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### **Prevention of discrimination and application of the law / remedies**

#### **1. The innovations brought about by directives 2000/43/EC and 2000/78/EC are best examined in the light of the *acquis communautaire*:**

- as regards equal treatment between women and men in matters of employment (ECJ case law now in excess of 150 judgements; Dir. 76/207/EEC brought up to date by Dir. 2002/73/EC, which ought to have been transposed by 5 October 2005).

This **broad-ranging law** tackles all forms of discrimination;

- as regards the free movement of workers.

#### **2. The practical implementation of the provisions of directives 2000/43/EC and 2000/78/EC is dependent on:**

- the system of social relations (especially the role of collective bargaining);  
 - the judicial system (civil, criminal and administrative; the organisation of the judiciary and the proportion of each type of litigation varies greatly between the member states).

#### **3. One illustration: the situation in France.**

- not always the best of examples, and the law in France has not necessarily performed better than in the other member states; however, there are some interesting facts worth knowing concerning the question of prevention and application.

### **I. – Social dialogue at an early stage with a view to prevention and ensuring the application of the law**

#### a) At the place of work:

##### 1. Collective bargaining (Dir. 2000/43/EC, Art. 11; Dir. 2000/78/EC, Art. 13; TCE<sup>1</sup>, Arts. I-48 and II-88):

First and foremost, these articles concern organisations of employees and employers. Collective agreements are an essential source of labour law (with their importance varying between the countries).

- several levels: company, sector, nationwide for several/all sectors,
- aims:

- to conclude non-discrimination and equal-treatment agreements making provision for positive actions (example: the nationwide inter-sectoral agreement of 7 April 2004, signed by all the social partners in France) dealing with remuneration, and drawing on existing instruments (such as the European Commission's code of practice of 17 July 1996

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<sup>1</sup> Treaty establishing a Constitution for Europe

regarding negotiations and remuneration with a view to avoiding sexual discrimination and assuring equality between women and men),

- to review agreements already in existence (applying the approach and concept of indirect discrimination: to verify the absence of indirect discrimination),

- more generally: to develop a procedure along the lines of *gender mainstreaming* for dealing effectively with all forms of discrimination and especially those on racial or ethnic grounds; every time negotiations take place, to diagnose the situation as regards discrimination and to verify the absence of discriminatory effects resulting from any planned decision.

## 2. Information, consultation and participation of employees' representatives:

- Information and consultation of employees (Dir. 2002/14/EC of 11 March 2002, which ought to have been transposed by 23 March 2005; TCE, Art. II-87);

A procedure for information and consultation of employees "in good time" must be effective, permanent and regular to ensure the involvement of employees in the activity of undertakings (undertakings with at least 50 employees and establishments with at least 20 employees);

This procedure deals particularly with employment trends, the organisation of work and employment contracts;

The employees' representatives have the right to obtain reasoned replies to the questions they put to the employer;

This includes scope for checking whether or not the company's policy causes direct or indirect forms of discrimination and for proposing corrective actions for ensuring equal treatment.

- Consultation in matters of health (Dir. 89/391/EEC of 12 June 1989, Art. 11).

Discrimination has negative impacts on employment and work and consequently has negative effects on working conditions and on the health of employees;

The employees' representatives thus have the powers to intervene in this matter,

In France, a judgement of the *Cour de cassation* dated 16 March 2005 (*Carrefour v. Michel Buisson*) has recently confirmed that discrimination, especially when there are acts of harassment, "deprives the victim of an opportunity of remaining in good health"; this is a wrong which ought also to be made good (cf. sanctions and compensation provided for in the directives and in case law).

- Other possibilities:

In France, the shop stewards (*délégués du personnel*) have the right to raise the alarm in the event of discrimination: formal referral to the employer, joint inquiry and, in the absence of a satisfactory solution, referral to an industrial tribunal, which has powers to impose any measure on the employer to bring the discrimination to an end. This possibility has turned out to be effective in the cases in which it has been put to use.

### b) In society.

Under this heading it is primarily the non-governmental organisations that are concerned (Dir. 2000/43/EC, Arts. 12-13 "body or bodies"; Dir. 2000/78/EC, Art. 14; the TCE, Art. I-47, affirms a "principle of participatory democracy").

- The NGOs concerned are those that have an "interest in contributing to the fight against discrimination" (whereby each state is free to define its criteria);

- The possible outcomes to this dialogue include campaigns concerning information/communication, public-opinion awareness raising, categories of the population and training with a view to promoting equal treatment;

- Member states are required to set up a body, whose role it is to promote equal treatment, especially to combat racial/ethnic discrimination (but also sexual discrimination, Dir. 76/207/EEC, Art. 8a); there is no equivalent provision in Dir. 2000/78/EC. This body has several tasks entrusted to it: first and foremost to provide assistance to individuals pursuing complaints and also to carry out studies and to formulate recommendations as well as to communicate and provide training.

In France, the body entrusted with this mission (by the law of 30 December 2004) is called HALDE (*Haute autorité de lutte contre les discriminations et pour l'égalité* = high authority for combating discrimination and promoting equality); it has powers to deal with all forms of discrimination.

## **II. – Judicial action for enforcing application and for future prevention:**

\* Everyone has the right of access to the courts and is entitled to a fair trial (cf. European Convention for the Protection of Human Rights, Art. 6 (1); TCE, Art. II-107, 1<sup>st</sup> and 2<sup>nd</sup> paragraphs).

\* The participation of those concerned in judicial proceedings is an element of democracy in a state subject to the rule of law (Jurgen Habermas, *Law and Democracy*, 1994).

### 1. Before the procedure (Dir. 2000/43/EC, Art. 7; Dir. 2000/78/EC, Art. 9):

- Such action must remain available, even after the ending of the relationship (dissemination of information – Dir. 2000/43/EC, Art. 10; Dir. 2000/78/EC, Art. 12; TCE, Art. II-107, 3<sup>rd</sup> paragraph as regards finances and Art. II-107, 2<sup>nd</sup> paragraph as regards reasonable time for bringing cases to court and remedies, possibility of receiving legal advice, etc.);

- It must be possible for actions to be initiated by associations, unions and organisations (Dir. 2000/43/EC, Art. 13; Dir. 2000/78/EC, Art. 9),

\* on behalf of individuals (e.g. right of substitution),

\* in support of individuals.

### 2. During the procedure:

- The defence of the rights of individuals: acting on behalf of / assisting / defending / representing (associations / NGOs and trades unions) / there is no right *per se* of action in the collective interest:

\* on behalf of individuals (e.g. right of substitution);

\* in support of individuals (e.g. as a party intervening in a civil case or plaintiff claiming damages in a criminal case);

\* others (e.g. actions to have provisions contained in contracts and agreements declared null and void – Dir. 2000/43/EC, Art. 14 b; Dir. 2000/78/EC, Art. 16 b).

- The courts have a duty of consistent interpretation (cf. Advocate General's Conclusions of 30 June 2005, case C-144/04, esp. §§ 112 ff.);

National courts must interpret domestic law in the light of community law (following a directive, but also before it) [ECJ, 13 Nov. 1990, Marleasing, case C-106/89, esp. § 8];

National courts have a duty to ensure that community law is effective: their interpretation of national law must make it possible to attain the result enunciated by the directive [ECJ, 10 April 1984, Sabine Von Colson and Elisabeth Kaman, case C-14/83, esp. §§ 15 and 26];

In the absence of this, the state concerned may be held liable [ECJ, 30 Sept. 2003, G. Kobler, case C-224/01].

### 3. After the procedure:

- Protection against victimisation (Dir. 2000/43/EC, Art. 9; Dir. 2000/78/EC, Art. 11),  
In France, protection is afforded to individuals who are parties in judicial actions and also to witnesses:

First judgement of the *Cour de cassation*, 28 Nov. 2000, Mme Harba: nullity of dismissal and her “reintegration” as an employee at her place of work (the French law took over the provisions of Dir. 76/207/EEC and was later amended and extended to all grounds of discrimination by the law of 16 Nov. 2001);

- Sanctions (Dir. 2000/43/EC, Art. 15; Dir. 2000/78/EC, Art. 17): these are to be “effective, proportionate and dissuasive” (ECJ, 2 Aug. 1993, Marshall II, Advocate General’s Conclusions).

The emphasis is placed on compensation to victims (more than on enforcement measures against perpetrators of discrimination): the sanction may be in the form of the nullity of the act causing the discrimination, and compensation may be in kind (the court may order that the victim benefit from a different classification, a promotion, a higher salary, etc.) or, failing that, may award damages. Too often the compensation granted is found to be inadequate, which has the effect of discouraging victims from taking judicial action.

The practice emerging in the French courts to award compensation in kind, supplemented by financial indemnities.

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The problem of *mobilisation of the law* by protagonists.

- The law does not get applied spontaneously, especially not when it is confronted by sociological and cultural inertia; in this field, the law is often in advance of mentalities;

- Mobilisation of the law is thus indispensable, especially for social and administrative/public protagonists (all the protagonists are themselves touched by the problem of discrimination).

- To make the law into a *credible threat*, court judgements have a positive effect in validating the testimony of victims, in breaking down discriminatory processes and in affirming values of equality. The law thereby becomes an essential vector for the promotion of equal treatment.