



CEJI Policy Response

Proposal for an Equality Directive

Brussels, March 2010

Creating Equality in European Equality Legislation

The proposed Equality Directive¹ is a much-needed instrument that will fill a gap in the European Union's current legislation. The current situation has created a 'hierarchy of suffering', in which certain groups mentioned in Article 13² are afforded more comprehensive protection against discrimination than others. The proposal would remedy this situation and afford legal recourse at the European level to ensure equal opportunities and treatment for the other groups. For instance, the proposal would be effective in rendering illegal the recent action of a public school principal, who stated that Jewish children would no longer be welcome in his establishment, claiming that their presence would make other children feel uncomfortable and raise tensions in the school³.

Its clear benefits notwithstanding, the European Commission proposal is still under discussion in the European Council. This policy response, informed by CEJI's fifteen years of experience in combating all forms of discrimination through education, addresses the concerns raised by the proposed Directive's opponents.

Legal Mandate/Subsidiarity

Since the adoption of the Amsterdam Treaty, the European Union has a legal mandate to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."⁴ Using this article as a legal basis, the Council in 2000 adopted two directives that deal respectively with discrimination on the ground of racial and ethnic origin⁵, and with equal treatment in employment on grounds of religion or belief, disability, age and sexual orientation⁶.

The current proposal fills some important lacunas left open by the previous directives, as illustrated below:

¹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426.

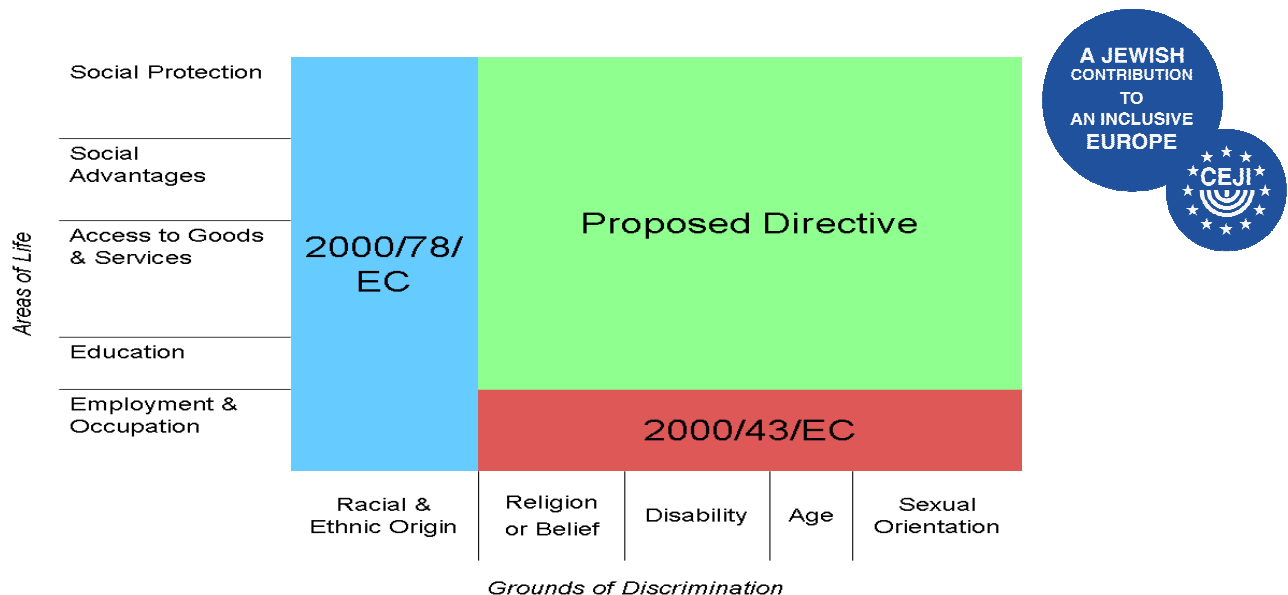
² Art. 13 of the Treaty on European Community, now Art. 19 of the Treaty on the Functioning of the European Union.

³ Bureau de Vigilance Contre l'Antisémitisme, www.sosantisemitisme.org.

⁴ Art. 13 TEC, now Art. 19 TFEU.

⁵ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive).

⁶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive).



As such, the proposed text falls well within the mandate of the European institutions⁷, as it raises the level of protection against unequal treatment on four grounds to the level of protection already guaranteed by the Racial Equality Directive, thus simply levelling the playing field. Moreover, while bound by the principle of subsidiarity and respect for the different Member States’ approaches to certain issues raised in the proposal, the European Union has the moral responsibility to ensure equality and equal protection on all grounds mentioned in the treaty. A single-ground directive, as had been proposed informally, would therefore be insufficient. Were the Commission or the Council to revert to this option, we hope that the European Parliament would use its newly acquired co-decision power in this area to counter such a proposal.

European Need

Since the adoption of the Employment and Race Equality Directives in 2000, many EU Member States have taken too long to implement these directives. In some cases, the discussion on appropriate ways of transposing the Directives has not been concluded, and jurisprudence in both the European Court of Justice and the Member States’ courts is only just starting to develop. Yet it has also become clear that without a European impetus, many Member States would not have protection against these discriminations on their books today⁸.

Since the founding of the European Union and its legal predecessors, discrimination has not ceased to exist in its territory. Many groups are still discriminated against, and current trends indicate a rising number of incidents⁹. Given the freedom of movement, and the growth in

⁷ As also elaborated in the Commission’s proposal, p. 6: “Subsidiarity and proportionality”.

⁸ *ibid.*

⁹ FRA, *European Union Minorities and Discrimination Survey* (December 2009) – the *Main Results Report* as well as the *Data in Focus Reports* on Roma and on Muslims; FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States* (2009); FRA, *Antisemitism: Summary Overview of the Situation in the European Union 2001-2008* (updated version February 2009); Symposium ‘*Building together the future of Europe - the fight against antisemitism, defending European values and co-existence*’, held at the European Parliament on 30 March 2009; EPEC, *Study on discrimination on grounds of religion and belief, age, disability and sexual orientation outside of employment* (Report to the European Commission submitted 13 June 2008); OSCE ODIHR, *Hate Crimes in the OSCE Region: Incidents and Responses Annual report for 2008* (September 2009); Community Security Trust, *Antisemitism Incidents Report 2009*, at www.thecst.org.uk; Centrum voor Informatie en Documentatie Israël, *Monitor antisemitische incidenten in Nederland: 2008*, at www.cidi.nl; Jonathan Githens-Mazer and Robert Lambert, *Islamophobia and Anti-Muslim Hate Crime: A London Case Study* (European Muslim Research Centre: Exeter, 2010). (This list is not exhaustive.)



cross-border services as well as cross-border crimes such as cyberhate, people need to be guaranteed basic rights and equal opportunities throughout the Union. Access to education, for example, must be assured, regardless of where in Europe a citizen decides to study. For this to be achieved, a European-level Council Directive, as proposed, is an effective and proportionate instrument¹⁰, for even though such legislation is in place in some Member States, it is not consistent throughout the Union, neither in scope nor in the grounds covered by national laws. The proposed Directive would create coherence in policy and legal certainty by setting a minimum standard common across the Union and across the grounds of discrimination.

Further, we see that many national governments have gathered little information on the actual facts of discrimination in their countries¹¹. Partly, this is due to an unwillingness to spend resources on such data gathering and monitoring, or to a lack of preparedness among law-enforcement officials. Partly, however, we believe that this shows a lack of recognition of the reality of disadvantaged groups in society. Without proper monitoring, most discriminatory incidents go undetected, thus masking the situation in the cloak of ignorance. Given such reticence in the Member States, quantitative indicators are difficult to establish. However, the need for a European instrument is clear from the qualitative evidence from both national and Union levels¹², as they show that the national governments are failing their citizens.

Financial Implications

Some Member States have voiced concern regarding the cost of implementing the proposed Directive. While the financial cost of catering to disability – for that is the ground that requires the most physical accommodation – may be significant, it is far less significant than the social cost of excluding citizens.

All European Union Member States, as well as the European Community itself, have signed the United Nations Convention on the Rights of Persons with Disabilities. That convention sets out much higher standards than does the proposed Directive. As such, all Member States have already committed to making accommodations for people with disabilities. They should be held accountable to these commitments, where possible by the European institutions, which are also signatories to the UN Convention. The proposed directive would not raise the level of protection afforded citizens when compared to the UN Convention. But it would provide the necessary incentive and enforcement to ensure minimal implementation of the Convention, while the direct effect of a Directive would have the added benefit of allowing recourse to the European Court of Justice. The European Union should show its commitment to Human Rights in practice and towards its citizens, so it can remain a leader in the field at global level.

Exemption for faith-based educational institutions

Article 3.3 of the proposal allows the Member States to “provide for differences in treatment in access to educational institutions based on religion or belief”. This exemption seems to us overly broad.

As phrased in the proposal, this exemption could be interpreted to not only allow for instance Jewish schools to admit only Jewish pupils, but it also seems to allow faith-based schools to

¹⁰ Commission proposal, p. 6: “Subsidiarity and proportionality”.

¹¹ FRA, *Annual Report 2009*; FRA, *European Union Minorities and Discrimination Survey* (December 2009); OSCE ODIHR, *op.cit.*

¹² *ibid.*; also: FRA, *Antisemitism*, *op. cit.*

refuse to admit, for example, students with same-sex parents or students with disabilities. A narrow reading of the law, allowing exemptions only in the case of faith or religion-based criteria that serve to sustain a certain religious ethos and atmosphere in the school and which is carefully defined by the Member States or the relevant regional authorities, would prevent this situation, and safeguard all children's fundamental right to education¹³. The considerations in the recital of the Directive must articulate that this narrow reading is intended, so as to ensure that the primacy of the universal right to education is maintained.



Discrimination on the Ground of Nationality

Discrimination on the ground of nationality is specifically excluded from the scope of the proposed Directive¹⁴, nor was it included in the two Equality Directives of 2000¹⁵. CEJI is concerned that, as the level of protection from discrimination on grounds of religion and belief is raised through the current proposal, nationality may come to be used as a cover for other forms of discrimination. A sign saying “Room for rent - Moroccans not welcome” could be one example of this. Such cases must be considered for their explicit intentions as well as their practical effects, and care must be taken during the implementation of the Equality Directives to ensure that racial, ethnic and religious discrimination cannot be hidden behind the matter of nationality or legal status.

Conclusion

CEJI, as one of the members of the *Starting Line Group* that advocated the inclusion of Article 13 in the Treaty of Amsterdam and the adoption of the Race and Employment Equality Directives of the year 2000, believes that the proposed Directive should be adopted and implemented as soon as possible. The Equality Directive would put an end to the unequal situation in European equality law, by providing a legal guarantee for equal treatment and equal opportunities. For the creation of an inclusive Europe, this is a crucial step, our concerns regarding the text of the proposal, as outlined above, notwithstanding.

We recognise that the passing of this law is but one step on the road to an inclusive society. Data monitoring at national and Union levels needs to be improved; and diversity education and anti-discrimination training should be a part of education systems throughout the Union.

Still, the adoption of the Equality Directive would show that the European Union is indeed proud of its diversity, and united through it.

CEJI – a Jewish Contribution to an Inclusive Europe delivers diversity education in fourteen EU Member States, working with people of all backgrounds. A Jewish voice at European level, we advocate for education, inter-cultural dialogue and equal opportunities. CEJI is a registered interest group with the European Commission

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¹³ Charter of Fundamental Rights of the European Union, Art. 14; Universal Declaration of Human Rights, Art. 26.

¹⁴ Commission proposal, art. 3.5.

¹⁵ Racial Equality Directive, art. 3.2; Employment Equality Directive, art. 3.2.