Staden och staten
Etnicitet, migration och medborgarskap
20-22 november 2002
Norrköping

Toward the Establishment of Employment Equity Within the European Union and Sweden?

The developing policies related to the use of anti-discrimination clauses in public contracts. An institutional strategy for changing discriminatory behaviour on the labour market[']

Paul Lappalainen[*]
Swedish Integration Board

Workshop 3

Arbetsmarknaden och arbetslivet/

Etnisk diskriminering i arbetslivet

[’] The Swedish Integration Board has published a report “Ingen diskriminering med skattemedel!”(No discrimination with tax funds!) and taken the initiative in developing its own policy concerning its public contracts and anti-discrimination clauses. This paper reflects to a large extent the ideas presented in this report. The views expressed in this paper, however, reflect those of the author and do not necessarily reflect the opinions of the Swedish Integration Board.

[*] E-mail: paul.lappalainen@integrationsverket.se

The main goal of this paper is twofold. The first goal is to provide a description of the use of contract compliance in different countries in structuring and developing institutional strategies for counteracting ethnic discrimination. The second focus is to provide an analysis of the current policy building and policy implementation that is taking place in Sweden. These factors may be laying the framework for moving in the direction of employment equity as it is being developed in Canada.

Contract compliance means the use of anti-discrimination clauses in public contracts in order, among other things, to complement and ensure compliance with the anti-discrimination laws and norms of the society. Depending on the national setting, the violation of such clauses can lead to various sanctions such as cancellation of the contract, damages or a ban on participation in future contract bidding. Contract compliance as a policy is assumed to discourage discrimination and promote diversity. The idea is to convince the employer to shift his focus and awareness onto his general employment practices and patterns by raising the potential risk related to discrimination (e.g. cancellation of the contract or disqualification from future contracts) through a format (contracts as opposed to only a law) that the employer deals with daily and relates directly to the employer's direct interests (his profits as opposed to the general well-being of society (law)).

This historical and legal background provides a brief insight into the situation in the US, Canada and the UK - the countries that have went the furthest in the development and application of contract compliance. The use of anti-discrimination clauses in the US as well as the development of contract compliance and its use today is examined more closely. Contract compliance in Canada and the UK is also presented. A brief overview of the EU's position follows thereafter as there has been a broadly held, though inaccurate, general assumption that EC law prevents the use of contract compliance. This includes an analysis of the positions taken by the EU, the EC-court and the Commission. Finally the varying developments concerning the ongoing policy processes in Sweden are analysed.

The policy process has come quite far in Sweden, at both the local and the national levels. If contract compliance is actually implemented, Sweden will become the first continental European country to put this policy into practice in the anti-discrimination field. Many policymakers have been asserting that this is a necessary complementary policy tool for promoting diversity and counteracting discrimination.

These policy processes may in the end result in policies that are comparable to the policy of employment equity found in Canada.

The disposition of the paper is the following. The paper begins with a short description of historical and legal situation concerning anti-discrimination clauses in the US. The next sections describe the situations in Canada, the UK and the European Union. I conclude with a description and a short evaluation of the institutional strategies for implementing anti-discrimination clauses in Sweden.

1. USA - Historical and legal background
2. Canada
3. UK
4. EU
5. Sweden

1. Anti-discrimination clauses in USA - historical and legal background.

The federal level

The historical legal origin behind anti-discrimination clauses at the national level in the US can be found in President Roosevelt's 1941 Executive Order concerning the introduction of clauses in all federal defense contracts. In 1941 black workers were routinely discriminated against within the expanding defense industry. Among others black union leaders and the NAACP arranged a meeting with Roosevelt to explain their concerns. One issue discussed was a mass demonstration in Washington to protest discrimination in the defense industry.

It was a sensitive point in history. Hitler was sweeping through Europe and the US was on the edge of entering into the war. The US war industry was already gearing up. Blacks had become an increasingly important part of the labour force needed by the expanding war industry. At the same time Roosevelt felt that obtaining the help of Congress in passing an anti-discrimination law was impossible. A creative political solution was needed. Roosevelt thus signed Executive Order 8802 one week before the demonstration as a means of indicating his position to its leaders. Two years later the President expanded the scope of the order to all federal contracts.

Initially the order basically required a declaration of an intent to not discriminate from the contractor if they wanted to participate in the federal contracting process. But no advice was given on the prevention of discrimination and sanctions were basically non-existent.

Eventually the clause was strengthened in various ways so that under President Kennedy it included a possibility to cancel the contract and a requirement that affirmative action be used by the contractor to ensure non-discrimination. This meant that the contractor not only was to prevent discrimination but also to undertake affirmative action to promote equal employment opportunities. In concrete terms non-compliant contractors could have their contracts cancelled and be banned from participating in future federal contracts.

These clauses were strengthened when race and sex discrimination were banned through adoption of the 1964 Civil Rights Act. Sex discrimination was thus incorporated into the clauses.

Eventually requirements were placed concerning the adoption of plans containing goals and time tables for achieving the goal of equal employment opportunities for those involved. Finally the Executive Order was expanded to cover the disabled as well.

Various researchers have come to the conclusion that the US federal Contract Compliance Program has had a substantial effect in promoting equal employment opportunities for women and ethnic minorities. For example, one study of contract compliance during 1974-80 showed that there was a 20 % increase in employment of minorities among federal contractors compared to a 12 % increase among non-federal contractors. For women the increase was 15 % compared with 2.2 %. There were even more dramatic differences found in the employment of "professionals" such as lawyers and doctors (a 57 % increase compared with 12 %). The most extensive research has probably been carried out by economist Jonathan Leonard. He has compared federal contractors and non-federal contractors over time and included controls for such factors as enterprise size, branch of industry, region and professional structure. He concludes that affirmative action in contract compliance terms has effective and that the policy has been decisive in convincing companies to increase the numbers of women and minorities they employ.

Similar contract compliance developments have also taken place at the state and local levels. It is even possible to see that the local/state level has often provided new ideas for the federal level.

According to Executive Order 11246 all companies that are parties to a contract worth more than 10,000 dollars per year for goods or services are considered to have agreed to not discriminate on the basis of race, skin color, gender, religion or national origin. In addition all contractors and sub-contractors with contracts worth more than 50,000 dollars per year and more than 50 employees are to develop written affirmative action programs for use by the company. A section of the Labor Department, the Office of Federal Contract Compliance Programs (OFCCP), is responsible for the collection and following up of these affirmative action programs. The OFCCP as a rule tries to reach negotiated settlements in regard to violations of the undertaking. If this does not work, the anti-discrimination clauses contain the possibility of cancelling the contract and disqualifying the contractor from future contracts until he is found to be in compliance with the requirements of Executive Order 11246. In practice contractors have almost always been willing to reach settlements with the OFCCP rather than risk the sanctions that can be applied. Additional sanctions are also available in accordance with Title VII of the Civil Rights Act. The government can also sue the contractor for damages for breach of contract.

This area of contract compliance programs is one of the areas concerning equal employment opportunities at the federal level where "affirmative action" is an issue. In addition a court can order a company that has violated Title VII, i.e. has discriminated, to develop and implement an affirmative action program to come to terms with its discriminatory employment policies. It should be note however that no federal law places

a general requirement on companies to implement affirmative action programs or anything similar.)

Examples of affirmative action measures:
• A declaration in want ads that the company is an equal opportunity employer.
• The placement of want ads in newspapers and other media that reach minorities.
• General training programs or programs directed toward specific target groups.
• The removal of tests that have a built-in bias against certain groups, i.e. tests that are not relevant to the work involved.
• The setting of various goals and time plans for achieving a diverse workforce.

It is this last point that is considered to be controversial. Some assert that this means that quotas are required. In spite of the various misconceptions in this regard it should be noted that these goals are not to be achieved through the use of quotas. According to the OFCCP quotas are forbidden by the Executive Order and would violate the order. A company only has to undertake "good faith" efforts to achieve the goals. Most companies should be able to demonstrate their good faith efforts without any greater problems.

State and local level
In a similar as in other federal states (Canada and Australia) almost all states have their own anti-discrimination laws. These laws basically mirror the federal law but can often contain for example additional grounds for discrimination. There are often similar state level government authorities, usually with a name like the state commission for human rights. In a similar way many states have contract compliance programs for state level contracts. According to Wisconsin's Contract Compliance Law state contractors shall in principle undertake to carry out an equal opportunities program in its personnel policies. All contractors with at least 25 employees and contracts worth more than 25,000 dollars must turn in an affirmative action program within 15 days after they agree to the contract. Similar requirements are placed on sub-contractors. The goal is a balance workforce which means that the program should take the underrepresentation of women, minorities and the disabled into account.

At the local or municipal level various anti-discrimination rules and policies have been adopted by many cities and counties. They often have a local control authority. San Francisco local rules require all city departments to place demand in their contracts that the contractor agrees to not discriminate in its employment policies in any of its activities with the boundaries of the US. The rules referred to in such contracts cover discrimination on such grounds as race, skin color, religion, disability or HIV-status and sexual orientation. This applies, for example, both when the ground actually exists (the person in question is disabled) as well as when the contractor has merely assumed that the ground exists (he is wrong in the assumption that the disability exists). For monitoring such contracts San Francisco has its own Human Rights Commission. The sanctions available include cancellation of the contract and disqualification from participation in future contracts. It should be noted that even these local requirements function in relation to contractors within the framework of normal contracts law. The city is able to place the

quality requirements and contract clauses that it chooses as an individual party to a contract. This means that the city is not bound to use only the general discrimination grounds defined in state or federal law. Sexual orientation was thus introduced as a discrimination ground in San Francisco long before it was adopted at the state level.

2. Other national implementation strategies

2.1 Canada

The federal level

Article 15 of Canada's Charter of Rights and Freedoms states the following:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Article 15 (2) underlines the principle that affirmative action programs for the benefit of disadvantaged individuals or groups are allowed.

The Canadian Human Rights Act - CHRA - was adopted in 1977 and last amended in 1996. The purpose of the law (§ 2): "The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted."

CHRA is a federal law that protects all residents of Canada against discrimination by or within the different federal authorities, the postal service, banks, airlines and other communications companies, and other federally regulated private industries. The ban on discrimination covers actions within industry and commerce (goods and services), within the rental and housing markets and working life (including employment advertisements). The law also indicates that unions are not allowed to discriminate against their members. Harassment is also banned.

Canada has also adopted the Employment Equity Act - EEA. The latest version entered into effect in 1996. All employers, both private and public, that are covered by federal legislation and have more than 100 employees are covered by the EEA. About 900,000 employees or 8 % of the Canadian workforce are covered by the law. The Canadian Human Rights Commission is to monitor the law. The purpose of the EEA (§ 2) is to achieve equality in the "workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences."

As complement to the EEA, a Federal Contractors Program has been developed. The program has the same purpose as the EEA, follows the same guidelines and relates to contractors that participate in federal public contracts. All organizations with more than 100 employees that want to participate in a federal contract worth at least 200,000 Canadian dollars must agree to follow the EEA guidelines. They shall also declare that the undertaking is part of their bid or contract offer. Once a contract has been granted the fulfilment of this undertaking is to be monitored. If it turns out that the contractor has failed to fulfil his undertaking, the result can be various sanctions such as disqualification from future contracts.

The states

In the same way as in the US there are laws and supervisory authorities at the state (province) level. Quite often it is the state laws that have provided guidance concerning new trends and developments for the federal level. Ontario's Human Rights Code contained a ban on sexual orientation discrimination long before it was adopted at the national level. At the same time it should be pointed out that the state laws to a large extent reflect the national law. They cover working life, housing, merchants (goods and services) and union membership. The same grounds are covered but they more clearly cover citizenship as well.

One interesting difference compared to the national law could be found a few years ago in Ontario where the law specified that one condition for every (state or provincial) public contract was that the contractor agreed to not violate the ban on discrimination in working life. The same also applied to every provincial subsidy, donation, loan or guarantee. The law also declared that violations that amounted to a breach of the condition, are sufficient ground for cancellation or voidance of the contract, subsidy, donation, loan or guarantee. Such violations also Ontario the right to refuse to enter into new agreements with the party involved. To determine which sanctions should be applied a Board of Inquiry can be appointed by the Ontario Human Rights Commission if a determination has been made that an inquiry is called for and that it has not been possible to reach a settlement. It is important to note that this law was repealed by a new government that later came to power in Ontario.

2.2 The United Kingdom

The supervisory authority in the UK for the Race Relations Act (RRA) is the Commission for Racial Equality (CRE). The CRE's main task is to counteract discrimination and promote equal opportunities, and follow up the manner in which the law is functioning and recommend changes when needed. In this connection it can also be noted that the CRE has participated in the development of so-called codes of practice for different braches of working life. These are to help employers and others to understand the law. Recommendations are provided concerning various ways to prevent discrimination and promote ethnic equality in working life. While these codes are not legally binding an industrial tribunal can take them into account in determining if a company has done what it should have in order to avoid discrimination. These codes also can play a role in the work of the local authorities with contract compliance.

Background to contract compliance in the UK

According to the original § 71 RRA local authorities have been under a duty to ensure that they carry out their functions with due regard to the need to elimination illegal racial discrimination and promote equal opportunities and good relations between people of different races. The law has been strengthened recently in a number of respects.

In addition to their support to Racial Equality Councils certain larger local authorities fulfil this duty through supporting a local contract compliance policy. In other words certain minimum requirements are placed on suppliers of goods and services (contractors) concerning their employment policies and the establishment of equal opportunities.

During the 1980s several local authorities used "contract compliance" as a qualification ground for public contracts. Many of these authorities had special contract compliance units. Various studies have shown that the adoption of equal opportunities policies increased markedly among the contractors involved. The CRE is convinced of the importance and effectiveness of contract compliance as a complement to the law as well as the various codes of practice. Contract compliance programs provide companies with a clear and direct economic encouragement to counteract discrimination.

Since 1969 all national contracts have included a clause that requires contractors to undertake reasonable measures to ensure that their employees and sub-contractors follow the rules in the Race Relations Act. However, no government has yet established system for following up compliance with the clause.

On the other hand, at the local level contract compliance has been handled in more than a symbolic manner. In 1983 the Greater London Council (GLC) introduced the use of contract compliance at the local government level in the UK. GLC's basically required in effect that the contractors undertook to follow the anti-discrimination laws in effect, i.e. those concerning race and gender. In 1988 the local right to utilize such clauses was

limited to the use of such clauses in relation to race discrimination and only to a limited extent. The Local
Government Act 1988, Section 18, (which limited the powers of local governments) together with the EC public procurement directives forms the legal framework for the CRE's views concerning the local contract compliance initiatives in this field.

The CRE:s view of the local initiatives

The background according to the Commission for Racial Equality (CRE) to the need for the local work with contract compliance is that race discrimination is common in the UK even though it is a multiethnic society. Unemployment is much higher among ethnic minorities than among the white majority. Among those with higher educations there is a much higher unemployment level among minorities than among whites with the same or even a somewhat lower level of education. The CRE also assumes that there is a very high rate of underreporting concerning ethnic discrimination. All this has led the CRE to the conclusion that local authorities can help to improve this situation through encouraging contractors to implement racial equality policies.

According to the Commission for Racial Equality (CRE) there are several bases for the use of contract clauses concerning equal employment opportunities

1 There is a legal duty for the local authorities to counteract ethnic discrimination and promote ethnic diversity (Race Relations Act, § 71).
2 Contract requirements concerning equal employment opportunities are effective. Various studies in the US and England have shown that these types of programs increase the employment opportunities of persons from groups that have been subjected to discrimination.
3 The applicable legislation gives local authorities the right to act. In spite of the limits in the law local governments have a right to promote equal employment opportunities policies through public contracts. Here the UK Local Government Act sets greater limits than for example the EC-directives.
4 The promotion of fairness and equal opportunities is a rational use of the taxpayer's money. A great deal of tax money goes to the voluntary and private sectors. These funds are paid in from all parts of society, men and women, disabled and non-disabled and people from all ethnic groups. Thus the local authorities are seen to have a moral (democratic) duty to ensure that public funds do not get paid to contractors or activities that directly or indirectly discriminate against any ethnic group.
5 This is also a rational use of the taxpayer's money with regard to quality and value for money. Presumptive contractors are naturally analyzed on the basis of various qualitative factors. And equal opportunities policies have become more and more recognized as being a part of good management practice, and have been pointed out as such by employer's organizations, professional institutions and the central government. Such policies promote employer recruitment of the most suitable personnel, i.e. on the basis of

competence and without regard to irrelevant factors such as ethnic background. This should lead to better quality production during the time of the contract.

These factors are the basis for the local work with contract compliance in the UK. As far as the CRE is concerned the legitimacy (democratic) and quality arguments are the overriding issues that need to be looked, as well as the fact that contract compliance combined with effective anti-discrimination achieves changes in behavior.

The Commission for Racial Equality thus recommends the use of the following points in contracts:

1 The contractor, and his subcontractors, shall adopt a policy for fulfilling his legal duties in accordance with the RRA, and thus agree to not discriminate.

2 The contractor, and his subcontractors, shall as a minimum act in accordance with the authority's written criteria and the CRE's Code of Practice in employment, which provides advice steps that can be taken to encourage underrepresented minorities to seek employment.

3 In those cases where it can be established through a court proceeding, an industrial tribunal or a CRE investigation that ethnic discrimination has taken place, the contractor shall inform the authority about this and undertake the measures necessary to prevent a repetition.

4 The contractor shall, upon request, inform the authority of the details related to (3).

5 The contractor shall provide such information to the authority that reasonably needs in order to be able to examine the contractor's fulfilment of 1-4 above, including requests for instructions, employment ads and other information and details about the monitoring of job seekers as well as the workforce currently employed.

The CRE functions as an advisor to the local authorities that work with contract compliance.

3. New directions within the European Union

Article 2 of the EC-treaty indicates that the community has the tasks, among other things, of promoting a high level of employment and social protection, free movement for workers, equal opportunities for men and women, improved working conditions and the social integration of the disabled and other less favored categories. The Commission has issued a green paper on public procurement within the EU. This paper examines article 2 together with the public procurement directives. Other important documents related to the EU and the relationship between social issues and public procurement are the Commission Communication of March 1998 and the Court's case law, particularly the Beentjes case.

The Green Paper on Public Procurement

According to the Green Paper procurement entities "may be called upon to implement various aspects of social policy when awarding their contracts, as public procurement is a

tool that can be used to influence significantly the behaviour of economic operators."

It is pointed out that the directives provide various possibilities for taking social issues into account. It is possible for example to exclude or disqualify contractors where they have been convicted of an "offence concerning their professional conduct or have been found guilty of grave professional misconduct. These rules clearly also apply where the offence or misconduct involves an infringement of legislation designed to promote social objectives." This clearly means that certain social objectives, such as non-discrimination, can be pursued to some extent in contract award procedures.

Another possibility mentioned is the possibility of placing conditions of a social character during the time the contract is being performed. The examples mentioned relate to obligations aimed at the "employment of women or the protection of certain disadvantaged groups." It is specified however that such conditions are not allowed if they result in discrimination against tenderers from other Member States and that transparency concerning such conditions must be ensured by mentioning the conditions in the contract notices or contract documents.

The commission does point out that in its view the Directives do not allow social considerations to be taken into account "when it comes to checking the suitability of candidates or tenderers on the basis of the selection criteria, which relate to their financial and economic standing or their technical capability, nor when it comes to awarding contracts on the basis of the award criteria, which must relate to the economic qualities required of the supplies, works or services covered by the contract." (This conclusion may be in conflict with the analysis made by the Court in a recent decision.).

The Beentjes case

The Commission's position in the Green Paper was based on among other things the Court's case law. In the Beentjes case (ECJ 31/87) a contractor was required to employ a number of long-term unemployed. The case involved the application of Council directive 71/305. The Court stated that placing such a requirement in a contract does not in itself violate the directive. However, the requirement cannot directly or indirectly discriminate against tenderers or applicants from other Member States. Furthermore, transparency is required.

Commission Communication: Public Procurement In The European Union

In addition to the Green Paper the Commission has issued a communication to clarify some aspects of public procurement policy in the EU (11 mars 1998). The communication underlines the importance of social policy and points out that the Amsterdam Treaty lays down as a priority "the elimination of inequality and the promotion of equality between men and women in all the policies and activities of the European Union and requires it to combat every type of discrimination".

The Commission repeats here the idea that social objectives can be taken into account in purchasing through the exclusion of candidates who violate national social legislation,

including those related to promotion of equal opportunities as well as through requiring compliance with contract conditions that, for example, are aimed at “promoting the employment of women or encouraging the protection of certain disadvantaged groups”.
Again the Commission points out that the limits of Community law must be respected, i.e. transparency and non-discrimination.

The Commission concluded its comments concerning social issues and procurement by stating that the Commission encourages the Member States to use their procurement powers to pursue the social objectives mentioned and indicated that the Commission will act similarly in its own procurement activity.

Concerning EC-law, given the Green Paper, the Communication and Court’s case it is clear that
1. Exclusion of candidates is allowed if they have violated anti-discrimination laws or norms. 2. Contract conditions requiring agreement to not violate anti-discrimination laws are valid, as long as certain formal norms are complied with. The only thing that is unclear is the extent to which a contracting entity can go beyond this type of law-related requirement. The Beentjes case involved a condition that did not relate to any legal requirement at all.

Interpretive Communication of the Commission

On 15 October 2001 the Commission issued its long awaited interpretive communication on the Community law applicable to public procurement. Development of this communication was mentioned in the Commission’s Communication on "Public procurement in the European Union" of 11 March 1998. The aim is to clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement.

The most significant conclusion concerning the addition of anti-discrimination clauses to public contracts is that: “Contracting authorities can impose contractual clauses relating to the manner in which a contract will be executed. The execution phase of public procurement contracts is not currently regulated by the public procurement directives.”

Furthermore it states that:

“ Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations. Listed below are some examples of additional specific conditions which a contracting authority might impose on the successful tenderer while complying with the requirements set out above, and which allow social objectives to be taken into account:
· the obligation to recruit unemployed persons, and in particular long-term unemployed persons, or to set up training programmes for the unemployed or for young people during the performance of the contract;

· the obligation to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity ;
· the obligation to comply with the substance of the provisions of the ILO core conventions during the execution of the contract, in so far as these provisions have not already been implemented in national law;
· the obligation to recruit, for the execution of the contract, a number of disabled persons over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer."

4. Sweden's developing contract compliance strategy

In Sweden the policy process concerning contract compliance has moved quite far. Right now Sweden seems poised to move into a new stage since policymakers on various levels are coming to the conclusion that the formal hinders that have been thought to exist are just not there. This means that politicians are simply going to have to face the question of whether or not a policy of contract compliance should be used in relation to the hundreds of billions of Swedish crowns that are used in public procurement.

Government Enquiries
The issue of anti-discrimination clauses was examined in a Government Enquiry in 1997. This Enquiry recommended their use as a complement to the proposal for a new law against ethnic discrimination that was developed. The Enquiry found that such clauses were within the framework of both EC-law and Swedish law. Their use was recommended to the greatest possible extent in public contracts for goods and services, as long as no legal hinders existed.
The Enquiry did recommend a further examination of the contents of such a clause and the routines that should be established for follow-up purposes.

This later led to a Parliamentary Enquiry which recently completed its findings. In its directive the Enquiry was to analyze the possibilities for a contracting entity to use so-called anti-discrimination clauses in public procurement contracts. The Enquiry clarified, as indicated above in the section on the EU, that "It is clear that social conditions, for example conditions concerning anti-discrimination, can be adopted in the form of added contract conditions (or clauses). A prerequisite is that the condition is presented in the information concerning the procurement and that the condition is not discriminatory."

European Conference Against Racism (Strasbourg, October 2000)
The Swedish government was one of participating States that agreed to the general conclusion that "The European Conference calls upon participating States to ensure that public funds are not awarded to companies or other organisations which are not committed to non-discriminatory policies."

National Action Plan Against Racism

In a national plan against racism submitted to the Parliament on 8 February 2001 the Government gave notice that it going to work in the direction of actually making use of the possibilities regarding the implementation of anti-discrimination clauses in public contracts.

Government Budget September 2001 - Introduction of clauses by 1 July 2002

One result of the government's budget negotiations with the Green Party and the Left Party is a clear indication that the Government intends to introduce anti-discrimination clauses into national public contracts by 1 July 2002.

Local policy processes in Sweden

Various local policy processes have been initiated throughout Sweden at the local level. Local motions supporting the use of anti-discrimination clauses have been submitted in most major urban areas at both the city and county government levels. These initiatives are currently at different stages. The most advanced processes can be found in Stockholm and Malmö.

The main points in the motions submitted use the following lines of reasoning:

• Despite its broad legislation Sweden still has substantial problems with among other things gender and ethnic discrimination. These clauses are a concrete way of complementing the existing legislation.
• They have a "human rights" perspective in that they are directed against all discrimination banned by law and are not related only one interest. The clauses include the idea that there is no reason to discriminate between the different grounds of discrimination and that the right to non-discrimination due to irrelevant factors is a human right.
• It is a way for local politicians to counteract discrimination, with actions as well as words.
• Their use will lead to an effective use of public funds.
• As more and more "public sector" activities are turned over to the private sector it is increasingly important that the public authorities retain certain responsibilities for how that money is used, i.e. it is democratically unacceptable that recipients of public funds are allowed to discriminate against various members of the public, including ethnic minorities.

They generally contain a formulation for a contract clause: the contractor, or sub-contractor who is used by the contractor, agrees to not violate any of the existing anti-discrimination laws. This is complemented with a cancellation clause: since the contracting entity considers discrimination to be a serious breach of contract, the contractor is put on notice that the contracting entity hereby has the right to cancel the contract if the contractor, or his sub-contractor, violates any of the existing anti-discrimination laws.

Stockholm

On 1 October 2002 the conservative majority in the Stockholm City Council agreed in principle to the introduction of anti-discrimination clauses in Stockholm's public contracts. This is a proposal that the opposition parties had long been supporting. The majority at the same time voted against a proposal that included specific wording for such clauses. Thus the specific details are going to be presumably worked out by the city's attorneys. The final specifics are expected to include a clause that will only allow for cancellation of a contract if the contractor has been required to pay damages in accordance with a final court judgment or is convicted of unlawful discrimination in accordance with §16:9 of the Penal Code.

The policy process has been underway since 1996. It will thus be important to follow the development of the details since the issue has been sidetracked a number of times even given majority support on occasion. In any case, since the parliamentary enquiry above clearly indicated that such clauses are legal politicians have had to focus on the political will to accept or reject such clauses.

City Council decision in Malmö
The policy process has come the furthest in Malmö. In the year 2000 a political majority adopted a motion proposing the use of anti-discrimination clauses. It has taken a long time but right now Malmö is in the process of introducing such clauses into their public contracts. The original proposal by the administration focused on race and ethnic discrimination but will presumably be expanded to other discrimination grounds given the Commission's clear statement in its interpretive communication mentioned above.

The National Integration Office
The National Integration Office has formulated a two-part anti-discrimination policy proposal in relation to the Office's own public contracts. The proposal indicates that the Office shall indicate in its contracts that the Office appreciates contractors that have a diverse ethnic workforce and that the contractor shall agree to not discriminate on any ground covered by law.

The National Public Procurement Office (NOU) has commented on the proposal above. In general the NOU's comments on the proposal for a cancellation clause were positive in that such clauses are within the bounds of Swedish and EC-law if they are written properly. This is however explained in extremely careful terms.

On the other hand the NOU was more critical concerning the requirement of a positive view towards ethnic diversity, particularly if this involved any active involvement. Here it was somewhat unclear if the NOU was making an analysis of the legality of the idea or only its suitability. But it should be apparent from the EC-Court's case law and the statements of the Commission above that even such possibilities exist as long as they are formulated in a legally correct manner.

The Parliament (Riksdagen)

In June 2002 the Riksdag basically adopted a government bill (Proposition 2001/02:142) concerning changes in the legislation concerning public procurement. One of the points in the bill was a proposed change in the law that specifies that public procurement contracts can include so-called social conditions to the extent allowed by EC-law, for example, related to compliance with anti-discrimination laws. While an amendment in the law was proposed, the government specified that this was a clarification that such social conditions could be included by government entities dealing with public procurement, but that this amendment "did not result in any change in the applicable legal rules and case law."

The Government Bill also pointed out that, in order to provide guidance regarding the types of contract conditions that can be used, the Government (dnr Fi2002/422) gave the National Public Procurement Board (Nämnden för offentlig upphandling) the task of developing examples of contract conditions for the promotion of equal treatment without regard to gender, race, skin color, national or ethnic origin, religious faith, disability or sexual orientation. The examples are to include contract clauses related to a contractor's undertaking to comply with existing anti-discrimination laws, and the consequences of a failure to comply.
The examples were to be developed in cooperation with the Gender equality ombudsman (JämO), the Ombudsman against ethnic discrimination (DO), the Disability ombudsman (HO) and the Ombudsman against discrimination due to sexual orientation (HOMO). The NOU was also to consult with the local government associations (Svenska Kommunförbundet and Landstingsförbundet) as well as business organisations and the unions.

The Public Procurement Board (Nämnden för offentlig upphandling)
The Board completed its report concerning examples of anti-discrimination clauses prior to the treatment of the public procurement bill in parliament. In general, the Board recommended only the use of an extremely limited anti-discrimination clause. Among other things, subcontractors were excluded from the scope of the clause. Furthermore, concerning recourse, rather than specifically allowing for the possibility of cancellation of a contract if a contractor discriminates or otherwise fails to follow the laws against discrimination, the maximum penalty recommended is a contract fine of about 2000 Swedish Crowns (USD 200 or 200 euros) for failure to properly report the compliance measures undertaken, and a maximum fine of 3 % of the contract amount for ongoing violations of the laws.

Final comments

In counteracting discrimination as a social phenomenon it is worthwhile to keep in mind the distinction that sociologists like R.M. McIver started making during the late 1940s. They taught people to distinguish between discrimination as a form of behaviour and prejudice as an attitude. The distinction was important in that while one could lead to the

other, neither was a prerequisite to the other. There can be a connection between the two, but a prejudiced person does not necessarily discriminate and discrimination is not always the result of prejudice.

This issue is relevant to the manner in which discrimination is approached in Europe. The tendency has been to use law in a manner that will hopefully change attitudes, as opposed to changing behaviour. One means of focusing on, and changing, behaviour that has been developed in some countries is the use of contract compliance. On the continent of Europe there have been serious doubts raised as to the legality of contract compliance. This has meant that little attention has been paid to its planning, structure and effectiveness. Yet these are the issues that policymakers will soon be faced with.

Europe in general has been extremely slow in developing laws against ethnic discrimination, in particular effective laws. Rather weak laws or no laws at all have been the norm. It seems that denial concerning the issue of racism and discrimination as European problems have been the norm. The EC Race Directive will mean that all EU member states must have a minimum level of legal protection against race and ethnic discrimination by July 2003. The implementation process will presumably also give an extra impetus to other complementary means of combating racism and discrimination. The use of anti-discrimination clauses will presumably be one of those means, and may lay the foundation for developments in the direction of employment equity.

Anti-discrimination clauses (contract compliance) have been found to be an effective complement to anti-discrimination legislation in the US, Canada and the UK. They are presumably effective in that they appeal to a contractor's basic interest in his own profits. Laws reach an employer on a more general level, whereas contract clauses involve a contractor's daily interests. If the issue of anti-discrimination is brought up within the environment of a contract, the contractor needs to consider the issue immediately. Does he have any problems in this regard? Can they be remedied? Can they be prevented? This presumably is what leads to the changes in the contractor's behaviour, at least in a preventive sense. This does not mean that anti-discrimination clauses are not uncontroversial. Whether or not they can even be used on the continent of Europe has been questioned. (The Swedish business community has expressed serious doubts about their usage in relation to Sweden's public contracts market that amounts to about 350-400 billion Swedish Crowns.)

The initial issue seems to always focus on the legality of contract compliance as a concept. It is possible that the legality issue is raised because it is harder to argue against their suitability given the legitimacy and quality arguments involved.

In any case, the EU stance on contract compliance has become much clearer. As long as certain minimum legal standards are met both the Commission and the Court agree that anti-discrimination clauses can be used.

In Sweden the policy process has been developing for a number of years. At least it has become almost impossible for the policymakers to say that legality is a major issue, since two government enquiries have dealt with this issue, and the Commission has been as clear as it has. The next step is thus going to be a focus on suitability. Apparently the national government, along with the parliamentary majority, has decided to move into the implementation stage. Local governments have also started moving in the same direction. At the same time it is going to be important to follow the details. Given the broad opposition that has existed on various levels it is important that the policy process is followed through to the development of concrete and effective clauses. Otherwise they risk ending up as symbols without any real content.

The so-called example presented by the Public Procurement Board provides an interesting barrier in the development of serious measures against racism and discrimination. It is quite possibly a new form of denial. The policy process concerning the development of laws against ethnic discrimination in Sweden started with little recognition of the issue as a Swedish problem. It was not until 1999 that a relatively modern law against ethnic discrimination in the workplace was adopted. This was largely due to widespread denial of racism and discrimination as a problem in Sweden - by both politicians and government bureaucrats. The Board seems to be following earlier processes in the field, by proposing a symbolic measure that can hardly be expected to change the behaviour of contractors.

Whether or not policymakers (i.e. politicians) will be sidetracked by the Board's report remains to be seen. If not, Sweden may be moving toward the implementation of an effective combination of laws and other measures to counteract discrimination and thus promote equal treatment within society.

References

SOU 1997:174, Räkna med mångfald!

SOU 2001:31, Mera värde för pengarna (More value for the money).

Public Procurement In The European Union, Commission Communication, Brussels 11 March, KOM (98) 143.

Brussels, 15.10.2001, COM(2001) 566 final, INTERPRETATIVE COMMUNICATION OF THE COMMISSIONOn the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement

En nationell handlingsplan mot rasism, främlingsfientlighet, homofobi och diskriminering (2000/01:59) (A National Action Plan Against Racism, Xenophobia…).

Green Paper, Public Procurement In The European Union: Exploring The Way Forward, Communication adopted by the Commission on 27th November 1996.

Beentjes-case (ECJ 31/87).

Bourn, C. & Whitmore, J. Anti-Discrimination Law in Britain, 1996.
Racial Equality and Council Contractors, 1995, Commission for Racial Equality.
Motion om införande av en antidiskrimineringsklausul i offentliga upphandlingar, anmäld 1999-04-13 till Stockholms läns landsting, av Paul Lappalainen m fl (mp) .
NOU, Ärende 1999/0075-21, Integrationsverkets frågor om upphandling med beaktande av etnisk mångfald.
Contract Compliance: A Brief History, GLC/ILEA (Greater London Council/Inner London Education Authority).
Motion (mp) om införande av en antidiskrimineringsklausul, Stockholms stad 1999:43.
General conclusions of the European Conference Against Racism, October 2000.
Jonathan Leonard, “What was affirmative action”, The American Economic Review 1986:2.
Jonathan Leonard, The Impact of Affirmative Action, 1983.
Erik Åsard, m fl, Positiv särbehandling I Sverige och USA, 2000.
NOU, Rapport om klausuler, 31 May 2002.
Proposition 2001/02:142 (Government bill on public procurement)