

Strategic litigation of race discrimination in Europe: from principles to practice

A manual on the theory and practice of strategic litigation
with particular reference to the EC Race Directive



INTERRIGHTS



STRATEGIC LITIGATION OF RACE DISCRIMINATION IN EUROPE: FROM PRINCIPLES TO PRACTICE

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of strategic litigation with particular reference
to the EC Race Directive**

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ISBN 2 960000 266 3 3

Printed by: Russell Press Limited, Nottingham, England

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INTRODUCTION

On 29 June 2000, the European Union (EU) adopted the Race Directive (*Council Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial or ethnic origin*), with a transposition date of 19 July 2004. The legal protection of racial minorities required by the Race Directive is groundbreaking. What are arguably the highest legislative standards against race discrimination internationally are now required of all States in the EU and those States that aspire to EU membership. Accordingly, the coming years promise exciting opportunities to advance the rights of racial minorities in Europe and litigation will be an important part of this.

Beyond the fundamental aim of protection and redress for immediate victims, litigating the Race Directive is essential to ensure that its principles are guaranteed in practice in EU Member States. In some states, transposition is and will remain inadequate. In others, the legislation will be adequate, but the laws will not be appropriately implemented or enforced. Essentially, the principles need to be woven into the fabric of domestic legal systems and made meaningful for everyone they affect, from employers and decision makers, to judges and lawyers, to potential victims of violations. Litigation is a vital part of this process.

Beyond their immediate importance in the EU system, the concepts enunciated in the Race Directive should be used to strengthen legal protection in the Council of Europe and beyond. It should be remembered that while the Race Directive was a European creation, the human rights violations that it seeks to address are very international in character. The strong definitions and principles adopted in the Race Directive should be promoted and enforced in other fora. The Race Directive is particularly important in strengthening the largely weak discrimination jurisprudence of the European Court of Human Rights and the decisions of the United Nations treaty bodies.

"Implementing European Anti-Discrimination Law" is a three-year joint project of the European Roma Rights Center, Interights and Migration Policy Group (the Joint Project), which aims to support local and regional groups and individuals in making the most of the historic opportunity for enhanced anti-discrimination efforts created by the EC Race Equality Directive. The Joint Project started in January 2001, and focuses on the 15 EU member states and 11 candidate countries (Turkey and 10 in Central and Eastern Europe). Working in conjunction with local NGOs and individuals, the Joint Project engages in three principal activities: Workshops for judges, lawyers, NGO anti-discrimination advocates, government officials, members of parliament and representatives of specialised bodies to provide key actors throughout Europe information about the legal obligations flowing from the Directive, support for their creative use and application, and the opportunity for individuals from different countries to discuss approaches and methods; Legislative advocacy before individual governments and relevant EU institutions to ensure that the requirements of the Directive are being swiftly and adequately complied with Litigation before selected constitutional and Supreme Courts, the European Court of Human Rights and the European Court of Justice to ensure the adoption in judicial case law of the various elements of the Directive. All three activities are predicated on research of anti-discrimination law and legal developments in the 26 countries: Country Reports on European Anti-Discrimination Law were commissioned by the Joint Project and published in September 2001 and summarised in the report 'Racial, ethnic and religious discrimination: a comparative analysis of national and European law', published by the project in 2002. Changes to the law since then have been monitored by the project partners and have been recorded in the tables included in this volume.

Strategic litigation

The Race Directive expressly allows legal entities, including non-governmental organisations, to engage in proceedings in support of or on behalf of victims (Article 7(2)). In order to maximise the impact of Race Directive litigation, the human rights community needs to litigate carefully and cleverly. Regrettably, there are too many victims of race discrimination in Europe, and access to justice is often so poor that individual litigation will never be a panacea for addressing race discrimination in Europe. It is important therefore for non-governmental organisations (NGOs) and lawyers to strategically select and develop cases that will lead to the greatest progress towards protection for all against discrimination. Indeed, given the very large number of cases that will fall within the purview of the Race Directive, NGOs, lawyers and specialised bodies increasingly will be faced with many cases worthy of intervention. The reality of limited litigation resources means that many advocates will have to be selective about those cases they take forward to regional or international litigation. This Manual aims to assist in making these choices.

How organisations and lawyers choose to litigate depends on a wide range of factors (see Chapter Two). The way in which a senior advocate in a large law firm secures cases varies significantly from the way in which a sole practitioner in a small minority community might come across cases. The two may have different aspirations for cases, working methods, available resources and will operate in very different political and legal contexts. Human rights advocates and NGOs are diverse - what might be an appropriate litigation strategy for a large international NGO partnering with lawyers may be manifestly unsuitable for a small domestic NGO which works with victims on a daily basis. A litigation strategy will often be driven by organisational priorities and structure. Many NGOs are mandated to be purely client-based in their approach to litigation while others will choose one of a few cases selected because of their promise to test or establish a legal issue. For client-based organisations, this Manual might generate ideas about how to litigate towards broader law reform, while also serving the interests of individual clients.

It should be noted that devising and implementing a litigation strategy involves more than those tasks normally performed by lawyers. It involves careful selection of cases to maximise the litigation goals, working with other lawyers and NGOs domestically, and perhaps regionally and internationally, and often the consideration of complex procedural questions. The kinds of cooperation and networking suggested in this Manual can assist in this regard.

The London Workshop

At the October 2003 workshop, discrimination lawyers and NGO representatives from across Europe (the London Workshop), built on advances made at a strategic litigation meeting convened under the Joint Project in Budapest in March 2002. During the October meeting participants discussed the key challenges in litigating the Race Directive in their local contexts and shared their experiences of race discrimination litigation. The group identified key concerns in litigating the Race Directive and considered ways in which these issues could be pushed forward through regional litigation. The deliberations of the London Workshop inform this Manual.

Using this Manual

This is a manual largely about *litigation processes*, rather than the substance of cases. It is aimed at providing lawyers and NGOs with basic information about the Race Directive and about the theory and practice of strategic litigation, with a view to marrying the two. This Manual does not purport to provide comprehensive exposition of the Race Directive or of race discrimination jurisprudence. Rather it is a tool to encourage lawyers and NGOs to think about the way in which they approach cases on race discrimination.

The Manual covers litigation at domestic, regional and international levels, but emphasises the opportunities available in litigation at the regional level. While the focus of this Manual is the Race Directive, much of the information about strategic litigation and international courts and tribunals is equally significant for other grounds of discrimination or human rights litigation more generally.

This is a manual to generate thought about the way in which cases are selected and strategies are adopted. Chapter One provides an overview of the content and significance of the Race Directive, explaining the key principles it establishes and notes its place within the European anti-discrimination legislative framework. The full text of the Race Directive is provided as Annex One to the Manual.

Chapter Two outlines in general terms the concept of and principles relating to 'strategic' litigation. Given the dearth of published information on how litigation strategies are planned and managed, the chapter includes a review of the experience of strategic litigation in other parts of the world and a range of public interest litigation programmes. The chapter challenges the reader to consider how litigation lessons elsewhere and on other legal issues can assist in devising strategies for litigating race discrimination.

Chapter Three outlines some of the concerns and experiences shared at the London Workshop, highlighting ways used by practitioners to tackle litigation challenges.

Chapter Four provides examples of practical applications of strategic litigation. In its first part, the European Roma Rights Center reflects on its experience of race discrimination litigation, distilling lessons learned that might benefit others in bringing cases. In its second part, the chapter provides an outline of possible considerations in devising a litigation strategy on discrimination in education, which emerged from the London Workshop. While by no means a comprehensive review, the outline provides a thumbnail sketch of the types of creative processes lawyers might employ when devising a litigation strategy. Annex Six provides hypothetical cases that readers of the Manual might use in taking themselves through a similar practical exercise.

Finally Chapter Five considers the critical question of the "direct effect" of the Race Directive. That is whether and to what extent, individuals can assert the Race Directive directly before national courts in order to secure their rights.

The Annexes to the Manual provide quick access to key documents, including the Race Directive, a transposition table, a guide to the application procedures for various international bodies and summaries of important cases.

Recognising the importance of accessing and exchanging information and others' experiences, Annex Six is a list containing contact information for a number of international and European inter-governmental bodies, and NGOs. Annex Seven provides information about the three project partners (European Roma Rights Center, INTERIGHTS and Migration Policy Group) who convened the London Workshop under the auspices of the *Implementing European Anti-Discrimination Law* project.

As is made clear in this Manual, litigation is not always the best way of addressing discrimination and violations of human rights. Even where it is, a good litigation strategy would supplement litigation with other advocacy tools such as campaigning, lobbying, human rights education and mobilisation. In the context of race discrimination in Europe, this might mean contributing to the work of bodies such as the European Commission Against Racism and Intolerance (ECRI), the OSCE Office for Democratic Institutions and Human Rights (ODIHR), or the UN Charter-based mechanisms. Such approaches enforce the advances made through litigation and maximise the effect of gains made. The details of such bodies are also included in the Annex Six contact list.

It is hoped that this Manual will go some way to stimulating thought and discussion about the ways in which litigation under the Race Directive and on race discrimination issues more generally is undertaken. The project partners would welcome readers' ideas and the sharing of experiences as race discrimination litigation in Europe moves ahead.

This publication was made possible with the financial support of Open Society Institute and the Sigrid Rausing Trust.

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CHAPTER ONE:

IMPLEMENTING THE PROVISIONS OF THE EC RACE DIRECTIVE

1. Introduction

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment irrespective of racial or ethnic origin (the Race Directive) was the first piece of Community legislation to be adopted on the basis of Article 13 of the EC Treaty, as inserted by the Amsterdam Treaty which entered into force in 1999. Article 13 EC provides a legal basis for the adoption of Community measures to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation,¹ thus extending Community competency in the field of equality beyond the grounds of sex and nationality,² and reflecting the fundamental Community principles of equality and non-discrimination.³

The Race Directive was closely followed by *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* (the Framework Directive), which prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation. In 2002 *Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending council 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* (the amending Sex Equality Directive) was adopted on the basis of Article 141(3) of the EC Treaty, broadly bringing consistency to the provisions against discrimination on the various grounds, though significant differences remain. It should be noted that in order to maximise the impact of the two 2000 anti-discrimination Directives, they were accompanied by the adoption of a Community Action Programme to Combat Discrimination (2001-2006).⁴

The deadlines for transposition of the Race Directive and the Framework Directive⁵ have now passed (19 July 2003 and 2 December 2003 respectively). The amending Sex Equality Directive must be transposed by 5

¹ Article 13 EC reads: (1) *Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

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

² Article 12 EC Treaty prohibits discrimination on the grounds of nationality (Member States only, not third country nationals); Article 141 EC Treaty embodies the principle of equal pay for work of equal value irrespective of sex. Article 21(1) of the Charter of Fundamental Rights of the European Union (OJ 2000 C 264/1) extends the list of grounds yet further, prohibiting any discrimination on the grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Nationality (thus also that of third country nationals) is added in Article 21(2). Currently, the Charter of Fundamental Rights is a political statement rather than binding law, although its provisions have been accorded persuasive value by the European courts. Advocate Generals of the European Court of Justice have referred to the Charter in their Opinions (e.g. the Opinions of Advocate General Tizzano in C-173/99, BECTU and Leger in C-353/99, Hautala). The European Court of Human Rights has also begun to make positive references to the Charter (ECHR Application no. 25680/94, Judgment 11 July 2002).

³ The protection of fundamental rights is one of the general principles of Community law and the ECJ has held that fundamental rights "include the general principle of equality and non-discrimination", cf. *Angel Rodriguez Caballero v Fondo de Garantía Salarial (Fogasa)*, Case C-442/00, ECR 2002, para. 32.

⁴ *Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006)*. Administered by the European Commission, this Programme, which supports activities combating discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, has three objectives: to improve the understanding of issues related to discrimination; to develop the capacity to tackle discrimination effectively; and to promote the values underlying the fight against discrimination. Under the first of these three strands, the Commission is working with groups of independent experts on the respective grounds of discrimination and has conducted a Eurobarometer survey of public opinion on racism (<http://www.stop-discrimination.info/fileadmin/pdfs/Eurobarometer.pdf>), and a series of studies, including a study on anti-discrimination law in the candidate countries (coordinated by MEDE European Consultancy and Migration Policy Group). Capacity building activities include the funding of transnational programmes with the aim of exchanging experience and best practice in fighting discrimination, as well as European non-governmental networks (European Network against Racism (ENAR), European Disability Forum, International Lesbian and Gay Association (ILGA) and AGE, European Older People's Platform). Under the awareness-raising strand a campaign entitled "For diversity, against discrimination" has been launched (www.stop-discrimination.info), and seminars for judges and lawyers are being held.

⁵ A further three years may be granted on request for transposition in relation to the grounds age and disability.

October 2005. Acceding countries must ensure their law adheres to the EC anti-discrimination Directives on the date of their accession to the EU.

EC Directives are binding on the Member States as to the objective to be achieved, but how this objective is incorporated into national law is left to the discretion of the national authorities. The general Community principle is that a legal situation must be created in which the rights and obligations arising from the directive can be recognised with sufficient clarity and certainty to enable the Community citizen to rely on or, where appropriate, challenge them before the national courts. This implies the enactment of mandatory provisions of national law or repealing or amending of existing rules. It is not sufficient to point to a general provision of the Member State's constitution.⁶ Any such provisions must be complemented by detailed legislative provisions which meet the specific requirements of the directive, be they of a criminal, civil or administrative nature. Dissatisfactory transposition of the Race Directive's provisions may lead to infringement proceedings against a Member State: from the date of the deadline for transposition of a directive, proceedings can be initiated by the European Commission (under Article 226 EC) against a Member State for failure to fulfil their obligations under the Treaty. A Member State can also initiate such proceedings against another Member State (Article 227 EC).

The following provides an overview of the provisions laid down by the European Community legislator in the Race Directive. Interpretation of these by national courts and ultimately the European Court of Justice (ECJ) will flesh out these norms. Now that the deadline for transposition has passed, citizens in Member States that have failed to implement certain provisions of the Directive are able to call upon those provisions with direct effect⁷ in legal action against a Member State (including all public bodies). Furthermore, all State bodies, thus also the courts, are obliged to interpret and apply national law in accordance with the Directive (indirect effect). The doctrine of direct effect, indirect effect, and State liability are set out by the European Roma Rights Center in Chapter 5 of this manual.

2. The concept of racial and ethnic discrimination

According to Article 1 of the Race Directive, the purpose of the Directive is to lay down a framework for combating discrimination on the grounds of 'racial or ethnic origin', with a view to putting into effect the principle of equal treatment. No definition of 'racial or ethnic origin' is included in the text of the directive. Recital 6 of the preamble asserts that "the European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories". This reflects the lack of agreement among some of the Member States as to the

⁶ In *Commission v Greece*, the European Court of Justice rejected the argument that a directly applicable constitutional equality clause was sufficient implementation of the right to equal pay for women and men, stating: 'the principles of legal certainty and the protection of individuals require an unequivocal wording which would give the persons concerned a clear and precise understanding of their rights and obligations and would enable the courts to ensure that those rights and obligations are observed'. Case C-187/98 *Commission v Greece* [1999] ECR I-7713, Para. 54.

⁷ According to the European Court of Justice, a provision of a directive has direct effect if it lays down the rights of citizens with sufficient clarity and precision, the alleged rights are not conditional, the national authorities are not given any room for manoeuvre regarding the content of the rules to be enacted, and the time allowed for implementation of the directive has expired.

use of language in relation to racial discrimination. A definitive interpretation of 'racial origin' or 'ethnic origin' is unlikely to be delivered by the European Court of Justice given these sensitivities. However, important questions must be raised as to the reach of the concept 'racial or ethnic origin' and it is hoped that the ECJ will expressly recognise other characteristics as falling under this term, for example 'colour', 'national origins' or 'descent'.

3. The concept of discrimination

The concepts embodied in the Race Directive, as in the Framework Directive, are based to a large extent on the EC legislation relating to sex discrimination and the ECJ's interpretation of these. Under Article 2 of the Directive, the concept of racial and ethnic discrimination is broken down into four key concepts: direct discrimination, indirect discrimination, harassment and instruction to discriminate.

Direct discrimination occurs when:

one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin (Article 2(2)a) Race Directive).

Member States' laws should include a clear definition of direct discrimination.

Direct discrimination may be overt or covert; the frequency of the latter is increasing as awareness of anti-discrimination laws among perpetrators grows. The less favourable treatment may have occurred in the past, may be currently taking place, or it may be purely hypothetical: 'would be' makes clear that it is not necessary that someone is actually treated less favourably than another person, but that a hypothetical comparator can be used. This may be particularly useful in areas or places of work in which the ethnic minority population is relatively small.

The wording 'on grounds of' implies that the prohibition covers situations in which a person is simply perceived to be of a certain racial or ethnic origin, and where a person is discriminated against on the basis of their association with a person who is of a certain racial or ethnic origin.

The very few circumstances in which direct discrimination can be justified are expressly laid down in the Directives, and discussed below under point 5.

Indirect discrimination occurs when:

an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (Article 2(2)b) Race Directive)

The motivation behind either direct or indirect discrimination is irrelevant, indeed the perpetrator may not even realise s/he is acting in a discriminatory way.

'Particular disadvantage compared with other persons' can be established through statistical evidence. The respective preambles of the Race and Framework Directives refer to statistical evidence as a means of establishing a prima facie case of indirect discrimination. However, not all European countries collect data⁸ on the groups at risk of discrimination, racial and ethnic discrimination being particularly controversial in this regard. As a result, the wording of the directive was intended to imply that other ways of proving indirect discrimination can and should be relied upon.⁹ Many States will rely on methods such as situation testing¹⁰ and scientific studies. Again, States must allow hypothetical comparators in demonstrating indirect discrimination.

An example of indirect discrimination is a requirement of fluency in a particular language for a cleaning job. The nature of the work in question will determine whether such a requirement is objectively justified and therefore valid. As the concept 'objectively justified' must be interpreted strictly, taking into account whether the aim is legitimate and proportionate by weighing the discrimination against the needs of the discriminator, it is unlikely that objective justification will be found.

The prohibition of indirect racial or ethnic discrimination may be relied upon to challenge direct discrimination on the grounds of religion or nationality, the EC law guarantees for which are narrower in scope than for racial and ethnic discrimination. For example, direct religious discrimination in schools is not prohibited in EC law (the Framework Directive covers only employment and occupation), but under the Race Directive, which covers education, a charge of indirect discrimination on the grounds of racial or ethnic origin could be levied against schools that prohibit the wearing of the headscarves or other religious symbols by pupils.¹¹

Harassment is unwanted conduct with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment (Article 2(3) Race Directive). This prohibition covers for example offensive remarks, jokes, inappropriate use of email or bullying. It is important that the employer or other person to which the Directive applies is placed under a duty to take steps to prevent harassment.

An **instruction to discriminate** constitutes an act of discrimination (Article 2(4) Race Directive). Thus, an employer cannot instruct a recruitment agency not to send Roma for interview. In such cases both the employer and the recruitment agency can be challenged over their discriminatory treatment.

⁸ The data protection laws in many European countries restrict the collection of such data. Under Article 8 of the *EC Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, processing data revealing racial or ethnic origin is prohibited. However, a series of exceptions to this general prohibition is provided, including where the data subject has given his/her explicit consent to the processing of the data (except where the laws of the Member State does not allow this), and where processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorised by national law providing for adequate safeguards. Cf. also the 1981 Council of Europe *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*.

⁹ Cf. *Proving Discrimination*, the report of the first experts' meeting of the project 'Towards the Uniform and Dynamic Implementation of EU Anti-discrimination Legislation: the Role of Specialised Bodies' hosted by the Belgian Centre for Equal Opportunities and Opposition to Racism on 14-15 January 2003, downloadable from www.migpolgroup.com.

¹⁰ While situation testing is a growing practice in some European countries (in Belgium it is expressly permitted by the new civil non-discrimination law), in others it is viewed as unethical and legally unacceptable (for example in Sweden both the government and the research community consider situation testing unethical and it is not allowed).

¹¹ It is unclear how this particular example would be viewed by the European Court of Justice, given the very different viewpoints of the Member States on this issue.

4. Scope

The Race Directive protects all persons on EU territory, including third-country nationals. Both natural and legal persons are protected, within both the public and the private sectors.

The Race Directive outlaws discrimination in the following employment-related situations:

- conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- employment and working conditions, including dismissals and pay;
- membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

The Framework Directive and the 2002 amending Sex Discrimination Directive mirror this scope. Significantly, however, the Race Directive goes beyond employment relationships, prohibiting discrimination in:

- Social protection, including social security and health
- Social advantages¹²
- Education
- Access to and supply of goods and services which are available to the public, including housing.

Despite this distinction – even hierarchy – of discrimination grounds,¹³ several EU Member States and acceding countries have opted for a comprehensive, horizontal approach to anti-discrimination guarantees. For example, the 2003 Belgian law prohibits discrimination on the grounds of colour, descent, national or ethnic origin, marital status, birth, fortune, current and future state of health, or a physical characteristic, in exactly the same way as it does discrimination on the grounds of sex, so-called race, sexual orientation, age, religion or belief, and a disability.¹⁴

Member States are of course perfectly within their rights to go beyond the minimum requirements of the Directives in this way, as is expressed in Article 6(1) of the Race Directive and Article 8(1) of the Framework Directive, which assert that Member States may introduce or maintain provisions that are more favourable to the protection of the principle of equal treatment than those laid down in the Directives. They must furthermore be cautious not to reduce the level of protection they already afford (non-regression principle in Article 6(2) Race Directive and Article 8(2) Framework Directive).

A key limitation of the material scope of the Directives is that it is confined to 'the limits of the areas of competence conferred on the Community'. This raises questions in particular as to scope of the application of the Directives in the fields of education, healthcare and housing.

¹² For a discussion of the meaning of this term cf. Evelyn Ellis, *Social Advantages: a new lease of life?* *Common Market Law Review* 40:639-659, 2003.

¹³ Mark Bell and Lisa Waddington discuss the possible reasons behind this in *Reflecting on inequalities in European equality law*, (2003) 28 *European Law Review*, June 349-369.

¹⁴ Act of 25 February 2003 pertaining to the combat of discrimination and to the amendment of the Act of 15 February 1993 pertaining to the foundation of a centre for equal opportunities and opposition to racism. Text reproduced at www.antiracisme.be.

5. Exceptions to the prohibition of discrimination

A. Discrimination on the ground of nationality

Article 3(2) of the Race Directive excludes discrimination on the ground of nationality from its scope. Third country nationals are nevertheless protected against discrimination on the grounds of racial or ethnic origin.

B. Genuine and determining occupational requirements

States may provide that 'a difference in treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement provided that the objective is legitimate and the requirement is proportionate' (Article 4 Race Directive). This test is likely to be interpreted very narrowly: recital 18 of the preamble of the Race Directive states that a difference in treatment based on a genuine and determining occupational requirement is justified only in very limited circumstances, and that such circumstances should be included in the information provided by the Member States to the Commission. Examples of jobs that may (or may not) satisfy this strict test are actors or models.

C. Positive action

Because in promoting equality it may be necessary to treat (groups of) individuals differently in order to achieve equality, positive action measures can be taken to overcome disadvantages of a particular group (Article 5 Race Directive). The provision on positive action in the Directive reflects the European Court of Justice's rulings on positive action in relation to sex discrimination, in particular the requirements that measures be limited in time to the period necessary to overcome the disadvantage being targeted, and that they be sufficiently flexible to allow exceptions in particular cases. Measures should be assessed and evaluated on a regular basis and transparency is of fundamental importance. Thus while Member States cannot be forced to provide for positive action, given the optional nature of Article 5, the ECJ is likely to define the parameters of any positive action programmes where they are provided.

6. Remedies and enforcement

Ineffective implementation of non-discrimination law constitutes the most pressing issue in the fight against discrimination across Europe. The low number of complaints (attributable largely to a lack of awareness of rights and available remedies), incomplete follow-up by law enforcement agencies, and the inherent difficulties in proving discrimination are contributing factors which must be tackled. The Directive's chapter on 'Remedies and Enforcement' provides a series of tools to this end.

A. Defence of rights

All persons who consider themselves wronged must have access to judicial or administrative procedures, and conciliation procedures should provide an additional alternative forum to seek justice (Article 7(1)). These

remedies must be available even after the relationship in which the discrimination took place has ended. Innovative instruments include special prosecutors for criminal offences related to discrimination, special tribunals or chambers for discrimination cases (such as the Irish Equality Tribunal), and specialised bodies with quasi-judicial powers (such as the Dutch Equal Treatment Commission).

Under Article 7(2) of the Race Directive, associations, organisations or other legal entities with a legitimate interest in ensuring compliance with the Directive's provisions may engage in proceedings on behalf of or in support of the complainant with his or her approval. The importance of effective implementation here cannot be overstated, as it is well recognised that victims of discrimination (as with other offences) are more inclined and confident to start legal action when they are supported by organisations with an interest in securing justice for them.

The criteria that govern the rights of associations to support a complainant must be quickly defined, in particular what amounts to 'a legitimate interest'. These must not be so narrow as to exclude practically all interested organisations from engaging in proceedings.

Member States can go yet further by guaranteeing organisations the financial means to support victims, and by providing that organizations can act in their own name without necessarily representing an individual named victim and allowing class actions (so-called group justice), which are not precluded by the Directives.

B. Shift of the burden of proof

The difficulties in proving discrimination are to some extent addressed by shifting the burden of proof to the defender of the discrimination claim (Article 8 Race Directive). The provision in the Race Directive reflects that in *Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex* (thus all Member States are already familiar with the concept). Once the complainant has established facts from which discrimination can be presumed, the onus is on the respondent to prove discrimination did not occur. It is for the national authorities to determine the point at which such facts have been established. The rationale behind this departure from traditional legal proceedings lies in the nature of discrimination cases and the lack of transparency that usually surrounds them, rendering the chances of victims obtaining sufficient evidence to prove the offence slim. For example, often only the employer knows the level of salaries comparable employees are paid.

The burden of proof cannot be shifted in criminal cases (Article 8(2) Race Directive), this being contrary to fair trial rules, as anchored in Article 6 of the European Convention on Human Rights. The Directives furthermore exclude proceedings in which it is for the court or competent body to investigate the facts of the case (Article 8(5) Race Directive). The courts or tribunals to which this provision applies must be clarified by the ECJ.

C. Victimisation

Protection against victimisation is part of the section on defence of rights rather than identified as a sub-category of discrimination (which is the case in some Member States). Member States of the EU are under an obligation to introduce measures as are necessary to protect employees against dismissal or other adverse

treatment or consequence as a reaction to a complaint or proceedings aimed at enforcing compliance with the principle of equal treatment (Article 9 Race Directive). Thus an employer may not, for example, give the complainant a bad reference as a reaction to his complaint about discrimination to the authorities. Measures should not only be for the protection of the person submitting the complaint, but also those who are providing evidence in the proceedings following the discrimination complaint, for example a colleague. As victimisation is not classed as a form of discrimination per se in the Directive, it is unlikely that rules on the shift of the burden of proof would apply. By the same token, it is not necessary that a comparator be established to make a finding of victimisation.

D. Dissemination of information

The 2000 anti-discrimination Directives include groundbreaking provisions relating to action that should complement the legislation. The first of these provisions contains a duty on Member States to disseminate information to all persons concerned and by all appropriate means (Article 10 Race Directive). Fulfilling this obligation is of fundamental importance to any attempt to combat discrimination. The contents of anti-discrimination legislation must thus be widely published in official journals, newspapers, radio and television, Internet, professional magazines and information booklets. Information campaigns should target the private and public sectors and be addressed to the public in general and to specific actors, such as victims, public authorities, judges, lawyers, social partners, service providers, personnel managers and NGOs. Adequate training of all professionals dealing with discrimination complaints including the police, public prosecutors, lawyers and judges, is vital.

In transposing the Directive some Member States have dealt with Article 10 by including dissemination of information within the mandate of the equality body required under Article 13 of the Race Directive.

E. Dialogue among stakeholders

Implementing non-discrimination guarantees requires active involvement of all stakeholders. Adequate measures must be taken to promote social dialogue between the two sides of industry in order to foster equal treatment (Article 11 Race Directive). Measures suggested by the Directive include monitoring workplace practices, collective agreements, codes of conduct, research and exchange of experience and good practice. Where it is consistent with national traditions and practice, Member States must also encourage the two sides of industry to conclude agreements laying down anti-discrimination rules in the fields referred to in Article 3 of the Directive that fall within the scope of collective bargaining.

States must encourage dialogue with appropriate non-governmental organisations which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on the grounds of racial or ethnic origin with a view to promoting equal treatment (Article 12 Race Directive). This is a unique opportunity for non-governmental organisations to call upon a legal obligation of governments to interact with them with a view to achieving their equality goals. The provision appears to be inviting Member States to define in national law which NGOs this applies to, and these are not necessarily the same as the legal entities referred to in Article 7(2). The nature of States' obligations should be elaborated upon. Active implementation of these provisions seems certainly to be required.

7. Bodies for the promotion of Equal Treatment

The Race Directive (Article 13) places a duty upon Member States to designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. The competences of these bodies should include providing independent assistance to victims of discrimination in pursuing their complaints, conducting independent surveys on discrimination, and publishing independent reports and making recommendations on any issue relating to such discrimination. The independence of the work of specialised bodies is critical, but may in some instances prove delicate where they are a quasi-public body or located within a ministry. Ideally the mandate and budget of such bodies should be set by parliament for a certain period. The board of the specialised bodies should be composed of independent persons, and the director should be free in terms of the appointment of the staff of the specialised bodies.

There is a parallel provision in the 2002 amending Sex Discrimination Directive, but no such requirement was included in the Framework Directive. Several Member States are however choosing to establish horizontal specialised bodies (e.g. the Equality Authority in Ireland deals with 9 grounds; the mandate of the Belgian Centre for Equal Opportunities and Opposition to Racism was recently widened to cover all prohibited grounds of discrimination), or several bodies that each deal with one ground (e.g. in Sweden the Ombudsman against Ethnic Discrimination, the Ombudsman against discrimination on the ground of sexual orientation, the Disability Ombudsman and the Equal Opportunities Ombudsman; in the UK, the Commission for Racial Equality, Disability Rights Commission and Equal Opportunities Commission). The work of existing specialised bodies in Member States¹⁵ has been instrumental in the fight against discrimination and this is one area where States would be well advised to go beyond the requirements of the Directives.

8. Additional provisions: screening, sanctions & reporting

A. Screening for compliance with the Race Directive

Measures must be taken to ensure that any laws, regulations and administrative provisions that are contrary to the principle of equal treatment are abolished, and that any provisions in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations that are contrary to the principle of equal treatment are or may be declared null and void or are amended (Article 14 Race Directive).

The wording of this article implies that active screening of existing laws must take place. There is little evidence, however, of Member States undertaking such action in transposing the Directives into national law. Constitutional non-discrimination guarantees will ultimately force discriminatory legal provisions to be repealed, but in practice this is a lengthy and cumbersome process that cannot be considered satisfactory.

¹⁵ For an overview see European Commission, Specialised bodies to promote equality and/or combat discrimination. Final Report, May 2002, http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/equalitybodies_final_en.pdf

Under the second clause Member States are bound to at least ensure a framework is in place for rendering discriminatory clauses in the listed provisions null and void, or subject to amendment. In practice it would of course be near impossible to undertake a finite screening process to root out all such clauses breaching the principle of equal treatment.

B. Sanctions

Under Article 15 of the Race Directive sanctions applicable to breaches of non-discrimination laws must be 'effective, proportionate and dissuasive'.¹⁶ EC law does not prescribe specific sanctions, but instead leaves the choice of sanctions to the Member State. Both criminal and civil law sanctions are acceptable under the Directive, indeed it is likely that a combination of measures will be necessary to give full implementation to the principles in the Directive.

Sanctions may include ordering the perpetrator to reinstate the complainant in his or her rights, imprisonment of the perpetrator, fines, compensation¹⁷, community service, a ban on activities, the dissolution of an organisation, the confiscation of property, withdrawal of subsidies, or exclusion from public contracts. Certainly it is practice in many European States to apply more stringent sanctions for crimes found to be racially aggravated.

Member States were under an obligation to notify the European Commission of their provisions on sanctions by 19 July 2003, and to notify it without delay of any subsequent amendment affecting them.

C. Reporting

Under the Directives Member States are required to communicate information to the European Commission on the application of the Directives every five years (Article 17 Race Directive). On the basis of this information, the Commission will report to the European Parliament and the Council, taking into account the views of the European Monitoring Centre on Racism and Xenophobia, the social partners and relevant non-governmental organisations.

It is hoped that national authorities draw up their reports in consultation with national civil society organisations, as the knowledge and experience of other stakeholders will be essential in providing an accurate account of the application of the Directive's principles in their country.

Obtaining such information from the Member States will assist the Commission in their assessment of Member States' compliance with the Directives and hence their evaluation of whether enforcement proceedings should be instigated.

¹⁶ Based on the formula developed by the ECJ in relation to sex discrimination. Cf. Case C-271/92 *Marshall v. Southampton AHA* [1993] ECR I-4367 the ECJ set the standard for enforcement of individual rights: Member States are required to "...Guarantee real and effective judicial protection..." and provide remedies that "...have a real deterrent effect on the employer..."

¹⁷ The European Court of Justice has held that there may be no upper limit of compensation that can be awarded; cf. *Marshall II* [1993] ECR I-4367

9. Relevant developments in the European anti-discrimination framework

A number of developments at European level should be monitored:

A. Proposal for a Framework Decision on Racism and Xenophobia

The Commission proposed a Framework Decision on combating racism and xenophobia on 29 November 2001 with the aim of harmonising national criminal law against racism and xenophobia. The proposal is based on Articles 29, 31 and 34(2) of the EU Treaty. Article 29 EU sets out the Union's goal *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*. The proposal for a Framework Decision is currently under discussion at the Council of the European Union where there is considerable disagreement on the proposed provisions.¹⁸

B. EU draft constitution¹⁹

The draft of the future constitution of Europe includes several references to non-discrimination. Under Part I 'Definition and objectives of the Union', Article 2 cites equality and non-discrimination among the Union's values, and Article 3 includes among the Union's objectives combating social exclusion and discrimination. Part II incorporates - and thus if adopted would make legally binding - the Charter of Fundamental Rights of the Union, which under Title III 'Equality' includes the non-discrimination clause in Article 21.

In Part III 'The policies and functioning of the Union', Title I 'Clauses of general application', Article III-3 states that *in defining and implementing the policies and activities referred to in this part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*. This suggests mainstreaming non-discrimination into European Union policies, which until now in the area of equality has been an instrument restricted to gender equality.²⁰ In Title II of the same part, Article III-8 reproduces Article 13 of the current EC Treaty.

If the draft Constitution is adopted in its current form, the competency of the EU to act in the field of equality and non-discrimination would thus be considerably extended.

C. Parallel efforts at the Council of Europe

Reference must also be made here to the work to combat discrimination which continues in the Council of Europe and its European Commission against Racism and Intolerance (ECRI). Protocol 12 was adopted in 2000 to complement the non-discrimination provision in Article 14 of the European Convention on Human Rights (ECHR), which is only applicable in the enjoyment of other rights guaranteed by the Convention.

¹⁸ The proposal was last discussed by the Justice and Home Affairs Council on 27/28 February 2003. To view the conclusions of this Council go to <http://ue.eu.int/pressData/en/jha/74719.pdf>. Framework Decisions are binding upon the Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. They do not entail direct effect (Article 34(b) EU Treaty).

¹⁹ http://europa.eu.int/futurum/documents/offtext/doc180703_en.pdf

²⁰ Under Article 3(2) EC Treaty which reads 'In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.'

Protocol 12 contains a freestanding prohibition of discrimination on the grounds '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. The grounds expressly included are those referred to in Article 14 ECHR. According to the Council of Europe Commentary on the provisions of the Protocol²¹ this solution was considered preferable over expressly including additional grounds such as physical or mental disability, sexual orientation or age, not because of a lack of awareness of the importance of such grounds in today's society, but because such an inclusion was considered unnecessary from a legal point of view since the list of grounds is non-exhaustive, and because inclusion of any particular additional ground might give rise to interpretations as regards grounds not included. The European Court of Human Rights has applied Article 14 to grounds of discrimination not expressly included in the text of that article.

Protocol 12 has been signed by 33 countries. Only 6, however, have ratified this Protocol: Bosnia and Herzegovina, Croatia, Cyprus, Georgia, San Marino and Serbia and Montenegro (10 ratifications are required for the Protocol to enter into force). Reasons put forward by EU Member States for their reluctance in ratifying this instrument focus on the open nature of the Protocol's wording and the far-reaching implications it could have.

ECRI recently adopted its seventh General Policy Recommendation, which sets out an extensive suggested framework for national legislation to combat racism and racial discrimination.²² The adoption of this recommendation was timely, in that ECRI provided a model for States already bound under the EC Directives to amend and expand their anti-discrimination law.

10. Conclusion

The context of the Race Directive should be kept in mind when litigating on its contents, as indeed it will be by the ECJ. The preamble refers to Article 6 of the Treaty on European Union, which lays down that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law...(recital 2). It also points to the international treaties of which the Member States are signatories, including the UN Convention on the Elimination of all forms of Racial Discrimination (recital 3). Furthermore, recital 9 recalls that discrimination may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice. The court will certainly recall that the freedom of movement of all citizens is compromised when a person is discouraged from moving to a Member State because the level of protection against discrimination is markedly lower than that s/he is leaving.

²¹ <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>, paragraph 20.

²² http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/1-Policy_Recommendations/Recommendation_N%B07/ecri03-8%20recommendation%20nr%207.pdf

These principles, coupled with the strong provisions of the Race Directive, lay the groundwork for a positive step forward in the development of case law that is favourable to combating discrimination on the grounds of racial and ethnic origin.

Migration Policy Group

CHAPTER TWO:

'STRATEGIC' LITIGATION AND CASE SELECTION²³

²³ This chapter is based on a research paper by Kevin Kitching. The full paper is available from INTERIGHTS. Thanks to Paul Green for his editorial assistance with this chapter.

1. Introduction

'Strategic' litigation is a method used by non-governmental organisations ("NGOs") and law firms to further the protection of human rights.²⁴ The objectives of this chapter are threefold:

- a. To identify the place of 'strategic litigation' among other methods and techniques used by legal services NGOs to achieve their aims.
- b. Examine the practices of legal service organisations in selecting cases for strategic litigation and describe how organisational objectives facilitate case selection.
- c. Identify the issues and factors that influence legal services NGOs in their selection of cases and litigation strategy, with a view to formulating a set of detailed case selection criteria.

2. Strategic litigation

A. What is strategic litigation?

'Strategic' or impact litigation uses the court system to attempt to create broad social change. Impact lawsuits aim to use the law to create lasting effects beyond the individual case. The chief focus is law or public policy reform, rather than the individual client's interests (as is the case in ordinary litigation), although they may both be an objective.

Strategic litigation is a method or technique that falls within the field of 'public interest' litigation. Broadly speaking, all public interest law organisations share the common objective of using law as an instrument to promote the rights and advancement of disadvantaged populations and to further social justice. In addition to strategic litigation, public interest litigation embraces activities such as the provision of legal aid to indigent individuals, the purpose of which is to facilitate access to justice or to remedy specific breaches of rights (usually egregious breaches of rights). Cases often arise in the course of legal aid provision that result in law or public policy reform. Indeed, across the field of public interest law, most 'impact' cases probably arise in an *ad hoc* manner. Because of certain fortuitous characteristics, these cases develop into public policy vehicles and are managed by the lawyers involved to achieve strategic effects. This chapter examines the idea of 'strategic' litigation both in the selection of cases and in their subsequent planning and management to identify some of the circumstances that make such cases successful.

²⁴ See, for example, the comment of the authors on page 42 of *Promoting Justice: A Practical Guide to Strategic Human Rights Lawyering* (2001): "The use of impact and test litigation was so common among the participating organisations that little recognition was given to the difficulty of finding the right client in the right legal situation to be presented to the right judge."

Litigants in person

In order to have significant public policy impact, it is not necessary that cases are strategically selected, as such, or have involvement by lawyers or activists at all. One of the most significant ever rulings of the U.S. Supreme Court, the 1963 decision in *Gideon vs. Wainwright*, made its way to the Supreme Court solely on the initiative of the appellant. Clarence Gideon was a drifter arrested in 1961, charged with breaking into and entering a Florida poolroom. When his case was called before a court, Gideon told the judge he wasn't ready because he didn't have an attorney to represent him. He asked for a lawyer to be appointed but the judge refused. Forced to serve as his own attorney, Gideon was found guilty and sentenced to five years in prison. While behind bars, he filed a handwritten petition to the Supreme Court. The Supreme Court accepted the case and on March 19, 1963, it unanimously ruled that all accused persons have the right to counsel. The ruling led to the establishment of the public defender system in the U.S.

Similarly, in India, some of the most important public interest cases have been filed using informal pleadings put together by the applicant or a non-lawyer representative.

B. How does strategic litigation achieve policy objectives?

The most predictable method of achieving the objectives of strategic litigation is through the establishment of effective and enforceable law (i.e. usable precedent in common law jurisdictions) in the courts. In successful litigation, this may arise through:

- i The interpretation of existing laws, constitutions and treaties to (i) substantiate or redefine rights (i.e. to clarify or change the law), or (ii) enforce or apply favourable rules that are underused or ignored.
- ii Challenges to existing laws detrimental to social justice or individual rights (e.g. based on a conflict with international law or constitutional law).

Legal precedent as a goal of strategic litigation

- a. Interpretation of existing laws to substantiate or redefine rights or enforce favourable rules underused or ignored.
- b. Challenges to existing laws. The majority of cases are probably of this type. This is because of the use of civil and political rights to challenge the State's restriction of personal rights or freedoms. In the case of *Norris v Ireland*, Senator David Norris, a prominent gay activist in Ireland, successfully challenged Ireland's criminal prohibition of homosexual conduct in the European Court of Human Rights. The result of the case led to new legislation changing Irish law.
- c. It could be argued that there is a third type of situation where existing law prohibits the human rights violations complained of but the local judicial and executive systems fail to provide a remedy for the wrong. An example is the official toleration of political violence against minorities by certain regimes. Impunity or amnesty laws are the embodiment in law of this kind of situation. Where this is just condoned by practice or there is a weak judicial system, litigation in international tribunals might help to highlight and document the human rights situation domestically.

Even where litigation is unlikely to succeed, organisations sometimes proceed with strategic litigation anyway. Why do they choose to do so?

a. Supporting the rule of law

Strategic litigation may contribute to the stabilisation and clarification of the legal system or its laws. This provides the foundation for further litigation in the future or, as is often the case, provides the basis for government reform and the legal parameters within which this must occur. In the post-totalitarian countries of Central and Eastern Europe, strategic litigation has proved to be a useful tool in developing protection of human rights.

b. Legal education

Because of its cutting-edge nature, strategic litigation raises the level of legal and human rights literacy by educating the judiciary and legal profession in the language and philosophy of individual rights and social justice. This benefits future claimants. NGOs often conduct human rights training programmes for judges and lawyers in addition to strategic litigation.

c. Documenting injustices

In many jurisdictions, the aim of strategic litigation is to document or expose institutionalised injustice even when the lawsuit is unlikely to succeed. By creating a record of official practices, strategic litigation documents official abuse, damages the perception of the legality of government action and lays the foundation for future efforts. There have been an enormous number of cases brought to the European Court of Human Rights by Kurdish victims of human rights by Turkey. The Turkish government have complied with few of these judgments and currently there are few indications that international human rights standards will be implemented in Turkey, yet these cases have importance in documenting the abuses of the government.

d. Government accountability

Strategic litigation, even if unsuccessful, promotes government accountability. In recent years, judgments of the European Court of Human Rights have triggered domestic law reform in many Council of Europe member states. The mere fact of referral to Strasbourg often initiates positive change.

e. Changing public attitudes and empowering vulnerable groups

Finally, by raising an issue publicly that affects a vulnerable social group, strategic litigation may contribute both to (i) a public understanding of the issues and to (ii) the empowerment of that group. It increases the capacity for people to help themselves in the future. The various successful campaigns by Lambda Legal in the US against criminal prohibitions of homosexuality contributed to an upsurge of confidence in the gay community.

Strategic litigation is used in many traditional public interest law fields including civil rights, access to justice, environmental law, personal injury law, labour rights, equality and freedom of expression. However, strategic litigation is also used by organisations that do not share a liberal human rights view of the world. This

highlights the fact that successful strategic litigation may not always reflect the views of the electorate or even a significant minority thereof, but rather the views of its sponsors. Legal service organisations should always bear this in mind when considering strategic litigation.

3. Organisational objectives and priorities

A. NGO constitutions and mission statements

The objectives of an NGO, as set forth in its constitutional documents and mission statement, are (or should be) the primary factors in (i) its organisational structure and policy and model of service delivery, (ii) the method it uses to achieve its objectives (e.g. strategic litigation or a publicity campaign), and (iii) its choice of cases for strategic litigation. The International Human Rights Law Group study, *Promoting Justice*, emphasised the importance of well-defined objectives in ensuring efficient and effective service delivery. Organisations do not therefore generally undertake cases outside of their stated objectives.

Given the constraints imposed by law (e.g. restricted funds rules, etc. in the case of charitable organisations) and governance rules, an organisation may not be permitted to become involved in a case the objective of which is beyond its stated powers. This is stating the obvious in the case of organisations with clear and narrow objectives, such as organisations specialising in a single issue or minority group. However, other organisations have a very broad mandate that is very difficult to exceed. The setting of priorities and the careful selection of cases are therefore important factors to ensure efficient and effective use of resources. Moreover, organisations with well-defined objectives may lack the expertise to deal at an equivalent level with issues outside of those objectives.

In the competitive field of *policy-oriented* organisations where resources are often scarce, efficient internal allocation of resources is vital. An organisation may have a number of objectives that may be furthered by strategic litigation or other strategies. Dedication to more than one case at any particular time may prejudice success due to resource constraints. It might be necessary to choose between objectives or prioritise. Many NGOs try to assist everyone, which constrains their effectiveness in the face of limited resources. An organisation must consider whether a case being considered for litigation would expend too many resources with insufficient impact.

B. How organisations set objectives and priorities

Legal NGOs generally establish or change their objectives, general mission, or prioritise between objectives based on the factors that affect the work that they do, the funding they can raise or their values. Many factors are important to the future success of the organisation and should be considered. It is always advisable to be aware of the 'market' need for the services provided and to regularly reassess particular programmes.

i. The 'client' market

Perceived need on the part of potential clients (the 'client' market) is a key consideration. NGOs must look at what options are available to an individual whose rights have been violated or whether there are genuine human rights abuses for which this kind of specialist assistance is necessary. Some international NGOs do not deal directly with the ultimate clients for their human rights services but rather provide services to local NGOs or lawyers who are representing those clients. For example, INTERIGHTS is a specialist in international and comparative legal analysis and provides services to local partners in a number of regions. In this situation, for the purpose of establishing objectives it is important also to consider the needs of those 'proximate' legal clients as well as the ultimate human right victims.

ii. The funding market

Perceived opportunities for funding in a particular field (the 'funding' market) may also influence objectives and priorities. Funders often request proposals for projects in specific fields (e.g. the EU or the Ford Foundation). This removes the level of analysis of 'need' up one level to the funders. If the constitution and ethics of the organisation permit, this may be a factor in favour of taking a particular case or litigating a particular issue. Public interest law groups' main goal is to protect individual rights against the state, which would create a major potential conflict of interest if public funding were accepted. Generally, does sufficient funding exist to support work on a particular case?

iii. Competition

The level of competition for funding and/or clients²⁵ (the 'product' and 'geographic' markets) must also be considered, particularly as the field of human rights becomes more specialised and the number of human rights NGOs increases. When using methods such as networking, participation in coalitions and partnerships, NGOs must always be aware of the risk of cannibalisation or competition for resources. What is the more important: the objectives of the organisations or the organisation's survival?

iv. Philosophy and values

The philosophy and values of the organisation, the founders of the organisation or its controlling authority²⁶ (even if funding or an obvious market is lacking) are vital to its framing of objectives.

v. Human resources

The key competitive advantages of the organisation and the skills of its personnel²⁷ may provide it with new outlets for growth and new objectives and priorities based on those unique skills. The objectives of an organisation generally determine its internal organisational structure and policies, such as for recruitment.

²⁵ The fact that an adequate number of other organisations are working in the same field may be a reason not to become involved. Too many NGOs may cause confusion of the issues and too much competition for scarce resources. Also, if other organisations are working in the field, claimants may have adequate representation of their issues and rights.

²⁶ A group of individuals with a particular agenda may seek to pursue it even if there is no obvious 'need' as such. There may be an internal conflict of interest between cases, personnel and the differing philosophies or objectives furthered thereby. Will the objective achieved by one project or case prejudice the objective or philosophy furthered by another? The area of human rights is a philosophical minefield where rights often must be balanced against competing rights. Again, this is obviously not the case where serious violations such as torture are at issue.

²⁷ An organisation may suffer from constraints that prevent it becoming involved in certain impact litigation. It may be unable to operate in a particular jurisdiction for legal or practical reasons. There may not be suitably qualified personnel available to carry out the work. It may be too expensive or time-consuming to develop expertise in a particular subject or region. On the other hand, organisations can sometimes harness the experience and expertise of their personnel to move into new areas.

It is obvious that an organisation should structure and operate itself in a way that maximises its chances of achieving its objectives (without breaching any laws or ignoring organisational values). NGOs with specialist values generally recruit individuals who share those values – only then can you be sure of their commitment to the cause. With broader objectives, the recruitment of individuals based on the agreement of their personal values with those of the organisation may be of lesser importance.

The client community is the primary determinant of the objectives of a *client-oriented* organisation. The needs and demands of that community and the limitations in resources of the organisation dictate the services provided by the organisation. Such organisations are, in this sense, more transparent than *policy-oriented* organisations that are free to set and pursue their own agenda. Case selection criteria (see section 5 below) are, thus, more important for policy-oriented organisations to reinforce the transparency of their activities. Policy-oriented organisations must engage in constant redefinition and re-evaluation of objectives and priorities in light of the current social and political context and, more often than not, available funding. The presence of a large number of competing NGOs in a particular field both addresses the needs (at least, theoretically) of the client community and soaks up available funds. Without developing a niche practice with strong competitive advantages, long-term survival is difficult.

Organisations must prioritise between objectives or within a field of operation to maximise both its positive effects on the needs of the client community and its funding opportunities. Ideally priorities would reflect both the central values of the organisation and its competitive advantages such as specialised knowledge or experience in a particular field or synergies with other programmes and projects (i.e. choose cases that are related to other programmes). In other words, choose cases that are best suited to the specific characteristics of the NGO and its clients.

4. Methods and models of legal human rights organisations

Legal service organisations, including human rights NGOs, use a variety of methods, practices and models of service delivery to achieve their objectives of supporting and promoting human rights and access to justice. Strategic litigation is used by organisations such as private law firms engaged in public interest practice, single issue NGOs and broad-based human rights organisations.

A. Models of service delivery

i. Client-orientated

The objectives, values and models of service delivery adopted by an organisation determine whether it will use strategic litigation as a method. An organisation must ask itself what kind of service will most effectively push forward its goals – impact litigation or volume service. Client-oriented organisations (such as Law Centres in the UK) focus on helping individuals without regard to the impact of a case on national policy. They concentrate mostly on representing clients in the office's area of specialisation. This may be a single issue,

such as housing or immigration, a single minority group, such as indigenous groups, or an underrepresented locality. The majority of such organisations are community based and close to the populations they represent. This model results from the needs of a group or locality, available resources, or the objectives and philosophy of the organisation. Where such an organisation decides to undertake litigation with 'strategic' effects, its choices of cases are more determined by constituency needs than potential impact. Although it may not choose the case with a view to strategic impact, organisations when confronted with a good set of facts often approach the case in a strategic way. Because of strong community ties, such organisations often have better community support, input, and understanding than policy-oriented organisations. Client-oriented organisations also often benefit from a greater flow of information from problem centres. This makes framing of goals much easier and also makes it easier to prepare cases.

ii. Policy-orientated

By contrast, policy-oriented organisations have more scope to be strategic both in conducting litigation and choosing goals and means for litigation. Organisations such as the American Civil Liberties Union, the Sierra Legal Defense Fund and the NAACP Legal Defense and Educational Fund have been instrumental in developing strategic litigation as a potent weapon of social justice in the United States. Other policy-oriented organisations such as Amnesty International use means other than litigation to bring about social change. There may be greater distance between such organisations and the constituency they represent than in the case of client-oriented organisations. Often, such organisations must locate and 'recruit' clients (if this is permissible under local laws or practices) to advance a particular programmatic objective or issue. As the objective of the case is not determined solely by the client's needs, this kind of approach necessarily involves a much greater degree of debate about values and priorities (often involving consultations with the constituent community) and strategic planning.

B. How do strategic litigation cases arise?

Related to both the organisation structure and the model of service delivery (volume work or impact work) is the issue of how legal services NGOs become involved in cases. Those organisations that have their own fully staffed branch offices on location are capable of generating cases internally (e.g. through open office or helplines, etc.). Other organisations must rely largely on referrals from community groups, NGOs or other local partners. How an NGO gets cases is important because it usually dictates to what extent the organisation becomes involved in the case. A local lawyer may only want specific advice regarding one of his or her cases rather than to transfer the case wholesale to the NGO. At any rate, many NGOs are ill-equipped to run a local case without local representation.

C. Methods and practices

Legal methods and practices of public interest law organisations include strategic litigation, advice, counselling, case referral and legislative advocacy. Non-legal strategies are often used in conjunction with, or instead of, legal methods. These include community service referrals, education and training programmes, use of publicity or the media, monitoring government action, networking and capacity building and collecting and disseminating data. Section 7 of this chapter looks at the various 'litigation support' strategies that can be

used to assist litigation efforts, including publicity. Alternative methods are particularly useful in following up on the litigation effort to ensure proper implementation of a victory in court. One of the greatest historical failings of strategic litigation has been the failure to ensure proper implementation of favourable decisions.

The methods used by an organisation again depend on the objectives, values and model of service delivery of the organisation. Traditional legal aid organisations generally provide direct legal assistance to those who cannot afford private lawyers. More policy-oriented organisations aim at affecting broad social change that will eliminate the particular human rights problem. In the United States, two models of public interest law organisation have emerged: the high-volume or 'routine' legal service provider, which provides assistance in a large number of cases within a given area of the law, and the law reform or 'impact' organisation, which takes a relatively small number of cases affecting large numbers of people and/or with precedential significance for the law. Case selection by 'routine organisations' is aimed at reducing caseload to a reasonable number. There is always a tension between quality and quantity of representation.

Many NGOs realise that they cannot secure rights for people on their own. Most NGOs are quite specialised and do not have expertise in all the necessary strategies and methods that can be used in a particular case. Partnerships and collaboration with other NGOs are vital to ensure that issues are presented properly in court and implemented thereafter. Amnesty International is highly skilled in campaigning work but does not have a similar level of experience in strategic litigation. Its experience of campaigning, however, may be extremely useful in supporting any strategic litigation effort. Resources outside of the organisation can help leverage the organisation's resources to maximum effect.

D. Assessment and relevance of impact

There remains a dearth of research on what difference NGOs actually make and how. NGOs themselves do not seem to measure impact in any kind of scientific way. Key indicators may include anecdotal evidence from the country in question that the pressure or litigation has had effect, resulting law reform or policy reform of key state institutions (although without implementation, this may have little effect in practice), or the level of community reaction (positive or negative).

In the case of *client-oriented* litigation, success can be measured in terms of the number of victories or the level of compensation or damages. Strategic litigation poses greater difficulties. Strategic litigation is one of various methods to achieve social change. As the primary aim is social change and not success in litigation, when an organisation decides to pursue strategic litigation it is important to make some attempt to assess its impact compared to any of the other available strategic methods. Many organisations use a combination of approaches to achieve their objectives, the choice of which depends on the nature of the problem. Impact is often assessed by continued ability to attract funding, or success in establishing standards in another state or region, or reputation, even if actual implementation is not examined at all. In the case of strategic litigation, we know, based on experience, some of its drawbacks and advantages.

E. Advantages and disadvantages of strategic litigation.

As a method of achieving organisational objectives, strategic litigation has several advantages over other strategies:

- i. A single case can have extensive legal and social effects.
- ii. It uses judicial power to defend and promote the rights of minority, deprived or marginalized groups. In a system where there is an independent judiciary and credible legal system, but where the executive and legislature reflect only the views of the majority or the political and economic elite (e.g. South Africa under Apartheid), this may be the only way to get redress for wrongs suffered.
- iii. It establishes precedent that benefits future claimants. This is particularly relevant in common law jurisdictions where *stare decisis* (i.e. legal precedent) is the rule.
- iv. It raises issues publicly (often in a less expensive way than publicity campaigns).
- v. In the case of international tribunals or courts, it may create political pressure from abroad.
- vi. In many cases (particularly for group claims through class action or similar procedures) it can be a cost-effective means of raising an issue or having genuine political effect.
- vii. It broadens access to justice.
- viii. It 'tests' and clarifies the content of existing laws, thus furthering government accountability by establishing the parameters within which government must operate.

Impact litigation may not always be an appropriate means of furthering policy objectives. Some of the relevant considerations are:

- i. By its very nature, the outcome of any litigation can rarely be assured. Hence, a 'trial and error' approach has been used in public interest law campaigns involving the use of multiple applicants and *fora*, and the refinement and modification of the strategy until success is achieved.
- ii. A related consideration is that because of the need for a decision of precedential value, there may be no judgment below that of the highest available court that is fully satisfactory. Given that in most legal systems it is only very few disputes that reach trial (because of settlement, lack of knowledge about rights, etc.), and fewer still appeal, and then only because of certain unique characteristics or peculiarities, this imposes greater pressure to choose cases and manage them carefully. One of the strange results of the strategic nature of these cases is that settlement out of court is not an option.
- iii. Litigation does not necessarily reflect public opinion and may achieve a result that has no public support. The objective of strategic litigation may be more properly achieved through debate in the political system rather than judicial decision. It must be noted also that the political system can generally override any judicial decision achieved through strategic litigation in national courts, by legislation or referendum (e.g. many constitutional referenda in Ireland have been the result of controversial judicial decisions of the Supreme Court that were then reversed by the people).
- iv. Impact litigation is dependent on finding the 'right' client. Ideal clients are not easily found in the real world. Many client problems, such as fear, lack of resources, inability to understand the process and inconsistencies in testimony, may need to be addressed through client management rather than case selection.

- v. Where legal protections and enforcement are weak, strategic litigation may not achieve the desired impact. For example, it took years for the results of the celebrated US Supreme Court decision in *Brown v. Board of Education* to have any social impact.
- vi. Where there is no independent judiciary, attempting to use the judicial power for policy ends may be redundant.
- vii. Often the process of strategic litigation is difficult to control, particularly in class action procedures where the claimant class is not fixed.
- viii. Strategic litigation may not actually benefit the affected community. As a strategy, it has been criticised for being lawyer-centred and lawyer-defined and having the effect of disempowering affected communities, relegating them to victim status and producing wins that do not improve the well-being of the community. This is because policy-oriented strategies do not focus on the client as an individual but rather as the means to further a social reform strategy. Client-oriented organisations rarely have this problem as they focus on where the community's needs are greatest.
- ix. Litigating may be a costly method of raising issues. Publicity or political lobbying may be cheaper.
- x. It is rare for the success or failure of a public interest campaign to hinge on a single case or decision, hence, a negative result may reaffirm an unfavourable law or practice²⁸ thereby deepening the social problem. This may make it more difficult to address the issue in the future. However, an unfavourable result may also precipitate lasting social reform. Most successful public interest groups adopt a comprehensive approach where litigation is only one option.

5. Case selection

A. Why we need case selection criteria

Good case selection and strategy overcome many of the disadvantages of strategic litigation and maximise its usefulness. It can also assist in the process of identifying the goals and values of the organisation.

i. Management issues

From a management perspective, organisations require case selection criteria for two main reasons:

a. Efficiency

Case selection criteria are necessary in order to ensure an efficient allocation of resources within an organisation. In order to achieve the objectives of the organisation in the most efficient manner, its resources must be directed to where they can have the most benefit. It is therefore necessary to demonstrate the objective benefit of taking a particular case.

²⁸ For example, under Article 26 of the Irish Constitution, the President may refer a proposed bill of doubtful constitutionality to the Supreme Court prior to its enactment into law. However, if the bill is found to be constitutional by the Court, the subsequent statute is immune from constitutional challenge.

b. Case filtering

Secondly, in order to justify the refusal to undertake particular cases, to comply with funders' conditions and organisational constitutional documents or to earn or maintain a reputation as equitable and transparent, objective criteria are necessary to exclude cases that will not be successful in terms of impact or are outside the chosen remit or priorities of the organisation. Filtering of incoming cases may involve value judgments regarding which issues are regarded as more worthwhile and in accordance with the interests and aims of the organisation. Even if a prospective client's case is perceived to be worthwhile and necessary, it might not attract funding, thus lessening its impact. Policy-oriented organisations, by definition, must be selective in their choice of cases. From a broader policy perspective (as opposed to that of the individual litigant), there is little point in success in an individual case if that success retards the overall policy aims.

ii. Moral hazard

Legal services NGOs generally provide their services at no charge. This creates a moral hazard in the case of some potential clients who may abuse the facility because it costs them nothing. In the case of *client-oriented* litigation particularly, case selection criteria based on merit helps to resolve this issue.

iii. Success

A timely and thorough due diligence investigation of any prospective case should also assist in developing appropriate legal strategies to select the cases most likely to succeed and to meet the organisation's objectives.

B. How do objectives and priorities facilitate case selection?

As already outlined, the specific criteria used by an organisation engaged in strategic litigation will ultimately depend on the objectives and priorities of the organisation and the model of service delivery. A key preliminary question is where does the organisation find the case. *Client-oriented* organisations receive most of their cases from individuals who walk in the door. Their selection of cases is usually limited only by (i) the means of the client, (ii) the merit of the case and (iii) available organisational resources. By contrast, *policy-oriented* organisations might advertise for and recruit clients to advance a particular programmatic objective or issue and thus have a stricter list of applicable criteria to find the right one.

Human rights organisations specialise in dealing with:

- i. cases of violations of particular rights (i.e. the thematic model); or,
- ii. all of the areas of interest to a particular minority group.

In the case of the thematic model, there is a natural limitation on the cases that the organisation might undertake. However, even then, an organisation might prioritise certain issues within freedom of expression, for example, restrictions on the media or defamation. Once priority issues are established, it is a question of strategy to achieve that objective - to find a good case and deliver it to the appropriate forum.

In the case of minority-focused NGOs, because of the breadth of issues that arise, prioritisation is vital. Again, the question then becomes how to best achieve that goal.

Broad-based criteria applied by many organisations in choosing cases include:

- i. client financial means;
- ii. the prospective merit of the case;
- iii. the type of client (e.g. women, children, workers, refugees or immigrants);
- iv. the type of case (i.e. civil, criminal, labour and death penalty);
- v. group rights as opposed to individual rights cases; and
- vi. the likely effect of the case based on an impact assessment.

An example of a set of case selection criteria used by a number of NGOs is as follows:

- i. the case addresses issues of substantial importance to a large number of people;
- ii. the issue is relevant to one or more thematic priorities;
- iii. the issue cannot be adequately addressed by grant of individual assistance; and,
- iv. the involvement is in the best interests of the minority group generally.

6. THE PROCESS OF STRATEGIC LITIGATION PLANNING

Any organisation that wishes to initiate a strategic litigation programme must identify its specific goals and how it will achieve them. The process of strategic litigation planning may, for convenience, be divided into **three** core areas:

- A. Is litigation the right strategy?
 - i. What are the issues for litigation?
 - ii. What are the litigation goals?
- B. Identifying the appropriate legal forum and jurisdiction?
- C. Identifying the 'best case' scenario (i.e. best facts) for litigation.

It may be appropriate to consider these criteria at more than one point in the planning process or once a case is underway. It is important to map at the outset all of the possible consequences of litigation in order to be prepared for every possible event during the litigation. Different strategies, techniques or methods (apart from litigation) may be necessary at any point in the process to bolster the overall campaign.

A. Is litigation the right strategy?

i. Litigation goals

After an organisation has determined that a particular project or case is within its objectives and current priorities, the project or case must be examined for its suitability for court proceedings. Can the underlying issue or problem be addressed by legal means, and is litigation appropriate in all the surrounding circumstances? Key questions include:

a. Objectives and method

What are the specific objectives to be achieved through the litigation? Litigation may be only one of many tools available. For example, publicity or political lobbying (legislative advocacy) may be more effective, depending on the circumstances.

b. Impact assessment

What is the overall potential impact of the case both in terms of the creation of a future legal precedent, any deterrent effect on the State, its agents, and other private actors, and its effect on the community whose interests are being represented - both whether the case is successful or unsuccessful?

c. Community perception

How will the relevant community perceive it? Will it be divisive? If the abuses at issue are universally abhorrent practices, the organisation may go ahead despite public opposition. The organisation must try to understand the opposition to change – is it well articulated or well informed?

d. Public hostility

If there is public hostility to a minority, the objective may be to set an example through a strong sanction or to use criminal law. Use of media campaigning and education may soften up public opinion and create a groundswell of support.

e. Difficulty in getting evidence

If there is difficulty in collecting evidence to support a court case, then the aim of litigation may be to persuade the courts to accept different types of evidence.

f. Low awareness among victims

If there is low awareness among victims, publicity can be used alongside litigation.

g. Lack of funding

Are there sufficient funds to finance a court case? It will be necessary to develop a strategy as to how to fund the case.

h. Fear of retaliation

If there is a fear of retaliation against claimants, the organisation might prioritise cases concerning

retaliation and harassment. In such cases, it may often be better to run the case from outside the relevant jurisdiction to avoid local threats or pressure.

i. Ineffective sanctions

If there is ineffective enforcement of court sanctions in practice, one might argue for a court judgment that imposes enforceable and realistic sanctions, such as (a) compliance training, (b) good system of monitoring and (c) punitive and not just compensatory damages.

j. Judges' human rights literacy

If judges are unaware of human rights or unwilling to utilise them, then consider providing training and education programmes for them.

k. Overall strategic approach

If there is a lack of an overall strategic approach in your area of interest, then it will be helpful to co-ordinate with other networks to discuss strategy and get their assistance in using a number of different methods to push forward the issue.

ii. Identifying issues for litigation - Case selection criteria

The process of case selection in most cases is driven by an awareness of laws or gaps in the law that can be used to develop the law in a way that is beneficial to your cause. Practitioners are often aware of the most relevant issues to the groups they represent and the legal instruments and legal fora that are available. In other cases, a survey or audit of the legal and political landscape is necessary to reveal priority issues and needs and to identify inadequacies in legal protection. Such a survey can be based on independent research (e.g. a review of jurisprudence nationally and internationally, the country reports of international human rights organisations or discussions with other lawyers and NGOs). Case selection criteria are used to identify the gaps in the law which have potential to be developed to the advantage of a particular cause.

The following factors should be considered:

a. Existing laws not enforced

Is there a law or regulation that is relevant, but is not being upheld or enforced? Look at relevant domestic laws and relevant international jurisprudence.

b. Compliance with international standards

Study the interpretation of national standards by governments and the courts to see to what extent, if at all, their interpretation accords with national and international standards. Is there evidence of non-compliance with the relevant standards that might be open to legal challenge?

c. Best practices

Look for best practices nationally and internationally (i.e. examples of the most advantageous application

of existing legal standards). Have the relevant legal standards been tested at national, regional, or international level and, if so, with what results? Are judges or lawyers in your national courts familiar with these standards? Can these standards be used or developed to your advantage?

d. Clarity of existing law

Is the law unclear? Clear law allows victims to know and assert their rights, and encourages potential plaintiffs to come forward and challenge abuses. A strategy of prosecuting violations of clear and accepted laws may ensure easy wins and develop momentum in the context of a campaign. A more challenging and high risk strategy would be to try to use less clear or more controversial laws to create a new legal precedent.

e. Application of existing law

How is the relevant law applied in practice? Do the State authorities need guidance from the courts on how to comply with international human rights standards? Has the application of a particular law by government officials been arbitrary and inconsistent, which might benefit from clarification by the courts?

f. Economic, social and cultural rights

Framing a human rights violation in terms of *civil and political* rights rather than *economic, social or cultural* rights has proved more successful in human rights cases because historically civil and political rights are regarded as being more 'justiciable' (i.e. capable of legal enforcement). Generally, national courts are reluctant to decide cases in which the recognition of an economic, social or cultural right could mean the reallocation of public resources and, arguably, involves the court in making policy choices that are normally left to government. There are now, however, some notable exceptions to this general rule. Some national courts (e.g. South Africa and India) appear prepared to consider cases involving such rights in certain circumstances. The best advice, as always, is therefore to consult the relevant legal and academic sources to assess how the courts in the relevant state are likely to approach this issue.

g. Likelihood of success

In each case, where gaps or issues are identified, ask what is the likelihood of success of litigation on the relevant issue. This will largely be determined by an analysis of the particular facts of the proposed case. Even at the domestic litigation stage, it is also important to bear in mind the possibility of an appeal from national courts to the European Court of Human Rights or other international forum. This consideration should influence both strategy and the ways of documenting the human rights violations.

In choosing between a number of issues each likely to be successful in setting a precedent the following might be considered:

- Look for under-utilised laws that can be used in other contexts as well.
- Go for the easiest issue or the one with most impact, if successful.
- Choose clients whose cases raise multiple issues.

h. Procedural goals

Other than the introduction of laws that directly effect individuals, strategic litigation may also be used to

advance more technical or procedural points of law. For example, (i) to test procedural or evidential barriers of the court, (ii) to introduce alternative (and better) legal remedies for individuals seeking redress, or (iii) to encourage more positive and progressive action on the part of the court. The aim of litigation could be to educate the court in the use of this new standard or to establish techniques to shift the burden of proof.

i. Negative court decisions

Even if it is clear that the court is likely to reject the claimant's case, it is sometimes possible that the overall strategy could benefit from a glaringly unjust decision on the part of the court (see section 2 above). There are also many indirect benefits of litigation; such as publicity, education of the judiciary and lawyers, and client empowerment. It might also be the case that whilst the case itself is lost, an important technical or procedural issue of law is developed by the court in a way that can be used to your advantage in a future case.

j. Interim goals

If litigation is the chosen method, it is important to be clear about its goals. It is important that each campaign have a set of tangible objectives and shorter-term goals along the way. Where there is strong public opinion against the case it may be counterproductive to succeed in the instant case because of the possibility of public or political backlash. However, some NGOs litigate not in the expectation of victory but to raise an issue publicly, educate lawyers and judges or compel government authorities agencies or public institutions to take action. As part of an overall strategic campaign to address the needs of a particular minority group, litigation may have a number of objectives short of ultimate victory in an appeal court.

B. Choice of jurisdiction and forum

This is not only a question of which courts or tribunals have jurisdiction to hear the case, but also which fora offer the most beneficial jurisprudence, procedures and remedies

i. Choosing the appropriate forum

a. Relevant law

The primary criteria will be whether or not the relevant national or international law permits a complaint to the chosen forum on the facts of your case.

b. Availability of appeals

Because of its law reform objectives, appeals are key to the success of strategic litigation. It is therefore important to consider whether the relevant national courts have a good appeals procedure. Also, is there an appeal to an international or regional court or tribunal? How long does it take before the case reaches the appeal stage? Some jurisdictions will be quicker than others.

c. Assessment of potential impact

Will success in the chosen forum have widespread effect or just limited local effect? If the effect will be limited, is that sufficient? For example, a victory in the European Court of Justice will have effects throughout Europe. Victory in the supreme court of a less influential state, even if more likely, might not have as great effect.

d. Ongoing cases

Are there cases on this subject already ongoing in the chosen courts? If so, it may be possible to take immediate advantage of this by offering your services or information to the lawyers in that case. It is also important to cooperate together to ensure that any such case does not prejudice a future case that your organisation may be contemplating.

e. Previous judgments or decisions

What is each court's record in dealing with this type of case? Do previous decisions indicate a favourable disposition towards a particular issue?

f. Quick wins

A jurisdiction where you can get early and quick wins to gain momentum and lay successful groundwork. You may not want a hard case, at least to begin with, because it may be a setback to the whole process.

g. Common law and civil law systems.

Are common law precedents worth more in strategic terms than civil law victories? Civil law jurisdictions give less importance to previous judicial decisions, hence there is less opportunity for systematic change through litigation than in common law systems that may use existing case law as future precedents.

h. Dualist and monist systems

Broadly speaking, states either take a 'monist' or 'dualist' approach to the application of international human rights treaties in municipal law. In *monist* systems a treaty becomes effective in international law and in municipal law simultaneously, although even then international treaties may still be subject to interpretation in accordance with national constitutions and national law. In *dualist* systems, on the other hand, a treaty does not become part of municipal law until it has been incorporated into law by national legislation. The weight particular national courts give to principles of international human rights law must therefore be assessed on a case-by-case basis.

i. National courts

If there is a choice of jurisdiction in which to bring the case then choose the national court with the more influential judgments nationally and internationally. This will ensure wider impact. If there is a choice of a national court or tribunal, choose the one that will give the most advantageous judgment. Some national courts in particular have a progressive approach to public interest law. For example, India, Bangladesh, Sri Lanka and Pakistan have a long history of public interest litigation (and innovative, pro-public procedures) in the highest courts. It is also important to establish whether the contemplated national court has procedures that are favourable to the circumstances of your case (e.g. is legal aid available? what is the relevant appeal procedure etc.).

j. Regional and international courts

It is important to determine how efforts in international courts or tribunals should interact with other efforts. Is the treaty body more likely than a regional court to push forward the jurisprudence on this issue? In the case of European states, what is the influence of the ECJ or ECtHR? Are there jurisdictions from which certain questions or issues are likely to get better outcomes in an international tribunal? International litigation may be more effective than domestic litigation if, for example, the offending state is concerned about its international or regional reputation, or the international community is likely to be more sympathetic.

k. The court and judiciary

A competent, independent and impartial judiciary is a pre-condition to any litigation strategy the objective of which is to establish precedent. However, litigation can highlight the corruption of a judicial system if an appropriate case is found. Strategic litigation because of its policy element also requires a proactive and progressive judiciary. Thus, it will be more difficult to get favourable judgments in those legal systems that take a more formal, rather than a dynamic, approach to interpreting the law.

l. Legal profession

Without an independent and effective legal profession, the chances of success in strategic litigation are limited. Lawyers in the jurisdiction chosen must be able to: (a) perform all of their professional functions without intimidation, hindrance, harassment or improper interference, (b) travel and to consult with their clients freely both within their own country and abroad, and (c) avoid threats of (or actual) prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. Do lawyers enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority? Do lawyers have access to appropriate information, files and documents in the possession or control of authorities in sufficient time to enable lawyers to provide effective legal assistance to their clients? Does the Government recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential? Are there any restrictions on the freedom of expression, belief, association and assembly of lawyers? Can lawyers join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation? Can lawyers form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity? What is the view of the bar associations and law societies towards the case?

m. Political and social context

i. Corruption

What is the level of corruption in the State? Will it affect the case? Will the judgment be enforced?

ii. Responsible government

How good is the current government on human rights issues? What is the economic situation in the

country? Is the government under political pressure (e.g. pending elections)? Is the culture in the State one of acceptance and understanding of human rights issues?

iii. Physical dangers

Will the organisation accept politically sensitive or volatile cases that may put the organisation or its leaders in personal danger? If yes, determine the most effective means to meet the potential risk and formulate a strategy.

ii. Applicable laws

It is vital to know in advance what law or standards will be applied in the case by the chosen tribunal. Can you use international law in domestic proceedings? Besides the UN and the regional treaties, the law and case law of other countries (mainly the judgments of the Supreme Courts and Constitutional Courts) might be successfully used. Has the State ratified the relevant international instruments? Has it incorporated them into national law? Are there international enforcement bodies? Are there reservations to the ratification? Is there a written constitution with human rights protections?

iii. Procedural criteria

a. Legal costs

The possibility that a litigant in an impact litigation case could lose their home because of an adverse costs order is a significant deterrent in prosecuting such cases.

Relevant issues concerning costs include:

- How much are the legal costs estimated to be? (including lawyers fees, court costs, and other disbursements - e.g. witness expenses, expert's fees, photocopying and travel expenses etc.) Can they be reduced?
- Are there procedural requirements such as 'security for costs'? A claimant may have to provide a large amount of money up front to cover the other parties' legal expenses should the case be unsuccessful.
- Can the claimant recover fees if the State is successfully sued?
- Is there any loosening of the 'costs follow the event' rule? (i.e. the rule that the losing party pays the winner's costs). This rule is a strong deterrent to public interest litigants who may be required to pay substantial costs if they lose. There may be exceptions to the general rule, where courts have discretion not to award costs against an unsuccessful litigant.

b. Time limits

Time limits can debar claims and so must be seriously considered when choosing a forum. Many international tribunals have a time limit for the submission of a case of six months after the exhaustion of domestic remedies. One must determine whether there are tight time limits for submitting the case (statutory or practice limitations). Will these time limits bar the case? Will they affect the quality of

presentation of the case? Can the court waive time limits? For appeals? Are there innovative approaches to time limitations? For example, the Indian Supreme Courts relaxation of the doctrine of *laches*²⁹ in public interest litigation cases. Is the doctrine of *laches* applicable?

c. Rules of standing

Because of the nature of public law litigation with its law reform element, private law rules of standing are not fully appropriate. However, many jurisdictions still require private law proof of standing.

i. Third party intervention

For NGOs a key question is whether the tribunal permits third parties to intervene in cases (or even bring the cases themselves on behalf of the victim)³⁰. Much NGO litigation work involves intervention as *amicus*³¹ in the cases of others. Are NGOs permitted to file complaints or to intervene and, if so, in what circumstances?

ii. Innovations

Is there any relaxation of rules of standing (e.g. Indian public interest litigation allow persons not personally affected by the action to bring a suit)?

iii. Class actions³²

What are the possibilities for a class action type claim? Because of the controversial nature of some personal injury class actions, a determination of who the class actions would benefit or hurt and what public benefit might be achieved is advisable.

d. Rules of evidence

Human rights litigation involves some of the most vulnerable and excluded groups in society. These groups are often worst placed to document and prove the violations they have endured. Rules of evidence, particularly those that exclude or question the value of certain types of evidence may operate to prejudice legitimate claims. Also, certain abuses such as indirect discrimination or institutionalised racism can be extremely difficult to prove. If permitted by procedural rules, it might be necessary to submit less commonly used types of expert evidence (e.g. sociological studies). It is important to establish at an early stage how to marshal evidence to establish the wrong complained and whether the evidence will be admissible. Are there rules that prevent the gathering of evidence from government defendants (e.g. on grounds of national security or public policy)?

²⁹ Based on the maxim that equity aids the vigilant and not those who procrastinate regarding their rights, the doctrine of *laches* provides that applicants must assert their claim or right within a reasonable and justified period of time, so as not to disadvantage the other party.

³⁰ Please see Article 7 (2) of the Race Directive – Annex One of this Manual in this regard.

³¹ An *amicus* is a 'friend of the court' who assists the court on points of law in a particular case. *Amicus* are generally not parties to the proceedings.

³² A class action is a representative action in which one or more plaintiffs are named in the complaint, along with their counsel, pursue a case for themselves and the defined class against one or more defendants. The claims of the "class representatives" must arise from facts or law common to the class members. Most class actions are called "plaintiff class actions;" however, in limited circumstances a class action can be filed against one or more defendants representing a group of defendants, i.e., a "defendant class" action.

e. Corporate cases

Such cases raise separate and complex issues of private international law, such as the jurisdictional concept of *forum non conveniens* and the *corporate veil*. Specialist advice should be sought.

f. Exhaustion of domestic remedies or other alternative venue doctrines

To what extent will the courts insist on formal application of such doctrines?

g. Method of pleading

How formal is it? (e.g. in Indian public interest litigation, a simple letter is enough to commence proceedings.)

iv. Choice of remedies

If the goal of the litigation requires a particular type of remedy, this will determine the type of procedure and the court. The type of action to be taken must be decided by the client together with a lawyer and/or NGO.

a. Civil remedies

Considerations in favour:

- The victim’s lawyer has more control over the proceedings and is free to organise and conduct the trial
- The client benefits from compensation for damages. What is the amount of damages available?
- The standard of proof is easier to meet in civil cases (i.e. on the balance of probabilities)

Considerations against:

- Court costs can be high (and may not always be recoverable)
- Criminal remedies arguably have a greater deterrent effect
- Evidence is theoretically gathered more quickly in criminal cases, although the practice often differs
- Compensation claims are primarily for the benefit of the individual who pursues them. The lawyer has no special access to the scene of a tort
- Lawyers in some jurisdictions may be passive or reluctant to investigate thoroughly on their own
- There are procedural rules in many countries that suspend civil actions while awaiting the results of any criminal proceedings. These rules may be open to interpretation. The best course of action would be to bring as many cases as possible, arguing for an independent civil action
- There are concepts in civil law such as domicile that might impede some human rights claims

b. Criminal actions

Obstacles to criminal actions may include:

- High standard of criminal proof required to get a conviction
- The rate of prosecution is low; therefore, criminal remedies are less likely to be successful
- Lack of resources allocated to regulators
- Inadequacy of criminal fines posing no deterrent (i.e. for a large corporation it would be cheaper to pay a fine than pay regular health and safety costs)
- In the case of multinational corporations, the parent companies are beyond the criminal jurisdiction of the local courts

- Difficulty in initiating procedures,
- Danger of defendant becoming a martyr

c. Innovative remedies

The Indian courts do not just give redress with public interest law actions but also correctives for the future, (e.g. they organise proceedings, design relief plans and oversee implementation and sends officials to periodically check on the progress of remedies.) The US courts also require positive measures to be introduced by the authorities.

C. Identification of best factual case

The purpose of this exercise is to identify the set of facts or case scenario that will best use the laws and means of litigation chosen to achieve the litigation goal. Choosing the right case scenario that will appeal to the court and will best use the particular laws is a difficult issue. The organisation must assess whether there are particular issues which are better litigated by a particular applicant or class of applicants because the court may be more willing to find in favour of them, or whether a particular group (e.g. non-nationals), because of their vulnerability everywhere, require a departure from the previous rule. Similarly, the defendant must be chosen carefully to maximise success and impact. Often it is easier to litigate in a jurisdiction with a diverse community because there may be individuals with multiple grounds of discrimination.

i. How do you find a client?

Clients may be 'recruited' from key local partners, other NGOs, through training or education programmes for local lawyers, field-work, canvassing local social service bureaus or community networks. It should be noted that in many countries lawyers are not allowed to advertise for clients. This may severely inhibit the ability of the organisation to formulate a winnable case.

Some suggested considerations in looking for a client are:

- Find a plaintiff with multiple grounds of discrimination or violations
- Stick to traditional fields for test cases, for example employment has historically provided a solid basis for test cases in some jurisdictions.
- Because of time limits (e.g. six months after exhaustion of domestic remedies in the case of the European Court of Human Rights), it is often difficult to find the best case

ii. The plaintiff or applicant

The characteristics and personal circumstances of the plaintiff need to be carefully assessed in strategic litigation cases, particularly as the chief objective of such cases is not to further the client's interests. However, social change litigation can only take place when people take risks, particularly clients.

a. Characteristics

The personal characteristics of the client must be such as to find favour of the court (e.g. in its perception of the level of violation and the credibility of the client) and facilitate successful litigation generally.

The 'Ideal' Plaintiff

Age, race, gender, sexual orientation, language, nationality or residence may sway the court depending on the facts of the case. The client's level and quality of education, sophistication and understanding of the process may make the burden of litigation easier on him and ensure a more successful campaign. Similarly the client's personality - credibility, confidence, friendliness, trustworthiness, perseverance, determination or resilience – may both appeal to the court and make the process easier. Will the client see the case through? What is the level of trust and co-operation between the client and apex lawyers? Is the client a good witness in his own case? The personal history of the client, even if unrelated to the specific facts of the case, may sway the court for or against him (e.g., past suffering, torture and fear or negative aspects such as history as a criminal, drug addict or prostitute). Similarly, previous history of torture may have negative effects on the recall or lucidity of the client and thus have implications for case strategy.

b. Personal circumstances

The client's personal circumstances must be considered both as regards the likelihood of success in the case and the effects a success or failure might have on the client's life. How will the client finance the case (if they have to)? Do they have a job, family support and can they get time off work? What kind of community support is available to them – financial, practical and emotional? What are their future prospects with or without the case? What damage might a successful case do to the client and his or her life? There are moral considerations to weigh, outside of the human rights objectives of the litigation - the case may be successful but what if it destroys the client's life?

c. Group claims

Would the objectives of the case be better served by group claim rather than an individual claim? Is there a class of applicants that finds favour with the court? Does the group have a recognised leader or procedures for making decisions as a whole? How are decisions for the group reached? Is the group complete? Are key members of the group missing? Why? Will their absence affect the claim?

iii. The defendant

The defendant must be chosen based on the substance of the relevant laws, the procedural requirements of the case, the likelihood of success and the potential impact of a positive decision.

a. The national government

The national government is one of the most common defendants in impact cases in smaller jurisdictions. Questions that can be asked regarding the national government include:

- Is the government against the proposed change? Why?
- Is the political opposition organised? Vocal? Will they pressurise the government in this field?
- Are other political parties/leaders supportive?

- How good are the State's lawyers? What strategy are they adopting?
- Are there elections pending which may affect the resolution of the issue – positively or negatively?

b. Lower levels of government

Local authorities, government agencies or institutions or governments of states in a federal system may be appropriate defendants. Apart from questions regarding their ability to defend themselves in court, lower levels of government are usually the organs charged with implementing any changes in policy. Some considerations include:

- Are there funds or infrastructure available to effect the change in policy? Is there institutional opposition? How can this be overcome?
- At which level is the defendant? What kind of support does it have from higher levels of government?
- How good are government relations with the media? How have they handled this issue so far? Is it part of government policy? What are the reasons for delay? Can we put it on the agenda?

c. Corporations

Legal actions against large corporations may set an example and create huge impact (particularly when accompanied by a publicity campaign that might hit profits). There are legal and tactical obstacles to targeting a private as opposed to a public actor. Most corporations can marshal huge legal resources, and legal issues such as the corporate veil and jurisdictional arguments make such cases particularly difficult. Expert legal advice should be sought. However, exposing corporate wrongdoing in the marketplace is a powerful tool to force reform. The reactions of stakeholders in a corporation (i.e. (i) shareholders, (ii) creditors, (iii) competition, (iv) management, (v) workforce, (vi) the public or market, (vii) market regulators) will be an important factor in the success or failure of strategic litigation against corporations.

d. Individual defendant

Individual defendants are rare in impact cases. Individuals provide neither the deep pockets of corporations or the public policy reform potential of governments.

iv. Fact patterns

It may be important to choose impact cases that cannot be ignored by the courts (e.g. something serious or close to the core civil and political or economic and social rights). Look at the most important issue for a particular group, or the easiest because of established case law. In the formulation of the 'best case' scenario, lawyers must try to understand the leanings of the various courts and tribunals and to gain a historical understanding of past rulings in order to find the factors most likely to influence such court or tribunal. It is important to link the case's strengths and weaknesses with the court's inclinations. This is particularly vital where there is a risk of setting an unhelpful precedent, which might be detrimental rather than beneficial to the advancement of the cause. It is also vital to be aware of fact patterns that would appeal to regional bodies and understand their past decisions and how to use and access their decisions.

v. The evidence

Success in strategic litigation will depend not only on the quality of the issue for presentation to the court but

on the quality of evidence supporting the claimant's case. A good case in theory may not prove to be so in fact once all the evidence has been collected.

7. Case management and strategy

There are a whole range of issues to consider in managing a strategic litigation case. Case strategy is again dependent on the objectives the organisation is trying to achieve. Determining case strategy is particularly important if litigation is expected to fail but used to highlight an issue. In common law countries the aim may be to set precedent through test litigation and in civil law jurisdictions to set standards that will have weight in future judicial determinations. If client empowerment is the aim, then the strategy will be much different. Much management work will involve co-ordination of the efforts and goals of lawyers, clients and NGOs.

A. Case strategy

In ordinary litigation the lawyer generally decides *on his or her client's instructions* what steps to take in the case. They advise the clients on alternative options and act in accordance with the client's wishes. In *policy-oriented* litigation, where the focus is more on the issue, it is not so clear how decisions should be made. There are, therefore, more complex questions that the lawyer or NGO should ask itself.

i. Client goals and the decision-making process

What is the client's goal and how can the lawyer help the client clarify these goals? What level of commitment does the client have to achieving the goals? Should the organisation pressurise the client to go forward? Do you explain the strategy to the client? How will the client or group act in the decision-making process? How will their involvement in the litigation be structured? Will their involvement help them solve similar or related problems in the future? The more technical the issue, the less point in democratic decisions otherwise get the community involved in defining objectives. By getting an NGO involved, is the apex lawyer effectively delegating questions of strategy to an outside expert? This is more efficient even if it could be described as undemocratic or unrepresentative.

ii. Other methods

Beyond litigation, are there other methods of achieving the client's goals? Are those more or less likely to be effective? It is important to appreciate the needs of the client who will often be from a different socio-economic class or culture.

iii. Factors in case strategy

Similar factors apply to determining case strategy as case selection:

- Who are the defendants and what is the estimated level of commitment? Who are their supporters?
- Who else has an interest in the issue and what are those interests? Will they support the client's position?

- Will those with an interest be willing to work together on reaching a solution? Are other actors with a less defined interest able to support the issue?
- Is there an alternative or compromise that will meet the needs of both sides? Is exploration of other avenues an option?
- What are the strengths and weaknesses of the client's case? What are the strengths and weaknesses of the opposition's position? What are the legal claims and how strong are those claims on the merits, within the system and in public opinion?
- How likely is it that the court will look favourably on the action?
- What political repercussions will follow either a win or loss in court?
- Is the legal theory clear and simple and the remedy easy to implement?
- Is another organisation better suited to take the case?
- By definition, the objective of a strategic litigation case is not to settle, it is to change the law. This removes one of the key tools of the court lawyer and may result in negative reactions from the court.

iv. Client considerations

It is important to assess what will be the effects of both the litigation and the particular strategy on the client and his or her interests. Should the lawyer encourage the client to continue the case despite a low likelihood of success? Will the client willingly sustain a long appeals process if this is necessary? Does the lawyer have a duty to explain the overall strategy to the client regardless of whether it affects his/her case? Is it ethical to fail to inform of an auxiliary reason for the strategy? Is there ever a justifiable reason for the client to lack awareness of strategy?

B. The client's lawyers

The quality of the apex lawyer is vital to the success of the case. Lawyers may risk ostracism, loss of prestige and retaliatory punishment when they undertake human rights cases. It is important to ensure that there are excellent lawyers on existing cases and that no procedural deadlines are missed. Relevant factors in assessing the quality of local lawyers include:

i. Background and experience

For how long has the lawyer been practising? Education, professional experience generally and in this specific area of law and in the relevant tribunal or court, reputation, personal acquaintance or knowledge of judges and other lawyers, quality as an advocate, general strengths and weaknesses, history of success in this field. Experience with the legal issue and the general substantive right area. How many cases? How did the cases turn out? Has the lawyer represented other individuals from the same minority? Is the lawyer familiar with special strategy problems in the relevant area? Is the lawyer aware of arguments that will be used against the client? Does the lawyer have relationships with and experience of NGOs? What are his or her contacts like in the legal profession generally?

ii. Personal philosophy

It is important that the lawyer's values do not prejudice success in the case. For example, a lawyer who has doubts about the equality of the client's group may not be a suitable representative. What are the lawyer's feelings about the personal and political decisions of the client? What are the lawyer's ties with and understanding of the relevant community? Is the lawyer easy to deal with?

iii. Management and responsibility

Does the lawyer have the time and resources to carry out the case? Is he or she willing to accept assistance (experts, consultations) from relevant organisations, particularly, expert witnesses? Has the lawyer ever used an expert witness in such a case as this? Who will be doing most of the work on the case – the lawyer or an assistant? What experience do assistants have with this type of case? Will they consult with another lawyer? What kind of office support is available (is it a sole practitioner, partnership, company or NGO)? Does the lawyer have personal and financial support, support services and research facilities? What demands are other clients making? Does the lawyer have access to facilities such as IT, precedents and staff (paralegals, assistants)? Does the lawyer have time (must look at the number of cases and the nature of the practice)? How good is the lawyer at managing cases?

iv. Fees and costs

Is there an initial consultation fee? A retainer? How is the client billed? Hourly rate? What are the hourly rates? Are contingency fee arrangements acceptable? What is the estimated total cost?

C. Financing litigation

Different legal systems have different rules with regard to costs. In most legal systems a losing plaintiff must not only pay the costs of their own lawyer, but also the majority or all of the successful defendant's legal costs. Since strategic litigation cases are often 'novel and risky', the loser pays fee structure presents a daunting barrier to litigation. The problem is exacerbated by the fact that states and corporate defendants invariably have deeper pockets than individuals and NGOs. Therefore, cases require proactive and imaginative lawyers to find creative funding solutions. The following is an inexhaustive list of some possible funding solutions:

i. Contingency fees

Some lawyers (e.g. US attorneys) are permitted to enter into contingency fee arrangements, whereby the attorney's fees are paid as a percentage of any damages awarded. However, such agreements are prohibited in many other legal systems.

ii. Conditional fee arrangements

In some jurisdictions (e.g. England and Wales) solicitors are permitted to enter into conditional fee arrangements with their client, under which either increased or reduced fees are received depending upon a successful judgment or the amount of damages awarded.

iii. Legal aid

In many legal systems it may be possible for the plaintiff to obtain legal aid to fund some or all litigation costs.

iv. Legal expenses insurance

In some jurisdictions it may be possible to obtain for a fee (or premium) insurance to indemnify a plaintiff for their own litigation expenses, and sometimes the costs of their opponent, should the case be unsuccessful. Although this kind of support will be inherently difficult to obtain where cases are considered 'novel and risky'.

v. Pro bono work

In practice, the most fruitful solution is likely to be a partnership between academics, NGOs and private practice working on a pro bono (i.e. no fee) basis. However, even in such cases it will usually still be necessary to fund general disbursements (e.g. travel expenses, court fees etc.)

D. Litigation support strategies

Litigation support strategies include NGO networks, media campaigns, international pressure, popular support, legislative reform and education. Involvement of independent government agencies (such as national human rights commissions), the training of judges and lawyers, the commissioning of surveys and the exchanging of information are also important. It is important to determine what kind of local resources are available. Use outside experts and analysis (especially in environmental cases). Use NGO analysis of international law. Work with other NGOs. Consult specialised legal resource centres that give information, assist preparation and act as *amicus curiae*.

i. Friendly legal or factual assistance

The assistance of other specialists in the human rights field might be important in providing legal or factual research or otherwise supporting the arguments made on behalf of the applicant or the overall campaign.

ii. NGOs

NGOs can provide general assistance in campaigning, fact-finding, networking, research or as *amicus curiae*. Find out the strength of the NGO community in the relevant jurisdiction and internationally on the relevant issue. If it is a work-related matter, trade union support may be necessary. What are the interrelationships of the legal community, judges and other NGOs? How familiar is the NGO with the subject matter and legal issues? Do the objectives of the NGO accord with the objectives of the litigation? What is their ability to mobilise support and publicise campaign? What is their presence internationally?

iii. Other amici curiae

Amici curiae must be assessed based on factors such as prestige, knowledge, reputation, motive and weight of its contribution and perceived weight for the particular tribunal. One must examine whether their contributions are allowed in a particular jurisdiction, how many are allowed, and if there is no limit, how many to include. Where there are numerous *amici*, they must be marshalled and coordinated to produce best overall set of arguments. States can submit *amici* in certain tribunals. What effect will this have? Can you negotiate with them?

iv. Research

Research is a powerful tool to substantiate the factual bases for high impact cases and to provide powerful or innovative legal argument. Use academics to write law review articles on the new standards.

v. National human rights institutions

National human rights institutions, or specialised equality bodies, may be important in fact-finding or acting as *amici*.

vi. Publicity and getting public support

Publicity is a tool that can be used alone (e.g. by organisations such as Amnesty) or in conjunction with a strategic litigation campaign. Publicity contributes greatly in educating the community in human rights ideology and in the understanding of particular human rights abuses.

a. The media

Is publicity an available tool? Has this issue already been widely publicised (existing newspaper interest or NGO activity)? Will publicity injure the case or the applicant and his or her family or the community? Is there freedom of expression? Is there press interest? Is it an issue that might attract publicity? Are there legal restraints on publicity? Will bad publicity be a problem? How do you handle publicity? Is inexpensive and good quality public relations support available? It may be possible to collaborate with another NGO with expertise in media campaigning to support the litigation effort.

b. Politicians

What is the attitude of local politicians to this issue? Have any politicians raised the issue in the media or in the parliament or local government? What is the reaction of political parties? Can you use political support to maximise impact, mobilize support and resources? How are politicians in favour of the action regarded by the wider public? Extremist politicians may do damage by publicising the case. More mainstream politicians may shy away from it.

vii. Case support

a. Casework

What can be done outside of the courtroom to support the case? What extra-legal work can be done to support the case? Will such efforts undermine the judicial process? Will such efforts create a sustainable change in the situation? What kind of support is available for this issue? Is there volunteer research or investigation available? Expert assistance may be vital in establishing facts or technical argument. An organisation may develop model briefs on particular issues. Provide legal memoranda outlining useful regional/international and comparative law on each issue (e.g. positive action, use of statistics instead of testers). Other members of the Bar may become involved. Fact-finding may be vital in putting together a winning case. How well established or contested are the facts of the case? Is investigative support needed? Are procedural tools such as discovery available?

b. Funding

Funding arrangements include general NGO funding, specific case funding, contingency fee arrangements and legal aid. Is this something for which there is specific or general funding? Does sufficient financial support exist to see the case to conclusion? Can money be raised to take the action? How will publicity impact on future funding from this source? There are philosophical considerations associated with funding from government authorities. Such funding may compromise the independence of the organisation.

viii. The applicant's family, local community and the relevant client community

The applicant's needs may often be forgotten in the pursuit of the 'greater' public policy aims of strategic litigation. However, the well being of the applicant is vital to the success of the case (and their own determination to pursue it). Sacrificing the applicant for the sake of the public good would seem to be contrary to the liberal philosophy underpinning modern civil and political rights. Furthermore, the public policy aims of strategic litigation are intended to benefit a certain community. If that community is at the same time damaged by the same litigation campaign, any success achieved is devalued.

a. Family

Does the applicant have a family - a wife or husband, partner and how many children? What is the family's attitude to the issue and the possible case? Where do they live? If they are located in an area where the case might endanger them then it is a problem. Could they be involved in the case as victims/additional applicants? Will they suffer if the case is brought or is publicised - children at school, a spouse or partner in the community or at work (e.g. husband of pro-choice wife in traditional society) - or suffer with their wider family? There is also a question of respect for cultural and social traditions. Impact is important but not at the expense of something of greater value.

b. Local community

Is there support or opposition in the local community? Will the applicant and their family suffer negative reactions if the case is brought? Do they understand this? How might such a backlash be minimised? What legal action can be taken in respect of it?

c. Managing the affected 'client' community

Keeping the relevant community informed, organising community support and understanding their values are all important.

Consider:

- Identify the community for whose benefit the action is taken. Does the community have a developed identity and a developed set of community organisations?
- Who are the chief protagonists? What are their attitudes, personalities, etc. and level of influence over the rest of the community? Are they leaders or just extremist activists?
- What are the principles or values of the community? How does this case accord with those principles/values etc.?
- How well does the applicant fit in with the community and its values?
- Is there community support for the applicant and the action?
- Are there opposing groups within the community, or opposing communities? How developed are the opposition community? Identify the values, protagonists, etc. of any opposing groups.
- How well do the values of the community, NGOs, lawyers and applicant accord?
- Is there a religious or fundamentalist element in the community? Is there a problem of crime, drug abuse or lack of facilities in the community? Have there been previous actions on behalf of this community? How have they been resolved? What kind of support or problems or issues arose in those actions?

- Are there specific NGOs who represent the issues most important to the community?
- Try to understand the underlying philosophy of those issues. How are the relevant community and its organizations/activists perceived by the wider public/society? Is the issue being raised something that might attract widespread opposition in the wider society or just at a political/institutional level or governmental level? Will litigation empower the clients or group represented? Is the element of empowerment important even if litigation likely to fail? Does litigation give the group or individual a 'voice' they would not otherwise possess? Are alternative means of resolving the conflict available? Will those with an interest be willing to work together to reach a solution? Or provide moral support?

8. Post-litigation implementation

Policy change can only go so far without implementation. Impact is heavily dependent on following up a court victory. This was identified in the Ford Foundation's publication *Many Roads to Justice* as one of the key issues - even good laws and rulings go unenforced. A key question that must be asked in advance is whether the decision will be enforced. Inadequate resources or vague regulation can prejudice the impact of a successful case. Unless accompanied by other social strategies (e.g. community services, new government policies, etc.), the impact of a litigation victory may be undermined. Collaboration with grassroots organizations is vital in order to ensure the full impact of cases that are successfully litigated.

Planning for impact is therefore vital. Key questions that must be asked in advance are:

- Is there reason to monitor enforcement, including court enforcement procedures in a litigation strategy seeking civil or criminal penalties?
- Is there allowance for private prosecution when the state fails to take action (or private criminal actions)?
- Is there an independent judiciary, democratic institutions, and mechanisms to counter corruption?
- Are the legal powers and institutions adequate to ensure the effective realization of the result (i.e. laws providing for enforcement, democratic institutions, rule of law and independent judiciary – the national infrastructure)? Is there a human rights commission?
- Is legal aid available - in order for other individuals to use the precedent established to protect their rights, there must be some form of legal aid?

CHAPTER THREE:

LONDON WORKSHOP - KEY CHALLENGES IN LITIGATING THE EC RACE DIRECTIVE³³

³³ *This chapter distils some key concerns, observations and experiences of participants at the London Workshop relevant to litigation of the Race Directive.*

1. Lessons learned from the European Court of Justice (ECJ)

First, it is important to situate the Race Directive in its European context. In many ways, the Race Directive now places race discrimination in a similar way to the earlier directives on sex discrimination some twenty years ago. Over the intervening decades, the sex equality directives strengthened legislation across the European Union (EU), and have been instrumental in the establishment of strong jurisprudence with respect to sex discrimination. However, a key difference now in comparison with twenty years ago and an advantage is that the operation of European Community (EC) law and its significance within Member States is well known.

In his presentation, Anthony Lester QC—who has taken many landmark cases both to the Luxembourg and Strasbourg courts—noted problems encountered in the early litigation under the sex equality directives, which may occur in the early litigation of the Race Directive. First, he noted, lawyers experienced difficulty in encouraging national courts, particularly lower courts, to refer cases to the ECJ. A lack of familiarity with EC law and the referral process meant that judges had to be educated through the litigation process.

Second, in early sex discrimination cases lawyers faced problems in framing and forwarding the correct question of EC law to be decided either by the national judge or, if necessary, by the European judge. The question has to be one of law, not sensitive to the facts. Further, the question needs to secure the agreement of the opposing party, so that the judge is not left to decide. It is then important to establish the necessary facts upon which the question was to be decided.

Third, the cost implications of cases needs to be considered. Lester noted the challenge of determining whether the relevant directive had direct effect. He encouraged lawyers to engage the European Commission on this issue at an early stage. It was noted that when the first cases on sex discrimination were brought, the Commission denied the direct effect of directives.

Finally, Lester emphasised that the strong jurisprudence of the ECJ with respect to sex must not be weakened by lesser decisions with respect to race. While it is important to ensure the cross-fertilisation of jurisprudence across grounds of discrimination, this should strengthen, not weaken standards. Accordingly, litigation has to be carefully planned to push the discrimination jurisprudence of the court forward. In conclusion, the Chair of the session, Laura Cox DBE observed that discrimination litigation can be very difficult, not just because of technical aspects of the law, but because many of the concepts (such as indirect discrimination and harassment) are often novel for judges. Accordingly, judges can have difficulty understanding and applying them to fact situations. As a result, early cases may be lost, meaning that persistence with litigation is particularly important.

2. Evidence

Questions of evidence promise to pose significant obstacles in the pursuit of successful litigation in this area of law. While the Race Directive opens up exciting possibilities with respect to evidence, problems of proof will

continue to create particular challenges for lawyers and judges alike due to the complex nature of substantiating claims of discrimination.

For example, in cases of indirect discrimination, it is common to encounter problems in identifying appropriate comparators to show less favourable treatment. In some cases in Central European countries, courts have accepted the discriminatory treatment of Romani plaintiffs when contrasted with the treatment of a similarly situated “testers” of non Romani origin. Significant national variation was noted in relation to the admissibility of evidence however, meaning that lawyers need to be creative within the existing bounds of evidentiary rules.

The Race Directive's inclusion of the shifting of the burden of proof is clearly welcome, however lawyers express concerns about the way this will work in practice and the way judges should understand it. A key issue is what kind of *prima facie* case will need to be established to shift the burden of proof.

The London Workshop discussed the UK experience with shifting the burden of proof, with the courts’ “drawing inferences” of discriminatory treatment being sufficient to shift the burden. It was noted that judges in the UK now recognise that discrimination cases are so hard to prove that the burden of proof has to be shifted.

One way of judges “drawing inferences” in the UK has been the use of questionnaires.³⁴ At the pre-trial stage, the questionnaire is filled in by the victim of the alleged discrimination, and then sent to the respondent to establish their reasons for the alleged discriminatory treatment. If the respondent does not fill in the questionnaire, or gives unreasonable answers the court may find sufficient grounds to draw inferences and shift the burden of proof to the respondent. Though they do not have official standing, many discrimination cases have been won in the UK because of inadequately answered questionnaires, and they are routinely used by specialised equality bodies. It was noted that similar, although perhaps less formulaic, questionnaires have been adopted by discrimination lawyers in other European countries. Though there may not be a culture of drawing inferences elsewhere, ECJ jurisprudence supports this practice in establishing a *prima facie* case, and this can be entrenched by further litigation.

Obviously there is national variation in the kinds of evidence that can be legally brought to court, meaning that lawyers often have to be creative and use other available means. In Denmark, for example, ethnic monitoring is prohibited. Lawyers have instead taken to recording phone conversations between the applicant for a job (the victim) and the employer (the respondent). Such tapes have been used successfully in out of court settlements.

3. Remedies

Effective remedies in discrimination cases are critical, not just to provide redress for victims, but to ensure that employers, educators, government officials, publicans and other potential discriminators take the law seriously.

³⁴ Examples of questionnaires used by specialised bodies in the United Kingdom are available from the Equality Commission for Northern Ireland (<http://www.equality ni.org>) and from the Commission for Racial Equality (<http://www.cre.gov.uk/>)

The Race Directive is vague as regards remedies and sanctions. This vagueness is further complicated by the inappropriate transposition of Article 15 of the Race Directive by many countries. The London Workshop agreed that to give substance to sanctions that are “effective, proportionate and dissuasive”, lawyers should read the Race Directive with the case law of the ECJ and the European Court of Human Rights (ECtHR).

The challenge for domestic judges, and therefore for lawyers bringing cases before them, will be to coalesce EU law and domestic law or declare domestic laws incompatible with EU law. Numerous ECJ cases (see Annex Five) consider effective remedies, and these should be invoked domestically to encourage this understanding of EU law.

4. Choice of Fora

One of the recurrent themes of the London Workshop was the question of choice of fora. Lawyers obviously owe it to the client, to be as informed as possible about all options with respect to fora. The Race Directive opens up opportunities for race discrimination litigation before the ECJ, although the referral system means that the process differs from traditional applications. The more stark choice for many lawyers is between either taking a case to Strasbourg or sending a communication to one of the UN Treaty Bodies.

A. UN treaty bodies

Many lawyers have traditionally rejected the possibilities presented by the UN Treaty Bodies to resolve a dispute as less desirable given that, unlike Courts, they have no powers of enforcement. However they should not be discounted out of hand. The treaty bodies serve important educative and interpretative purposes, and can be used as effective lobbying tools. They sometimes hold applicants to easier standard of proof and can be less stringent in terms of admissibility. Significantly, the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Elimination of Discrimination Against Women (CEDAW) have few communications before them and therefore are not dealing with the backlog which plagues the Strasbourg court. The swifter process is much easier on victims than the prolonged Strasbourg process. In terms of strategy, the international reach of UN treaty bodies means that decisions can effect the interpretation of treaties and concepts of law internationally.

The admissibility requirements and processes for the UN treaty bodies does vary and a guide to sending communications to them is set out in Annex Three, along with a list of the advantages and disadvantages of available fora.

Ideally, a comprehensive and well-funded litigation strategy would see a range of discrimination cases being taken to various fora, testing how different bodies deal with similar fact patterns and with a view to the potential effect for improving the standard of race discrimination law.

B. ECJ

The position of the ECJ on race discrimination is to date untested. But the court has established a solid body of jurisprudence in sex discrimination cases and is familiar with a number of the concepts embodied in the Race Directive that found expression in earlier directives on sex discrimination.

Challenges will obviously lie in familiarising domestic lawyers and judges of the procedural mechanisms of the ECJ (as elaborated in Annex 3). It is expected that the litigation process will also be lengthy, although perhaps not on the scale of that currently experienced in Strasbourg.

C. ECtHR

The problems with respect to the definition of Article 14 of the European Convention on Human Rights (ECHR) and discrimination are well known. Until Protocol No. 12 comes into force, Article 14 will continue to provide inadequate protection against discrimination. The ECtHR has little jurisprudence on discrimination compared with the ECJ. The limitation both on the face of Article 14 and in its interpretation by the Court, along with the use of the doctrine of the “margin of appreciation” undermines the chances of success of many discrimination cases. In an effort to move the ECtHR towards more favourable case law in discrimination, lawyers might invoke the principles enumerated in the Race Directive and ECJ jurisprudence.

As the mandates of the courts increasingly overlap, the relationship between the two will require clarification. To date it is unclear how exactly discrimination jurisprudence will be cross-fertilised between the two courts. It should be noted that in its judgments the ECJ does on occasion refer to the European Convention on Human Rights and Strasbourg case law. For example in its 7 January 2004 judgment in *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, the ECJ considered Article 12 of the ECHR in the context of the right of transsexuals to marry. Earlier, in *P v S and Cornwall County Council*, the ECJ called on equality principles expressed in Strasbourg jurisprudence.³⁵ Obviously, the more often lawyers make use of the cross-fertilising jurisprudence before regional and international bodies; the more likely judges are to take account of other jurisprudence when producing judgements.

³⁵ ECJ [1996] IRLR 347

5. Resources

Litigation can be very resource intensive and a lack of funds or available expertise poses a constant challenge when taking cases to international courts and bodies. The shortage of funds is more critical given the limited resources of most NGOs, and those lawyers who tend to take on discrimination cases.

There is limited financial aid available to certain regional courts. In the case of Luxembourg, legal aid is available for indigent persons. The Strasbourg Court may provide financial aid to applicants once their case has been deemed admissible. There is no funding available currently to assist with submitting communications to the UN treaty bodies. The precarious financial position of the Office of the High Commissioner for Human Rights means that funding for communications from the UN itself is highly unlikely for the foreseeable future. The London Workshop noted however, that successful cases might encourage certain governments to provide international legal aid. In certain states, the submission of successful communications to UN Treaty bodies has resulted in governments establishing systems of reimbursement for lawyers' costs in such cases. Such a system is worth lobbying for.

In the absence of securing funding from the courts or States, NGOs and discrimination lawyers need to elaborate case selection criteria³⁶ and also work to create a greater pool of lawyers prepared and equipped to take discrimination cases. Across the region, the willingness and ability of local lawyers to take on race discrimination cases varies enormously. For example, in some Central and Eastern European countries, the stigma attached to taking on cases involving Roma victims deters lawyers from representing Roma clients. In addition to building the capacity of lawyers in both the Race Directive and the practice of discrimination litigation, networks need to be established to support lawyers in their work on race discrimination. The London Workshop identified the creation of a regional network of discrimination lawyers as critical in the progress of litigation under the Race Directive, and the practicalities of such a network are now being investigated by INTERIGHTS.

³⁶ Case selection criteria can be found on the websites of the following specialised bodies: Commission for Racial Equality (http://www.cre.gov.uk/legaladv/assist_cre.html), the Irish Equality Authority (<http://www.equality.ie/services.shtml>) and the Equality Commission for Northern Ireland (<http://www.equalityni.org>)

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CHAPTER FOUR:

STRATEGIC LITIGATION IN PRACTICE

1. European Roma Rights Center's experience in strategic litigation

The European Roma Rights Center (ERRC) provides legal assistance to Romani victims of human rights violations. These cases are predominantly those in which Roma are subjected to racially motivated violence or racial discrimination. Through a Legal Defence Programme, we provide funds for local lawyers or national public interest law organisations to represent Romani victims in domestic courts. If no domestic remedy is obtained, ERRC and the local partner will often take the case to an international court or tribunal, principally the European Court of Human Rights or an appropriate UN Treaty Body. In the future we will bring ethnic discrimination cases to the European Court of Justice.

We cannot support every case. We therefore apply the principles of strategic litigation. In determining which cases to support we use the following criteria:

- whether the case raises an issue of general public importance with respect to the protection of the rights of Roma;
- whether the case constitutes a particularly grave violation of human rights;
- the quality of legal representation and the viability of the proposed legal strategy;
- the potential for the case to have an impact on similar cases or on domestic jurisprudence;
- the potential for publicity about the case to serve a wider educational purpose.

At the end of October 2003, we had 120 cases pending before domestic courts, 32 before the European Court of Human Rights, and five before UN Treaty Bodies.

Some of the problems encountered and lessons learned

A. Proving discrimination

Problem: Under present legislation in many countries it is difficult for the victim to provide proof of discrimination, to use as evidence before a Court. An example:

Katalin F. case

A Hungarian Romani woman, Katalin F., found a newspaper advertisement for a position as a hotel maid. She telephoned the hotel to see if the job was still available and was told it was. Upon arrival, the receptionist asked her to wait and went to the Manager's office behind the reception. Katalin overheard the receptionist tell the Manager that a "young gypsy girl was applying for the job". She also heard the Manager's response that "I hate Gypsies and would never employ them in my hotel". The receptionist came back and informed Katalin that the position had been filled. When the case came to trial the hotel denied that Katalin had ever applied for the job. Despite telephone records proving she had called the hotel, and her descriptions of the incident to other people (including local officials) the same day, the court said that she had not met her burden of proving she had applied for the job. On appeal, the second instance court fully accepted the reasoning of the first instance court. The case is pending before the Hungarian Supreme Court.

Solution: Use of situational testing, in which different individuals (or groups of individuals) who are as similar as possible in all characteristics except race or ethnicity, are sent out to document whether one individual (or

group) is treated differently from another, is becoming an accepted form of evidence before courts in the region for ethnic discrimination cases, particularly those on access to places of public accommodation. Testing is of great help in providing facts to presume that discrimination has taken place, and in turn shifting the burden of proof to the respondent. Testing was developed as a tool in Europe by the UK Commission for Racial Equality. The use of hidden cameras and tape recorders is also becoming an accepted form of evidence before Courts, although some Courts view testing as provocation and recording as against the principle of equality of arms between parties to the litigation. ERRC and its national partners use situational testing as evidence for many discrimination cases.

B. Obtaining statistics and using statistics as evidence

Another problem is the difficulty in obtaining statistics due to national data protection laws that make it harder for statistics to be compiled on racial ethnicity, and once obtained, in using these as evidence of widespread discrimination.

Ostrava case

ERRC and Czech partners have an important case pending before the European Court in Strasbourg, filed in April 2000. Eight months of detailed research provided a comprehensive statistical basis to the complaint, in which 18 Romani children from the Czech city of Ostrava challenged the system of racial segregation in Czech schools. Each applicant, ranging from 9 to 15 years of age, was assigned to a special school for pupils with learning difficulties, a system that has been abused by Czech officials to place disproportionate numbers of Roma children in special schools. In Ostrava, the proportion was 27 Roma to 1 non-Roma in special schools. The syllabus taught in special schools is far inferior to that taught in “normal” schools. An administrative action and subsequent application to the Czech Constitutional Court were unsuccessful as the court ruled that it had no jurisdiction to consider statistical evidence.

Solution: Courts should allow victims to invoke statistical data to establish the existence of direct or in-direct racial discrimination. This should shift the burden of proof to the respondent. In gender discrimination cases, statistics are widely available and used. Conditions would, of course, need to be established for acceptable ethnic monitoring, based on clear procedures and well-defined objectives.

C. Quality of domestic legislation

The quality of anti-discrimination provisions in domestic legislation is problematic. Most Central, Eastern and South-Eastern European States have broad constitutional standards on fundamental rights. However criminal, civil and administrative laws often have unclear or non-existent anti-discrimination provisions. An example:

Miroslav Lacko case

Shortly after entering the railway station restaurant in Kosice, Slovakia, Mr Lacko and his friends were told to leave by the waitress as the owner of the restaurant had ordered that Roma should not be served. This policy was confirmed by the manager of the restaurant. A complaint was filed with the District Prosecutor and with the Slovak Inspectorate of Commerce, responsible for overseeing the lawful operation of commercial

enterprises. Both bodies found no evidence that an offence had been committed under Slovak law and that said there was no further legal remedy available. ERRC and a local partner submitted a petition to the Committee on the Elimination of Racial Discrimination. After the complaint was found admissible by the Committee on the Elimination of Racial Discrimination (CERD), the Slovak Prosecutor General took the case seriously. CERD held that the State had an obligation to provide a criminal prosecution for such conduct. The restaurant owner was eventually sentenced to a fine for inciting racial hatred, the only Slovak criminal law under which a prosecution could be brought against this type of discrimination.

Lesson learned: Each State should have on its Statute Book a single anti-discrimination law that encompasses the EC Race Directive, the International Convention on the Elimination of Racial Discrimination, and ECRI's General Policy Recommendation no 7. This would make it simpler for the legal profession (lawyers and judges) and the public to understand the scope, content and sheer importance of anti-discrimination measures. The Bulgarian "Protection Against Discrimination Act", passed in September 2003, is a particularly good example of best-practice legislation. ERRC and other public interest law organisations can play a strong role in advocating for effective domestic anti-discrimination legislation and in helping to draft legislation, or commenting on draft laws.

D. Plaintiff withdraws from lawsuit due to victimisation

We have found that in some cases, the plaintiff may withdraw from a lawsuit due to a fear of victimisation or other pressure. The very sensitive nature of many discrimination cases, especially ones in health care and education, in which the plaintiff would need to receive a public service from the respondent at some time in the future, may result in the applicant withdrawing consent. Pressure by a hospital, by a local government official and by the husband of a sterilised woman were the reasons for three victims to drop their claims in coercive sterilisation cases in Slovakia. In a Croatian education discrimination case, the local authorities threatened to cut the social benefits of the parents of the applicants and to no longer provide free text books.

Solution: Once specific remedies against victimisation are incorporated into domestic law, their effective implementation is a legal solution to this practice. In addition, local community support is important in helping the applicant to counter victimisation or other pressure.

E. Individual cases do not necessarily change wide-spread discriminatory practices

It is quite clear that individual cases, however strategically important, do not necessarily change wide-spread discriminatory practices. ERRC and a Hungarian partner brought a case before a Hungarian Court, in which Roma were denied access to public accommodation, a disco. The company running the discotheque were found guilty and fined. But they still bar Roma from entering, using the pretext of a membership card system.

Solution: Strategic litigation together with media/communications work and advocacy, such as issuing press releases or holding press conferences, publishing country specific or issue specific reports and writing to heads of government, is ERRC's preferred way to inform the public, government, judiciary and international community about wide-spread ethnic discrimination practices in a country, and to try to change those practices. This was used successfully in the Croatian education case.

F. Attitudes of legal practitioners to racial discrimination cases

In many countries in the region the general legal culture among lawyers is one of finding problems rather than finding solutions. It can also be difficult to find experienced lawyers who are willing to take on discrimination cases on behalf of Roma victims. Many Judges apparently disregard international standards, although this is changing, particularly around EU law which is seen to carry more weight.

Solution: There is a role for NGOs to help to educate the legal profession. An emphasis on EU standards may be a good strategy for lawyers taking on discrimination cases, supported by international treaty law. With more discrimination cases being decided by domestic courts, rather than eventually going to an international tribunal, there is more of a need to introduce international case law at the domestic level, for example through a formal or informal *amicus* brief³⁷. So called “forum shopping”, choosing the best tribunal to hear a case, is important for certain types of discrimination cases, depending on the violation at issue. The European Court should not necessarily be seen as the first choice for international litigation. One of the UN Committees might be a better choice (and probably quicker), especially on public accommodation or housing cases (CERD).

European Roma Rights Center

2. Discrimination in education: Considerations in devising a strategy³⁸

Applying the outlines in the preceding chapters of the EC Race Directive and the principles of case selection, this section lists possible considerations in devising a strategy with respect to discrimination in education. While not exhaustive, this list aims to assist in consolidating an approach to strategic litigation on the issue. Although these considerations specifically relate to education, similar factors would be relevant in devising a strategy with respect to housing or other common spheres of discrimination.

Readers of the Manual can take themselves through a similar process with respect to some hypothetical cases provided in Annex Four to this Manual.

A. Identifying issues to be addressed

Possible issues arising in an educational context include:

- Segregation
 - Separate schools for racial/ethnic minority students.
 - Separate classes for racial/ethnic minority students within integrated schools.

³⁷ An *amicus* is a ‘friend of the court’ who assists the court on points of law in a particular case. *Amicus* are generally not parties to the proceedings.

³⁸ This section is based on a brief discussion of the issue during a break-out group at the London Workshop.

- Racial/ethnic minority students being educated in special schools for children with learning disabilities.
- Ways being found to educate non-minority children outside integrated school systems.
- “Private tutoring” of minority children.
- Poor quality of education.
 - The poor quality of education and schooling provided to minority children (failure to provide basic educational amenities, overcrowded, no heating, ill treatment by teachers etc.).
 - Minority children being withdrawn from core classes, denying the ability to learn core subjects and ultimately proceed to higher education and employment.
 - Assumptions made about children’s abilities based on their minority status.
- Quotas for minorities in integrated schools.
- Abuse and ill treatment.
 - Minority children receiving harsher discipline, including increased likelihood of corporal punishment.
 - Expulsion, suspension and suggestion of children being withdrawn.
 - Racial harassment of children in integrated schools.
- Additional discrimination faced by children from minorities who are disabled.

B. Means

i. Choice of plaintiffs

- Consider having more rather than fewer plaintiffs, given the natural attrition rate of plaintiffs in lengthy and difficult litigation.
 - Problem with getting parents to sign powers of attorney.
 - Problem of keeping in touch with Traveller or Roma families.
 - Problems of literacy.
 - Problems of dealing with community leaders, where they exist. Need to work with a diverse group of leaders in settlements so that you are not reliant on one set of parents for all of your litigation. Problem of absence of community leaders in other contexts.
 - Problem with trust diminishing over time as litigation becomes lengthy and difficult.
- What possibilities exist for group action: not have individual applicants, but an organisation on behalf of a group. Do interest groups have standing to file cases?
- Village or city school students?
 - What is the aim of the litigation? If the aim is to solve problems in a particular area, it will make sense to concentrate on that area. If a more policy-driven approach is required, you may wish to consider:
 - Ability to access and work with clients (might be easier in smaller communities).
 - Higher likelihood of victimisation in smaller communities.
 - Ease of evidence-collection (might be easier in smaller communities).
 - City teachers and school authorities may be friendlier to discussions about discrimination, more helpful with information and more likely to change their approach.
- Where reasons are given to discriminate against students (for example, “they don’t speak the national language”) find plaintiffs to whom such excuses do not apply (for example, students who are fluent in the national language).

ii. Victimisation

As with all discrimination cases, in education cases there is a possibility of victimisation of those pursuing litigation.

The following are worth considering:

- Is victimisation likely? From whom? Against whom?
- What preventative measures might be taken? What remedial measures?
- Is the victimisation likely to extend beyond the applicants, to the whole community in which the applicant lives, and external people who support or assist with the litigation?
- Need for community level support, and specific funding for this support. Also desirable to encourage press vigilance.
- While the EU Race Directive provides for protection against victimisation, the Directive is not clear on guidelines for victimisation remedies. Problems will also lie with the effective transposition of the Directive provision on victimisation. There will be need for litigation on failure to provide a remedy for victimisation.
- In some jurisdictions, discrimination by association is already illegal.

Remember: litigation is a long and often difficult process for individuals and communities alike, which demands comprehensive on-site client support.

iii. Evidence

Evidentiary issues that might arise in the context of proving discrimination in education include:

- How to collect statistics to support discrimination claims:
 - Are official statistics available?
 - If official statistics are unavailable, will local educational inspectorates cooperate? Will quasi-government authorities such as the Ombudsman assist? In an ERRC education case in Croatia, the Deputy Ombudsman was helpful in providing statistical information.
 - Can statistics be collected on a school-to-school basis, asking schools to provide information on the students, certificates etc.?
 - Do problems of personal data legislation arise?
 - The ideal case would hold the possibility of securing statistical information easily and with minimal cost. In the ERRC's Ostrava application, the collection of statistical evidence took a number of people eight months to complete, with considerable costs incurred.
- Situational testing might be useful in some contexts:
 - Situational testing can be used with respect to discriminatory enrolment procedures, where minority children are rejected from schools on the basis that there are no places or that they do not live in a region covered by the school. This has been used in countries such as Bulgaria and Ireland to reveal discriminatory practices.
- What to do in the absence of statistical information or situational testing?
 - For example, would it be possible to shift the burden of proof on the basis of political statements?
- Use of experts: might include government officials, teachers, education experts.
 - Can foreign expert witnesses be used in the case? Are they necessary?
 - This will obviously depend on the jurisdiction. Many States' maintain lists of official experts, which

might be supplemented only when necessary. Consider how best to argue that local expertise does not exist? Will foreign experts from certain countries be more palatable politically than experts from other countries?

- When is expert evidence most likely to be accepted? Submit and get it accepted early in the proceedings?
- We should be aware of the double-edged sword of using student results in evidence. For example, if you are planning on using poor student results to demonstrate the absence of an adequate education due to segregated education of minority students, the statistics might equally be used by the authorities to demonstrate poor scholastic performance, arguing that such students therefore require segregated education.

iv. Invoking international jurisprudence

- Will comparative or international jurisprudence in pleadings be accepted by the court?
 - If so, the jurisprudence of which countries would hold the most weight? Strasbourg decisions? Decisions of neighbouring countries? Political allies?
 - Generally Strasbourg and European Court of Justice judgments will carry the most weight, particularly in accession countries.
 - If not, how might international standards and jurisprudence otherwise be introduced? Would local experts give evidence to this effect? Can judges be trained? Provided with information on international law either directly or indirectly (e.g., through the publication of articles in journals read by judges)?
 - Can you file briefs of amicus curiae in domestic courts? Should you try?

v. Available local remedies

- What local remedies are available? Civil, administrative or constitutional remedies?
 - What limits on remedies are provided by the State? Are they effective?
 - Might you argue for civil remedies that you know the courts cannot grant, so as to allow for an Article 13 challenge in Strasbourg?
 - Constitutional Courts may have the power to strike out laws or give guidance on new legislation. How can these best be utilised in the educational context? Might they be supplemented by lobbying for ministerial decrees to support court judgments?
- Are criminal remedies appropriate?
 - Is it possible, for example, to argue that failure to provide education endangers minors in criminal terms?
 - Expert evidence secured in criminal trials, might later be useful in civil claims.
 - Are standards of proof too high? What is the likelihood of success? What would be the impact on a civil case if a criminal case was to be lost? Would criminal prosecutions prove too difficult politically?
- Is it possible to pursue disciplinary proceedings against teachers who ill-treat students?
 - What effect will this have in the case in question? Will behaviour actually change on the ground?
- Would compensation alone provide an adequate remedy? Would it be adequate for the victims? Would it provide more of a political than legal remedy?
- Is it possible to secure more innovative remedies, such as requirements for staff training, reviews of policies and procedures etc? What follow up is required to ensure that these are effective? Can the Ombudsman or civil society actors be enlisted to support such follow-up?

- Do local remedies conform to the EU Race Directive and ECJ jurisprudence?
 - Will Courts be prepared to invoke remedies that are not on inscribed in their domestic laws?

vi. Forum

- Is there a choice of domestic forum?
 - Must cases be sent to Commissioners or Commissions, before they can be considered by a court?
 - Does the case law of certain domestic courts give more hope of a favourable decision? A speedier decision?
- Which international fora are available?
 - Would the European Court of Human Rights or the UN human rights treaties provide greater likelihood of success?
 - How about speed of consideration?
 - Consider the existing case law: Which has the strongest jurisprudence on discrimination in respect of education?
 - Consider admissibility requirements for international fora.

C. Other matters of strategy in international litigation

- Is the issue given to a regional or international approach?
 - Would it benefit from similar cases being brought from other States?
 - Which States have similar issues? Which might proceed through Strasbourg or the UN more swiftly?
 - For example, Traveller children in Ireland face very similar discrimination in respect to education as Roma children in Central Europe. Successful educational cases from Ireland might push forward the law equally with respect to Roma children.
- How might the strategy be enforced by advocacy approaches?
 - At a local level, for example, requests to specialised bodies to draft codes of practice in education? Lobbying of Ministers of Education? Teachers' Unions?
 - Internationally, enlisting the support of the UN Special Rapporteur on Education etc.

The European Roma Rights Center, INTERIGHTS

CHAPTER FIVE:

DIRECT EFFECT OF THE EC RACE DIRECTIVE – ANTICIPATING THE APPROACH OF EUROPEAN COURT OF JUSTICE (ECJ)

1. Introduction

To say that European Community ("EC") law has direct effect means that individuals can, under certain conditions, assert EC law before national courts in order to invoke their Community rights. The European Court of Justice (the "ECJ" or the "Court") first developed the concept of direct effect in *Van Gend & Loos*³⁹. *Van Gend & Loos*⁴⁰ gave individuals the power to directly invoke EC law in the form of Treaty Articles⁴¹ against a Member State in national courts. The doctrine of direct effect provides that if Community law is sufficiently precise and unconditional, it can create private rights and obligations for individuals which are enforceable by those individuals before their national courts regardless of whether the Member State has acted to implement the particular Community norm into its national law.⁴²

The ECJ subsequently expanded the doctrine of direct effect by confirming that EC regulations are directly applicable and also by establishing the direct effect of decisions and directives.⁴³ It became an accepted principle that directives, regulations, decisions and Treaty Articles are directly effective, at least against Member States. In other words, individuals can assert these four forms of EC law in national courts directly against Member States; this concept is known as *vertical direct effect*. Decisions, Treaty Articles and regulations can also be invoked directly by an individual in a national court against other individuals - i.e., they have *horizontal direct effect*.

The doctrine of direct effect as applied to Directives is different than that as applied to Treaty provisions or to Regulations. Specifically, although Directives can serve to grant individuals rights that they can enforce against their respective governments (so-called "vertical" direct effect), the ECJ continues to reject arguments that Directives should impose upon those same individuals obligations which can be enforced against them or by them against other individuals (so-called "horizontal" direct effect). Thus, although an individual may rely upon the provisions of a Directive for the purpose of enforcing against its Member State the rights prescribed therein or, similarly, as a defence against the attempted enforcement by such Member State of a national rule

³⁹ In 1963, the Court decided *Van Gend & Loos* in which it established the notion of direct effect. Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105 (1963). In *Van Gend & Loos*, the *Van Gend & Loos* company had imported chemical substances from Germany into the Netherlands. The company was charged by Customs and Excise with an import duty which the company alleged had been increased since the time of coming into force of the EEC Treaty, contrary to Article 12 of the EEC Treaty. Treaty Establishing the European Economic Community, March 25, 1957, art. 12 (now art. 25), 298 U.N.T.S. 11 [hereinafter EEC Treaty]. The payment of the duty was appealed before the Dutch Tariefcommissie and the appellant raised Article 12 in its argument. *Van Gend & Loos*, 1963 E.C.R. at 17. The Tariefcommissie then referred two questions to the ECJ, one of which was whether nationals of a Member State can, on the basis of Article 12, lay claim to individual rights which must be protected by the courts. Id. The ECJ concluded that "independently of the legislation of Member States, Community law ... not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."

⁴⁰ Although the concept of direct effect was established in *Van Gend & Loos*, the notion of direct applicability originates in Article 249 of the EC Treaty (ex art. 189). Consolidated Version of the Treaty Establishing the European Community, December 24, 2002, O.J. (C 325/33) [hereinafter EC Treaty]. For the purposes of this Memo, when "ex art." appears in parentheses after a citation to an EC Treaty Article, this reference is to the former Article as it appeared in the EEC Treaty.

⁴¹ Under EC law, Treaty Articles are a form of primary legislation, whereas regulations, directives and decisions are forms of secondary legislation, established by Article 249 of the EC Treaty. See EC Treaty art. 249 (ex art. 189).

⁴² The indirect-direct effect of European Community Directives. John M. Appleton, 5 UCLA J. Int'l L. & For. Aff. 59

⁴³ See Case 39/72, *Commission v. Italy*, 1973 E.C.R. 101, [1973] 3 C.M.L.R. 439 (1973) (confirming the direct applicability of regulations as established by Article 249 of the EC Treaty); Case 9/70, *Franz Grad v. Finanzamt Traunstein*, 1970 E.C.R. 825, [1971] C.M.L.R. 1 (1971) (establishing the direct effect of decisions); *Van Gend & Loos*, 1963 E.C.R. 1 (establishing the direct effect of directives). Notably, a directive can only be directly effective if the Member State in question has seriously mis-implemented the directive into national law or if it has failed to implement the directive altogether. See Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, I-5408, 2 C.M.L.R. 66 (1991)

which does not conform with a Directive,⁴⁴ Directives are not capable of establishing rights that private parties can assert in their national courts against other private parties. In this sense, the doctrine of direct effect as applied to Directives has inherent limitations as a tool for enforcing Community law.

The Court has resisted establishing horizontal direct effect for directives. For example, the Court has stated that directives are only binding on the Member State to whom they are addressed and therefore they cannot be used against individuals or non-state entities.⁴⁵

Under current EC case law, an individual who is wronged due to an unimplemented or seriously mis-implemented EC directive has a cause of action if the perpetrator is a Member State, but does not have a cause of action if the perpetrator is an individual or a non-state entity. In this way, the lack of horizontal direct effect for directives makes EC law less powerful because it limits access to potential defendants and arbitrarily leaves some plaintiffs without a cause of action.⁴⁶

2. Existing EU forms of legislation

The Court's differing treatment of EC Treaty provisions, regulations, and decisions from directives seems to stem from the power granted to each of these forms of legislation by the language of the EC Treaty. To begin with, the EC Treaty does not spell out who is bound by Treaty Articles or to what extent Treaty Articles are binding. On the other hand, secondary legislation such as directives and regulations is provided for by Article 249 of the EC Treaty.⁴⁷ Article 249 states that a decision is "binding in its entirety upon those to whom it is addressed," but no mention is made in the EC Treaty as to the direct applicability of decisions.

The EC Treaty also contrasts a regulation, which "shall be binding in its entirety and directly applicable in all Member States" with a directive, which "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."⁴⁸ This difference in the Treaty's language has been interpreted by the Court to require the national implementation of directives by Member States, while allowing regulations to be incorporated directly into national law without requiring any extra measures for implementation.⁴⁹

⁴⁴ Case 148/78, *Ratti v. Ratti*, 1979 E.C.R. 1629, [1980] 1 C.M.L.R. 96 (1980).

⁴⁵ See Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723, 749, 1 C.M.L.R. 688 (1986). Helen Marshall, an employee of the Health Authority, was dismissed in 1980 on the ground that she had passed the normal age of retirement applicable to women. Under the Authority's written policy, female employees were to retire at age 60 and male employees at 65. Under national legislation, women became eligible for a state pension at 60, whereas men did not become eligible until the age of 65. However, the national legislation did not impose any obligation on women to retire at 60, because payment of the state or occupational pension would be deferred until actual retirement. Ms. Hampton brought a case before the Industrial Tribunal complaining that her dismissal violated the 1976 Equal Treatment Directive. The Court held that the binding nature of a directive exists only as against the state or states to which it is addressed and therefore could be used by Ms. Marshall as against the Health Authority only insofar as it was an emanation of the state.

⁴⁶ However, the author of this memo argues that with reference to the Race Directive, it could be argued that it has horizontal effect, since it is clearly defined in its scope that it applies both to public and private sectors (Article 3 (1)). To interpret it otherwise, would render the Race Directive completely ineffective.

⁴⁷ EC Treaty art. 249 (ex art. 189).

⁴⁸ *Ibid.*

⁴⁹ See generally Paul Craig & Grainne de Burca, *EU Law: Text, Cases and Materials* 186 (2d ed. 1998)

Given the language of Article 249, it is not surprising that the Court has been much more reluctant to give direct effect to directives than to regulations and decisions.⁵⁰ It takes some manipulation of the wording of the EC Treaty to argue that directives should have direct effect, especially considering that directives leave implementation up to Member States and are therefore necessarily less specific than regulations. Since Member States have substantial leeway in implementing directives, it is difficult to enforce a directive as presented by the EC - i.e., if it is not implemented by the Member State. Also, if the Member State has taken steps to implement the directive, it is difficult to challenge the proper implementation of the directive when the Member State alone has the flexibility to implement the directive as to its form and methods. The ECJ faced these two issues when it expanded the doctrine of vertical direct effect to apply to directives.

3. Individual rights under the directives

As stated above, the Court originally developed the doctrine of direct effect with respect to Treaty Articles. In *Van Gend & Loos*, the ECJ held that under Article 12 (now Article 25) nationals of a Member State can claim individual rights which the domestic courts must protect.⁵¹ The Court concluded that, "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights... and the subjects of which comprise not only Member States but also their nationals." The Court did not conclude that all Treaty articles are directly effective. Rather, a Treaty provision which is capable of direct application must be "clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure."

Notably, *Van Gend & Loos* involved vertical direct effect only; it concerned an action by an individual asserting EC law against emanations of the state, not against other individuals. The Court first considered horizontal direct effect, which occurs when EC law is asserted in a national court by any individual as against another individual, in *Defrenne v. Sabena*.⁵² The Court held that the fact that certain Treaty Articles are addressed to Member States only "does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down."⁵³

In addition to Treaty Articles, the Court considered the direct effectiveness of decisions, regulations and directives. As to regulations, the Court confirmed their direct effect was established by Article 249 and criticized any attempt by a Member State to alter or dilute the requirements of a Community regulation.⁵⁴ This

⁵⁰ Regulations are not necessarily given direct effect by the EC Treaty as the doctrine of direct effect is now understood, because it is possible for regulations to require further legislation by the Member States. They are, however, automatically valid in the Member States. see also Paul P. Craig, Directives: Direct Effect, Indirect Effect and the Construction of National Legislation, 22 Eur. L. Rev. 519 (1997) ("the reluctance to admit that directives can have direct effect is also in part because while Article 189 [now art. 249] states that regulations are directly applicable, this phraseology is not used in relation to directives" (emphasis added)).

⁵¹ Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*,

⁵² *Defrenne v. Belgian State*, 80/70

⁵³ Following *Defrenne*, the Court established the direct effect of various other Treaty Articles, many of which were held to have vertical as well as horizontal direct effect. See Margot Horspool, European Union Law, 1998, at 136 (referring to EC Treaty Articles 28, 29, 30, 31, 39, 43, 49, 81 and 82 as Treaty provisions which the ECJ has concluded have vertical and horizontal direct effect.)

⁵⁴ See Case 39/72, *Commission v. Italy*, 1973 E.C.R. 101, 114, [1973] 3 C.M.L.R. 439 (1973).

holding was later narrowed by *Amsterdam Bulb*⁵⁵, a case in which the Court indicated that a national measure to implement a regulation is invalid only if it "alters, obstructs or obscures the nature of the Community regulation."

The Court addressed the direct enforceability of decisions in *Franz Grad*⁵⁶. Concluding that decisions have direct effect, the ECJ stated that: "It would be incompatible with the binding effect attributed to decisions... to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision."⁵⁷ The Court also concluded that the obligation imposed by the decision in question was sufficiently clear, precise and unconditional so as to meet the *Van Gend & Loos* standards. Thus, at least some decisions are capable of meeting the *Van Gend & Loos* criteria for direct effectiveness. Notably, the question of horizontal direct effect of regulations and decisions has not been specifically addressed by the Court. However, decisions, by their very nature, have direct effect in regard to anyone to whom they are addressed. Also, regulations, by virtue of being "binding in their entirety," have direct effect against any individual or entity that they address.⁵⁸

The Court's decisions regarding the direct effectiveness of Treaty provisions, regulations and decisions creates doubts regarding its discourse on directives. *Van Duyn* established the direct effect of directives.⁵⁹ In that case, the Court concluded that the possibility relying on directives directly before national courts could not be ruled out; each provision must be examined in context to determine whether the obligation it imposes or the right it creates is sufficiently clear and concise to be capable of being applied directly by a national court.⁶⁰ At first glance, it does not appear that a directive should be capable of meeting the standards for direct effectiveness set out in *Van Gend & Loos*, namely that an EC law provision be clear, precise, unconditional and independent of any national implementing measure. A directive may leave some discretion to the Member State, it will always require further implementation according to the explicit terms of Article 249, and it might not be sufficiently precise to allow for proper national judicial enforcement. In fact, if the Court had adhered to the initial standard set out in *Van Gend & Loos*, directives could not be capable of direct effect, because by their nature they are dependent on national implementing measures. However, as mentioned earlier, the Court relaxed the *Van Gend & Loos* standards over time, which allowed it to conclude in *Van Duyn* that directives could have direct effect. After *Van Duyn*, a directive needs only to impose a clear, precise and complete obligation on a Member State in order to be directly effective; a Member State may exercise discretion without eliminating the possibility that the directive be directly effective as long as the clear, precise and complete criteria are met.

⁵⁵ Case 50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen*, 1977 E.C.R. 137, 146, 2 C.M.L.R. 218 (1977)

⁵⁶ Case 9/70, *Franz Grad v. Finanzamt Traunstein*, 1970 E.C.R. 825, [1971] C.M.L.R. 1 (1971).

⁵⁷ *Ibid*

⁵⁸ EC Treaty art. 249 (ex art. 189).

⁵⁹ See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, 1 C.M.L.R. 1 (1975).

⁶⁰ Several questions were presented to the ECJ, including whether direct effect could apply to Directive 64/221. See *id.* See also Council Directive 64/221, 1952-67 O.J. Spec. Ed. (L 850/64) 117.

4. Expanding the doctrine of direct effect: the definition of Member State, indirect effect and Francovich liability

So far this chapter has discussed the nature and binding character of the EU legislation and directives in particular, as well as the actions taken by the ECJ to enhance the effectiveness of EC law by expanding the doctrine of direct effect to cover ever more types of EC legislation. Following *Van Gend & Loos* and *Van Duyn*, however, the Court limited this expansion, namely with its decision in *Marshall*.⁶¹ The case involved a conflict between a local policy and an EC law directive where the local Health Authority was acting in accordance with its policy and not the EC directive.⁶² The ECJ concluded that the direct effect of a directive could only be pleaded by an individual against the Member State that failed to implement it and not against a non-state entity or individual who failed to observe it.

In other words, directives have vertical direct effect but not horizontal direct effect.⁶³ The Court reasoned that the binding nature of a directive exists only in relation to the Member States to which it is addressed.⁶⁴ "It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person." This holding is inconsistent with the Court's ruling in *Defrenne v. Sabena* that Article 119 (now Article 141) applies to individuals as well as to Member States, although it was expressly addressed only to Member States. Therefore, in any future case that might be brought under Race Directive, it is worth questioning the viability of the Court's holding that directives do not have horizontal direct effect.

As a result of the Court's failure to establish horizontal direct effect for directives, the Court took an alternative route to enhance the potency of EC law. This alternative route included:

- i. the expansion of the definition of a Member State, which allows for a larger pool of potential defendants;⁶⁵
- ii. the development of the principle of indirect effect, under which Member State courts are required to read domestic legislation in light of EC law, even if the domestic law was created before the EC law directive,⁶⁶ and

⁶¹ See Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Auth.*

⁶² As it turned out in *Marshall*, only vertical direct effect was at issue because the Court determined that the local Health Authority was a public authority.

⁶³ The ECJ confirmed its *Marshall* holding in *Faccini Dori v. Recreb*, in which Dori sought to rely on a right contained in a non-implemented directive to resist the enforcement against her of a contract she had entered into with Recreb. See Case C-91/92, *Faccini Dori v. Recreb*, 1994 E.C.R. I-3325, 1 C.M.L.R. 665 (1995).

⁶⁴ See *Marshall*

⁶⁵ See, in chronological order: *Marshall*, 1986 E.C.R. 723 (concluding that the Health Authority constituted an organ of the State; therefore, the directive could be enforced against the Health Authority); Case 103/88, *Fratelli Costanzo SpA v. Comune di Milano*, 1989 E.C.R. 1839, 3 C.M.L.R. 239 (1989) (concluding that if the directive is of such a nature that an individual may rely on it as against a Member State, the individual may also rely on it as against all organs of the administration, including decentralized authorities such as municipalities); Case C-188/89, *Foster v. British Gas plc*, 1990 E.C.R. I-3313, 2 C.M.L.R. 833 (1990) (holding that an individual can rely on a directive against any body that is responsible for providing a public service under the control of the State, if such directive could be relied upon as against the Member State itself).

⁶⁶ See, in chronological order: Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, 2 C.M.L.R. 430 (1984); Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135, 1 C.M.L.R. 305 (1992).

- iii. Francovich liability, which is the principle that Member States can be liable in damages for a breach of EC law, including the failure to implement or the serious mis-implementation of a directive.⁶⁷

i. Expansion of the Definition of Member State

The Court embarked on its expansion of the definition of a Member State in *Marshall*.⁶⁸ In *Marshall*, the ECJ concluded that the Health Authority constituted an organ of the State; therefore, the claimant in that case could rely on the directive in question against the Health Authority. The ECJ held that it does not matter in what capacity the Member State is acting. A subsequent case broadened the definition of a state even more. In *Fratelli Costanzo*, the ECJ concluded that, "when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions."⁶⁹

The Court furthered this line of reasoning in *Foster v. British Gas* where it held that: [The provisions of a directive capable of having direct effect]... may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.⁷⁰

It is clear that the ECJ increased the number of plaintiffs who could directly invoke EC law when a State fails either to implement a directive or to implement a directive without serious mis-implementation. In other words, it was looking for one way to fill the gap left by its refusal to apply horizontal direct effect to directives.

ii. The doctrine of indirect effect

At the same time that the Court was expanding the definition of a Member State, it developed the principle of indirect effect. This principle requires national law to be interpreted in light of EC directives. "By urging national courts to read domestic law in such a way as to conform to the provisions of directives, the Court attempted to ensure that directives would be given some effect despite the absence of proper domestic

⁶⁷ See *Francovich*, 1991 E.C.R. I-5357. The ECJ held that although the provisions of the directive were not precise enough for the directive to be directly effective, the directive nevertheless clearly intended to confer rights of which these individuals had been deprived through the State's failure to implement it. See *id.* Notably, Francovich liability applies to directives that are not otherwise directly effective, as well as to those that are. Although *Francovich* concerned a directive that did not have direct effect, *Brasserie du Pecheur* concluded that Francovich liability extended to directly effective directives as well. See *Francovich*, 1991 E.C.R. at I-5385 (holding that a Member State can be liable in damages to individuals for failing to give effect to a non-directly effective directive); Case C 46/93, *Brasserie du Pecheur SA v. Germany*, 1996 E.C.R. I-1029, 1 C.M.L.R. 889 (1996) (holding that a Member State can be liable in damages to individuals for failing to give effect to a directly effective directive).

⁶⁸ *Marshall*, 1986

⁶⁹ Case 103/88, *Fratelli Costanzo SpA v. Comune di Milano*, 1989 E.C.R. 1839, 3 C.M.L.R. 239 (1989). The issue in *Fratelli Costanzo* was whether a municipal authority was bound by an EC directive if it was determined that the Italian law in question was found to be incompatible with the directive. The ECJ held that it was so bound.

⁷⁰ Case C-188/89, *Foster v. British Gas plc*, 1990 E.C.R. I-3313, I-3349, 2 C.M.L.R. 833 (1990). The issue in *Foster* was whether British Gas - a privatized, yet nationalized industry with responsibility for and a monopoly of the gas-supply system in Great Britain - was a body of the type against which the provisions of a directive could be invoked. The Court ruled that it was.

implementation."⁷¹ The principle of indirect effect was first established in *Von Colson*, where the Court held that "in applying the national law ... national courts are required to interpret their national law in the light of the wording and the purpose of the Directive..."⁷²

Interestingly, the directive in question in *Von Colson* was insufficiently precise to have direct effect.⁷³ Therefore, by requiring the national courts to read the domestic legislation in light of the directive, the Court gave effect to a directive that would not otherwise have been enforceable by individuals as against even a public authority.

The Court expanded upon its *Von Colson* ruling by holding in a subsequent case that national law must be interpreted in light of an EC directive whether the national law is enacted before or after the directive.⁷⁴ In *Marleasing*, the ECJ stated that the national court is to interpret the directive "as far as possible" in light of the wording and purpose of the directive.⁷⁵ It can be argued that this language really leaves it entirely within the Member State courts' discretion whether or not to read the national law in light of the EC directive. Yet another interpretation is that it is not clear just what *Marleasing* requires, because the "as far as possible" language is surrounded by language implying that the duty to interpret national law in light of a directive is an absolute obligation.⁷⁶

In view of case law following *Marleasing*, it appears that the decision to interpret national law in light of a directive is solely within national courts' discretion. Cases after *Marleasing* restricted the doctrine of indirect effect that it broadened. The ECJ "seemed to leave it to the discretion of the national court whether or not an interpretation in conformity with a Directive was possible."⁷⁷

⁷¹ See generally Paul Craig & Grainne de Burca, *EU Law: Text, Cases and Materials* 186 (2d ed. 1998).

⁷² Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, 1909, 2 C.M.L.R. 430 (1984). The case involves a claim by applicants to a German prison that they were discriminated against on grounds of sex in violation of the 1976 Equal Treatment Directive. The question was whether the directive required the appointment of the complainants to a post, because under German law, which purported to implement the directive, the complainants were allowed reliance loss only. (In this case, the reliance loss was reimbursement of one of the plaintiffs' travelling expenses.) The Court ruled that appointment to a post was not necessary, but that the directive did require German law to provide an adequate and effective remedy. (For a detailed analysis of this case see John M. Appleton, *The indirect-direct effect of European Community Directives*, 5 *UCLA J. Int'l L. & For. Aff.* 59)

⁷³ Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, 31 *N.Y.U. J. Int'l L. & Pol.* 307, 326 (1999) (stating that *Von Colson* illustrates that indirect effect applies in cases in which a directive has no direct effect because it fails the *Van Gend & Loos/Van Duyn* criteria).

⁷⁴ Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135, I-4159, 1 C.M.L.R. 305 (1992) ("In applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive ..."). *Marleasing* involved two non-state companies in which the plaintiff company sued the defendant company in order to have the defendant company's articles of association declared void as having been created for the sole purpose of defrauding and evading creditors, including *Marleasing*. Under the Spanish Commercial Code, "lack of cause" is a ground for nullity of articles of association; however, "lack of cause" is not a ground for nullity under Council Directive 68/151, which should have been implemented by Spain. Spain had determined that its existing Commercial Code sufficiently implemented the directive. The Court declared that all Member States have a duty to take all appropriate measures to fulfill their obligations under the Treaty and to abstain from any measure which could jeopardize the attainment of Treaty objectives.

⁷⁵ *Ibid.*

⁷⁶ See Grainne de Burca, *Giving Effect to European Community Directives*, 55 *Mod. L. Rev.* 215, 227 (1992) (stating that the meaning of "as far as possible" is not clear given the fact that other parts of *Marleasing* are phrased in terms of an absolute obligation on national courts to construe domestic law in conformity with directives). The article additionally indicates that if an absolute obligation to read national law in light of a directive is established by *Marleasing*, this would obviate the distinction between the national court's obligation to interpret the directive and the direct enforcement of directives against individuals. It would do this without addressing the policy concerns the ECJ seems to have with horizontal direct effect. Such a contention implies that either the Court is being very disingenuous or it necessarily is not requiring an absolute obligation to interpret national law in light of a directive.

⁷⁷ Craig & de Burca, *EU Law: Text, Cases and Materials* 186 (2d ed. 1998). The book goes on to cite three cases, *Wagner-Miret*, *Faccini Dori* and *El Corte Ingles* and explains that in each of these cases the ECJ accepted the limits of interpretation found by the national courts. See *id.* at 203 (citing Case C-192/94, *El Corte Ingles v. Cristina Blazques Rivero*, 1996 E.C.R. I-1281, 2 C.M.L.R. 507 (1996); Case C-91/92, *Faccini Dori v. Recreb*, 1994 E.C.R. I-3325, 1 C.M.L.R. 665 (1995); and Case C-334/92, *Wagner-Miret v. Fondo de Garantia Salarial*, 1993 E.C.R. I-6911, 2 C.M.L.R. 49 (1995)).

Also, the Court went so far as to dissuade national courts from interpreting directives in a way that would cause them to have horizontal direct effect.⁷⁸ In *Luciano Arcaro*, the Court recited a national court's obligation under *Marleasing* and concluded that: "[The] obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed..."⁷⁹

In any case, considering that *Marleasing* involved one individual asserting EC law against another individual, indirect effect under *Marleasing* is a substitute for horizontal direct effect for directives. It is at least possible after *Marleasing* to obtain the results of horizontal direct effect for directives without a formal acceptance of the horizontal direct effect doctrine by the ECJ. However, since indirect effect is strictly dependent on the interpretation of the national court in question, obtaining results that are comparable to the result that would be obtained if horizontal direct effect were applied to directives is at the whim of the national court. Thus, indirect effect does not fill the gap in the effectiveness of EC law left by the lack of horizontal direct effect of directives.

iii. Francovich liability

A third doctrine applied by the Court in order to expand the protection of individual rights, is Francovich liability. Francovich⁸⁰ was initially brought as two separate cases. The issues involved in those cases essentially were the same and, thus, the ECJ joined the two cases in returning a combined ruling. Each case concerned the failure of the Republic of Italy to have transposed into national law Council Directive 80/987⁸¹ on the approximation of laws of the Member States relating to the protection of employees in the event of their employer's bankruptcy. Specifically, Directive 80/987 provided that the Member States were required to establish certain guarantee funds to ensure that employees would be able to receive payment of unpaid wages arising prior to one of three dates, the selection of which was left to the Member State to decide in implementing the Directive into national law.⁸² The Directive also provided that the Member State could limit the maximum payment obligation to either three months or eight weeks pay and could establish a ceiling on the maximum amount of damages recoverable, provided that the social objectives of the Directive were still met.

The deadline for transposing this Directive into national law was October 23, 1983. Italy failed to meet this deadline, and eventually the Commission brought an Article 169 enforcement proceeding against Italy.⁸³ In February 1989, the ECJ returned a judgment against Italy for failure to fulfill its Treaty obligations. Less than two months following this ruling, Mr. Bonifaci and 33 of his co-workers brought an action before the national court claiming that their employer had been declared insolvent four years earlier and that significant wages were still owed. The plaintiffs contended that since the Republic of Italy had failed to implement Directive 80/987 in a timely manner, it should be ordered to pay to the aggrieved employees the minimum amounts

⁷⁸ Craig & de Burca, *ibid*, at 204. The authors propose that: The Court can be seen not simply leaving it to national courts to decide how far they wish to go in interpreting national law in the light of directives, but apparently dissuading them from seeking such a harmonious interpretation where the end result might be seen as a form of horizontal direct effect.

⁷⁹ C-168/95, *Criminal Proceedings Against Luciano Arcaro*, 1996 E.C.R. I-4705, I-4730, 1 C.M.L.R. 179 (1997).

⁸⁰ Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66 (1991).

⁸¹ 1980 O.J. (L 283) 23.

⁸² See *id.* The Member States could select from: (a) the date of the onset of insolvency; (b) the date that the notice of dismissal was issued to the employee; or (c) allowing an option between either "a" or "b."

⁸³ See Case 22/87, *EC Commission v. Italy*, 1989 E.C.R. I-143, [1993] 2 C.M.L.R. 66 (1993).

that would have been guaranteed under the Directive. The Italian national court stayed the proceedings and, in December 1989, referred the matter to the ECJ for a preliminary ruling. This case eventually was joined with a claim brought earlier by Mr. Andrea Francovich under similar circumstances.

In each case, the principle question presented to the ECJ was identical: is a private individual who had been adversely affected by Italy's failure to have implemented Directive 80/987 entitled to (1) require that Italian courts give effect to the Directive so as to allow that individual to recover the guarantees that would have been provided had the Directive been implemented in a timely manner, or, alternatively (2) be compensated for the damages sustained? On the surface, the two parts of this question appear to be identical. The first aspect of the question, however, related to the nature of the guarantees by which the payments were to be ensured. Specifically, Article 5 of Directive 80/937 required Member States to establish particular rules for the financing and operation of institutions that were to provide the financial guarantees of the required payments. The Member States, however, were not obligated to provide the guarantees themselves. Clearly, the strategy of the plaintiffs in the instant cases was to emphasize that the Member States, and not just the insolvent employers, had specific obligations arising out of the Directive that could be translated into a duty to pay monetary compensation. If the plaintiffs could establish that this provision of the Directive should be ascribed direct effect, it might be possible to recover damages directly from the Italian government within the framework of the already well-established doctrine of direct effect, despite the fact that it was actually the employers that had been obligated under the Directive to make the payments.

The first aspect of this question, therefore, required a determination that the obligation contained in the Directive was sufficiently precise and unconditional so as to have direct effect. An affirmative answer to this question seemed questionable, however, since the Directive explicitly granted leeway to the Member States to adopt alternative structures for operating and financing the guarantee institutions. Furthermore, the Member States had been provided with absolute discretion to establish the date prior to which employees must be able to obtain payment of their outstanding claims and to establish a ceiling on the maximum payment obligation. While the ECJ concluded that the Directive was sufficiently precise with regard both to the fundamental contents of the guarantees (that minimum payments would be secured) and the persons entitled to the guarantee (the employees), it went on to reject the plaintiffs' argument, ruling that the provisions of the Directive were not sufficiently precise in respect of the identity of the party that was to be held liable to pay under the guarantees.⁸⁴ As such, the individual plaintiffs were not entitled to rely upon the Directive as against the Member State. The doctrine of direct effect, therefore, provided no relief.

As to the second aspect of this question, the ECJ adopted a much more liberal approach. In reaching its decision, the ECJ reasoned that "the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law for which a Member State can be held responsible."⁸⁵ It followed, the ECJ concluded, that where the effectiveness of a Community rule is subject to prior action by a Member State and, in the absence of such action, individuals are unable to enforce the rights granted to them under the Community rule, "the possibility of compensation by the Member State

⁸⁴ See *Francovich*, 1991 E.C.R. I-5357.

⁸⁵ *Ibid*

is particularly indispensable."⁸⁶ As such, the ECJ held that a Member State could, in fact, be held liable for monetary damages based on its failure to implement a particular Directive properly, provided that three conditions were met: (1) the Directive must entail a specific grant of rights to individuals; (2) the contents of those rights must be identifiable from the face of the Directive; and (3) there must be a causal link between the breach by the Member State's of its obligation and the harm suffered by the individuals.⁸⁷

Therefore, instead of attempting to enforce a directive against another private party in violation of a directive, an individual can seek damages from the Member State for failure to implement the directive altogether or for serious mis-implementation.⁸⁸ In this way, Francovich liability serves as an alternative to the lack of horizontal direct effect for directives. As O'Keefe puts it, indirect effect and Francovich liability "allow individuals to claim remedies based on a directive even in a situation such as that in *Marleasing*, thus avoiding the denial of the remedy established by *Marshall I*."⁸⁹

However, *Francovich* does have its limits. Member State liability is subject to the fulfilment of various conditions. For example, three conditions must be fulfilled under *Francovich* in order for liability to attach to a Member State: 1) the purpose of the directive must be to grant rights to individuals; 2) it must be possible to identify the content of those rights on the basis of the provisions of the directive; and 3) there must be a causal link between the breach of the State's obligation and the damage suffered. Also, Member State liability does not exist for every kind of infringement of EC obligations, but only for "sufficiently serious" violations. Although subsequent cases have helped to make the *Francovich* criteria less ambiguous,⁹⁰ the basic conditions established in *Francovich* persist. Therefore, the explicit language of the doctrine itself places limits on its applicability.

5. Conclusions

Where a Directive is sufficiently precise and unconditional, the doctrine of direct effect provides that the legal norms contained in such Directive are to serve as Community legal norms upon which private individuals may rely against their Member States. The scope of this doctrine, however, is limited to situations where a precise

⁸⁶ Ibid.

⁸⁷ See Ibid

⁸⁸ Under *Francovich* an individual is able to sue a Member State for damages sustained at the hand of another individual due to the non-implementation of a directive. As stated earlier, Francovich liability applies regardless of whether the directive does or does not have direct effect.

⁸⁹ David O'Keefe, *Judicial Protection of the Individual By The European Court of Justice*, 19 *Fordham Int'l L. J.* 901, 905-06 (1996). O'Keefe's reference to *Marshall I* is the same case referred to in this memo as *Marshall*. There is a counterpart to the *Marshall* case concerning damages only, which O'Keefe addresses in his article and which explains the distinction he makes between *Marshall I* and *Marshall II*.

⁹⁰ See Case C 46/93, *Brasserie du Pecheur SA v. Germany*, 1996 E.C.R. I-1029, 1 C.M.L.R. 889 (1996) (establishing factors to be considered to determine a serious breach under *Francovich* where transposition of the directive has been imperfect); Joined Cases C-178-79/94 & C-188-190/94, *Dillenkofer v. Germany*, 1996 E.C.R. I-4845, 3 C.M.L.R. 469 (1996) (concluding that failure to transpose a directive altogether automatically constitutes a sufficiently serious breach under *Francovich*). The factors established by *Brasserie du Pecheur* to be considered in determining whether a breach is sufficiently serious include: 1) the clarity and precision of the rule breached; 2) the measure of discretion left by that rule to national or Community authorities; 3) whether the infringement and the damage caused was intentional or involuntary; 4) whether any error of law was excusable or inexcusable; 5) the fact that the position taken by a Community institution may have contributed towards the omission; and 6) the adoption or retention of national measures or practices contrary to Community law. See *Brasserie du Pecheur*, 1996 E.C.R. at I-1150.

norm can be asserted as a defence against the attempted enforcement of a national rule that does not conform to the Community Directive or where an individual strives to enforce certain rights against the Member State provided for within the Directive. Further, this right comes into being only upon the expiration of the deadline for the Member State to have transposed the Directive in question into national law.

The doctrine of indirect effect or Directive-conform interpretation addresses the limitations in the doctrine of direct-effect as national courts are required, as far as possible, to interpret their own national law in accordance with the wording and intent of Community Directives - within both the “public” and the “private” context. This is true even if such Directives are not sufficiently precise and irrespective of whether the deadline for the Member State to transpose such Directives into national law has lapsed or whether the national law in question was enacted prior or subsequent to the relevant Directive.

When a directive has not been implemented but is directly effective, individuals may rely on the directive itself without waiting for its implementation. The *Francovich* doctrine of state liability, provided for the first time individuals with a civil damages remedy provided that the goals contemplated in the directive could not be achieved through either the doctrine of direct effect or the doctrine of directive – conform interpretation of the national law.

6. Implications for the Race Directive

In view of the above, creative lawyering with reliance on the *Francovich* ruling is key to the successful implementation of the Race Directive. Where the effectiveness of a Community directive is subject to prior action by a EU member state and, in the absence of such action, individuals are unable to enforce the rights granted to them under the Community rule, “the possibility of compensation by the Member State is particularly indispensable.”⁹¹

Moreover, in *Brasserie du Pecheur* the ECJ concluded that a member state could be liable in damages to individuals for failing to give effect to a directly effective directive. Hence, a domestic court could find the state itself liable for the damages an individual is unable to recover from a private party due to the state's failure to implement a directive, regardless of its applicability.

Finally, litigation under the Race Directive should make use of the other doctrine developed by the Court, i.e. the obligation of national courts to interpret their own national law in accordance with the wording and intent of the directive. This is irrespective of whether the deadline for the member state to transpose such directives into national law has lapsed or whether the national law in question was enacted prior or subsequent to the relevant directive.

⁹¹ *Francovich*

In conclusion, the community of human rights lawyers should be able to rely on the direct effect of the Race Directive:

- i. To bring claims against a state defendant in a test case, such as *Francovich*, and request that the state concerned be held responsible for damages caused to individuals as a result of its failure to pass the laws protecting them, and
- ii. In the absence of adequate domestic implementation, make use of the directive in a creative way, under the Van Colson and Marleasing doctrine, interpreting the directive “as far as possible” in light of its wording and purpose, within both the “private” and “public” context.

European Roma Rights Center

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ANNEX ONE:

TEXT OF THE EC RACE DIRECTIVE

EN Official Journal of the European Communities 19.7.2000 L 180/22

COUNCIL DIRECTIVE 2000/43/EC of 29 June 2000

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

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission (Not yet published in the Official Journal.),

Having regard to the opinion of the European Parliament (Opinion delivered on 18.5.2000 [not yet published in the Official Journal]),

Having regard to the opinion of the Economic and Social Committee (Opinion delivered on 12.4.2000 [not yet published in the Official Journal]),

Having regard to the opinion of the Committee of the Regions (Opinion delivered on 31.5.2000 [not yet published in the Official Journal]),

Whereas:

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

(2) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and should 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.

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

(4) It is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.

(5) The European Parliament has adopted a number of Resolutions on the fight against racism in the European Union.

(6) The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.

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

(8) The Employment Guidelines 2000 agreed by the European Council in Helsinki, on 10 and 11 December 1999, stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.

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

(10) The Commission presented a communication on racism, xenophobia and anti-Semitism in December 1995.

(11) The Council adopted on 15 July 1996 Joint Action (96/443/JHA) concerning action to combat racism and xenophobia (OJ L 185, 24.7.1996, p. 5.) under which the Member States undertake to ensure effective judicial cooperation in respect of offences based on racist or xenophobic behaviour.

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

social security and healthcare, social advantages and access to and supply of goods and services.

(13) To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.

(14) In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.

(16) It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members.

(17) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for

disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organizations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.

(18) In very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(19) Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.

(20) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

(21) The rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

(22) Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to

prove the facts, which it is for the court or competent body to investigate.

(23) Member States should promote dialogue between the social partners and with non-governmental organizations to address different forms of discrimination and to combat them.

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

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

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

(27) The Member States may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements, provided that the Member States take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive.

(28) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty, the objective of this Directive, namely ensuring a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the

proposed action, be better achieved by the Community. This Directive does not go beyond what is necessary in order to achieve those objectives,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

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

For the purposes of paragraph 1:

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

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the

means of achieving that aim are appropriate and necessary.

Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3

Scope

Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

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

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

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

(d) membership of and involvement in an organisation of workers or employers, or any organisation

whose members carry on a particular profession, including the benefits provided for by such organisations;

(e) social protection, including social security and healthcare;

(f) social advantages;

(g) education;

(h) access to and supply of goods and services which are available to the public, including housing.

This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 4

Genuine and determining occupational requirements

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

Article 5

Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Article 6

Minimum requirements

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

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

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 7

Defence of rights

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

Member States shall ensure that associations, organizations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 8

Burden of proof

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

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

Paragraph 1 shall not apply to criminal procedures.

Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).

Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 9

Victimisation

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

Article 10

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

Article 11

Social dialogue

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

Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum

requirements laid down by this Directive and the relevant national implementing measures.

Article 12

Dialogue with non-governmental organizations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

CHAPTER III

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13

Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination, publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER IV

FINAL PROVISIONS

Article 14

Compliance

Member States shall take the necessary measures to ensure that:

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

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

Article 15

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 16

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003 or may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements. In such cases, Member States shall ensure that by 19 July 2003, management and labour introduce the necessary measures by agreement, Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 17

Report

1. Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

The Commission's report shall take into account, as appropriate, the views of the European Monitoring Centre on Racism and Xenophobia, as well as the viewpoints of the social partners and relevant non-governmental organisations. In accordance with

the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 18

Entry into force

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

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Luxembourg, 29 June 2000.

For the Council

The President

M. ARCANJO

ANNEX TWO:

TRANSPOSITION TABLE

(current to 1 January 2004⁹²)

⁹² Prepared by Migration Policy Group

Legislation

	Constitutional Provisions	Civil and Administrative Law	Criminal Law
AUSTRIA	Art. 7 B-VG, Art. 2 Basic Law, Arts. 63, 66 and 67 Treaty of St Germain, Art. 1 Constitutional law of 3-7-73 implementing ICERD	Draft Equal Treatment Act, Art. IX(1)n°3-4 of Introductory provisions to the Code of Administrative Procedure, Labour Law	Offence committed for racist and xenophobic reasons = aggravating factors (§33Z5 Penal code), Arts. 321, 283 Penal code
BELGIUM	Arts. 10 and 11 and 191 Constitution	Act of 25 February 2003 pertaining to the combat of discrimination and to the amendment of the Act of 15 February 1993 pertaining to the foundation of a Centre for equal opportunities and opposition to racism: regional competences have led to legislation in the Flemish and Brussels' departments, and is still under preparation in the Walloon region and in the French and German Communities	Act of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia, amended in 2003
BULGARIA	Art. 6 Constitution. Also, international treaties prevail over national law, but not over the Constitution.	Protection Against Discrimination Act, adopted in 2003, also many references in other legislative instruments.	Art. 10(1) and (2) and 439b(2.2) Criminal Procedure Code, Arts. 162, 163, 164 and 172 Criminal Code
CZECH REPUBLIC	Charter of Fundamental Rights and Freedoms, containing a general anti-discrimination clause, is part of the Constitutional order	Law on Consumer Protection, Labour Code, Law on Employment, Civil Code, Civil Procedure Code, Code of Administrative Court Procedure, Law on Minorities, Draft general law on equal treatment and protection against discrimination	Sections 196, 197, 198, 198a, 219-235, 257, 260, 261 Criminal Code, amended Law 140/1961
DENMARK	None	Act on the Prohibition of Differential Treatment on the Labour Market etc. (to be amended), Act on Equal Treatment irrespective of ethnic origin (No. 155) adopted in 2003 (does not concern discrimination in the labour market)	Prohibition of dissemination of expression of racial prejudice (Section 266b criminal code), Act on Prohibition of Discrimination based on Race etc.
ESTONIA	Art. 12 Constitution	Art. 3 Law on Cultural Autonomy of National Minority, Art. 10 Law on Employment Contracts, Art. 5 Law on Wages, Art 6 Law on Employment Service, Art. 6 Law on Advertising, Art. 6 Code of Civil Procedure, Draft law on equality and equal treatment	Arts. 89 (crimes against humanity), 90 (prohibition of genocide), 151 (incitement), 152 (violation of equality), Penal Code, Art. 13 Code of Criminal Law Procedure
FINLAND	Section 6 Constitution	Equality Act (HE 44/2003), Employment Contracts Act, Employment Services Act, and several other acts	Sections 11:9 and 47:3 Penal Code
FRANCE	Preamble to the Constitution, Art. 1 Constitution	Labour Code, Act 2001-1066 on the Fight Against Discrimination, Law 29 July 1981 on the freedom of press, 1972 and 1990 anti-racism laws	Arts. 121.2, 225.1, 225.2, 225.4, 226.19, 226.24, 432.7 new Penal Code
GERMANY	Arts. 3.1 and 3.3 Basic Law (Constitution)	Civil Services codes, Labour Law, Works Constitution Act, Social Security Act, etc., draft legislation expected in 2004	No explicit provisions prohibiting discrimination on the basis of racial or ethnic origin, religion or belief, section 130 Criminal Code: incitement to racial hatred
GREECE	Art. 5.2.a Constitution 1975/1986/2001	Of relevance: Art. 57 Civil code, Aliens Law 2910/2001, Law 2472/1997 on data protection, legislation and code of conduct on radio and television. Proposed legislation: Bill on Application of the principle of equal treatment irrespective of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation.	Law 927/1979 (amended by Laws 1419/1984 and 2910/2001) on Punishment of Acts or Activities Aiming at Racial Discrimination, Art. 192 Penal Code
HUNGARY	Art. 70/A Constitution, extended by decision 61/1992 Constitutional Court	Act No 125 of 2003 on Equal Treatment and the Fostering of Equal Opportunity (ETA), Art. 5 Labour Code, Art. 2 Promotion of Employment and Support for the Unemployed, Art. 7(1) Healthcare Act, Art. 3(2) Child Protection Act, Art. 4(7) Public Education Act, Art. 76 Civil Code, Art. 3(2) Media Act, Arts. 3(5) and 4 Minorities Act	Arts. 155, 157, 174b, 269 Penal Code
IRELAND	Arts. 40.1, 40.3.1, 40.3.2, 44.3.3 Constitution	Employment Equality Act 1998 (draft amendments pending), Equal Status Act 2000 (draft amendments pending), Unfair dismissal Act 1973-1993	Prohibition of Incitement to Hatred Act 1989, Video Recording Act, Criminal Justice (Public Order) Act 1994, Offences Against the State Act 1939
ITALY	Art. 3 Constitution	Presidential Decree 215 of 9 July 2003 implementing Directive 2000/43, Immigration Act, Labour law, Education law, Immigration and legal condition of foreigners Act	Prohibition of dissemination of expression of racial prejudice (Art. 1 1993 Act n°205)

LATVIA	Art. 91 Constitution	Arts. 7 and 29 Labour Law, Arts. 1 and 3 Law on Unrestricted Development and Right to Cultural Autonomy of Latvian's Nationalities and Ethnic Groups, Art.3 Law on Scientific Activity, Art. 2 Law on Social Security, (Art. 4(2) Judicial Power Law, Art. 3 Education Law)	Art. 78 (in field of economic, political and social rights) Criminal Code
LITHUANIA	Art. 29 Constitution	Law on Equal Opportunities, adopted 18/11/2003, will enter into force 1/1/2005. Otherwise mainly 'scattered system'; Art. 2 Labour Code (2003), Art. 3 Law on the Legal Status of Aliens in the Republic of Lithuania, Preamble Law on Ethnic Minorities, Art. 3 Law on Religious Communities and Associations, Law on Equal Opportunities of Women and Men, etc.	Art. 169 of New Criminal Code (2003)
LUXEMBOURG	No (Arts. 10bis and 111 Constitution relevant but do not contain an explicit non-discrimination clause)	Law on Integration of Foreigners in Luxembourg Act, 27 July 1993, Labour Law, collective agreements, Art. 10 general statute of civil servants; proposed legislation: Bill to transpose Directive 2000/43/EC	Art. 454 Penal code
NETHERLANDS	Art. 1 Constitution	Civil law provisions on tort, Equal Treatment Act 1994 (amendments proposed to transpose Directive 2000/43/EC), General Act on Administrative law refers to General Principles of Proper Administration; non-discrimination is one of those	Arts. 90quater, 137c,d,e, f, g, 429quater Criminal Code
POLAND	Art. 32(1) and (2) Constitution (general). Arts. 19, 25, 27, 33, 35, 72, 76 Constitution (specific categories)	Chapter 11a Labour Code, otherwise mainly 'scattered system' with non-discrimination clauses in specific legislation, e.g. Art. 13 Education Act, Art. 2a(1) Law on the Social Security System, Art. 27(1) Personal Data Protection Act, Art. 18(1) and (2) Radio and Television Act, Law on Employment and Countering Unemployment, (draft bill on a General Inspectorate for Counteracting Discrimination)	No explicit criminal law provisions
PORTUGAL	Arts. 13 and 15 Constitution	Anti-discrimination Law 134/1999, Employment Act 105/1997, Labour Code, Civil Code and many references in other laws. Proposed legislation: Bill to establish a legal framework to combat discrimination on grounds of racial or ethnic origin.	Arts. 239, 240, 251, and 252 Penal Code; Arts 132 and 146 Law 20/96
ROMANIA	Arts. 1(3) (implicitly), 4(2), 6, 16, 38 and 46 Constitution	Ordinance 137/2000 on Preventing and Punishing All Forms of Discrimination (amended by Ordinance 77/2003), Arts. 5, 6, 59 and 154 Labour Code, Art. 3(1) Law on Health Insurance, Art. 10(1) Law on the National System of Social Assistance, Art. 6d Law on Publicity, Art. 2(3) Unique National Level Collective Agreement	Art. 247 and 317 Penal Code, Emergency Ordinance 31/2002
SLOVAKIA	Arts. 12, 20, 30, 46 Constitution	Section 13(1) new Labour Code, Section 1(4) Public Service Act, Civil code, Civil Procedure Code, Act on Use of Languages of National Minorities, Education Act, Employment Act, legislative proposals pending	Sections 196, 198, 198a, 260, and 261 Criminal Code amended Act 140/1961
SLOVENIA	Arts. 14, 15 and 63 Constitution	Arts. 6, 89 and 133 Employment Relationship Act, Article 4(1) Law on the Legal Status of Religious Communities, Art. 15 Associations Act, Art. 3 Political Parties Act, Art.8 Media Act	Arts. 141, 300, and 373 Penal Code
SPAIN	Arts. 1.1; 9.2, 10, 13.1, 14 Constitution	Law 62/2003 of Fiscal, Administrative and Social Measures, Civil Code, Basic Law on Employment 2003, Worker's Statute 1980, Organic Law 4/2000 on the Rights and Freedoms of Aliens, Law on Religious Freedom 1980, Education System Law 1990, Law on Emergency Measures to Promote Employment 1994, Law on Violations and Sanctions of the Labour Laws 1988	Arts. 22.4, 137bis, 165, 173.4, 181bis, 314, 510-512, 515 and 607.2 Criminal Code
SWEDEN	Chapter 2, Art. 15 Constitution	Act on the Prohibition of Discrimination 2003:307, Act on Measures Against Ethnic Discrimination in Working Life 1999, and many other references in specific legislation	Chapter 16, Art. 9 Criminal Code
TURKEY	Art. 10 Constitution	Civil code (2001), Art. 5 and 18 new Labour Code (2003), Art. 5 Act on Political Parties, Art. 5 Associations Act, Art. 4 National Education Fundamental Act, Art. 4 Act on the Foundation and Broadcasting of Radio and Television, Art. 5 Higher Education Act, Civil Servants Act	Arts. 175, 176, 179.2 and 312 Criminal Code (although no explicit general provision on discrimination, but foreseen in amendment)
UNITED KINGDOM	No written constitution	Great Britain: Race Relations Act 1976, Race Relations (Amendment) Act 2000, Race Regulations 1976 (Amendment) Regulations 2003, ; Northern Ireland: Race Relations (NI) Order 1997, Race Relations Order (Amendment)(NI) Regulations 2003	GB: Public Order Act 1986, Crime and Disorder act 1998; NI: Public Order (NI) Order 1987

Definitions

	Direct Discrimination	Indirect Discrimination	Harassment	Instruction to Discriminate
AUSTRIA	No definition, Art. 6.2 Treaty of Vienna (distinction and definition in draft legislation)	No definition, Art. 6.2 Treaty of Vienna (distinction and definition in draft legislation)	Evolving notion sexual harassment in employment, (general clause included in draft legislation)	"Paras. 12 & 13 Criminal code and 7 Administrative Penal Code, gender, (general clause included in draft legislation)"
BELGIUM	Distinction and definition, Art. 2(1) 2003 Act	Distinction and definition Art. 2(2) 2003 Act	Art. 2(6) 2003 Act, Art. 442bis and ter Criminal Code, Act concerning violence and moral harassment at work (11.6.02)	Art. 2(7) 2003 Act
BULGARIA	Distinction and definition, Arts. 4(1) and 4(2) Protection Against Discrimination Act	Distinction and definition, Arts. 4(1) and 4(3) Protection Against Discrimination Act	Art. 5 of the Protection Against Discrimination Act read with section 1 Additional Provisions	Art. 5 Protection Against Discrimination Act read with section 4 Additional Provisions. Art. 162(1) Criminal Code lacks enforcement.
CZECH REPUBLIC	"Distinction and definition in amended Labour Code and new Law on Employment (not yet published); (draft General Law on Equal Treatment and Protection against Discrimination)"	"Distinction and definition in amended Labour Code and new Law on Employment (not yet published); (draft General Law on Equal Treatment and Protection against Discrimination)"	Amended Labour Code, new Law on Employment	No (to very limited extent in Misdemeanours Law, indirectly in specific laws through liability for damages for unlawful acts)
DENMARK	Distinction, no definition, Art. 1 Act on the Prohibition of Differential Treatment on the Labour Market, defined by jurisprudence	Distinction, no definition, Art. 1 Act on the Prohibition of Differential Treatment on the Labour Market, defined by jurisprudence	Assumed to be within meaning of discrimination in Act on the Prohibition of Differential Treatment in the Labour Market	Act on Ethnic Equality in 2003 in non-employment situations. Not prohibited in relation to employment.
ESTONIA	Notion can be found in domestic law (Art. 12 Constitution) but without distinction and no definition; (proposed legislation includes distinction and definition)	Notion can be found in domestic law (Art. 12 Constitution) but without distinction and no definition; (proposed legislation includes distinction and definition)	Indirectly Art. 3(2) Law on Cultural Autonomy of the National Minorities; (inclusion foreseen in proposed legislation)	Art. 12 Constitution; (inclusion foreseen in proposed legislation)
FINLAND	Distinction and definition Art. 6 Equality Act	Distinction and definition Art. 6 Equality Act	Art. 6 Equality Act. Very serious forms covered by Occupational Safety and Health Act, Sexual Harassment Act, Criminal law	Penal code, Art. 6 Equality Act
FRANCE	No distinction, no definition but case law, Art. 225.1 Penal code and 1881 Law (freedom of press), term introduced in Act 2001-1066 on the Fight Against Discrimination	No distinction, no definition but case law, Art. 225.1 Penal code and 1881 Law (freedom of press), term introduced in Act 2001-1066 on the Fight Against Discrimination	Art. 222-33-2 Penal Code, Arts. 122-46 and 122-49 Labour Code	Not in general prohibited. Arts. 23 and 24 Law 1881 (public incitement to racial or religious discrimination), Art. R625-7 Penal Code (non-public incitement)
GERMANY	Constitutional doctrine, not explicit in legislation	Constitutional doctrine, not explicit in legislation	Libel and slander prohibitions cover some acts of harassment; may be covered by protection of personality rights (tort). Sexual harassment prohibited	May be covered by sections 26 and 185 Penal code (libel, slander); in public law would be breach of Art. 3.1 Basic Law
GREECE	No distinction, no definition; (distinction and definition in proposed legislation)	No distinction, no definition, (distinction and definition in proposed legislation)	Arts. 1 and 2 Law 927/1979, (definition in proposed legislation)	May be covered by Arts. 1 and 3 Law 927/1979, (definition in proposed legislation)
HUNGARY	Distinction and definition Art. 7(1) and 8(1) ETA	Distinction and definition Art. 9 ETA	Art. 10(1) ETA	(In)direct discrimination, harassment, victimisation and segregation are listed in Art 7 as violating equal treatment. Instructing these is also said to be outlawed.
IRELAND	Section 6(1) Employment Equality Act 1998, Section 3(1) & (2) Equal Status Act 2000	Section 31(1) Employment Equality Act 1998, Section 3(1c) Equal Status Act 2000	Section 32 Employment Equality Act, Section 11 Equal Status Act	Section 8(4) Employment Equality Act 1998
ITALY	Distinction and definition Art. 2(1)a) Decree 215/2003, distinction but no definition Art. 43 Immigration Act	Distinction and definition Art. 2(1b) Decree 215/2003, distinction but no definition Art. 43 Immigration Act	Art. 2(3) Decree 215/2003, Criminal law (crimes against honour)	Art. 2(4) Decree 215/2003, Art. 43 Immigration Act

LATVIA	Distinction and definition: Arts. 7 and 29 Labour Law, Art.3 Law on Unrestricted Development and Right to Cultural Autonomy of Latvian's Nationalities and Ethnic Groups, Arts. 78 and 150 Criminal Code	Distinction and definition: Arts. 7, 29(4) and (5) Labour Law Art.3 Law on Unrestricted Development and Right to Cultural Autonomy of Latvian's Nationalities and Ethnic Groups, Arts. 78 and 150 Criminal Code	No (possibly Art. 156 Criminal Code: intentional violations of a person's dignity or oral degradation, future: amendments to Labour Law)	Arts. 20 jo. 78 and 150 Criminal Law, to a very limited extent (future: amendments to Labour Law)
LITHUANIA	No distinction, no definition (definition only with reference to gender); (Art. 2(3) Law on Equal Opportunities: distinction and definition)	No distinction, no definition (definition only with reference to gender); (Art. 2(4) Law on Equal Opportunities: distinction and definition)	Art. 169 Criminal Code (2003), Code of Administrative Violations (sexual harassment); (general definition in Art. 2(5) Law on Equal Opportunities)	Arts. 24 and 169 New Criminal Code (but not specifically for discrimination); (Art. 2(6) Law on Equal Opportunities)
LUXEMBOURG	Definition Art. 454 Penal law, no distinction; (defined in proposed legislation)	No distinction, no definition; (defined in proposed legislation)	Art 454 Penal code: sexual harassment; Art. 10 General statute for civil servants; (defined in proposed legislation)	Case law based on Art. 454 Penal code; (defined in proposed legislation)
NETHERLANDS	Distinction and definition, Art. 1a and b Equal Treatment Act	Distinction and definition, Art. 1a and c Equal Treatment Act. Criminal law: indirect discrimination cannot be objectively justified, Civil law: objective justification	"Rulings from the ETCommission, the ETCommission will not limit the scope to employment but to other areas covered by the ETA; (included in Art. 1a proposed amended Equal Treatment Act)"	"No express provision but falls under definition of discrimination (not necessary to prove intention); (included in Art. 1a proposed amended Equal Treatment Act)"
POLAND	Art 18 ^{3a} para. 3 amended Labour Code, Constitutional Court Definition (draft Bill on General Inspectorate contain distinction and definition)	Art 18 ^{3a} para. 4 amended Labour Code, Constitutional Court Definition (draft Bill on General Inspectorate contain distinction and definition)	amended Labour Code: Penal Code outlaws activities that could be construed as serious forms of harassment	amended Labour Code
PORTUGAL	No distinction, no definition. Art. 3 Anti-discrimination Law 134/1999 (distinction + definition in draft legislation)	No distinction, no definition. Art. 3 Anti-discrimination Law 134/1999 Law 105/1997 on Employment (distinction + definition in draft legislation)	Anti-discrimination Law 134/99, Penal Code (included in draft legislation)	Anti-discrimination Law 134/99, Arts. 26 and 27 Penal Code. (general prohibition included in draft legislation)
ROMANIA	Distinction and definition: Art.2(1) Ord. 137/2000, Art. 4a Law on Equal Opportunities Women and Men, Art. 5(3) Labour Code	Distinction and definition: Art.2(2) Ord. 137/2000, Art. 4a Law on Equal Opportunities Women and Men, Art. 5(4) Labour Code	Sexual harassment (Art. 4c Law on Equal Opportunities, Art. 202 draft Penal Code)	No (removed from Ord. 137/2000 in 2002)
SLOVAKIA	Distinction and definition in Art. 13(1) new Labour Code	Distinction and definition in Art. 13(2) new Labour Code	Art. 13(3) new Labour Code	Sections 158 and 198a Criminal Code
SLOVENIA	Distinction and definition in Art. 6 Employment Relationship Act, in relation to gender: Act on Equal Opportunities for Women and Men	"Distiction and definition in Art. 6 Employment Relationship Act; in relation to gender: Act on Equal Opportunities for Women and Men"	Not mentioned as such, but identifiable concept in e.g. Arts. 34 and 35 Constitution, Arts. 44 and 45 Employment Relationship Act, Art. 10(3) Executing Criminal Sanctions Act	Art. 63 Constitution, Arts. 141 and 300 Penal Code
SPAIN	Distinction and definition, Art. 28(1)b Law 62/2003, Art. 23.1 OL on Rights and Freedoms of Aliens	Distinction and definition, Art. 28(1)c Law 62/2003, Arts. 23.1 and 23.2 OL on Rights and Freedoms of Aliens	Art. 28(1)d Law 62/2003; (Art. 184 Criminal Code)	Art. 28(2) Law 62/2003, Criminal Code, OL on Rights and Freedoms of Aliens
SWEDEN	Art. 8 Act on Measures Against Ethnic Discrimination in Working Life, Art. 3(1) Act on the Prohibition of Discrimination 2003	Art. 9 Act on Measures Against Ethnic Discrimination in Working Life, Art.3(2) Act on the Prohibition of Discrimination 2003	Art. 9a Act on Measures Against Ethnic Discrimination in Working Life, Art. 3(3) Act on the Prohibition of Discrimination 2003	Art. 9b Act on Measures Against Ethnic Discrimination in Working Life, Art. 3(4) Act on the Prohibition of Discrimination 2003
TURKEY	No distinction, no definition	No distinction, no definition	No	No (Art. 312 Criminal Code; to a certain extent)
UNITED KINGDOM	"Distinction and definition; GB: Section 1(1)a and 3.3 Race Relations Order"	"Distinction and definition; GB: Section 1(1)(b) replaced for race and ethnic and national origin by Section 1(1A) Race Relations Act (since 2003 Regulations); NI: Art. 3.1(b) replaced as in GB by Art. 3(1A) Race Relations Order (since 2003 Regulations)"	GB: Section 3A Race Relations Act (since 2003 Regulations); NI: Art. 4A Race Relations Order (since 2003 Regulations)	GB: Section 30 (and 31) Race Relations Act, NI: Arts. 30 (and 31) Race Relations Order

Material scope

	Access to employment	Training	Employment, Working Conditions	Membership, Involvement in Organisations
AUSTRIA	Constitution: public sector; (included in draft legislation) Art. 2(4) 2003 Act, Art. 2bis 1981 Act	Constitution: public sector; (included in draft legislation) Art. 2bis 1981 Act, draft provisions of legislative act of Flemish Region and of Walloon Region	Constitution: public sector; (included in draft legislation) Art. 2(4) 2003 Act, Art. 2bis 1981 Act	Constitution: public sector; (included in draft legislation) Art. 23 Constitution, Art. 2 1981 Act
BELGIUM	Art. 6, 12 and 26 Protection Against Discrimination Act, Constitutional ban on discrimination	Art. 6, 15 and Chapter 2 Protection Against Discrimination Act, Constitution. To a certain extent covered by incorporated definitions of international and national law	Chapter 2, Title I Protection Against Discrimination Act, Constitution	Chapter 2, Title III Protection Against Discrimination Act, Constitution. Specific acts, e.g. Art. 29(1)8 Animal Breeding Act, Arts. 9.1 and 29(1)1 Trades Act
BULGARIA	Section 1, para. 1 Law on Employment, Labour Code, Art. 26 §2 of the Charter, Law on Employment, amended Art. 1§1 and 2 Law on Employment, Art. 1 §3 and 4 Labour Code	No (only for persons who are already engaged in economic activities; re-training etc.)	Included in non-discrimination clause in Labour Code	No
CZECH REPUBLIC	Section 2 and 3 Act on Prohibition of Differential Treatment on the Labour Market	Act on Prohibition of Differential Treatment based on Race etc., principle of equality in administrative law	Section 2 Act on Prohibition of Differential Treatment on the Labour Market	No
DENMARK	Arts. 12 (and 29) Constitution, Arts. 6 and 10.1 Law on Employment Contracts; (draft legislation)	Arts. 12 Constitution, Art. 10.1 Law on Employment Contracts; (draft legislation)	Arts. 12 Constitution, Art. 10.1 Law on Employment Contracts; (draft legislation)	Arts. 12, 29 Constitution, Art. 10.1 Law on Employment Contracts; (draft legislation)
ESTONIA	Chapter II, section 6 Constitution, Art. 47.3 Penal code, Employment Contracts Act, Art. 2 Equality Act	Chapter II, section 6 Constitution, Art. 47.3 Penal code, Employment Contracts Act, Art. 2 Equality Act	Chapter II, section 6 Constitution, Art. 47.3 Penal code, Employment Contracts Act, Art. 2 Equality Act	Chapter II, section 6 Constitution, Art. 2 Equality Act
FINLAND	Art. L 122-45 Labour Code, Act 2001-1066 on the Fight Against Discrimination	Constitution, Act 2001-1066 on the Fight Against Discrimination	Art. L 122-35 Labour Code, Act 2001-1066 on the Fight Against Discrimination	Constitution, administrative law, Act 2001-1066 on the Fight Against Discrimination
FRANCE	Art. 3 Basic Law	Art. 3 Basic Law	Art. 3 Basic Law	Art. 3 Basic Law
GERMANY	Art. 5 ICERD (Law 494/1970), Art. 4 Civil Code, jurisprudence Supreme Civil and Criminal Court, (proposed legislation)	Partly Art. 5 ICERD (Law 494/1970), no express provision in Law on Vocational Training (709/1977), (proposed legislation)	Partly Art. 5 ICERD (Law 494/1970), Art. 4 Civil Code, jurisprudence Supreme Civil and Criminal Court, (proposed legislation)	Art. 7.1 Law 1264/1982, partly Art. 5 ICERD (Law 494/1970), (proposed legislation)
GREECE	Art. 21(a) ETA	Art. 21(d) ETA	Art. 21(a) and (e) ETA	Art. 21(g) ETA (only employees' organisations)
HUNGARY	Art. 40.3-1-2 Constitution, Sections 2,8,13 Employment Equality Act 1998 (proposed amendment will include self-employment)	Section 8, section 12(1)-(2) Employment Equality Act 1998, section 7(2)b Equal Status Act 2000	Sections 8, 29 Employment Equality Act 1998, Unfair Dismissal Act 1977-93	Section 13 Employment Equality Act 1998
IRELAND	Art. 3(1)a Decree 215/2003, Arts. 43.c, 43.e Immigration Act	Art. 3(1)c Decree 215/2003, Arts. 43.c, 43.e Immigration Act	Art. 3(1)b Decree 215/2003, Arts. 43.c, 43.e Immigration Act	Art. 3(1)d Decree 215/2003, Arts. 43.d of Immigration Act
ITALY	Art. 7 Labour Law, Art. 91 Constitution (but lacks horizontal effect)	Art. 29(1) Labour Law, Art. 3 Law on Education, Art. 91 Constitution (but lacks horizontal effect)	Arts. 29(1) and 60 (1) Labour Law, Art. 91 Constitution (but lacks horizontal effect)	Art. 2 Law on Trade Unions, Art. 2(2) Law on Organisations of Employers and Their Associations, Art. 8 Labour Law (none includes an express non-discrimination)
LATVIA				

LITHUANIA	Art. 29 Constitution, Art. 169 Criminal Code, Art. 3 Law on the Legal Status of Aliens in the Republic of Lithuania, Art. 2 Labour Code and related specific legislation	Art. 29 Constitution, Art. 169 Criminal Code, Art. 3 Law on the Legal Status of Aliens in the Republic of Lithuania, Art. 2 Labour Code and related specific legislation	Art. 29 Constitution, Art. 169 Criminal Code, Art. 3 Law on the Legal Status of Aliens in the Republic of Lithuania, Art. 2 Labour Code and related specific legislation
LUXEMBOURG	Penal Code, (probably covered by proposed legislation)	Penal Code, (probably covered by proposed legislation)	Possible interpretation judicial power of Art. 455 Penal Code to cover this, (probably covered by proposed legislation)
NETHERLANDS	Arts. 5(1)a-c Equal Treatment Act, Criminal Code, Civil Code	Arts. 5(1)e and 7(1) Equal Treatment Act, Criminal Code, Civil Code	Case law: (included in Art. 6a draft amendments to Equal Treatment Act)
POLAND	Art. 65 Constitution, Art. 18 ^{3a} para. 1, Art. 11(2) and (3) Labour Code, Law on Employment and Countering Unemployment	Art. 65 Constitution, Art. 18 ^{3a} para. 1, Arts. 17 in connection with 103, Art. 11(2) and (3) Labour Code, Art. 15(1) Law on Employment and Countering Unemployment	Art. 59 Constitution, Trade Unions Act, Employers' Unions Act
PORTUGAL	Art. 4 Anti-discrimination law 134/1999	Art. 4 Anti-discrimination law 134/1999	Art. 4 Anti-discrimination law 134/1999
ROMANIA	Ordinance 137/2000 on Preventing and Punishing All Forms of Discrimination, Art. 5 Labour Code	Ordinance 137/2000 on Preventing and Punishing All Forms of Discrimination, Art. 5 Labour Code	Ordinance 137/2000 on Preventing and Punishing All Forms of Discrimination, Art. 5 Labour Code
SLOVAKIA	Constitution, Arts. 1, 6 and Section 41(8) new Labour Code, Employment Act, Public Service Act	Art. 1 and Section 13 new Labour Code	Section 13(1) new Labour Code, Act on the Association of Citizens
SLOVENIA	Art. 49 Constitution, Art. 6 Employment Relationship Act, Public Servants Act	Constitution, Art. 6 Employment Relationship Act	Constitution
SPAIN	Art. 29 Law 62/2003, Art. 14 Constitution, Criminal Law, Social law, OL on Rights and Freedoms of Aliens	Art. 29 Law 62/2003, Art. 14 Constitution, Criminal Law, Social law, OL on Rights and Freedoms of Aliens	Art. 29 and 34 Law 62/2003, Art. 14 Constitution, Criminal Law, Social law, OL on Rights and Freedoms of Aliens
SWEDEN	Constitution, Criminal Code, Act on Measures Against Ethnic Discrimination in Working Life, Act on the Prohibition of Discrimination 2003	Criminal Code, Act on Measures Against Ethnic Discrimination in Working Life, Act on the Prohibition of Discrimination 2003	Constitution, Criminal Code, Act on the Prohibition of Discrimination 2003
TURKEY	Art. 10 read with Arts. 48-50 Constitution, Art. 5 new Labour Code	Constitution, Art. 5 new Labour Code (Vocational Education Act does not contain explicit non-discrimination clause)	Art. 10 read with Arts. 51 and 135 Constitution, Arts. 20 and 31 Trade Unions Act
UNITED KINGDOM	GB: Part II Race Relations Act, NI: Part II Race Relations Order	GB: Part II Race Relations Act, NI: Part II Race Relations Order	GB: trade unions, employers orgs., etc. section 11, other associations sections 25-26, Part III Race Relations Act, NI: trade unions, employers orgs., etc. Art. 13, Part II, other associations, Art. 25, Part III Race Relations Order

Material scope

	Social Protection	Social advantages	Education	Goods and services
AUSTRIA	Constitution: public sector, (included in draft legislation) Art. 2 2003 Act	Constitution: public sector, (included in draft legislation) Art. 2 2003 Act	Constitution: public sector, (included in draft legislation) Art. 2 2003 Act, competence of the Flemish and French Communities	Constitution: public sector, (included in draft legislation) Art. 2(4) 2003 Act, Art. 2 1981 Act
BELGIUM	Covered by international law and Art. 6 Protection Against Discrimination Act, Constitution	Covered by Constitution, both for public and private sector. Not mentioned in Protection Against Discrimination Act.	Chapter 1, Title II Protection Against Discrimination Act. To a certain extent: incorporated definitions of international law in national law, Constitution	Art. 37 Protection Against Discrimination Act. Also Constitution and international law.
BULGARIA	No (only general non-discrimination clauses in Charter and Civil Code)	No (only general non-discrimination clauses in Charter and Civil Code)	No (only general non-discrimination clauses in Charter and Civil Code)	Art. 6 of the Law on Consumer Protection
CZECH REPUBLIC	2003 Act on Equal Treatment irrespective of ethnic origin, Act on Prohibition of Differential Treatment based on Race etc., principle of equality in administrative law, Health Insurance Act, Hospital services Act	2003 Act on Equal Treatment irrespective of ethnic origin, Act on Prohibition of Differential Treatment based on Race etc., principle of equality in administrative law, Health Insurance Act, Hospital Services Act	2003 Act on Equal Treatment irrespective of ethnic origin, Act on Prohibition of Differential Treatment based on Race etc., principle of equality in administrative law, no direct prohibition of racial discrimination in Danish Folk School Act	2003 Act on Equal Treatment irrespective of ethnic origin, Act on Prohibition of Differential Treatment based on Race etc.
DENMARK	Art. 12, 28 Constitution; (foreseen in draft legislation)	Art. 12 Constitution; (foreseen in draft legislation)	Art. 12 (and 37) Constitution; (foreseen in draft legislation)	No; (foreseen in draft legislation)
ESTONIA	Chapter II, section 6 Constitution, may be reduced by Acts on social security, Art. 2 Equality Act	Chapter II, section 6 Constitution, may be reduced by Acts on social security, Art. 2 Equality Act	Chapter II, section 6 Constitution, Art. 2 Equality Act (but the educational system and the objectives or content of education are excluded)	Art. 2 Equality Act (but not between private persons)
FINLAND	Constitution, administrative law, no specific provision	Constitution, administrative law, no specific provision	Constitution, circulars from Ministry of Education	Constitution, Arts. 225-2 and 432-7 Criminal law, Act 2002-73 on social modernisation (housing)
FRANCE	Art. 3 Basic Law	Art. 3 Basic Law	Art. 3 Basic Law	Art. 3 Basic Law
GERMANY	Art. 39 Aliens Law 2910/2001, Art. 5 ICERD (Law 494/1970); (proposed legislation)	Art. 39 Aliens Law 2910/2001, Art. 5 ICERD (Law 494/1970), Art. 27 Law 3016/2002 on Social Policy explicitly discriminates against non-Greek or EU citizens; (proposed legislation)	Art. 40 Aliens Law 2910/2001 Art. 5 ICERD (Law 494/1970); (proposed legislation)	Art. 3 Law 927/1979, (Law 494/1970); (proposed legislation)
GREECE	Art. 24 and 25 ETA	Art. 24 ETA	Art. 27-29 ETA	Art. 26 and 30 ETA
HUNGARY	Art. 40.1 Constitution, sections 2 and 5(1) Equal Status Act 2000, Ombudsman Act 1980	Art. 40.1 Constitution, sections 2 and 5(1) Equal Status Act 2000, Ombudsman Act 1980	Sections 7(1)-(2) Equal Status Act 2000, Sections 41(3)(b) Education Act 1998, Ministerial Guidelines on Traveller Education in Primary Schools	Sections 2(1), 5(1) Equal Status Act 2000, Art. 40.1 Constitution. Housing: section 6(1), section 6 Equal Status Act
IRELAND	Art. 3(1)e-g Decree 215/2003, Art. 43.c Immigration Act	Art. 3(1)e-g Decree 215/2003, Art. 43.c Immigration Act	Art. 3(1)h Decree 215/2003, Art. 43.c Immigration Act	Art. 3(1) Decree 215/2003, Art. 43.b Immigration Act
ITALY	Arts. 91, 109 and 111 Constitution, Art. 2 Law on Social Security, Art. 16 Medical Care Code (no express guarantee of equality)	Art. 91 Constitution, Art. 3 Law on Social Services and Social Security (no express guarantee of equality)	Art. 3 Law on Education (both public and private sphere)	Art. 91 Constitution (but lacks horizontal effect), Criminal Law (to a very limited extent)
LATVIA				

LITHUANIA	Art. 29 Constitution, Art. 169 Criminal Code, Art. 3 Law on the Legal Status of Aliens in the Republic of Lithuania, Art. 2 Labour Code and related specific legislation	Art. 29 Constitution, Art. 169 Criminal Code, Art. 3 Law on the Legal Status of Aliens in the Republic of Lithuania, Art. 2 Labour Code and related specific legislation	Art. 29 Constitution, Art. 169 Criminal Code, Art. 3 Law on the Legal Status of Aliens in the Republic of Lithuania, Art. 2 Labour Code and related specific legislation
LUXEMBOURG	Penal Code, (probably covered by proposed legislation)	Penal Code, (probably covered by proposed legislation)	Penal Code, (probably covered by proposed legislation)
NETHERLANDS	Equal Treatment Act, Criminal Code, Civil Code, (Art. 7a draft amendments to Equal Treatment Act)	Equal Treatment Act, Criminal Code, Civil Code	Art. 7 Equal Treatment Act, Criminal Code, Civil Code, (Art. 7(1) draft amendments to Equal Treatment Act)
POLAND	Social Assistance Act, Law on Retirement and Disability Pensions from the Social Insurance Fund, Social Security System Act (no explicit non-discrimination clauses)	Social Assistance Act, Law on Retirement and Disability Pensions from the Social Insurance Fund, Social Security System Act (no explicit non-discrimination clauses)	Art. 135 and 138 Code of Minor Offences; Art. 75(1) Constitution (housing)
PORTUGAL	Art. 4 Anti-discrimination law 134/1999, (draft legislation)	Art. 4 Anti-discrimination law 134/1999, (draft legislation)	Art. 4 Anti-discrimination law 134/1999, (draft legislation)
ROMANIA	Ordinance 137/2000 on Preventing and Punishing All Forms of Discrimination, Art. 5 Labour Code	Ordinance 137/2000 on Preventing and Punishing All Forms of Discrimination	Ordinance 137/2000 on Preventing and Punishing All Forms of Discrimination
SLOVAKIA	Art. 12 Constitution, Social Insurance Act	Art. 12 Constitution, Schools Act	Art. 6 Consumer Protection Act
SLOVENIA	Art. 50 Constitution, Art. 4 Social Security Act, Parental Protection and Family Benefit Act, Pension and Invalidity Act	Art. 50 Constitution, Art. 4 Social Security Act, Parental Protection and Family Benefit Act, Pension and Invalidity Act	Constitution, Arts. 79 - 96 Housing Act (race or ethnicity not explicitly mentioned)
SPAIN	Art. 29 Law 62/2003, Art. 14 Constitution, Criminal Law, Social law, OL on Rights and Freedoms of Aliens	Art. 29 Law 62/2003, Art. 14 Constitution, Criminal Law, Social law, OL on Rights and Freedoms of Aliens	Art. 29 Law 62/2003, Art. 14 Constitution, Criminal Law, Social law, OL on Rights and Freedoms of Aliens
SWEDEN	Constitution, Criminal Code, Act on the Prohibition of Discrimination 2003	Only at universities (Equal Treatment of Students at Universities Act); Swedish government admits gap in legislation and a government enquiry is investigating the field	Criminal Code (not proven to be effective), Act on the Prohibition of Discrimination 2003
TURKEY	Art. 10 read with Art. 60 Constitution	Art. 10 read with Art. 42 Constitution, Art. 4 National Education Fundamental Act, Art. 5 Higher Education Act	Art. 10 Constitution, Act No. 4778 (fourth harmonisation package) allows minority foundations to acquire immovable property
UNITED KINGDOM	GB: Part III, including Section 19B Race Relations Act (since 2000 Act), NI: Arts. 20A and 21 Race Relations Order (since 2003 Regulations)	GB: Section 17 Part III Race Relations Act, NI: Art. 18 Part III Race Relations Order	GB: Part III Race Relations Act, NI: Part III Race Relations Order

Genuine and determining occupational requirements, positive action & representation

	Genuine and Determining Occupational Requirement	Legal Provisions for Positive Action	Programmes for Positive Action	Representation by Associations, Organisations or Other Legal Entities
AUSTRIA	No (but included in draft legislation)	Indigenous ethnic groups/ disabled/ women (proposed legislation)	Croat & Slovene minorities/ gender	Where representation by attorney is not compulsory, any natural person can represent victim, including (but not specifically) persons from organisations
BELGIUM	Art. 2(5) 2003 Law	Art. 4 2003 Law	French and Flemish communities: ethnic minorities/gender	Art. 31 2003 Act: Centre for Equal Opportunities and Opposition to Racism and other registered charities and non-profit org. existing for at least 5 years
BULGARIA	Art. 7(2) Protection Against Discrimination Act	Arts. 7, 13, 11, 24, 38 and 39 Protection Against Discrimination Act	Policy document 'Framework Programme for Equal Integration of Roma into Bulgarian Society' and Programme for development of the Roma Community in Sofia	Arts. 47(1)5 and 9, and 71(2) Protection Against Discrimination Act: trade unions and non-profit public interest legal entities
CZECH REPUBLIC	Art. 1 para. 4 Labour Code (broad definition)	No (only for disabled persons)	Roma	Representation by associations with a legitimate interest, trade unions (summary actions foreseen in draft legislation)
DENMARK	On religious grounds: section 6 Act on Prohibition of Differential Treatment on the Labour Market	No general provision but Sections 6(2) and 9(2) Act on Prohibition of Differential Treatment on the Labour Market allows measures in employment in public sector	Minorities in education	If they have power of attorney of complainant
ESTONIA	Art. 2 and 10 (2) Law on Employment Contracts (age, legal capacity, sex, religion and language); Art. 14 Law on Public Service (age educational level, legal capacity, citizenship, official language)	Guarantees in access to education for disabled and the older generation (Art. 4 Law on Basic School and Gymnasium, Art. 14.4 Law on Vocational School, Art. 7.1 Law on Adult Education), disabled persons (Ch. 10 Law on Traffic) (draft legislation)	Mostly education and language, aimed at ethnic and national minorities, disabled and the older generation	Legal entities with a legitimate interest, but only indirectly, on behalf or in support of the victim
FINLAND	Art. 7(2) Equality Act	Art. 7(4) Equality Act, Act on Equality Between Men and Women	Minorities in employment, gender, Action Programme to combat ethnic discrimination and racism	Only lawyers representing legal entities (to a limited extent Equality Act)
FRANCE	Art. L 122-45 Labour Code (sex, age; legitimate objective is required)	Art. 10 Act 2001-1066, Art. L 767-2 Social Security Act, Circular of 18 Jan. 1999 of Ministry of the Interior	Housing, education and equal opportunities for women and young immigrants	Trade Unions (Art. 122-45-1 Labour Code) and other organisations (founded since at least 5 years and with interest and victim's consent)
GERMANY	Gender, religion	Legal provisions in some states.	Minorities, gender discrimination	No (only in relation to environment, competition and consumer protection)
GREECE	No; (in proposed legislation)	Art. 116.2 Constitution (gender), Art. 18 Law 2646/1998 ("vulnerable population groups")	Operational Programme to combat exclusion from the labour market, covers immigrants, Pomaks and Roma. Muslim minority in Thrace (education), several Ministerial Decisions concerning Roma	No; (very limited provision in proposed legislation)
HUNGARY	Art. 22(a) ETA	Chapter IV ETA	Action Programmes, 1999 Medium-term Package: social protection, employment, education, housing Roma, men/women	Yes; Art. 18 ETA
IRELAND	Section 37(2)-(5) Employment Equality Act 1998, Section 5(2) Equal Status Act 2000	Section 33 Employment Equality Act 1998, Section 14(b) Equal Status Act 2000, Housing Act 1998	Traveller community, gender equality in employment	Equality Authority, Human Rights Commission (other organisations, according to proposed amendment Equal Status Act 2000)
ITALY	Art. 3(3) Decree 215/2003, Art. 43(1) Immigration Act	Possibly Art. 3(4) Decree 215/2003	Gender discrimination/public administration	Art. 5 Decree 215/2003: organisations recognised by Department of Equal Opportunities
LATVIA	Arts. 29(2) and (5) Labour Law (resp. gender and race, ethnic origin, religion, etc.)	No	Pilot project concerning disabled persons	Trade unions (Art. 14 Law on Trade Unions and Art. 8 Law on Labour Disputes), certain organisations in administrative procedures

LITHUANIA	No, but Constitutional court ruling would allow certain exemptions to the principle of equal treatment	Art. 92 Labour Code (aimed at disability and age) (Art. 3 Law on Equal Opportunities)	National Action Plan for the Protection and Promotion of Human Rights in Lithuania, projects aimed at participation disabled persons and equal share men / women	Art. 18 Labour Code, Arts. 55 and 56 Civil Procedure Code, Administrative Proceedings Law
LUXEMBOURG	No, (proposed legislation)	Inter alia Law of 29.04.99 amending the Grand Ducal Regulation of 1972 on the employment of foreign workers on the territory of the Grand Duchy of Luxembourg, (proposed legislation)	Certain disadvantaged groups based on racial, ethnic origin, religion, belief, pregnant women (proposed legislation)	Yes (approved list of Ministry of Justice)
NETHERLANDS	Art. 2(4) Equal Treatment Act, (Arts. 2(1) and (4) draft amended Equal Treatment Act)	Art. 2(3) Equal Treatment Act	Participation of minorities in labour market	Yes; Arts. 10 and 12(2)e Equal Treatment Act
POLAND	Art. 18 ^{3b} para. 2 Labour Code (but different wording from Directive)	Art. 134 Electoral Law for the Sejm and Senate (minorities), several provisions to sustain education for national minorities, provisions aimed at disabled persons	Pilot Programme for the Roma Community in the Malopolska Province for 2001-2003, grants competition by General Inspectorate for Countering Discrimination, aimed at NGO initiatives, (Polish version of EU's "Equal" programme is under preparation)	Social organisations acting in support or on behalf of the complainant (Arts. 90(1) and (3) Penal Proceedings Code, Art. 31(1) Administrative Procedural Code, limited Art. 61(1) Civil Proceedings Code, scope in future enlarged in amendment)
PORTUGAL	No	Minorities/gender (explicit provisions foreseen in draft legislation)	Education/training	Yes (with victim's consent), (draft Bill)
ROMANIA	Religion (Art. 15(5) Ordinance 137/2000, Art.3 Law on Equal Opportunities Women and Men	No (formally prohibited by Art. 6(2) Constitution), Art. 42(1) Ordinance 77/2003 amending Ordinance 137/2000	Strategy of the Government of Romania for Improving the Conditions of the Roma, programmes for students of Roma origin or who depend on social assistance	Yes, as a third party (Civil Procedure Code), in actio popularis (Law on the Protection of the Environment, Art. 22 Ordinance 137/2000)
SLOVAKIA	Section 1 and Art. 13(3) new Labour Code, (proposed anti-discrimination law)	Constitutional prohibition of positive action (Art. 12 Const.) unless constitutionally permitted for women, juveniles and disabled (Section 38 Const.)	Complex Development Programme of Romany Settlements, Programme of Special Social Workers for Members of Roma Community, programmes aimed at social rights for women, disabled and juveniles	Trade unions
SLOVENIA	No general clause, exists only on grounds of sex, age and disability	Art. 65 Constitution, Art. 59(5) Local Self-Government Act, Art. 25 Act on Organisation and Financing of Education, Act on Special Rights for Members of the Italian and Hungarian National Minorities in the Field of Education	Roma, Italians, Hungarians	Organisations with legal interest as third parties (not on behalf or in support of complainant)
SPAIN	Art. 34 Law 62/2003	Art. 30 and 35 Law 62/2003, Law on the Education System, Workers' Statute	Gender discrimination, education	Yes: Art. 31 Law 62/2003 and OL on Rights of Aliens and Law on Contentious-Administrative Jurisdiction
SWEDEN	Art. 8.2 Act on Measures Against Ethnic Discrimination in Working Life	Equal Opportunities Act, Act on the Prohibition of Discrimination 2003, under investigation for inclusion in Cohesive Discrimination Legislation Dir. 2002:11	Gender discrimination	Trade Unions, possibly other organisations with legitimate interest under the power of attorney
TURKEY	Arts. 30(7), 71 and 85 (disability, age, gender)	No (only for disabled, ex-convicts and victims of terrorism; Art. 30 Labour Code)	Employment for disabled, persons with criminal record and victims of terrorism	Trade unions (representation)
UNITED KINGDOM	GB: Section 4A Race Relations Act (since 2003 Regulations), on grounds of colour/ nationality existing Section 5 (not compliant with Directive); NI: Art. 7A Race Relations Order (since 2003 Regulations), on grounds of colour/ nationality existing Art. 8 (not compliant with Directive)	GB: Sections 35, 37-38 Race Relations Act, NI: Arts. 35 and 37 Race Relations Order	Facilities to meet special needs in relation to education, training, welfare; training and encouragement for jobs where there is evidence of under-representation of particular racial groups; positive action by trade unions / employers orgs.	GB + ECNI: Commission for Racial Equality and Equality Commission for Northern Ireland, Trade unions and other organisations, with victim's consent

Burden of Proof, Victimisation & Specialised body

	Burden of proof	Victimisation	Specialised Body or Other Relevant National Bodies
AUSTRIA	Gender discrimination/ employment (in draft legislation, but only to a limited extent)	Notion of victimisation part of laws on sexual harassment (more general clause in draft legislation)	Draft legislation: broaden mandate Equal Treatment Commission and Attorneys for Equal Treatment
BELGIUM	Art. 19(3) 2003 Act	Art. 21 2003 Act (limited to employment)	Centre for Equal Opportunities and the Opposition to Racism (expanded mandate since 2003; includes all grounds except gender)
BULGARIA	Art. 9 Protection Against Discrimination Act	Art. 5 of the Protection Against Discrimination Act, definition in Additional Provision 3	Protection against Discrimination Commission
CZECH REPUBLIC	Code on Civil Court Procedure through Amendment No. 151/2002	Art. 7 Labour Code and new Law on Employment	Public Defender of Rights (Ombudsman), in ministries: Council for Human Rights, Council for National Minorities, Inter-Ministerial Commission for Roma Community Affairs (proposed legislation: Centre for Equal Treatment)
DENMARK	No (only with regard to gender, proposed legislation foresees in this requirement)	Only with regard to gender: Section 3 Act on Equal Payment for Men and Women, possibly also Act on Prohibition of Differential Treatment in the Labour Market (included in proposed legislation)	Danish Institute for Human Rights (2003), Board for Ethnic Equality (closed down end 2002), the Documentation and Advisory Centre on Racial Discrimination (NGO; subsidy withdrawn)
ESTONIA	No (but in limited form foreseen in proposed legislation)	No (but foreseen in draft legislation). Some components of victimisation to be found in Art. 94 Law on Employment Contracts	Legal Chancellor Office (since 1999 as Ombudsman, from 1 Jan. 2004 specialised body)
FINLAND	Art. 17 Equality Act	Chapter 11 section 8 Penal code, Art. 8 Equality Act	Board Against Discrimination, Minority Ombudsman, Occupational Health and Safety Authority for discrimination in employment)
FRANCE	Art. L 122-45 Labour Code (only in labour-related discrimination cases)	Art. 122-45-2 Labour Code, Art L 123-1 Labour Code in cases of harassment	Study Group on the Fight Against Discrimination (GELD), High Council for Integration, National Consultative Commission on Human Rights, Departmental Commissions; Commission led by Ombudsman charged with outlining the body to be set up
GERMANY	Discrimination on grounds of sex or disability	Labour law, but not specifically for discrimination cases	Commissioners for Foreigners, anti-discrimination offices in municipalities, specialised agencies in some states
GREECE	No; (foreseen in proposed legislation)	No; (foreseen in proposed legislation)	Proposed legislation foresees extended mandate for Ombudsman, a role for Labour Supervision Body in Labour Ministry and a new Committee of Equal Treatment in Justice Ministry
HUNGARY	Art. 19 ETA	Art. 10(3) ETA	National Authority Art. 13-17 ETA will enter into force 1/1/2005, Ombudsman for the Rights of National and Ethnic Minorities
IRELAND	In practice, the Equality Tribunal tends to reverse but no legal provisions (only in case of gender discrimination) (will be included in proposed amendment to Equal Status Act 2000)	Section 74 Employment Equality Act 1998, Section 3(2) Equal Status Act 2000	Equality Authority
ITALY	To limited extent Art. 3(4) Decree 215/2003	No, but taken into account when awarding damages	New Office for the promotion of equal treatment to be set up under Decree 215/2003; Commission for Integration policies
LATVIA	Art. 29(3) Labour Law, Arts. 103(2) and 150 Administrative Procedure Law (entry into force 2004)	Arts. 8 and 9 Labour Law (although not explicitly concerned with discrimination), Art. 6(3) Law on National Human Rights Office (future: amendments Labour Law)	National Human Rights Office

LITHUANIA	In principle no shift of proof in discrimination cases. Exceptions before Administrative Disputes Commission and Employment Disputes Commission (non-judicial)	Gender, (Art. 7(5) and 8(4) Law on Equal Opportunities)	Equal Opportunities Ombudsman (gender); (mandate extended in Law on Equal Opportunities)
LUXEMBOURG	Gender discrimination; (general clause in proposed legislation)	Gender	National Council for Aliens/Special Permanent Commission against Racial Discrimination
NETHERLANDS	Based on practice and case-law but no legal provision (only in procedure before Equal Treatment Commission), (included in Art. 10 draft amended Equal Treatment Act)	Art. 8(1) Equal Treatment Act limited to dismissal, more inclusive in Art. 8a draft amended Equal Treatment Act	Equal Treatment Commission (designated Art.13 body), National Bureaus against Racial Discrimination
POLAND	Only in employment cases: Art. 18 th para. 1 Labour Code; draft bill on the General Inspectorate for Counteracting Discrimination	Art. 18 th Labour Code (protection only against termination of employment relationship)	Plenipotentiary for Women and Men (since 2002 competency also for race, ethnic origin, religion, belief, age and sexual orientation)
PORTUGAL	No (but foreseen in draft Bill)	Only for workers: Labour law and Art. 4 of Anti-discrimination Law 134/99 (general clause foreseen in draft legislation)	Commission for Equality and Against Racial Discrimination within High Commissioner for Immigration and Ethnic Minorities
ROMANIA	No	Art. 2(5) Ordinance 77/2003 amending the Ordinance 137/2000 (rejected by Chamber of Deputies, under discussion in Senate)	National Council for Combating Discrimination, Ombudsman
SLOVAKIA	Section 13(5) new Labour Code	Art. 12(4) Constitution, Sections 6 and 7 Act on Complaints, Section 13(6) new Labour Code	Section of Human Rights and Minorities of the Office of the Government, Government Plenipotentiary for Addressing Roma Minority Problems, Ombudsman (no special mandate for discrimination issues), draft amendment on Slovak National Centre for Human Rights
SLOVENIA	Arts. 6(4) and 45(3) Employment Relationship Act	No, only for trade union representatives (Arts. 113 and 210 Employment Relationship Act)	Human Rights Ombudsman
SPAIN	Art. 32 and 36 Law 62/2003; (Dismissal and sex discrimination: Workers' Statute, Law of Social Procedure)	Only in labour field: Art. 8 Law on Violations and Sanctions of the Labour Laws	Council for the Promotion of Equal Treatment of All Persons Without Discrimination on the Grounds of Racial or Ethnic Origin, Ombudsman
SWEDEN	Act on Measures Against Ethnic Discrimination in Working Life, Act on the Prohibition of Discrimination 2003:307, Equal Treatment of Students at Universities Act	Art. 12 Act on Measures Against Ethnic Discrimination in Working Life	Ombudsman Against Ethnic Discrimination
TURKEY	Arts. 5(7) and 18c and d read with Art. 20(2) new Labour Code	Art. 18 Labour Code (concept developed in jurisprudence)	No (Human Rights Committees, Human Rights Advisory Committees - are not concerned with discrimination)
UNITED KINGDOM	GB: Art. 54A Race Relations Act (since 2003 Regulations), NI: Art. 52A Race Relations Order (since 2003 Regulations). In both jurisdictions applies only where grounds are race or ethnic or national origin, and in GB only in relation to activities specified in section 1(1B)	GB: Section 2 Race Relations Act, NI: Art. 4 Race Relations Order	GB: Commission for Racial Equality, NI: Equality Commission for Northern Ireland

ANNEX THREE:
FORA

As identified earlier, in Europe we are fortunate to have a number of different opportunities in the regional and international sphere to take cases should they fail domestically. Critical to taking such cases is a having a detailed understanding of admissibility criteria, procedural requirements and an understanding of what can and can not be reasonably expected in taking the case further.

While not comprehensive, below is a table of potential advantages and disadvantages of taking cases to various international bodies.

This Annex also provides basic information about the steps required to take a case beyond domestic courts. Please do consult the relevant websites and officials of the courts and treaty bodies covered for additional information on these processes.

A. Some of the advantages and disadvantages of different international fora⁹³

Advantages	Disadvantages
<p>I. European Court of Justice⁹⁴</p> <ul style="list-style-type: none"> • Has by far the best jurisprudence on discrimination issues compared to any other international legal forum. • Will be bound by the Race Directive, a document containing the highest anti-discrimination standards in terms of both substance and procedure. • Its decisions are legally binding as regards the interpretation of EU law and its mandatory implementation in Member States. 	<ul style="list-style-type: none"> • An individual has no standing to initiate proceedings directly. • The preliminary referral procedure may be somewhat difficult to understand and utilise by both judges and lawyers otherwise used to arguing their cases in a more conventional manner.
<p>II. UN Human Rights Committee⁹⁵</p> <ul style="list-style-type: none"> • It is the most judicious of all UN Committees. • Article 26 of the ICCPR contains a comprehensive prohibition of discrimination not limited to civil and political rights only. • It has already recognised indirect discrimination in its case law. • Lower standard of proof required than in Strasbourg. • There is no time limit for filing cases. 	<ul style="list-style-type: none"> • Proceedings take almost as long as in Strasbourg. • It can merely find a violation and recommend remedies such as an unspecified amount for compensation. • Its decisions are not formally binding but may be a powerful lobbying tool.

⁹³ Prepared by European Roma Rights Center

⁹⁴ Jurisdiction only covers member states of the European Union.

⁹⁵ Individual complaints can only be considered by the Committee if the State in which the alleged violation took place has ratified the Optional Protocol to the International Covenant.

Advantages

Disadvantages

III. CEDAW⁹⁶

- There are currently very few individual complaints pending.
- The Committee is therefore likely to deal with cases within a reasonable period of time.
- It may also be more liberal in terms of admissibility as well as the merits.
- Lower standard of proof required than in Strasbourg.
- There is no time limit for filing cases.

- CEDAW language is mainly focused on guaranteeing equality between men and women and creative arguments may be required in order to bring other forms of discrimination faced by women within its material scope.
- It can merely find a violation and recommend remedies such as an unspecified amount for compensation.
- Its decisions are not formally binding but can be a powerful lobbying tool.

IV. CERD⁹⁷

- Covers all forms of racial discrimination.
- Has a relatively light caseload and is likely to deal with complaints within a reasonable period of time.
- Is relatively flexible on issues concerning admissibility.
- Lower standard of proof required than in Strasbourg.

- Its decisions are not formally binding.
- They often lack detailed legal reasoning.
- There may be a six-month time limit for filing cases.
- It can merely find a violation and recommend remedies such as an unspecified amount for compensation.
- Its decisions are not formally binding but can be a powerful lobbying tool.

V. European Court of Human Rights⁹⁸

- Compared to the ECJ, an individual has standing to initiate proceedings directly.
- Its judgements are binding and contain detailed legal reasoning.
- Can award specific amounts of damages to victims unlike the UN Committees.
- Has the best enforcement machinery.

- Article 14 of the ECHR offers weak protection against discrimination compared with most other international instruments. Provision can only be invoked if the discrimination falls within the ambit of another right protected by the ECHR.
- Has produced hardly any good case law under Article 14 relating to racial discrimination.
- Very high standard of proof required.
- The Courts current case law provides for no shift of the burden of proof in cases of discrimination.
- There is a six month time limit for filing cases

⁹⁶ Individual complaints can only be considered by the Committee if the State has ratified the Optional Protocol to the Convention on the Elimination of Discrimination against Women.

⁹⁷ Individual complaints can only be considered by the Committee if the State has made a declaration allowing this, under Article 14 of the International Convention on the Elimination of all forms of Racial Discrimination.

⁹⁸ Individual complaints can only be considered if the State is a party to the European Convention for the protection of Human Rights.

B. How to Complain to the Relevant UN Treaty body

There are three principal UN treaty bodies that deal with complaints concerning issues of discrimination; they are (1) the Human Rights Committee (HRC), (2) the Committee on the Elimination of Racial Discrimination (CERD), and (3) the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW). The overall complaint's process in respect of these treaty bodies is summarised very briefly in the table below, and a checklist for communications to the treaty bodies follows.

Individual Complaints – summary of process

- (1) The complainant prepares the 'complaint' (also called a 'communication' or 'petition').
- (2) The complaint is received by the Secretary-General of the United Nations (Secretariat of the Office of the UN High Commissioner for Human Rights in Geneva or the Division for the Advancement of Women in New York), who brings it to the attention of the relevant treaty body.
- (3) The treaty body registers the complaint.
- (4) The treaty body examines the complaint and considers:
 - (a) The *admissibility* of the complaint, and (if admissible);
 - (b) The *merits* of the communication, (i.e. whether or not there has been a violation of a treaty article).
- (5) The State party is required to respond to the complaint.
- (6) The complainant has an opportunity to reply to the State's response.
- (7) After hearing from both parties (or after having given the state a reasonable time to respond), the treaty body issues its 'Views' (also called an 'Opinion' or 'Decision') to both the complainant and the relevant State.

1. Admissibility

In order for a complaint to be accepted by a treaty body, the complainant must establish that the relevant treaty body has *jurisdiction* (*ratione materiae*, *ratione persone*, *ratione temporis*, *ratione loci*) and that all other admissibility issues are satisfied.

Ratione materiae (or subject matter jurisdiction)

A. Has the offending State signed and ratified the relevant treaty?

- i. An individual can only bring a complaint against a state that has ratified the relevant treaty.

To check whether a State is a party to a treaty, consult the treaty body database on the OHCHR web site (<http://www.unhchr.ch/>). To access the database, click on *Documents* on the home page followed by *Treaty body database*, *Ratifications and reservations* and *States parties*; then check the relevant country. Alternatively, you may contact the Petitions Team of the relevant treaty body.

- ii. The human rights violation must have occurred after the date of ratification, unless the violation is 'continuing'.

B. Has the offending State recognised the competence of the relevant treaty body to hear individual complaints?

An individual can only bring a complaint against a state that has recognised the competence of the relevant treaty body.

HRC A State recognizes the HRC's competence by becoming a party to the First Optional Protocol to ICCPR (entered into force on 23 March 1976).

CERD A State recognizes the CERD's competence by making a declaration under Article 14(1) of ICERD (effective from 3 December 1982).

CEDAW A State recognizes the HRC's competence by becoming a party to the Optional Protocol to the Women's Convention (entered into force on 22 December 2000).

To check whether a State has made the relevant ratification or declaration, access the OHCHR web site, select the relevant State, and click on *Declarations on procedural articles*.

The human rights violation must have occurred *after* the date the complaint mechanism was adopted, unless the violation is 'continuing'.

C. Can it be argued that the discriminatory behaviour violates the rights contained in one or more articles of the relevant treaty?

- HRC International Covenant on Civil and Political Rights (ICCPR)
- CERD International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- CEDAW Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention)

D. Has the offending State made any reservations to the relevant treaty that might limit or prevent the applicability of a treaty article?

- i. **Substantive Reservations** - these are reservations that limit or qualify a state's assent to be bound by a particular right. A complaint cannot be brought alleging the breach of an obligation under the relevant treaty if the state has indicated, through a reservation, that it does not consent to be bound by that obligation. However, as an exception to this rule, if the treaty body considers that a reservation is contrary to the object and purpose of the treaty, it might disregard the reservation and treat the relevant obligation as binding on the state party.
- ii. **Procedural Reservations** - A state may have made procedural reservations to the complaint mechanism, limiting the committee's competence to examine certain communications.

E. Has the case ever been considered by another international forum?

- HRC At the time the complaint is lodged, the matter must not be under investigation by another procedure of international investigation or settlement. (Complaints to the Commission on Human Rights do not constitute an international forum for these purposes.) Once a procedure of international investigation or settlement has fully ended, there is, in theory, nothing to prevent an individual communication being brought about the same matter. However, in practice, many states parties have made reservations precluding recourse to the HRC once any other international procedure has been used. The HRC, however, allows the same petitioner to bring the same facts to different bodies:
- i. if the treaty provisions are different (e.g. a petitioner may bring a freedom of association issue before the European Court of Human Rights and a discrimination claim arising out of the same facts before the Human Rights Committee.), or
 - ii. if a complaint has been dismissed by other international mechanisms on procedural grounds, or
 - iii. if the ICCPR provides greater protection in some respects than is available under other international instruments.
- CERD No restriction.

CEDAW A communication is inadmissible where the same matter has been, or is being, examined under another procedure of international investigation or settlement. Some international procedures may not be considered to amount to procedures of “international investigation or settlement” (e.g. the UN Special Rapporteur on Violence against Women and ECOSOC).

Ratione temporis (or time limits)

F. Did the event complained of fall within the relevant time limit?

HRC No time limit applies, but very long delays in bringing the claim may result in the complaint not being considered. The HRC will require a ‘convincing’ or ‘reasonable’ explanation to justify any delay.

CERD Requires a complaint to be submitted within six months following the exhaustion of domestic remedies (ICERD, article 14(5)).

CEDAW No time limit.

G. Did the event occur after the State Party had ratified the relevant treaty and after the relevant complaints mechanism was adopted by the State? (see 1 and 2 above)

Ratione persone (or personal jurisdiction)

H. Standing - is the complaint to be brought by an individual or a group?

HRC Claims are limited to individuals

CERD or CEDAW Claims may be brought by groups or individuals.

I. Has the complainant been personally affected by the human rights violation (i.e. the complainant will normally be the ‘victim’)?

If, however, a victim is unable to complain, another person (e.g. a relative, an NGO, or other representative) may bring a claim on his or her behalf. Unrelated third parties cannot submit a claim on behalf of a victim, unless they can clearly show that the victim authorized them to act on their behalf. If, due to the circumstances (e.g. the victim is dead or being held incommunicado) the consent of the victim cannot be obtained, the author must explain why not, and why he/she is authorized to bring the complaint on the victim’s behalf. *Actio popularis* claims are not permitted (i.e. abstract claims challenging policy where there is no specific victim).

Ratione loci (or territorial jurisdiction)

J. Was the complainant subject to the territorial jurisdiction of the offending state at the time the alleged violation occurred?

- i. In some cases, a person may fall within the jurisdiction of a state party even though they were not within the state's territory at the relevant time (see e.g. the test of "effective control" as described in *Bancovich* and *Cyprus v Turkey*).
- ii. A victim who has fled the state that violated his/her human rights can bring a claim, even though he/she is no longer within the territorial jurisdiction of that state.
- iii. Even though a victim is outside the territory of a state party at the time he/she makes the complaint, he/she must still have exhausted any domestic remedies that are available within the violating state party before bringing a claim.
- iv. The victim need not be a citizen or resident of the offending state party. Therefore, refugees and illegal immigrants can bring claims.

Other admissibility issues

K. Have all domestic remedies been exhausted?

The requirement for all domestic remedies to have been exhausted before bringing a complaint may be waived if it is possible to show that the exhaustion of remedies is (a) ineffective, (b) not available, or (c) unreasonably prolonged.

L. Is there sufficient evidence to substantiate the claim?

If there is not sufficient evidence to make the claim credible, the relevant treaty body may dismiss the claim.

M. Could the complaint be dismissed as an abuse of the process?

- i. The same matter may not be complained about several times. This means that identical claims will not be accepted. However, different victims of the same act of violation can bring their claims separately.
- ii. There may be no insulting language in the complaint.
- iii. A complaint will be dismissed if the complaints procedure is being used for reasons other than a genuine human rights complaint (e.g. the complaint constitutes a political attack on the state party).

N. The complaint must not be anonymous

The identity of both the victim and the complainant (if different from the victim) must be revealed in the communication. If the complainant fears reprisals from the offending state, he/she may request that their identity is not made public.

2. Choice of treaty body?

It is possible that the complaint may be admissible to more than one treaty body. If so, it is necessary to decide which treaty body is most appropriate to hear the complaint; consider the following:

- Has the treaty body made any helpful General Comments or Recommendations relevant to the subject matter of the complaint?
- Which treaty body is most likely to request the specific remedy that the complainant is seeking?

3. Individual complaint procedures

A. Submitting the communication

- i. A communication should be submitted in writing, by letter, fax or email to the relevant treaty body. Contact details are provided in **Annex Six**
- ii. Fax or email communications must be confirmed by signed copies received by the Secretariat.
- iii. Communications cannot be anonymous.
- iv. The state party must be clearly identified.
- v. Communications should be expressly addressed to the relevant Treaty body.

B. Confidentiality

The practice of all three treaty bodies is for all documents relating to a communication to be treated as confidential and cases are not publicised, except by the eventual release of its decision.

C. Registration of the Communication

- i. The UN Secretariat initially reviews all communications prior to their registration. It can request additional information from the author before registering the claim.
- ii. Failure to provide adequate information may result in a communication not being registered.
- iii. If the Special Rapporteur on New Communications, upon receiving a summary from the Secretariat, determines that there are genuine issues as to a violation of the relevant treaty, the case will be registered.
- iv. If the Special Rapporteur finds that there are no real issues in the case or that it clearly does not meet admissibility criteria, the case will not be registered. Generally, this ends the case.

D. Transmission to and response from the State Party

If the Special Rapporteur considers that the communication is admissible, he/she will transmit the case to the relevant state and request submissions on the issues of admissibility and the merits. The State must respond within the specified time limit:

HRC within **six** months (Optional Protocol, Article 4)

CERD within **three** months to respond. (Note: The practice of the Committee is to seek a response on the issue of admissibility separately from the merits. Thus, the state party is given 3 months to respond on the issue of admissibility. If the complaint is held admissible, the state will then have a further 3 months to respond on the merits.)

CEDAW within **six months**

E. State's response and complainant's chance to reply

The complainant will be sent the state party's response (assuming there is one) and given the opportunity to respond to the state's submissions within the specified period:

HRC within **two months**.

CERD within **three months** (this is based on CERD practice, there is no express deadline though some complainants have been set a deadline of six weeks)

CEDAW **within a time frame fixed by CEDAW**

The complainant's response is then sent to the state party.

F. State's further reply

A further reply by the state is permitted, if necessary.

G. Consideration of the merits

If the relevant treaty body decides the case is *admissible*, it proceeds to consider the *merits* of the complaint. The general practice of all three Treaty bodies is for deliberations take place in private, on the basis of the written information provided to the treaty body by the parties. Although the theoretically they all have the power to hear from the complainant and the state party in person.

H. The treaty body's view and follow-up

Once the treaty body has reached a view on the merits of the communication, it will send its decision (View or Opinion) to the complainant and to the state party at the same time. The text of any final decision on the merits or admissibility of the case will be posted as part of the committee's jurisprudence at: <http://www.unhcr.ch/html/menu2/8/jurispr.htm>. If the treaty body finds that there has been a violation it can *recommend* measures to the state to remedy the violation. There are no sanctions for non-implementation. Nor is there any appeal against a Treaty body's decision.

HRC After considering the merits the HRC will give its 'View'. If the individual's rights are found to have been violated, the HRC will request the state to inform within 90 days of the remedy provided to the victim.

CERD After considering the merits the CERD will give its 'Opinion'. No formal procedure to follow-up, although CERD may invite the state party to report "in due course" of the action taken pursuant to the Opinion.

CEDAW After considering the merits CEDAW will give its 'View'. Within six months of issuing its View, the State party is required to submit a written response detailing any action taken thereon. CEDAW may invite the State party to submit further information about measures taken by it, either directly or through its next periodic report. Under its Rules of Procedure, the Committee is to designate a special rapporteur or working group on follow-up.

I. Interim Measures

It usually takes about 12 to 18 months to declare a case admissible or inadmissible. The process of examining the merits of the case may then take a year or two. If the complainant needs protection more urgently, he/she may ask for interim measures to avoid irreparable harm. Interim measures may be requested at any time before or after the admissibility decision. A request by a Treaty body for interim measures does not mean that it will eventually find a violation.

4. Other treaty body complaint's mechanism

A. CEDAW – Investigative mechanism

In addition to the individual communication procedures, the Women's Convention authorizes CEDAW to undertake investigations in response to "reliable information" which indicates "grave or systematic violations" (Optional Protocol, Article 8 – in force December 2000). The process is as follows:

- i. Has the offending state ratified the Optional Protocol and not exercised its opt-out (Article 10), or any other form of reservation?
- ii. Information may be submitted (anonymously, if necessary) to CEDAW by individuals or groups, stating that it is submitted for the purposes of triggering an inquiry. (Such requests do not preclude the submission of an individual communication on the same set of facts.)
- iii. If CEDAW decide that the information is indicative of grave or systematic violations of rights, CEDAW starts the "examination stage", and will invite the relevant state party to submit its observations. CEDAW may also solicit information from governmental organizations, non-governmental organizations, and individuals.
- iv. The inquiry process may, with the consent of the relevant state party, involve a country visit (Article 8) and/or a hearing.
- v. Upon completion of the inquiry, CEDAW submits its findings to the relevant state party.
- vi. The Optional Protocol obligates the state party to then submit its response within six months.
- vii. Investigations are "conducted confidentially", although CEDAW is required to include a summary of its activities under the Protocol in its annual report, which includes the existence and results of any investigations, and it must publish a summary of its findings and recommendations.
- viii. CEDAW is required to maintain pressure on the state party by inviting it to give details of the measures

- taken in response to an inquiry as part of its periodic state reporting obligations.
- ix. The inquiry procedure cannot yield a recommendation for an individual remedy.

B. The State reporting system

- i. Complainants may make use of the State reporting system, in particular, as follows:
 - a. Concluding comments or observations issued by the treaty bodies are a source of guidance as to how a treaty body may respond to an individual complaint (e.g. where a treaty body has expressed “concern” with regard to state behaviour);
 - b. A state may be willing to consider an individual complaint more favourably in order to avoid adverse comment from a treaty body;
 - c. Complainants may bring situations of non-compliance with prior Views to the treaty bodies’ attention;
 - d. The rules of procedure for HRC and CEDAW both provide for state parties to include in their state reports information on any steps they have taken to respond to recommendations and concerns expressed in Views on individual communications.
 - e. There are no formal restrictions on who can bring information to the treaty body’s attention. “Shadow” or “alternative” reports prepared by NGOs are often used as a source of information for treaty bodies in their consideration of State Party’s reports.
- ii. State reporting is focused on a state party’s overall record, rather than individual cases, thus treaty bodies are more likely to be interested in particularly egregious violations, or violations involving a continuing policy or practice.
- iii. It is unlikely that a treaty body will recommend an individual remedy.

C. The European Court of Human Rights – Individual Complaints Procedure

This is an introduction to the European Court of Human Rights (ECtHR) only. Comprehensive information about the application procedure is available on the ECtHR's website <http://www.echr.coe.int/> and from the Registry of the ECtHR.

1. Admissibility criteria

A case must satisfy the following criteria to proceed to consideration before the ECtHR.

A. Exhaustion of domestic remedies

The Court may only deal with a case after all domestic (i.e. national) remedies have been exhausted.

B. Ratione personae (Who may complain and about whom?)

Complaints can only be brought by "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation". Thus, the applicant must be a direct or indirect victim of the alleged violation.

C. Ratione temporis (When should the complaint be brought?)

States can only be held responsible for violations that occur after ratification of the European Convention.

D. Six month limit

Complaints have to be introduced within six months of the final decision of the national authorities (i.e. after the exhaustion of domestic remedies). This requirement is very strongly enforced by the ECtHR.

E. Ratione loci (Where did the violation take place?)

States can only be liable for violations that occur "within their jurisdiction" (Article 1). Broadly speaking, all events that occur on their sovereign territory will normally be within the jurisdiction.

F. Ratione materiae (What can be complained about?)

The Court can only examine complaints that relate to the rights and freedoms contained in the articles of the European Convention.

G. Other international procedures

Applications already submitted to another procedure of international investigation or settlement (e.g. a UN treaty body).

An application will not be admissible if its contents are essentially the same as a complaint already made to another international mechanism and it is brought by the same applicant.

H. Applications must not be anonymous

The applicant's personal details must be contained in the application. However, if there are good reasons for anonymity, an applicant may request confidentiality at the time the application is made.

I. Abuse of the right of application

An application must not be vexatious or written in offensive language, and relevant information or evidence must not be deliberately concealed.

J. Manifestly ill-founded

A complaint will be declared manifestly ill-founded if on the preliminary examination it does not disclose any possible ground on which it could be stated that there has been a violation of the Convention, and if the allegations are unsupported by the material submitted by the applicant.

2. Procedure

Applications may be lodged directly with the Court by any Contracting State (a “State application”) or an individual claiming to be a victim of a violation of the Convention (an “individual application”).

Legal representation is not required at the initial stages of an application, although a lawyer is required if the case proceeds to an oral hearing. Individuals may apply to the court for financial assistance for legal representation if the case is declared admissible.

Applications may be submitted in an official language of a Contracting State. However, if and when an application is declared admissible, one of the Court’s official languages (English or French) must be used, unless the President of the Chamber/Grand Chamber authorises otherwise.

There are two main stages of consideration of the application: admissibility and the merits of the case.

A. Admissibility

Depending on the strength of the application, the complaint will either be declared inadmissible soon after submission, or will proceed to a formal consideration of admissibility, either by a three-member Committee or by the Chamber. In the latter case, the application will be formally communicated to the State and the State will be invited to provide its observations on the substance of the complaint. The State’s observations on the admissibility of the complaint will be set out in their reply, and the reply is copied to the applicant for comment. Decisions on admissibility are taken by a majority vote and reasons for the decision are made public. The first stage of the procedure is generally written, although the Chamber may decide to hold a public hearing, in which case issues arising in relation to the merits will normally also be addressed.

B. Merits

Once the Chamber has decided that the complaint is admissible, it may invite the parties to submit further evidence and written observations, including any claims by the applicant for “just satisfaction”.

The President of the Chamber may, in the interests of the proper administration of justice, invite or grant leave to any Contracting State which is not party to the proceedings, or any person concerned who is not the

applicant, to submit written comments, and, in exceptional circumstances, to make representations at the hearing.

During the procedure on the merits, negotiations aimed at securing a friendly settlement may be conducted through the Registrar. These negotiations are confidential.

C. Judgment

The Chamber reaches its decision by a majority vote after an oral hearing (if necessary). Any judge who has taken part in the consideration of the case is entitled to append to the judgment a separate opinion, either concurring or dissenting.

A Chamber's judgment becomes final on expiry of three months from the date of the judgment, or earlier if: (a) the parties announce that they have no intention of requesting a referral to the Grand Chamber, or (b) after a decision of the Grand Chamber rejecting a request for referral.

Responsibility for supervising the execution of judgments lies with the Committee of Ministers of the Council of Europe. It verifies whether States in respect of which a violation of the Convention is found have taken adequate remedial measures to comply with the specific or general obligations arising out of the Court's judgments.

D. Referrals to the Grand Chamber (the appeals process)

Within three months of delivery of the judgment any party may request that the case be referred to the Grand Chamber if it raises:

- a. a serious question of interpretation or application of the European Convention, or
- b. a serious issue of general importance.

Requests for referrals are examined by a Grand Chamber of five judges composed of the President of the Court, the Section Presidents (but not the Section President of the Section that gave the original judgment), and another judge selected by rotation from those judges not members of the Chamber that made the decision being referred.

If the panel accepts the request, the Grand Chamber renders its judgment by a majority vote. Its decisions are final and binding on state parties.

E. Interim Measures

If the applicant needs protection more urgently than the Court is able to deal with the case through its normal procedure, the Chamber may at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties (Rule 39).

D. Court of Justice of the European Communities - Jurisdiction and Complaints Procedure

Following is a brief summary of the jurisdiction of the Court of Justice of the European Communities ("ECJ") and the procedure for preliminary rulings by the ECJ. This annex should be treated only as an introduction to the various proceedings before the ECJ. Additional information and the Rules of Procedure of the ECJ and its Court of First Instance (CFI) are available at the ECJ's website <http://curia.eu.int>.

1. Jurisdiction

The ECJ generally deals with five types of cases :

A. Action for failure to fulfil Treaty obligations

An action may be brought by the Commission against a Member State (most cases), and by Member State against another Member State (extremely rare) to determine whether a Member State has fulfilled its obligations under EU law. If the Court finds that the obligation has not been fulfilled, the Member State concerned must comply without delay. The Court has the power to impose a fixed or a periodic penalty.

B. Actions for annulment

An action for the annulment of all or part of an item of EU legislation may be brought by a Member State, the Council, the Commission and, in certain circumstances, the Parliament. Individuals may also seek the annulment of a legal measure that is of direct concern to them (known as 'direct actions').

C. Actions for failure to act

The Court may review the legality of a failure to act by an EU institution (e.g. Parliament, Council of Ministers, the Commission), and penalise inaction.

D. Preliminary rulings

Preliminary rulings are used to ensure the effective application of EU law and that it is interpreted and applied uniformly throughout the EU.

E. Appeals

May be brought before the ECJ against judgments given by the CFI.

2. Preliminary rulings

In the context of the Race Directive, preliminary rulings are most relevant:

- To ensure the effective application of the Race Directive and to avoid variant interpretations of its provisions, Community law provides for a institutionalised cooperation between the ECJ and national courts.

- In cases involving the Race Directive, national courts are able to (and last instance courts are obliged to) seek a preliminary ruling from the ECJ on relevant questions of law. Such questions will arise if there is doubt as to the interpretation or validity of provisions of the transposed law.
- Critically, any such ruling must be sought by the national court, which alone has the power to decide that it is appropriate to refer a question, unless it is a last instance court or tribunal which is under an obligation to do so.
- The challenge for lawyers is to persuade national courts to refer specific questions to the ECJ. Note that any instance court may make a referral and it is generally preferable for lower courts to make the referral early in the proceedings.
- Following the written referral of a question to the ECJ, most cases proceed to an oral hearing in open court, in which all parties to the case may take part.
- When the ECJ has made its judgment, the referring national court must apply the law as interpreted by the ECJ without modification to the dispute at hand.
- Such rulings on interpretation by the ECJ also serve as a guide for other national courts dealing with a substantially similar difficulties in interpretation
- Where a preliminary ruling has been requested, the language used is that of the national court which referred the question to the ECJ.

ANNEX FOUR:

HYPOTHETICAL EXERCISES⁹⁹

⁹⁹ Prepared by the European Roma Rights Center

The following four hypothetical cases provide the opportunity to give practical consideration to the types of matters outlined in the Manual. Following each fact pattern is a set of questions to generate consideration of how the case might be developed. This is followed by some thoughts on key issues with respect to the case (some of which address the questions posed).

1. Access to housing

Mr Azari, Mr Bati and Ms Columbus are of Romani ethnic origin and live in the village of Porto in an EU member state country. The Porto region has high levels of poverty, unemployment, and homelessness. About 80% of the inhabitants of the village are of Roma ethnic origin.

Mr Azari and Mr Bati are nationals of the EU member state, unemployed with no income. Both have a poor command of the EU member state's official language, as is the case of most of the Roma living in Porto. Ms Columbus is a national of Romania but has a valid residence permit for the EU member state, and has a low-paid, temporary job. They all live with their aunt and her 15 extended family members in a one-room house with no running water or electricity. The house has a leaking roof and next to the house is a waste disposal site.

In November, the local Municipal Council adopted a decree which set out the conditions under which individuals and families could apply for free state housing. The decree stressed that only indigent citizens of the EU member state, residing in Porto, could apply. Applicants had to complete a detailed and complicated form in the EU member state's official language within 3 days of the decree. The Municipal Council did not offer a translation into the Romany language or offer any other assistance to help people complete the forms. As a result 80% of the successful applications were from non-Roma. Both Mr Azari and Mr Bati applied. However their applications were rejected as the forms were not fully completed.

As she was not a national of the EU member state, Ms Columbus did not apply, and continued to live with her aunt. In January of the next year, she inherited money from her father in Romania who had recently died. Throughout January and February she tried to rent a small apartment/room in Porto but had no success. Estate agents and owners told her by telephone that they had rooms and apartments to rent but when she went in person to see the agent/owner she was told that there was nothing available. Some of the apartments/rooms remained vacant for weeks after Ms Columbus' attempt to rent them. On one occasion, an owner told her that she could not rent the apartment because she was Roma and that he could "freely choose to whom he could rent his own property".

Consider:

- In the case of Mr Azari and Mr Bati, have they suffered direct or indirect discrimination?
- If so, is this within the scope of the EC Race Directive?
- What would Mr Azari and Mr Bati need to prove, and how might they do this?
- Is there enough evidence from the facts of the case to shift the burden of proof?
- Has Ms Columbus suffered direct or indirect racial discrimination?
- If so, is this within the scope of the EC Race Directive?
- How might she prove discrimination?

- Does the prohibition of discrimination contained in the EC Race Directive apply to both the public and private sectors and what does that imply?

Some thoughts:

- Mr Azari and Mr Bati may have been subjected to direct discrimination in access to housing (Article 3.1.h of the Race Directive) if the Municipal Council designed the process of applying for the new housing in order to exclude many Roma. But very difficult to prove. However they were subjected to indirect discrimination as the application process had a disproportionate effect on the Romani inhabitants of Porto district.
- They would need statistical evidence to prove indirect discrimination. This might include population and ethnicity data for Porto district; numbers who applied for the housing and numbers who were successful, broken down into ethnic groups; the reasons for rejection in the process, again broken down into ethnic groups, and standards of housing broken down into ethnic groups.
- Ms Columbus suffered direct discrimination in accessing housing (Article 3.1.h). Applies equally to private and public sector if the goods or service was available to the public. She could prove discrimination, and shift the burden of proof to the respondent, by using a situational test (in which different individuals, or groups of individuals, who are as similar as possible in all characteristics except race or ethnicity, are sent out to document whether one individual, or group, is treated differently from another).

2. Access to a public place

On a Friday evening in the town of Nove Mesto, four well-dressed Romani youth, two boys and two girls, all over the age of 18, decided to go to a popular local disco. At the entrance to the disco they were stopped by the doormen, who asked them to show their membership cards. As they had none, the Romani teenagers were refused entry. In order to get into the disco, the four Roma offered to purchase membership cards. However the doormen responded politely that membership issues were only dealt with on weekday mornings.

The Romani youth then stayed in front of the disco for another hour, hoping that the doormen might change their minds and let them into the disco. During that time they noticed that all the other young people queuing to get into the disco, all non-Roma, walked in without being asked to show any membership cards.

Finally the Roma youths plucked up courage and confronted the doormen with the fact that no one else was asked to show a membership card. Again politely but firmly, the doormen responded by saying that all the other people were members and regular customers and that they personally knew them all. They also added that they do have Roma members as well.

Throughout their time in front of the disco, the four Roma teenagers noticed no other Roma entering or indeed even trying to enter the disco.

Consider:

- Have the Romani youth suffered direct or indirect discrimination?
- If so, is this within the scope of the EC Race Directive?

- Would there be any difference if the disco were in a public (Government) owned building, or a private club?
- What would the victims need to prove discrimination, and how might they do this?
- Is there enough evidence from the case to shift the burden of proof?
- Would a situational test, conducted later, help as evidence?
- Under your country's domestic legislation would the victims have a case?

Some thoughts:

- The case indicates that the Romani youth suffered direct discrimination in trying to access services that are available to the public (Article 3.1.h of Race Directive).
- However, they would need evidence of discrimination in order to shift burden of proof to the respondent, so that the disco owners provide evidence to the court that a membership card only entry policy was in place, enforced fairly, and that this did not discriminate on grounds of race and ethnicity. A situational test (in which different individuals, or groups of individuals, who are as similar as possible in all characteristics except race or ethnicity, are sent out to document whether one individual, or group, is treated differently from another) would be a good form of evidence.

3. Employment hiring practices

A Romani woman answered a job advertisement that she saw in a local newspaper for a chambermaid at Hotel California, a hotel located in her home town. She discussed the requirements of the job by telephone with an employee of the hotel and was offered an interview on 19 April at 14.30.

She arrived at the reception of the hotel at the arranged time. The receptionist announced her arrival to the Hotel Director (who was in an office behind the reception with his door open) with the words "A Gypsy girl is looking for you concerning the chambermaid position". The Roma woman heard the Director respond to the Receptionist "We don't hire Gypsies, I hate Gypsies". A few minutes later the Director came out of his office and informed the Roma woman that the hotel no longer had an opening for a Chambermaid position.

The position was, in fact, only filled later, at the end of May.

The Roma woman left the hotel overwhelmed with shame and went to the Mayor's Office to complain. At the Mayor's Office she was told that she should direct her complaint to the Parliamentary Commissioner for National and Ethnic Minorities as the Municipality was not the competent authority for dealing with such complaints.

Consider:

- Has the Romani woman suffered direct or indirect discrimination?
- If so, is this within the scope of the EC Race Directive?
- What would she need to prove, and how might she do this?
- Is there enough evidence from the facts of this case to shift the burden of proof?
- Has she been subjected to harassment?
- Do the actions of the Mayor's Office violate the provisions of the EC Race Directive?

Some thoughts:

- The Romani woman was subjected to direct discrimination in access to employment (Article 3.1.a of the Race Directive), and possibly harassment as her dignity was violated and she was put in a degrading environment (Article 2.3).
- However it might be hard to prove discrimination if we presume that the receptionist refused to make a witness statement on the Manager's remarks. Evidence needed would include copies of the job advertisement, including adverts placed after the incident; an itemised telephone record to show she had called the hotel, and witness statements from the Mayor's Office. Better might be to set up a situational test (in which different individuals, or groups of individuals, who are as similar as possible in all characteristics except race or ethnicity, are sent out to document whether one individual, or group, is treated differently from another).

4. Segregation in education

The Petrovi family live in the 7th District of Focia, in a neighbourhood called New Life. All of the residents in New Life are of Roma ethnic origin. There are seven State schools in the 7th District, although only one school in the New Life neighbourhood, the 45th School, where all of the students are Roma.

The Petrovi family are unsatisfied with the quality of education at the 45th School. Like many other pupils at the school, their oldest son (in 9th grade) can hardly read and write. Their second child, in 4th grade, cannot read and write. Their youngest child is due to start school in September. Taking into consideration the low quality of education at the 45th school, the Petrovi family decide to send their youngest child to the 46th School. This is a State school just outside of the New Life neighbourhood but within the 7th District of Focia, and it has a good reputation for the quality of education it provides.

On 21 May, Mrs Petrova went to the 46th School to enroll her child there. Mr Dimov, Deputy Director at the school, told her that it was too early to enroll students and that she should return to the school at the beginning of September. However, Mrs Petrova again visited the school on 2 July but was barred entry by the school guard and was told that the school had broken up for summer holidays and that she should return on 10 September, when the school year restarted. On 4 August Mrs Petrova again visited the school. She spoke to Mr Dimov, Deputy Director, who told her that she could not enroll her child at the 46th School as she lives in the New Life neighbourhood and that her child should therefore be enrolled to the 45th School. Not content with this, Mrs Petrova met the Director of the 46th School, Ms Ancheva, on 5 August. Ms Ancheva told her that all of the places in 1st grade classes were already full. However if Mrs Petrova came back to the school at the beginning of September there might be a free place for her son, if another child did not take up her or his place.

Consider:

- Has Mrs Petrova's youngest child been subjected to direct or indirect discrimination?
- If so, is this within the scope of the EC Race Directive?
- What would she need to prove and how might she do this?
- Is there enough evidence from the facts of the case to shift the burden of proof?

- Have Mrs Petrova's two oldest children suffered direct or indirect discrimination?
- If so, is this within the scope of the EC Race Directive?
- What would she need to prove and how might she do this?
- The government argues that their policy is to allocate pupils to their nearest school, for ease and safety in travelling to school and for the best possible parent/teacher relationship. That is why Mrs Petrova's children are allocated places at the 45th school. Is this a legitimate objective and a proportionate requirement under the EC Race Directive?

Some thoughts:

- Mrs Petrova's youngest child suffered direct discrimination in accessing education (Article 3.1.g of the Race Directive) as people in positions of authority at the 46th School gave her misleading information. This is possibly enough to shift the burden of proof to the school to show when the enrolment period started and finished, to explain the inconsistencies in the information given to Mrs Petrova, and to prove that the misleading information was not given because of her ethnic origin.
- The use of situational testing (in which different individuals, or groups of individuals, who are as similar as possible in all characteristics except race or ethnicity, are sent out to document whether one individual, or group, is treated differently from another) might help. However this could not take place until the next school enrolment period.
- Mrs Petrova's oldest children suffered indirect discrimination in access to education. She would need statistical evidence from all the schools in the district showing percentage of Roma and non-Roma pupils, and the qualifications of teachers and educational standards at each school, to prove that the State policy of a limited school catchment area was having a disproportionate impact on the Roma ethnic group. This would shift the burden of proof to the State to justify that the aims of this policy were legitimate and that the means used were proportionate.

ANNEX FIVE:
RELEVANT CASES

The following provides a guide to European Court of Justice (ECJ) case law that may impact upon the way in which the Race Directive is interpreted by the court. It is followed by two recent decisions of European domestic courts that elucidate principles enunciated in the Race Directive

1. An overview of relevant equality jurisprudence of the ECJ¹⁰⁰

This overview of the European Court of Justice's case law that could be relevant to the interpretation and application of Directive 2000/43 (the 'Race Directive') is divided into three parts. The first concerns general interpretation rules, the principle of discrimination and the doctrine of direct effect; the second is concerned with definitions of direct and indirect discrimination, harassment, victimisation, occupational requirements, etc.; whereas the third concerns the scope of the directive and of Community law. In quotations of the Court, the emphasis is always added by the present author.

A. Equal treatment

i. The principle of non-discrimination

Case 43/75, *Defrenne v. Sabena II* [1976] ECR 455

Concerns the question whether the equal pay of men and women is just an economic principle, as the Belgian government argues; to avoid discrepancies in cost prices due to the employment of female labour less well paid for the same work than male labour. The Court: Article 119 [now Article 141] "forms part of the *social objectives* of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the *constant improvement of the living and working conditions* of their peoples, as is emphasised by the Preamble to the Treaty. (...) This *double aim*, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community."

C-63/89, *Les Assurances du Crédit* [1991] ECR I-1799

Unjustified comparison between public export credit insurance operations, and other export credit insurance operations. The Court: "these products must be treated in the same manner *unless differentiation is objectively justified*."

C-279/93, *Schumacker* [1995] ECR I-225

Tax law case. The Court: "discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situation."

C-243/95, *Hill and Stapleton* [1998] ECR I-3739

Similar to *Schumacker*, but in sex equality case. The Court: "discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situation."

¹⁰⁰ Migration Policy Group, current to December 2003

C-186/01, Dory, 11 March 2003, not yet published

Concerns compulsory military service in Germany which is limited to men. The Court: “the delay in the careers of persons called up for military service is an inevitable consequence of the choice made by the Member State regarding military organisation and does not mean that that choice comes *within the scope of Community law*. The existence of reverse consequences for access to employment cannot, without encroaching on the *competences of the Member States*, have the effect of compelling the Member State in question either to extend the obligation of military service to women, thus imposing on them the same disadvantages with regard to access to employment, or to abolish compulsory military service.”

ii. Wide interpretation of non-discrimination**Joined Cases 117/76 and 16/77, Ruckdeschel & Co. [1977] ECR 1753**

Case concerning agriculture; general principle of equal treatment. The Court: “comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.”

C-262/88, Barber [1990] ECR I-1889 (first in a range)

Concerns the interpretation of the term 'pay'. The Court: “unlike the benefits awarded by national statutory social security schemes, a pension paid under a contracted-out scheme constitutes consideration paid by the employer to the worker in respect of his employment and consequently falls within the scope of Article 119 of the Treaty.”

C-218/98, Abdoulaye [1999] ECR I-5723

Concerns collective agreement providing for an allowance for pregnant women going on maternity leave. The Court: “Since the benefit paid by an employer to a female employee when she goes on maternity leave, such as the payment in question in the main proceedings, is *based on the employment relationship*, it constitutes pay within the meaning of Article 119 of the Treaty and Directive 75/117. While such a payment is not made periodically and is not indexed on salary, its characteristics do not, contrary to what Renault contends, alter its nature of pay within the meaning of Article 119 of the Treaty.”

C-285/98, Kreil v. Germany [2000] ECR I-69

Concerns the exclusion of women from functions that oblige the wearing of arms in German army. The Court: “it is for the Member States, which have to adopt appropriate measures to ensure their *internal and external security*, to take decisions on the organisation of their armed forces. It does not follow, however, that such decisions are bound to *fall entirely outside the scope of Community law*.”

iii. Direct effect**Case 26/62, Van Gend en Loos [1963] ECR 1**

Concerns the question whether a company could rely directly on an Article in the EEC Treaty and not pay import levies. The Court: “the Community constitutes a *new legal order* of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which

comprise not only Member States, but also *their nationals*. Independently of the legislation of Member States, Community law therefore not only imposes *obligations* on *individuals* but is also intended to confer upon them *rights* which become part of their legal heritage." The *conditions* for direct effect of the Article under concern: "The wording of Article 12 contains a *clear and unconditional prohibition* which is not a positive but a *negative obligation*. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law."

Case 6/64, Costa v. ENEL [1964] ECR 585

Concerns State aid case. The Court: "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the *legal basis of the Community itself* being called into question."

Case 39/72, Commission v. Italy [1973] ECR 101

Infringement proceedings for failures and delay in transposition of certain regulations; question of direct effect of those regulations. The Court: "it cannot be accepted that a Member State should apply in an incomplete or selective manner provisions of a Community *Regulation* so as to render abortive certain aspects of Community legislation which it has opposed or which it considers contrary to its national interests."

Case 2/74, Reyners [1974] ECR 631

Refusal to admit a person to the Belgian Bar on the ground of his nationality. The Court: "In laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 thus imposes an obligation to *attain a precise result*, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures. (...) After the expiry of the transitional period the *directives* provided for by the Chapter on the right of establishment have become *superfluous* with regard to implementing the rule on nationality, since this is henceforth *sanctioned by the Treaty itself with direct effect*."

Case 41/74, Van Duyn v. Home Office [1974] ECR 1337

Case concerning the possible direct effect of *directives*. The Court: "It is necessary to examine, in every case, whether the *nature, general scheme and wording* of the provision in question are capable of having direct effects on the relations between Member States and individuals." With regard to the Directive under discussion: "*legal certainty* for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has *no automatic direct effect in its entirety*."

Case 43/75, Defrenne II [1976] ECR 455

Concerns possible horizontal direct effect in case of air hostess against her employer. The Court: "the fact that certain provisions of the Treaty are *formally addressed to the Member States* does not prevent rights from being conferred at the same time on *any individual* who has an interest in the performance of the duties thus laid down."

Case 50/76, Amsterdam Bulb [1977] ECR 137

Concerns the validity of national measures enacted with the intention of giving effect to a regulation. The Court: "By virtue of the obligations arising from the Treaty the Member States are under a duty not to *obstruct* the direct effect inherent in regulations and other rules of Community law. (...) Therefore, the Member States may neither adopt nor allow national organisations having legislative power to adopt any measure which would *conceal* the Community *nature and effects of any legal provision* from the person to whom it applies."

Case 148/78, Ratti [1979] ECR 1629

Introduction of the principle of estoppel. The Court: "a Member State which has not adopted the implementing measures required by the *directive* in the prescribed periods may not rely, as against individuals, on its own *failure to perform the obligations* which the directive entails."

Case 152/84, Marshall [1986] ECR 723

Concerns the possible *horizontal direct effect of directives*. The Court: "the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person."

Case 71/85, Netherlands v. FNV [1986] ECR 3855

Concerns the moment of entry into force of Directive 79/7 (Social Security Directive). The Court: "It follows that until such time as the national government adopts the necessary implementing measures, women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation, since, where the directive has not been implemented, those rules remain the only valid point of reference."

Case 87-89/90, Verholen [1991] ECR I-3757

Concerns the question whether the direct effect of a provision can be pleaded by someone other than an individual seeking to enforce rights conferred on that individual. The Court: "the right to rely on the provisions of Directive 79/7 is not confined to individuals coming within the scope *ratione personae* of the Directive, in so far as the possibility cannot be ruled out that *other persons may have a direct interest* in ensuring that the principle of non-discrimination is respected as regards persons who are protected. While it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the *national legislation does not undermine the right to effective judicial protection*."

iv. Indirect effect**Case 14/83, Von Colson and Kamann [1984] ECR 1891**

Concerns the possible effect of an inadequately implemented Directive, where direct effect is excluded. The Court: "in applying the national law and in particular the provisions of a national law specifically introduced in

order to implement Directive No 76/207, national courts are required to interpret their national law *in the light of the wording and the purpose of the Directive* in order to achieve the result referred to in the third paragraph of Article 189."

C-106/89, Marleasing [1990] ECR I-4135

Concerned a question of indirect effect of a Directive in a horizontal situation. The Court: "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, *as far as possible*, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty."

C-168/95, Luciano Arcaro [1996] ECR I-4705

Question about 'indirect effect' of Directive, even if that would worsen the legal position of a defendant in criminal proceedings. The Court: "that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the *imposition on an individual of an obligation* laid down by a directive which has not been transposed, or, more especially, where it has the effect of *determining or aggravating*, on the basis of the Directive and in the absence of a law enacted for its implementation, *the liability in criminal law* of persons who act in contravention of that directive's provisions."

v. State liability

C-6/90, Francovich [1991] ECR I-5357

Concerns a financial claim of private persons against a private firm which is not under the obligation to pay, because the Member State concerned had not transposed the Directive to that effect. The Court: "It must be held that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain *compensation* when their rights are infringed by a breach of Community law for which a Member State can be held responsible. The possibility of compensation by the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is *subject to prior action on the part of the State* and consequently individuals cannot, in the absence of such action, enforce the rights granted to them by Community law before the national courts. (...) Further foundation for the obligation on the part of Member States to pay compensation for such harm is to be found in Article 5 EEC, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to *nullify the unlawful consequences of a breach of Community law*."

On the conditions for liability under Francovich, the Court: "The *first* of those conditions is that the result prescribed by the directive should entail *the grant of rights to individuals*. The *second* condition is that it should be possible to *identify the content* of those rights on the basis of the provisions of the directive. Finally, the *third* condition is the existence of a *causal link* between the breach of the State's obligation and the harm suffered by the injured parties."

C-46/93, Brasserie du Pêcheur II/ Factortame [1996] ECR I-1029

Question whether State liability may also exist in respect of a breach of directly effective EC law, since national remedies are available for such an infringement. The Court: “the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a *minimum guarantee* and is *not sufficient in itself* to ensure the full and complete implementation of the Treaty.” With regard to the level of liability: “where a Member State acts in a field where it has no wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in the comparable situation.”

B. Definitions**i. Direct discrimination****C-177/88, Dekker [1990] ECR I-3941**

Refusal to enter into an employment contract with a female candidate who was otherwise suitable for that work, when the only basis of refusal was the adverse consequences for the employer of employing a pregnant woman. The Court: this differential treatment of pregnancy, although obviously affecting only certain female employees, constitutes *direct* gender discrimination.

C-343/92, De Weerd [1994] ECR I-571

Lowering the level of one group, in order to bring it on the same level as the disadvantaged group does not constitute ‘discrimination’. According to the Court: equally bad treatment, is still equal treatment. The Court: “Community law does not prevent Member States from taking measures, in order to control their social expenditure, which have the effect of *withdrawing social security benefits* from certain categories of persons, provided that those measures are compatible with the principle of equal treatment between men and women.”

C-408/92, Smith v. Avdel Systems [1994] ECR I-4435

Similar situation as in *De Weerd*. The Court first establishes its point of departure: “once the Court has found that discrimination in relation to pay exists and so long as measures for bringing about equal treatment have not been adopted by the scheme, the only proper way of complying with Article 119 is to grant to the persons in the disadvantaged class the same advantages as those enjoyed by the persons in the favoured class.” Subsequently, the Court makes clear that nothing stands in the way of Member States to adjust their legislation by levelling down the protection in order to achieve equal treatment. “Article 119 of the Treaty does not preclude measures which achieve equal treatment by *reducing the advantages* of the persons previously favoured.”

ii. Indirect discrimination

Concept developed in ECJ case-law. Codified for the first time in 1997 in the Burden of Proof Directive (97/80/EC). It should be noted that the latter’s definition of indirect discrimination differs from that in the Race Directive (2000/43/EC) and the Framework Directive (2000/78/EC) and interpretation of this term will reflect this.

Case 170/84, Bilka-Kaufhaus [1986] ECR 1607

The Bilka department store established a supplementary occupational pension scheme as part of the employees' contracts. The scheme was accessible only after fifteen years of full-time employment. A female employee claims that female workers are more likely to take part-time work, than their male colleagues. The Court: "if the undertaking is able to show that its pay practice may be explained by *objectively justified factors unrelated to any discrimination* on grounds of sex there is no breach of Article 119."

N.B. In practice, if the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued, and are necessary to that end, the fact that the measures affect a far more greater number of women than men is not sufficient to show that they constitute an infringement of Article 119. There is no need to establish an intention to discriminate.

C-189/91, Kirsammer Hack [1993] I-6215

Denial of indirect discrimination on the basis of insufficient *statistics*. The Court: "There would be such discrimination only if it were established that small businesses employ a *considerably higher percentage* of women than men. In the present case, the information provided to the Court does not establish such a disproportion."

C-343/92, De Weerd and others [1994] ECR I-571

Concerned an indirectly discriminatory national measure, whereby a previous income requirement for eligibility for incapacity benefits was easier to obtain for men and unmarried women, than for married women. The Court: "application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more women than men" is precluded unless it is based on objectively justified factors unrelated to any discrimination on grounds of sex. Also: "to concede that *budgetary considerations* may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex (...) would be to accept that the application and scope of a *fundamental rule of Community law* as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States."

C-457/93, Lewark [1996] ECR I-243

Part-time working woman not compensated for time spent on training course outside her individual working hours. The Court: "In the light of all those considerations and taking into account the possibility of achieving the social policy aim in question by other means, the difference in treatment *could be justified* from the point of view of Article 119 of the Treaty and in the Directive only if it appeared to be *suitable and necessary* for achieving that aim. It is for the *national court* to ascertain whether that is so in the present case."

C-243/95, Hill and Stapleton [1998] ECR I-3739

Concerns 'objective justifications' for indirect discrimination. Case similar to Bilka-Kaufhaus, but involving State actor rather than only private actors. Discrimination against job-sharers who are predominantly women. The Court seems to apply greater standard of scrutiny of the 'objective justification' exception raised by States. The Court: "So far as the *justification based on economic grounds* is concerned, it should be noted that an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs."

C-226/98, Jørgenson [2000] ECR I-2447

Case concerning self-employment. The Court: "a situation may only reveal a prima facie case of indirect discrimination if the *statistics* describing that situation are valid, that is to say, if they cover enough individuals, do not illustrate *purely fortuitous or short-term phenomena*, and appear, in general, to be *significant*."

C-79/99, Schnorbus [2000] ECR I-10997

(Compare with *Kirsammer Hack*). Concerns access to practical legal training for lawyers. Priority given to male students who have already lost one year on compulsory military service. Alleged discrimination of women. Whereas the defendant and the Commission seem to accord great importance to the *statistical data*, the Court takes a different view. The Court: "it is not necessary in this case to *analyse the specific consequences* of the application of the JAO. It is sufficient to note that, by giving priority to applicants who have completed compulsory military or civilian service, the provisions at issue themselves are evidence of indirect discrimination (...)."

N.B. Note that the Race Directive, as well as the Framework Directive (2000/78/EC) and the Equal Treatment Directive (2002/73/EC) now includes the phrase "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical data."

C-187/00, Kutz-Bauer, 20 March 2003, Industrial Relations Law Reports vol. 32, No. 6, June 2003, p.368-374

Concerns exclusion from a scheme of part-time work for older employees under a collective agreement applicable to the public service. The Court: "the fact remains that the broad *margin of discretion* which the Member States enjoy in matters of social policy cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal treatment of men and women."

iii. Comparability

In order to establish whether direct or indirect discrimination has taken place, the Court needs to compare the actual situation with another situation. The determination of the group to compare with, is decisive for the outcome of that comparison and therefore for the answer to the question if there has been discrimination or not.

Case 129/79, Macarthy v. Smith [1980] ECR 1275

Female worker earns less than her male predecessor. The Court: "It follows that, in cases of actual discrimination falling within the scope of the direct application of Article 119, comparisons are confined to parallels which may be drawn on the basis of *concrete appraisals of the work actually performed* by employees of different sex within the same establishment or service." Thus, comparisons cannot be made with a "hypothetical male worker", but can be made between a woman and a man who previously held the same occupation.

N.B. Note that the Race Directive applies another wording: direct discrimination is also taken to occur when a person is treated less favourably than another person "is, has been or would be treated". This wording implies the comparator can be hypothetical.

Case 69/80, Worringham and Humphreys [1982] ECR 767

Case of male employees in a bank, with regard to compensation for obligatory payments to a pension fund, from which female employees were excluded. The Court: illegal discrimination may occur even where the impugned law or practice did not operate between the two sexes and it was sufficient that the distinctive criterion singled out *one class of men or women* from the rest of men and women.

Case 237/85, Rummler [1986] ECR 2101

A job classification scheme based on the strength required to carry out the work or the degree of physical hardship which the work entails is not in breach of the non-discrimination principle, as long as the following conditions are observed. The Court: "the criteria governing pay rate classification must ensure that the work which is *objectively the same* attracts the same rate of pay whether it is performed by a man or a woman; (...) in order for a job classification system not to be discriminatory as a whole, it must, in so far as the nature of the tasks carried out in the undertaking permits, take into account *criteria for which workers of each sex may show particular aptitude*."

C-177/88, Dekker [1990] ECR I-3941

Discrimination of women on the basis of pregnancy; who serves as comparator? The Court: there can be a finding of discrimination on grounds of sex if an employer bases adverse treatment on *pregnancy* even though there are no men that could serve as *comparators*.

Case 127/92, Enderby [1993] ECR 5535

(Compare to *Lawrence*) A speech therapist argued that she had been discriminated against on grounds of sex, because members of her profession, overwhelmingly female, were paid appreciably less well than members of comparable professions whose jobs were of equal value to hers (like clinical psychologists and pharmacists, where more men than women are employed). The Court: "if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a *prima facie* case of sex discrimination (...)."

C-237/94, O'Flynn [1996] ECR I-2617

(Compare: *Macarthys v. Smith*) Alleged case of indirect discrimination against migrant worker; infringement of Art. 7(2) Regulation 1612/68. Concerns a 'virtual' comparator. The Court: "unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is *intrinsically liable* to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a *particular disadvantage*." Art. 2(2)(b) Race Directive seems to reflect this judgement.

C-309/97, Angestelltenbetriebsrat [1999] ECR I-2865

Two groups of Austrian psychologists and doctors were performing identical activities, but with different professional training background. The Court: the term "same work" for the purposes of Art. 141 (ex Art. 119) does not apply where "the same activities are performed over a considerable length of time by persons the basis of whose qualification to exercise their profession is different."

C-381/99, Brunnhofer [2001] ECR I-4961

In order to ascertain whether work is "equal work" of the "same job", the Court: "it is not sufficient that two workers are classified in the same job category under a *collective bargaining agreement*."

C-320/00, Lawrence [2002] ECR I-7325

Alleged discrimination in pay between women and men. Women worked with catering and cleaning contracts, which were of equal value to jobs done by men. When part of the company was transferred, factually, the women started earning less than the men, but at a different firm. The Court: "where (...) the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC."

iv. Harassment

The definition of harassment in the Race Directive is new, as while the ECJ had made findings of harassment in its case-law, the definition of sexual harassment only entered EC legislation in Directive 2002/73/EC. Because harassment is described as a form of discrimination, there is no requirement of a comparator as a prerequisite for a finding of discrimination.

T-333/99, X v. European Central Bank [2001] ECR II-3021

Alleged sexual harassment of a male colleague by sending electronic messages containing pornographic and/or ideologically extreme material, by insinuating that the colleague in question is homosexual and by threatening physical assault. The applicant was thereby alleged to have poisoned the working atmosphere in the office which he shared with other employees of the ECB. As a consequence, he was dismissed. The Court: "As regards the denial that the pornographic documents and the items containing biographies and photographs of Nazi leaders were capable in themselves of constituting grounds for dismissal, it must be observed that the documents in question were sent by internal electronic mail to the victim of the harassment and therefore *constitute an aspect of that harassment*. Those facts constitute an infringement of the obligations laid down in Article 4(a) of the Conditions of Employment, which are of *fundamental importance* for the accomplishment of the ECB's objectives and which constitute an *essential element* of the way in which its staff are required to behave in order to safeguard its *independence and dignity*."

C-62/01 P, Campogrande v. Commission [2002] ECR I-3793

Official from the European Commission claims to have been sexually harassed by a colleague. The uncontested facts are that she has been "smacked on the lower part of her back" in a public occasion by the defendant, while saying "As you can see, my directorate is very well represented by women." An administrative inquiry concludes that "there is no evidence to conclude with certainty that the act in question has been committed by Mr A. with the intention of humiliating Ms Campogrande as a woman." Subsequently, the Court of First Instance characterised the uncontested events as "no more than friendly remarks or mere coincidences." The Court: "It is apparent, therefore, that the Court of First Instance did respond to the appellant's complaints, that it did so adequately and that accordingly [the appeal] is unfounded."

v. Instruction to discriminate

There is no jurisprudence on the instruction to discriminate. Instruction, as a form of discrimination has been inserted in the Race Directive (2000/43/EC), the Framework Directive (2000/78/EC) and the Revised Second Equal Treatment Directive (2002/73/EC).

C-256/01, Allonby, 13 January 2004, not yet published

Concerns dismissal of part-time female lecturer, who is subsequently hired again to perform the same work, but through an employment agency, whereas most male lecturers remain to be employees of the university. Allegedly case of sex discrimination because employees of the employment agency are entitled to a lesser extent to social protection. It could have been argued that the employment agency was instructed to discriminate by the university. The Court: considers the formal situation of the applicant towards her employer: "The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that Article." However, the Court does not mention the "instruction to discriminate" as included in the Revised Second Equal Treatment Directive.

vi. Victimisation

The concept of victimisation has been developed, as it used to imply only protection against dismissal, whereas the Race Directive refers to "any adverse treatment or adverse consequence".

C-185/97, Coote [1998] ECR I-5199

Former employer refuses to provide references to potential employers because the claimant had previously brought a claim of sex discrimination against the respondent. The Court: "The principle of effective judicial control (...) would be deprived of its effectiveness if the protection which it provides did not cover measures which, as in the main proceedings of this case, an employer might take as a reaction to the legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to *jeopardise implementation of the aim pursued by the Directive.*"

vii. Genuine and determining occupational requirements

This provision in the Race Directive is inspired by the Court's jurisprudence, as developed, among others, in the following cases.

Case 165/82, Commission v. UK [1983] ECR 3431

Case concerning limited access of men to the profession of midwife. The Court holds that this limitation is in conformity with the allowed exceptions to the principle of equal treatment, in view of the fact that "*personal sensitivities*" could play an important role in the relationship between midwife and patient.

Case 222/84, Johnston [1986] ECR 1651

Concerns the refusal of a woman as armed member of a police reserve force. The Court: "it is for the national court to say whether the reasons on which the Chief Constable based his decision are in fact *well founded* and justify the specific measure taken in Mrs Johnston's case. It is also for the national court to ensure that the *principle of proportionality* is observed and to determine whether the refusal to renew Mrs Johnston's contract *could not be avoided* by allocating to women duties which, without jeopardising the aims pursued, can be performed without fire-arms."

C-273/97, Sirdar [1999] ECR I-7403

Concerns cook in Royal Marines; policy of excluding women from service on the grounds that their presence is incompatible with the requirement of every Marine, irrespective of his specialisation, to be capable of fighting in a commando unit. According to the Marines, this policy excludes the employment of women. The Court: "in determining the scope of any derogation from an individual right such as the equal treatment of men and women, the principle of *proportionality*, one of the general principles of Community law, must also be observed (...). That principle requires that derogations remain within the limits of what is *appropriate and necessary* in order to achieve the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public security which determine the context in which the activities in question are to be performed."

C-285/98, Kreil [2000] ECR I-69

Concerns the general exclusion by law of women from serving in military positions involving the use of arms. The Court: "such an exclusion, which applies to almost all military posts in the Bundeswehr, cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out. However, the derogations provided for in Article 2(2) of the Directive can apply only to *specific activities*."

viii. Positive action

Not worded in exactly the same terms in the Equal Treatment Directive (76/207/EEC) and the Race Directive. Whereas the first refers to "removing existing inequalities", the latter is more inclusive when it allows Member States to "maintain or adopt specific measures to prevent or compensate for disadvantages". The jurisprudence of the former can probably be applied to the latter.

C-450/93, Kalanke [1995] ECR I-3051

Employer found Mr. Kalanke equally qualified for post as section manager as female candidate, but gave preference to the latter, as required by Bremen laws on positive action. The Court: national measures which give a specific advantage to women to improve their ability to compete on the labour market and pursue a career on equal footing to men are permitted. However, rules, which guarantee women absolute and unconditional priority for appointment or promotion, go beyond the limits of the exception in Article 2(4) Equal Treatment Directive. As a *derogation from an individual right laid down in the directive*, the exception for positive action measures must be interpreted *strictly*.

C-136/95, Thibault [1998] ECR I-2011

Case concerning career advancement procedures of employees. A woman missed an assessment of performance, and hence an opportunity for promotion because of her absence due to pregnancy. The Court: “the result pursued by the Directive is *substantive, not formal, equality*.” The discretion Member States have when adopting social measures in order to guarantee protection of women in connection with pregnancy and maternity “cannot serve as a basis for unfavourable treatment of a woman regarding her working conditions.”

C-409/95, Marschall [1997] ECR I-6363

Situation similar to *Kalanke*. The Court: such selection criteria do not breach the Directive, provided that, “in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an *objective assessment* which will take account of all criteria specific to the individual candidates and will *override the priority* accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates.”

C-158/97, Badeck [1999] ECR I-1875

Concerns positive action in training/education. The question is if the Directive precludes a women's advancement plan for the public service which, in trained occupations in which women are under-represented and for which the State does *not* have a monopoly of training, allocates at least half the training places to women. The Court: “the provision (...) forms part of a restricted concept of equality of opportunity. It is not places in employment which are reserved for women but *places in training* with a view to obtaining qualifications with the prospect of subsequent access to trained occupations in the public service. (...) The measures provided for are thus measures which are intended to eliminate the causes of women's reduced *opportunities of access to employment* and careers, and moreover consists of measures regarding vocational orientation and training. Such measures are therefore among the measures authorised by Article 2(4) of the Directive.”

C-407/98, Abrahamsson and Anderson [2000] ECR I-5539

Possibility in Swedish law to appoint an applicant from an ‘under-represented sex’ if she is less qualified than a male applicant, as long as she has “sufficient qualifications” for the post. The Court: notwithstanding the imposition of the requirement of objectivity, this provision is incompatible with EC law because it effectively gives priority to women, even when they are less qualified than male candidates. The Court aims at *substantive*, rather than *formal* equality.

C-476/99, Lommers [2002] ECR I-2891

The Court repeats that the positive action provision is an exception, but does not mention the principle of narrow interpretation, which it normally applies to exceptions. It emphasises, to the contrary, the importance of proportionality. The Court: “in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of *proportionality*, which requires that derogations must remain within the limits of what is *appropriate and necessary* in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim pursued.”

ix. Burden of proof

This concept was first developed in relation to sex discrimination in the jurisprudence of the Court before being codified in the 1997 Directive on the burden of proof. The wording of the principle in the latter is the same as the wording in the Race Directive.

Case 170/84, Bilka-Kaufhaus [1986] ECR 1607

Concerns: exclusion (female) part-time workers from an occupational pension scheme. The Court: “when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 of the Treaty, unless the *employer* shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex.”

Case 109/88, Danfoss [1989] ECR 3199

Complex payment system hampers assessment and proof. Employer pays the same basic wage to employees in the same wage group, but it also awards individual pay supplements which are calculated on the basis of mobility, training and seniority. As a result, a man's average wage is higher than that of a woman. The Court: “in a situation where a system of individual pay supplements which is completely lacking in transparency is at issue, female employees can establish differences only in so far as average pay is concerned. They would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not *to impose upon the employer the burden of proving* that his practice in the matter of wages is not in fact discriminatory.”

Case 127/92, Enderby [1993] ECR 5535

Details of the case: see *supra*. The Court: “Where there is a *prima facie* case of discrimination, it is for the employer to show that there are *objective reasons for the difference* in pay. Workers should be *unable to enforce* the principle of equal pay before national courts if evidence of a *prima facie* case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory.”

C-400/93, Royal Copenhagen [1995] ECR I-1275

Concerns employees covered by one collective agreement, where some are paid on a piece-work basis, whereas others receive a fixed minimum. The Court: “where in a piece-work pay scheme in which individual pay consists of a variable element depending on each worker's output and a fixed element differing according to the group of workers concerned it is not possible *to identify the factors* which determined the rates or units of measurement used to calculate the *variable element in the pay*, the employer may have to bear the burden of proving that the differences found are not due to sex discrimination.”

x. Sanctions

The wording in the Race Directive is based on case-law developed by the Court of Justice in order to secure the effectiveness of the existing Directives (Equal Treatment, Burden of Proof, etc).

Case 68/88, Commission v. Greece [1989] ECR 2965

Sanctions need to be effective, proportionate and dissuasive. The Court: “In choosing the appropriate solution for guaranteeing that the objective of the Directive is attained, the Member States must ensure that the infringements of Community law are penalized under *conditions*, both procedural and substantive, which are *analogous* to those applicable to infringements of domestic law of a similar nature and importance.”

Case 14/83, Von Colson and Kamann [1984] ECR 1891 (and many others)

Concerns the failure of Germany to implement the Second Equal Treatment Directive. The Court: EC law does not prescribe a specific sanction, in particular, it does not prescribe that the complainant is reinstated in his or her rights. However, “the sanctions chosen by the Member States must have a *real dissuasive effect* on the employer and must be *adequate* in relation to the damage sustained in order in order to ensure *real and effective judicial protection*.”

C-271/91, Marshall II [1993] ECR I-4367

Concerns a claim for compensation for damage sustained as a result of dismissal. The Court: “Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be *adequate*, in that it must enable the loss and damage actually sustained as a result of a discriminatory dismissal to be made good in full in accordance with the applicable national rules.” Moreover, “the fixing of an *upper limit* of [compensation] cannot, by definition, constitute proper implementation of Article 6 of the Directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal.”

Case C-180/95 Draehmpaehl [1997] ECR I-2195

Concerns a claim for payments for lost income because application of the applicant had not been considered because, allegedly, he was a man. The Court: “if a Member State chooses to penalise breach of the prohibition of discrimination by the award of compensation, that compensation must be such as to guarantee real and effective judicial protection, have a real deterrent effect on the employer, and must in any event be adequate in relation to the damage sustained. *Purely nominal compensation* would not satisfy the requirements of an effective transposition of the Directive.”

C. Scope**i. Access to employment****Case 318/86, Commission v. France [1988] ECR 3559**

Concerns a case of very complex and opaque recruitment procedure. The Court condemns a system of recruitment, characterised by a lack of transparency, as being contrary to the principle of equal access to employment on the ground that *the lack of transparency prevented any form of supervision by the national courts*.

C-226/98, Jørgensen [2000] ECR I-2447

Case concerning self-employment. The Court applies the same standard for proving inequalities as in *Enderby*. The Court: "a situation may only reveal a prima facie case of indirect discrimination if the statistics describing that situation are valid, that is to say, if they cover *enough individuals*, do not illustrate *purely fortuitous or short-term phenomena*, and appear, in general, to be *significant*."

N.B. The Court did not take into account that it may be more difficult to collect statistical data on self-employment than on employees.

ii. Access to all levels of vocational training**Case 293/83, Gravier [1985] ECR 593**

Concerns enrolment fee for vocational training not paid by nationals of the Member State, but due for other EU citizens. The Court: "although educational organisation and policy are not as such included in the spheres which the Treaty has entrusted to the Community institutions, access to and participation in courses of instruction and apprenticeship, in particular vocational training, are *not unconnected with Community law*."

Case 24/86, Blaizot [1988] ECR 379

Concerns the question whether university study can be covered by 'vocational training'. The Court replies to the affirmative, "not only where the final academic examination directly provides the required qualification for a particular profession, trade or employment but also in so far as the studies in question provide specific training and skills, that is to say where a student needs the knowledge so acquired for the pursuit of a profession, trade or employment."

C-25/02, Rinke, 9 September 2003, not yet published

Concerns disadvantage for part-time trainee doctors, who are in majority women. The Court: "the harmonisation at Community level of that training not only facilitates the free movement of doctors but also contributes to a high level of public health protection in the Community. In the pursuit of those objectives, the Community legislature must be allowed a *wide margin of discretion*, which cannot, however, render meaningless the implementation of a *fundamental principle of Community law* such as the elimination of indirect discrimination on grounds of sex."

iii. Employment and working conditions, including dismissals and pay**Case 12/81, Garland v. British Rail Engineering [1982] ECR 359**

Concerning the concept of "pay". The Court: the term "pay" includes the grant of special travel facilities to ex-employees after retirement, even though the benefit is received following termination of employment and is *not granted pursuant to any contractual entitlement*. The Court considers that the legal nature of the facilities is not important for the purposes of the application of Article 141 (ex 119) provided that they are granted in respect of the applicant's employment.

Case 151/84, Roberts [1986] ECR 703

Case about occupational pension scheme providing for compulsory retirement with a pension at age 65 for men and 60 for women. The question was if this situation was covered by the Social Security Directive or the Equal Treatment Directive. The Court: the *imposition of an age limit for compulsory redundancy* is not about the terms on which an early pension is granted, even if it involves the grant of a pension, but about the terms of *dismissal*.

C-342/93, Gillespie and others [1996] ECR I-475

Question whether maternity benefits paid by an employer constitute “pay” in the sense of the Directive. The Court: “the concept of pay includes all consideration which workers receive directly or indirectly from their employers in respect of their employment. The legal nature of such consideration is not important for the purposes of the application of article 119 provided that it is granted in respect of employment.”

N.B. In later jurisprudence (C-262/88 Barber [1990] ECR I-1889 and follow-up case-law), the Court has held that the term “pay” includes equally occupation pension schemes, temporary post-employment payments, sick benefits, severance allowances and travel concessions.

iv. Workers' and employers' organisations**C-213/90, ASTI I [1991] ECR I-3507**

Concerns the interpretation of the term 'trade union'. The Court: “the exercise of trade-union rights referred to in [Regulation 1612/68] *extends beyond the bounds of trade union organisations in the strict sense* and includes, in particular, the participation of workers in bodies which, while not being, in law, trade-union organisations, perform similar functions as regards the defence and representation of worker's interests.”

C-171/01, Wählergruppe Gemeinsam, 8 May 2003, not yet published

Concerns the exclusion of Turkish workers from election to a chamber of workers, whereas those workers fully comply with the requisites for eligibility, except for the Austrian nationality. The Court: “it is settled case-law that the non-application of the rules laid down in Article 48 of the Treaty to activities which constitute participation in the exercise of powers conferred by public law is an *exception to a fundamental freedom* and must therefore be interpreted in such a way as to limit its scope to that which is *strictly necessary* in order to safeguard the interests which that exception allows the Member States to protect. It follows that that exception cannot permit a Member State to submit generally any participation in a public law institution such as the chambers of work in Austria to a *condition of nationality* (...).”

v. Social protection, including social security and healthcare**Case 170/84, Bilka-Kaufhaus [1986] ECR 1607**

Facts of the case: see *supra*. The Court considers occupational pension schemes entirely financed by the employer to be a matter of pay rather than social security. The Court: “The contractual rather than the statutory nature of the scheme in question is confirmed by the fact that (...) the scheme and the rules governing it are regarded as an integral part of the contracts of employment between Bilka and its employees. It must therefore be concluded that the scheme does not constitute a *social security scheme governed directly by statute* and thus does not fall outside the scope of Article 119.”

C-262/88, Barber [1990] ECR I-1889

The main question in this case is, in essence, whether contracted-out occupational pension schemes are social security or pay (following either *Defrenne I* or *Bilka*). The Court: focuses on three features of the contracted-out scheme: 1. if it is agreed and entirely financed by the employer (not imposed directly by statute), 2. if it is not compulsorily applicable to general categories of employees and governed by its own rules (although in conformity with national legislation), 3. if the provisions can also go further than the statutory scheme (which it is a substitution for) and provide additional benefits, thereby making it indistinguishable from supplementary schemes.

N.B. The long range of jurisprudence on the difference between 'pay' on the one hand, and 'social security' on the other hand, has probably become obsolete for the purpose of the Race directive, since both areas are covered in the anti-discrimination principle of this directive.

vi. Social advantages**Case 32/75, Cristini [1975] ECR 1085**

One case in a range, giving wide interpretation to Article 12(2) of Regulation 1612/68 on 'social and tax advantages' for migrant workers. The Court: "in view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, *whether or not attached to the contract of employment*, such as the reductions in fares for large families."

Case 207/78, Even [1979] ECR 2019

Concerning the interpretation of Article 12(2) of Regulation 1612/68. The Court: "It follows from all its provisions and from the objective pursued that the advantages which this regulation extends to workers who are nationals of other Member States are all those which, *whether or not linked to a contract of employment*, are generally granted to national workers primarily because of their *objective status as workers* or by virtue of the *mere fact of their residence* on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community."

Case 69/80, Worringham [1981] ECR 767

Case of social advantages in sphere of anti-discrimination legislation. For the facts of the case, see *supra*. The Court: "Although, where women are not required to pay contributions, the salary of men after deduction of the contributions is comparable to that of women who do not pay contributions, the inequality between the gross salaries of men and women is nevertheless a source of discrimination contrary to Article 119 of the Treaty since because of that inequality men receive benefits from which women engaged in the same work or work of equal value are excluded, or receive on that account greater *benefits or social advantages* than those to which women are entitled."

Case 65/81, Reina [1982] ECR 33

Concerns the question if a 'childbirth loan', which is part of the German demographic policy encouraging its nationals to have children, is a 'social advantage'. The Court: "It should be stated that, since the Community has no powers in the field of demographic policy as such, the Member States are permitted, in principle, to

pursue their achievement of the objectives of such a policy, even by means of social measures. This does *not* mean, however, that the *Community exceeds the limits of its jurisdiction* solely because the exercise of its jurisdiction affects measures adopted in pursuance of that policy."

vii. Education

Case 9/74, Casagrande [1974] ECR 773

Concerns Article 12 of Regulation 1612/68 on equal access for the children of a migrant worker to the state's educational courses. The Court: this provision covers also any *general measures intended to facilitate educational attendance*, including an educational grant for secondary school in Germany.

C-153/02, Neri, 13 November 2003, not yet published

Concerns Italian student who follows courses of UK university at agreed branch of that university in Italy. Italy will not recognise diplomas obtained by Italians at that institution because it is unable to guarantee its quality. The Court: "However, whilst the aim of ensuring high standards of university education appears *legitimate* to justify *restrictions on fundamental freedoms*, such restrictions must be *suitable for securing the attainment of the objective* which they pursue and must *not go beyond* what is *necessary* in order to attain it."

viii. Access to and supply of goods and services

Application of the equal treatment principle in the access to and provision of goods and services brings a number of situations within the scope of the Race Directive that had previously been held to be outside the employment-focussed scope of sex equality directive.

C-243/90, Smithson [1992] ECR I-467

Concerns the question whether the allocation of housing benefits is covered by the term 'social assistance' in Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The Court: "In order to fall within the scope of Directive 79/7, therefore, a benefit must constitute the whole or part of a statutory scheme providing protection against one of the specified risks or a form of social assistance having the same objective." With regard to the *special allowance* enabling a person to *meet housing costs*, the Court: "The age and invalidity of the beneficiary are only two of the criteria applied in order to determine the extent of the beneficiary's financial need for such an allowance. [This] is not sufficient to bring that benefit within the scope of Directive 79/7."

2. Recent national judgments on Race Directive principles¹⁰¹

A. Cour de Cassation; case 3294 of 11 June 2002

Case in appeal against judgement no. 870 of 5 June 2001, Criminal court of appeal, Montpellier
Appeal instituted by SOS Racisme against the acquittal of the accused of the charge of racial discrimination perpetrated in the provision of a service on the grounds of origin or ethnicity.

¹⁰¹ Cases summarised by Migration Policy Group

The facts of the case

Several members or sympathisers of *SOS Racisme* organised a 'testing' operation in order to establish possible discriminatory practices at the entrance of discos or bars. The persons involved split up into three groups, each made up of two women and one man. The persons in one of these groups were all of European origin, whereas the persons in the other groups were of northern African origin. They presented themselves at the bars and discos concerned, and the persons of northern African origin were refused access. On the basis of these facts, the public prosecutor charged the managers as well as the porters of these bars and discos with racial discrimination perpetrated in the provision of a service on the grounds of origin or ethnicity. They were subsequently acquitted by the criminal court of Montpellier. The claims of the civil parties, amongst which *SOS Racisme*, were dismissed.

Decision of the Court in appeal

The Court takes into consideration that in penal law the establishment of evidence is free for the judge and that the judge should base his decision on the evidence brought and discussed before him. However, even where the establishment of the truthfulness of a fact is essential, the finding of those facts is subject to professional ethics and morality in the investigations carried out by the police, the gendarmerie, the customs and other authorised government services. If an organisation takes upon itself to establish evidence, it is subject to the same obligations to act in good faith.

This is the case for *SOS Racisme*. Their fight against all kinds of segregation does not allow it to breach the rules of penal procedure, imposing a presumption of innocence and good faith in the finding of evidence. In this case, the 'testing' operation was carried out by groups of potential clients and organised by the organisation alone, who had informed only their members and sympathisers about the scope of the operation, the aim of which was not to enter the bars or discos, but to demonstrate the segregation performed at the entrance of these places.

Another consideration mentioned by the Court of appeal, leading to its decision, was the fact that only the testimonies collected by *SOS Racisme* were presented. The Court held that there is no objective observation permitting the corroboration of the testimonies of the civil parties. Even where the testing revealed a different attitude by the porters, this does not confirm in any way that the refusal of entry was racially motivated. Moreover, the testimonies before the tribunal has demonstrated that the clientele of two of the three places is multiracial, and the accused have denied the offence of racial discrimination. With the exception of the subjective opinion expressed by the civil parties, nothing leads the court to consider that the accused selected their clientele on the basis of racial criteria. Even if a selection took place, this is to be considered as usual in this kind of business, where commercial considerations lead to the establishment of places for 'gays', 'blacks', 'heteros' or the 'jet set'.

In a final consideration, the Court of appeal finds that the method of 'testing' used by *SOS Racisme*, which took place without any intervention of an officer of the court ('*officier de justice*' or '*huissier de justice*'), is not at all transparent and is not marked by the good faith required in the establishment of evidence in penal

proceedings. It thus infringes the right of defence, which is a general principle of law, repeated continually by the legislator and the Supreme Court, as well as the right to a fair process enshrined in Article 6 of the European Convention on Human Rights. The Court moreover holds that the 'testing' may have met the requirement of good faith if the findings of the private party had been recorded by authorities called to the place for that reason.

Judgment of the 'Cour de Cassation'

The '*Cour de Cassation*' (highest instance in France for civil and criminal proceedings) finds that the Court of appeal has infringed Article 427 of the Penal Procedure Code. This Article establishes that infringements can be proved by all means of evidence ("*tout mode de preuve*"). In stating that the testing procedure used in this case did not meet the requirement of good faith, on the grounds that there had not been any intervention by police officers to record the offence of racial discrimination, the Court of appeal failed to observe Article 427 of the Penal Procedure Code.

What is more, the '*Cour de Cassation*' confirms that discrimination of *one person* suffices to establish the offence; the absence of discrimination with regard to *other persons* is not a reason for the exoneration of the discriminator of that person. In the same way, the existence of a practice of selection in other, similar, places, cannot negate liability for the offence of discrimination.

For these reasons, the '*Cour de Cassation*' holds that the judges in appeal have infringed the law, in basing their decision on incorrect reasoning according to which firstly, the clientele in the discos is multiracial, and secondly, the selection of clients on the basis of a 'niche in the clientele market' ('*créneau de clientèle*') is common in this kind of business.

On the basis of these considerations, the '*Cour de Cassation*' quashed and annulled the decision of the Court of appeal of Montpellier, in so far as it relates to the dismissal of the claims of *SOS Racisme*, whereas the rest of the judgment remains in place. It sent the case to the Court of appeal of Lyon.

B. Bundesverfassungsgericht (Federal Constitutional Court) 2 BvR 1436/02 of 24 September 2003

In a case against the decision of the Bundesverwaltungsgericht (Federal Administrative Court) JZ 2002, 254¹⁰² Constitutional objection raised by a female claimant against the administrative decision whereby she is not allowed to wear a headscarf while teaching.

The facts of the case

The case concerned a naturalised German woman of Afghan origin, who had finished her university studies to become a teacher in Germany, including the obligatory two-year practical experience. The woman was Muslim and wore a headscarf. When, after finishing her education she sought employment in the state of

¹⁰² See, for a more in-depth discussion of this judgment M. Mahlmann, Religious Tolerance, *Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, German Law Journal 2003, p.1099-1116, www.germanlawjournal.com

Baden-Württemberg, she was turned down by the responsible administration on the basis of what is formally called "*mangelnder persönlicher Eignung*", or 'lack of personal qualification'. This general precondition for appointment, to which all potential German civil servants are subject, is a statutory demand in the German federal law. The question raised was whether *not* wearing a headscarf can be considered as part of a teacher's 'personal qualification'.

At stake are several, possibly conflicting, constitutional provisions. A very important fundamental right is contained in Articles 4.1 and 4.2 of the Basic Law ("*Grundgesetz*") on the freedom of religion. But this fundamental right can conflict with other fundamental principles. One such principle laid down in Article 33.2 of the Basic Law is that of the precondition of "*persönlicher Eignung*" or "personal qualification". Also, the principle of equal treatment clearly has its importance. Article 33.3 of the Basic Law guarantees equal access to public offices irrespective of, among others, religion. This provision is in turn limited by Article 33.5 of the Basic Law, which provides that any civil servant has to accept special limits to his constitutional rights in order to enable the functioning of public administration. Moreover, Article 7.1 of the Basic Law establishes that the state is responsible for educational matters. This provision may collide with Articles 4.1 and 6.2 of the Basic Law on the negative freedom of religion of children (to not be confronted with religious expressions), and the right of parents to determine the content of education.

The decisions by the lower administrative courts, confirmed by the Federal Administrative Court

The decision by the administration stating that the applicant was not qualified to be a teacher, because she did not comply with the requirement of the 'personal qualification' because she wore a headscarf, was upheld by two lower instance administrative courts. When asked to rule on this case, the Federal Administrative Court (the highest administrative instance in Germany), confirmed that it touched upon the freedom of religion of the applicant, and that any appointment of a civil servant had to be made irrespective of religion. However, it also held that Article 33.5 of the Basic Law, which obliges civil servants to accept special limits to their constitutional rights, can be read as referring to the preservation of the neutrality of the state as to religious doctrines and matters of belief. This leads to the conclusion that in order to preserve the neutrality of the state, a teacher can be asked to remove her headscarf. The Administrative Court buttressed this conclusion by referring to the negative freedom of religion and the right of parents to determine the content of education. It found, indeed, that a headscarf worn by a teacher is a powerful symbol of religious affiliation.

The decision by the Federal Constitutional Court

The final decision by the Federal Constitutional Court in this case very much surprised legal actors and scholars. In fact, the Court did not give an unequivocal ruling on the question whether or not it is allowed to refuse to employ teachers wearing a headscarf, but allocated the competence to solve the problem to the "*Länder*" (German federal states).

The reasoning of the Constitutional Court was similar to that of the administrative courts at the outset. It emphasised the importance of the constitutional requirement of 'personal qualifications' in order to become a civil servant, as well as the equal access to public offices irrespective of religion, and the freedom of religion.

However, it also recalled that the principles of neutrality of the state, parents' rights and negative freedom of religion of the pupils, possibly limited the *prima facie* legal position of the plaintiff. The Constitutional Court weighed up these elements and came to the conclusion that due to the essential nature of the issue for the constitutional rights of the applicant, a restriction of these rights needs to be laid down in a statute. In other words, the law as it stands now does not allow the administration to refuse access to civil service of women wearing a headscarf. However, it leaves the possibility open for the legislator (including on the federal state level) to introduce new legislation expressly prohibiting the wearing of headscarves by teachers. An individual administrative decision cannot justify such an important breach of fundamental rights.

Some elements of the (very detailed) ruling of the Federal Constitutional Court are worth mentioning. One concerns the meaning of the headscarf. It does not give importance to the possible expression of suppression of women in Muslim culture or to the subjective meaning the wearer gives to it. What is important is how the 'objective observer' interprets it. According to the Court, basing itself on some empirical evidence, the headscarf cannot be reduced to a mere symbol of the suppression of Muslim women. It does recognise, however, that a teacher wearing a headscarf could have a harmful influence on children (although it recognises at the same time that the opposite may be true). The Court does not seem to consider the lack of evidence proves this postulate to be an impediment to the legislator deciding on the matter.

ANNEX SIX:

CONTACT DETAILS

This is a non-exhaustive list of relevant international and European institutions and organisations.

INTERNATIONAL INSTITUTIONS

Human Rights Committee (HRC)

c/o Office of the High Commissioner for Human Rights, Palais Wilson
52 Rue des Pacquis
1211 Geneva
Switzerland
Fax : + 41/ 22-917-9022
E-mail : tb-petitions.hchr@unog.ch

Committee on the Elimination of Discrimination against Women (CEDAW)

c/o Division for the Advancement of Women, Department of Economic and Social Affairs
United Nations Secretariat
2 United Nations Plaza, DC-2/12th Floor
New York, NY 10017
United States of America
Fax : + 1/ 212 963 3463
URL : <http://www.unhchr.ch/html/menu2/6/cedw.htm>

Committee on the Elimination of Racial Discrimination (CERD)

c/o Office of the High Commissioner for Human Rights
Palais Wilson
52 Rue des Pacquis
1211 Geneva, Switzerland
Fax : + 41/ 22 917 9022 (particularly for urgent matters)
E-mail : tb-petitions@ohchr.org
URL : <http://www.unhchr.ch/html/menu2/6/cerd.htm>

International Labour Organization (ILO)

International Labour Office
4, route des Morillons
CH-1211 Geneva 22
Switzerland
Tel. : + 41/ 22.799.6111
Fax : + 41/ 22.798.8685
E-mail : ilo@ilo.org
URL : <http://www.ilo.org/>

International Organisation for Migration

URL : <http://www.iom.int>

UN Human Rights Committee (UNHRC)

Office of the High Commissioner for Human Rights
 United Nations Office at Geneva
 1211 Geneva 10
 Switzerland
 Fax : + 41/ 22 917 9022 (particularly for urgent matters)
 E-mail : tb-petitions@ohchr.org
 URL : <http://www.unhcr.ch/html/menu2/6/hrc.htm>

SPECIALISED BODIES**Belgian Centre for Equal Opportunities and Opposition to Racism**

E-mail : centre@antiracisme.be
 URL : <http://www.antiracisme.be/>

Cyprus Commissioner for Administration (Ombudsman)

6 Gladstone Street
 1095 Nicosia
 Cyprus
 URL : <http://www.kypros.org/PIO/cygov/indepoff.htm#Ombudsman>

Danish Institute for Human Rights

E-mail : center@humanrights.dk
 URL : <http://www.humanrights.dk/frontpage/>

Dutch Equal Treatment Commission

E-mail : info@cgb.nl
 URL : <http://www.cgb.nl/>

Estonian Legal Chancellor

E-mail : info@oiguskantsler.ee
 URL : <http://www.oiguskantsler.ee>

Finnish Ombudsman for Minorities

E-mail : vahemmistovaltuudetun.toimisto@mol.fi
 URL : <http://www.mol.fi/vahemmistovaltuutettu/ombudsmaneng.html>

Greek Ombudsman

5 Hadjiyanni Mexi Str.

115 28 Athens

URL : http://www.synigoros.gr/en_index.htm

Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities (Hungary)

E-mail : nekjob@obh.hu

URL : <http://www.obh.hu/nekh/en/index.htm>

Equality Authority, Ireland

E-mail : info@equality.ie

URL : <http://www.equality.ie/>

Italian Ministry of Equal Opportunities

Via Barberini 38

00100 Roma

Latvian National Human Rights Office

E-mail : vcb@vcb.lv

URL : <http://www.vcb.lv/eng/index.php>

Office of the Equal Opportunities Ombudsman (Lithuania)

E-mail : mvlgk@lrs.lt

URL : http://www3.lrs.lt/pls/inter/w3_eng_h.home

Equality Commission for Northern Ireland

E-mail : information@equalityni.org

URL : <http://www.equalityni.org>

Centre for Combating Ethnic Discrimination (Norway)

E-mail : smed@smed.no

URL : <http://www.smed.no>

High Commissioner for Immigration and Ethnic Minorities (Portugal)

E-mail : acime@acime.gov.pt

URL : www.acime.gov.pt

Romania National Council for Combating Discrimination

35a Nicolae Bălcescu Blv., Entrance A, Floor 5, apt 10

Bucharest, sector 1

Romania

Slovak National Centre for Human RightsE-mail : lpava@zutom.skURL : http://www.snslp.sk/index_en.html**Swedish Ombudsman against ethnic discrimination**E-mail : do@do.seURL : <http://www.do.se/>**British Commission for Racial Equality (CRE)**E-mail : info@cre.gov.ukURL : <http://www.cre.gov.uk>**EUROPEAN INSTITUTIONS****COUNCIL OF EUROPE****European Commission against Racism and Intolerance (ECRI)**

Secretariat of ECRI

Conseil de l'Europe

F-67075 STRASBOURG CEDEX

France

Fax : + 33/ 0 3 88 41 39 87

URL : http://www.coe.int/t/E/human_rights/ecri/**Council of Europe:** activities related to Roma/GypsiesURL : http://www.coe.int/T/E/Social_Cohesion/Roma_Gypsies/**Secretariat of the Framework Convention for the Protection of National Minorities**E-mail : minorities.fcnm@coe.intURL : http://www.coe.int/T/E/human_rights/minorities/**European Court of Human Rights (ECtHR)**

Council of Europe

F - 67075 Strasbourg-Cedex

Tel. : + 33/ 0 3 88 41 20 18

Fax : + 33/ 0 3 88 41 27 30

E-mail : webmaster@echr.coe.intURL : <http://www.echr.coe.int>

EUROPEAN UNION**European Commission**

B-1049 Brussels

Belgium

Via the switchboard: + 32/ 2 299 11 11

URL : http://www.europa.eu.int/comm/index_en.htm

DG Employment and Social Affairs

URL : http://www.europa.eu.int/comm/employment_social/index_en.htm

European Commissioner for Employment and Social Affairs - DG Employment and Social Affairs

B-1049 Brussels

Belgium

Fax : + 32/ 2 2982 099

E-mail : empl-info@cec.eu.int

European Commission: Action Programme to Combat Discrimination 2001-2006

URL : http://www.europa.eu.int/comm/employment_social/fundamental_rights/prog/index_en.htm

European Court of Justice (ECJ)

Cour de justice des Communautés européennes

L-2925 Luxembourg

Tel. : + 352/ 4303.1

Fax : + 352/ 4303.2600

Registry of the Court of Justice

Fax : + 352/ 433766

E-mail : ECJ.Registry@curia.eu.int

URL : <http://www.curia.eu.int/>

European Monitoring Centre on Racism and Xenophobia (EUMC)

Rahlgasse 3

A – 1060 Vienna

Austria

Tel. : + 43/ 1 580 30 - 0

General inquiries fax number: + 43/ 1 580 30 - 99

E-mail : information@eumc.eu.int

URL : <http://www.eumc.at/eumc/index.php>

European Parliament

Rue Wiertz

B-1047 Bruxelles

Tel. : + 32/ 2 284 21 11

Allée du Printemps

B.P. 1024/F

F-67070 Strasbourg Cedex

Tel. : + 33/ (0)3 88 17 40 01

URL : <http://www.europarl.eu.int>

OTHER**OSCE: Office of the High Commissioner on National Minorities (HCNM)**

P.O. Box 20062, 2500 EB, The Hague

Netherlands

Tel. : + 31/ 70 312 55 00

Fax : + 31/ 70 363 59 10

E-mail : hcnm@hcnm.org

URL : <http://www.osce.org/hcnm/>

OSCE: Office for Democratic Institutions and Human Rights (ODIHR)

Aleje Ujazdowskie 19, 00-557 Warsaw, Poland

Tel. : + 48/ 22 520 06 00

Fax : + 48/ 22 520 06 05

E-mail : office@odihhr.pl

URL : <http://www.osce.org/odihhr/>

EUROPEAN ORGANISATIONS PARTICIPATING IN THE LONDON WORKSHOP**Bulgarian Helsinki Committee**

Central office

7 Varbitsa Street

1504 Sofia

Bulgaria

Tel./fax : + 359/ 2 943 4876, 2 944 0670, 2 943 9060

E-mail : bhc@bghelsinki.org

URL : http://www.bghelsinki.org/index_en.html

Documentation and Advisory Center on Racial Discrimination (DRC)

Medborgerhuset - Nørre Alle 7, 2. sal, 2200 København N.

Denmark

Tel. : + 45/ 35 36 38 45

E-mail : drc@drcenter.dk

URL : <http://www.drcenter.dk>

Equality Authority Ireland

Clonmel St, Dublin 2

Ireland

Tel. : + 353/ 1 4173333

Fax : + 353/ 1 4173366

E-mail : info@equality.ie

URL : <http://www.equality.ie>

European Roma Rights Center (ERRC)

H-1386 Budapest 62

PO Box 906/93

Hungary

Tel. : + 36/ 1 4132200

Fax : + 36/ 1 4132201

URL : <http://www.errc.org/index.shtml>

Hungarian Helsinki Committee

1428 Budapest P.f.: 40

1073 Budapest

Kertész utca 42-44. II/9

Hungary

Tel./fax : + 361/ 321 4141, 321 4323, 321 4327

E-mail : helsinki@mail.datanet.hu

URL : <http://www.helsinki.hu>

Interights

Lancaster House
33 Islington High Street
London N1 9LH
UK
Tel. : + 44 /0 20 7278 3230
Fax : + 44/ 0 20 7278 4334
E-mail : ir@interights.org
URL : <http://www.interights.org>

Legal Defence Bureau for National and Ethnic Minorities (NEKI)

Budapest, Hungary
Tel./fax : + 361/ 303 89 73, 314 49 98
URL : <http://www.neki.hu>

Migration Policy Group (MPG)

205 Rue Belliard, Box 1
1040 Brussels
Belgium
Tel. : + 32/ 2 230 59 30
Fax : + 32/ 2 280 09 25
E-mail : info@migpolgroup.com
URL : <http://www.migpolgroup.com>

Mouvement contre le Racisme, l'Antisémitisme et la Xénophobie (MRAX)

37 r de la Poste
B-1210 Bruxelles
Tel. : + 32/ 2 209.62.50
Fax : + 32/ 2 218.23.71
URL : <http://www.mrax.be/>

National Bureau against Racial Discrimination (LBR)

Building De Weenahof
Schaatsbaan 51
3013 AR Rotterdam
Netherlands
Tel. : + 31/ 0 10 2010201
Fax : + 31/ 0 10 2010222
E-mail : info@lbr.nl
URL : <http://www.lbr.nl>

Romani Baht Foundation

Sofia 1373, 8 Nov Jivot str.

Bulgaria

Tel./Fax : + 359/ 2 980 06 52, 2 23 13 03

URL : baht2000@rtsonline.net

OTHER EUROPEAN ORGANISATIONS**European Council on Refugees and Exiles (ECRE)**

ECRE Secretariat

103 Worship Street

London EC2A 2DF

UK

Tel. : +44/ 0 20 7377 7556

Fax : +44/ 0 20 7377 7586

E-mail : ecre@ecre.org

ECRE Brussels Office

205 rue Belliard

Box 14, 1040 Brussels

Belgium

Tel. : +32/ 0 2 514 5939

Fax : +32/ 0 2 514 5922

E-mail : euecre@ecre.be

URL : <http://www.ecre.org>

European Network Against Racism (ENAR)

43 rue de la Charité, B-1210 Brussels

Belgium

Tel. : +32/ 2 229 35 70

Fax : +32/ 2 229 35 75

E-mail : info@enar-eu.org

URL : www.enar-eu.org

Internet Centre Anti-Racism Europe (ICARE)

ICARE is a partnership project of UNITED and Magenta

E-mail : info@icare.to

URL : <http://www.icare.to>

Minority Rights Group International (MRG)

379 Brixton Road
London, SW9 7DE
UK

Tel. : + 44/ 0 20 7978 9498
Fax : + 44/ 0 20 7738 6265
E-mail : minority.rights@mrgmail.org
URL : <http://www.minorityrights.org>

The Platform of European Social NGOs

Avenue des Arts 43
B-1040 Brussels

Tel. : + 32/ 25 11 3714
Fax : + 32/ 25 11 1909
E-mail : platform@socialplatform.org
URL : www.socialplatform.org

European Roma Information Office

Avenue Eduard Lacomble 17
1040 Brussels

Tel. : + 32/ 27 33 3462
E-mail : erio-brussels@skynet.be

UNITED for Intercultural Action

European network against nationalism, racism, fascism and in support of migrants and refugees
Postbus 413
NL-1000 AK Amsterdam
Netherlands

Tel. : + 31/ 20 6834778
Fax : + 31/ 20 6834582
E-mail : info@unitedagainstracism.org
URL : <http://www.unitedagainstracism.org>

ANNEX SEVEN:

**PARTNER ORGANISATIONS IN
IMPLEMENTING EUROPEAN ANTI-
DISCRIMINATION LAW PROJECT**

The European Roma Rights Center (ERRC) is an international public interest law organisation which monitors the human rights situation of Roma in Europe and provides legal defence in cases of abuse. Since its establishment in 1996, ERRC has developed an acknowledged expertise in human rights litigation on behalf of Roma, established an extensive network of contacts with lawyers, legal advocates and NGOs throughout much of Europe, and acquired a track record of effective advocacy targeting intergovernmental organisations, including the Council of Europe and the European Union. ERRC's role in the Project reflects the broadly acknowledged fact that Roma are among the most deprived ethnic/racial groups in Europe. ERRC have consultative status with both the Council of Europe and the United Nations Economic and Social Council and have undertaken advocacy work, with respect to the Council of Europe and the European Union before the United Nations bodies. ERRC publications and additional information about the organisation are available at <http://www.errc.org>.

INTERIGHTS is the international centre for the legal protection of human rights, created in 1982. INTERIGHTS' main purpose is to assist judges and advocates, NGOs and the victims of human rights violations in accessing and applying international and comparative human rights law and mechanisms. INTERIGHTS undertakes regional and national projects in Central and Eastern Europe, Africa and South Asia in partnership with local organisations both to enhance the capacity of human rights organisations and individual lawyers and to develop jurisprudence which effectively protects human rights. To achieve its goals, INTERIGHTS: (i) offers assistance or legal representation in cases of strategic importance with the aim of developing, interpreting and applying international human rights norms; (ii) organises training sessions for judges and practising lawyers; (iii) prepares and distributes legal materials and publications in a variety of languages, including English, French, and Russian; and (iv) maintains an Internet database containing summaries of international human rights judicial decisions. INTERIGHTS holds consultative status with the United Nation's Economic and Social Council, the Council of Europe and is authorised to present collective complaints under the European Social Charter. For more information about the activities of Interights, see <http://www.interights.org>.

The Migration Policy Group (MPG), an independent organisation based in Brussels, is committed to policy development on migration and mobility, diversity and anti-discrimination by facilitating the exchange between stakeholders from all sectors of society, with the aim of contributing to innovative and effective responses to the challenges posed by migration and diversity. MPG is currently promoting the debate on European migration policies, inter alia, through the European Migration Dialogue, a partnership of 25 organisations in 17 countries. MPG is monitoring the implementation of European anti-discrimination legislation through the organisation of international seminars, the production of reports on the legal and political situation in European countries, and the coordination, for the European Commission, of a group of independent experts on racial, ethnic and religious discrimination. In the 1990s MPG acted as the secretariat of the Starting Line Group, which campaigned for the adoption of EC legislation against racism. MPG publishes the monthly publication the Migration News Sheet, and is co-editor of the European Journal on Migration and Law and a book series on Immigration and Asylum Law and Policy in Europe. Further information can be found at <http://www.migpolgroup.com>.

European Roma Rights Center

PO Box 906/93
1386 Budapest 62
Hungary

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www.errc.org

INTERIGHTS

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Fax +44 20 7278 4334

www.interights.org

Migration Policy Group

Rue Belliard 205, Box 1
1040 Brussels
Belgium

Tel +32 2 230 5930
Fax +32 2 280 0925

www.migpolgroup.com