
EUROPEAN DEVELOPMENTS

Taking Stock and Looking Forward: The Commission Green Paper on Equality and Non-Discrimination in an Enlarged European Union

1. INTRODUCTION

Five years after the inclusion of Article 13 in the EC Treaty, the Commission has taken stock of its achievements thus far and invited reflections on the future development of equality policy. The Commission's Green Paper, *Equality and Non-Discrimination in an Enlarged European Union* (COM (2004) 379 final, 28.05.2004), which was published at the end of May 2004, has, according to its introductory paragraph, two main objectives: to analyse 'the progress that has been made so far' and to seek 'views about how the EU can continue and reinforce its efforts to combat discrimination and promote equal treatment' (p 4). The paper itself is divided into three sections—addressing the achievements of EC non-discrimination policy, the challenges for the future, and a questionnaire to be used by respondents. The results of the public consultation 'will help to shape the European Commission's future policy strategy with regard to non-discrimination and equal account' by being taken into account by the new Commission, the new Social Policy Agenda and the Commission's reports to the Parliament and Council in the implementation of the Article 13 non-discrimination Directives (p 4).

2. PROGRESS TO DATE

A. Article 13 and the Two Equality Directives

The first main section of the Green Paper not only provides an overview of the two Article 13 Directives and the accompanying Action Programme, but also considers the impact of a variety of other EU and international instruments on non-discrimination policy within the EU. Article 13 is described as a 'quantum leap forward in the fight against discrimination at the EU level' and its adoption 'reflected the growing recognition of the need to develop a coherent and integrated approach towards the fight against discrimination' (p 5). The Green Paper continues by noting that Article 13 is a 'more effective basis for addressing situations of multiple discrimination' and that it 'allows for common legal and policy approaches covering the different grounds, including common definitions of discrimination' (p 5). This assessment prompts the question whether the Commission's use of Article 13 has actually achieved these goals and, in some cases, whether these goals were even actually desirable in the first place. Criticism has been made of the Article 13 Directives, for example, on the grounds that in some cases their transposition has threatened the coherency and consistency of a pre-existing system of non-discrimination law. One case in point is the United Kingdom, where the Race Directive (Directive 2000/43/EC, [2000] OJ L180/22)

has required changes to the UK Race Relations Act (RRA) 1976 which have increased the level of protection provided from discrimination for those grounds covered in the Directive, but left other grounds under the RRA, such as nationality, with lower levels of protection. Previously all grounds falling under the RRA enjoyed the same levels of protection. McCrudden has also suggested that it is not necessarily appropriate to develop common approaches and definitions with regard to different forms of discrimination, but that differing responses and goals may be required (Christopher McCrudden, 'Theorising European Equality Law' in Cathryn Costello and Eilis Barry (eds), *Equality in Diversity: The New Equality Directives*, Irish Centre for European Law, 2003, 1–38). Such critical insights are missing from the Green Paper. In contrast, the Green Paper lavishes praise on the Race Directive and the Framework Employment Directive (Directive 2000/78/EC, [2000] OJ L303/16). They have 'raised significantly the level of protection against discrimination across the EU' and 'required significant changes to national law in all Member States'. Some countries have been required to introduce 'an entirely new, rights-based approach to anti-discrimination legislation and policy' and the Directives have indirectly contributed to a further development of gender equality law, with the updating of the Equal Treatment Directive (2002/73/EC [2002] OJ L269/15) (p 6). The result is that the 'EU has one of the most advanced legal frameworks [with regard to non-discrimination legislation] to be found anywhere in the world' (p 6) and is 'widely regarded as an effective model' (p 12). The adoption of the Directives has indeed had a significant impact on the level of protection provided to victims of discrimination throughout the EU. Their broad personal scope, addressing 'unpopular' and 'neglected' grounds, is particularly important in this respect. Weaknesses have nevertheless been identified in the EU's approach to non-discrimination: the continued reliance on the individual enforcement model, the lack of alternative measures, such as an elaborated public procurement process tied to equality goals, and the emphasis on a negative non-discrimination approach rather than a positive equality model, are factors which could arguably undermine the current Article 13 based structure. In its uncritical assessment of the Directives, the Green Paper is arguably a little short-sighted. This view is perhaps best demonstrated by one of the first questions in the questionnaire which asks what impact European legislation has had on the level of protection against discrimination. The possible answers range from 'very strong impact' to 'no impact' or 'don't know'. Presumably the Commission assumes that a (very) strong impact would be a positive response, although the set answers provide no means for actually assessing the quality of that impact. This lack of insight into the possible weaknesses of the Directives is probably the Green Paper's greatest weakness. The questionnaire nevertheless provides various opportunities for respondents to point to problems related to the EC's approach, with questions asking what the remaining obstacles to the effective implementation of EC anti-discrimination law are (ten possible answers, including 'other', are listed, and a maximum of three can be selected) and a question asking whether serious problems exist which are not currently addressed (a hundred word maximum answer).

The Green Paper notes that a number of Member States have gone further than the minimum requirements set under Community law, by prohibiting discrimination beyond employment with regard to religion or belief, disability, age and sexual orientation

(Directive 2000/78/EC only prohibits *employment* related discrimination on these grounds); establishing a single legal framework addressing discrimination on a variety of grounds; or establishing a single equality body to address all forms of discrimination under the Directives (Directives 2000/43/EC, and, more recently, Directive 2000/73/EC only require that such bodies exist with regard to race and gender discrimination) (p 6). The Commission clearly regards such developments as positive yet, in spite of having the legal competence to propose (new) legislation to extend the scope of non-discrimination protection beyond employment, or require the establishment of equality authorities for the grounds currently falling under the Framework Employment Directive, it has not yet done so, and has no plans to do so in the immediate future. The reason for this reluctance is arguably the poor response of some Member States to the current Article 13 Directives and the anticipated difficulties of securing the adoption of future such Directives.

B. Related EU Policy Areas and Initiatives

The Green Paper also refers to legal developments beyond Article 13 and its related Directives. In particular the Charter of Fundamental Rights and the new Constitution, the 'Lisbon agenda' and the European Employment Strategy and Social Inclusion Process and international developments are mentioned. The new Constitutional Treaty was not agreed at the time the Green Paper was released, and the Commission's comments on the impact of the Treaty, and the incorporation of the Charter, are rather circumspect. Article 21 of the Charter addresses discrimination, and is broader than the current Article 13 in that it covers more grounds, such as membership of a national minority and genetic features, and prohibits discrimination, rather than simply conferring the power to combat discrimination. Article 21 though is not designed to replace Article 13 (this role falls to Article III-8), and the Commission states that the integration of the Charter into the new Treaty does 'not provide a new legal basis for further Community legislation in the field of non-discrimination'. Nevertheless, the additional non-discrimination grounds referred to in the Charter, such as genetic features, 'raise important and sensitive issues... [and] it will be necessary to consider how to take the debate on such issues forward at EU level' (p 10). The Commission does foresee a role for Article 21 in that the principles set out in the Charter should 'guide the development of policy in the EU' and implementation at the national level. In addition, the Commission foresees (a greater) influence of the Charter on the ECJ, and argues that the fundamental right of non-discrimination will influence the Court's case law with regard to the Race and Framework Employment Directive. Article 21 is part of the broader Equality Chapter of the Charter, which includes six other Articles. Interestingly, no reference is made to these Articles in the Green Paper.

The ambitions for the 'constitutionalised' Charter, and particularly Article 21, are modest and perhaps disappointing. Caution is arguably understandable given that the debate on the new Constitution was not completed at the time the Green Paper was issued, and there still remains the difficult ratification stage. Nevertheless, the accompanying questionnaire only makes one explicit reference to the Charter, and none at all to the new Constitution, when it asks if the EU should stimulate debate on additional grounds of

discrimination covered by the Charter and lists seven possible new grounds (but only allows a maximum of three responses). One can anticipate that responses to the Green Paper will call on the Commission to explore more fully the possibilities offered by the new Constitution.

The Green Paper also makes a link between the goals of the 'Lisbon Agenda' and combating discrimination. One goal of 'Lisbon' was to raise the employment rates of older workers and women, and to reduce the disadvantaged position on the labour market of disabled people, ethnic minorities and migrants. Whilst many programmes concentrate on equipping these groups with the skills needed to compete in the labour market, the Green Paper argues that non-discrimination legislation can also help to tackle barriers to employment by addressing stereotypes and prejudices. The Green Paper notes that this goal is now explicitly reflected in the Employment Guidelines, which refer to developing employability, increasing job opportunities and preventing all forms of discrimination (Guideline 7). The Social Inclusion Process also pays particular attention to the position of ethnic minorities and disabled people and the European Structural Funds, and especially the EQUAL initiative within the ESF, address discrimination.

3. CHALLENGES FOR THE FUTURE

A. Enlargement

The second main section of the paper identifies challenges for the future development of EU anti-discrimination law, the most prominent of which are arguably enlargement and securing the transposition of the current Article 13 Directives. An expanded Union brings with it many new challenges, including a larger number of Member States amongst whom agreement must be reached before any new Article 13 legislation is adopted, and a significantly higher profile for Roma discrimination. Discrimination against Roma is prohibited under the Race Directive, and Roma are now regarded as 'the largest ethnic minority group' in the EU (p 13). The Green Paper notes that the new Member States were expected to have transposed the Race and Framework Employment Directive by the date of accession, and that, in meeting this deadline, they have faced many of the same difficulties as the old Member States. In particular, the rights-based approach to disability and the need to introduce legal protection from discrimination on new grounds, including disability, but also age and sexual orientation, has presented particular challenges in some Member States, both new and old.

Looking to the future, the unanimity requirement under Article 13, which has been retained under the new Constitution, may prove to be a significant barrier to taking the non-discrimination legislative agenda forward. It has already proved difficult to secure agreement on new Article 13 legislation within the EU-15, as the much delayed, and still unadopted, proposal for a gender goods and services Directive reveals (COM (2003) 657 final. See Council doc 9426/1/04 for the latest developments [at time of writing]). The heady days of 2000 are over, and one wonders when the climate will be right to revisit Article 13. The questionnaire accompanying the Green Paper does not expressly refer to

Article 13 or mention any future use of the Article, and the Commission clearly feels this is off the political agenda.

B. Securing Implementation of the Current Directives

Whilst interest groups and experts have called for further Article 13 Directives, the Commission's attention is currently focussed on meeting the 'immediate challenge . . . to ensure the full and effective implementation' of the two Directives. The Commission does not shy away from noting the problems that exist: many Member States have not made 'the best use' of the three year implementation period; representatives of civil society have not always been adequately consulted by Member States during the implementation phase; in some countries draft legislation is still under discussion, or has not even been formally proposed, whilst in other Member States, certain regions are excluded from the scope of the legislation which does exist. Even when legislation is in force, there is evidence to suggest it does not always fully implement the Directives.

The Commission has certainly not exaggerated the problems. One has a sense that many Member States were not aware of what they were signing up to in 2000, but now, with their obligations under the Race and Framework Employment Directive becoming apparent, and the Commission committed to ensuring effective transposition, States will act cautiously should any further Article 13 proposals come across the Council's desk. The Commission states in the Green Paper that it will take the 'necessary legal action' to secure transposition (p 6). It has subsequently followed up on this commitment and initiated infringement procedures for not communicating the means taken to transpose the Directives against six of the fifteen 'old' Member States (Germany, Austria, Luxembourg, Greece, Belgium and Finland, Commission MEMO/04/189, 19.07.2004). Other procedures may follow against both new and old Member States. The Commission's limited desire to monitor and promote transposition of the 2000 Directives may seem disappointing for many, but, in the circumstances, it is probably the only realistic option available.

C. The Action Programme

The Green Paper notes the need for complementary legislative instruments. This includes the need to obtain better data on discrimination and a continued role for the Community Action Programme to combat discrimination. The Programme has funded a number of transnational activities and has adopted an integrated approach, covering all the grounds referred to in the Directives. The Green Paper notes the high level of interest in, and demand for funding under the Programme, but recognises that the relevance of some of the projects supported by the programme is questionable. A second round of action programme projects has recently been initiated, and it is to be hoped that the Commission can assess their achievements in a more favourable light. A further key role for the Action Programme involves providing subsidies to the main 'Article 13 NGOS'—the European Disability Forum, the European Network Against Racism, The European Older Persons Platform (AGE) and ILGA-Europe (International Lesbian and Gay Association), as well

as a number of disability-specific NGOs. These organisations, in response to the legislative framework based on Article 13 and the Action Programme, have worked together more closely, and this is perhaps a less prominent, but beneficial, result of the new EU non-discrimination framework.

D. Stakeholders

A further challenge for the Commission involves reinforcing cooperation with stakeholders 'in the implementation of this agenda, and to promote networking and exchanges of experience' (p 17). A wide range of actors are mentioned, including academic experts. The Commission notes an 'important body of academic literature has emerged' on the new Directives. In light of this, and not mentioned in the Green Paper, the Commission has funded a useful transnational research project which provides a thorough overview of academic literature in this field, with summaries of the most important articles (*Critical review of academic literature relating to the EU Directives to combat discrimination*, European Commission, 2004, available at http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubdocs/critcrevaclit.pdf).

E. Related EU Policy Areas and Initiatives

The last section under the heading 'Challenges' addresses the interesting issue of integrating the principle of non-discrimination into other policy areas. Many of the issues mentioned in the earlier section are returned to. The Green Paper notes that the National Employment Action Plans are only beginning to be used by some Member States to tackle discrimination; only a minority of Member States make an explicit link between the Social Inclusion National Action Plans and combating discrimination; and national measures continue to emphasise the need for migrants and ethnic minorities to adapt in order to integrate, with limited attention being paid to discriminatory attitudes and behaviour. A key challenge is to reinforce 'the contribution of other EU policy and funding instruments to the fight against discrimination' (p 19). This must involve ensuring that all relevant Units are not only singing from the same non-discrimination hymn-sheet, but that they are also singing the same notes at the same time. There may be a tendency for Units to pursue their own agenda and not to link up with related initiatives of other Units. Establishing the framework to achieve this, and to achieve the broader goal of mainstreaming gender, race and disability issues is a complex process, and this is not explored in the Green Paper. It is worth noting though that, on the basis of Article III-3 of the new Constitution, there will exist an obligation to mainstream anti-discrimination measures on all Article 13 grounds when 'defining and implementing the policies and activities'. The questionnaire may be also inviting comments on this as it asks how a number of instruments, including those mentioned above, could be used more effectively to support the EU's efforts to tackle discrimination (again, maximum 3 responses).

4. THE QUESTIONNAIRE

Respondents are strongly encouraged to complete the questionnaire online. In many cases a list of possible answers are provided, but only a limited number (usually three) of these can be selected. In some cases space for free text is provided, although this is also subject to a (hundred) word limit. On the one hand this easy and quick to fill in questionnaire may push up the number of responses. However, one wonders how much value an unmotivated set of ticked answers will be to the Commission. Short written submissions can also be made to the Commission, and one imagines that many organisations and individuals closely involved in this topic will do this, rather than confine themselves to the questionnaire.

5. CONCLUSION

The Commission is clearly sending out the message in the Green Paper that expectations about the use of Article 13, and the development of the EU non-discrimination framework through legislative means, should not be high in the foreseeable future. There is no prospect of a new Article 13 Directive being proposed in the short-term, and the Commission is also circumspect with regard to any possibilities that may arise as a result of the new Constitution. Nevertheless, many respondents to the Green Paper will call for such action. It seems the future will instead see the Commission attempt to consolidate the 'gains' achieved thus far, and endeavouring to secure, with limited resources, the full implementation of the original Article 13 Directives and further developing the Action Programme. An additional realistic goal, which lies wholly within the hands of the Commission, rather than reluctant Member States, should perhaps be the development of the infrastructure needed to secure a full and thorough mainstreaming of equality objectives within Community policies.

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