Application of EU Directives 2000/78 and 2000/43 in the Member States and Consequences in case of Non-Implementation or Incorrect Implementation

1. Introduction

1. Employment and occupation have been recognised by the European Community (EU) as key elements in guaranteeing equal opportunities for all. They contribute strongly to the full participation of citizens in economic, cultural and social life, and to realising their potential. Since it has been established the EU has encouraged Member States to work towards achieving a high level of employment and social protection, increased standards in living and quality of life, economic and social cohesion and solidarity. Discrimination can seriously undermine these achievements, and damage social integration in the labour force and at large. As part of a comprehensive legal framework to establish equality in 2000 the European Community (EC) enacted two Equality Directives which are the subject of this conference.

2. The Race Equality Directive (Directive 2000/43) and the Employment Equality Directive (Directive2000/78) require Member States to establish a legal framework to effect the principle of equal treatment and prohibit discrimination on the grounds of race or ethnic origin, religion or belief, age, disability and sexual orientation. They were adopted in order to ensure a minimum standard of protection in this respect for all Member States. They do not prevent Member States from providing by means of domestic legislation for greater protection against discrimination than the minimum which is required by the Directives. However in transposing the Directives Member States were not entitled to reduce the level of existing protection.

3. The Directives protect natural and legal persons in the European Union, including persons who are not EU citizens. Both Directives prohibit discrimination in the field of employment, occupation and vocational training. In addition to this, the Racial Equality Directive prohibits discrimination on the grounds of racial or ethnic origin in the fields of social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and services which are available to the public, including housing. Within their remits, both Directives protect natural and legal persons against direct and indirect discrimination, harassment, instructions to discriminate and victimisation.

4. The Directives follow directly from Article 13 of the Treaty establishing the EC and were unanimously agreed by the EU governments within 18 months of the Treaty of Amsterdam entering into force in May 1999.

5. The two Directives do not cover discrimination on the ground of sex. Since 1957, the EEC Treaty has contained a provision prohibiting unequal pay for men and women, which has been revised in the Treaty of Amsterdam. From 1975, the EU has issued several directives on sex discrimination and the European Court of Justice (ECJ) has given a large number of judgments on sex discrimination cases. These Directives have now been harmonised in the Recast Directive 200 / which came into force on August 2006 and has to be fully transposed by August 2008. This session does not therefore deal with gender discrimination.

A summary of transposition so far.

6. Full transposition of the Directives was required by 19 July 2003 for the Race Equality Directive and 2 December 2003 for the Employment Equality Directive. The 10 new member states had until 1 May 2004 in respect of both Directives. However, the Employment Equality Directive permitted Member States an additional period of time for transposition of the provisions on age and disability discrimination, coupled with an obligation to send an annual progress report to the Commission. For age discrimination, Sweden, the UK, Germany, Belgium and the Netherlands extended the deadline for the full three years until 2 December 2006, and Denmark extended the deadline for one year until 2 December 2004. For disability, the UK and France extended the deadline for the full three years and Denmark for one year.

7. The Commission drafted a report on the progress made towards transposition and presented it to the Council in October 2005. A summary of the findings are as follows. For disability, new legislation was introduced in France, the UK and Denmark. For age, the Netherlands adopted legislation but, until 2 December 2006, it will still be possible to link a compulsory dismissal to the starting date of a pension under the age of 65 without any justification of the dismissal being necessary. Belgium informed the Commission that it considers that it has transposed the Directive apart from Article 6 which provides that certain differences in treatment may be justified in certain circumstances. Sweden had established a commission to examine how to extend existing anti-discrimination legislation to age. It was due to report in January 2006. The UK undertook public consultations on age with draft secondary legislation which has now come into force as from 1st October 2006. Germany presented the Commission with the Bill that existed prior to the elections that halted the legislative process. The Commission viewed the coming into force of new legislation in Denmark, France, the Netherlands and the UK as a positive step towards the full transposition of the Directive by 2 December 2006, and it hoped that the other Member States will have their legislation in force by the deadline. Since then more progress has been made. For example, in Germany the Law Transposing the European Directives Realising the Principle of Equal Treatment from 18 August 2006 generally transposes the Directives.

8. The process of implementation has therefore not been uniformly applied in the EU countries. For those Member States that did not meet the deadlines for compliance, and had not requested an extension period, the European Community has now initiated infringement proceedings which are discussed below and have in some cases resulted in judgements against Member States, to ensure that transposition occurs.

What action can be taken where there is a failure to implement fully?

9. If a Member State has not implemented the Directives or has failed to implement the Directives correctly there are a number of ways an individual may rely upon the provisions of the Directives, even where they have not been correctly or fully implemented into national law. Where the alleged discriminator is the State or a public body, provisions of the Directives which are clear, precise and unconditional can be directly invoked before the national

courts[1]. Such provisions are defined as having ‘vertical direct effect.’ This means that if a Member State has failed to transpose the Directives on time, or has transposed them incorrectly, individuals who allege that they have been discriminated against by a public body can nevertheless rely on the provisions of the Directives.

10. This may be necessary where there is no national law transposing the Directive. According to established case-law, directives may not be directly invoked before the national courts against another individual or private entity (this is usually described as the possibility of directives having ‘horizontal direct effect’)[2].

11. Where the alleged discriminator is another individual or private entity, national courts must in any case give directives ‘indirect effect’ and do everything possible to interpret national law in a way which is compatible with Community law. This means that as far as is possible the national courts are obliged to interpret national law in light of the Directives in order to achieve the result intended by the Directives. It is irrelevant whether national legislation was adopted before or after the Directives[3]. This is even more the case where the dispute before the national court concerns the application of domestic provisions which have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must presume that the Member State, in exercising its discretion as to how the implement the directive had the intention of fulfilling all the obligations arising from the directive concerned[4].

12. Another possibility is for individuals to rely on the concept of state liability. Where, after the transposition deadline, there is no national law implementing a directive, or a national law is contrary to EC law, the Member State must compensate for any loss actually suffered by individuals which directly resulted from this failure to implement the Directive[5]. Three conditions must be satisfied;

    i. the aim of the Community provision which has been breached must be to grant rights to individuals;

    ii. the breach must be sufficiently serious;

    iii. there must be a causal link between the state’s failure and the damage suffered by the individual concerned.

13. National courts can be asked to decide whether a Member State has failed to implement the Directive or failed to give full effect to its provisions. If the court finds it has then the complainant will be entitled to the remedies provided for by national law such as compensation.

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[1] Case C-9/90 ***Francovich and others*** [1991] ECR I-5357, paragraph 11, and Case c-62/00 ***Marks & Spencer*** [2002] ECR I 6325.
[2] Case C-152/84 ***Marshall*** [1986] ECR 723, paragraph 48; Case- 91/92 ***Faccini Dori*** [1994] ECR I-3325, paragraph 20; and Case C-2201/02 Wells [2004] ECR 1-1000, paragraph 56.
[3] See C-106 C-106/89 ***Marleasing*** [1990] ECR I-4135, paragraph 8.
[4] Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20.
[5] *Francovich and Others* [1991] ECR I-5357

14. National courts can also refer questions about the interpretation of particular requirements of the Directives to the European Court of Justice which will then consider the issue and direct the national court on the correct interpretation of the EC law provision (see below). Where a national court is uncertain whether the implementation of the Directives is correct, or is not certain how a particular term in the Directives should be interpreted, it can refer questions to the the European Court of Justice (ECJ) for a preliminary ruling on the interpretation of the Directives, in order to enable it to give its judgment in the case before it (Article 234 of the EC Treaty).

15. Last instance courts (those whose judgments cannot be appealed) are obliged to refer such questions to the ECJ. The ECJ answer the questions on the relevant provision of the Directives and give its interpretation taking account of the circumstances of the national case. In doing so it will consider the observations of the parties and any observations submitted by Member State governments or the Commission.

16. ECJ judgments on preliminary references are an important source of law on the proper and uniform application of the provisions of the Directives. Preliminary rulings have been vital in the interpretation of EU sex equality legislation. It has been used by parties to litigation, NGOs, trade unions, statutory commissions and other interested organisations in Member States to clarify the provisions of the Directives and test the adequacy of the law in their country.

17. Cases that interpret the key concepts contained in the Directives are slowly starting to come before the national courts of the Member States. Some examples are included below.

18. In the recent case of ***Mangold***[6] which will be discussed in detail in a later session, a German court of first instance referred questions to the ECJ on the compliance with the Employment Equality Directive of a provision in national law relating to fixed-term contracts. The facts concerned Mr Mangold, 56, who had brought proceedings in the Munich labour court against his employer, challenging the fixed-term nature of his contract. Under the German law which regulates fixed-term employment contracts (the "TzBfG"), fixed-term employment contracts are only permissible where they are justified by an objective reason.

19. However, Article 14(3) of the TzBfG sets out an exception allowing the conclusion of fixed-term employment contracts with persons who are 58 years old; such contracts do not require an objective reason. A legal amendment to this provision in January 2003 lowered the age from 58 to 52. The Munich labour court asked the ECJ whether the German rules on fixed-term employment contracts for older workers were compatible with Article 6 of Directive 2000/78. The ECJ found that a national provision permitting fixed-term employment contracts to be offered to anyone who had reached the age of 52, without restriction, constituted age discrimination, which breaches both the general Community law principle of equality and, more specifically, Article 6 of Directive 2000/78.

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[6] *Case C-144/04* ***Mangold v Rüdiger Helm****, judgment of the Grand Chamber of 22 November 2005*

20. Whilst the Court conceded that the TzBfG's public-interest purpose was a legitimate objective in that its purpose was clearly to promote vocational integration of unemployed older workers, it held that the means used to achieve that objective go further than is appropriate and necessary. It noted that legislation such as the TzBfG could lead to a situation in which all workers aged 52 or over may lawfully be offered fixed-term contracts until they retire.

21. Of greatest interest, the court held that this finding could not be called into question by the fact that in respect of its provisions on age, the Directive does not need to be transposed into German law until 2 December 2006. The Court stated that the general principle of equal treatment, in particular in respect of age, cannot be conditional upon the expiry of the period allowed Member States for the transposition of a Directive. It concluded that, "it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law." This is the case irrespective`of whether the deadline for a directive's transposition has expired.

22. A Spanish court's preliminary reference to the ECJ in *Case C-13/05* ***Chacón Navas,*** *OJ C 69/8, 19.3.2005).* has led to the first judgment on disabililty. The issue was the interpretation of disability for the purposes of the protection afforded by the Employment Equality Directive. More particularly the question being asked is whether the protection of the Directive, in so far as Article 1 lays down a general framework for combating discrimination on the grounds of disability covers a worker who has been dismissed from her company solely because she was ill. The ECJ has ruled that disability discrimination does not encompass dismissal "solely on account of sickness". It says that the concept of "disability" for the purpose of the Directive "must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life", and that "disability" differs from "sickness". "The two concepts cannot therefore simply be treated as being the same." The ECJ therefore concludes that: "In order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time ... There is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness."

23. Some commentators have found this reasoning less than satisfactory. Neither the question referred, nor the facts of the case, proposed that a worker falls within the definition of disabled "as soon as they develop any type of sickness." Ms Chacón Navas was certified as off work ill for some 7 ½ months before she was dismissed. Sickness and disability clearly are not coterminous, but neither are they mutually exclusive. Sickness can disable. The ECJ stated that the meaning and scope of disability must be given "an autonomous and uniform interpretation throughout the Community". However as the Directive contains a non-regression clause this will ensure that those Member States such as the UK which have a broader definition of disability will be unaffected by this restrictive judgment.

24. In a very recent reference of 20 July 2006 from the UK, Case C-303/06 ***Coleman v Attridge Law***, the ECJ is asked whether Directive 2000/78/EC only protects from discrimination persons who are themselves disabled, or does it protect also employees who, though they

are not themselves disabled, are discriminated on the ground of their association with a person who is disabled?

Infringement proceedings

25. If the Commission believes that a Member State has breached Community law it is entitled to initiate an 'infringement procedure' under article 226 EC Treaty. As explained above, for each EC directive passed, a deadline will be set for the transposition of its objectives into national law and all Member States are legally obliged to meet the deadline, unless an agreed alternative or exception is made. Once the deadline has elapsed, the European Commission may issue a non-communication and thereafter proceed against the Member State to ensure full transposition. The aim is to resolve the issue as quickly as possible with the Member State in question.

    I. "**Non-communication**", a Member State is notified that it has failed to communicate to the European Commission its national measures implementing the EC legislation by the required deadline for transposition. The Member State will initially be given a 2-month phase to communicate its reasons.

    II. "**Non-conformity**", a Member State is notified by the European Commission that its national measures do not conform with the Directive(s) in question. The Member State will be given a reasonable time by the European Commission to put its legislation in conformity.

26. If the procedure is not settled during the preliminary stages of the infringement procedure process, and the European Commission is of the reasoned opinion that a Member State is still in breach of Community law, the ECJ will be called on to pronounce on the matter. If the ECJ upholds the case, it may impose a financial penalty on the Member State in question under article 228 EC, if the Member State does not comply with the judgment. The three basic criteria which the Court takes into account are, in principle, the degree of seriousness of the infringement, its duration and the ability of the Member State to pay[7].) In particular, the Court considers the effects of the failure to comply on private and public interests, and the urgency of persuading the Member State concerned to fulfil its obligations.

27. Infringements procedures brought under the Directive include a number of cases which have resulted in a finding against the Member States including Case C-43/05 against Germany and Case C-70/05 against Luxembourg for lack of transposition of the Employment Equality Directive.

[7] Case C- 119/04 EC Commission v Italian Republic

Implementation in the Member States

28. The state of implementation in three Member States, UK, Germany and Czech as reported in 2006 is summarised below as examples of the general state of implementation and difficulties that are arising in different jurisdictions. As changes are ongoing there may have been further developments since the report was compiled.

The UK

29. In the UK, legislation is now in place which had been enacted to meet the transposition requirements of Directive 2000/43 and Directive 2000/78, other than in respect of age for which the UK has notified its intention to defer implementation until 2 December 2006. The UK has also notified its intention to make further amendments to complete transposition of the Directive 2000/78 in relation to disability discrimination and vocational training. The report on Implementation considered that in a number of respects the UK legislation failed to comply with the Directives. The main problems raised by the expert reporting were as follows:

- the definition of indirect discrimination is narrower than in Directive, and the test potentially less rigorous;
- no statutory right to seek legal redress for instructions to discriminate; further, the UK law does not prohibit instructions to discriminate on grounds of sexual orientation or, in GB, on grounds of religion or belief.
- self-employment and occupation are not fully covered;
- the test to justify genuine occupational requirement in UK legislation is less rigorous than in the Directives;
- the law prohibiting discrimination on grounds of religion or belief in GB is deficient as it is subject to ss. 58 – 60 School Standards and Framework Act 1998;
- the imposition of a “reasonableness test” in the definition of harassment may conflict with the non-regression principle in the Directives;
- there is no provision permitting organisations to engage in proceedings on behalf of a complainant;
- the definition of victimisation requires a comparator and is retrospective; it does not provide for preventative measures;
- case law has demonstrated that sanctions for unlawful acts of discrimination and harassment available to tribunals and courts are not effective, proportionate and dissuasive
- compensation for ‘unintentional’ indirect discrimination is restricted

- the Disability Discrimination Act (DDA) offers protection only to people who come within statutory definition of "disabled" rather than prohibiting discrimination and harassment etc "on grounds of disability", with the result that under UK legislation people who are perceived as disabled or associated with a disabled person are not protected against discrimination;

30. In **R(ex-parte Amicus and others) –v- Secretary of State for Trade and Industry**[8] Amicus and six other trade unions applied for the annulment of certain provisions of the Employment Equality (Sexual Orientation) Regulations 2003 which are the regulations for the transposition of the Employment Equality Directive in respect of sexual orientation. The unions challenged several exceptions to the new Regulations by way of judicial review of the genuine occupational requirement exceptions, including the particular exception in respect of employment for the purposes of an organised religion, and an exception as regards discrimination in respect of benefits dependent on marital status. It was argued that these provisions were not compatible with the Employment Equality Directive and/or the European Convention on Human Rights. The Regulations were upheld in all respects. The case is of interest as illustrating how a domestic challenge on transposition may clarify the meaning of domestic law implementing a Directive applying a purposive approach.

31. There were three main issues. Regulation 7(2) contains an exception in respect of discrimination where sexual orientation is a genuine and determining occupational requirement even though the exception applies not only where a person does not in fact meet the requirement as to sexual orientation, but also where it is "reasonable" for the employer "not to be satisfied" that the person meets it. This was criticised as allowing employers, and tribunals, to act on stereotypes as to whether someone presents as lesbian or gay, even though they do not admit it. However, the court considered that reg. 7(2) has "a sensible rationale": if an employer seeking to apply a valid GOR asks about a person's sexual orientation, they should not be bound to accept the answer given at face value.

32. The requirement of reasonableness, the judge said, "ensures that decisions cannot lawfully be based on mere assumptions or social stereotyping." Regulation 7(3) contains a specific exception from the prohibition on discrimination where the employment is "for the purposes of an organised religion". The court considered this compatible with the Directive but added that on its proper construction, this exception is "very narrow", so that employment as a teacher in a faith school, for example, was unlikely to fall within it. Moreover, in order for the GOR to apply, the requirement must be applied "so as to comply with the doctrines of the religion", which was an objective test that was very narrow in scope. Similarly, the alternative allowing a GOR related to sexual orientation where the requirement is applied "because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers", is construed as requiring "careful examination of the precise nature of the employment" and is to be read as an "objective, not subjective, test." The main result of this decision, therefore, is

[8] [2004] EWHC 860 (Admin); www.bailii.org/ew/cases/EWHC/Admin/2004/860.html

that it confines any possible legitimization of sexual orientation discrimination to a very small number of jobs.

33. Also of interest is in the judge's interpretation of the meaning of "sexual orientation" for the purposes of the Regulations. The UK Government had distinguished between a person's "orientation", which is protected, and manifestations of their orientation or behaviour, which may not be protected. In contrast, the judge ruled that "the protection against discrimination on grounds of sexual orientation relates as much to the manifestation of that orientation in the form of sexual behaviour as it does to sexuality as such." Sexual orientation and its manifestation in sexual behaviour are both "inextricably connected" with a person's private life and identity. The wording of the derogation in Article 4(1) of the Directive, which refers to a difference of treatment "which is based on a characteristic related to" sexual orientation, was "wide enough to embrace a difference of treatment based on sexual behaviour related to sexual orientation."

34. The application also dealt with whether the Directive allows the exclusion of survivor's benefits and all other benefits determined by reference to marital status from coverage of the right not to be discriminated against on grounds of sexual orientation. The court decided that the Directive did allow such an exclusion even though language supporting this finding is only clearly found in a recital to the Directive rather than the text of the Directive itself. The judge acknowledged that there is no authority that a recital can be relied on alone as establishing an important limitation on the scope of a directive, but upheld the relevant regulation on grounds that to rule otherwise would be to frustrate the legislative intention as it appears in the recital.[9].

Germany

35. The German report pointed out that the law against discrimination is not yet seen as a field of law in its own right, but as a general requirement binding the legislature, executive and judiciary. This may create difficulties for legislators to fully understand the requirements of the Directives. In addition, since anti-discrimination law is not an established field in German law, lawyers and courts often have no expertise and will not be trained to gain detailed knowledge of the field. Legislative acts against discrimination are conceptualised in a tradition of criminal sanctions of racism and anti-Semitism, partly understood as a specifically German reaction to the holocaust. In labour law, legislation is based on a concept of employer responsibility, rather than on a concept of civil rights. There is a tradition to oblige employers to employ disabled people: 5 % for companies with at least 20 employees) or pay a compensation fee to the state as there is a more than 20 years development of affirmative action law against sex discrimination in public employment.

36. In order to transpose the Employment Equality Directive there is a general clause against discrimination in collective labour, in § 75 Industrial Relations Act

[9] Since the decision the Civil Partnerships Act has given equal rights in respect of benefits to same-sex civil partners to claim survivor's benefits will not be retrospective.

(*Betriebsverfassungsgesetz*). According to this provision, it is the duty of the employer and works council to ensure that all employees are treated according to law and equity, i.e. that no person is treated differently on the basis of descent, religion,nationality, origin, political or trade union activity or conviction, or gender or sexual identity. However, it is limited to private enterprises with more than five employees, it is not applicable to recruitment, and it is not applicable to enterprises of a distinct religious, cultural, political or similar nature, the latter in accordance with the Directives. A similar provision exists for collective labour law in public employment. There are also some specific areas of state action, like welfare legislation directed at children and youth or regarding unemployment, and since 1994 a mostly ineffective law against sexual harassment.

37. There is no anti- discrimination law in respect of age to date beyond the obligation in employment to take care that elder people are not disadvantaged which is however, according to the Federal Labour Court, not applicable in cases of dismissal. Quite to the contrary, age limits to employment are a widespread practice the courts accept on a broad scale. Germany has used the option to defer implementation in this regard. However, gender discrimination regarding access to age benefit systems has been subject to several court decisions.

38. In summary the author of the report on Germany reported that as at the date of the report efforts to implement the Directives had been hesitant, sparked negative responses from many important actors, particularly employer organisations and insurance companies, and have not yet come to an end. However, political parties have been willing to implement the Directive, yet differ as to the degree and interpretation of what "implementation" will mean. The conservative parties and lobby groups for employers, churches, and insurances strongly oppose the Draft law debated in the Bundestag. Even in academic journals, there are exaggerated visions of mass litigation which may ruin the German economy, and almost no scholar takes a position in favour of the law. Some NGOs have also criticized the Draft to not reach far enough. The German Institute for Human Rights has endorsed the Government efforts.19 Regarding the German tradition of not litigating such cases, and of courts hesitant to issue judgments on compensation, and of the absence of punitive damages, such worries seem highly unrealistic. However, the history of implementation efforts is severely hampered by this.

39. In 2002, the German government accepted the need for legislative revision based on the new Directives, and the Ministry of Justice issued a draft law against discrimination which was subsequently withdrawn. In 2003, several branches of government were put in charge of preparing legislation and at the end of 2004, a government draft had been published and was passed by the Bundestag in June 2005. However it fell to the principle of discontinuity after the Bundestag had been dissolved in July 2005 and elections took place in September. The legislative procedure has to start from the beginning with the new Parliament. The Draft proposed to replace and optimize existing law against sex discrimination and around disability, and covered „race or ethnic origin, gender, religion or belief, disability, age or sexual identity". It went beyond the Directives in several aspects, particularly regarding civil law on goods and services. Some states have considered issuing legislation or issued statements on implementation within their competence. However, as reported above a law was passed in August 2006 which sought to generally implement the Directives.

40. In addition, existing German law needs to be thoroughly scanned to erase discrimination, which the current Drafts to implement the Directives do not suggest will happen.

41. As for cases, in the context of age discrimination see the important case of ***Mangold*** referred to above. In addition there has been a case brought alleging discrimination on grounds of age in dismissal., The female claimant lost her case against her dismissal in a company which introduced IT systems when she was dismissed on the basis that she was not deemed fit enough to handle the new systems and in which colleagues were much younger than her which the employer thought not to "harmonize well". Unfortunately perhaps, the court did not apply the Directive but discussed and rejected the age discrimination complaint by stating that the employer may use the harmony-argument.

Czech Republic

42. There is a general anti-discrimination clause in the Charter of Fundamental Rights and Freedoms. As one of the first pieces of post-communist Czechoslovak federal legislation, the Charter was decreed as a part of the new constitutional order established by the newly constituted Czech Republic in 1993. The Charter is divided into five chapters, including a chapter on general provisions, establishing the equality of rights, the principle of non-discrimination which applies to all fundamental rights and freedoms and the principle of the rule of law. The second chapter, entitled Basic Human Rights and Freedoms, is divided into two parts: 1. governing human rights, setting out personal rights, including the right to free movement, the right to personal dignity and freedom, property rights, religious freedom, the right to privacy, the prohibition of torture, inhuman and degrading treatment and the prohibition of slavery; and 2. establishing some political rights. The third chapter is dedicated to the rights of national and ethnic minorities, setting out the principle of non-discrimination, the right to self-development including minority education, the right to use a minority language and the right to self-determination in issues involving the minority. Chapter IV is dedicated to economic, social and cultural rights. Chapter V covers procedural rights (right to fair trial). The provisions of the Charter more or less cover the same rights as those covered by the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. A comparative study of the text shows that in some places the provisions of the Charter are more detailed than those of the international instruments (such as the provisions of Chapter V covering the right to fair trial), but that, on the other hand, they are more vaguely formulated (such as economic, social and cultural rights). Article 3 of the Charter guarantees equality in access to fundamental rights and freedoms and includes an open-ended list, expressly prohibiting discrimination on the grounds of sex , race, colour, language, religion or belief, political or other conviction, national or social origin, membership of a national or ethnic minority, property and birth or other status. It does not specifically provide protection against discrimination on sexual orientation and disability grounds. All grounds not explicitly included are, according to case law, contained implicitly in the term "other status". The only body competent to interpret the Charter with binding effect is the Constitutional Court. The Constitutional Court can only deliver such interpretation through a judicial decision. As far as the author of this report is aware, there has not been any judicial decision by the Constitutional Court dealing with discrimination on the grounds of age or sexual orientation.

Anti-discrimination clauses (sometimes enumerative, sometimes open-ended) can be found in various ordinary laws governing employment and labour relations.

43. During 2003-2004, the definitions of discrimination required by the Racial Equality and Employment Equality Directives were inserted into the Labour Code5, the new Law on Employment and the Law on service by members of the security services. Further action is required in order to ensure full conformity with the Directives. Work on the new complex Anti-discrimination Bill was completed in July 2004 but, due to the governmental crisis in the summer and appointment of the new government, it was only approved by government in December 2004 to be debated by Parliament.

44. Czech State of implementation of the Directives. The 2006 Report identify the following major problems.

- Certain occupations are not covered by the Labour Code.
- The national laws governing them are incompatible with the Directives. There are no anti-discrimination provisions in these laws (not even definitions of direct and indirect discrimination) and the antidiscrimination provisions of the Labour Code do not apply here (laws governing the labour relations of judges, state attorneys, members of parliament, members of local government, and the labour relations of prisoners and volunteers.
- For the ground of disability.
- Where an occupation is conducted in a self-employed capacity (not in the form of employment) the anti-discrimination clauses and definitions in the Labour Code and Law on Employment do not apply. The laws governing self-employment are thus in breach of the Directives (i.e. laws governing self-employment for attorneys, medical doctors, notaries and many others);
- In the Law on Employment, (which deals also with certain entitlements of self-employed persons with respect to vocational training and re-qualification), the term “state of health” is considered a ground of direct discrimination, while the term “disability” is only used in the definition of indirect discrimination (Art. 2 para. 1 subsection b) ii)). The social security office has the authority to issue a decision recognising a person as “disabled”. For other people, the entitlements do not apply. Therefore it does not appear that the definition of indirect discrimination on the ground of disability is compatible with the
- The Czech Republic, as a new Member State, was not eligible to take advantage of a deferral of the implementation of Directive 2000/78/EC. The Anti-discrimination Bill implementing both EU Directives was approved by the government in December 2004 and submitted to Parliament in early 2005.

45. The draft proposes to provide protection against discrimination which goes beyond the minimum requirements of the EU Directives. It provides the same material scope and the same level of protection for all discrimination grounds. It is proposed to confer the

competencies corresponding to Article 13 (Directive 2000/43/EC) to the Public Defender of Rights (Czech Ombudsperson).

46. The Directive has not been implemented into laws governing social protection. field of social protection, healthcare and access to healthcare. Neither is the Directive implemented into laws governing education and access to education, laws governing access to goods and services and consumer protection, or laws governing access to housing.

47. **Case Law** – Two interesting cases concerning Roma are:

- **(Jan Kovac (claimant) v. AZ ALFA s.r.o. (defendant), (**Upper court in Prague

  b. 10.12.2002 1 Co 162/2002-64 (file number) **a** first decision in a civil matter where the court expressly acknowledged direct racial discrimination as the infringement of human dignity of a person discriminated against and thus the right of such person to civil court protection under the protection of personality provisions (Section 11 of the Civil Code). The claimant was denied access to a discotheque with the explanation that Roma were not permitted entry. The appeal court stressed that, where discrimination takes place, the court should always consider compensation for non-material damages and returned the case to the court of first instance which had held that an apology was adequate compensation. An award of 75,000 CZK (€2,500) in compensation for non-material damages was reduced by the appeal court to 50,000 CZK (€1,600) upon further appeal lodged by the defendant.

- **František Kroščen (claimant) v. Bohema Travel s.r.o. (defendant)**[10] The first Czech civil court case including a racial harassment claim. The Roma petitioner

  invoked the definition of harassment as defined by the Race Equality Directive 2000/43/EC and concluded that creating such intimidating, hostile, degrading, humiliating or offensive environment does fall within the limits where the protection of personal integrity should be provided. The plaintiff of Roma origin sued the restaurant owner who in the premises of his restaurant displayed for a long time a statue of antic goddess holding in the hand baseball bat with a visible inscription “Go to get gypsies”. In accordance with traditional view of personality protection the court rejected his claim. The court held the defendant’s act as “inappropriate”, but refused to held defendant liable for infringement with personality rights, as the scope of personal integrity does not identically cover harassment. There is not specific definition of harassment in the Czech law. At the time of this report, there is still no legislative provision defining racial harassment in access to goods and services or securing effective remedy for its victim. As racial harassment in access to services can be dealt with only under Protection of Personality provisions of the Civil Code, the adequate protection is refused in cases like this one.

[10] All information on the case are in the file with the Centre for Citizenship/Civil and Human Rights. Available on request at poradna@iol.cz.

Conclusion

48. Implementation is an ongoing progress on which progress is being made but is far from complete. Where implementation has not occurred or is defective there are actions that can be taken to protect the rights of individuals and to clarify the law and speed the process of implementation both at domestic level and before the ECJ. In addition the Commission can and does take action.

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21.11.06