permitting them to challenge discrimination even in the absence of an individual complainant. (64) Alternatively, in France there is no specialised equality agency, but many cases are brought by organisations concerned in the fight against racism, such groups enjoying legal standing once they have been lawfully registered for at least 5 years. (65) The new anti-discrimination provisions introduced in the Luxembourg Penal Code in July 1997 also provide legal standing for recognised anti-racism groups. (66) Given their proximity to the workplace, legal standing for trades unions to bring anti-discrimination cases may form an additional means of supporting individual litigants. The importance of this issue was recognised by the European Parliament in 1993 when it called on the Member States to consider "the possibility for the legal persons and organisations concerned to initiate proceedings against racist acts and to claim damages." (67) An associated issue is the possibility for ' **class actions**', that is, cases taken on behalf of *groups* of workers. This exists in US anti-discrimination law, and Forbes and Meade suggest it would make "legislation more effective while minimising costly and time-consuming tribunals and litigation." (68)

Clearly it would be a considerable undertaking were new anti-discrimination legislation to include a legal obligation to establish an equality agency. However, it would be real step forward in the fight against racism and would be an unequivocal signal that the Member States were concerned not just with making new legislation, but with making legislation which will be actively utilised to improve the everyday situation of those vulnerable to discrimination. Consistent with subsidiarity, the Member States would remain free to determine the exact form and responsibilities of such bodies. Thus, one could find an equality labour inspectorate in Italy, equality ombudsmen (and women) in Denmark or Finland, or an equality authority in Ireland. At the very least, this is a question which deserves detailed consideration in the preparation of new anti-discrimination legislation.

### 2.2.2. Civil Law Remedies

The existence of civil law remedies is another crucial element in enhancing

individual access to justice. Under certain national legal provisions, racial discrimination is dealt with through the civil law, as is the case in the UK. (69) In other jurisdictions, the criminal law has been relied upon to deal with cases of racial discrimination. For instance, this is the case in France and Luxembourg. Other states have opted for a mixed approach, allowing for action in either the criminal law or civil law to challenge discrimination. For example, in the Netherlands, employment discrimination is an offence under the Criminal Code, but there also exists the possibility of taking an action for compensation under the Civil Law. Certainly, there are arguments in favour of penalising discrimination under the criminal law. This symbolises that racial discrimination is an offence against society as a whole as well as the individual victim. The existence of penal remedies serves to underline the gravity of the offence. Furthermore, where the prosecution is brought by the law enforcement authorities, then the individual complainant is sheltered from litigation costs. However, there is significant evidence to support the argument that criminal law provisions alone are inadequate to effectively combat racial discrimination. (70) There are a number of problems peculiar to the criminal law:

the burden of proof: the criminal law generally requires that the alleged offence be proved beyond reasonable doubt. Yet, as has been indicated from the experience of sex discrimination legislation, it is even quite challenging to prove discrimination on the balance of probabilities, precisely because the evidence often lies exclusively in the hands of the employer.

recourse to the criminal law depends on the attitude of the law enforcement authorities. In many instances, ethnic minority communities lack sufficient confidence in the police to make a complaint. Moreover, unless there is legal standing for anti-racism groups, as in France, decisions concerning the handling of the case, in particular, whether or not to prosecute, lie with the police; the victim may be left with very little control over the direction of the case. (71)

remedies; the criminal law sanctions may not provide direct compensation to the victim of the discrimination, reducing the motivation for the individual to make a complaint in the first place. There is also little option for remedies available in the civil law, such as reinstatement.

The French experience tends to support the argument that the criminal law is not an appropriate vehicle for dealing with employment discrimination. Although the annual number of discrimination cases in the 1980s was, on average, 80-90, rising to 101 in 1991, the number of employment law cases is consistently low, on average, 3 or 4 cases *per annum*. In contrast, around 90% of the cases at tribunal represented by the British CRE are employment-related; in 1996 this meant that 160 of the 181 cases the CRE represented were employment related. (72) This strongly endorses the argument that the civil law will be of much wider impact, and more effective in tackling the everyday racism in the Member States.

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### 2.3. Challenging institutionalised discrimination

Even an enhanced individual complaints procedure contains inherent limitations. Crucially, the individual must be *aware* of the discrimination, but, as argued earlier, in many instances the more subtle, institutionalised forms of discrimination are, by their very nature, less amenable to individual challenge than more overt forms of discrimination. These forms of discrimination demand different strategies. Again, the existence of an equality agency is a necessary element in the fight against institutionalised discrimination. Such agencies may take a more systematic approach to challenging discrimination. They are well-placed to identify sectors of the economy where there are specific difficulties for ethnic minorities, and the option of **strategic investigations**, as exists in the British and Dutch legislation, allows the adoption of a more proactive approach to combating discrimination. In a similar vein, **discrimination-testing** is an innovative and direct means of uncovering discriminatory practices in recruitment. (73) This works by sending applications for employment to employers where the applicants have equivalent qualifications, but it will be evident that the individuals are of differing ethnic origins. This often reveals in stark terms the severity of discrimination in the labour market. A recent report by the CRE found that in Britain "the chances of a white person getting a job or an offer of interview ... were three times as high as those of an Asian applicant and almost five times as high as those of a black applicant." (74) In Germany, a trial with 4 000 applications by German and Turkish youths aged 20-25 revealed that discrimination against the Turkish youths occurred in 1 in 5 cases. Often this took the form of the employer telling the Turkish applicant that the vacancy had been filled, whilst later inviting the German applicant for an interview. (75) Again it is worth repeating that this paper does not attempt to provide an exhaustive analysis of the potential measures which could be adopted to combat institutionalised discrimination. However, there exist three central options which will naturally deserve further scrutiny by the EU institutions in preparing new anti-discrimination legislation: contract compliance, ethnic monitoring and positive action.

#### 2.3.1. Contract Compliance

In line with a more proactive approach to combating discrimination, contract compliance has been identified as an effective strategy to encourage changes in the behaviour of employers. Contract compliance is based on the linkage of public finance, usually public procurement contracts, to the equal opportunities record of a firm. On the one hand, contract compliance may be deployed in a negative fashion, that is, employers found guilty of discrimination may be threatened with the sanction of disqualification from future public procurement contracts. Such a model already exists in the Fair Employment Act 1989, which forbids religious discrimination in employment in Northern Ireland. Disqualification notices may be issued in respect of offending firms, however, this possibility has been little used. Indeed, the difficulty with this approach is

that is still an essentially *reactive* instrument, only intervening after discrimination has been established. A more *proactive* approach requires firms competing for public-sector contracts to submit details of their equal opportunities policies and even the ethnic composition of their labour-force. This policy has been applied most notably in the USA, but there are some examples from within the Member States. Forbes & Meade note that several local authorities in the Netherlands were operating such a policy (76), and this is also the case in the UK. Indeed, contract compliance has been actively pursued by many local authorities in London since the 1980s, often leading to direct improvements in equal opportunities amongst the firms involved. (77) In other Member States, in particular Germany, contract compliance schemes have been in operation, but only in respect of equal opportunities between women and men.

Contract compliance is an issue of particular relevance to EU anti-discrimination policy. The completion of the single market resulted, *inter alia*, in the adoption of EU legislation governing public procurement contracts. Whilst the legislation is designed to ensure equal access to such contracts for all EU firms, concerns have been expressed that the legislation has the unintentional effect of restricting the opportunities for contract compliance. (78) For instance, one means to reducing ethnic minority unemployment (or equally to improve equal opportunities between women and men) is the specification of local labour requirements in public contracts. For public works to be conducted in an area mainly inhabited by ethnic minorities, a local labour requirement can bring concentrated benefits to the employment situation of ethnic minority communities. However, such rules run contrary to EU public procurement legislation, as they may be regarded as discriminating against non-domestic firms who may wish to bring use their own employees for the performance of the contract. This issue was acknowledged by the Commission in its Green Paper on Public Procurement (79). The Commission expressed its opinion that whilst 'negative' forms of contract compliance were possible "the Directives do not currently allow social considerations to be taken into account when it comes to checking the suitability of candidates or tenderers on the basis of the selection criteria", which would appear to preclude 'positive' contract compliance schemes. Contract compliance and EU law is an issue worthy of reexamination. The potential benefits of contract compliance are considerable; Forbes and Meade conclude:

*" ... it concentrates minds and changes practices more quickly than would otherwise be the case. Should they choose to use this approach, central and local governments find themselves in a very strong position, given their vast and often concentrated purchasing power ..."* (80)

Indeed, the Commission point out in the Green Paper on Procurement that each year the EU's public authorities spend around 720 billion ECU purchasing goods and services. (81) Whilst it is unlikely that mandatory contract compliance could be enacted by the EU for application throughout the Member States, at the very least, the EU should ensure that its legislation does not prevent Member States implementing contract compliance schemes at the national level. Furthermore, there is a strong case for the EU to set an example to the Member

States with regard to its own procurement policies. A welcome step in this direction was provided by the 1993 reform of the Structural Funds. Article 7 of the new Regulation states:

*" actions funded by the Structural Funds or the EIB or any other existing financial mechanism must conform to the content of the treaties and acts and rulings relating to them, as well as Community policies, including ...respect of the principle of equal opportunities between women and men". (82)*

This principle should now be expanded to include equal opportunities for ethnic minorities.

### 2.3.2. Ethnic Monitoring

Another proactive measure which may contribute to the fight against racism is the monitoring of the ethnicity of employees. An example of how this could work may be taken from Northern Ireland. The 1989 Fair Employment Act requires all firms with more than 10 employees to submit an annual statement to the Fair Employment Commission with details of the religious profile of their workforce. Furthermore, firms which employ more than 250 employees are also required to monitor the religious profile of their applicants. Where "fair participation" is not present, firms are required to carry out "affirmative action" to rectify the situation. (83) In the Netherlands, the 1994 Act for the Promotion of Proportional Labour Participation of Non-Nationals requires all companies with more than 35 employees to monitor the ethnicity of their workforce and to draw up plans for the creation of a proportional workforce. (84) This is supplemented by a requirement to release these figures on an annual basis. However, initial compliance with the legal requirements were low. In 1995, only 26% of companies presented the information required and only 12% of those had a specific policy on the employment of ethnic minorities. (85) A difference form of ethnic monitoring has been employed by the Århus Kommune in Denmark, where data protection requirements meant that the statistics must be collected in such a way so as to prevent the identification of any individual. The Kommune has then deployed the statistics to demonstrate what would be approximate to a proportional labour force for firms operating in the locality. It has also required each of its own departments to monitor the number of applications for vacancies from ethnic minorities and the subsequent number of ethnic minorities employed. (86)

Monitoring does not in itself improve the employment situation of ethnic minorities. However, it identifies precisely where the problems lie, in which professions/sectors there are the greatest barriers to equal opportunities. The Kahn Commission concluded that "effective record keeping and monitoring are central to the effective implementation of equal opportunities policies and action plans; and in measuring the way in which actions and policies of the organisations involved tackle discrimination." (87) However, monitoring is controversial strategy. In particular, objections have been raised, especially from within the France, that such measures will only serve to reinforce difference, through heightening consciousness of separate ethnic identities. Furthermore, in order for monitoring to be rendered meaningful, there is a need for

complementary data on the ethnic profile on the population as a whole, and particularly in the locality of the firm. In many Member States, this is not currently available. Finally, there may also be problems of ethnic classification. For instance, persons of mixed race have expressed dissatisfaction with rigid systems of ethnic classification. These kinds of practical difficulties, and the potential conflict with different political traditions tend to suggest that monitoring is unsuitable for imposition through EU legislation. This should not though prevent it from being endorsed as a potentially useful strategy for combating discrimination. Indeed, the Social Partners' Declaration states that monitoring is a central element in the "successful implementation of a policy of equal opportunities and equal treatment". [\(88\)](#)

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#### **2.4. Positive Action**

Most schemes involving ethnic monitoring are based on the premise that where monitoring reveals an under-representation of ethnic minorities in a firm, or in a particular section of the firm, then this will be followed up through the adoption of additional measures to rectify this situation. Normally, this implies the use of positive action to achieve this objective. A distinction may be drawn between two types of positive action; that which seeks to offer additional support to ethnic minorities up to, but not including, the point of employment selection (at which stage the decision is made on the basis of 'merit'); and those forms of positive action which provide specific advantages at the point of selection. An example of the latter would be an employment quota, where a specific number of positions are reserved for ethnic minorities. Such policies have been deployed in the USA, but are less familiar to European labour law. Where positive action schemes have been put in place, such as those followed by a number of German Länder, they have normally been confined to redressing discrimination between women and men; there are fewer examples of positive action schemes which extend to combating the effects of racial discrimination. One of the few examples of statutory requirements for positive action for ethnic minorities was the Dutch law on the equal participation of foreigners in the labour market. However, in 1997, it was reported that the Dutch government had decided to remove the requirement to employ a certain number of foreigners to reflect the area where the firm was established. [\(89\)](#) Another complicating factor has been the uncertainty concerning the legality of positive action under EU law. The decision of the ECJ in *Kalanke* [\(90\)](#) confirmed that automatic quota schemes are contrary to the principles of existing EU equality legislation, but equally the decision in *Marschall* [\(91\)](#) indicates that many other forms of positive action are quite acceptable under EU law. This paper will focus on the latter. Three practical examples may be given of positive action policies in this category: outreach advertising, targeted training, and positive action redundancy schemes.

##### **2.4.1. Outreach advertising**

Outreach advertising was expressly endorsed by the Social Partners in their 1995 Declaration: " *When advertising vacancies, it is recommended that the commitment of the organisation in terms of equal opportunities be expressly mentioned in order to motivate people from minorities to apply*". (92) One of the major barriers to equal opportunities may be described as the 'chill factor'. The assumption on the part of ethnic minorities, based on past experiences of discrimination, that there is no point in even applying for certain occupations, or to particular firms, results in a situation where there may be not actually be any overt discrimination at the point of selection, precisely because of the discrimination-avoidance techniques employed by minority communities. Traditional anti-discrimination mechanisms cannot effectively address this form of inequality; the absence of any 'incident' of discrimination makes it impossible to challenge such mechanisms of discrimination through an individual complaints procedure. Outreach advertising can assume two forms. First, the employer is encouraged to state their commitment to equal opportunities in the recruitment advertisement. In certain instances, the employer may wish to go further and to specifically encourage applications from ethnic minorities. Second, the location of recruitment advertisements needs to be reassessed. Thus, employers are encouraged to advertise vacancies in newspapers, etc. popular in ethnic minority communities, alongside advertisements in more mainstream media. The use of community centres in recruitment is another option. None these measures imply any form of reverse discrimination; the final decision may still be made in conformity with the 'merit' principle. However, they do offer a practical means of improving equal opportunities.

#### 2.4.2. Targetted training

Targetted training aims at providing the skills and experience necessary to enable ethnic minorities to compete better in the labour market. This may take the form of general language training, or more vocational training. For example, the Helsinki Mail Centre ran a series of language courses in both Finnish and English to improve communication between Finnish and non-Finnish employees. Not only were the courses provided by the firm, but employees were able to study during working hours. (93)

Such schemes are particularly suitable for large employers who have a significant under-representation of ethnic minorities in their workforce. In the 1976 (GB) Race Relations Act, section 37 permits the establishment of training courses limited to members of a specific racial group for work in which their particular racial group is under-represented. (94) Clearly, ethnic-specific training programmes have the advantage of providing much more direct assistance to the disadvantaged group in question, but are naturally more controversial as a result of their exclusivity. (95)

Nonetheless, Wrench points out that in many cases it is not a lack of qualifications that limits ethnic minorities in the labour market, but discrimination. (96) He proposes a range of possible anti-discrimination schemes which employers could pursue, not to address ethnic minorities, but to raise awareness and sensitivity to racism amongst the workforce and management as a whole. Such courses could, *inter alia*, concentrate on

explaining the equal opportunities policy of the firm, encouraging cultural sensitivity and explaining the requirements of anti-discrimination legislation, where this is in place. Such training courses would form an appropriate counterpart to the positive action training courses referred to earlier.

#### 2.4.3. Redundancy

Finally, another potent form of positive action is in the field of redundancy. One of the real challenges to equal opportunities legislation is how to promote the employment situation of ethnic minorities in the context of a contracting labour market. One of the problems which has been identified in this regard is the vulnerability of ethnic minorities to redundancy. Even where a firm has made genuine efforts to improving equal opportunities, the gains made in this field can often be swept away by the onset of recession and the need for the firm to reduce its labour force. Traditionally, the principle of 'last in, first out' has been a common industrial approach to determining which employees are selected for redundancy. However, as ethnic minorities are often disproportionately located amongst the most recent employees, this principle may be indirectly discriminatory in impact. Thus, it is important to carefully scrutinise the criteria on which redundancies are made. This point was explicitly recognised in the 1994 Code of Practice produced by the Dutch Ministry of the Interior. This stated that ethnic minorities should not be disproportionately effected by collective dismissals. (97) Clearly this is an area where the stated commitment of trades unions and employers to equal opportunities can be tested. Given their significant control over the redundancy process, it is up to the Social Partners to take such considerations into account. Whilst length of tenure is naturally a relevant consideration, arguably it should not be the *sole* criterion on which redundancies are distributed. Skills and qualifications should also be relevant considerations.

The purpose of this section of the paper has been to demonstrate that there are numerous forms of positive action which do not bring one into the thorny debate surrounding goals and timetables, quotas and automatic preferences, as have been recently the subject of litigation at the ECJ. At the very least, any future anti-discrimination directive should provide the Member States with the discretion to adopt such positive action measures as seem appropriate in the national context. This is fully in keeping with the principle of subsidiarity. Requiring the adoption of certain forms of positive action seems a more difficult proposition. As has been demonstrated, national legal traditions may come into conflict with an overly-prescriptive approach in this sphere. For instance, there are serious obstacles to the adoption of ethnic monitoring in certain Member States. Wrench suggest discrimination-testing conflicts with Swedish standards on research ethics. (98) Thus, whilst an endorsement of positive action, possibly in an EU Code of Practice (see conclusion), may be appropriate, it seems unlikely to be possible to incorporate such measures in the framework of an anti-discrimination directive.

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## Footnotes to Chapter 2

1. European Council Consultative Commission (1995) "*Final Report*" Ref. 6906/1/95 Rev 1 Limite RAXEN 24, at p. 39
2. *Ibid.*, at p. 59
3. Unless otherwise stated, all national examples are taken from European Foundation for the Improvement of Living and Working Conditions (1996) "*Preventing racism at the workplace - a report on 16 European countries*", and Forbes, I & Mead, G (1992) "*Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community*".
4. European Commission (1997) "*Commission Opinion on Romania's application for membership of the European Union*" COM (97) 2003, 15.7.97; at p. 14
5. European Commission (1997) "*Commission Opinion on Slovenia's application for membership of the European Union*" COM (97) 2010, 15.7.97; at p. 17
6. European Commission against Racism and Intolerance (1997) "*Legal Measures to combat racism and intolerance in the Member States of the Council of Europe*" Report prepared by the Swiss Institute of Comparative Law, Lausanne. CRI (97) 38; Strasbourg: Council of Europe; at p. 425.
7. UN Centre for Human Rights (1996) "*Model national legislation for the guidance of governments in the enactment of further legislation against racial discrimination*" Geneva: UN
8. European Commission (1996) "*Proposal for a Council Directive on the burden of proof in cases of discrimination based on sex*" COM (96) 340, 17.7.97; at p. 3
9. A total of 157 complaints have been made. ("Law against discrimination in the labour market does not work" *Migration News Sheet* September 1996, at p. 13)
10. Forbes & Meade (1992) "*Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community*" at p. 48
11. Para. 15, Resolution on the communication from the Commission on racism, xenophobia and anti-Semitism, 9 May 1996 (OJC 152/57, 27.5.96)

12. Of course, it would always be open to the Community to rely on Article 6a in conjunction with Article 235; "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

13. European Foundation for the Improvement of Living and Working Conditions (1996) *"Preventing racism at the workplace - a report on 16 European countries"* at p. 72

14. Dummett, A (1994) "The Starting Line: a proposal for a draft Council directive concerning the elimination of racial discrimination" *New Community* Vol. 20(3) pp. 530-538

15. UN Centre for Human Rights (1996) " *Model national legislation for the guidance of governments in the enactment of further legislation against racial discrimination*" at p. 4

16. European Foundation (1996) *"Preventing racism at the workplace - a report on 16 European countries"* at p. 38

17. It should though be acknowledged that Turkish employees, whilst "not on a completely equal footing with Union citizens in the field of work permit law, ... do receive favourable conditions on the basis of the legislation on association matters between the European Union and Turkey." (The Federal Government's Commissioner for Foreigners' Affairs (1994) *"Report by the Federal Government's Commissioner for Foreigners' Affairs on the situation of foreigners in the Federal Republic of Germany in 1993"* Berlin: The Federal Government's Commissioner for Foreigners' Affairs; at p. 34

18. Wrench, J (1997) "Mechanisms of exclusion: ethnic minorities and labour markets" *Nordic Labour Journal* 1/1997 pp. 16-19, at p. 17

19. Dummett, A (1991) "Europe? Which Europe?" *New Community* Vol. 18(1) pp. 167-175 at p. 173

20. Regulation 1612/68 on the free movement of workers, OJ 1968 L II/475 ; Article 19

21. European Commission (1988) " *Communication on the social situation and employment of migrant women*" COM (88) 743, 15.12.88

22. European Council Consultative Commission (1995) *"Final Report"* Ref. 6906/1/95 Rev 1 Limite RAXEN 24, at p. 59

23. MacEwan, M (1995) *"Tackling Racism in Europe: an examination of Anti-Discrimination Law in Practice"* Oxford: Berg Publishing, at p. 4

24. European Foundation (1996) "*Preventing racism at the workplace - a report on 16 European countries*" at 151
25. European Commission (1997) " *Proposal for a Council Act establishing the Convention on rules for the admission of third country nationals to the Member States*" COM (97) 387, 30.7.97; at p. 5
26. Federal Government's Commissioner (1994) "*Report by the Federal Government's Commissioner for Foreigners' Affairs on the situation of foreigners in the Federal Republic of Germany in 1993*" at p. 71
27. *Ibid.*
28. The Federal Commissioner for Foreigners' Affairs in Germany has highlighted the introduction in 1993 of further restrictions on access to vocational education for non-nationals in Germany. This would be limited to all those with an unlimited residence permit. She observed that this promised to only exaggerate the already "severe under-representation of migrants" in vocational training. ( *Ibid.* at p. 29)
29. Emphasis added; UNICE, ETUC & CEEP (1995) Joint Declaration on the prevention of racial discrimination and xenophobia and promotion of equal treatment at the workplace, adopted by the Social Dialogue Summit in Florence, 21 October 1995. Reproduced in European Commission (1997) *The European institutions in the fight against racism: selected texts.*
30. European Commission (1974) "Social Action Programme" *Bull. EC Supplement*, 2/74 at p. 8
31. Castles, S (1993) "Migrations and Minorities in Europe. Perspectives for the 1990s: Eleven hypotheses" in Solomos, J & Wrench, J (eds.) "*Racism and Migration in Western Europe*" Oxford: Berg Publishing; at p. 27
32. UNICE, ETUC & CEEP (1995) Joint Declaration on the prevention of racial discrimination and xenophobia and promotion of equal treatment at the workplace; at p. 2
33. Interview: Isabelle Chopin, Brussels, 12.12.96
34. "Muslims want religious holidays" *Migration News Sheet* March 1997, at p. 19
35. European Foundation for the Improvement of Living and Working Conditions (1997) "European Compendium of Good Practice for the Prevention of Racism at the Workplace" (Report by Wrench, J) Dublin: European Foundation
36. *ibid.*, at p. 45
37. *ibid.*, at p. 51

38. [1983] 2 AC 548 HL
39. Case No. 247738/88 Equal Opportunities Review Discrimination Case Law Digest 2
40. For further discussion of the definition of "ethnic group" in British law, see Bourne, C & Whitmore, J (1993) *"Race and Sex Discrimination"* 2nd. ed. London: Sweet & Maxwell
41. Sénat: service des affaires européennes; division des études de législation comparée (1997) *"Le port de signes d'appartenance religieuse dans les établissements scolaires"* Paris: Série: législation comparée, les documents du travail de Sénat
42. Report on the proposal for a Council Directive on the burden of proof in cases of discrimination based on sex (Ghilardotti), A4-115/97, 25 March 1997; at p. 12
43. European Commission (1997) *"Annual Report from the Commission: Equal Opportunities for Women and Men in the European Union 1996"* COM (96) 650, 12.2.97; at pp. 6-7
44. Fitzpatrick, B; Blom, J; Knegt, R & O'Hare, U (1996) *"The utilisation of sexual equality litigation in the Member States of the European Community"* V/782/96 - EN (Report to the Equal Opportunities Unit, DG V)
45. Fletcher, L (1996) "Enforcement of Community Sex Equality Law" in Hervey, T & O'Keeffe, D *"Sex Equality in the European Union"* Chichester: John Wiley & Sons; at p. 173
46. Fitzpatrick *et al.* (1996) *"The utilisation of sexual equality litigation in the Member States of the European Community"* V/782/96 - EN. It should be noted though that the litigation rate varies considerably between the Member States.
47. Dickens, L (1992) "Anti-discrimination legislation - exploring and explaining the impact on women's employment" in McCarthy, W (ed.) *"Legal Interventions in Industrial Relations: Gains and Losses"* Oxford: Basil Blackwell
48. Fitzpatrick *et al.* (1996) *"The utilisation of sexual equality litigation in the Member States of the European Community"* V/782/96 - EN.
49. *See further:* UNICE, ETUC & CEEP (1995) Joint Declaration on the prevention of racial discrimination and xenophobia and promotion of equal treatment at the workplace
50. The addresses of these various equality agencies are provided in Annex 7.
51. Equality Officers to deal with sexual discrimination already exist in Italy, which may provide a useful model of an alternative enforcement mechanism to

the Labour Inspectorate for racial discrimination.

52. European Foundation (1996) *"Preventing racism at the workplace - a report on 16 European countries"* at p. 75

53. *Ibid.*, at p. 76

54. Since 1997, there is also a CRE for Northern Ireland.

55. Its investigatory powers are though circumscribed by the requirement of suspicion before an individual employer may be subject to investigation. (Forbes & Meade (1992) *"Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community"* at p. 24)

56. Commission for Racial Equality (1997) *"Annual report of the Commission for Racial Equality: January to December 1996"* London: CRE; at p. 3

57. Subsequently, certain provisions in the legislation were deemed unconstitutional by the Supreme Court in Ireland, and the legislation now awaits re-enactment with appropriate amendments.

58. "Complaints of discrimination" *Migration News Sheet* June 1997, at p. 16

59. European Foundation (1996) *"Preventing racism at the workplace - a report on 16 European countries"* at p. 73

60. "Increasing number of complaints against racism" *Migration News Sheet* January 1996, at p. 13

61. "Increasing number of complaints against racism" *Migration News Sheet* February 1997, at p. 13

62. Paragraph 17, 1994 Law against ethnic discrimination in the workplace. (*ibid.*, at p. 71)

63. Commission for Racial Equality (1997) *"Annual report of the Commission for Racial Equality: January to December 1996"* at p. 6

64. This point was recognised in point 2(e) of the 1990 Council Resolution, which called for "the granting to the bodies concerned in the fight against racism and xenophobia of the right to institute or support legal proceedings, to the extent that this is compatible with the legal system in the Member State concerned."

65. Forbes, I & Mead, G (1992) *"Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community"* at p. 37

66. Article VI, Loi du 19 juillet 1997 complétant le code pénal en modifiant

l'incrimination du racisme et en portant incrimination du révisionnisme et d'autres agissements fondés sur des discriminations illégales (Journal Officiel du Grand-Duché de Luxembourg, A-No. 54, p. 1680, 7 août 1997)

67. Para. 12, Resolution of the European Parliament on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremist violence, 21 April 1993. (OJC 150/127, 31.5.1993).

68. Forbes, I & Mead, G (1992) "*Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community*" at p. 24

69. It should be noted though that incitement to racial hatred is a criminal law offence.

70. MacEwan, M (1995) "*Tackling Racism in Europe: an examination of Anti-Discrimination Law in Practice*", chapter 1

71. Forbes, I & Mead, G (1992) "*Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community*" at p. 14

72. Commission for Racial Equality (1997) "*Annual report of the Commission for Racial Equality: January to December 1996*" London: CRE; at p. 6

73. European Foundation (1996) "*Preventing racism at the workplace - a report on 16 European countries*" at p. 165

74. Commission for Racial Equality (1997) "*Annual report of the Commission for Racial Equality: January to December 1996*" ; at p 16

75. "ILO report denounces discrimination in employment" *Migration News Sheet* May 1996, at p. 13

76. Forbes, I & Mead, G (1992) "*Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community*" at p. 60

77. European Foundation (1996) "*Preventing racism at the workplace - a report on 16 European countries*" at p. 63.

78. Szyszczak, E (1992)"Race discrimination: the limits of market equality?" in Hepple, B & Szyszczak, E "*Discrimination: the limits of the law*" London: Marshall

79. European Commission (1996) "*Green Paper - Public Procurement in the European Union: exploring the way forward*" COM (96) 583, 27.11.96; at pp. 39-40

80. Forbes, I & Mead, G (1992) "*Measure for Measure: a comparative analysis*

*of measures to combat racial discrimination in the Member Countries of the European Community" at p. 17*

81. Para. 1.1, at p. 1d.

82. Regulation 2081/93 (OJ L 193, 31.7.93) Cited in European Commission (1997) *"Annual Report from the Commission: Equal Opportunities for Women and Men in the European Union 1996"* COM (96) 650, 12.2.97; at p. 16.

83. Hegarty, A & Keown, C (1996) "Hierarchies of Discrimination: the political, legal and social prioritisation of the equality agenda in Northern Ireland" *Equal Opportunities International* Vol. 15 No. 2 pp. 1-24, at p. 4. Fair participation is defined according to the religious profile of the "catchment area" from which the firm recruits.

84. Wet Bevordering Evenredige Arbeidsdeelname Allochtonen

85. *Migration News Sheet* "Law on Equal Participation of Foreigners in the Labour Market is hardly applied" November 1996, p. 15. As a result, the Government recently agreed to amend the regulations so as to simplify the procedures; henceforth, firms are only required to submit a report once a year to the Regional Employment Bureau detailing the ethnic profile of the workforce and measures adopted to employ more ethnic minorities. (*Migration News Sheet* "Modification of controversial law on employment of ethnic minorities" April 1997, p. 15)

86. European Foundation (1997) *"European Compendium of Good Practice for the Prevention of Racism at the Workplace"* at pp. 46-47

87. European Council Consultative Commission (1995) *"Final Report"* Ref. 6906/1/95 Rev 1 Limite RAXEN 24, at p. 40.

88. UNICE, ETUC & CEEP (1995) Joint Declaration on the prevention of racial discrimination and xenophobia and promotion of equal treatment at the workplace, Conclusion

89. "Quota of foreign employees abolished" *Migration News Sheet* January 1997, at p. 15

90. C-450/93 *Kalanke v Bremen* [1995] ECR I-3051

91. C-409/95 *Marschall v Land Nordrhein Westfalen*, 11 November 1997

92. UNICE, ETUC & CEEP(1995) Joint Declaration on the prevention of racial discrimination and xenophobia and promotion of equal treatment at the workplace, Section 2 'Measures'

93. European Foundation (1997) *"European Compendium of Good Practice for the Prevention of Racism at the Workplace"*, at p. 50

94. Forbes, I & Mead, G (1992) " *Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community*" at p. 22

95. As an interesting alternative, in Northern Ireland, the Fair Employment Act 1989 does not permit religion-specific training schemes; however, it does allow for access to training schemes to be made conditional on criteria which may disproportionately favour a religious group under-represented in the workforce. For example, training schemes could be reserved for the long-term unemployed, which is a group in which the Catholic community is consistently over-represented.

96. European Foundation (1996) "*Preventing racism at the workplace - a report on 16 European countries*" at p. 157

97. *Ibid.*, 67

98. Wrench, J (1997) "Mechanisms of exclusion: ethnic minorities and labour markets" *Nordic Labour Journal* 1/1997 pp. 16-19, at p. 17

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European Parliament: 12/1997

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EUROPEAN PARLIAMENT



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**European Union Anti-Discrimination Policy:  
FROM EQUAL OPPORTUNITIES  
BETWEEN**

# WOMEN AND MEN TO COMBATING RACISM

Directorate-General for Research  
Working document  
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## 3. Mainstreaming equal opportunities for ethnic minorities

Whatever the shape and final text of any new anti-discrimination legislation, experience demonstrates that legislation needs to be accompanied by a much broader strategy in the fight against racism. Wrench remarks that "anti-discrimination legislation is a necessary but not sufficient means of reducing racial discrimination". (1) The Parliament has consistently stressed the need for a multi-disciplinary approach to combating racism. The 1985 Evrigenis report called for legislative action alongside action in the fields of education, information and the media. This has also been recognised in the Council of Ministers. In November 1997, the Council reaffirmed the role which education could play in combating racism: "school, which along with the family is the first place in which young people learn social skills, must be supported in its efforts to impart democratic values." (2) For example, in the field of media, the Parliament has given its backing to the proposals for "codes of conduct for the media to ensure that freedom of expression and freedom of the press are complete, but are used responsibly." (3) The media may also be a means to highlight examples of successful integration, providing role models for the wider community. For example, in the UK, the CRE has launched a 'Roots of the Future' exhibition to illustrate that "far from being a 'drain on the nation' or a 'threat to its culture', newcomers to Britain, and their descendants, have created jobs, both for themselves and for other people, and have contributed immeasurably to the economical, cultural and social life of Britain." (4) Elsewhere, the training of public officials in working in a multicultural environment may form an important means of preventing discrimination arising in the public sector, as well as giving a positive example to the private sector. Relations between the police and ethnic minorities are a particular area of concern, and the Parliament has already expressed its opinion that better training of the police could make a significant contribution to reducing discrimination. In 1995, the Parliament called "for special training programmes for public servants and especially the police and judiciary in order to promote tolerance and understanding of different cultures and to prevent discriminatory behaviour." (5)

Alongside the need for multi-disciplinary action, there is a need for greater

consistency between different EU policy fields with regard to promoting equal opportunities for ethnic minorities. Other EU policy areas, although not ostensibly related to combating racism, may have a direct impact on anti-discrimination policy. In 1997, the Parliament called on the European Union to "set a convincing example in combatting racism, by carefully scrutinizing its own policies to see whether they contain racist, xenophobic or ethnic tendencies". (6) It has already been mentioned how public procurement policy has had a spillover effect on contract compliance schemes. Alternatively, Szyszczak has argued that single market legislation on the mutual recognition of qualifications failed to take sufficient account of those individuals (disproportionately ethnic minorities) who possess non-EU qualifications. She argues that the current legislation tends to reinforce the primacy of EU qualifications and could thus generate further indirect racial discrimination in the labour market. (7)

Anti-discrimination principles are also relevant in the EU's external relations. This dimension to anti-racism policy was identified by the Parliament in 1993 when it called "for the inclusion in all association agreements of specific clauses to protect against the infringement of fundamental rights and racial discrimination." (8) Promoting non-discrimination outside the Union may play an important role in setting foreign policy priorities. The war in the former Yugoslavia is an instructive example of where a greater emphasis on combating racism and ethnic hatred both inside and outside the EU could have assisted in ensuring that effective action was taken at an earlier stage in the conflict. Indeed, in 1996, the Parliament stated that it deplored "the inability of the Union to reject and combat ethnic hatred in a consistent and effective manner through its foreign policy." (9) More generally, anti-discrimination principles form part of the broader argument in favour of a foreign policy driven more by respect for fundamental human rights and less by economic imperatives.

Another example of the relevance of anti-discrimination to external relations arises in connection with the enlargement process. Respect for human rights and the protection of minorities forms one of the key criteria for decisions concerning the suitability of an applicant state for membership of the EU. It is therefore important that the applicant states are required to demonstrate a commitment to the fight against racism comparable to that of the existing Member States. The Parliament has stated its opinion that the Union "should insist that the candidate countries for accession attach the greatest possible importance to protecting minorities on their sovereign territory, bearing in mind that this is a key criterion for accession to the European Union." (10) In chapter 2, some of the positive institutional innovations in the applicant states were highlighted. However, it is impossible to ignore the simultaneous evidence of significant discrimination and disadvantage amongst national minorities in these states, most especially with regard to the Roma. For example, a recent report for the ELDR group in the European Parliament concluded that in the Czech Republic the Roma population "suffer severe discrimination, particularly violent attacks by skinhead gangs and other racist hate groups ... Gypsies face daily discrimination in housing, education and employment." (11) Elsewhere, in Romania, the report concluded that "in the last few years intimidation and persecution of gypsy communities has intensified. There is no public outcry

when the police destroy encampments, arrest gypsies or ill-treat them." (12) As a means to tackling these problems, the EU could consider requiring all applicant states to ratify the UN Convention on the Elimination of Racial Discrimination (CERD), including the right of individual petition to the Committee for the Elimination of Racial Discrimination. A more ambitious requirement could be for all applicant Member States to have national legislation prohibiting racial discrimination in (at least) employment, education, housing and the supply of goods and services, in line with the recommendations of the 1990 and 1995 Council Resolutions on racism. However, the main barrier to such an approach lies in the patchy record of the existing Member States. The EU cannot reasonably require the applicant states to ratify CERD and its individual petition provision (Article 14) when not all existing Member States have ratified this Convention, and the majority still do not recognise the right of individual petition. Similarly, the EU would lay itself open to charges of hypocrisy if it was to require applicant states to have national legislative protection against racial discrimination in employment, etc.

The importance of extending the principles of equal opportunities into other policy spheres has already been recognised in the field of sexual equality. The most definitive response to this has been through the 'mainstreaming' initiative in the Fourth Medium-Term Community Action Programme on Equal Opportunities for Women and Men (1996-2000). Mainstreaming has been defined by the Commission as "the systematic consideration of the differences between the conditions, situations and needs of women and men in all Community policies, at the point of planning, implementing and evaluation, as applied to Europe, the industrialised countries and the developing countries." (13) Put more simply it aims at ensuring that "equal opportunities are applied horizontally across the widest possible range of fields." (14) The implications of mainstreaming in practice were illustrated in a Commission Communication in 1996, which outlined how the goal of equal opportunities between women and men demanded a reorientation of EU policies in fields such as enterprise, agriculture and external relations, in particular, development policy. (15) Nonetheless, there has been little consideration of the need to broaden the focus of mainstreaming to include other groups vulnerable to discrimination. First, there is a need to ensure that all EU policies respect the principle of equal opportunities for ethnic minorities. This can be best secured through the careful monitoring of all policies for any potentially adverse impact on minority communities/anti-racism policy. Second, and the much greater challenge to the EU, is to secure the mobilisation of all policy fields in the fight against racism. The former objective suggests that other policies must at least refrain from discriminatory measures. The latter demands the active reorientation of EU policies towards the promotion of equal opportunities.

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### *3.1. Incorporating anti-discrimination into immigration and asylum policies*

The most obvious field where mainstreaming is required in respect of racial equality is immigration and asylum policy. It is important to be clear at the outset what is meant by immigration and asylum. Immigration policy may be distinguished from free movement policy; the latter concerns movement within the European Union, the former movement from third countries into the EU. Immigration may be distinguished from asylum by reference to the nature of the migration. Immigration is essentially *voluntary*, that is, the individuals have *chosen* to come to the Member States. In contrast, asylum arises where individuals are *compelled* to leave due to persecution in their country of origin. Whereas states are relatively free to determine their own immigration regime, asylum is governed by the 1951 Geneva Convention relating to the Status of Refugees, to which all Member States are signatories. At the same time, it is increasingly difficult to maintain a strict distinction between asylum and immigration. Where a person leaves a country blighted by war and economic deprivation, it is often rather artificial to attempt to classify their reasons for leaving as either economic or due to a fear of persecution. Before proceeding to consider the need for mainstreaming equal opportunities into immigration and asylum policy, it is necessary to provide a brief overview of the evolution of European cooperation in this field.

### 3.1.1. The evolution of European immigration and asylum policies

Concern over the scale of immigration rose in the late 1980s, linked to spiralling unemployment in the Member States. The focus of debate has been asylum policy, and the steady increases in the number of asylum-seekers. This trend was sharply exaggerated following the refugee crisis triggered by the war in the former Yugoslavia, to the extent that in the space of only three years, the number of asylum-seekers in the EC more than doubled from 170 650 in 1988, to 420 150 in 1991. (16) This increased yet further to a peak of 674 000 in 1992 (17), with 438 000 in Germany alone. (18) Moreover, immigration, both legal and illegal, continued alongside asylum-related migration, buoyed by the end of the Cold War, which generated new immigration from Central and Eastern Europe. This was accentuated by simultaneous increases in migration from the South, especially from within the Maghreb, as a result of the political, economic and demographic pressures experienced in North Africa. (19) The multitude of migratory pressures provokes Husbands to refer to the 1990s as the "decade of the migrant". (20)

The prevailing public policy response has been to seek solutions in cooperation with other states. Cross-border initiatives have grown substantially since the mid-1980s. Cooperation has occurred on two levels: bilateral and multilateral agreements, and EU-wide initiatives. With regard to the first category, the Schengen Agreement is the most notable example of multilateral immigration policy harmonisation. An inner core of five Member States established the Schengen Agreement in 1985. (21) This was initially designed to facilitate "short-term measures for the relaxation of border controls" (22), but these looser arrangements were transformed by the adoption of the 1990 Schengen Implementing Agreement. This produced a model for EC immigration policy based on a mix of tight external controls and random internal checks, and has

been operative since the abolition of internal frontiers by seven Member States in 1995. (23)

In contrast to Schengen, the *Ad Hoc* Working Group on Immigration was based on the inclusion of all Member States from the outset. This was established in October 1986, at the initiative of the UK, "to end abuses of the asylum process." (24) Whilst inclusive of all Member States, the Group remained firmly outside of the normal EC institutional framework, thereby avoiding the scrutiny of the European Parliament and the European Court of Justice (ECJ). As with Schengen, the policies which emerged focused heavily on immigration control. For example, one of the first measures to be adopted was the agreement of a common visa requirement for 50 non-member countries, instantly making travelling within the Member States considerably more difficult for resident non-EC nationals. (25) The Group's main work though has focused on asylum policy, leading to the 1990 Dublin Convention. (26) This aimed to abolish the right of an asylum-seeker to make an application for asylum in more than one Member State. (27) This was further supplemented by the 1992 'London Resolutions'. These placed even more pressure on the right to asylum through recommending:

the introduction of a 'fast track' procedure for 'manifestly unfounded' asylum applications

the sending of asylum-seekers to a 'safe third country' where one may be identified

Both of these Resolutions were met with criticism. On the concept of the 'fast track' asylum process, the Joint Council for the Welfare of Immigrants (JCWI) have stated their view that it would:

*"adversely affect race relations ... since they disproportionately affect ethnic minority communities. ... These vindictive measures are not only inhumane, unreasonable, unlikely to achieve their stated purpose, socially divisive and discriminatory, but are also in conflict with international instruments ... including the UN Refugee and Children Conventions."* (28)

The 'safe third country' concept has also been the subject of protest; for example, the Parliament's report on human rights in the EU in 1994 drew attention to the fact that this designation has been "awarded rather generously by some Member States, to an extent that the protection of all asylum-seekers might be endangered." (29) In 1994, the UNHCR took the unusual step of publicly criticising the policies under construction. It issued a detailed rebuttal of the individual policy measures adopted, such as the designation of certain states as 'safe', from where applications can be presumed to be unfounded. (30)

The *Ad Hoc* Group was subsequently placed on a more permanent basis through the 1991 Treaty on European Union (TEU). In an uneasy and complex compromise, the 'European Union' was superimposed on the existing EC legal framework. The EC Treaty became just one 'pillar' of the European Union structure. Alongside the EC Treaty (Title II of the TEU), there would also be

Title VI, or the 'third pillar'. Title VI concerned "provisions on cooperation in the fields of justice and home affairs", and therein established new procedures for immigration policy. Article K.1 specified as areas of "common interest", "(3) immigration policy and policy regarding nationals of third countries". Whilst recourse to the 'third pillar' brought EU immigration policy into the Treaty, it ensured the ongoing exclusion of the European Parliament and the ECJ from the policy process, and thus maintained the less democratic features familiar to the intergovernmental mechanisms.

In 1994, the Commission, acting in response to mounting criticism of the restrictive nature of the EU immigration policies, issued a communication calling for a more balanced approach to migration. In particular, it advocated the adoption of a three-pronged policy:

action to tackle the causes of migration

action to manage future immigration

action to promote integration and combat racial discrimination

Throughout the document, the Commission acknowledge that the existing policy was in places unsustainable, and often counterproductive. For example, there is an acceptance that states cannot simply decide to reduce the number of refugees accepted, and that international law requires that asylum be given to all who require such protection. (31) Perhaps the most dramatic shift in emphasis was the Commission's call for a recognition that it "is neither feasible nor desirable" to 'end' immigration; "what is needed is the proper management of immigration policy". (32)

The more moderate approach advocated by the Commission was reflected in a variety of initiatives in 1995/96 which focused less on immigration control. In 1995, the Council adopted a Resolution on minimum guarantees for asylum-seekers. Whilst a welcome step in the right direction, the guarantees were indeed minimal, and did not meet the objections of the Parliament, UNHCR and other NGOs concerning the procedures for 'manifestly unfounded' applications for asylum or the 'safe third country' principle. (33) In 1996, the Council addressed the concerns of third-country nationals, and adopted a Resolution on the status of long-term residents in the Member States. This called for the equal treatment of long-term residents with regard to, *inter alia*, working conditions, social security, emergency health care and compulsory schooling. (34) More important than either of these non-binding measures, was the Commission's 1995 proposal to extend to third-country nationals the right to travel in the Member States for periods up to three months. (35) The proposal was produced following a legal challenge from the Parliament over the alleged failure of the Commission to complete the abolition of border controls as required, in the view of the Parliament, under Article 7a of the EC Treaty. This proposal would have provided practical benefits to third-country nationals, however, it met with disagreement over its content and over the appropriate legal base, and there seems little prospect now of its adoption. The failure of the Member States to take this first step to enhancing the legal position of third-country nationals does

not augur well for future initiatives.

More recently, the Commission have issued two further proposals relating to third-country nationals. In July 1997, the Commission proposed a Convention on the rules governing the admission of third-country nationals. (36) Despite its title, the Convention also deals with the legal status of resident third-country nationals, and builds on the earlier Council Resolution on long-term residents. Its main innovation is to propose a right for third-country nationals who are long-term residents to seek employment in other Member State. (37) However, long-term residents may only take up this position if no other EU citizen or third-country national resident in the Member State in question can fill the vacancy. Even then, the individual will lose the rights of a long-term resident for a period of two years after moving to the new Member State, a series of provisions likely to ensure that few third-country nationals will be either willing or able to enjoy to the right to work in another Member State which is currently enjoyed by all EU citizens. This proposal has been followed by a proposed Regulation to extend the application of Regulation 1408/71 on the application of social security schemes to migrant workers and their families to third country nationals inside the EU. (38) This complements the proposal in the draft Convention to allow long-term residents to take up employment in another Member State, as Regulation 1408/71 seeks to ensure that persons moving in the EU do not lose their social security rights and that they do not become liable for contributions in more than one Member State.

In contrast to the rhetoric of a balanced immigration policy, the most substantive measures continue to be focused on migration control. For example, the "Eurodac" Convention requires the mandatory finger-printing of all applicants for asylum aged 14 and over. (39) Aside from the obvious infringement of the personal integrity of all applicants for asylum, and the potential risk to their security through the holding of such data, it is not difficult to see how this will reinforce perceived links between refugees and crime in the public mind.

### 3.1.2. Immigration and asylum after Amsterdam

The Treaty of Amsterdam (40) maintains the existing pattern of immigration and asylum policy. The Treaty converges the Schengen Agreements with the EU and commits the latter to the realisation of "an area of freedom, security and justice" within five years of the entry into force of the Treaty. (41) To achieve the abolition of internal frontiers, immigration and asylum are moved under the aegis of the EC Treaty, thus allowing for the adoption of binding EC legislation in these fields. (42) However, Protocols 2,3,4 and 5 provide certain exemptions for Denmark, Ireland and the UK from this process, most notably in relation to the right to retain border controls and to remain outside of any EC legislation governing asylum and immigration. Whilst the Treaty formally transfers immigration and asylum into the framework of the EC Treaty, the structures remain quasi-intergovernmental. The Commission and the Member States will share the right of initiative for a further five year period, after which the Commission will gain an exclusive right of initiative. The Parliament remains purely consultative, for at least a further five years, with no promise of an automatic transition to codecision-making. (43)

The Treaty also retains the predilection towards measures based on immigration control. The Member States proceeded to agree the *Protocol on asylum for nationals of Member States of the European Union* which seeks to end the possibility of an EU national claiming asylum in any other Member State, despite repeated objections from UNHCR that this is in contravention of the 1951 Geneva Convention. On immigration, there is a similar focus on control; whereas the Member States are committed to achieving common rules on "illegal immigration and illegal residence, including repatriation of illegal residents" (44) within five years of the Treaty entering into force, no such deadline exists in relation to "measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States." (45)

### 3.1.3. Balancing immigration control with the integration of ethnic minorities

The emerging EU immigration and asylum policies have overwhelmingly focused on the objective of curtailing any additional migration into the Member States. In the field of asylum, the emphasis has been on combating alleged abuse of the asylum process, in particular, tackling the supposed 'welfare migrant'. These policies have been defended by the Member States and the Commission on the grounds that they will contribute to reducing racial tensions through reassuring the general public that migration is under control. For example, in their 1994 Communication on Immigration and Asylum, the Commission maintained that immigration controls are essential to combating racism:

*"society's readiness to accept the inflow of new migrant groups depends on how it perceives government to be in control of the phenomenon" (46)*

More recently, this position has been modified, and there has been greater recognition of the need to balance immigration control measures with measures to promote the integration of ethnic minorities already lawfully resident in the Member States. The Commission's proposed Convention on third-country nationals is clearly an attempt to balance restrictive policies on entry with more generous measures for those resident in the Union. The Commission argue that "although long-term residence is distinct from initial admission, the provision of rights in this area is an integral part of this proposal and ensures its political balance. The Union must encourage the integration of legally resident migrants." (47)

Nonetheless, anti-racism organisations remain critical of the nature of European immigration and asylum policies. On one level, it is a question of popular stereotypes. There is a risk that an excessive emphasis on the 'threat' posed by uncontrolled migration may result in increased public hostility to ethnic minorities in general. The CRE warned the Commission in 1993 that:

*" Minorities have often argued that far from being inter-dependent, strict control and good integration contradict each other; if the government sends out a public message that certain kinds of people should be stopped from coming, those in the category who have already arrived will be the object of dislike and discrimination". (48)*

There also exists the risk that control policies may exacerbate existing racial tensions. Fundamentally, the policy pursued by the Council focuses on the immigrants themselves as the key to reducing racism; through controlling their entry and residence in the Member States racial discrimination may be reduced. Geddes argues that:

*"how an issue is defined is central to an analysis of the policy responses generated to 'solve' the 'problem'. If immigrants and asylum-seekers (particularly the number of them) are construed as the problem, then groups which advocate firm control (and, often linked to such a stance, racist ideologies) are drawn closer to mainstream political debate."* (49)

Therefore, centring policy around immigration control can result in a radicalisation of policy, with a constant drift towards ever-increasing control mechanisms. New immigration controls may not reassure the general public, but may paradoxically contribute to a climate of fear surrounding immigration, by reinforcing the notion that immigration constitutes a 'threat' to society.

The stereotyping of immigrants, and ethnic minorities in general, as a 'threat' is also reinforced by the frequent linkage of immigration and crime in the policy process. For example, the *Ad Hoc* Group was an off-shoot from the TREVI Group, which had been created in 1976 to enhance police cooperation in combating terrorism. This amalgamation of immigration policy with issues such as terrorism and drug-trafficking is typical of the construction of immigration and immigrants as a 'threat' to society. The Economic and Social Committee has criticised the Member States for dwelling on the "defensive aspects" of immigration policy. (50) Fekete and Webber go further and argue that EU immigration and asylum policies have contributed to the "criminalisation and dehumanisation of immigrants and refugees". (51) For its part, the European Parliament has expressed the view that "many of the recent decisions by the Council and the Member States in the field of immigration and asylum policy have contributed towards exacerbating the climate of suspicion towards nationals of third countries and applicants for asylum." (52)

New controls also contain the potential to exacerbate the alienation of ethnic minorities resident in the Member States by increasing insecurity and fears of being subject to state harassment. For example, increased immigration controls, especially random internal checks, may give way to racial harassment by the police and immigration authorities. This is borne out by recent experience in Ireland, where there is evidence that immigration officials have been explicitly conducting immigration controls on the basis of skin colour. (53) Hoogenboom sums up the dilemma over immigration control and integration measures:

*"The official view of the Member States is that integration can only succeed if immigration is limited. ... Immigrant groups will find this policy paradoxical and threatening, and this in turn may prove counterproductive in terms of integration. The situation is aggravated because immigration will certainly continue, despite its official banning."* (54)

Evidence of the ongoing alienation and frustration felt by immigrant

communities can be witnessed in the instances of social unrest in urban areas with a high concentration of ethnic minorities, such as occurred in 1997 in the French 'banlieues', and in certain districts of Brussels.

#### 3.1.4. Mainstreaming and immigration and asylum policies

Mainstreaming offers a fresh approach to immigration policy, placing more stress on the need to consider the impact policy measures may have on ethnic relations and encouraging a greater emphasis on the protection of the fundamental rights of immigrants and refugees, thereby rebalancing policy away from a focus on measures directed at control. This does not require that Member States adopt an 'open borders' policy on immigration. Rather, it simply demands that "whatever immigration policy is adopted towards third countries, it should be administered in a manner that treats members of different racial/ethnic/national groups equally and with respect for their human rights." (55) The importance and relevance of fundamental human rights is their application to all individuals, residents and non-residents, documented and undocumented. Maintaining respect for the right to asylum and combating racial discrimination against all persons present on the territory of the Union form important challenges to the democratic credentials of the Member States.

The 1992 *van den Brink* report of the Civil Liberties Committee of the European Parliament provides an outline of a more humane, and non-discriminatory immigration policy. This rests on an acceptance of migration as "an economic and human reality" (56), and an acknowledgement that it is impossible to 'stop' further immigration. Furthermore, the report stressed the importance of a positive reevaluation of immigration, to counter the extreme right's argument that immigration was economically and socially detrimental. For example, the Committee pointed out that "well-integrated immigrants make a major contribution to the economy, not least by setting up small and medium-sized business or by becoming self-employed." (57) It is worth remembering that a model for a more constructive approach to immigration already exists in the EU law governing free movement. This exemplifies how migration may be portrayed as a beneficial and economically progressive phenomenon. JCWI have pointed out that EC law provides:

*"a positive, rights-based concept of migration, where migrants are actively encouraged as a contributory factor to economic growth and international cooperation, and where their rights are protected and inviolable."* (58)

Crucially, throughout EC law there is a recognition that effective integration must be built on the principle of non-discrimination, as expressed in Article 6 of the EC Treaty. Building on this body of law, a new immigration policy could be founded on respect for and protection of the fundamental human and social rights of migrant communities. In this respect, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families offers a useful starting point. The universality of fundamental rights is particularly appropriate, and offers a means of determining the minimum standard of treatment to be enjoyed by all migrants, both documented and undocumented. The 1990 Convention is based on the principle

that migrants are "more than labourers or economic entities. They are social entities with families and have rights accordingly including that of family reunification." (59) Similarly, in relation to asylum policy, a return to the accepted international norms on asylum and a commitment to place human rights considerations at the centre of asylum policy could do much to reduce the discriminatory impact of current asylum policy on ethnic minority communities. In particular, there is an urgent need for government-led action to challenge the stereotype of all asylum-seekers as being 'economic migrants', who will be a burden on the state. A recent survey in the UK of 263 people with refugee status, or exceptional leave to remain, found that, on average, their skill levels exceeded those of the British population as a whole. The majority were highly qualified, often from professional backgrounds. The study concluded that "Britain is wasting the talents of numerous refugees by failing to make use of their skills and their influences." (60) A positive presentation of the contribution which could be made by asylum-seekers must be a central element of any policy to reduce racial discrimination against these individuals and ethnic minorities in general.

Whilst mainstreaming demands long-run changes in the fundamental direction and orientation of immigration and asylum policy, as described above, in the short-run it simply requires that the Commission monitors new proposals for potentially discriminatory effects. A prime example of the need to bear anti-discrimination objectives in mind is the case of 'employer sanctions'. In 1996, the Council adopted a resolution calling on Member States to introduce sanctions against employers found to be employing illegal immigrants. Whilst there do exist legitimate arguments in favour of such a policy (61), the UK CRE has expressed serious reservations concerning such measures. (62) They contend that there is a genuine risk that employers, uncertain as to exactly who is entitled to work, may simply avoid employing ethnic minorities in general. Irrespective of the arguments concerning the specific case of employer sanctions, it is illustrative of a more general point; the need to alert policy-makers to potential conflicts at an early stage and thereby avoid the adoption of contradictory measures.

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### Footnotes

1. European Foundation (1996) *"Preventing racism at the workplace - a report on 16 European countries"* at p. 154
2. Declaration by the Council and the representatives of the governments of the Member States, meeting within the Council of 16 December 1997 on respecting diversity and combating racism and xenophobia. (OJC 1/1, 3.1.98)
3. Para. 18, Resolution of the European Parliament on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremist violence, 21

April 1993. (OJC 150/127, 31.5.1993).

4. Commission for Racial Equality (1997) " *Annual report of the Commission for Racial Equality: January to December 1996*", at p. 18

5. Para 10, Resolution of the European Parliament on racism, xenophobia and anti-semitism, 26 October 1995. (OJC 308/140, 20.11.95) *See*: Annex 3

6. Recital H, Resolution on racism, xenophobia and anti-Semitism and the European Year against Racism (1997) [Ford, G & Oostlander, A] 30.1.97 OJC 55/17, 24.2.97. *See*: Annex 5

7. Szyszczak, E (1992)"Race discrimination: the limits of market equality?" in Hepple, B & Szyszczak, E "*Discrimination: the limits of the law*"

8. Para. 13, Resolution of the European Parliament on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremist violence, 21 April 1993. (OJC 150/127, 31.5.1993).

9. Para 8, Resolution on the communication from the Commission on racism, xenophobia and anti-Semitism; 9 May 1996 (OJC 152/57, 27.5.96)

10. Recital O, Resolution on racism, xenophobia and anti-Semitism and the European Year against Racism (1997) [Ford, G & Oostlander, A] 30.1.97 OJC 55/17, 24.2.97. *See*: Annex 5

11. ELDR (Group of the European Liberal, Democrat and Reform Party) (1997) "Human Rights in Eastern Europe" Brussels; at p. 13.

12. *ibid.*, at p. 39

13. European Commission (1997) "*Annual Report from the Commission: Equal Opportunities for Women and Men in the European Union 1996*" COM (96) 650, 12.2.97; at p. 2

14. *Ibid.*, 10

15. European Commission (1996) "*Incorporating equal opportunities for women and men into all Community policies and activities*" COM (96) 67, 21.2.96

16. UNHCR Regional Office for European Institutions (1992) in Butt-Philip, A (1994) "EU Immigration Policy: Phantom, Fantasy or Fact?" *West European Politics* Vol. 17(2) pp.168-191, at p. 182

17. Commission, UK Office (1996) "Fewer seek asylum in the EU" *Week in Europe*, 8.2.96

18. European Parliament (1996) "Report of the Committee on Civil Liberties on the Council Resolution on minimum guarantees for asylum procedures" EP Doc.

A4-0315/96, 10.10.96; at p. 22

19. Commission (1994) "Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policy" COM (94) 23, at p. 7

20. Husbans, C (1992) "The other face of 1992: the extreme-right explosion in Western Europe" *Parliamentary Affairs* Vol. 45(3) pp. 267-284, at p. 283

21. The five concerned were Germany, France, Belgium, Luxembourg and the Netherlands.

22. den Boer, M (1996) "Justice and Home Affairs" in Wallace, H & Wallace, W " *Policy-making in the European Union*" 3rd. ed. Oxford: OUP, at p. 397

23. The five founding states with the addition of Spain and Portugal removed internal border controls from 26 March 1995. The agreement has also been signed by Italy (1990), Greece (1992), Austria (1995), and Denmark, Sweden and Finland (1996). The agreement is now partially operational in respect of Italy since the abolition of border controls for air travellers on 26 October 1997. It is anticipated that it will become fully operational for Italy, Greece and Austria by the end of March 1998. ( *La Repubblica* (27.10.97) 'Europe, addio alle frontiere')

24. Webber, F (1993) "The New Europe: immigration and asylum" in Bunyan, T (ed.) " *Stategatching the New Europe: a handbook on the European State*" Nottingham: Russell Press, at p. 144

25. Joint Council for the Welfare of Immigrants (JCWI) (1989) " *Unequal Migrants: the European Community's Unequal Treatment of Migrants and Refugees*" Policy Papers in Ethnic Relations No. 13 Warwick: Centre for Research in Ethnic Relations, University of Warwick, at p. 11.

26. Convention determining the Member State responsible for examining applications for asylum lodged in one of the Member States of the European Communities; OJC 254/1, 19.8.97.

27. Spencer, M (1995) " *States of Injustice - a guide to human rights and civil liberties in the European Union*" London: Pluto Press, at p. 86

28. Joint Council for the Welfare of Immigrants (JCWI) (1996) " *Annual report and policy review*" London: JCWI; at p. 10

29. European Parliament (1996) "Annual report on respect for human rights in the European Union in 1994" A4-0223/96, 1.7.96; at p. 23 In particular, the report criticised the practice of Germany to consider all countries it borders as 'safe' for asylum-seekers, and the return of asylum-seekers by Greece to Turkey.

30. The UNHCR stated that it regarded this as "contrary to the necessary individual determination of refugee status under the 1951 Convention which

includes assessment of the subjective element of fear of persecution. It is impossible to exclude as a matter of law the possibility that an individual could have a well-founded fear of persecution in any particular country however great its attachment to human rights and the rule of law." (UNHCR (1994) " *An overview of protection issues in Western Europe: legislative trends and positions taken*" Geneva: UNHCR, at p. 11)

31. Commission (1994) "Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policy" COM (94) 23, 23.2.94, at p. 22

32. *ibid.*, at p. 1

33. See further: Guild, E & Niessen, J (1996) " *The developing immigration and asylum policies of the European Union - adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions*" London: Kluwer Law International); European Parliament (1996) "Report of the Committee on Civil Liberties on the Council Resolution on minimum guarantees for asylum procedures" [d'Ancona] EP Doc. A4-0315/96, 10.10.96

34. Section V(2); Council Resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the territory of the Member States. (OJ 80/2, 18.3.96) See further: Peers, S (1997) "Undercutting integration: developments in Union Policy on Third-Country Nationals" *European Law Review* Vol. 22 pp. 76-84

35. European Commission (1995) " *Proposal for a Council Directive on the right of third-country nationals to travel in the Community*" COM (95) 346, 12.7.95

36. European Commission (1997) " *Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States*" COM (97) 387, 30.7.97.

37. *ibid.*, Article 35

38. European Commission (1997) "Proposal for a Council Regulation amending Regulation (EEC) 1408/71 concerning its extension to third-country nationals" COM (97) 561, 12 November 1997

39. Article 4(1); EU-Council (1997) " *Draft Convention concerning the establishment of "Eurodac" for the comparison of fingerprints of applicants for asylum*" 11079/97 Limite ASIM 187, 2 October 1997.

40. European Union (1997) " *Treaty of Amsterdam*" Luxembourg: OOPEC

41. Article 73i.

42. Article 73k

43. Article 73o(1)
44. Article 73k(3)(b)
45. Article 73k(4)
- 46.> European Commission (1994) "*Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policy*" COM (94) 23, 23.2.94; at p. 32
47. European Commission (1997) "*Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States*" COM (97) 387, 30.7.97; at p. 5
48. CRE (1994) "*Submission on the European Commission's Green Paper on Social Policy together with comments on the Communication to the Council and European Parliament on immigration and asylum*" March 1994; held in the library of the European Foundation for the Improvement of Living and Working Conditions, Dublin; par. 8
49. Geddes, A (1995) "Immigrants, ethnic minorities and the European Union's democratic deficit" *Journal of Common Market Studies* Vol. 33 pp. 197-217, at p. 207
50. ESC (1994) "*Opinion of the Economic and Social Committee on the Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*" OJ 1994 C 393/69, 14.9.94; at point 3.2
51. Fekete, L & Webber, F (1994) "*Inside Racist Europe*" in Bunyan, T (ed) "*Statewatching the New Europe: a handbook on the European State*" Nottingham: Russell Press; at p. 27
52. Para. 12, Resolution on racism, xenophobia and anti-Semitism and the European Year against Racism (1997) [Ford, G & Oostlander, A] 30.1.97 OJC 55/17, 24.2.97.
53. *Migration News Sheet* "Border police accused of checking only black passengers" November 1997, p. 14
54. Hoogenboom, T (1992) "Symposium: the status of non-Community nationals in Community law - integration into society and free movement of non-EC nationals" *European Journal of International Law* Vol. 3 pp. 36-52, at pp. 42-43
55. CRE (1994) "*Submission on the European Commission's Green Paper on Social Policy together with comments on the Communication to the Council and European Parliament on immigration and asylum*", at para. 8
56. European Parliament (1992) "Report of the Committee on Civil Liberties

and Internal Affairs on European immigration policy" A3-0280/92, 2.10.92; at p. 5

57. *ibid.*, at p. 10

58. JCWI (1989) "*Unequal Migrants: the European Community's Unequal Treatment of Migrants and Refugees*" Policy Papers in Ethnic Relations No. 13 Warwick: Centre for Research in Ethnic Relations, University of Warwick; at p. 2

59. CCME (1991) "*Proclaiming Migrants Rights - the new International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*" at p. 2

60. CRE (1997) "Credit to the nation " *Connections* 1997/3, at p. 10

61. It has be argued that this would be beneficial to race relations as it would reduce the exploitation of undocumented migrant labour by employers.

62. Commission for Racial Equality (1997) "*Annual report of the Commission for Racial Equality: January to December 1996*" London: CRE; at p. 11

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**European Union Anti-Discrimination Policy:  
FROM EQUAL OPPORTUNITIES**

# **BETWEEN WOMEN AND MEN TO COMBATING RACISM**

Directorate-General for Research  
Working document  
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## **4. Conclusion**

This paper has demonstrated the steadily increasing involvement of the European Union in the fight against racism. As a result of the lobbying from the Parliament, the Commission and relevant NGOs, the issue finally made it onto the agenda of the Council of Ministers. Clearly a turning point in this regard is the amendment of the Treaty at Amsterdam. This amendment, although not without its limitations, opens the door to a new chapter in EU anti-racism policy. Most notably, it enables the Union to adopt binding legislation and to move beyond the realm of symbolic rhetoric which has so characterised the policy to date. This is already in evidence through the decision to establish the Monitoring Centre and the European Year against Racism initiative. The Amsterdam Treaty creates a real expectation of future anti-discrimination legislation at the EU level. Whilst the Member States are under no legal obligation to adopt such measures, the whole amendment process will be rendered rather meaningless if there is not a swift move to enact new anti-discrimination measures. Section 2 of the paper has sought to identify in general which measures may be useful in the fight against racism, and more particularly, which choices are facing the EU institutions in the preparation of new anti-discrimination legislation. Clearly, it has not been an exhaustive examination of the potential measures which may be taken for the prevention of racial discrimination. For example, there has been little consideration of measures relating to the judiciary. The case for the establishment of specialist tribunals to deal with anti-discrimination cases, or for the training of judges in cultural sensitivity and equal opportunities has not been explored.

On the one hand, there are measures relating to the extent of legal guarantees against discrimination. In this respect, there should naturally be protection provided against direct and indirect discrimination, and victimisation of those who exercise their rights under anti-discrimination laws. The institutions will have to determine to which sectors the legislation will apply, and the inclusion (or non-inclusion) of discrimination based on religious grounds or against third-country nationals. In relation to the latter, it must be noted that if the legislation does not apply to third-country nationals, it will fail to provide protection to those individuals most vulnerable to racial discrimination. This would

substantially reduce its significance to the fight against everyday racism.

In a second category are those measures which pertain to the operation of the legislation; that is, the practical enforcement of the legal guarantees to non-discrimination. Based on the experience of more than two decades of EU equal opportunities legislation, it is fair to comment that legal guarantees alone will not be sufficient to produce a qualitative improvement in the position of ethnic minorities. Rather, considerable attention must be given to making a reality of these guarantees through the provision of practical and accessible means of enforcement. Prosecuting a case has a heavy financial and emotional cost for the individual plaintiff; left to themselves most individuals are likely to conclude it is not worth the effort. Cook puts it bluntly:

*" the reality of trying to pursue such a case is harrowing, costly and time-consuming. Would it really be worth the hassle and the heartache to go to such lengths? Much easier you may decide to bide your time and find another job."* [\(1\)](#)

Existing EU equal opportunities legislation has traditionally taken a 'hands-off' approach to national legal procedures and remedies. Nonetheless, there is a growing recognition that this has been a source of weakness in EU equality legislation. As Wedderburn comments,

*" rights are worth little without effective remedies and these are in the hands of the domestic jurisdictions."* [\(2\)](#)

The ECJ has also supported a more interventionist approach in this field. Access to justice has been held by the Court to be a fundamental right under Community law, therefore, it cannot be left completely at the discretion of the Member States [\(3\)](#). For example, on the question of the burden of proof in sex discrimination cases, in several instances the Court has been prepared to intervene in the national legal procedures and lay down rules when the burden of proof shifts from the employee to the employer. [\(4\)](#) In line with this jurisprudence, the Commission have been pressing for almost a decade for the adoption of a directive on the burden of proof in sex discrimination cases. [\(5\)](#) The significance of the directive is that it expressly intervenes in the national procedures governing sex discrimination.

In a similar vein, new EU anti-discrimination legislation needs to consider the establishment of a set of minimum standards with regard to national legal procedures for access to justice. This paper has highlighted the great contribution which may be made by the existence of a specialist public body responsible for the provision of legal and financial assistance to individual victims of discrimination. Arguably, new anti-discrimination legislation should require Member States to establish a specialist equality agency. A less satisfactory alternative would be to extend legal standing to NGOs, as in Luxembourg and France, and to combine this with the provision of significant public funding to support such groups. The Parliament has already endorsed the latter point on several occasions; for example, in 1994, it called on "the authorities of the European Union and the Member States governments to

increase aid to refugee and immigrant associations and associations set up to combat racism and xenophobia." (6) Amongst other issues for which there seems a strong case for express inclusion in new legislation is access to civil remedies. Naturally though, the precise determination in each case would require a more specific study of the measure in question, with reference to experience in national law.

Other policy options, such as ethnic monitoring or certain forms of positive action, whilst potentially beneficial in the fight against racism, seemed best left to the discretion of the Member States according to the precise socio-legal context. This is consistent with the approach taken in several Member States, in particular the UK and the Netherlands, where there is a distinction drawn between those measures rendered mandatory through incorporation in national legislation, and those measures left to the discretion of employers, but endorsed through inclusion in a national Code of Practice. The creation of an EU Code of Practice on Racial Discrimination could thus be a means of accommodating those measures which appear to be inappropriate for inclusion in binding legislation, but which should be promoted as beneficial instruments in the fight against racism. Indeed, this process is already underway through research conducted by the European Foundation for the Improvement of Living and Working Conditions. This resulted in the adoption of a Compendium of Good Practice by the Social Partners in Lisbon, 24-25 November 1997. (7)

This contribution by the Social Partners also raises the potentially crucial role both employers and trades unions may play in the fight against racism. Both Social Partners are at the cutting edge of discrimination, at least in so far as employment discrimination is concerned, and are well placed to directly act to prevent and remedy discrimination. There are many examples of good practice in the Member States demonstrating the role that committed employers and trades unions may play. For example, in Spain, two trades unions have each created a network of special centres to meet the specific needs of immigrants. As a result there are now over 100 centres throughout Spain offering assistance for immigrants on issues such as residence and work permits, labour law, social security and discrimination. (8) With particular regard to employers, it is important to persuade them of the economic costs of discrimination. The Chairman of the UK CRE recently stated that much of their progress with employers had come about through "the realisation [by employers] that racial discrimination is wasteful of human resources ... expensive - compensation payments and legal costs can be onerous - and can damage reputations." (9) More generally, an information campaign to convince the public of the costs to society of discrimination could form an important means to combating the racist propaganda of the extreme right-wing, and could make a contribution to underpinning democratic values.

New anti-discrimination legislation, combined with a much broader perspective on equal opportunities would make a significant contribution to meeting the objectives of the EU as set out in the 1986 Joint Declaration. At the same time, the underlying problem in EU policy on racism has been the unequal protection afforded to discrimination based on sex and discrimination based on race. EU law created a "hierarchy of discrimination which is formalised and reinforced in

law ... a system which itself discriminates is incapable of bringing about equality." (10) New anti-discrimination legislation goes some way to redressing the current legal inequality, yet if it fails to include other groups vulnerable to discrimination, it will also generate new forms of legal inequality. Recent legislation in Ireland, the Netherlands and Luxembourg has adopted a much wider definition of the prohibited categories of discrimination. In 1994, the Parliament called for "the implementation of a global non-discrimination policy at Union level which is based on the principle of equality". (11) In this vein, the Amsterdam amendment covers not only racial and religious discrimination, but also discrimination based on disability, age and sexual orientation. The needs of these groups must also be accommodated if the right to non-discrimination in EU law is to be made a reality. "As a minimum, the law ought to extend the same degree of protection, accord the same priority to redressing imbalance, and afford the same remedies to all disadvantaged groups." (12) This is the challenging agenda facing the EU after Amsterdam.

### Footnotes

1. Cook, E "Unfair? Go on, prove it" *Independent on Sunday* (supplement) 19.10.97 p. 1
2. Lord Wedderburn (1995) " *Labour law and freedom: further essays in labour law*" London: Lawrence & Wishart; at p. 266
3. Case 222/86 UNECTPF v Heylens [1987] ECR 4097
4. For example, *Danfoss*, Case 109/88 [1989] ECR 3199; *Enderby*, Case 127/92 [1993] ECR I-5535
5. OJC 176/5, 5.7.88. Following consultation with the Social Partners, the Commission renewed its proposal in 1996 (COM (96) 340, 17.7.96), and the directive was adopted in December 1997. (European Commission (UK Office) *The Week in Europe* 18.12.97)
6. Para. 17, Resolution of the European Parliament on racism, xenophobia and anti-semitism, 27 October 1994 (OJC 323/154, 20.11.1994) *See*: Annex 2
7. European Foundation for the Improvement of Living and Working Conditions (1997) "European Compendium of Good Practice for the Prevention of Racism at the Workplace" (Report by Wrench, J) Dublin: European Foundation
8. The centres have been created by the CCOO and UGT trade unions. (European Foundation (1997) "European Compendium of Good Practice for the Prevention of Racism at the Workplace" at pp. 72-73)
9. Commission for Racial Equality (1997) " *Annual report of the Commission for Racial Equality: January to December 1996*" London: CRE; at p. 3
10. Hegarty & Keown (1996) "Hierarchies of Discrimination: the political, legal and social prioritisation of the equality agenda in Northern Ireland" *Equal*

*Opportunities International* Vol. 15 No. 2 pp. 1-24, at p. 1

11. Para. 7, Resolution of the European Parliament on racism, xenophobia and anti-semitism, 27 October 1994 (OJ C 323/154, 20.11.1994) *See*: Annex 2

12. *ibid.*

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## Annexes

[Annex 1](#): Joint Declaration by the European Parliament, the Council and the Commission against racism and xenophobia, 11 June 1986 (OJ C 158,

25.6.1986)

[Annex 2](#) : Resolution of the European Parliament on racism, xenophobia, and anti-semitism, 27 October 1994 (OJ C 323/154, 20.11.1994)

[Annex 3](#) : Resolution of the European Parliament on racism, xenophobia and anti-semitism, 26 October 1995 (OJ C 308/140, 20.11.0995)

[Annex 4](#) : Joint Action adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia, 15 July 1996 (OJ L 185, 24.7.96)

[Annex 5](#) : Resolution of the European Parliament on racism, xenophobia and anti-semitism and the European Year against Racism (1977)[Ford G & Oostlander A], 30 January 1997 (OJ C 55/17, 24.2.97)

[Annex 6](#) : Resolution on racism, xenophobia and anti-semitism and the results of the European Year against Racism, 29 January 1998

[Annex 7](#) : Equality Agencies in the Member States

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## **Annex 1**

**Joint Declaration by the European Parliament, the Council and the Commission against racism and xenophobia, 11 June 1986 (OJ C 158, 25.6.1986)**

**The European Parliament, the Council, the Representatives of the Member States meeting within the Council, and the Commission,**

Recognizing the existence and growth of xenophobic attitudes, movements and acts of violence in the Community which are often directed against immigrants;

Whereas the Community institutions attach prime importance to respect for fundamental rights, as solemnly proclaimed in the Joint Declaration of 5 April 1977, and to the principle of freedom of movement as laid down in the Treaty of Rome;

Whereas respect for human dignity and the elimination of forms of racial discrimination are part of the common cultural and legal heritage of all the Member States;

Mindful of the positive contribution which workers who have their origins in other Member States or in third countries have made, and can continue to make, to the development of the Member State in which they legally reside and of the

resulting benefits for the Community as a whole;

1. vigorously condemn all forms of intolerance, hostility and use of force against persons or groups of persons on the grounds of racial, religious, cultural, social or national differences;
2. affirm their resolve to protect the individuality and dignity of every member of society and to reject any form of segregation of foreigners;
3. look upon it as indispensable that all necessary steps be taken to guarantee that this joint resolve is carried through;
4. are determined to pursue the endeavours already made to protect the individuality and dignity of every member of society and to reject any form of segregation of foreigners;
5. stress the importance of adequate and objective information and of making all citizens aware of the dangers of racism and xenophobia, and the need to ensure that all acts or forms of discrimination are prevented or curbed.



## **Annex 2**

### **Racism and xenophobia**

**B4-0261/94**

#### **Resolution on racism, xenophobia and anti-semitism**

The European Parliament,

- having regard to the Joint Declaration of 11 June 1986 <sup>(1)</sup> by Parliament, the Council and the Commission and all the resolutions adopted subsequently on this subject,
- having regard to the conclusions of its committees of inquiry into racism and xenophobia <sup>(2)</sup> and its resolutions of 21 April 1993 <sup>(3)</sup> and 2 December 1993 <sup>(4)</sup> on racism and xenophobia and 20 April 1994 <sup>(5)</sup> on ethnic cleansing, and insisting again on its recommendations made therein,
- having regard to the conclusions of the Corfu European Council of 24-25 June 1994 on racism and xenophobia,
- having regard to Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which stipulates that 'the enjoyment of the rights and freedoms set forth in the Convention shall be secured without

discrimination on any ground such as sex, race, colour, language, religion, political or other opinion ...

- having regard to Article F(2) of the Treaty on European Union,

A. whereas racism, xenophobia, anti-semitism and ethnic cleansing strategies and expulsions, which have caused great conflicts and suffering to various regions and nations of Europe throughout history, have left deep and lasting wounds and yet are still rampant as the 20th century draws to a close,

B. whereas people are more vulnerable to racism and xenophobia at times of revolution, misery and uncertainty in various fields, partly because of political manipulation,

C. whereas persistent structural unemployment is weakening resistance to racism and xenophobia, by causing a rise in economic problems and excluding tens of millions of people in the European Union from participating with any dignity in economic, social and political life,

D. concerned at the electoral success of racist parties in Europe, such as the FPÖ in Austria, the Front National in France, the British National Party in the United Kingdom, the Vlaams Blok and Front National in Belgium, and pleased at the fall in the share of the vote for the Republikaner and the DVU in the elections in the Federal Republic of Germany,

E. deploring the fact that certain political forces are using the existing crisis in employment and the economy to stir up xenophobic and racist sentiments and exploit them for electoral ends,

F. regarding the existence of multi-ethnic and multi-cultural societies as an expression of civilization and as offering support to the European ideal, and observing that a living culture is open to outside cultural influence and thus displays a spontaneous tendency towards mixing, which even determines the character and history of many States and peoples,

G. stressing that the significant progress made in establishing human rights legislation since 1945 has not been matched by practical achievements and that the Universal Declaration on Human Rights is clearly not yet backed up by the necessary political will to apply them universally,

H. stressing that even within the European Union, Member States differ in opinion on the implementation of human rights when individual and group rights are at stake as they have different constitutions and laws based upon these constitutions,

I. deeply regretting that, on the one hand, in spite of its commitment over five years to the fight against racism, xenophobia and other forms of discrimination, its demands have scarcely been heeded by political decision-makers, and, on the other hand, the incidence of racism has if anything increased,

1. Condemns once more, in even stronger terms, racism in all its forms, xenophobia, antisemitism, flagrant breaches of individual rights directed specifically at women, and the intolerance in any form of religious discrimination;
2. Calls on all the governments of the European Union to condemn any form of intolerance and any racist or xenophobic declaration in their policy and their acts, especially where such attitudes are manifested institutionally;
3. Considers the Consultative Committee a good opportunity to present a reasoned selection of proposals for concrete and urgent action, which can be considered as a draft response by the Council on all the proposals already made by the European Parliament and the Council of Europe, and interprets the committee's mandate accordingly;
4. Considers that incitement to racism, as well as the dissemination and promotion of any type of revisionist thesis concerning the Holocaust or denial that the Holocaust took place, should be considered a criminal offence at Union level and calls on all the Member States accordingly to adapt their legislation against the perpetrators of acts of racism;
5. Notes with concern the increasing sympathy with which the positions of extreme right-wing movements and political parties are being received in several Member States of the Union and a candidate country;
6. Calls on the governments of the Member States and the Commission to give political and financial support to citizens' movements and organizations which play an active part in combating racism and xenophobia;
7. Calls for the implementation of a global non-discrimination policy at Union level which is based on the principle of equality and may function as a useful and effective complement to the policy of and within the Member States;
8. Calls on the Member States to take firm preventive action against racism and ill-treatment by police and other state agents, and to ensure that racist behaviour by law enforcement personnel will not be tolerated, by introducing pre-employment screening, training and when necessary formal disciplinary measures among the police force;
9. Repeats once more its request to the Commission to draw up as a matter of urgency a directive laying down measures to reinforce the relevant legal instruments in the Member States, using the document 'The Starting Line' as a basis and taking account of Parliament's guidelines for antiracist policy, in particular in the areas of: education, the media, information, culture, youth, citizens' rights, women's rights, the law, social affairs, economic affairs and employment, and immigration and asylum policy;
10. Calls on the budgetary authority to increase the financial aid allocated to anti-racist projects and to finance NGOs whose objectives include a clearly anti-

racist dimension;

11. Expresses its grave concern at the particularly restrictive nature of the resolution on immigration adopted by the Ministers of Justice and Home Affairs on 20 June 1994, a resolution which draws a link between the level of unemployment in the European Union and the presence of third country nationals, a decision which can only encourage xenophobic feelings and extreme right-wing movements in the EU;

12. Calls once more for the portfolio of one of the Commissioners to include the fight against racial discrimination and xenophobia and any question of discrimination in general; stresses in this context that extending Union citizenship to citizens of third countries with their residence in the Union is a major step towards granting them equal rights and represents a significant contribution towards the fight against racism, and calls on the Member States to take this into account when they review the Treaty on European Union;

13. Calls on the Council, in close cooperation with the Commission and Parliament, to use the occasion of the fiftieth anniversary of the end of the Second World War to launch concrete actions, especially in the areas of education and information, with a view to promoting the values of freedom, pluralist democracy, tolerance and respect for human rights which have been fundamental to the struggle for the liberation of Europe from Nazi domination and to the philosophy which inspired the founding fathers of the construction of Europe;

14. Calls on the Commission to urge the Member States of the Union to contribute, in cooperation with non-governmental organizations and active members of society, in particular youth organizations which play an important role in the fight against racism and xenophobia, to making public opinion more aware and to preventing racist, discriminatory and intolerant attitudes;

15. Believes that, as stated in the 'Strasbourg declaration' (the outcome of the European Conference on 'Vigilance for Democracy' held in Strasbourg on 20 and 21 October 1994), it is very important to establish an annual prize for integration, which could be awarded to neighbourhoods, organizations or institutions which are a positive example of the successful integration of native and foreign citizens;

16. Emphasizes that immigration policy and asylum policy require different solutions, as asylum is not the same as immigration;

17. Calls on the authorities of the European Union and the Member State governments to increase aid to refugee and immigrant associations and associations set up to combat racism and xenophobia;

18. Instructs its President to forward this resolution not only to the Consultative Committee on Racism and Xenophobia but also to the Council, the Commission, the Economic and Social Committee, the Council of Europe and

the governments and parliaments of the Member States and applicant countries.

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### **Annex 3**

#### **Racism and xenophobia**

##### **B4-1239/95**

##### **Resolution on racism, xenophobia and anti-Semitism**

The European Parliament,

- having regard to the Joint Declaration by the European Parliament, the Council, the representatives of the governments of the Member States meeting within the Council and the Commission against racism and xenophobia of 11 June 1986 <sup>(6)</sup>, and all the resolutions adopted subsequently on this subject,
  - having regard to the conclusions of its committees of inquiry into racism and xenophobia <sup>(7)</sup> and its resolutions of 21 April 1993 <sup>(8)</sup> on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremist violence, 2 December 1993 <sup>(9)</sup> on racism and xenophobia, 20 April 1994 <sup>(10)</sup> on ethnic cleansing, 27 October 1994 <sup>(11)</sup> and 27 April 1995 <sup>(12)</sup> on racism, anti-Semitism and xenophobia, and 15 June 1995 <sup>(13)</sup> on a Holocaust Memorial Day, and insisting again on the recommendations made therein,
  - having regard to the conclusions on racism and xenophobia of the Corfu European Council of 24-25 June 1994 and of the Cannes European Council of 25-26 June 1995,
  - having regard to Article 14 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, which stipulates that 'the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion... ',
  - having regard to Article F (2) of the Treaty on European Union,
  - having regard to the final report of the Consultative Commission on Racism and Xenophobia as submitted to the European Council in Cannes in June 1995,
- A. whereas the existence of multi-ethnic and multi-cultural societies is in line with the ideals of the European Union and whereas successful measures against intolerance, discrimination and violence caused by racism, xenophobia and anti-Semitism are essential if the goal of a closer union among the peoples of Europe

is to be achieved,

B. whereas, at the same time, racism, xenophobia, anti-Semitism and ethnic cleansing strategies and expulsions represent the dark side of European history, have left deep and lasting wounds and still persist in many places on our continent,

C. whereas racism, xenophobia and anti-Semitism must be met with a package of suitable practical measures, above all where these would be most effective and have most impact, i.e. at local and national level,

D. whereas there is nevertheless a fundamentally European dimension, based on free movement of persons and the fact that differences in legislation mean that behaviour or actions which are not permitted in one Member State can still reach that Member State from across the border of another Member State or from across the external borders of the Community,

E. whereas the Commission has used the Treaty to take measures in the social field to combat racist phenomena and to strive for non-discrimination, and whereas in this respect further measures are contained in the Social Action Programme for the medium term (1995-1997),

F. whereas some citizens of the Union continue to suffer racist, xenophobic and anti-Semitic attacks in their daily lives, in particular when exercising their right to freedom of movement,

1. Welcomes the final report of the Consultative Commission on Racism and Xenophobia as an important document to form the basis for the forthcoming work within the Union and its Member States to curb racism, xenophobia and anti-Semitism;

2. Regrets that the European Council in Cannes displayed a political unwillingness to adopt an overall strategy against racism, xenophobia and anti-Semitism;

3. Urges the Council under the Spanish presidency, which has assumed a positive attitude towards the conclusions in the Commission report, to ensure that the Consultative Commission's work is fully utilized;

4. Calls as a matter of urgency on the Spanish Presidency of the Council to do everything in its power to conclude, in time for the next meeting of the Justice and Home Affairs Council on 23 November 1995, the discussion on the draft joint action by the Member States on measures to combat racism, xenophobia and anti-Semitism, an action which should include a requirement concerning conduct by the Member States;

5. Welcomes the progress report from the Chairman of the Reflection Group on the 1996 Intergovernmental Conference which stresses the need to ensure full observance of fundamental rights in the Union, and supports the idea of

incorporating provisions concerning the following issues into the EU Treaty:

(a) condemnation of racism, xenophobia and anti-Semitism and

(b) extension of Article 6 (hitherto of the EC Treaty) to prohibit all forms of discrimination;

6. Calls once more upon the Commission to submit a proposal for an anti-discrimination directive as a matter of urgency;

7. Calls on the Council to send a clear political signal regarding its commitment to the fight against racism, xenophobia and anti-Semitism by complying with the decisions of the European Parliament under the 1996 budgetary procedure which seek to give financial support to measures designed to implement a global policy of non-discrimination at Union level;

8. Calls on the governments of the Member States to:

- ratify all international instruments concerning the fight against all forms of racial discrimination,

- guarantee the protection of persons against any form of discrimination on grounds of race, colour, religion or national or ethnic origin,

- promote equal opportunities for groups of persons who are most vulnerable to discrimination, particularly women, young people and children;

9. Calls on the Member States and the Commission to promote research and production of educational material and the arranging of international courses, 'round table' discussions, youth exchanges, exhibitions, media campaigns etc. on racism, xenophobia and anti-Semitism;

10. Calls for special training programmes for public servants and especially the police and judiciary in order to promote tolerance and understanding of different cultures and to prevent discriminatory behaviour;

11. Calls on the European Ombudsman to submit an annual report on the complaints of Union citizens and to give special attention to incidents with a racist, anti-Semitic or xenophobic background;

12. Is of the opinion that incitement to racism and the production and distribution of and support for racist, xenophobic and anti-Semitic material and theses as well as any revisionist claims denying the reality of the Holocaust should be treated as criminal offences throughout the European Union and therefore requests all the Member States to adapt their legislation accordingly;

13. Calls on the Council, the Commission and the governments of the Member States to strengthen their support for movements actively participating in the fight against racism and xenophobia;

14. Suggests that the Council transfer the mandate of the Consultative Commission on Racism and Xenophobia to the Community institutions in order to ensure adequate co-ordination of the work of the controlling parliamentary body and of the Commission in combating racism, xenophobia and anti-Semitism;

15. Considers, however, that this should not occur until the Consultative Commission has completed its current work programme with regard to the establishment of an EU Observatory on Racism and Xenophobia;

16. Urges the Consultative Commission to reiterate its demand for a Treaty change in 1996 to include unambiguously therein the fight against racism and xenophobia;

17. Strongly supports the idea that any EU Observatory on Racism and Xenophobia should be an institution of the EU, that would cooperate with the Council of Europe and be active in combating racism on the basis of its work;

18. Instructs its President to forward this resolution to the Consultative Commission on Racism and Xenophobia, the Council, the Commission, the Economic and Social Committee, the Council of Europe and the governments and parliaments of the Member States and applicant countries.



#### **Annex 4**

#### **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)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Article K.3 (2) (b) of the Treaty on European Union,

Having regard to the initiative from the Kingdom of Spain,

Whereas the Member States regard the adoption of rules in connection with action to combat racism and xenophobia as a matter of common interest, in accordance with Article K.1 (7) of the Treaty in particular;

Whereas regard should be had to the conclusions on racism and xenophobia

adopted by the European Council in Corfu on 24 and 25 June 1994, in Essen on 9 and 10 December 1994, in Cannes on 26 and 27 June 1995 and in Madrid on 15 and 16 December 1995;

Whereas the Consultative Commission on Racism and Xenophobia, established by the Corfu European Council, adopted recommendations;

Whereas, despite the efforts made over recent years by the Member States, racism and xenophobia offences are still on the increase;

Concerned at the differences between some criminal law systems regarding the punishment of specific types of racist and xenophobic behaviour, which constitute barriers to international judicial cooperation;

Acknowledging that international cooperation by all States, including those which are not affected at domestic level by the problem of racism and xenophobia, is necessary 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;

Emphasizing that the right to freedom of expression implies duties and responsibilities, including respect for the rights of others, as laid down in Article 19 of the United Nations International Covenant on Civil and Political Rights of 19 December 1966;

Determined, in keeping with their common humanitarian tradition, to guarantee that, above all, Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 are complied with;

Wishing to build upon the work begun within the framework of Title VI of the Treaty during 1994 concerning the criminal aspects of the fight against racism and xenophobia,

HAS ADOPTED THIS JOINT ACTION:

#### TITLE I

A. In the interests of combating racism and xenophobia, each Member State shall undertake, in accordance with the procedure laid down in Title II, to ensure effective judicial cooperation in respect of offences based on the following types of behaviour, and, if necessary for the purposes of that cooperation, either to take steps to see that such behaviour is punishable as a criminal offence or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality for such behaviour:

(a) public incitement to discrimination, violence or racial hatred in respect of a

group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin;

(b) public condoning, for a racist or xenophobic purpose, of crimes against humanity and human rights violations;

(c) public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin;

(d) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;

(e) participation in the activities of groups, organizations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred.

B. In the case of investigations into, and/or proceedings against, offences based on the types of behaviour listed in paragraph A, each Member State shall, in accordance with Title II, improve judicial cooperation in the following areas and take appropriate measures for:

(a) seizure and confiscation of tracts, pictures or other material containing expressions of racism and xenophobia intended for public dissemination, where such material is offered to the public in the territory of a Member State;

(b) acknowledgement that the types of behaviour listed in paragraph A should not be regarded as political offences justifying refusal to comply with requests for mutual legal assistance;

(c) providing information to another Member State to enable that Member State to initiate, in accordance with its law, legal proceedings or proceedings for confiscation in cases where it appears that tracts, pictures or other material containing expressions of racism and xenophobia are being stored in a Member State for the purposes of distribution or dissemination in another Member State;

(d) the establishment of contact points in the Member States which would be responsible for collecting and exchanging any information which might be useful for investigations and proceedings against offences based on the types of behaviour listed in paragraph A.

C. Nothing in this Joint Action may be interpreted as affecting any obligations which Member States may have under the international instruments listed below. Member States shall implement this Joint Action consistently with such obligations and will refer to the definitions and principles contained in such instruments when so doing:

- the European Convention for the Protection of Human Rights and

Fundamental Freedoms of 4 November 1950,

- the Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967,

- the United Nations Convention on Genocide of 9 December 1948,

- the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966,

- the Geneva Conventions of 12 August 1949 and Protocols I and II of 12 December 1977 to those Conventions,

- Resolutions 827(93) and 955(94) of the United Nations Security Council,

- Council Resolution of 23 November 1995 on the protection of witnesses in the fight against international organized crime (1), in cases of criminal proceedings for the types of behaviour listed in paragraph A, if witnesses have been summoned in another Member State.

## TITLE II

Each Member State shall bring forward appropriate proposals to implement this Joint Action for consideration by the competent authorities with a view to their adoption. The Council will assess the fulfilment by Member States of their obligations under this Joint Action, taking into account the declarations annexed to it, by the end of June 1998. This Joint Action and the annexed declarations, which are approved by the Council and are without prejudice to the application of this Joint Action by Member States other than those whom these declarations concern, will be published in the Official Journal.

Done at Brussels, 15 July 1996.

For the Council

The President

D. SPRING

(1) OJ No C 327, 7. 12. 1995, p. 5.

## ANNEX

### DECLARATIONS REFERRED TO IN TITLE II

1. Declaration by the Greek delegation re Title I.B (b):

'Greece interprets Title I.B (b) in the light of those provisions of its Constitution which prohibit any action being taken against persons facing prosecution on

political grounds.`

2. Declaration by the French delegation re Title I.C, fifth indent:

'France points out that Additional Protocol I of 8 June 1977 to the Geneva Conventions of 1949 cannot be invoked against it, in that France has neither ratified nor signed that instrument and that it cannot be taken as a translation of international customary law applicable in armed conflicts.`

3. Declaration by the United Kingdom delegation re Title I:

'The United Kingdom delegation declares that for the purposes of the application of the Joint Action by the United Kingdom, and taking into account the provisions and general principles of United Kingdom criminal law, the United Kingdom will apply Title I, paragraph A, points (a) to (e) and references thereto where the relevant behaviour is threatening, abusive or insulting and is carried out with the intention of stirring up racial hatred or is likely to do so.

This would include, in accordance with Title I.B and Title II, enabling the relevant United Kingdom authorities in this context to search for and seize tracts, pictures or other material in the UK which is intended for dissemination in another Member State and which is likely to incite racial hatred there.

If problems arise from the application of this declaration, the UK will consult with the Member State concerned with a view to overcoming the problems raised.`

4. Declaration by the Danish delegation re Title I:

'The Danish delegation declares that for the purposes of the application of the Joint Action by Denmark, and taking into account the provisions and general principles of Danish criminal law, Denmark will apply Title I, paragraph A, points (a) to (e) and references thereto only where the relevant behaviour is threatening, insulting or degrading.`



## **Annex 5**

### **Racism and xenophobia**

**B4-0045/97**

### **Resolution on racism, xenophobia and anti-semitism and the European Year against Racism (1997)**

## The European Parliament,

- having regard to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) which states that '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',
- having regard to Article 19 on the International Covenant on Civil and Political Rights adopted within the framework of the United Nations which states that the exercise of the right of freedom of expression carries with it special duties and responsibilities, including respect for the rights of others,
- having regard to the 1966 International Convention on the Elimination of All Forms of Racial Discrimination,
- having regard to Article F.2. of the Treaty on European Union which states that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms... and as they result from the constitutional traditions common to the Member States, as general principles of Community law',
- having regard to the joint declaration against racism and xenophobia <sup>(14)</sup> of the European Union, the Council, the representatives of the Member States meeting within the Council, and the Commission of 11 June 1986 and all the resolutions adopted on this subject,
- having regard to the conclusions of its Committee of Inquiry into Racism and Xenophobia (A2-160/85 and A3-0195/90) and having regard to its resolutions of 21 April 1993 on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremism <sup>(15)</sup>, of 2 December 1993 on racism and xenophobia <sup>(16)</sup> of 20 April 1994 on ethnic 'cleansing' <sup>(17)</sup>, of 21 April 1994 on the situation of gypsies in the Community <sup>(18)</sup>, of 27 October 1994 <sup>(19)</sup> and of 27 April 1995 <sup>(20)</sup> on racism, xenophobia and anti-semitism, of 15 June 1995 on a day to commemorate the Holocaust <sup>(21)</sup>, of 13 July 1995 on discrimination against the Roma <sup>(22)</sup>, of 26 October 1995 on racism, xenophobia and anti-semitism <sup>(23)</sup> and of 9 May 1996 on the Commission's communication on racism, xenophobia and anti-semitism <sup>(24)</sup> and in particular the recommendations contained therein,
- having regard to the conclusions adopted by the European Council at its meetings in 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) on the subject of racism and xenophobia,
- having regard to the resolutions of the Council and the representatives of the governments of the Member States, meeting within the Council of 5 October 1995 on combating racism and xenophobia in the field of employment and the social field <sup>(25)</sup> and of 23 July 1996 on the European Year against Racism (1997)

<sup>(26)</sup> and the 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 <sup>(27)</sup>,

- having regard to the reports of the Consultative Committee on Racism and Xenophobia (the Kahn Committee) drawn up for the meetings of the European Council in Essen, Cannes, Madrid and Florence, and the feasibility study submitted by the consultative committee with a view to establishing a European observatory for racism and xenophobia (May 1996),

A. whereas one of the main *raison d'être* of the European Union is to prevent racism, xenophobia and anti-semitism,

B. whereas 1997 has been designated European Year Against Racism by the European Union, and the Commission has begun planning activities for this year,

C. whereas the United Nations designated 1995 International Year of Tolerance and the Council of Europe launched a European youth campaign against racism, xenophobia, anti-semitism and intolerance, under the slogan 'All different all equal',

D. whereas despite the efforts taken over the last few years by the European Union, its Member States, the Council of Europe and the United Nations, racist and xenophobic attitudes continue to prevail within the European Union, and many citizens of the Union are still subjected in their daily lives to racist, xenophobic and anti-semitic attacks and insults, many of which result in death or permanent injury,

E. whereas this terrible situation is set to deteriorate further owing to the resurgence of egotistical attitudes and the loss of community values and principles,

F. whereas owing to its role in shaping awareness and in nurturing a sense of social responsibility, education plays an important role in combating racism,

G. whereas the situation is such that individual governments have based their foreign policies quite clearly on ethnic considerations,

H. whereas the European Union should itself set a convincing example in combating racism, by carefully scrutinizing its own policies to see whether they contain racist, xenophobic or ethnic tendencies, but above all by promoting initiatives aimed at mutual knowledge and understanding,

I. whereas the economic problems facing the Member States are being exploited by irresponsible politicians and opinion-shapers to fan racism and xenophobia,

J. whereas in the last few decades integration policy in the Member States has been insufficient and ineffective, to the detriment of tolerance, harmony and

cooperation in society,

K. whereas the institutions of the European Union and the relevant authorities of the Member States should adopt appropriate and effective practical measures, particularly at local, regional and national level, and coordinate them with other institutions and government authorities,

L. whereas organizations which are independent of government control, such as trade unions, employers' associations, the media, schools and churches have played a key role in combating racism,

M. whereas racism cannot be successfully combated by a political debate alone; whereas what is needed is a comprehensive debate encompassing all reaches of society and the active participation of civil society,

N. whereas it is very important in this connection that representatives of institutions and bodies engaged in combating racism and xenophobia should pool their experience regarding the measures already taken to combat intolerance, discrimination and violence, especially if solidarity within the Community is to be further developed and a close union is to be established between the peoples of Europe,

O. whereas the Union should insist that the candidate countries for accession attach the greatest possible importance to protecting minorities on their sovereign territory, bearing in mind that this is a key criterion for accession to the European Union,

P. whereas in its 1997 Budget the European Parliament set aside resources for measures to combat racism, xenophobia and anti-semitism and for the successful organization of a European Year Against Racism (1997),

Q. whereas the purpose of the European Year Against Racism (1997), is to combat racism, xenophobia and anti-semitism in the long term and to promote the European Idea, namely that harmonious societies characterized by ethnic and cultural diversity are an expression of civilization and that the diversity of the various cultures and traditions constitutes a positive and enriching factor,

R. whereas the consultative committee on racism and xenophobia (the Kahn committee) has demanded the immediate establishment of a European observatory for racism and xenophobia,

S. whereas the Intergovernmental Conference is urged to review the Treaties to see if they contain racist, xenophobic or anti-semitic elements,

1. Welcomes the European Union's official designation of 1997 as 'European Year Against Racism' and hopes that this year will provide an opportunity to combat racism and xenophobia more effectively through the establishment of a European action framework;

2. Wishes, nevertheless, that the funding of the European Year Against Racism

should not be carried out at the expense of the initiatives so far supported by the Commission;

3. Condemns in the strongest terms all kinds of racism, xenophobia and anti-semitism as flagrant violations of individual rights and as an expression of intolerance and calls on the governments of the Member States to ensure that foreign communities are protected against racist violence and any form of discrimination;
4. Condemns political leaders who stir up racism and xenophobia for electoral reasons, and expects political parties to remove any kind of racist propaganda from their election programmes;
5. Condemns vehemently any racist statement or publication in the European Parliament;
6. Expresses its profound compassion with the families of those who have died following racist or xenophobic attacks and with persons injured in such attacks;
7. Expresses its regret at racist and xenophobic statements by politicians and parties at national and at European level, and points out that such statements only exacerbate the problem of racism within the Union; distances itself from such politicians and their views and calls on all democratic parties to use all democratic means to ostracize racist movements and groups;
8. Would like to see a further increase in public awareness of the dangers of racism and xenophobia, since these attitudes are diametrically opposed to all the values embodied in Europe, namely the protection of human dignity and the promotion of mutual respect, understanding and solidarity between peoples;
9. Expresses its high regard for the various initiatives launched by the Commission in this sphere, and calls for a reinforcement of the legal instruments, in accordance with its declared desire for measures to combat racism, xenophobia and anti-semitism in all areas;
10. Draws attention to the vital role the media should be playing in denouncing racism and intolerance and promoting tolerance and solidarity, in particular by pointing out the positive contribution which immigrants are making to European society;
11. Considers that the notion of race has no scientific, genetic or anthropological basis, and that this concept can therefore only serve to underpin ethnic, national and cultural discrimination or discrimination linked to colour, since it is based on the erroneous idea that there are separate 'races' which are hierarchically structured;
12. Urges the Council and the Member States to square their immigration and asylum policy with the objectives of European Year Against Racism; takes the view that many of the recent decisions by the Council and the Member States in the field of immigration and asylum policy have contributed towards

exacerbating the climate of suspicion towards nationals of third countries and applicants for asylum;

13. Calls on the Member States and the European Union to develop their asylum and immigration policy in close connection with an adequate integration policy in order to avoid inter-ethnic tensions and to promote mutual acceptance;

14. Notes the intention to incorporate in the Treaty measures to prevent and combat racism and xenophobia as a field of activity of Community significance within the framework of the Intergovernmental Conference; remarks however that, within the framework of the first pillar, the European Union should be given responsibility for the development of measures against racism and xenophobia, so that the Commission is given the right to initiate measures, the Council decides by majority voting and the European Parliament acquires powers of co-decision, in order that, within the framework of the first pillar, an anti-discrimination directive can be drawn up as soon as possible; calls once more for binding legal instruments to combat racism and xenophobia at European level;

15. Looks to the Member States to make intensive efforts to honour their commitments on the basis of the above Joint Action of 15 July 1996 concerning measures to combat racism and xenophobia and to implement the recommendations set out in the various resolutions in question;

16. Calls on the Member States to take initiatives on the basis of Article K.1(7) of the TEU in order effectively to combat racism, xenophobia and anti-Semitism, and the dissemination of negationist theories, by introducing or strengthening penalties and improving the opportunities for prosecution;

17. Calls for non-Community immigrants to enjoy equal treatment with regard to economic and social rights, and the recognition of civic, cultural and political rights, including the right to vote in local elections, for those who have been resident in a Member State for more than five years, in accordance with the Council of Europe convention;

18. Regrets the delays and postponements between the adoption and implementation of legislation, as listed in a comparative study carried out at the behest of the Council of Europe on national legal provisions against racism and xenophobia - in particular in view of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, and reminds the Member States of their obligation to implement the Convention in its entirety in national legal provisions;

19. Expresses its satisfaction at the proposal to include an anti-discrimination article in the Treaty, but is opposed to the unanimity needed to introduce measures at European level; urges that the Commission should receive the right of initiative in this field, that the Council should decide by majority voting and that the European Parliament should acquire co-decision rights;

20. Calls on the Council to submit to the European Parliament a report setting

out which practical measures and strategies it has so far developed with a view to implementing the recommendations contained in the final report of the consultative committee on racism and xenophobia (the Kahn committee), in particular as regards the fields of education, training, the media and information policy,

21. Urges the Council, under the Dutch Presidency, which has adopted a positive attitude towards the conclusions of the report of the consultative committee, to ensure that full use is made of the committee's work;
22. Supports the establishment of a European observatory for racism and xenophobia which will act as the centre of a network of existing organizations and promote the research of these independent organizations, while at the same time ensuring that the duplication of work can be avoided;
23. Welcomes the decision unanimously adopted by the General Affairs Council of 6 December 1996 to set up the observatory for racism and xenophobia (RAXEN) as rapidly as possible; welcomes the fact that the Commission has submitted a proposal in this connection; intends to deliver its opinion on this proposal as soon as possible, and calls on the Council thereafter to make a rapid decision on this matter in accordance with the wishes expressed by Parliament;
24. Expects the observatory to be set up very shortly as a permanent and independent institution of the European Union which will work closely with the Council of Europe, and urges the Council rapidly to reach decisions on budgetary matters and the legal basis for the observatory;
25. Expresses its disappointment at the British Government's objection to a Community basis for the European Union Observatory to monitor racism, xenophobia and anti-semitism; asks it to reconsider its stance;
26. Urges the Council and Commission to consider the possibility of setting aside small sums in the 1997 Budget during the second half of the year, in order to provide for the establishment of the observatory (RAXEN) in 1998 - which depends on Parliament's approval of the Commission proposal;
27. Confirms that the Commission must be accountable to the European Parliament, not least for financial matters, in respect of the observatory and that it must submit a detailed annual report on the activities of the observatory;
28. Takes the view that the observatory, as the centre of a network of existing organizations, should undertake a survey of racist, xenophobic and fascist phenomena and their causes and evaluate existing policies, in order successfully to contribute to an exchange of information and pooling of experience; considers that the observatory should also assume the task of coordination and consultation in respect of appropriate measures and strategies which can be developed and implemented by local authorities, national governments and the European Union;
29. Expresses its satisfaction at the fact that the consultative committee on

racism and xenophobia (the Kahn committee) will continue its work until the establishment of the European Observatory for Racism and Xenophobia (RAXEN) in 1998;

30. Urges all those Member States which have so far failed to do so to follow Denmark's example and increase the national resources set aside for combating racism and xenophobia;

31. Takes the view that the European Year Against Racism will only be taken seriously if the institutions of the European Union are themselves prepared to make available the necessary resources;

32. Hopes that, in order to reach the largest possible number of persons, practical measures are taken at various levels, based on the principle of communication, partnership and cooperation with non-government organizations, the media, trade unions, employers' organizations, local and regional authorities, religious organizations, educational institutions, etc.;

33. Calls on the Commission to carefully scrutinize its policy of project funding - in particular in view of the European Year Against Racism - in order to ensure that priority is given to projects which actually reach citizens where they live and actively involve them in combating racism;

34. Urges the implementation of a broad range of activities to combat racism, xenophobia and anti-semitism in the Member States and at European level, including various events concerned with the topics of the European Year which will attract substantial publicity, for example:

- the preparation of practical projects on a local and regional basis,
- high-profile events involving pop groups, sportsmen and other prominent personalities which could take place at the same time in various places in Europe,
- the public award of special prizes for tolerance and understanding,
- ambitious political and cultural events with a trans-border dimension,
- the preparation of exhibitions,
- the promotion of campaigns in the fields of information and communication, including the use of telematic sites,
- the development of pedagogical material,
- youth exchanges,
- the organization of round-table discussions,
- a hearing in the European Parliament's Committee on Civil Liberties and

Internal Affairs involving non-governmental organizations and persons concerned on the subject of racism and xenophobia within the first four months of 1997 as a contribution towards the Year Against Racism (1997);

35. Instructs its President to forward this resolution to the Council, the Commission, the consultative committee on racism and xenophobia (the Kahn committee), the Council of Europe and the governments and parliaments of the Member States and the countries which have applied to join the Union.

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## **Annex 6**

### **Racism**

#### **B4-0108/98**

#### **Resolution on racism, xenophobia and anti-semitism and the results of the European Year against Racism (1997)**

##### The European Parliament,

- having regard to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,
- having regard to the International Convention on the Elimination of All Forms of Racial Discrimination adopted in 1966,
- having regard to the new Article 29 of the EU Treaty and the new Article 13 of the EC Treaty, as incorporated into those treaties by the Treaty of Amsterdam, which establish the fight against racism and xenophobia and against the many forms of discrimination as a European Union objective,
- having regard to the conclusions of its committees of inquiry on racism and xenophobia (A2-0160/85 and A3-0195/90), and its resolutions of 21 April 1993 on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremist violence <sup>(28)</sup>, 2 December 1993 on racism and xenophobia <sup>(29)</sup>, 20 April 1994 on ethnic cleansing <sup>(30)</sup>, 21 April 1994 on the situation of gypsies in the Community <sup>(31)</sup>, 27 October 1994 <sup>(32)</sup> and 27 April 1995 <sup>(33)</sup> on racism, xenophobia and anti-Semitism, 15 June 1995 on a day to commemorate the Holocaust <sup>(34)</sup>, 13 July 1995 on discrimination against the Roma <sup>(35)</sup>, 26 October 1995 on racism, xenophobia and anti-Semitism <sup>(36)</sup>, 9 May 1996 on the communication from the Commission on racism, xenophobia and anti-Semitism <sup>(37)</sup> and 30 January 1997 on racism, xenophobia and anti-Semitism and the European Year Against Racism (1997) <sup>(38)</sup>,
- having regard to the declaration 'Europe Against Racism', issued on 30 January

1997 in The Hague by the Dutch Prime Minister and then President-in-Office of the Council, the President of the Commission and the President of the European Parliament, on the occasion of the conference inaugurating European Year Against Racism (1997),

- having regard to the public hearing on the topic 'European Year Against Racism 1997: an interim assessment', held by the Committee on Civil Liberties and Internal Affairs on 1 July 1997,

- having regard to the Council Joint Action of 15 July 1996 concerning action to combat racism and xenophobia <sup>(39)</sup>, Council Regulation (EC) No 1035/97 establishing a European Monitoring Centre for Racism and Xenophobia <sup>(40)</sup> and the Council declarations of 24 November 1997 on the fight against racism, xenophobia and anti-Semitism in the youth field <sup>(41)</sup> and of 16 December 1997 on respecting diversity and combating racism and xenophobia <sup>(42)</sup>,

- having regard to the undertaking given by Commissioner Flynn that relevant legal provisions would be introduced by the end of 1998,

A. whereas the European Union specifically undertakes in the Treaty of Amsterdam to respect human rights, fundamental freedoms and fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States (new Article 6 of the EU Treaty),

B. whereas the Treaty of Amsterdam also for the first time expressly lays down as an objective of the European Union the prevention and combating of racism and xenophobia in order to provide citizens with a high level of safety within an area of freedom, security and justice (new Article 29, first paragraph, of the Treaty on European Union),

C. whereas the Treaty of Amsterdam provides for the possibility that '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 ... racial or ethnic origin, religion or belief ...' (new Article 13 of the EC Treaty),

D. warmly welcoming the new Article 13 of the EC Treaty, but calling for the prompt ratification of the Treaty of Amsterdam and urging the Commission and the Council meanwhile to make the appropriate preparations so that the article concerned can enter into force immediately after that ratification,

E. whereas the basic principles of democracy and fundamental freedoms include respect for the cultural diversity of citizens, respect for the dignity of different cultures and the acceptance of cultural diversity as part of the democratic legal order, so that meetings and exchanges between the cultures should be fostered with a view to achieving better mutual understanding,

F. whereas cultural diversity must be seen as a source of social and cultural

enrichment, and not as a danger to security and public order,

G. whereas appropriate forms of education, which foster tolerance, coexistence between cultures and non-discrimination, must form the basis of any policy which seeks to combat racism,

H. whereas the fight against anti-Semitism must be at the forefront of the policy to combat racism and xenophobia,

I. whereas today measures to combat xenophobia must focus in particular on discrimination against immigrants and religious minorities,

J. whereas, despite the many international initiatives against racism and xenophobia launched in recent years (United Nations 'International Year of Tolerance'; 'All different, all equal' - European youth campaign organized by the Council of Europe against racism, xenophobia, anti-Semitism and intolerance; the European Union's 'European Year Against Racism'), some sections of the population continue to hold racist and xenophobic views, views which sometimes even find expression in insults and violent attacks which leave the victims with psychological and physical injuries and permanent disabilities and in some cases even result in their death,

K. applauding the general activities undertaken by the European Commission as part of the European Year Against Racism,

L. having regard to the "Charter on European political parties for a non-racist society" adopted on 5 December 1997 by the EU Advisory Committee on Racism and Xenophobia (Kahn Committee) and the Conference "A code of good practice - political parties and non-discrimination" to be held from 26 to 28 February 1998 in Utrecht,

M. convinced that, if they are to have a sustainable positive impact, the wide range of measures launched to combat racism must be continued and further developed now that the European Year Against Racism has ended, and mindful of the fact that the Year should be seen as a basis for further measures, and not simply as a reminder of a problem,

N. whereas the European Union itself should set a convincing example in the fight against racism and xenophobia by constantly reviewing its own policies to check for possible racist, xenophobic or ethnic tendencies,

O. noting that economic problems in the Member States are being exploited by some politicians and opinion-leaders in order to incite people to racism and xenophobia, and urging all politicians and commentators to refrain from manipulating xenophobic instincts and, in their actions and political activities, to condemn all forms of intolerance and racist remarks,

P. whereas Parliament itself, as the Community institution which has been democratically elected and therefore represents the cultural diversity of Europe,

must commit itself to the fight against racism and xenophobia,

Q. welcoming the formal establishment of the European Monitoring Centre on Racism and Xenophobia in Vienna on 20 January 1998 and hoping that it can embark on the tasks entrusted to it as soon as possible,

R. welcoming the Monitoring Centre, but noting the composition of the Board and concerned that great care be taken to ensure that its staff represent Europe's residents,

S. welcoming the above-mentioned Regulation (EC) No 1035/97; regretting that the Centre's tasks have been confined to specific areas under the first pillar and hoping that these restrictions will be removed when the Centre's tasks are reviewed, as they are due to be three years after its establishment,

T. hoping that the preparations for the work of the European Monitoring Centre on Racism and Xenophobia (recruitment of personnel, fitting-out of premises, provision of the requisite resources) can be quickly completed, so that the Centre can take on the tasks entrusted to it as soon as possible,

U. firmly believing that the European Union should require applicants for membership to guarantee the protection of minorities on their territories prior to accession,

1. Welcomes the fact that the new Article 29 of the EU Treaty expressly states for the first time that the fight against racism and xenophobia makes a vital contribution to creating an area of freedom, security and justice;

2. Calls on the Council and Commission to forward to Parliament, as soon as it has been completed, the assessment of the Member States' efforts to honour their obligations under the above-mentioned Joint Action of 15 July 1996, an assessment which must be carried out before the end of June 1998;

3. Calls on the Commission to propose an action programme under Title VI of the EU Treaty, using the above-mentioned Parliament and Council assessment as a basis, which sets out appropriate measures whereby the following actions can be categorized as criminal offences and punished effectively in all the EU Member States:

- incitement to racism and xenophobia and to commit racist and xenophobic acts,

- denial of the Holocaust and crimes against humanity,

- production, printing and dissemination of racist, xenophobic and revisionist material,

- participation in the activities of groups involved in racist or xenophobic actions or which advocate racist, xenophobic and revisionist doctrines;

4. Regrets that the Treaty of Amsterdam fails to enshrine non-discrimination as a fundamental principle with immediate effect under Community law and that the provisions of the new Article 13 of the EC Treaty first require implementing measures to be taken, which must furthermore be adopted unanimously by the Council;5. Calls on the Commission, immediately after the entry into force of the Treaty of Amsterdam, to propose 'appropriate action' on the basis of the provisions on non-discrimination set out in the new Article 13 of the EC Treaty, in order to prevent and combat discrimination on the grounds of race, ethnic origin or religion;

6. Urges the Member States to treat racist, xenophobic or anti-Semitic motives for offences as aggravating circumstances;

7. Urges the European institutions and the Member States to develop their immigration policies in close coordination with a proper integration policy designed to promote mutual inter-ethnic acceptance and to harmonize the Member States' laws on immigration, coordinating the rights of immigrants in the various Member States; in this connection, consideration should be given to drawing up a European charter of immigrants' rights, so as finally to reach agreement on immigration into the European Union; accordingly, supports and highlights the good results of the work carried out by local NGOs regarding the status of immigrants, who often have no relevant documentation, such as the "sans papiers", as a first step towards their integration;

8. Believes that the directives prohibiting discrimination, in particular in the fields of employment, education, health care, social security, housing and public and private services, could make a major contribution to curbing racism and xenophobia in the European Union; believes that consideration should also be given, in this connection, to whether and how the experience gained with regard to positive discrimination for women could be applied to other groups affected by ingrained discriminatory attitudes;

9. Calls on the Council and the Member States to draw up special programmes for female immigrants and asylum-seekers, since as a rule they find themselves exposed not only to racism, anti-Semitism and xenophobia, but also to discrimination on grounds of sex;

10. Calls on the Member States to structure school curricula appropriately and require exemplary behaviour from teachers, so as to encourage school children to tolerate and accept all their fellow human beings;

11. Welcomes the many measures and projects adopted or launched during the European Year Against Racism, particularly by the Commission, as important contributions to strengthening and consolidating public awareness of the dangers posed by racism and xenophobia;

12. Calls on the Commission to expand and consolidate the networks to combat racism set up during the European Year Against Racism, so as to ensure that the many positive initiatives launched during that year in the Member States have a

long-term future;

13. Calls on the Commission to ensure that the programmes and experience of local and regional authorities and the NGOs are exploited and built on;

14. Distances itself from and unequivocally rejects politicians and parties that make racist and xenophobic statements at either national or European level and calls on all democratic parties to combat racist movements and groups and xenophobic tendencies in their own ranks with all the democratic means at their disposal;

15. Takes note of the Charter on European political parties for a non-racist society, referred to above and now to be submitted to the European political parties; calls on all political parties within the EU, and in particular in the European Parliament, to approve the Charter and use it as the basis for their work;

16. Recommends that, during accession negotiations, the applicant countries should be urged to guarantee the protection of minorities resident on their territories prior to accession and calls on the Commission to pay special attention to this point in its annual reports;

17. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States and of the applicant countries and the Council of Europe.



## **Annex 7**

### **Equality Agencies in the Member States**

One of the main recommendations of this paper is that the Member States consider establishing specialist equality agencies to provide assistance to individual victims of discrimination. In several Member States, there already exist such bodies, and they are listed below. Public bodies, such as the Danish Board for Ethnic Equality, or the Finnish Advisory Board for Refugee and Migration Affairs which combat discrimination in general, but do not deal with individual victims of discrimination, have not been included.

#### **Belgium**

Centre pour l'Egalité des Chances et la Lutte contre le Racisme  
Résidence Palace  
Rue de la Loi, 155 (8ème étage)  
1040 Bruxelles  
Tel. +32 2 2330611

Fax. +32 2 2330704

### **The Netherlands**

Dutch Commission for Equal Treatment  
PO Box 16001  
3500 DA Utrecht  
Tel. +31 30 23 35 111  
Fax. +31 30 23 00 606

### **Sweden**

Ombudsmannen for etnisk diskriminering (DO)  
10333 Stockholm  
Tel. +46 8 23 74 50  
Fax. +46 8 21 74 14

### **United Kingdom**

Commission for Racial Equality (Great Britain)  
10 Allington Street  
London SW1E 5EF  
Tel. +44 171 932 5380  
Fax. +44 171 931 0429

Commission for Racial Equality for Northern Ireland  
Scottish Legal House  
65-67 Chichester Street  
Belfast BT1 4JT  
Tel. +44 1232 315996  
Fax. +44 1232 315993



### **Footnotes**

1. OJ C 158, 25.6.1986, p. 1.
2. A2-0160/85 and A3-0195/90.
3. OJ C 150, 31.5.1993, p. 127.
4. OJ C 342, 20.12.1993, p. 19.
5. OJ C 128, 9.5.1994, p. 221.

6. OJ C 158, 25.6.1986, p. 1.
7. A2-0260/85 and A3-0195/90.
8. OJ C 150, 31.5.1993, p. 127.
9. OJ C 342, 20.12.1993, p. 19.
10. OJ C 128, 9.5.1994, p. 221.
11. OJ C 323, 21.11.1994, p. 154.
12. OJ C 126, 22.5.1995, p. 75.
13. Minutes of 15.6.1995, Part II, Item 17.
14. OJ C 158, 25.6.1986, p. 1.
15. OJ C 150, 31.5.1993, p. 127.
16. OJ C 342, 20.12.1993, p. 19.
17. OJ C 128, 9.5.1994, p. 221.
18. OJ C 128, 9.5.1994, p. 372.
19. OJ C 323, 21.11.1994, p. 154.
20. OJ C 126, 22.5.1995, p. 75.
21. OJ C 166, 3.7.1995, p. 132.
22. OJ C 249, 25.9.1995, p. 156.
23. OJ C 308, 20.11.1995, p. 140.
24. OJ C 152, 27.5.1996, p. 57.
25. OJ C 296, 10.11.1995, p. 13.
26. OJ C 237, 15.8.1996, p. 1.
27. OJ L 185, 24.7.1996, p. 5.
28. OJ C 150, 31.5.1993, p. 127.
29. OJ C 342, 20.12.1993, p. 19.
30. OJ C 128, 9.5.1994, p. 221.

31. OJ C 128, 9.5.1994, p. 372.
32. OJ C 323, 21.11.1994, p. 154.
33. OJ C 126, 22.5.1995, p. 75.
34. OJ C 166, 3.7.1995, p. 132.
35. OJ C 249, 25.9.1995, p. 156.
36. OJ C 308, 20.11.1995, p. 140.
37. OJ C 152, 27.5.1996, p. 57.
38. OJ C 55, 14.2.1997, p. 17.
39. OJ L 185, 24.7.1996, p. 5.
40. OJ L 151, 10.6.1997, p. 1.
41. OJ C 368, 5.12.1997, p. 1.
42. OJ C 1, 3.1.1998, p. 1.

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European Parliament: 12/1997

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