European Monitoring Centre on Racism and Xenophobia

Migrants, minorities and legislation:

Documenting legal measures and remedies against discrimination in 15 Member States of the European Union

Report submitted by the
International Centre for Migration Policy Development
(ICMPD)

On behalf of the European Monitoring Centre on
Racism and Xenophobia (EUMC)

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Foreword

This study comprises a unique collection of material on anti-discrimination legislation and case law in the European Union in 2003. Referring to the year when the EU Council Directive on Racial Equality (along with the Employment Equality Directive) was due to be transposed, this study presents a comparative analysis of existing and developing legal measures and remedies against discrimination of migrants and ethnic minorities.

Thus, this study focuses on how different Member States approach the implementation of the Racial Equality Directive by either adapting current legislation or establishing new separate laws. On the other hand, an overview of existing non-discrimination legislation across the EU shows up to which degree anti-discrimination, anti-racism or general equality provisions have already been part of the Member States' constitutions or specific laws. In addition, the study also highlights exemplary court cases and complaints concerning discrimination, and finishes with selected recommendations for the EU and its Member States.

Legislation — be it civil, administrative or penal law — builds the foundation of every action and policy against discrimination. In transposing the Council Directives 2000/43/EC and 2000/78/EC Member States use a variety of methods, legal provisions and legal wording. Whereas some countries' status quo has demanded only minor amendments to comply with the Directives, it is clear that in countries lacking a history of strong anti-discrimination legislation the two Directives have induced a major positive change. I hope that this report, which also identifies existing shortcomings and areas of problems, will contribute to this encouraging process.

The data for this report was compiled for the EUMC by its RAXEN National Focal Points in each of the (at the time) 15 Member States. The EUMC then invited the International Centre for Migration Policy Development in Vienna (ICMPD) to bring this material together in the form of the current report. I would like to thank the researchers at ICMPD and the National Focal Points for their contribution.

Beate Winkler

1. Executive summary

This comparative study on anti-discrimination legislation regarding migrants and minorities is based on 15 national reports by the National Focal Points (NFPs) of the EUMC RAXEN network on the situation in the EU Member States as well as on further research undertaken by the authors on the subject covering the period 2001-2003. The study takes a holistic approach to the question of discrimination and legislation, analysing the existing and currently developing legal measures and remedies against discrimination, especially within the framework of the two Council Equality Directives and their respective implementation through national legislation.

Legislation (be it civil, administrative or penal law) lays the foundation of every action and policy against discrimination. The overview of anti-discrimination legislation shows that EU Member States do include anti-discrimination, anti-racism or general equality provisions in their constitutions or in their civil, administrative and penal legislations targeting to protect human rights and to fight racism and discrimination. Furthermore, all EU Member States have ratified the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).

Anti-discrimination legislation has to be seen in the broader context of aliens' legislation, namely immigration and integration policies pursued in the different EU Member States. Differing historic developments and experiences with regard to migration issues, legal traditions and systems have influenced the particular extent of experience with anti-discrimination measures in the various EU Member States. Specific problems of comparing the existing information are the result. In addition, some data in the field of anti-discrimination legislation is consequently not available and therefore missing in a comparative perspective: In some countries the exact structure and dimension of the migrant population is not exactly known, respectively analysed, which, of course, would be an indispensable background for the elaboration of targeted policies and legislation. Equality and anti-discrimination policies have evolved in a distinctive way in the various EU Member States, often leaving little space to comparison while sometimes covering very diverse areas with a rather different focus, based on differing backgrounds, premises, definitions and concepts of immigrants and minorities. Furthermore, one has to mention the lack of official sources on complaints, lack of systematic statistics, missing relevant institutions and no systematic monitoring of cases where immigrants are discriminated against.

The direct interrelation between a historically and culturally grown concept of society in general and a specific legal framework covering foreigners, minorities and anti-discrimination policies, has a strong impact on the respective implementation process of the Racial Equality Directive. This is particularly true for the chosen legalistic way to transpose the Directive, be it comprehensive anti-discrimination laws, adaptation of already existing legislation, separate laws etc. Some countries' status quo demands only minor alterations to comply with

the terms of the Racial Equality Directive. For other countries its implementation and integration into miscellaneous concepts means a challenge in legislation both in terms of its legal as well as its social impact.

In short, the EU Member States can broadly be divided into three different groups according to their immigration history and their concepts of migrants and minority population:

The first group of countries looks back on a history of relatively significant immigration from former colonial territories (France, the Netherlands, and the United Kingdom). The second group consists of those countries which systematically practised the recruitment of migrant workers (Austria, Belgium, Denmark, Germany, Luxembourg, and Sweden). The third group encompasses the so-called 'new immigration' countries. After having experienced long-time emigration, these countries have been subject to significant immigration only since the late 1980s (Greece, Italy, Spain and Portugal) and early 1990s (Finland and Ireland). However, some countries would obviously fit in more than one category.

For those European countries with high immigration rates and a history of long-term residence of their immigrant population, two major models of anti-discrimination policies can be distinguished:

Countries, mainly belonging to the first group, with a considerable minority population of various ethnic backgrounds, are often presented as being multi-ethnic/multi-cultural societies (France, the Netherlands, the United Kingdom, Sweden to a certain extent with regard to its concept of society and resulting integration policy). Over time, these countries have adopted systematic concepts of anti-discrimination policies understood primarily as racial equality issues.

In terms of anti-discrimination policy towards the immigrant population, most countries included in the second (and even in the third) group use a 'foreigner concept' rather than a 'minority concept'. Hence, some countries of this group have often not systematically developed a specific equality or anti-discrimination legislation over the past decades and consequently some of them like Austria and Germany relied on rather general, not adequately adapted, legal instruments.

Within the first group, France, the Netherlands and the United Kingdom already in the past had had a distinctive anti-discrimination policy and a distinctive legal basis (including the judiciary) in the prosecution of racism and discrimination.

The United Kingdom can build on one of the oldest traditions and experience in anti-discrimination legislation, and to some extent influenced the Racial Equality Directive. Already in 2000, the UK Government introduced a statutory duty on public authorities in Great Britain to promote racial equality.

Dutch anti-discrimination legislation is primarily orientated towards equal treatment embodied in the constitution as well as in other legal provisions, theoretically covering direct as well as indirect discrimination. Furthermore, the Netherlands was the first EU Member State to pass a comprehensive

anti-discrimination law, covering a broad range of grounds (race, ethnic origin, religion, belief, political opinion, nationality, sexual orientation, civil status). The Equal Treatment Act has been in force since 1994. *The Independent National Bureau against Racist Discrimination (LBR),* committed to the monitoring and working against racism and discrimination, was already set up in 1985. A Directive on Discrimination in force since 1985 stipulated how the judiciary and the public prosecutor have to respond to cases of discrimination.

Swedish legislation contains a number of regulations set to fight racist crimes and to counteract discrimination of individuals as well as people belonging to a collectively termed *national* or *ethnic group.* The main civil law against ethnic discrimination existing so far was the *Measures to Counteract Ethnic Discrimination in Working Life Act.* Besides this, the Penal Code includes a provision against 'unlawful discrimination'.

In Portugal, in addition to constitutional provisions, a law on racial and ethnic discrimination was passed in 1999 (Law 134/99), specified by decree-law 111/2000. Its understanding of discrimination is modelled on that proposed by the UN Convention on the Elimination of all Forms of Racial Discrimination (CERD).

Despite the recent evolution from a country of mass emigration to one of immigration Ireland has developed a comprehensive equality legislative framework. The *Employment Equality Act 1998* covers employment and related areas such as vocational training or membership of trade and professional bodies. The *Equal Status Act 2000* covers the provision of goods and services, and of a wide range of services available to the public or to a section of the public including access to places, transport, banking, insurance, cultural activities, refreshment, and many aspects of education. Some disposals of property and the provision of accommodation are also covered. These Acts identify nine grounds for discrimination: gender, marital status, family status, age, disability, race, sexual orientation, religious belief, and membership of the Traveller community.

Through the detailed analysis of certain requirements set out by the Racial Equality Directive, it is possible to observe that the single aim of transposing these legal standards into particular national legal frameworks is being pursued by the Member States through a variety of methods, legal provisions and legal wording[1]. This analysis has also allowed identifying countries and areas where specific anti-discrimination legislation is still missing.

In countries lacking a history of strong anti-discrimination legislation, the two Council Directives have indeed induced a major positive change. Most Member States undertook at least some preparatory activities for the transposition of the Equality Directives into national legislation. This preparation has resulted in a re-assessment and re-examination by the governments of Member States' legislation and institutional mechanisms to combat discrimination on the grounds

[1] The latest available information on the transposition of Directives 2000/43/EC and 2000/78/EC is to be found in the Annex on Table A3. Please be aware that relevant information in other chapters may be older.

of racial or ethnic origin, religion or belief, disability, sexual orientation and age. Overall, the legislative proposals either strengthen current legislation or shift the main body of legislation to combat discrimination into the civil law sphere.

At the time of the completion of the study, only Belgium and Italy had fully implemented both Equality Directives. Ireland, Sweden, Denmark and the United Kingdom implemented the Race Equality Directive fully, France just partly, while the other countries were currently still in the process of adapting their respective national legislation.

In Belgium, a general anti-discrimination law was adopted which pursues a single legislative approach and takes over all the grounds of discrimination provided for in Art. 13 of the Treaty of Amsterdam and the two Council Directives. It also extends the competence of the Centre for Equal Opportunities and Opposition against Racism.

In Ireland, an amendment of the *Employment Equality Act 1998* for the employment field of both Directives and of the *Equal Status Act 2000* for the non-employment field of the Racial Equality Directive is necessary for the respective transposition. The latter concerns equal treatment in regard to the provision of goods and services, accommodation, and education. The tasks under Art. 13 of the Racial Equality Directive will be undertaken by the Equality Authority and the Office for the Director of Equality Investigations (the Equality Tribunal), established by the Employment Equality Act for all grounds of discrimination.

In Italy, the two Directives are implemented in separate legislation. Since 9 July 2003 the new Decree-Law No. 215, *Decreto legislativo,* implementing the Racial Equality Directive went into effect.

In Sweden, the two EU Directives are mainly being implemented through a new act prohibiting discrimination and through some amendments to existing laws against discrimination. The new act extends effective protection against discrimination from working life and higher education to other areas of society. The new act combats discrimination related to ethnic origin, religion or other belief, sexual orientation or disability. The areas covered are labour market programmes, starting or running a business, occupational activity, membership of, participation in and benefits from organisations of workers or employers or professional organisations, and goods, services and housing. In addition, the prohibition of discrimination on grounds of ethnic origin, religion or other belief also applies to the social services, local and national transport, services for disabled people and housing adaptation allowances, social insurance and related transfer systems, unemployment insurance and health, medical and other medical services. A person who discriminates against someone or exposes someone to reprisals in a way that is prohibited under the act shall pay damages for the violation that the discrimination or reprisals involve. In order to fully implement the EC Directives a number of amendments are also being made to the 1999 acts and to the Act on Equal Treatment of Students. In part, the amendments are

intended to establish the same definitions of discrimination grounds and the same concept of discrimination in the acts and to state the rule on a shared burden of proof directly in the text of the acts.

In the United Kingdom, the Government transposed the EU Directives by introducing regulations to amend existing anti-discrimination legislation. The standards of the Race Equality Directive are in certain respects better than the UK legislation as well as providing for a different definition of indirect discrimination. The UK government has therefore introduced the Race Regulations 2003 in Great Britain to further improve the 1976 Act and to ensure full and complete incorporation of the Directive. A separate regulation, the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003, has been introduced for Northern Ireland. The transposition of the Directive required amendments to the *Race Relations Act 1976,* to reflect the provisions dealing with the definition of indirect discrimination, racial harassment, genuine occupational requirements, the burden of proof in proceedings, and abolition of statutory provisions which are contrary to the principle of equal treatment.

The *Employment Equality (Religion or Belief) Regulations 200*3 came into force on 2 December 2003. The Regulations are part of the transposition of the Council Directive on equal treatment in employment and occupation into national law. The 2003 Regulations make it unlawful to discriminate on grounds of religion or belief in employment and vocational training. They prohibit direct discrimination, indirect discrimination, victimisation and harassment.

In Denmark, separate legislation has been planned for transposition of the Racial Equality and Employment Equality Directives. The draft Act on Equal Treatment irrespective of race or ethnic origin was adopted and in April 2004 the Danish Parliament finally adopted Act. no. 253 of 7 April 2004 on Prohibition of Differential Treatment in the Labour Market.

In France, two laws have been adopted: the French Parliament passed an Anti-Discrimination Bill to combat discrimination, which prohibits both direct and indirect discrimination in respect to a broad range of situations. New grounds of discrimination were introduced, namely real or ascribed ethnic origin, physical appearance and name, age and sexual orientation (in addition to the already existing ones including gender, origin, race, nationality, political opinion, etc.). The burden of proof was shifted to the defendant. The other *Law on Social Modernisation* includes a chapter on combating moral harassment in the work place providing civil remedies and on the burden of proof. A proposal for a single specialised equality body has been put forward. Development of legislation was planned for 2003.

In Austria, a ministerial proposal was drafted to transpose the Equality Directives by amendments to the Equal Treatment Act and the Federal Equal Treatment Act, which so far only applied to issues related to equal treatment of women and men at the workplace.

In Finland, the approach taken towards implementation was a general single Equality Act covering all the grounds in the Directives. After a consultation process with interest groups and social partners, the government submitted to

Parliament a formal legislative proposal. The Government has also proposed to extend the mandate of the Ombudsman for Minorities to cover Art. 13 EC Treaty grounds of discrimination and set up a Board of Discrimination covering the grounds of racial or ethnic origin. The draft law proposal was dropped due to early parliamentary elections in 2003.

In Germany, two draft anti-discrimination laws were planned for the beginning of 2003, a labour law and a civil law act. The planned labour law act will focus on the employment and occupation aspects of the Directives. A draft civil law act was presented and discussions have focused on whether it should cover all the grounds under Art. 13 EC Treaty. The draft civil law act is currently envisaged to cover the non-employment aspects of the Racial Equality Directive and extend the grounds of non-discrimination in goods and services to sexual orientation and age. Nevertheless, no official draft regarding the transposition was passed before the expiration of the deadline on 19 July 2003.

In Greece, a single bill was tabled in Parliament in December 2003 covering both the Racial Equality Directive and the Employment Equality Directive. However, due to a change of government in early 2004, the bill was not voted. Recent proposals include the establishment of three equality bodies: one for issues concerning relations between the citizens and the State (the existing Ombudsman), one for issues concerning relations between private persons (a new equality body under the supervision of the Ministry of Justice) and one for labour conflicts between employees and employers (the existing Labour Inspectorate Body).

In Luxembourg, two laws were anticipated to transpose the Racial Equality Directive. The first proposed law will implement the provisions of the Directive except for the provision relating to the designation or establishment of an equal treatment body, issue to be covered by a second Bill. The Ministry of Employment will present a bill with the objective of transposing the Employment Equality Directive by the end of 2003/start of 2004. It is intended that the new bill will also implement the Racial Equality Directive as regards the employment field.

In the Netherlands, the equality legislation has recently been under extensive review. The implementation of the Racial Equality Directive is planned through amendments to the existing general Equal Treatment Act, which will cover additionally to the already included grounds of religion or belief and sexual orientation also the prohibition of harassment, instruction to discriminate and membership/involvement in organisations of workers or employers. The Implementation Bill was submitted to Parliament. The Equal Treatment Commission covers all grounds of discrimination in the general Equal Treatment Act.

In Portugal, there are plans for two legislative proposals. One will amend the existing Law No. 134/99 to bring it fully in line with the Racial Equality Directive and a new labour code to implement the Employment Equality Directive, covering *inter alia* the grounds of religion or belief. The High Commissioner for Immigration and Ethnic Minorities has a role in overseeing the transposition of the

Directive. A Commission for Equality and Against Racial Discrimination was set up as a public authority to, amongst other tasks, collect information and hear cases.

In Spain, a single approach is being pursued. There is a draft proposal for an Equal Treatment Act, with a chapter for general provisions, a chapter on equal treatment and non-discrimination on grounds of racial or ethnic origin in the non-employment field of the Racial Equality Directive and a chapter on equal treatment and non-discrimination in employment covering all the grounds under Art. 13 EC Treaty. The draft proposes the establishment of a Council for equal treatment and combating discrimination on the grounds of racial or ethnic origin.

The Directives set minimum standards for the EU Member States and some Member States have used the opportunity of the transposition process to go beyond the minimum standards in a variety of ways: for example by extending the non-employment aspects to grounds in addition to racial or ethnic origin and in some cases introducing non-discrimination Art. 13 EC Treaty grounds (Belgium, Finland [draft], Ireland, Sweden); by extending the employment aspects to grounds in addition to Art. 13 grounds (e.g. Belgium, France, Ireland, Netherlands and Portugal) or proposing the establishment of an equal treatment body/bodies to cover grounds in addition to racial or ethnic origin (e.g. Austria [draft], Belgium, France, Ireland, Netherlands, Sweden, United Kingdom) and establishing the equal treatment body/bodies with powers beyond the minimum requirements (e.g. Belgium, Ireland, Netherlands, Portugal, Sweden and UK).

Additionally, the degree and extent of consultation with social partners and non-governmental organisations regarding the implementation of the Race Equality Directive varied considerably: with Member States such as Belgium, Germany, Denmark, Ireland, the Netherlands, Finland, Sweden and the UK (both in Great Britain and Northern Ireland) actively involving these groups at an early stage in the consultation process.

Specific features in the national context are also pointed out in this study, ranging from special legislation focused on crimes in the context of National Socialism to special protection of autochthonous minorities.

The study concludes with ten selected recommendations to the EU and its Member States, drawing on recommendations commonly provided by the NFP reports, official documents of the EU and further research by the authors.

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Part I: Methodological and Formal Issues of Data Comparability

2. Introduction

2.1. Aims and organisation of the study

The overall aim of this comparative study on anti-discrimination legislation regarding migrants and minorities and the respective legislation is to provide the European Union (EU) and its Member States with helpful information, analysis and recommendations that can be used to enhance equality and diversity and to reduce racism, discrimination and other forms of exclusion within the European Union. Thus, this study intends to give a comparative overview of the existing legislation targeting discrimination in the EU Member States, especially regarding the on-going transposition of the relevant EU Directives, in order to identify gaps and different developments, and consequently provide recommendations to improve the legislation combating discrimination in all EU Member States.

The comparative study is divided into three parts. Part I discusses methodological issues, Part II analyses and compares the existing evidence and Part III presents common problems and conclusions. The first part starts with laying out the aims and organisation (Section 2.1.) as well as the working methodology (Section 2.2.) of the study, and discusses the conceptual and methodological framework for data collection regarding legislation and problems related to comparability. These sections are followed by a detailed analysis of the contextual differences and similarities in the EU Member States: background information, a brief analysis of the various terms and definitions used in each Member State and the resulting problems related to the comparability (Section 3). Part II contains the description, analysis and comparison of data regarding the existing legal framework and is subdivided into six chapters. The first of these chapters describes the anti-discrimination legislation and the transposition of the EU Directives (Chapter 4); Chapter 5 describes constitutional provisions; Chapter 6 outlines relevant penal provisions; Chapter 7 describes special legislation of importance in the EU Member States; Chapter 8 presents the complementary legal framework of the EU Member States, covering aliens' legislation, autochthonous and 'co-ethnic' minorities and international conventions (Sections 8.1.-8.3.); and Chapter 9 examines complaints and court cases (Sections 9.1.-9.2.). Part III analyses common problems (Chapter 10) and provides conclusions and recommendations (Chapter 11).

2.2. How the study was conducted

In November 2002, the International Centre for Migration Policy Development (ICMPD) has been contracted by the European Monitoring Centre on Racism and Xenophobia (EUMC) to write a EU level comparative study, based, after performing a quality control (peer review), on the 15 national studies on the legislation sector produced by the National Focal Points (NFPs) of the EUMC RAXEN network[2]. The 15 national reports of the NFPs, based on data collected during 2001 and 2002, were reviewed by the research team of ICMPD in February 2003, whereupon an assessment was made in 15 draft peer reviews, including a gap analysis and recommendations for further improvements. With the help of the draft peer reviews and a process of direct interactions with the NFPs, further improvements in the coverage of the 15 national reports were achieved. Based on the revised national reports of the NFPs, a survey of additional pertinent literature and our own research, the comparative report was finalised by September 2003. It should be noticed that the NFP reports covered primarily the facts and events in 2002, but that this comparative study may also present for the better understanding of the context developments prior to and after this year. It should also be noted that, for the same reason, legal evolutions in 2003 might not be covered completely, although we have made every effort to be as up-to-date as possible. Thus, the information in this study covers mainly the period up to December 2002 and in some cases may not contain developments which have taken place since that date[3].

2.2.1. Conceptual and methodological framework

This study is concerned with anti-discrimination legislation in the 15 EU Member States and examines country-specific findings on legislation combating discrimination and inequality in a comparative perspective.

The main focus is placed on developments related to discrimination on the grounds of racial or ethnic origin and religion or belief. The study summarises the main developments and attempts to draw some conclusions about the overall development of legislation and the main areas of legislative changes.

First, the concept of discrimination needs further elaboration. It has to be noted that a variety of definitions of discrimination were and, to some extent, still are applied by national laws in the Member States of the EU. Thus, a central reference point for defining discrimination is the Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective

[2] The EUMC has been set up by Council Regulation (1035/97/EC) of 2 June 1997 to provide the EU and its Member States with objective, reliable and comparable data at European level that can be helpful in the fight against racism. In order to fulfil its mission the EUMC has created the RAXEN (Racism and Xenophobia Network), composed of 15 National Focal Points (NFPs), one in each EU Member State. The NFPs are in charge of data collection under guidance by the EUMC.

[3] The authors worked on the basis of the information given by the NFPs in the national reports which contained mostly information up to this date.

of racial or ethnic origin,[4] which had to be implemented in the national legislation of the EU Member States by 19th July 2003, and prohibits discrimination on grounds of racial or ethnic origin. It defines direct discrimination as *'where one person is treated less favourably than another is, has been, or would be treated in a comparable situation on grounds of racial or ethnic origin',* and indirect discrimination as *'where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons'.* On the one hand, this definition draws on already existing national legislation in the EU Member States (e.g. the 1976 Race Relations Act in the United Kingdom). On the other hand, it is progressively being transposed in the relevant legislation of other EU Member States.[5]

The reports on national legislation by the NFPs have taken a holistic approach to the field of discrimination, analysing the legislation sector in broad terms complemented by available information on mechanisms and bodies in this field. The scope of the analysis thus follows the Racial Equality Directive and to a lesser extent also Council Directive (2000/78/EC) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[6] The comparative study reflects this approach and offers an overview and new insights by compiling and structuring the available information on the national levels, and supplementing it by other sources.

The adoption of the two Equality Directives[7] by the Council in June and November 2000, respectively, is probably the most important development in the area of anti-discrimination legislation in the period under review. The former prohibits discrimination on grounds of race[8] and ethnic origin, while the latter considers discrimination on grounds of religion, disability and sexual orientation.

The focus of this comparative study is therefore on the assessment of the progress of the implementation of the two Directives into the national legislation of the individual EU Member States, while keeping other anti-discrimination measures in sight. To date, only Belgium and Italy have fully implemented both Directives. Ireland, Sweden and the United Kingdom implemented the Race Equality

4 Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin – Official Journal L 180, 19.07.2000, pp. 0022-0026 – (referred to as 'Racial Equality Directive'). This Directive had to be implemented in the national laws of the EU Member States by 19 July 2003 at the latest.

5 The Amsterdam Treaty, which entered into force in May 1999, introduced a new Art. 13 into the EC Treaty, whereby the Community acquired for the first time the power to take legislative action to combat racial discrimination.

6 Council Directive (2000/78/EC) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation – Official Journal, L 303, 02.12.2000, pp. 0016-0022 – (referred to as 'Employment Equality Directive'), which encompasses *inter alia* conditions for access to employment, to self-employment or to occupation, employment and working conditions, including dismissals and pay, and membership in workers' organisations. This directive is to be implemented in the national laws of the EU Member States by 2 December 2003 at the latest.

7 Racial Equality Directive and the Employment Equality Directive.

8 The term race is only employed in order to denote specific forms of discrimination. See the preamble of the directive 2000/43/EC of 29 June 2000, para. 6.

Directive fully, Denmark and France partly, while the other countries are currently still in the process of adapting their respective national legislation.

2.2.2. Problems related to comparability and non-availability of data

Regarding the subject of this study, it has to be noted that the comparability of the existing information is affected by various factors related to different developments in the individual EU Member States, and that some data in the field of anti-discrimination legislation are not available and therefore missing in a comparative perspective.

It should also be mentioned that in some countries at present there is no data on the exact composition and size of the migrant population, which, of course, would be an indispensable background for developing targeted policies and legislation. In Greece, for instance, it is difficult to establish the demographic situation with precision due to, on the one hand, the nature of illegal immigration and, on the other hand, the inability (or unwillingness) of public authorities to effectively measure the resident migrant population. Thus, analyses and policies often have to rely on different estimates in this regard.

Another relevant factor with regard to the comparability of data is the absence or very limited existence of English translations of legislation and other relevant material, which, for example, is the case in Italy.

The diverse histories and experiences of the EU Member States with regard to migration issues exert great influence on the variety and singularity of their respective legal frameworks. Thus, the national reporting systems on discrimination and the relevant legislation, its existence and extent present themselves in an enormous variety and disparity between the different EU Member States. The legal framework for integration and anti-discrimination and the availability and effectiveness of relevant institutions and bodies is often shaped idiosyncratically and therefore often very difficult to compare. Hand in hand with this phenomenon, equality and anti-discrimination policies evolved in different ways in the various EU Member States covering sometimes very diverse areas with a rather different focus, based on different backgrounds, premises, definitions and concepts of immigrants and minorities.

Those EU Member States, for instance, which have had only relatively recently any significant experience with immigration, consequently do not have an elaborated tradition of integration, equality, and anti-discrimination policies for immigrants. As the legal and institutional framework is often only now developing, topic-specific data are still relatively poor. Thus, the various experiences of the respective countries discussed have important implications for the comparability of the existing data.

Another example in this regard are complaints and court cases. One has to take into account a number of country specific features which influence both the availability and scope of the data. The existence of quite effective complaint mechanisms and better registration systems in some EU Member States may lead to more complaints by victims, which are publicly noticed. This may produce a

large amount of data compared to other countries, leading to the wrong impression that there is a higher level of discrimination in these countries than in others, which in fact lack reporting mechanisms or effectiveness in distinctively recording complaints. In these countries many cases consequently remain invisible, but this does not signal a lesser problem of discrimination. In France and Greece, the absence of central (electronically accessible) records or databases of cases and lawsuits renders a systematic monitoring of court cases extremely difficult.

To summarise, the major problems for a comparative analysis of data on complaints about discrimination are: lack of official sources on complaints, lack of systematic statistics, missing relevant institutions and no systematic monitoring of cases where immigrants are discriminated. Furthermore, in some countries ethnic origin as such does not appear in official statistics, as it is not recorded. All this and the variety of concepts used concerning minorities makes any comparison difficult.

Thus, it has to be noted that due to the gaps in data collection, the often varying quality of the data and the sporadic information on certain issues, the anti-discrimination legislation sector (and especially the area of complaints and court cases) remains difficult to grasp, and for some issues meaningful comparisons across countries are in fact prevented.

Finally, the focus of the policies in the EU Member States also influences existing legislation and the data provided, since some countries already have quite extensive anti-discrimination legislation while others try to deal with the issue mostly through their immigration policy. This problem became also very obvious in the 15 national studies on the legislation sector produced by the NFPs of the EUMC RAXEN network who provided data with an often very different emphasis.

3. Terminology and background information

Immigration and minority policies, concepts of integration and the battle against discrimination and racism have become essential topics for the harmonisation of migration policies in the ongoing integration process of the European Union. Although today the EU Member States present a very diverse picture regarding migrants and minorities, in all of these countries a historically and culturally grown concept of society in general, and a specific legal framework covering foreigners, minorities and anti-discrimination policies are strongly linked. This direct interrelation has a strong impact on the respective implementation process of the Racial Equality Directive, especially on the chosen legalistic way to transpose the Directive, be it comprehensive anti-discrimination laws, adaptation of already existing legislation, separate laws etc. Some countries' status quo

demands only minor alterations to comply with the terms of the Racial Equality Directive. In other countries, its transposition poses a legal challenge.

The following discussion gives an outline of the various approaches to migration, integration and minority concepts and important elements regarding equality legislation of today's EU Member States. Thus the study examines in more detail which terms and definitions for migrants and minorities are in common use in the EU Member States, as reflected in the Reports on Legislation of the 15 NFPs of the EUMC, representing therefore essential background information for the following comparative analysis.

In each country, specific historical, political and economic developments have determined the flows of migrants to and from the territory. For a number of reasons — geographic, political, social, cultural, legal and others — historical patterns of migration and settlement have tended to persist and have formed distinctive processes of immigration and integration. These varying historical experiences of European states with migration have shaped both the ethnic and national composition of minorities with a migrant background as well as public perceptions of their place in society and, hence, public policies vis-à-vis these minorities.

In short, the EU Member States can broadly be divided into three different groups according to their immigration history and their concepts of migrants and minority population.

The first group of countries looks back on a history of relatively significant immigration from former colonial territories (France, the Netherlands, and the United Kingdom).

The second group consists of those countries, which systematically practised the recruitment of migrant workers (Austria, Belgium, Denmark, Germany, Luxembourg, and Sweden). These countries have significant immigrant populations who are non-nationals of their countries of residence and are commonly referred to as 'immigrants' or 'foreigners' rather than immigrant or ethnic minorities. In most of the countries of both the first and second group, immigrant minorities have been present for long, and many of the immigrants have acquired citizenship (e.g. South-East Asians in the United Kingdom, North Africans in France, and increasingly Turks in Germany).

The third group encompasses the so-called 'new immigration' countries: having experienced long-time emigration, these countries are subject to significant immigration only since the late 1980s and early 1990s (Greece, Italy, Spain, Portugal, Finland, and Ireland).[9]

[9] Some countries would fit in more than one category, e.g. France and the Netherlands in the first two and Portugal and Spain in the first and third.

For those European countries with high immigration rates and a history of long-term residence of their immigrant population, two major models of anti-discrimination policies can be distinguished:[10]

1. Countries, mainly belonging to the first group, with a considerable minority population of various ethnic backgrounds are often presented as being multi-ethnic/multi-cultural societies (France, the Netherlands, and the United Kingdom).[11] Over time, these countries adopted systematic concepts of anti-discrimination policies understood primarily as racial equality issues. The concept of ethnic minorities comprises specific minority groups with immigrant background (variously called 'ethnic or racial minorities', 'persons of foreign origin' or 'allochtonen' and denoting immigrants and descendants, irrespective of their current citizenship).

2. In terms of anti-discrimination policy towards the immigrant population, most countries included in the second (and even in the third) group use a 'foreigner concept' rather than a 'minority concept' and therefore have not systematically developed a specific equality or anti-discrimination legislation over the past decades.

Within the first group, France, the Netherlands and the United Kingdom show a distinctive anti-discrimination policy and a distinctive legal basis (including the judiciary) in the prosecution of racism and racial discrimination.

In **France,** legislation focuses strongly on the equal treatment of *individuals* dating back to the republican ideal of citizenship originating at the end of the 18th century. The three principles of the French revolution *Liberté, Egalité, Fraternité* are deeply rooted in French society.[12] This secular concept of equality explains the complex approach towards the concept of 'origin'. Since the specific feature of society does not allow inequality based on 'origin', the use of the criteria 'origin' for policy purposes was being refused.[13] This is also mirrored by the fact that only little statistical data on ethnic, respectively immigrant minorities

[10] Schulte, A. (1994) 'Antidiskriminierungspolitik in westeuropäischen Staaten (Anti-discrimination policy in Western European States)', in: Heinelt, H. (ed.) *Zuwanderungspolitik in Europa – Nationale Politiken. Gemeinsamkeiten und Unterschiede (Immigration policies in Europe – National policies. Similarities and Differences*. Aus der Reihe Gesellschaftspolitik und Staatstätigkeit, Bd. 4. Opladen, pp. 123-161, p. 124 and pp. 131,132.

[11] With regard to its concept of society and resulting integration policy, Sweden could, to a certain extent, also be included in this group.

[12] The French tradition derives from the Enlightenment conception of equality enshrined in the 1789 Declaration of the Rights of Man and Citizen. Like the preamble of the constitution of 1946, the Declaration was adopted by the constitution of 1958. Both documents express opposition to racism based on an absolute conception of humanity and, inseparably, on respect for human dignity, human rights, and the universality of the principle of equality.

[13] French law grants to all individuals, and to their beliefs and allegiances, its uniform and impartial protection, but does so solely to *individuals*. For legal purposes, groups defined by such beliefs or allegiances simply do not exist. As a consequence, France has systematically rejected clauses in international conventions or declarations that imply that individuals should be granted rights on the basis of their membership of a minority. The most important recent case concerned the Framework Convention for the Protection of National Minorities drawn up by the Council of Europe, which commits signatory states to the recognition of national minorities.

exist. Indirect and institutionalised forms of discrimination are therefore hardly recognised. The developments of France's anti-discrimination policy as well as its legislation directed against racism and xenophobia, namely in penal law, dates back to the 1972 Anti-racism Act *(Pleven Law)*. From the 1980s onwards, public controversies surrounding immigration have become more and more concerned with the integration of longstanding migrants, including naturalised ones. While traditionally French statistics only differentiated between French citizens on the one hand, and foreign citizens on the other, from the 1990 census onwards, a new category of *'immigrants' (issue d'immigration)* was introduced. It refers to persons born abroad and with a foreign citizenship at birth (including people who were born in the overseas territories [DOM-TOM]).

In the **United Kingdom** (UK) the understanding of society is strongly influenced by the concept of being a multi-cultural or multi-ethnic. The pluralist approach is also characterised by efforts to decentralise administration. Different integration and equality strategies have developed to a certain extent in Scotland, Wales, and Northern Ireland.

The specific situation of the UK with regard to its racially diverse ethnic minority population, resulting largely from historical immigration patterns from Africa, the Caribbean and the Indian sub-continent (India, Pakistan and Bangladesh) from the 1950s to the 1970s, make settled ethnic communities the focus of attention of these policies. The UK passed its first *Race Relations Act* in 1965.[14] The 1976 *Race Relations Act* of Great Britain prohibits discrimination on 'racial grounds', which encompasses 'colour, race, nationality or ethnic or national origins'. A 'racial group' means a group defined by reference to any of these racial grounds. Whereas in French legislation the focus on discrimination of the *individual* does not easily allow the recognition of indirect discrimination, in the UK the *Race Relations Act* 1976, the definition of indirect discrimination in legal terms was for the first time explicitly recognised (although primarily for the employment sector). The 1976 RRA also established the *Commission for Racial Equality* to promote and enforce the legislation.

The **Netherlands'** approach to multi-ethnic minority policy and anti-discrimination legislation enjoys a certain reputation of progressiveness. This is not least evident in the relatively open approach to citizenship and naturalisation as well as the opening of political participation to permanent residents regardless of nationality. The Dutch immigrant population has been variously named

[14] In Great Britain, the Race Relations Acts (RRA) in 1965, 1968, and 1976; the establishment of the Commission for Racial Equality under the provisions of the 1976 RRA; and the introduction of incitement to racial hatred offences in the Public Order Act 1986. The Race Relations (NI) Order 1997 outlaws discrimination in all aspects of employment; in education, housing and health; in the provision of goods, facilities and services and in the disposal and management of premises and provides a mechanism for victims of racial discrimination to obtain redress. It also imposes a duty on all District Councils to have due regard in carrying out their functions not to discriminate on racial grounds and to promote equality of opportunity and good relations between persons of different racial groups. 1998 – Northern Ireland Act – establishes statutory obligation for public bodies to promote racial equality and good race relations in public service delivery; 1999 – establishment of ECNI.

'repatriates', 'overseas citizens', 'refugees' or 'foreign workers' and consists of immigrants of (former) colonial territories as well as from Mediterranean labour migration (to a significant extent of Turkish and Moroccan descent).[15]

Dutch anti-discrimination legislation is primarily orientated towards equal treatment embodied in the constitution as well as in other legal provisions, theoretically covering direct as well as indirect discrimination. The *Independent National Bureau against Racist Discrimination (LBR)* committed to the monitoring and working against racism and discrimination, was already set up in 1985.

In the Netherlands, and accordingly to a large extent in the Flemish part of Belgium[16], the term *allochtonen* describes a member of an ethnic minority as a person who was either not born in the Netherlands (respectively Belgium) or who has one parent who was not born there.[17] This definition of ethnic minorities thus comprises all parts of the population of foreign origin or descent. However, the Dutch statistical and analytical literature as well as relevant legislation (e.g. the SAMEN Act — Act to Stimulate the Employment of Minorities) uses a narrower definition of *allochtonen* (ethnic minorities) that is restricted to persons of 'non-Western' origin.[18]

From the countries subsumed in the second group, Austria, Germany and Luxembourg use a 'foreigner concept' rather than a 'minority concept' with a strong emphasis on citizenship. In **Austria** and **Germany,** the definition of 'national minority' primarily refers to autochthonous ethnic groups residing on the national territory. 'Protection of minorities' therefore does not include immigrant populations. Germany, for instance, restricts the application of the European Framework Convention on Minorities to its autochthonous Danish, Sorbian, Friesians and German Sinti and Roma minorities.[19] Although not directly recognised as a minority population, the 'ethnic German immigrants' *(Aussiedler)* legally considered as German nationals or co-ethnics are entitled to enter German territory and enjoy a specific integration arrangement and other privileges. Since 1950, respective inflows of *Aussiedler* and accompanying family members amounted to more than 4.2 million persons (to former Western Germany now united Germany). Most are former residents of one of the areas recognised as

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15 Applied first with regard to the colonial Eurasian population in Indonesia and to the population of Surinam and the Dutch Antilleans (Amersfoot, H. van (1999) *Migration Control and Minority Policy: The Case of the Netherlands.* In: Brochmann, G, Hammar, T. (eds.) *Mechanisms of Immigration Control – A comparative Analysis of European Regulation Policies*, Oxford/New York: Berg pp. 135-167, pp. 135, 138, 139, 143, 145).

16 With regard to integration and minority policy, the policies in the Flemish part of Belgium in general are in many ways similar to the Dutch policy.

17 By referring to 'allochtonen' the use of other expressions like 'foreigners', 'of foreign origin' or 'immigrants' could be avoided. Nevertheless in Flanders the term 'ethno-cultural minorities' is also used. www.suffrage-universel.be (23.08.2003).

18 Europaforum Wien (01.2002) *Migration und Integration Teil 1: von Integration zu Diversität (Migration and Integration Part I: from Integration to Diversity)* available at http://www.europaforum.or.at/download/mingbroschuere/teil1_diversitaet.pdf (23.08.2003).

19 Official German statistics do not refer to ethnic origin or identity. Therefore, figures on national minorities have only been estimated: 50,000 Danish; 60,000 Sorbian; 60,000-70,000 Frisians; 70,000 German Sinti and Roma.

German settlement areas within the former Soviet Union, although until 1993 most ethnic German immigrants came from Romania and Poland.

Regarding anti-discrimination policies and legislation, the countries in the second group did not systematically develop specific equality or anti-discrimination legislations. As a consequence, the rather general legal instruments in this field were for a long time not adequately adapted, respectively no great attention was paid to them. However, in consequence to its National-Socialist past, Germany's anti-totalitarian approach in its constitutional law was, theoretically, greatly concerned with its minorities and refugees, not solely with those from Communist countries.

Luxembourg follows a concept of 'differentiations' in treatments rather than a concept of 'discrimination'. For example, employment law contains various legal provisions prohibiting any kind of discrimination, namely towards foreigners, meaning that a differentiation only becomes a form of discrimination when it is unjustified.

Like most other European countries, with the notable exception of France, these countries do not understand themselves as 'countries of immigration'.[20]

The **Danish** concept refers to 'immigrants and their descendants'. Thus, an *immigrant* is a person whose parents both are foreign citizens or born outside Denmark, while a *descendant* is a person born in Denmark by parents of whom neither is a Danish citizen born in Denmark.[21] Since **Sweden** became a member of the Nordic passport Union[22] in 1954 labour migration from the neighbouring Nordic countries made up a large proportion of total immigration in addition to the large-scale labour immigration mainly from Greece, Turkey and Yugoslavia at the end of the 1960s. Sweden followed the idea of a multiethnic society by a policy of permanent residence combining integration and immigration activities and by a strong effort to integrate *'foreign-born'* (persons who were born abroad) and persons of *'foreign origin'* (persons who have either migrated to Sweden or have at least one parent who has done so) into the welfare system. The integration of the relatively high percentage of asylum seekers since the end of the 1980s meant a challenge to this immigration and integration policy.[23] Following the concept of a

[20] This is although other tendencies could be observed e.g. in Germany's recent introduction of the principal of "*ius soli*" for the majority of children born to migrants in Germany.

[21] Denmark, Ministry of Refugee, Immigration and Integration Affairs, *Statistical Yearbook of Foreigners in Denmark 2002*, available at: http://www.inm.dk/publikationer/aarbog2002_english/start.htm (09.09.2003).

[22] Nationals of the Nordic passport Union countries were permitted to travel without passport and to work and reside in the Nordic Union countries without special permit (Hammar, T. (1999) 'Closing the Doors to the Swedish Welfare State', in: Brochmann, G, Hammar, T. (eds.) *Mechanisms of Immigration Control – A comparative Analysis of European Regulation Policies*, Oxford/New York: Berg pp. 169- 202, p. 170).

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multicultural society and liberal integration policy Swedish legislation contains a number of regulations set to fight racist crimes and to counteract discrimination of individuals.

The third group of countries is marked by the fact that their population development was for a long time characterised by emigration. They have all only recently experienced significant immigration (in the 1980s for Greece, Italy, Spain and Portugal, and the 1990s for Finland and Ireland). Therefore these countries cannot build on a long tradition of integration, equality and anti-discrimination policies. Specific administrative and legal frameworks in dealing with migrants and immigrant minorities are to some extent still developing.

Similarly to the terminology used in the countries of the second group, the basic concept used in Italy, Portugal and Spain to describe the situation of immigrants is that of *'foreigners'* (i.e. non-nationals), which, in view of the recent character of immigration, may well denote the largest share of their immigrant and minority populations. In the Mediterranean countries, an increasing proportion of the immigrant population (mainly from African States, Latin America, Eastern European Countries and China) enters the country irregularly and many immigrants remain undocumented.[24] Due to its very nature, data on the undocumented immigrant population cannot easily be provided. Despite the fact that new regulations are set up to reduce irregular immigration, it must be recognised that the shape of ethnic composition of the non-national immigrant population will be changing. Regularisation/registration processes constitute a significant instrument in the fields of immigration policy and efforts to foster integration. It has to be noted that in Italy and Spain the principle of non-discrimination is also part of immigration legislation.[25] The focus of policies and legislation in this regard therefore seems to primarily target on the concept of immigrants, rather than on ethnic groups as in other EU countries. Undocumented migrants are often described in these countries as a marginalised group of high vulnerability to discrimination.

Some countries of the third group (namely Greece and Finland) are additionally concerned with the situation of their autochthonous ethnic minority groups. In **Greece,** for instance, discrimination and social exclusion is also discussed with reference to notably ethnic Greeks (palinnostountes omogeneis) repatriated from the Newly Independent States of the former Soviet Union (entitled to Greek citizenship and correspondingly privileged in access to social services, education

[24] This is a phenomenon which affects the other EU countries to a lesser extent.

[25] In Italy, the articles of anti-discrimination in the law on immigration of 1998 reconfirmed the principle of non-discrimination and provided a positive definition of the concept of discrimination, reiterating the definition which had already appeared in the International Convention on the Elimination of Racial Discrimination. It identifies the content of the concept of racial discrimination and introduces a specific action of restrictive nature in order to put an end to acts of discrimination and at the same time to obtain the compensation for the damage, also non patrimonial, the victim has suffered. In Spain, the Greco (Global Programme to Regulate and Coordinate Foreign Residents' Affairs and Immigration in Spain) Programme is considered one of the important instruments against racism and discrimination.

and employment),[26] the Muslim minority in Thrace, the Roma minority (who are all Greek citizens) and migrant ethnic Greeks from Albania.

In **Finland,** current immigrants are for the most part first-generation immigrants, who arrived only during the 1990s. At the end of 2001 the number of foreigners amounted only to 1.89% of the entire population (Russians, Estonians, Swedes, Somali). Approximately 20,000 immigrants are of Ingrian Finn origin, or ethnically Finnish. Ingrian Finns, previously living in the former Soviet Union, have been able to obtain residence permits only on the basis of their ethnic background. In addition, the Sami as the indigenous minority and the Roma (which both have an official status) and other minorities have linguistic and cultural rights.

In **Ireland,** traditionally seen as a country of mass emigration, significant immigration of non-nationals has occurred as a direct consequence of skill and labour force shortages and active labour recruitment in recent years. Equality issues have traditionally been framed in terms of racism (covering 'race', 'colour', 'nationality', 'ethnic or national origin'), while the initial focus on ethnicity was almost entirely placed on Irish Travellers (people with a shared history, culture and traditions, including a historically nomadic way of life).[27] There are no figures available on absolute numbers of foreigners in Ireland or members of minority ethnic groups.[28] Despite the fairly recent evolution from a mass emigration country to an immigration country, Ireland developed comprehensive equality legislation by passing the *Employment Equality Act 1998* and the *Equal Status Act 2000.*

Portugal officially does not use any definition of ethnic minority. Roma are the only community to have such a status, although only to a certain extent. Because of data security and privacy in Portugal (as in some other countries) official ethnicity-related demographic data is generally not available. However, several studies, as well as migrants' and religious associations tried to estimate the dimension of ethnic communities in Portugal. Since 1975, when Portuguese colonies became independent, a considerable number of Portuguese citizenship rights were granted to people emigrating from the former colonial territories. In 1998, the composition of Portuguese minority populations of various ethnic backgrounds was estimated for Roma (25,000 to 30,000), Luso-Africans (30,000 to 50,000), Indians (33,000) and Timorese (1,500).[29] Although the concept of ethnic minorities is not defined in Portuguese legislation it is nevertheless noticeable as part of the governmental programme e.g. with the establishment of the *High Commissariat for Immigration and Ethnic Minorities (ACIME)* and the *Commission for Equality and Against Racial Discrimination* (2000).

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[26] The privileged situation of this immigrant group is similar to the situation of co-ethnic immigrants in Germany (*Aussiedler*).

[27] The Travellers Community, an indigenous Irish group with a estimated population of 24,000 people, remains the largest minority group in Ireland.

[28] The final results of the 2002 Census will be made available within two years of Census Day.

[29] Machado, F. L. (1999) *Contrastes e Continuidades. Migração, Etnicidade e Integração dos Guineenses em Portugal*. Phd in Sociology. Lisboa: ISCTE.

Because the EU Member States use different legal and statistical concepts for their immigrant and minority populations it is difficult to form representative and comparable statistical groups out of the immigrant and minority populations in the EU Member States. Where statistical information about immigrants is based on nationality only, newly arrived immigrants are over-represented in the data.[30]

Whatever criteria one applies, however, it is clear that European societies are becoming increasingly diverse, with a rising number of residents with foreign citizenship of varying backgrounds and a growing number of settled and legally fully assimilated migrants as well as a fair number of other, historically present, minorities. For example, Austria and Greece have such autochthonous minorities protected not only by the constitution (similarly to Finland) but also by international agreements. In both countries the overall size of these specific minority groups is small compared to the total population. In Austria, the minority population composed by six minority groups is estimated to be between 150,000 and 200,000, with Slovenes in Carinthia and Croats in Burgenland (each 50,000) being protected by the constitution. In Greece, minority protection primarily extends to the religiously defined Muslim minority in Northern Greece, which is comprised of three groups namely Roma, Turks and Pomaks with a total estimated size of about 120,000. In Finland the number of Sami amounts to 10,000.

The minority status of so-called 'national minorities' such as ethnic Germans in South Tyrol fundamentally rests on a claim to self-government and cultural autonomy, and is not explicitly the subject of the present report.

Due to the fact that refugees and asylum seekers form a significant part of today's immigration into Europe, issues of migration and asylum cannot be analysed separately. At this point we only want to mention that for all EU Member States the 1951 Geneva Convention and the 1967 New York Protocol constitute the basic instruments for asylum policy and legislation. For further analysis on the asylum field please refer to Section 8.1.2 of this study.

[30] For detailed statistics on foreigners and immigrant minorities in the EU Member States please refer to table A1 and A2 of the Annex.

Part II: Inventory of existing and non-existing data

4. EU regulations: implementing the Racial Equality Directive (and the Employment Equality Directive)

Most Member States undertook at least some preparatory activities for the transposition of the Equality Directives into national legislation. This preparation has resulted in a re-assessment and re-examination by the governments of Member States' legislation and institutional mechanisms to combat discrimination on the grounds of racial or ethnic origin, religion or belief, disability, sexual orientation and age.

Member States are free to choose how they are going to implement the two Directives. The preparations have therefore been carried out in different ways. Some Member States strengthened their own currently existing legislation; others moved the main body of their legislation into the sphere of civil law and again others chose to implement the Directives by adopting a comprehensive anti-discrimination law. Some went beyond the minimum standards set by the Directives; some established new specialised bodies for equal treatment to cover the legislative requirements regarding racial or ethnic origin; others extended the remit of existing bodies to cover broader grounds, too.

As mentioned above (Section 3.), already prior to the Directives, a legal framework which guaranteed the principle of non-discrimination on the grounds of race or ethnic origin, religion or belief existed in most EU Member States. However, the nature and scope of the framework differed widely with the emphasis in some Member States on constitutional guarantees, criminal law or civil law provisions. Certain Member States had either specific anti-discrimination legislation (Belgium, Greece, Ireland, Netherlands, Portugal, Sweden and the UK) and/or functioning Racial Equality Bodies prior to the adoption of the Directives (Belgium, Denmark, Ireland, Netherlands, Portugal, Finland, Sweden and the UK). This had of course an impact on the availability of and accessibility to legal remedies, but also on the burden of proof required to pursue cases. There were also areas where the legislation, though existing, required more clarity particularly in defining concepts of discrimination.

In the year 2002 and the first half of 2003 a part of the Member States had either drafted new legislative initiatives or submitted proposals to their parliaments. Overall, the legislative proposals either strengthen current legislation or shift the main body of legislation to combat discrimination into the civil law sphere. Attention should be given in this respect particularly to areas such as the definition of indirect discrimination, the application of the law to both the public and private sectors, to the ease, adequacy and effectiveness of legal remedies, to the concept of harassment and the shift in the burden of proof.

In **Austria,** there are proposals for a new Equal Treatment Act. A ministerial working group drafted a proposal to transpose the Directives by amendments to the Equal Treatment Act *(Gleichbehandlungsgesetz* — GlBG 1979)[31] and the Federal Equal Treatment Act *(Bundes-Gleichbehandlungsgesetz* — B-GBG 1993)[32], which so far only applied to issues related to equal treatment of women and men at the workplace, by extending the Acts to all grounds of discrimination named in the Directives and to non-employment aspects of the Racial Equality Directive. The Ministerial Draft for a new Equal Treatment Act contains three main parts: Part I on equal treatment in employment and occupation, covering men and women and discrimination on all other grounds; Part II with provisions against discrimination on grounds of racial or ethnic origin in other areas including the fields of social protection, social advantages, education and access to goods and services; and Part III with rules relating to institutions and procedures. According to the draft law amending the Equal Treatment Act the Commission for Equal Treatment *(Gleichbehandlungskommission)* shall be structured into three senates. Whereas the first senate is supposed to deal with issues related to equal treatment of women and men, the second senate shall be responsible for tackling discrimination in employment and occupation covering all other grounds mentioned in art 13 TEC (Treaty of the European Community) except disability. The third senate shall be responsible for the non-employment related scope of the Racial Equality Directive. Cases involving multiple discrimination would fall under the competence of the first senate. The Office for Equal Treatment *(Gleichbehandlungsanwaltschaft)* will be set up under the same structure and will be responsible for all grounds of discrimination mentioned in art 13 TEC and shall undertake tasks of the equal treatment body outlined in the Racial Equality Directive.

In **Belgium,** a general anti-discrimination law was adopted on 12 December 2002[33] which pursues a single legislative approach and takes over all the grounds of discrimination provided for in Art. 13 of the Treaty of Amsterdam and the two Council Directives. A first draft was introduced in Parliament already in 1999, but was subsequently amended to include the stipulations of both Directives. Under Art. 2, the Anti-discrimination Law will now cover the grounds of discrimination related to gender, race, colour, descent, national or ethnic origin, sexual

[31] BGBl. No. 108/1979 as last revised by BGBl. I No. 129/2001 of 27 November 2001.

[32] BGBl. No. 100/1993 of February 12, 1993, as last revised by BGBl. I No. 119/2001.

[33] The *Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme* was published in the Belgisch Staatsblad/ Le Moniteur Belge on 17 March 2003 and came into force on 25 March 2003.

orientation, civil status, birth, wealth, age, religious or philosophical conviction, present or future state of health and a disability or physical characteristic[34]. It will also extend the competence of the Centre for Equal Opportunities and Opposition against Racism to cover all the above grounds of discrimination, except gender which will be overseen by a proposed Equality institute. In analogy to the 1981 Law on the Suppression of Racist Acts, the law penalises incitement to discriminatory acts under criminal law.

In **Denmark,** separate legislation has been planned for transposition of the Racial Equality and Employment Equality Directives. Three pieces of legislation to implement the Racial Equality Directive were foreseen by the government: Act No. 411 of 6 June 2002 established the Danish Centre for International Studies and Human Rights which has the competences outlined under Art. 13 of the Racial Equality Directive and was assigned the task to make legally non-binding[35] decisions on individual cases of discrimination,[36] the draft Act amending the Act on Prohibition of Differential Treatment in the Labour Market[37] (which will apply only to employment related aspects of discrimination); and the Draft legislation on a new Act on Equal Treatment irrespective of Race or Ethnic Origin[38] (which will apply to the non-employment aspects of the Racial Equality Directive). The draft Act on Equal Treatment irrespective of race or ethnic origin took effect on 1 July 2003.[39] The draft act amending the Act on Prohibition of Differential Treatment in the Labour Market was finally adopted by the Danish Parliament in April 2004.

In **Finland,** the approach taken towards implementation was a general single Equality Act covering all the grounds in the Directives. After a consultation process with interest groups and social partners, the government submitted to Parliament a formal legislative proposal.[40] The Government has also proposed to extend the mandate of the Ombudsman for Minorities to cover Art. 13 EC Treaty grounds of discrimination and set up a Board of Discrimination covering the grounds of racial or ethnic origin. The draft law proposal was dropped due to early parliamentary elections in 2003. In autumn 2003 the government submitted a new

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34 Art. 2 para.1: Direct discrimination occurs if a difference in treatment that is not objectively or reasonably justified, is directly based on sex, a so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic. *'Il y a discrimination directe si une différence de traitement qui manque de justification objective et raisonnable est directement fondée sur le sexe, une prétendue race, la couleur, l'ascendance, l'origine nationale ou ethnique, l'orientation sexuelle, l'état civil, la naissance, la fortune, l'âge, la conviction religieuse ou philosophique, l'état de santé actuel ou futur, un handicap ou une caractéristique physique.'*

35 As stated in the Act on Ethnic Equal Treatment.

36 On 20 May 2003 a new Bill on equal treatment irrespective of ethnic origin was passed by the Danish Parliament confirming that the new Institute for Human Rights is assigned the task to receive individual complaints based on Art. 13 of the Race Directive, which took effect from 1 July 2003.

37 The draft Act was put before the Danish Parliament on 23 January 2003.

38 The draft Act was put before the Danish Parliament on 28 January 2003.

39 The Act was passed by the Danish Parliament on 20 May 2003.

40 A government proposal (HE 269/2002) for an Act on Equality and amendments to related laws was submitted to parliament on 20 December 2002, available at: http://www.eiro.eurofound.ie/2003/08/Feature/FI0308203F.html (10.09.2003).

draft law to the parliament. A reformed Employment Contracts Act came into force on 1 June 2001.

In **France,** two laws have been adopted: the French Parliament passed an Anti-Discrimination Bill in November 2001[41] to combat discrimination, which prohibits both direct and indirect discrimination in respect to a broad range of situations. New grounds of discrimination were introduced, namely real or ascribed ethnic origin, physical appearance and name, age and sexual orientation (in addition to the already existing ones including gender, origin, race, nationality, political opinion, etc.). The burden of proof was shifted to the defendant. The other *Law on Social Modernisation*[42] includes a chapter on combating moral harassment in the work place providing civil remedies and on the burden of proof. Art. 169 of the *Law on Social Modernisation* was modified by Art. 4 of the Loi no. 2003-6 of 3/1/03 concerning the burden of proof in case of moral harassment.[43] A proposal for a single specialised equality body has been put forward. Development of legislation was planned for 2003.

In **Germany,** two draft anti-discrimination laws were planned for the beginning of 2003, a labour law and a civil law act. The planned labour law act will focus on the employment and occupation aspects of the Directives. A draft civil law act was presented in February 2002, and discussions have focused on whether it should cover all the grounds under Art. 13 EC Treaty. The draft civil law act is currently envisaged to cover the non-employment aspects of the Racial Equality Directive and extend the grounds of non-discrimination in goods and services to sexual orientation and age. Nevertheless, no official draft regarding the transposition was passed before the expiration of the deadline on 19 July 2003.

In **Greece,** it has not been decided yet whether only one bill covering both Directives, or two separate bills, one for each Directive, will finally be submitted. Working groups have been organised in both competent Ministries (the Ministry of Justice and the Ministry of Labour), but without cooperation with social partners. The previous administration had proposed in 2003 the establishment of three equality bodies: one for issues concerning relations between the citizens and the State (the existing Ombudsman), one for issues regarding relations between private persons (a new equality body under the supervision of the Ministry of Justice) and one for labour conflicts between employees and employers (the existing Labour Inspectorate Body).

In **Ireland,** an amendment of the Employment Equality Act 1998 for the employment field of both Directives and of the Equal Status Act 2000 for the non-employment field of the Racial Equality Directive is necessary for the respective transposition. The latter concerns equal treatment in regard to the provision of goods and services, accommodation, and education. The tasks under

41 France, *Loi relative à la lutte contre les discriminations* no. 2001-1066 of 16.11.2001.

42 France, *Loi de modernisation sociale* no. 2002-73 of 17.01.2002.

43 Available at: http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCX0200158L (10.09.2003).

Art. 13 of the Racial Equality Directive will be undertaken by the Equality Authority[44] and the Office for the Director of Equality Investigations (the Equality Tribunal),[45] established by the Employment Equality Act for all grounds of discrimination. In addition, the Labour Court, an industrial relations tribunal, investigates and mediates in disputes under the Employment Equality Act.

In **Italy,** the Parliament approved a delegating Law[46] in March 2002 authorising the President of the Council of Ministers to issue a specific decree to transpose the Racial Equality Directive into national legislation. The Parliamentary decree — Law No.39/2002 *(Legge Comunitaria)* covered other Directives by the EU and did not transpose the Racial Equality Directive in itself but defined the criteria to be followed in drawing up the implementation legislation by the President of the Council of Ministers. Transposition first of all required a delegated decree of the President of the Council of Ministers; to issue a delegated decree means that the future decree will neither need approval nor be subjected to a binding parliamentary review before it comes into force. The decree was adopted on 28 March 2003. The two Directives are implemented in separate legislation. Since 9 July 2003 the new Decree-Law No. 215, *Decreto legislative,* [47], implementing the Racial Equality Directive went into effect.

In **Luxembourg,** two laws are anticipated to transpose Directives 2000/43/EC and 2000/78/EC. The first proposed law will transpose the provisions of the Directive except for the provision relating to the designation or establishment of an equal treatment body, issue to be covered by a second Bill. The two Bills were submitted on 21 November 2003.

The **Netherlands** was the first EU Member State to pass a comprehensive anti-discrimination law, covering a broad range of grounds (race, ethnic origin, religion, belief, political opinion, nationality, sexual orientation, civil status). The Equal Treatment Act *(Algemene wet gelijke behandeling)* has been in force since 1994. The equality legislation has recently been under extensive review. The implementation of the Racial Equality Directive is planned through amendments to the existing general Equal Treatment Act, which will cover apart from the already included grounds of religion or belief and sexual orientation the prohibition of harassment, instruction to discriminate and membership/ involvement in organisations of workers or employers. The Implementation Bill was submitted to Parliament on 28 January 2003. The Equal Treatment

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44 The Equality Authority is tasked, among else, to monitor the implementation of the Acts and to provide information to the public on the issue of discrimination.

45 The Equality Tribunal is charged to provide redress to victims of discrimination who have lodged a complaint on the basis of either of the two equality laws.

46 Italy, 'Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità Europee – Legge Comunitaria 2001', Law No. 39 of 1st march 2002, published in the Official Gazette No. 72 of 26th marzo 2002, ordinary supplement.

47 Official publication in *Gazzetta Ufficiale* No. 186 del 12.08.2003, available at: http://www.gazzettaufficiale.it/guri/sommario?service=0&numgu=186&data_gu=12.08.2003 (23.08.2003).

Commission covers all grounds of discrimination in the general Equal Treatment Act. A Directive on Discrimination in force since 1985 stipulated how the judiciary and the public prosecutor have to respond to cases of discrimination.

In **Portugal,** in addition to constitutional provisions, a law on racial and ethnic discrimination was passed in 1999 (Law 134/99), specified by decree-law 111/2000. Its understanding of discrimination is modelled on that proposed by the UN Convention on the Elimination of all Forms of Racial Discrimination (CERD). In addition, there are plans for two legislative proposals. One will amend the existing Law No. 134/99 to bring it fully in line with the Racial Equality Directive and a new labour code to implement the Employment Equality Directive, covering *inter alia* the grounds of religion or belief. The High Commissioner for Immigration and Ethnic Minorities oversees the transposition of the Directive. A Commission for Equality and Against Racial Discrimination was set up as a public authority to, amongst other tasks, collect information and hear cases.

In **Spain,** a single approach is being pursued. There is a draft proposal for an Equal Treatment Act, with a chapter for general provisions, a chapter on equal treatment and non-discrimination on grounds of racial or ethnic origin in the non-employment field of the Racial Equality Directive and a chapter on equal treatment and non-discrimination in employment covering all the grounds under Art. 13 EC Treaty. The draft proposes the establishment of a Council for equal treatment and combating discrimination on the grounds of racial or ethnic origin. Other legislative and institutional developments included the introduction of general legislation on Sport, which also covers offences related to race, as well as an order, which created Offices for Foreigners.[48]

In **Sweden,** the two EU Directives are mainly being implemented through a new act prohibiting discrimination and through some amendments[49] to existing laws against discrimination in working life (e.g. the *Measures to Counteract Ethnic Discrimination in Working Life Act*[50]). In 2001, the government presented a national action plan against racism, xenophobia, homophobia and discrimination, which proposes several legislative measures. A year later, in 2002, a parliamentary committee was appointed to consider consolidated discrimination legislation covering all or most discrimination grounds and areas of society. The Committee of Inquiry on discrimination proposed *inter alia* amendments to the anti-discrimination acts covering ethnic origin, religion or belief to extend the scope of the relevant acts to cover the non-employment fields. A Government Bill proposed separate legislation covering working life and the non-employment aspects dealt with by the Racial Equality Directive. The Committee of Inquiry is to report its findings on extending an equal level of protection for all grounds no

48 13359 Order PRE/1700/2002.

49 *Extended protection against discrimination*, Fact Sheet, Ministry of Justice, Sweden, Ju 03.12e, June 2003, available at: http://www.justitie.regeringen.se/inenglish/pressinfo/pdf/FaktaJu_0312e.pdf (10.09.2003).

50 *Measures to counteract discrimination in working life act* (SFS 1999: 130) – including amendments up to and including SFS 2000:762; available at: http://naring.regeringen.se/inenglish/pdf/sfs1999_130.pdf (23.08.2003).

later than 1 July 2005.[51] Other legislative and institutional developments included the Equal Treatment of Students at Universities Act, which came into force on 1 March 2002. The act aims to promote equal rights for students at universities and colleges and counteract discrimination of students and applicants not only on the grounds of racial or ethnic origin, but also due to gender, sexual orientation and physical disability.

A new act prohibiting discrimination came into force on 1 July 2003.[52] The new act extends effective protection against discrimination from working life and higher education to other areas of society. It combats discrimination related to ethnic origin, religion or other belief, sexual orientation or disability. The areas covered are labour market programmes, starting or running a business, occupational activity, membership of, participation in and benefits from organisations of workers or employers or professional organisations, and goods, services and housing. In addition, the prohibition of discrimination on grounds of ethnic origin, religion or other belief also applies to the social services, local and national transport, services for disabled people and housing adaptation allowances, social insurance and related transfer systems, unemployment insurance and medical services. A person who discriminates someone or exposes someone to reprisals in a way that is prohibited under the act shall pay damages for the violation the discrimination or reprisals involve.

In order to fully implement the EC Directives, a number of amendments are also being made to the 1999 acts and to the Act on Equal Treatment of Students. In part, the amendments are intended to establish the same definitions of discrimination grounds and the same concept of discrimination as in the acts, and to state the rule on a shared burden of proof directly in the text of the acts.[53]

In the **United Kingdom,** the Government is implementing the EU Directives by amending the *Race Relations Act 1976,* including the burden of proof and removing several exemptions in the act. The *Employment Equality (Religion or belief) Regulations 2003*[54] implementing the Employment Equality Directive (in Great Britain) came into force on 2 December 2003. The Regulations make it unlawful to discriminate on grounds of religion or belief in employment and vocational training. They prohibit direct discrimination, indirect discrimination, victimisation and harassment.

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51 *Extended protection against discrimination*, Fact Sheet, Ministry of Justice, Sweden, Ju 03.12e, June 2003, available at: http://www.justitie.regeringen.se/inenglish/pressinfo/pdf/FaktaJu_0312e.pdf (10.09.2003).

52 The Ombudsman against Ethnic Discrimination, the Ombudsman against Discrimination because of Sexual Orientation and the Disability Ombudsman will monitor compliance with the new Act.

53 *Extended protection against discrimination*, Fact Sheet, Ministry of Justice, Sweden, Ju 03.12e, June 2003, available at: http://www.justitie.regeringen.se/inenglish/pressinfo/pdf/FaktaJu_0312e.pdf (10.09.2003).

54 Statutory Instrument 2003 No. 1660*,* available at: http://www.legislation.hmso.gov.uk/si/si2003/20031660.htm (10.09.2003).

There is ongoing discussion on whether and how to establish a single equality body covering Art. 13 EC Treaty grounds — The government decided in November 2003 to set up a single equality body, the Commission for Equalities and Human Rights (and published a White Paper in May 2004).

In April 2001, the statutory duty to promote race equality was introduced through an amendment of the Race Relations Act 1976. Two orders were issued for public authorities: one amending the list of bodies and authorities required to promote racial equality, and the other setting a range of individual duties for public authorities which had to be met by 31 May 2002 in order to comply with the new legislation.[55] It should be noted, however, that the UK already largely complies with the requirements of the Racial Equality Directive.

The Anti-Terrorism, Crime and Security Act 2001[56] was used to amend the Crime and Disorder Act 1998 to create specific 'religiously aggravated offences' along similar lines to the existing racially aggravated offences. The 2001 Act was also used to also amend the Public Order Act 1986 to increase the maximum penalty for incitement to racial hatred from two years to seven years and extended the law to prohibit incitement to racial hatred against groups abroad.

The Directive required the amendment of the *Race Relations Act 1976,* in particular to reflect the provisions which deal with the definition of indirect discrimination, harassment, genuine and determining occupational requirements, the burden of proof in proceedings, and abolition of statutory provisions which are contrary to the principle of equal treatment. Thus, the *Race Relations Act 1976 (Amendment) Regulations 2003*[57] that came into force on 19 July 2003 implements in Great Britain the Racial Equality Directive. Regulations were also introduced to implement the Directive in Northern Ireland, also with effect from 19th July 2003.

The Directives set minimum standards for the EU Member States and some have used the opportunity of the transposition process to go beyond the minimum standards in a variety of ways, by, for example:

a. extending the non-employment aspects to grounds in addition to racial or ethnic origin and in some cases introducing non-Art. 13 EC Treaty grounds (Belgium, Finland [draft], Sweden),

b. extending the employment aspects to grounds in addition to Art. 13 grounds (Belgium, France, Netherlands and Portugal) or

[55] *The Race Relations Act (General Statutory Duty) Order 2001* (Statutory Instrument 2001 No. 3457) (in force on 3 December 2001), available at: http://www.hmso.gov.uk/si/si2001/20013457.htm (10.09.2003) and Statutory Instrument 200, *No.3458, The Race Relations Act 1976 (Statutory Duties) Order 2001*, (in force on 3 December 2001), available at: http://www.hmso.gov.uk/si/si2001/20013458.htm (10.09.2003).

[56] Available at: http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm (l0.09.2003).

[57] Statutory Instrument 2003 No. 1626, available at: http://www.hmso.gov.uk/si/si2003/20031626.htm (10.09.2003).

c. proposing the establishment of an equal treatment body/bodies to cover grounds in addition to racial or ethnic origin (Austria [draft], Belgium, France, Ireland, Netherlands, Sweden, United Kingdom) and

d. establishing the equal treatment body/bodies with powers beyond the minimum requirements (Austria [draft], Belgium, Denmark, Ireland, Netherlands, Portugal, Finland, Sweden and UK).

Additionally, the degree and extent of consultation with social partners and non-governmental organisations varied considerably: Belgium, Germany, Denmark,[58] Ireland, the Netherlands, Finland, Sweden and the UK actively involved these groups at an early stage in the consultation process. As foreseen by the Directives, consultation with social partners and non-governmental organisations represents an important component of the transposition process and enhances not only the effectiveness of the legislative outcome, but promotes a broad discussion, understanding and dissemination of information within civil society.

4.1. Direct and indirect discrimination

The Racial Equality Directive, which had to be implemented in the national laws of the EU Member States by 19th July 2003, prohibits discrimination on grounds of racial or ethnic origin. Besides 'harassment' and 'instruction to discriminate' the concept of discrimination is defined, as quoted previously, as follows: Direct discrimination: *'where one person is treated less favourably than another is, has been, or would be treated in a comparable situation on grounds of racial or ethnic origin',* and indirect discrimination: *'where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons'.* Although national laws of the EU-Member States do not all exactly coincide with the Directives, the general concept of direct discrimination as defined in the Council Directives is generally covered. However, the concept and provisions concerning indirect discrimination often differ. In some Member States both definitions draw on already existing national legislation (e.g. the 1976 Race Relations Act of the UK), whereas in other Member States, it is gradually being transposed into relevant legislation. Next to the concept of direct discrimination, the majority of Member States also consider indirect discrimination, although this concept is not or only partly defined. A distinction between direct and indirect discrimination might only be found for certain areas.

[58] Only in regard to the implementation of the Race Equality Directive; on employment only the Danish Confederation of Trade Unions (*Landorganisationen*, LO) and the Danish Employers' Confederation (*Dansk Arbejdsgiverforening*, DA).

Besides the basic principles of 'non-discrimination' in the human rights principles and the rejection of racism and any kind of discrimination as enshrined in the constitutions or other legislation, **Finland,**[59] **Germany,**[60] **Greece and** Luxembourg,[61] do not clearly distinguish between direct or indirect discrimination on the grounds of religion, race or ethnic origin in their entire legal framework. However, the **German** anti-discrimination draft law clearly distinguishes between direct and indirect discrimination.

In **Finland** the concept of non-discrimination is mainly protected by its constitution, covering discrimination on ethnic and religious grounds applied to everyone irrespective of nationality, as well as the protection of indigenous and national minorities. The Penal Code additionally covers discrimination in employment, providing goods and services, etc. As 'discrimination' has not yet been specifically defined, provisions other than the protection of minorities primarily refer to direct discrimination.

Although not defined, the **Austrian** 1955 State Treaty, in the rank of constitutional law, generally prohibits direct and indirect discrimination of citizens in all areas of law based on sex, race, religion or language.[62] It has to be noted that the Austrian as well as the **German**[63] anti-discrimination draft law do include those discrimination grounds indicated in the Directives and a new definition of discrimination as developed for gender equality legislations differentiating between discrimination and admissible forms of distinction.[64]

In **France** the legal principle of non-discrimination is foreign to the tradition of its legal approach to racism and discrimination. The French principle of equality within a universalistic framework based on statehood, nationhood and citizenship has been enshrined in a range of instruments, including the constitutions of 1946[65] and 1958 and the major international human-rights conventions as incorporated into French law. Moreover, there are comprehensive criminal laws and sentences against racism and xenophobia. Nevertheless, a new principle of non-

[59] In Finland the draft legislation which has been prepared contains a definition of indirect discrimination which is the same, or virtually the same, as that included in the Directives. Available at: http://www.stop-discrimination.info/index.php?id=385 (23.08.2003).

[60] However, in Germany indirect discrimination is defined in respect to gender-discrimination.

[61] In Luxembourg the draft legislation which has been prepared contains a definition of indirect discrimination which is the same, or virtually the same, as that included in the Directives. Available at: http://www.stop-discrimination.info/index.php?id=385 (23.08.2003). Art. 2 of the 1981 Act (December 08) on equality of treatment between men and women already mentions indirect discrimination.

[62] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Austria*, pp. 9, 14.

[63] Has not been adopted yet.

[64] EUMC (2002*) Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Austria*, p. 15 and Germany, p. 13, 14.

[65] While the constitution of 1946 has been abrogated, the general principles proclaimed in its preamble were explicitly incorporated into the constitution of 1958, and remain an important source of constitutional law.

discrimination has been introduced more recently largely deriving from EC law. With the 2001 *Anti-discrimination Act* this principle has been extended primarily to the whole range of labour law[66] and is applicable to civil law. In theory both direct and indirect discrimination are prohibited in respect of a broad range of situations.[67] As mentioned above, four new grounds of discrimination were introduced: sexual orientation, age, real and supposed belonging to an ethnic group, and physical appearances (in addition to the already existing ones including gender, origin, race, nationality, political opinion etc.). The legal framework is thus still far from comprehensive. Working life, including remuneration, career progression and indirect discrimination, covered by the labour code, are not criminal offences and therefore cannot be formally reported by labour inspectors. It still remains to be seen how effective changes adopted will be in the absence of any legally admissible category of 'origin' which would enable statistical assessment of unequal treatment.

In the case of **Portugal** the concept of equality is largely inspired by the 1966 UN Convention on the Elimination of all forms of Racial Discrimination (CERD).[68] Like in Finland or in the Netherlands, the general provisions of equality in Portugal are covered by the constitution (CPR). They are applied equally to Portuguese citizens and to residing foreign citizens, even if their situation is irregular.[69] Portugal's Anti-discrimination-Law No.134/99 of August 28, 1999, covers indirect discrimination explicitly with respect to equality in employment.

Up to now, **Denmark** has not formulated a specific anti-discrimination policy. Apart from the general Consolidated Act No. 626 of September 29, 1987 against Differential Treatment on any ground (such as race, colour, national or ethnic background, faith or sexual orientation) direct or indirect discrimination were explicitly prohibited only in the employment sector by Act. No. 459 of 12 June 1996.[70] However, to implement the Racial Equality Directive the *Act on Ethnic Equal Treatment* came into force in July 2003. Besides other adjustments, a new definition of 'discrimination' was introduced.

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66 The concept of non-discrimination had only become 'effective' since being recognised by the *Cour de Cassation* (the High Court of civil and criminal appeal) in the context of discrimination by employers against union members or delegates and of disputes about equal pay for equal work.

67 Including job-applications, training, promotion, wages etc.

68 Approved by Portugal, for adherence, through Law No. 7/82, 29 April 1982, and directly applicable in the Portuguese legal system and became part of the Portuguese internal legal order.

69 CPR, Art. 15: 'Foreigners and stateless people who reside or are on national territory have the same rights and are subject to the same duties as Portuguese citizens.'

70 Act. No. 459 of 12 June 1996 *Prohibition against discrimination in the labour market* was adopted as a consequence of the Danish ratification of the UN Convention on Elimination of all Forms of Racial Discrimination in 1971 and the ILO Convention No.111.

In general, **Italy** and **Spain** cover indirect discrimination by their laws on immigration. **Italy's** immigration law 1998[71] *(Testo Unico)* reconfirmed the principle of non-discrimination as defined in CERD.[72] Protection against acts of racial discrimination 'cannot be limited only to the protection of residents, but it regards any person, even if he/or she is only staying temporarily, or is travelling through our country'. The most important novelty of the law of 1998 consists in the new consideration of racial discrimination which is not exclusively seen anymore in the realm of relations between 'citizens and foreigners', but is being identified also in the relationships between institutional agents (public administration, police, scholastic and sanitary institutions etc.) and immigrants. In addition, Italy's legislation attaches legal consequences to indirect and institutional discrimination, which can derive from acts carried out by public officials or persons who have been put in charge of public services.[73] The same principle is covered in the context of employment by punishing employers or employees' superiors based on any discriminatory behaviour, also indirect discrimination, which produces a prejudicial effect due to a worker's belonging to a racial, ethnic or linguistic group, religious faith or nationality. Since 9 July 2003, the Racial Equality Directive has been implemented, and its requirements relating to direct and indirect discrimination are fully covered by the new Law No. 215, *Decreto legislativo.*[74] Art. 3, N° 3 introduces a general exception on unequal treatment on grounds of race or ethnic origin for the employment sector in case the actual activity or the context of exercising this activity requires specific and determinate characteristics.

In **Spain,**[75] the *Basic Law on Rights and Freedoms of Aliens* 8/2000 provides the following definition: 'Discrimination is any act which, directly or indirectly, implies a distinction, exclusion, restriction or preference with regard to an alien based on race, colour, descent, national or ethnic origin, or religious convictions

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71 Law of July 25, 1998, official publication in *Gazzetta Ufficiale* No. 191 del 18.08.1998.

72 Racial discrimination is 'any behaviour which, directly or indirectly, involves a distinction, exclusion, restriction or preference based on race, colour, ancestry, national or ethnic origin, religious conventions or practices, and which has the goal or the effect to destroy or compromise the recognition, the possession or exercise, in condition of parity, of human rights and fundamental freedoms in the political, economic, social, cultural or any other sector of public life' Among the most significant assumptions of discrimination sanctioned by the 1998 law is the one activated by 'anybody who illegitimately imposes more disadvantageous conditions, or refuses to provide the access to employment, lodging, training, education and social services as well as services of social assistance to the foreigner, regularly residing in Italy, only because of his status as a foreigner or because he/she belongs to a certain race, religion, ethnic group or nationality'.

73 The judge *can* confirm the occurrence of a direct or indirect discrimination with the measure he deems to be the most suitable, or, if necessary, also with a restrictive pronouncement, and he can 'order the suspension of the (prejudicial) behaviour and adopt any other suitable measure according to the circumstances, to remove the effects of the discrimination'.

74 Official publication in *Gazzetta Ufficiale* No. 186 del 12.08.2003, available at: http://www.gazzettaufficiale.it/guri/sommario?service=0&numgu=186&data_gu=12.08.2003 (23.08.2003).

75 'In Spain, the draft legislation which has been prepared contains a definition of indirect discrimination which is the same, or virtually the same, as that included in the Directives.' Available at: http://www.stop-discrimination.info/index.php?id=385 (23.08.2003).

and practises, and which has the aim or the effect of destroying or restricting the recognition or exercise, in conditions of equality, of human rights and fundamental freedoms in the political, economic and social or cultural sphere.'[76]

In **Swedish**[77] legislation, the 'Instrument of Government' (as part of the Swedish constitution), Penal Law and other legal provisions clearly define direct discrimination. In addition, the Swedish 1999 *Act on Measures to Counteract Ethnic Discrimination in Working Life*[78] in Sections 8 and 9 define both direct and indirect discrimination based on the ethnic background in the employment sector. However, 'the prohibition of direct discrimination does not apply if the treatment is justified having regard to such ideological or other special interests as are manifestly more important than the interest to prevent discrimination in working life because of ethnic background'.[79] The act prohibiting discrimination, which came into force on 1 July 2003, forbids direct and indirect discrimination. The definition of direct and indirect discrimination complies with the Racial Equality Directive. Furthermore, in case of direct discrimination, it is sufficient that any one of the grounds is *one* of the reasons for the disadvantage for this to be counted as discrimination. The decisive factor is the occurrence of a negative effect, not the reason behind the disadvantage. According to the new act, indirect discrimination does not occur if the provision, criterion or procedure can be motivated by a legitimate aim and the means are appropriate and necessary to achieve the aim. [80]

In **Belgium,** the definition of discrimination in the amended Anti-Racism Law of 30 July 1981 is largely based on CERD.[81] The scope of the new Belgium Act of 25 February 2003 (Art. 2 paras.1 and 2), however, largely corresponds to the Racial Equality Directive. Herein indirect discrimination 'is defined in terms of behaviour or practice which are seemingly neutral but which have an adverse effect on particular people'.[82] Nevertheless, the definition of discrimination has been subject to criticism, especially because it provides that direct discrimination could be justified under particular circumstances (the so-called 'objective ground of justification') direct discrimination occurs if a difference in treatment is not

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[76] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Spain*, p. 18.

[77] "In Sweden, the draft legislation which has been prepared contains a definition of indirect discrimination which is the same, or virtually the same, as that included in the Directives." Available at: http://www.stop-discrimination.info/index.php?id=385 (23.08.2003).

[78] SFS 1999:130.

[79] *Measures to counteract discrimination in working life act* (SFS 1999: 130) – including amendments up to and including SFS 2000:762; available at: http://naring.regeringen.se/inenglish/pdf/sfs1999_130.pdf (23.08.2003).

[80] *Extended protection against discrimination*, Fact Sheet, Ministry of Justice, Sweden, Ju 03.12e, June 2003, available at: http://www.justitie.regeringen.se/inenglish/pressinfo/pdf/FaktaJu_0312e.pdf (10.09.2003).

[81] The 1994 amendment to the Anti-Racism law of 1981 introduced a definition of discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life'.

[82] See http://www.stop-discrimination.info/index.php?id=385 (23.08.2003).

objectively or reasonably justified. In view of compliance with the two Council Directives, para. 5 of Art. 2 stipulates that in the area of labour relations (as defined in the second and third clause of para. 4) the difference in treatment is based on an objective and reasonable justification if such a characteristic constitutes an essential and prescribed part of the professional activity. The reason for including the 'objective ground of justification' relates to the large scope of this law. Moreover, it covers more discrimination grounds than those indicated in the Directives.[83] It follows an open interpretation of direct discrimination instead of a closed definition, in which case an exhaustive list of all the exceptions to the rules would need to be established. This approach has also been chosen for indirect discrimination.

Discrimination in the **Irish** anti-discrimination legislation is defined in both the *Employment Equality Act 1998* and the *Equal Status Act 2000* and applies to nine discriminatory grounds including race and membership of the Traveller community. The definition of indirect discrimination in these Acts is being amended to comply with the Framework Employment and Racial Equality Directives and will apply across the nine grounds. The Equality Authority recommended that the definition of indirect discrimination in the Race Directive be fully applied and incorporated into the *Equal Employment Act* — already covering partly the indirect discrimination definition[84] — and into the *Equal Status Act* for all nine grounds of discrimination.

Like in Finland and in Portugal, the constitution of the **Netherlands** not only protects the equal status of all citizens but of all individuals living in the Netherlands with regard to the State. Art. 1 of the 1994 Equal Treatment Act[85] prohibits direct and indirect discrimination based on religion, political opinion, race, gender, nationality, sexual orientation or civil status, in labour relationships, the professions and the provision of goods and services (including health care, housing, education, and advice on school and career choices). The labour process covered by this protection runs from recruitment and selection, remuneration, treatment and promotion, up to termination. The concept of labour relationships includes volunteers, interns and flexi workers. The Equal Treatment Act has a so-called closed system: there is a general prohibition of unequal treatment. According to the act, both direct and indirect discrimination (termed indirect *distinction*)[86] are prohibited. 'The prohibition shall not apply to indirect distinction which is objectively justified' (Art. 2.1).[87]

The UK largely complies with the requirements of the EU Race Directive due to the provisions of **the** *Race Relations (Amendment) Act 2000* and similar

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83 Notably marital status, current and future health conditions of a person, fortune.

84 EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Ireland*, p.11.

85 *Algemene Wet Gelijke Behandeling (AWGB*).

86 Indirect *distinction* is discrimination that occurs on grounds other than those mentioned above, but that results in discrimination on those grounds.

87 EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Netherlands,* pp. 10, 15.

legislation in Northern Ireland that prohibit direct and indirect discrimination on the grounds of 'colour, race, nationality or ethnic or national origins' in public functions, housing allocation, employment, training and education, the provision of goods, facilities and services and certain other specified activities. It further provides legal protection against racial discrimination by public authorities in almost all aspects of their functions and tasks. However, the standards of the Directive are in certain respects better than the UK legislation as well as providing for a different definition of indirect discrimination. The UK government has therefore introduced the Race Regulations 2003 in Great Britain to further improve the 1976 Act and to ensure full and complete incorporation of the Directive. A separate regulation, the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003, has been introduced for Northern Ireland.

The Race Relations Act 1976 (Amendment) Regulations 2003,[88] which came into force on 19th July 2003, uses similar wording to the Directive by referring to a 'provision, criterion or practice' rather than to a 'requirement or condition'.[89]

At present, discrimination directed against ethnic groups (including Sikhs and Jews) is prohibited. However, discrimination against a religious group may only be prohibited under the race relations legislation in certain circumstances. Only Northern Ireland has anti-discrimination laws on the grounds of religious belief, although addressing particularly the Protestant and Roman Catholic communities.

4.2. Harassment

The notion and concept that harassment based on race or ethnic origin in itself constitutes discrimination is rather new in the EU Member States' legislation, contrary to provisions prohibiting sexual harassment. The implementation of the Racial Equality Directive will therefore introduce this concept in many cases as a new legal provision into the Member States' legislation. It remains to be seen how effective the application of the (often) new legal remedies will prove to be.

In **Austria,** a definition of harassment such as that outlined in Art 2.3 of the Racial Equality Directive is currently missing. The Ministerial Draft for a New Equal Treatment Act includes a definition of harassment, based on race or ethnic origin, which is consistent with the Racial Equality Directive. The definition of harassment is also included in the employment related part of the draft law amending the Equal Treatment Act. The wording is in line with the definition of harassment in both Directives.[90]

In **Belgium,** the definition of harassment in the general anti-discrimination law passed on 12 December 2002 follows closely Art. 2.3 of the Directive.

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88 Statutory Instrument 2003 No. 1626.

89 Available at: http://www.hmso.gov.uk/si/si2003/20031626.htm (23.08.2003).

90 Sec 15 Equal Treatment Act, available at: http://www.wif.wien.at/gleichstellungs_site/gleichstellung_pages/downloads/gbg-rv.doc (15.05.2004).

In **Denmark**[91] the *Act on Ethnic Equal Treatment*[92] includes harassment in its definition of discrimination.

In **Finland** the government submitted a draft law on Promoting Ethnic Equality to the Parliament in December 2002. However, due to early elections in 2003, the Parliament was not able to handle and pass the draft law, so it was dropped. The definition of discrimination, including harassment, in the dropped draft law was similar to the Directive. In autumn 2003 the government submitted a new draft law on a new Non-Discrimination Act to the parliament.

In **France** the concept of unlawful harassment has only partly been codified. The *Social Modernisation Act* of 17 January 2002 includes similar principles as the anti-discrimination act to create grounds for criminal and civil action against harassment *(harcèlement moral)* and for civil remedies against housing discrimination. In addition, the *Law of Social Modernisation* incorporates in the Labour and Criminal Codes the offence of moral harassment. The definition of moral harassment does not follow the exact wording of the Employment Equality Directive, particularly as this law provides that the contested conduct needs to be repetitive in order to be covered by this provision (Art. L.122-49).[93] Additionally, harassment remains to be included in the definition of discrimination in several areas, such as social security, education, social welfare and the provision of goods and services.

In **Ireland,** provisions against harassment are made in the *Employment Equality Act 1998* and the *Equal Status Act 2000* and apply to nine discriminatory grounds including race and membership of the Traveller community. The definition of harassment in these Acts is being amended to comply with the Framework Employment and Racial Equality Directives and will apply across the nine grounds. The Equality Authority, established under the Employment Equality Act and the Equal Status Act, as foreseen in its mandate, prepares codes of practice under the legislation. The Equality Authority has stated in its recommendations that the objective nature of the definition of harassment should be deleted, as

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91 The report 'Denmark – A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief, with the Council Directives' noted as possible legal interpretation that although no direct prohibition of harassment on account of race, ethnic origin or religion exists, Section 2 of the Act on Prohibition of Differential Treatment in the Labour market *inter alia* bars the employer from discriminating with regard to labour conditions. Interpreted in accordance with Section 4 of the Act on Equal Treatment of Men and Women, this provision may include a protection against harassment on account of race, ethnic origin or religion (however, at the time of the study's completion, no case law on this issue was reported to exist). Harassment may also be covered by provisions on harassment (section 265 Criminal Code), race discrimination (section 266b) or libel (section 267). See: Denmark – A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief, with the Council Directives. EUMC, Vienna 2002; available at: http://eumc.eu.int/eumc/material/pub/Art13/ART13_Denmark-en.pdf (27.08.2003).

92 This Act, presented in Parliament in January 2003, passed on 20 May 2003 and entered into force on 1 July 2003 covers no employment issues. On 20 May 2003 a majority in the Danish Parliament rejected the proposed Bill amending the Act on Prohibition of Differential Treatment in the Labour Market.

93 http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MESX0000077L (26.08.2003).

according to the Directive, harassment need not to be reasonably regarded as violating the dignity of the person but merely has to have the purpose or effect of violating the dignity of a person.

The *Legal Decree No. 215* adopted on 9 July 2003 implementing the Racial Equality Directive in **Italy** includes a definition on racial or ethnic harassment, which fulfils the requirements of the Racial Equality Directive.

In the **Netherlands** the Equal Treatment Commission issued two rulings. They determine that harassment within the workplace belongs to the definition of distinction in the *Equal Treatment Act,* and that the definition will not solely be applied to employment issues but to other areas covered by the *Equal Treatment Act* as well. Nevertheless, harassment as defined in Art. 2.3 of the Racial Equality Directive is not explicitly included in the Equal Treatment Act.[94]

In Spain, there is no concept of unlawful harassment corresponding to Art. 2.3 of the Racial Equality Directive.

In **Sweden,** the *Act on Measures against Ethnic Discrimination in Working Life* contains the concept of harassment (para. 3), but falls short of Art. 2.3 of the Racial Equality Directive. The 1999 act also imposes the duty on the employer to investigate and take measures against harassment (para.13). In this new act, which came into force on 1 July 2003, harassment is defined as discrimination and is covered by the prohibition of discrimination. According to this act, harassment refers to conduct that violates a person's dignity and is related to ethnic origin, religion or other belief, sexual orientation or disability.[95]

In **Great Britain,** under the *Race Relations Act 1976,* harassment on racial grounds is regarded as direct discrimination because it constitutes a 'detriment' in employment or in the way a service is provided. The *Race Relations Act 1976 (Amendment) Regulations 2003*[96] make harassment on grounds of race or ethnic or national origin (according to Art. 2.3 of the Racial Equality Directive) a separate unlawful act in Great Britain. The changes of this Amendment apply to the provision of goods, facilities and services and to public functions (such as any form of social security; health care; other forms of social protection; and any form of social advantage) and only to acts of discrimination on grounds of race, ethnic or national origin (therefore e.g. not on grounds of colour or nationality, which are, however, covered by the provisions of the Race Relations Act 1976).[97] In Northern Ireland the *Race Relations (Northern Ireland) Order 1997* did not expressly define racial harassment. As the concept of unlawful harassment as a form of direct discrimination existed already in case law, it has been inserted in the

[94] Netherlands – A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the Council Directives. p.16f., EUMC, Vienna, 2002; available at: http://eumc.eu.int/eumc/material/pub/Art13/ART13_Netherlands-en.pdf (26.8.2003).

[95] *Extended protection against discrimination*, Fact Sheet, Ministry of Justice, Sweden, Ju 03.12e, June 2003, available at: http://www.justitie.regeringen.se/inenglish/pressinfo/pdf/FaktaJu_0312e.pdf (10.09.2003).

[96] Entered into force on 19 July 2003.

[97] http://www.cre.gov.uk/legaladv/rra_regs.html (26.8.2003).

1997 Order through a definition similar to Art. 2.3 of the Racial Equality Directive.[98]

In **Germany, Greece, Luxembourg**[99] and **Portugal**[100] there is currently no definition of unlawful harassment based on race or ethnic origin as outlined in Art. 2.3 of the Racial Equality Directive.

4.3. Instruction to discriminate

The definition of discrimination provided in the Racial Equality Directive states that *'instruction to discriminate against a person on grounds of racial or ethnic origin shall be deemed to be discrimination...'* The disparity of legal provisions covering 'instruction to discriminate' in the EU Member States is particularly obvious. However, in most States the national legal systems protect against incitement of hatred or discrimination, by making it a criminal offence.[101]

Legislation in **Austria, Belgium, Denmark, Ireland, Italy, Portugal, Sweden** and the **United Kingdom** explicitly prohibits instruction to discriminate. Nevertheless, this concept is expressed in different legal terms and is to be applied in specific cases. While Belgium and Portugal use a concept that considers 'encouragement' as unlawful, Ireland and the United Kingdom penalise 'procurement'.

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98 *Race Directive, a note on implementation in Northern Ireland*; The Office of the First Minister and Deputy First Minister, 2003; available at: http://www.ofmdfmni.gov.uk/equality/ (27.8.2003).

99 The NFP noted that despite the absence of specific guarantees against acts of sexual harassment, Luxembourg provides legal protection in the employment sector against sexually or racially-oriented harassment or abuse of authority through the 2000 law, by means of protection or caution measures and the defence of the weakest party, but also through the 1997 law on discrimination. This law has a repressive vocation, since the people who commit discriminatory acts incur criminal sanctions. Nevertheless, the law does not provide for means of intervention within undertakings in order to re-establish the situation of the person who has been victim of such acts. The person has the possibility to take advantage of Art. 27 of the 1989 law.

100 Although the definition of racial discrimination in Law 134/99, 28 August 1999 is formulated very broadly, no concept of unlawful harassment corresponding to the Art. 2.3 of the Directive seems to exist.

101 For a more detailed elaboration of the Member States' legislation on incitement and instigation covered in Penal Law, refer to section 6 of this report.

According to **Austrian** Criminal Code (para. 12 and 13) it is generally unlawful to instigate or incite to commit a crime or make someone commit a crime.[102] Up to now this is only provided and applicable in criminal law. The proposal for a new Equal Treatment Act foresees discrimination also in terms of instruction to discriminate within the meaning of the definition. Sect. 13 para. 3 and sect. 27 para. 3 of the draft provides for 'instruction to discriminate' to be regarded as discrimination. [103]

With the **Belgium Act** 2003 *pertaining to the combat of discrimination and to the amendment of the Act of 15 February 1993 pertaining to the foundation of a centre for equal opportunities and opposition to racism* the aspect of 'instruction to discriminate' is analogous covered by focusing on incitement as *'any and all practices which consist of inciting discrimination against a person, a group, a community or members of it pursuant to one of the grounds referred to in para.1, shall be considered as discrimination pursuant to this act'*[104] (Chapter II para.7). This concept was already provided in the 1981 Anti-discrimination law where incitement to racial discrimination was declared unlawful.[105] As far as words and intentions are concerned, two types of discriminatory statements can be penalised, statements encouraging *others* to discriminate and statements by means of which a person publicises with the intention to discriminate. A mere insult against a person based on race is not punishable on the basis of the anti-racism law. The insult must be an incitement to hatred. Insulting individuals is dealt with separately in the Penal Code (Art. 561, para. 7), like libel and slander (Art. 443 et. seq. of the Penal Code).

Although 'instruction to discriminate' is not specifically prohibited in **Irish** legislation, it could be argued that the prohibitions on procurement in the 1998 *Employment Equality Act* (EEA) and 2000 *Equal Status Act* (ESA) cover such actions. Prohibition of procurement is covered in Section 14 of EEA as: *'A person who procures or attempts to procure another to do anything which constitutes discrimination under the Act (or victimisation under the act) shall be guilty of an offence'* and Section 13 of ESA: *'A person shall not procure or attempt to procure another to engage in conduct prohibited by the Act, and a person who does so procure shall be guilty of an offence'*. These sections apply to all the discriminatory grounds covered by the legislation. [106]

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[102] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Austria*, p. 16.

[103] See http://www.wif.wien.at/gleichstellungs_site/gleichstellung_pages/downloads/gbg-rv.doc.

[104] Available at: http://www.antiracisme.be/en/laws/Act_discrimination.htm (23.8.2003).

[105] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Belgium*, p. 17.

[106] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Ireland*, p. 15.

Ireland is amending the *Employment Equality Act 1998* to include within the definition of discrimination the issue of an instruction to discriminate, in accordance with the Framework Employment and Racial Equality Directives and will apply across the nine grounds.

In **Italy,** Art. 2, 4 of the new Law *Decreto legislativo* of 9 July 2003 implementing the Race Equality Directive, covers 'instruction to discriminate' in exact wording as defined and required by the Directive. In addition, 'the 1998 immigration Law *(Testo Unico)* gives to the judge the power of issuing an order of interruption of discriminatory behaviour. An instruction to discriminate, given for instance to an employment placement agency, seems to be covered by the definition of discrimination given by Art. 43, once the causal connection between the order and an actual discrimination is proved.' [107]

Portuguese Law No. 134/99, 28 August 1999, governed by Decree-Law No. 111/2000 includes the 'instruction to discriminate' generally stated as: 'any distinction, exclusion, restriction or preference on the grounds of race, which has the objective of or produces as a result invalidation or restriction...'[108] In respect to the employment sector, in chapter II, the following situation typifies — besides others — a discriminatory practice: *'Adoption of a procedure, measure or criterion, either by the employers themselves or through instructions given to their workers or the employment agency, that makes a job offer, cessation of a work contract, or refusal to hire a worker depend on factors of a racial nature'.*

In respect to religion or race Art. 240, no. 2 on Racial or religious discrimination of the Penal Code,[109] it has to be noted that *the intention of inciting or encouraging racial or religious discrimination (...)* has not often been properly established and proved after the crime has become known. This fact has led to many cases being closed on the grounds that there was no evidence of racist motivation. Art. 240, no. 2 of the Penal Code[110] punishes, besides other offences, anyone who publishes with the intention of inciting or encouraging racial or religious discrimination a document which causes violent acts.[111] The penal scale ranges from 6 months to 5 years imprisonment.

In the new **Swedish** law prohibiting discrimination, which came into force on 1 July 2003, there is an explicit regulation on *instructions to discriminate* on the ground of racial or ethnic origin: The term instructions to discriminate refers to a situation in which someone gives another person orders or instructions to discriminate against some other individual. Indeed, instructions to discriminate

[107] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Italy*, p. 15.

[108] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Portugal*, p. 16.

[109] In force since Law No. 65/98, 2 September 1998.

[110] In force since Law No. 65/98, 2 September 1998.

[111] ...against a person or a group of persons due to their race, colour, ethnic or national origin, or religion, slanders or insults a person or a group of persons due to their race, colour, ethnic or national origin, or religion, denies war crimes or crimes against the humanity...

are defined as discrimination and are covered by the prohibition of discrimination.[112] Furthermore, since January 2003 the legislation on agitation against a national or ethnic group was partly changed. For example, it is now possible to define incitement as a 'gross' or serious crime with a penal scale ranging from 6 months to 4 years imprisonment. If interpreted very broadly, the provisions of Chapter 2 of the 'Instrument of Government'[113] dealing with fundamental freedoms and rights indicate closeness to 'instruction' in Sentence 2 by stipulating that every citizen is protected in his relations with the public institutions *'against any coercion to divulge an opinion in any political, religious, cultural or other such connection, against any coercion to participate in a meeting for the formation of opinion or a demonstration or other manifestation of opinion, or belong to a political association, religious community or other association for the manifestation of opinion'.*

Under **UK** anti-discrimination legislation it is unlawful to give instruction to discriminate on racial grounds (religious grounds are not included) under Section 30 of the 1976 *Race Relations Act* and Art. 30 of the 1997 *Race Relations (Northern Ireland) Order: 'In a relationship of authority or in accordance with whose wishes that other person is accustomed to act, to instruct him to do any act which is unlawful (by virtue of Part II or Part III) or procure or attempt to procure the doing by him of any such act'.*[114] Therefore it is unlawful to instruct or procure a person, or to attempt procuring a person to any act that constitutes unlawful discrimination. Any legal challenge based on 'instruction to discriminate' is not possible for an individual, but must be initiated by the *Commission for Racial Equality* or the *Equality Commission for Northern Ireland.* Additionally, in accordance to Section 31 of the 1976 Act and Art. 31 of the 1997 Order to induce or attempt to induce another person to discriminate is unlawful. [115]

The *Fair Employment and Treatment (Northern Ireland) Order 1998* cover religious grounds stating in Art. 35 that *'any person who knowingly aids, incites, or directs, procures or induces another to unlawful religious discrimination'.*[116]

[112] *Extended protection against discrimination*, Fact Sheet, Ministry of Justice, Sweden, Ju 03.12e, June 2003, available at: http://www.justitie.regeringen.se/inenglish/pressinfo/pdf/FaktaJu_0312e.pdf (10.09.2003).

[113] The "instrument of Government" is one of the four fundamental laws of the Swedish constitution.

[114] The Race Relations (Northern Ireland Order) 1997 (Instrument No. 869 [N.I. 6]); available at: http://www.law.qub.ac.uk/humanrts/ehris/ni/const/RACEREL97.htm (23.08.2003).

[115] With the Race Relations Act 1976 (Amendment) Regulations 2003 (*Statutory Instrument 2003 No. 1626*) – which came into force on 19th July 2003 – extends to office holders (Regulation 31) the application of the section of the 1976 Act dealing with instructions to discriminate (or, now, harass); available at: http://www.hmso.gov.uk/si/si2003/20031626.htm (23.08.2003).

[116] Statutory Instruments 1998 No. 3162 (N.I. 21). The *Fair Employment and Treatment (Northern Ireland) Order 1998 – continued.* Available at: http://www.hmso.gov.uk/si/si1998/98316204.htm#35 (23.08.2003).

All other Member States do not explicitly prohibit 'instruction to discriminate' (even though this might fall under the general definition of discrimination). In the **Netherlands,** for example, a person who gives 'instruction to discriminate' is not discriminating under the present legal definition. Under criminal law the discriminating person who breaks the law, whether 'deliberately'[117] or not, is found guilty.[118] Moreover, since an amendment of 1992 Art. 137f determines that providing support to discriminatory activities is no longer a summary offence, but a crime.

According to the provisions in the **Danish** Criminal Code, 'incitement', 'assistance' or 'attempt' to racial or ethnic discrimination in regard to the provision of goods, facilities and services is prohibited under Section 23 and 21.[119] A proposed act was to be presented to Parliament in the beginning of 2003. It contains a definition of discrimination, i.e. direct and indirect discrimination, harassment and instruction to discriminate. However, Denmark has transposed only the non-employment part of the Directive.

There may be situations of 'instructions' which could partly be covered by 'incitement' or other similar provisions. According to the **Finnish** Penal Code chapter 11, section 8, it is unlawful to order, hire, harass or otherwise intentionally incite or compel another person to a crime.

In **Spanish** legislation 'provocation', 'promotion' and 'incitement' are considered to be unlawful. 'Provocation to discriminate' is covered in Art. 510.1 Penal Code, penalising it with imprisonment and a fine for *'those who provoke discrimination, hatred or violence against groups or associations for racist, anti-Semitic or other reasons relating to their members' ideology, religion or beliefs, family situation, membership of an ethnic group or race, national origin, sex, sexual orientation, illness or disability'.* Regarding the 'promotion of discrimination' and 'incitement to discriminate', Art. 515.5 of the Penal Code states that those associations shall be considered illegal and be punished *'which promote discrimination, hatred or violence against a person, groups or associations because of their members or some of their members belong, their sex, sexual orientation, family situation, illness or disability'.*[120] It has to be added that for the year 2003 the government planned a reform of the Spanish legislation.

In **France, Germany, Greece, Luxembourg** and **Spain,** Criminal Law principles can be applied in order to ban 'instructions' resulting in discrimination of either an

[117] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Netherlands*, p. 17.

[118] Art. 137g, since the amendment of 1992, contains not only the ban on deliberate discrimination in the running of a business or the practice of a profession, but also in the exercise of official duties. Art. 429quater forbids the same offence as 137g, but without the requirement that the discrimination be deliberate.

[119] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Denmark*, p.12.

[120] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Spain*, p. 21.

individual or a group. As in other States, in the legislation of **France** incitement is predominant rather than 'instruction to discriminate'. The legal framework deriving from the Law of 29 July 1881, as modified, deals besides certain other specific offences with incitement to hatred defined as *'behaviour intended to create a feeling of hostility or rejection and to encourage discriminatory or violent behaviour directed at a person or group of persons'.* Further, it states a number of offences deriving from the verbal (oral or written) and non-verbal expressions of various forms of racism, specifically racial defamation, racial insult, incitement to racial discrimination, hatred or violence, denial of or apology for crimes against humanity. The acts are indictable offences (*délit,* equivalent to felony in legal language) if committed publicly, i.e. when the words, writings, printed material, drawings, etchings, paintings, emblems, images, or any other medium of speech, word, or picture, are distributed, presented for sale, or exhibited, in public places or gatherings. The offences carry maximum sentences of one-year imprisonment and € 45,000 fine for defamation and incitement, and 6 months imprisonment and a € 22,500 fine for insult. When committed privately, the same acts are not indictable (they are *contraventions* in French legal terminology, 'misdemeanours' in English legal terminology) and carry a maximum fine of € 1,500 for incitement, and € 750 for defamation and insult. Although incitement in itself is not considered to constitute discrimination, increased use of the Criminal Code has clarified Penal law; and the Anti-discrimination Act of 16 November 2001[121] on a number of points, which will be of great assistance to future victims.[122]

In **Luxembourg** the law against racist acts and incidents of 19 July 1997[123] does not specifically provide legal action against 'instruction to discriminate'. However, Art. 457-1 of the Criminal Code (introduced by this same law) creates an offence of, and sets penal sanctions for incitement to discrimination in public by verbal means (written, painted, printed etc. or oral) 'towards a natural person or legal entity, group or community'. However, the law does not stipulate that these instructions can be considered as discrimination. [124]

[121] *Loi no. 2001-1066 du 16 novembre 2001 relative à la lutte contre les discriminations (JORF no. 267 du 17 novembre 2001, p. 18311*).

[122] It has been declared unlawful to demand financial guarantees from a prospective tenant on grounds of nationality, for a mayor to use communal pre-emption rights to prevent foreigners from purchasing a house, and for a public declaration to refer to the 'immigrant' population in a way conducive to incitement to discrimination.

[123] Amending the Penal Code.

[124] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Luxembourg*, p. 15.

In addition, in **Germany** or **Greece** instigation could — depending on interpretation and application — be regarded as instruction. In **Germany** this could be 'incitement of the people' ('Volksverhetzung', para. 130 Penal Code [*STGB*]) and instigation to commit libel or slander (Sections 26, 185 Penal Code [*STGB*]).[125] Under para.130 Penal Code anyone can be sentenced to prison from three months to five years who calls on hate and violence against parts of the population or 'against a national, racial, religious group or a group defined by national customs and traditions', or who abuses, disparages or slanders these groups and thereby attacks human dignity.' A situation where instruction to discriminate may be regarded as illegal under Section 26, para 185 Penal Code, could be for instance: an official, for example a police officer, instructing a subordinate to discriminate against persons on the grounds of racial or ethnic origin. This would — apart from the criminal offences implied — make the resulting administrative act illegal, among other reasons, because of a breach of the principle of the rule of law and a violation of Art. 3.1., 3.3 of the Basic Law.[126]

Art. 1 and 3 of **Greece's** first anti-racist law 927/1979 (and its amendment appended to law 1419/1984[127] and to law 2910/2001[128]) punish by imprisonment of up to two years or a fine or both '*anyone who intentionally and publicly instigates acts or activities capable of provoking discrimination, hate or violence against individuals or groups because of their racial, ethnic origin and religion'* and by Art. 3 punishing the act of refusing to sell goods or supply services, or subjecting the aforementioned activities to special conditions on racial grounds. Incitement to discrimination is expressly covered by Art. 1 and may also, in practice, cover instruction to discrimination. The statutory purpose of the Anti-Racism Law is to safeguard 'public order' and is therefore directly related to a general criminal provision: Art. 192 of the Greek Penal Code. Art. 192 of the Penal Code punishes any action 'inciting disharmony among citizens'.[129] Prosecution may be initiated *ex officio.* A maximum of 2 years punishment, if no other more severe penalty is provided by another provision (e.g. Art. 1 of anti-racist-law 927/1979[130]), is applied to anyone who publicly provokes or incites citizens to act violently against each other, or to mutual discord, and disturbs public peace. It is nevertheless inevitable to amend the law so as to define clearly the concept of 'racist instruction'.

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125 EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Germany*, p. 15.

126 EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Germany*, p. 15.

127 Greece, No. 1419/1984 (FEK 28A/14-03-1984), specified that discrimination on the basis of religion is also punishable.

128 Greece, No. 2910/2001 (FEK 91A/02-05-2001) allows the public prosecutor to bring charges ex officio.

129 "Citizens" are defined as 'groups of citizens whose bond is i.e. religious or political conviction, professional occupation or race or some conviction other than religion or political ideology'. It has to be mentioned that on the basis of this article groups claiming a Macedonian or Turkish ethnic identity or the right to use the Macedonian language have been prosecuted and convicted.

130 Greece, No. 927/1979 (FEK 139A/28-06-1979).

4.4. Genuine and determining occupational requirements

According to Art. 4 of the Directive, two requirements have to be complied with:

1. the distinctive treatment must be based on a genuine and determining occupational requirement and

2. the objective must be legitimate and the requirement proportionate.

In **Austria,** the Ministerial Draft for a new Equal Treatment Act, concerning equal treatment without difference due to race, ethnic origin, religion or belief, age and sexual orientation in employment includes in Art. 14 (1) a definition equal to Art. 4 of the Racial Equality Directive. Additionally, there exist specific exceptions for direct differentiation on grounds of religion or belief in the context of activities of churches or other public or private organisations whose ethos is founded on religion or *Weltanschauung.* Art. 14 of the Draft Law furthermore includes exceptions on grounds of age. In regard to equal treatment without difference due to race or ethnic origin in other areas, Art. 27 of the Draft Law is similar to the corresponding article of the Racial Equality Directive.

In **Belgium,** according to the constitution, only Belgians are eligible for civil and military service, but exceptions could be provided for by law.[131] Also, differences in treatment may occur without being considered as discrimination, in areas linked to sex and religious grounds (jurisprudence of the Council of State).[132] Concerning genuine and determining occupational requirements, the general anti-discrimination law, passed on 12 December 2002, comes close to the Art. 4 of the Racial Equality Directive, although the explicit specification that the objective needs to be legitimate and the requirement needs to be proportionate is lacking (in the law the term 'objective ground of justification' is used). [133]

[131] Art. 10 [Equality] (2) of the constitution: Belgians are equal before the law; they are the only ones eligible for civil and military service, but for the exceptions that could be made by law for special cases.

[132] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Belgium*, p. 29f.

[133] The definition of discrimination proposed in the bill has been subject to criticism, especially because it was provided that direct discrimination could be justified under particular circumstances, the so-called 'objective ground of justification'. In view of compliance with the two Council Directives, para. 5 of Art. 2 stipulates that in the area of labour relations, as defined in the second and third clause of para. 4, the difference in treatment is based on an objective and reasonable justification if such a characteristic, due to the nature of the professional activity or context within which it has to be carried out, constitutes an essential and prescribed part of the professional activity. The reason for including an 'objective ground of justification' has to do with the large scope of this law. Moreover, this law covers more discrimination grounds than those indicated in the Directives, notably health condition of a person, physical characteristic and financial assets. It is purposely opted for an open interpretation of direct discrimination instead of a closed definition, in which case an exhaustive list of all the exceptions to the rules needs to be established.

In **Denmark,** in regard to the employment sector, provisions in the proposed Bill amending the Act on Prohibition of Differential Treatment in the Labour Market, which was rejected in the Danish Parliament on 20 May 2003, should have established exceptions as a consequence of occupational requirements in order to comply with the Racial Equality Directive instead of adopting new legislation. However, section 6 (1) of the Act on Prohibition against Differential Treatment in the Labour Market provides specific exceptions for employers and includes in section 6 (2) a general exception in relation to occupational requirements.[134] It might be questionable if these exemptions fulfil the criteria of constituting a legitimate objective and being a proportionate requirement.

In **Finland** the constitution, chapter 11 section 125, establishes that it may be admissible to adopt a parliamentary act that only Finnish citizens can be appointed to certain public offices. There are also accepted restrictions, which, besides citizenship, relate to religion, such as who may be employed as a minister in the Finnish Lutheran and Orthodox Church.[135] The Penal Code sanctions in chapter 47, section 3 an employer's behaviour to the detriment of a job seeker or an employee if the distinction due to a variety of grounds[136] is made without an important and justifiable reason. These provisions are similar to Art. 4 of the Directive, but nevertheless, legislative amendments seem to be necessary in order to achieve compliance with Art. 4. The preamble of the Employment Contracts Act, stating in chapter 2 section 2 that the employer shall not exercise any unwarranted discrimination[137] against employees, provides that discrimination is not unwarranted if it is based on proper and justified cause.[138]

In **Germany,** the exemption of differential treatment due to genuine and determining occupational requirements is not inconsistent with the principle of equal treatment as laid down in the German Basic Law, if the condition is given that equal situations are treated equally. The civil law anti-discrimination bill, which is planned, would, once coming into force, bring modifications to the Civil Code (Bürgerliches Gesetzbuch BGB). Para. 319d section 1 No.1 BGB of the

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134 Act on prohibition against differential treatment in the labour market (Act 456/1996, Denmark) Section 6 – Exceptions (1) Sections 2 to 5 shall not apply to an employer whose enterprise has the express object of promoting a particular political or religious opinion, unless this is in conflict with European Community law. (2) If it is of decisive importance in connection with the exercise of certain types of occasional activities or training activities that the person concerned is of a particular race, political opinion, sexual orientation, national, social or ethnic origin or has a particular colour or belong to a particular religion, the appropriate Minister may, after having obtained the opinion of the Minister of Labour, make exceptions to the provisions laid down in sections 2 to 5. However, this shall not apply, if it is in conflict with European Community law.

135 EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Finland,* p 18.

136 Because of race, national or ethnic origin, colour, language, sex, age, relations, sexual preference or state of health or because of religion, political opinion, political or industrial activity or a comparable circumstance.

137 On the basis of age, health, national or ethnic origin, sexual preference, language, religion, opinion, family ties, trade union activity, political activity or any other comparable circumstance.

138 EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Finland,* p 18.

draft establishes permissible differentiations for contractual relationships between employer and employee if one of the grounds listed in para. 319a section 1 BGB (among others: ethnic origin) constitutes an important occupational requirement that is appropriate and required for the occupation. Concerning other contracts, para. 319d section 1 No. 2 BGB provides for permissible differentiations only if justified by objective reasons. Grounds such as race and ethnic origin are excluded, and therefore in Germany no objective reasons exist to justify differentiation on those grounds. Furthermore, para. 319d section 3 of the draft provides for permissible differential treatment in cases where unequal treatment serves the interest of establishing full equality. It is obligatory for civil servants to have German citizenship, although exceptions are possible if there is an urgent public need to recruit civil servants who are non-Germans (as for example for the police force).

In **Greece,** no specific exemptions relating to genuine and occupational requirements exist. However, the employment code provides that only Greek citizens shall be appointed as civil servants. An exemption is established through Law 2431/1996, allowing recruiting of nationals of EU Member States, as long as the person is not involved in the direct or indirect exercise of political powers or tasks to safeguard the general interests of the state or other public-sector agencies.[139]

In **Ireland** the *Employment Equality Act 1998* (EEA) includes in Section 36 the option for language tests and tests in relation to residence and citizenship in certain areas of employment (such as police force and civil service). The specific exemptions to the prohibition on discrimination provided for in section 37(2) to (5) of the *Employment Equality Act 1998* are being replaced with new provisions which are in accordance with Art. 4 of the Framework Employment and Racial Equality Directives. Section 37 subsections 2-5 contains several specific exemptions to the prohibition on discrimination, e.g. Section 37(2) of the EEA (1998) allows a difference of treatment if the relevant characteristic of a person is or amounts to an occupational qualification. Section 37(5) establishes the exemption from the prohibited grounds of discrimination the employment of any person within a private household.[140] Section 5(2)(i) of the *Equal Status Act 2000* (ESA) provides that the difference of treatment in the area of providing goods and services *inter alia* on grounds of race should be 'reasonably required'.

In **Italy,** the implementing Legal Decree defines that the notion of discrimination applies, unless the concerned provision, criterion or practice is objectively justified by objective reasons not based on the mentioned qualities. Also, discrimination shall not be noted if these reasons regard essential requirements for the carrying out of a certain work activity. In **Italy,** *Decreto legislativo,* Decree-Law No. 215, implementing the Racial Equality Directive, entered into

[139] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Greece*, p. 10.

[140] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Ireland*, p. 22.

force on 9 July 2003 and covers genuine and determining occupational requirements as outlined in the Directive.

The Penal Code of **Luxembourg,** Art. 457 provides that for certain exemptions Art. 455 and 456 of the Penal Code, punishing discriminatory treatment, are not applicable in cases of distinctive treatment. This applies under certain conditions to differential treatment on grounds of health and handicap (employment area) and nationality (employment; public service; matters concerning entry, stay and right to vote in the country).[141] In para. 5 of Art. 457 Penal Code, the legislator reserved the possibility of creating new exceptions to which Art. 455 and 456 would not be applicable. For establishing compliance with Art. 4 of the Directive, this paragraph needs to be reviewed in order to prevent any kind of already existing discriminatory practice to be legalised. [142]

In the **Netherlands,** Art. 2 (4) of the Equal Treatment Act outlines that the '*prohibition on discrimination on the grounds of race shall not apply in cases where a persons' appearance stemming from a particular racial background, is a determining factor'.* Art. 2 of the Equal Treatment Decree sums up categories to which Art. 2 (4) of the Equal Treatment Act applies: artists if the part they are playing requires so, mannequins or models in cases where certain features and appearances are reasonably required, beauty contests and providing services that can only be rendered to persons with certain features and/or appearances. This list of exceptions is exhaustive, no other exceptions are allowed. Art. 3 of the Equal Treatment Act provides that this act shall not apply to legal relations within religious communities and independent sections thereof and within other associations of a spiritual nature and the office of cleric. Furthermore, Art. 5 (2) a. of the Equal Treatment Act provides that subsection 1 (unlawful discrimination) does not apply to '*the freedom of an institution founded on religious or ideological principles to impose requirements which, having regard to the institution's purpose, are necessary for the fulfilment of the duties attached to a post; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status'.*[143]

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[141] Art. 457 somehow moderates the provisions that precede it by omitting to consider certain facts as discriminatory: 1) In discrimination based on health, when it consists of operations having as objective the prevention and the coverage of the risk of death, risk striking a blow at the physical integrity of a person or the risk of incapacity to work or invalidity; 2) In discrimination based on health or handicap, when it consists of a refusal to hire or dismissal based on the medical inaptitude stated by the interested party; 3) In discrimination based on hiring, on nationality, when belonging to a definite nationality constitutes, according to the statutory provisions relative to public service, to the rules relative to the exercise of certain occupations and to the provisions in Employment law, the determining condition in the exercise of a job or a professional activity; 4) In discrimination based on entry, of staying and in the right to vote in the country, on nationality, when belonging to a definite nationality constitutes, according to the legal and statutory provisions relative to entry into a country, of staying and of the right to vote in the country, the determining condition of entry, of staying and exercise of the voting right in the country.

[142] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Luxembourg*, p. 23.

In **Great Britain,** the Race Relations Act 1976 (Amendments) Regulations 2003, introduces exemptions for genuine occupational requirements, where '*having regard to the nature of the employment or the context in which it is carried out being of a particular race or of particular ethnic or national origins is a genuine and determining occupational requirement; it is proportionate to apply that requirement in the particular case; and either the person to whom that requirement is applied does not meet it, or the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it'.*

Furthermore regarding Northern Ireland, Art. 8 of the 1997 Order lists specific jobs where being of a particular racial group is a genuine occupational qualification for one of those jobs. For example, it might be specified that waiters in a Chinese restaurant be of Chinese origin because the employer wants to create an authentic atmosphere. Or a theatre might specify that an actor playing Martin Luther King be of African-Caribbean origin. In order to comply with Art. 4 of the Race Directive, which introduces the new concept of a genuine occupational requirement, Art. 8 of the 1997 Order is repealed in respect of the relevant grounds. In its place an exception has been introduced based on genuine occupational requirements. Employers will be able to recruit staff on the basis of a genuine occupational requirement if it can be shown that it is a genuine and determining requirement of the job to be of a particular race or of particular ethnic or national origins. In cases involving colour or nationality the existing provisions in Art. 8 of the 1997 Order will continue to apply.[144]

No specific exceptions are provided for in Portuguese legislation, nevertheless, Portugal, as well as Spain, has ratified ILO Convention 111, which stipulates that distinctions, exclusions or preferences based on qualifications required by the employment do not constitute discrimination.[145]

4.5. Positive action

In accordance with Art. 5 of the Racial Equality Directive the principle of equal treatment shall not prevent any *Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.* The implementation of such measures, generally referred to as 'positive actions' is meant to ensure full equality in practice. Such measures may permit organisations of persons of a particular racial or ethnic origin where their

[143] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council Directive – Netherlands*, p.19f.

[144] Race Regulations Order (Amendment) Regulations (Northern Ireland) 2003, in force since 19 July 2003. Office of the First Minister and Deputy First Minister, *Race Directive, a note on implementation in Northern Ireland*, 2003; available at: http://www.ofmdfmni.gov.uk/equality/ (27.08.2003).

[145] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council Directive – Portugal*, p.19f.

main object is the promotion of the special needs of those persons (point 17 of the introductory remarks to the Racial Equality Directive).

Generally, positive actions are implemented in most Member States. As in other areas, differences appear in respect to conceptions and definitions. In some states the adoption of such measures is recognised in the form of a general principle (Belgium, Ireland, Netherlands, UK), while in other states special action is applied specifically to certain groups and/or institutions (Austria, Germany, Greece).

In recent years, most countries developed specific legal or policy measures in certain areas like education, culture and language, employment and training, housing or political participation with the aim to compensate for disadvantages. Activities to prevent discrimination are more likely to be covered by policy measures or specialised bodies.

The following section only gives an overview of a range of positive actions in various fields taken by the Member States.

Recognition in the form of a general rule

Besides other measures, with the **Belgium** Act of 25 February 2003 pertaining to the combat of discrimination and to the amendment of the Act of 15 February 1993 pertaining to the foundation of a centre for equal opportunities and opposition to racism,[146] the aspect of introduction of positive measures in Art. 4 is virtually identical to the requirements of the Racial Equality Directive implemented as: '*The provisions of this act shall constitute no obstacle to the taking or using of measures geared to guaranteeing full equality in practice, or preventing or offsetting the disadvantages entailed by one of the grounds referred to in Art. 2'*.[147]

In **Ireland,** the 2000 *Equal Status Act* specifies certain actions which should not be 'construed as prohibiting'. Among others, this includes in section 14 (b) the preferential treatment or the taking of positive measures which are *bona fide* intended to 1) promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons, or 2) cater for the special needs of persons, or a category of persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs.'[148] Furthermore, positive action is permitted under the 1998 *Employment Equality Act* stating,

[146] *Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme* MONITEUR BELGE, 17 mars 2003, Err. M.B., 13 mai 2003.

[147] Art. 2 covers the definitions of discrimination; available at: http://www.antiracisme.be/en/laws/Act_discrimination.htm (23.08.2003).

[148] Section 9 of the Act specifically refers to members of the Travellers community by underlining that a 'Club' catering only for the needs of persons of, besides other grounds, religious belief, nationality or ethnic or national origin or persons who are members of the Travellers community, shall not be considered to be a discriminating club; available at: (23.08.2003).

under Section 33 (1) that nothing shall prevent the taking of measures (intended to reduce or eliminate the effects of discrimination) in order to facilitate the integration into employment, either generally or in particular areas or a particular workplace, of — among others — members of the Traveller community.[149] This provision is being replaced with a new more general provision, applying to the nine grounds.

In relation to housing, the 2000 *Equal Status Act* specifically allows housing authorities to provide 'different' (although arguably not less favourable) treatment to persons *inter alia* on grounds of membership of the Traveller community. The Traveller Accommodation Act 1998 requires Housing Authorities, in consultation with Travellers and the general public to prepare and adopt a 5 year programme to meet the existing and projected accommodation needs of Travellers in their area.[150]

As a general rule the **Dutch** 1994 Equal Treatment Act *(Algemene Wet Gelijke Behandeling; AWGB)* states in Section 2 (3) that the prohibition of discrimination *shall not apply if the aim of the discrimination is to place women or persons belonging to a particular ethnic or cultural minority group in a privileged position in order to eliminate or reduce de facto inequalities and the discrimination is reasonably proportionate to that aim'.*[151]

The Act on the Promotion of Ethnic Minorities in the Labour Market *(Wet SAMEN)* came into force on 1 January 1998 and was extended until the end of 2003. The act is to govern enterprises (the government included) in which at least 35 persons are employed. Each entrepreneur must try to reach a representation of minorities within the enterprise that is proportional to their share in the regional population. After evaluating the annual reports submitted to the Works Councils, the government has developed various incentives to promote compliance with the SAMEN law as described in the Policy Document on Labour Market Policy for Ethnic Minorities by the Ministry of Social Affairs and Employment: Plan of Action 2000-2003.[152]

The **UK** is the only Member State giving statutory force to tackling institutional racism: to make the promotion of racial equality and the elimination of existing discriminatory practices integral parts of how public functions are carried out, Section 2 of the *Race Relations (Amendment) Act* 2000 imposes a general positive duty[153] on an extensive list of specific public authorities. The RRA combines a negative obligation to eliminate unlawful discrimination with a complementary positive obligation to promote equality of opportunity and good relations between

[149] Available at: http://www.acts.ie/zza21y1998.1.html (23.08.2003).

[150] See: Travelling People Section – Dublin County Council- Accommodation Programme for the Travelling Community, year 2000- 2004; available at: http://www.acts.ie/zza33y1998.1.html (20.08.2003).

[151] Available at: http://www.cgb.nl/english/asp/awgb.asp (23.08.2003).

[152] *Nota Arbeidsmarktbeleid voor etnische minderheden: Plan van aanpak 2000-2003, Ministry of Social Affairs and Employment, The Hague, 2000*), see: National Bureau against Racial Discrimination (LBR), '*Internationaal* – year in perspective', available at: http://www.lbr.nl/euroinfo/english/yip_2000_eng_a.html (23.08.2003).

[153] The Act came into force on 2 April 2001.

people of different racial groups. The Act provides stipulates or specifies that a public body remains responsible for the performance implementation of the statutory duty to promote race equality imposed on it even if it has contracted out some of its functions. Supplementary, two Orders under section 71 of the *Race Relations Act* 1976 as amended came into force on 3 December 2001[154] imposing specific duties on bodies subject to the described general duty, to ensure their better performance of this duty.[155] Similar positive statutory duties have been imposed on many of the devolved regional authorities. In Northern Ireland, Section 75 of the *Northern Ireland Act* 1998 imposes a duty on specified public authorities to have due regard to the need to promote equality of opportunity across all the protected grounds in carrying out their public functions.

Recognition of positive action for specific ethnic groups and areas of application

In **Austria,** the existing specific legal measures of positive action to promote equal treatment of ethnic minorities — due to the protection accorded to autochthonous minorities by the constitution and the *Volksgruppengesetz* — have become the subject of public debate.[156] In addition, legal provisions in order to promote the interests of autochthonous minorities have stimulated a certain tendency towards segregation. Experts suggest that the claim of interest should be reached via positive action programmes, special provisions for certain settlement areas and policies, via special subsidies and via establishing own institutions.[157] With the Austrian ministerial draft for a new Equal Treatment Act, no specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin are foreseen.[158]

[154] Available at: http://www.hmso.gov.uk/si/si2001/20013457.htm; (23.08.2003) and http://www.hmso.gov.uk/si/si2001/20013458.htm (23.08.2003).

[155] Under this second order, listed government departments, local authorities, police and health authorities, regulatory bodies, commissions and advice agencies are required to prepare and publish a Race Equality Scheme, setting out how they intend to fulfil the requirements of the duty. A similar duty is imposed on educational bodies in respect of the ethnic composition and performance of their staff and pupils. The specific duties set out in the Orders are only enforceable by the *Commission for Racial Equality* (CRE) which has issued an extensive and detailed *Code of Practice*.

[156] There has been a long dispute on bilingual place names on signposts in Southern Carinthia.

[157] Baumgartner, G./Perchinig, B. (1997) 'Minderheitenpolitik (Minority policy)*',* in*:* Dachs, H./Gerlich, P./Gottweis, H./Horner, F./Kramer, H./Lauber, V./Müller, W.C., Tálos, E. (eds.) *Handbuch des politischen Systems Österreichs: Die Zweite Republik* (*Handbook of the Austrian political system: The Second Republic*), Vienna: Mainz, p.637.

[158] However, one has to mention that the latest draft version of the Equal Treatment Act issued on November 4, 2003 transposes art 5 Racial Equality Directive and art 7 Equality Employment Directive in sec 16 and 28 which explicitly lay down that positive measures do not constitute discrimination.

In **Germany** and **Greece,** too, positive action measures are taken in regard to their autochthonous minorities. In **Germany,** legislation on cultural matters, including language and education, is a prerogative of the federal states where theses minorities are primarily settled. However, as of August 2002, only five of 16 states had adopted legislative provisions regarding minority protection.[159] None of these articles specifically mentions Sinti and Roma, although the other three recognised minority groups (Danes, Friesians, and Sorbians) are specifically mentioned in the legislation of the states in which individuals belonging to these groups reside.

In **Greece,** a legal response is taken for example in the area of education. The Law 2341/1995[160] introduced the notion of affirmative action in favour of a socially excluded minority: according to the provisions of the law a specific number of places at every university department are reserved for Muslim minority (Turks, Pomaks and Roma) students. The *Presidential Decrees* 155/1978, 182/1984 and 86/2001 define the procedures for the recognition of studies and certificates of foreign schools and the integration of children to Greek schools through positive discrimination measures.[161]

Recognition of positive action for specific situations and areas of application

In **Denmark,** the 1996 act on prohibition against discrimination in respect of employment and occupation under para. 5, (9), 2 states: '*This Act shall be without prejudice to measures being introduced by virtue of other legislation, by virtue of provisions having their legal basis in other legislation or otherwise by means of public initiatives, with a view to promoting employment opportunities for persons of a particular race, colour, religion, political opinion, sexual orientation or national, social or ethnic origin'.*[162] Furthermore, para. 4 of the Act on Ethnic Equal Treatment allows for the possibility to use positive measures.

In **Finland,** the government action plan to combat ethnic discrimination and racism was adopted by parliament in March 2001. Focusing on the years 2001 to 2003, the government is prepared to support and promote measures to combat all forms of discrimination and racism. Besides a list of measures to be taken on local, regional and national level, one of the principal measures at government and ministerial level is '*a duty ... to promote the recruitment of persons belonging to*

[159] Art. 25 of the constitution of Brandenburg, Art. 18 of the constitution of Mecklenburg-West Pomerania, Art. 5.2 and 6 of the constitution of Saxony, Art. 37.1 of the constitution of Saxony-Anhalt, and Art. 5 of the constitution of Schleswig-Holstein. In addition, the school laws of Brandenburg and Saxony make it possible for Sorbian pupils to learn the Sorbian language.

[160] Greece, No. 2341/1995 (FEK 208A/06-10-1995).

[161] However, Art. 116.2 of the constitution actually provides a platform on which positive anti-discrimination legislation and administrative provisions could be based. It stipulates that affirmative action in favour of women does not constitute discrimination on the basis of sex. Moreover it provides that the state "*shall attend to the elimination of inequalities actually existing, especially to the detriment of women"*.

[162] Available in English at: http://www.posting.dk/data/english/forskelsbehandling2.htm (23.08.2003).

ethnic minorities to the staff of the ministries and their subordinate administration… '[163]

In **France,**[164] four governmental bodies responsible for labour market policy and immigration[165] concluded a three-year agreement in 2002 to reinforce the fight against discrimination by improving the access of migrants to public employment services, jobs and training.[166]

In **Luxembourg** specific measures where implemented aiming at '*favouring certain groups which are disadvantaged due to their racial or ethnic origin, religion or beliefs, with a view to eliminating existing inequalities affecting these groups, or to encourage real equality of opportunity for all members of society.'* In this context the law of 29 July 1999, amending the Grand-Ducal Regulation of May 1972 covering employment regulations for foreigners should be mentioned. Although measures are only temporary it provides for preferential treatment of refugees fleeing from a war zone, which is as such determined by the Dutch Council of State in respect to the general legislation on employment of foreigners.[167]

In **Portugal** several very tentative initiatives are taken particularly in the area of education to promote the Roma minority as well as ethnic immigrant minorities. These include measures aiming at increasingly involving Roma communities in the process of affirming their citizenship and equality. Cultural mediators established by Joint Decree No. 304/98[168] (Art. 2) for example, are entrusted with the responsibility to promote intercultural dialogue, stimulate respect and a sounder knowledge about cultural diversity and social inclusion.

The Normative Decree no. 5/2001, of 14 December 2001[169] establishes the Inter-cultural *(Entreculturas)* Secretariat.[170] The Secretariat is charged with devising, launching and coordinating inter-ministerial projects and programs, namely within the educational system, aimed at promoting values like socialising, tolerance, dialogue and solidarity, and securing specialised technical support. The Consultative Council for Immigration-Related Issues, created by Decree-Law No. 39/98, aims at ensuring the participation and cooperation of associations of

[163] Available at: http://wwwmol.mol.fi/migration/etnoraen.pdf (23.08.2003).

[164] In addition to legal provisions France implemented several institutional measures in order to counteract discrimination. Such provisions are '114' – a free of charge hotline for victims of discrimination and documentation centre, and the organisation GELD (Groupe d'étude et de lutte contre les discriminations). See section 6.2 on specialised bodies.

[165] The National Employment Agency; Action and Support Funds for Integration and Fighting Racism; General Directorate for Employment and Vocational Training; and the Population and Migration Department.

[166] Available at: http://www.stop-discrimination.info/index.php?id=382 (23.08.2003).

[167] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Luxembourg*, p. 23.

[168] Official gazette, II series, no. 96, April 24.

[169] Official gazette no. 27, series I-B, February 1, 2001. Revoking Normative Decree No. 63/91, February 18.

[170] Directly dependent on the government member with tutelage over equality issues and the Minister of Education.

immigrants and social partners, as well as social solidarity institutions in the definition of policies for social integration and the fight against exclusion. As far as the integration of immigrants and ethnic and/or cultural minorities is concerned, the essential principles of the national immigration policy, as listed in the preamble to Decree-Law No. 244/98, 8 August 1998, Art. 36, specifically include the 'Encouragement to Immigrants' Associations'. Law No. 20/96 constitutes the legal base for the participation of immigrant associations, anti-racist or human rights organisations in penal proceedings.

In the **Spanish** 1990 law on the education system, Art. 63, under section V *Compensation for inequalities in education, stipulates 'in order to render effective the principle of equality in the exercise of the right to education, the authorities develop compensatory actions aimed at persons, groups and territorial regions with unfavourable situations, and provide the necessary economic resources.'* [171]

Although not an action of preferential treatment, the provisions of the 1999 *Measures to counteract discrimination in working life Act* are most striking in **Swedish** legislation. Art. 4 to 7 instruct employers to actively promote ethnic diversity within the framework of their business by the implementation of such measures ensuring an appropriate work situation for all employees irrespective of ethnic background. Furthermore, '*the employer shall implement measures to prevent and stop any employee being subject to ethnic harassment or for reprisals as a result of a report of ethnic discrimination'* (Section 6).[172]

4.6. Burden of proof

The Racial Equality Directive outlines in its Art. 8[173] the burden of proof in civil and administrative cases, while already stressing in its introductory remarks that *the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.*[174] An exemption is made for criminal procedures.[175]

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[171] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council directive – Spain*, p. 23.

[172] Measures to counteract discrimination in working life act (*SFS* 1999: 130) – including amendments up to and including SFS 2000:762. Available at: http://naring.regeringen.se/inenglish/pdf/sfs1999_130.pdf (23.08.2003).

[173] Art. 8 para.1 of the Racial Equality Directive: *'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.*

[174] Point 21 of the introductory remarks to the Racial Equality Directive.

[175] Art. 8 para. 3of the Racial Equality Directive.

Indeed, the Directive emphasises thereby that once legal proceedings commence, the complainant is obliged to establish 'facts from which it may be presumed that there has been direct or indirect discrimination'. If this is achieved, then the burden of proof shifts to the respondent, who must prove that there has been no unlawful discrimination.[176]

The principle of the or shifting of the burden of proof in cases of racial and religious discrimination had existed so far in **Denmark** (where it was limited to wage differentiation)[177], **France** (only in employment)[178], Ireland (in practice in case-law, although explicit provisions are required)[179], **Italy** (partially and limited to employment)[180], **Netherlands** (based on a Supreme Court ruling, not on legislation),[181] **Spain** (but solely limited to social law)[182], **Sweden** (limited to employment)[183] and the **United Kingdom**[184].[185]

In **Austria,** the transposition of this article of the Directive seems insufficient. Whereas the Directive requires that the respondent must '*prove* that there has been no breach of the principle of equal treatment', the draft version of the Equal Treatment Act only obliges the respondent to *establish relevant facts.* This would make it much easier for any defendant to clear himself or herself from any reproaches and therefore is not in line with the minimum requirements established by the Directive.[186]

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[176] Combating racial and ethnic discrimination: taking the legislative European agenda further, ed. By Isabelle Chopin and Jan Niessen, March 2002, Brussels/London.

[177] Section 2(4) of the Act on Prohibition against Differential Treatment in the Labour Market.

[178] Anti-discrimination Act of 16 November 2001, *Loi relative à la lutte contre les discriminations* no. 2001–1066 and *Loi de modernisation sociale* no. 2002-73 of 17/1/02 on social modernisation which includes a chapter on combating moral harassment in the work place and on the burden of proof. Art. 169 of the social modernisation law was modified by Art. 4 of the Law no. 2003-6 of 3/1/03 concerning the burden of proof in case of moral harassment.

[179] The Equality Bill 2004 provides for a shift in the burden of proof to the respondent where a prima facie case of discrimination is established across all nine grounds.

[180] Art. 44, comma 9 of the Act no 286 of 1998 regulating immigration and the legal condition of foreigners, *Decreto legislativo 25 July 1998, No. 286 Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, although there has been scarcity of judicial implementation according to the NFP report.

[181] Based on the ruling of the Supreme Court in the so-called Binderen case (HR 10.12.'82, NJ 1983, 687).

[182] Art. 55 of the law on the Workers' Statute.

[183] See preparatory works to the 1999 Measures to Counteract Ethnic Discrimination in Working Life Act (SFS 1999:130).

[184] The position under UK law regarding the burden of proof in discrimination cases was set out by the Court of Appeal in the case of King v Great Britain China Centre [1991] IRLR 513, which was approved by the House of Lords in Zafar v. Glasgow City Council [1998] IRLR 36.

[185] European Roma Rights Center (ERRC), Interrights, Migration Policy Group (MPG) (August 2002) Racial, ethnic and religious discrimination, *A comparison of national and European law*, A comparison of EC Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Protocol No 12 to the European Convention on Human Rights with existing national law in 15 EU Member States and 11 candidate countries, Eds. Isabelle Chopin and Jan Niessen.

[186] See http://www.wif.wien.at/gleichstellungs_site/gleichstellung_pages/downloads/gbg-rv.doc (15.05.2004).

In **Belgium,** the new law foresees a shift of the burden of proof:[187] the federal law passed in January 2003 banning all forms of discrimination states explicitly that statistical data (or 'situation tests') can be used to establish the fact that there is prima facie evidence of unequal treatment in cases of discrimination. (A 'situation test' compares the way someone behaves in different circumstances, when, for example, they are confronted by a person of an ethnic minority or by someone of European origin.) Once the fact is established, the onus shifts to the person accused of unfair treatment to demonstrate that there are valid reasons for their behaviour.[188]

In **Denmark,** the new Act on Ethnic Equal Treatment introduced the idea of a shared burden of proof in cases of offence against the prohibition against discrimination. The Act on Prohibition of Differential Treatment in the Labour Market, which was finally adopted in April 2004, also introduced a shared burden of proof in cases of unequal treatment in the labour market.

In **Italy,** *Decreto legislativo,* Decree-Law No. 215, implementing the Racial Equality Directive, entered into force on 9 July 2003. The easing of the burden of proof remains partial in cases of discrimination on grounds of racial or ethnic origin. According to the decree, the plaintiff is required to present factual elements of a 'serious, exact and consistent' nature, suitable to establish that direct or indirect discrimination has occurred.

In **Spain,** it is planned to include the same provisions on the sharing of the burden of proof in legislation banning discrimination on various grounds as those incorporated in gender equality laws.[189]

In the **Netherlands,** initially the Dutch government showed reserve towards this provision.[190] For this reason it seemed wise to do as much as possible to clear up the misunderstandings regarding the provision's scope: if someone is thought to have been discriminated against, he has to produce the facts or circumstances on which that suspicion is based. The mere allegation of discrimination is therefore not enough. The burden of proof is not reversed, but it is shifted to the other party if the plaintiff has made a reasonable case for his argument.[191] This shifting of the burden of proof is not new in Dutch law. In civil cases, this mitigation of the burden of proof is also used when the standard division of the burden of proof leads to unreasonable results, such as cases of medical liability.[192] The Equal Treatment Commission has been applying the shifting of the burden of proof to

[187] Art. 19 para. 3 of the *Act of February 25, 2003 pertaining to the combat of discrimination and to the amendment of the Act of February 15, 1993 pertaining to the foundation of a Centre for Equal Opportunities and Opposition to Racism,* available at: http://www.antiracisme.be/en/laws/Act_discrimination.htm (10.09.2003).

[188] Available at: http://www.stop-discrimination.info/index.php?id=379 (10.09.2003).

[189] Available at: http://www.stop-discrimination.info/index.php?id=379 (10.09.2003).

[190] Also see Parliamentary Documents II, 1999-2000, 22 112, no. 145, p. 15.

[191] Also see Bosse, C. (2000) 'Richtlijn inzake bewijs van discriminatie', in: *SMA,* 2000, pp. 64-68.

[192] Netherlands, Hoge Raad, HR 20.11.1987, NJ 1988, 500, annotated by Heemskerk (Timmer/Deutman) and repeated in Nederland, Hoge Raad, HR 18.02.1994, NJ 1994, 368 (Schepers/De Bruin).

cases of discrimination since its establishment in 1994.[193] The Directive necessitates a modification of the law of evidence in the Equal Treatment Act.

In **Sweden,** a rule of proof with the following wording has been introduced in the new act, which came into force on 1 July 2003: '*If a person who feels that he/she has been discriminated against or exposed to reprisals shows that the circumstances give reason to presume that he or she has been discriminated against or exposed to reprisals, the respondent shall show that discrimination or reprisals have not occurred.'* The rule of proof means that if it is likely that discrimination has occurred, then the person who is supposed to have carried out the discrimination must show, respectively prove, that this was not the case.[194]

In **Great Britain,** the Race Relations Act 1976 (Amendment) Regulations 2003[195] foresees that regarding the burden of proof before employment tribunals that '*where, on the hearing of the complaint, the complainant proves facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent has committed such an act of discrimination or harassment against the complainant […] the tribunal shall uphold the complaint unless the respondent proves that he did not commit […] that act.'* Similar wording is also introduced regarding the burden of proof before County and Sheriff Courts in Northern Ireland.[196]

4.7. Specialised bodies

Chapter III of the Directive sets out the requirements of specialised bodies for the promotion of equal treatment of all persons without discrimination on grounds of racial or ethnic origin. Art. 13 defines the minimum competences those bodies should have.

Accordingly, these tasks can be assigned to one or several bodies, which can also be part of already existing bodies, charged at national level with the defence of human rights or individuals rights, therefore, new creation of a body is not required per se. Its aims and tasks as lined out in Art. 13 of the Directive are:

- Independent assistance to victims of discrimination in pursuing their complaints
- Conducting independent surveys concerning discrimination
- Publishing independent reports/recommendations on any related issue

[193] Leenders, M. (1997) *Bewijsrecht en discriminatie bij de arbeid*, Zwolle: Tjeenk Willink, p. 64.

[194] *Extended protection against discrimination*, Fact Sheet, Ministry of Justice, Sweden, Ju 03.12e, June 2003, available at: http://www.justitie.regeringen.se/inenglish/pressinfo/pdf/FaktaJu_0312e.pdf (10.09.2003).

[195] Statutory Instrument 2003 No. 1626, which came into force on 19 July 2003, available at: http://www.hmso.gov.uk/si/si2003/20031626.htm (10.09.2003).

[196] Thus, Regulations 41 and 43 alter the burden of proof in tribunal and court proceedings relating to discrimination on grounds of race, ethnic or national origins, or harassment, in areas with which the Directive is concerned.

Especially concerning the bodies' task in dealing with complaints, Art. 13 of the Directive remains vague. Also, in a few countries such as the UK, anti-discrimination legislation and therefore also specialised bodies had been established according to the countries' needs and background well before the Racial Equality Directive was adopted. Consequently, this is reflected in the diversity of competences assigned to the specialised bodies that exist today as well as their organisational framework (publicly funded NGOs, offices attached to a Ministry or the PM's Office or a specialised Ombudsman's office e.g. Finland and Sweden).

Belgium, Denmark, Finland, Ireland, Italy, the Netherlands, Portugal, Sweden and the United Kingdom have established institutions that fulfil the requirements as requested by Art. 13 of the Directive. In the remaining EU Member States, bodies, which perform parts of the tasks of specialised bodies, as referred to in Art. 13, exist, but it is questionable whether they fully meet all the requirements as set out in the Directive.

In **Austria,** a draft law foresees the extension of the functions of the present Equal Treatment Commission and the Office of the Ombudsman for Equal Treatment Opportunities to deal besides discrimination on the ground of gender, with all other grounds mentioned in Art 13 Treaty of the European Community (TEC), except disability. In **Germany, Greece** and **Spain** no specialised bodies as set out in Art. 13 exist yet.

France[197] has partially implemented the Racial Equality Directive passing in 2001 two laws, making significant changes to the Labour Code (Social Modernisation Act of 17 January 17 2002) and the Criminal Code (Anti-Discrimination Act of 16 November 2001). The president of the High Council on Integration recommended the establishment of an independent body with investigative powers in discrimination cases in employment in his report 'Combating Discrimination', April 1999. This recommendation has not been followed so far,[198] although a research group 'Group to study and combat Discrimination' *(Groupe d'Etude et de Lutte contre les Discriminations* — GELD) was given the task to analyse issues related to discrimination based on ethnic origin. This group also fulfils an advisory and information function.[199]

[197] As a result of the perception of inadequate remedies provided by the courts, combined with the requirement under European law to establish independent machinery for access to remedies with respect to discrimination, a debate has developed on the creation of an independent anti-discrimination authority. The President of the Republic has now himself proposed the creation of such an institution.

[198] France – A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief, with the Council Directives, EUMC, Vienna 2002, p. 37, available at: http://eumc.eu.int/eumc/material/pub/Art13/ART13_France-en.pdf (27.08.2003).

[199] Group to study and combat of Discrimination, France. p. 1; available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/fr_geld_en.pdf (27.08.2003).

Country/body	Remit/Areas of activity and legal basis	Board and staff	Financial resources
AT			
	NO, but draft law exists[200]		
BE			
Centre for Equal Opportunities and Opposition to Racism (CEOOR)	**Legal basis:** Law of 15 February 1993 (amended 2003, extended competences) Independent body and has legal status in its own right and exercises its activities independently.[201] **Tasks:** Fighting discrimination, ensure basic rights for foreigners, information/advice, expert opinion, receive individual complaints, mediation, research, training, may take cases to court.[202] **Discrimination grounds covered:** Covers all discriminatory grounds as set out in Art. 13 EC-Treaty (except for gender).	Board (21) appointed by Royal Decree for 6 years. Staff is hired by management (65-95 full-time, permanent staff members).[203]	Almost entirely from general fiscal budget, minor project-based grants. 2001: CEOOR received € 4.3 million from general budget, plus project- based grants of € 0.1-0.3 million. Total sum expected to double. [204]

[200] However, the following bodies do exist: People's Advocate, Human Rights Advisory Board, National Minority Advisory Councils to the Federal Chancellery (Volksgruppenbeiräte); Austria, instead of establishing new anti-discrimination bodies, opted for extending the mandate of the already existing institutions which were established on the basis of the Act on Equal Treatment of Men and Women at the Workplace: Ministerial Draft for a New Equal Treatment Act, available at: (10.09.2003). *Equal Treatment Commission* (Gleichbehandlungskommission): para. 32, 33 of the draft Act on Equal Treatment foresees to set up an Equal Treatment Commission within the Federal Ministry for Health and Women's Issues, which shall be structured into three senates on equal treatment (1st senate shall be responsible for equal treatment of men and women in the employment sector as well as multiple forms of discrimination, the second senate shall be responsible for equal treatment without difference due to race, ethnic origin, religion or belief, age and sexual orientation in employment and the 3rd senate shall be responsible for equal treatment without difference due to race or ethnic origin in other areas). Members of the senates are appointed for a 4-year period from the ministries and social partners. If a senate concludes that discrimination did occur, it may submit a proposal to the culprit on how to realise equal treatment. If the person does not act accordingly, the senate may take the case to court. Also the responsible ombudsperson may, with the consent of the victim, equally take cases to court. The senate has to publish the Commissions' expert opinions and relevant court decisions in an anonymous way. *Office of the Ombud for Equal Treatment Opportunities (*Gleichbehandlungsanwaltschaft*)*: para. 34-37 of the draft act sets up an Ombudsman institution at the Federal Ministry for Health and Women's Issues. Additionally to the already existing ombudsperson on equal treatment of women and men in the employment there shall be one ombudsperson responsible for equal treatment without difference due to race, ethnic origin, religion or belief, age and sexual orientation in employment and another ombudsperson responsible for equal treatment without difference due to race or ethnic origin in other areas. The three ombudspersons for Equal Treatment shall be appointed by the Federal Minister for Health and Women's Issues after hearing the Social Partners. In the performance of their duties both ombudspersons shall be autonomous and independent. The task of the Office of the Ombudsman for Equal Treatment Opportunities would be to provide advice and support to persons who feel discriminated against. The ombudspersons can conduct independent investigations and publish independent reports and recommendations on topics related to discrimination.

[201] Belgium – A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief, with the Council Directives. EUMC, Vienna 2002. p. 42., available at: http://eumc.eu.int/eumc/material/pub/Art13/ART13_Belgium-en.pdf (27.08.2003).

[202] PLS Ramboll management (2002) *The European Union against discrimination. Specialised bodies to promote equality and/or combat discrimination, Final Report*, p. 26, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/equalitybodies_exec_en.pdf, (06.08.2003).

[203] Centre for Equal Opportunities and Opposition to Racism, Belgium. p. 2; available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/be_ceclr_en.pdf (06.08.2003).

[204] Centre for Equal Opportunities and Opposition to Racism, Belgium. p. 6; available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/be_ceclr_en.pdf (06.08.2003).

Country/body	Remit/Areas of activity and legal basis	Board and staff	Financial resources
DK			
Danish Centre for International Studies and Human Rights (DCISM)	**Legal basis:** Act No 411 of 6 June 2002. Established as of 1 January 2003. Fusion of several bodies[205]. Act on Ethnic Equal Treatment. **Tasks:** Research, campaigns to promote equal treatment, receive (except for employment issues) individual complaints (assistance with complaints given by local legal aid institutions) and formulate a finding after investigation (legally non-binding),[206] the bill on equal treatment irrespective of ethnic origin, passed by parliament on 20 May 2003, assigned task to receive individual complaints, in effect from 1 July 2003. **Discrimination grounds covered:** Race and ethnic origin.	Overall board and director responsible for administration and finance. IHR will operate in parallel to the IIS, each with their own board and director and with autonomy in all other matters. IIS will have a new board, whereas the current board of the DCHR succeeds as the board for the IHR.[207]	
FI			
Ombudsman for Ethnic Minorities	**Legal basis:** Law 660/2001 and 687/2001. **Tasks:** Succeeded Ombudsman for Foreigners. To promote positive ethnic relations; report, monitor and improve situation of ethnic minorities and foreigners through recommendations/expert opinion/annual report and investigations but has no decision-making authority. Provides legal advice to individuals and may take case to court by request of complainant.[208] Heard in processes of asylum demands and in cases of extradition of foreigners. Foster cooperation between public and non-public bodies involved in fighting discrimination. **Discrimination grounds covered:** racial and ethnic origin, Ombudsman is consulted in asylum cases and in cases of expulsion.	Ombudsman appointe (for maximum of 5 years) by Government as is equally the board (16 members).[209]	Whole funding from fiscal budget, in 2001 it was 250.000 Fin Marks (without salaries). Due to limited resources only substantial and principal cases taken to court.[210]

[205] The Centre consists of two institutes: 1. **Institute for International Studies**, IIS, incorporating the existing activities at Danish Institute of International Affairs, DUPI; Centre for Development Research, CDR; Copenhagen Peace Research Institute, COPRI; and a special section for the activities at Danish Centre for Holocaust and Genocide Studies. 2. **Institute for Human Rights**, IHR, incorporating the existing activities at Danish Centre for Human Rights, DCHR; and parts of the Board for Ethnic Equality, NEL. Available at: http://www.dcism.dk; http://www.cdr.dk/info/chart.htm; http://fusion.humanrights.dk/ (11.08.2003).

[206] Information provided by the Institute for Human Rights (Danish Centre for Human Rights), 21.08.2003.

[207] www.humanrights.dk/news/Bill/ (11.08.2003).

[208] Institutional profile of The Ombudsman for Minorities, Finland. (February 2002). p. 1-4; available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/fi_ombuds_en.pdf (06.08.2003).

[209] Institutional profile of The Ombudsman for Minorities, Finland. (February 2002). p. 2; available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/fi_ombuds_en.pdf (06.08.2003).

[210] Institutional profile of The Ombudsman for Minorities, Finland. (February 2002). p. 4f; available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/fi_ombuds_en.pdf (06.08.2003).

Country/body	Remit/Areas of activity and legal basis	Board and staff	Financial resources
FR			
	NO[211]		
DE			
	NO[212]		
EL			
	NO[213]		

[211] However, the following institutions active in this field exist: National Consultative Commission for Human Rights, Group to study and combat of Discrimination, Commission on Access to Citizenship, High Council on Integration.

[212] However, among others, the following institutions active in this field exist: Commissioner for Integration at federal level (formerly Commissioner for Foreigner's Affairs) also providing advice on discrimination issues (http://www.integrationsbeauftragte.de), Independent Committee of the German parliament on human rights policies and humanitarian aid, Independent German Institute for Human Rights, Commissioner for Integration.

[213] However, the following institution exists: the National Commission of Human Rights.

Country/body	Remit/Areas of activity and legal basis	Board and staff	Financial resources
IE[214]			
Equality Authority	**Legal basis:** Set up as independent body under the *Employment Equality Act 1998; Equal Status Act 2000* expanded its mandate. **Tasks:** Works towards the elimination of forbidden discrimination and the promotion of equality of opportunity and of the rights in equality legislation. Conducts research, publishes reports, provides information, advice and, in the case of an important point of principle or inability of a claimant to adequately present his or her case, may provide legal assistance. In certain circumstances, the Authority may take a case, in place of a complainant, to the Equality Tribunal.[215] **Discrimination grounds covered:** Gender; marital status; family status; age; disability; race; sexual orientation; religious belief and membership of the Traveller community.[216]	Board (12) appointed by government for four-year term. Board appoints director (subject to Ministerial approval) who manages rest of staff (45-54).[220]	Annual allocation in the fiscal budget € 5 million, only marginal funding from project grants.[222]
Office of Director of Equality Investigations - the Equality Tribunal (ODEI)	**Legal basis:** *Employment Equality Act 1998,* under the *Equal Status Act 2000* its remit was extended. **Tasks:** Under the aegis of the Department of Justice, Equality and Law Reform, however, independent body with function of Equality Tribunal (quasi-judicial body); power to receive individual complaints, investigating and mediating individual complaints; if discriminatory conduct is proven, redress[217] (compensation) may be awarded through binding and enforceable decisions.[218] **Discrimination grounds covered:** Same nine grounds as for the Equality Authority.[219]	Director is appointed by Minister of Justice, Equality and Law Reform Equality officers and Equality Mediation Officers (13) Legal Advisor Clerical and administrative workers (12).[221]	Completely funded by the Exchequer, for 2001 the amount was € 1 700 000.[223]

[214] Besides the Equality Authority and ODEI, there exists the Irish Human Rights Commission. **Legal base:** established under the Human Right Commission Act, 2000. **Tasks:** This independent body's mandate is to keep under review the adequacy and effectiveness of legislative provisions in order to protect human rights in the widest sense; to conduct and to commission research on issues related to discrimination which lie within its competence; to provide legal assistance to individuals in defence of their human rights. Available at: http://homepage.tinet.ie/~ihrc/powers.htm (07.08.2003). 15 Commissioners, appointed by the Government for 5 years. In accordance with the Human Rights Commission Acts 2000 and 2001, not less than 7 of the members are female and not less than 7 are male, additional recruitment of 3 staff members in progress. Available at: http://homepage.tinet.ie/~ihrc/commissioners.htm (07.08.2003).

[215] Equality Authority, Ireland. p. 8; available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/irl_equalauth_en.pdf (06.08.2003).

[216] http://www.equality.ie/ninegrounds.shtml (12.08.2003).

[217] Office of the Director of Equality Investigations (ODEI-The Equality Tribunal), Ireland. p. 1, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/irl_odei_en.pdf (06.08.2003); www.odei.ie (2.7.2004).

[218] PLS Ramboll management (2002) *The European Union against discrimination. Specialised bodies to promote equality and/or combat discrimination, Final Report*, p. 27, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/equalitybodies_exec_en.pdf, (07.08.2003).

[219] http://www.odei.ie/mission.htm (12.08.2003).

[220] Equality Authority, Ireland. p. 3f.; available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/irl_equalauth_en.pdf (06.08.2003).

[221] Office of the Director of Equality Investigations (ODEI-The Equality Tribunal), Ireland. p. 2, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/irl_odei_en.pdf (06.08.2003).

[222] Equality Authority, Ireland. p. 10; available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/irl_equalauth_en.pdf (06.08.2003).

[223] Office of the Director of Equality Investigations (ODEI-The Equality Tribunal), Ireland. p. 8, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/irl_odei_en.pdf (06.08.2003).

Country/body	Remit/Areas of activity and legal basis	Board and staff	Financial resources
IT			
Office to fight against discrimination[224] (Ufficio per il contrasto delle discriminazioni)	**Legal basis:** Legal Decree No 215, 9 July 2003 implementing the Racial Equality Directive (published in G.U. 12 August 2003, no. 186).[225] **Tasks:** Assistance to victims of discrimination, conducting inquiries concerning discrimination, measures and affirmative actions to avoid or compensate disadvantages connected with specific racial or ethnic origin, advice and recommendations on legislation, modification of existing legislation and issues related to discrimination, annual reports to Parliament and Prime Minister, information distribution and awareness raising campaigns, research. **Discrimination grounds covered:** Race and ethnic origin.	Directed by responsible person named by the Prime Minister or by a minister delegated by him, who promotes equality and the removal of discriminations based on race or ethnic origin.	

[224] The National Focal Pointed noted that in view of the fact that such an 'office' is being instituted at the seat of the government, the office appears to be destined to operate under the strict guidance of the head of government and governmental structures; and that such an office shall be headed by only one responsible person, a responsible director nominated by the Prime Minister or a Minister delegated by him, the Art. 13 of the Racial Equality Directive may not be entirely fulfilled especially regarding the required independence.

[225] http://www.eius.it/normativa/2003/024.asp (20.08.2003).

Country/body	Remit/Areas of activity and legal basis	Board and staff	Financial resources
LU[226]			
Special and Permanent Commission against Racial Discrimination (CSP-RAC)	**Legal basis:** Law of 27 July 1993 set up the National Council for Foreigners (CNE), within the CNE three commissions have been established, one is the CSP-RAC. **Tasks:** Independent advisory body to the government, training (public sector employees),[227] either on request or own initiative to draft proposals, campaigns and project plans to fight racial discrimination and to promote integration of foreigners; reception of complaints from individuals or groups who claim that their rights as set out in CERD have been violated after exhaustion of all other available legal remedies (Article 14/2 CERD).[228] Commission may submit its opinion to complainants in trying to resolve a case of racial discrimination, act as mediator or refer the case to an appropriate court.[229] **Discrimination grounds covered:** Race and ethnicity.	The CNE has a board of 30 members, 15 thereof represent foreigners, the others are representatives of different organisations (incl. trade unions, immigrant associations...), appointed by the Ministry of the Family. The CSP-RAC comprises 13 members, partly members from the CNE and also external specialists, appointed by the CNE.[230]	Receives some administrative support and ad hoc subventions.[231]

[226] Also established: the ***Consultative Commission on Human Rights.***

[227] Special and Permanent Commission against Racial Discrimination, Luxembourg. p. 2f, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/lux_csprac_en.pdf (27.08.2003).

[228] Until 2002 no such complaints have been put forward to the CSP-RAC.

[229] ECRI – Second Report on Luxembourg, adopted 13 December 2002. p. 10f, available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/Luxembourg/Luxembourg_CBC2_pdf.pdf (27.08.2003).

[230] Special and Permanent Commission against Racial Discrimination, Luxembourg. p. 2f, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/lux_csprac_en.pdf (27.08.2003).

[231] Special and Permanent Commission against Racial Discrimination, Luxembourg. p. 6, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/lux_csprac_en.pdf (27.08.2003).

Country/body	Remit/Areas of activity and legal basis	Board and staff	Financial resources
NL[232]			
Equal Treatment Commission	**Legal basis:** The Equal Treatment Act, Equal Treatment of Men and Women Act, Art. 7:646 and 7:648 of the Civil Code and Art. 125g of the Civil Servants Law.[234] **Tasks:** Training, policy advisor, expert opinion to public bodies, companies etc whether their policy is in line with equal treatment legislation; receives complaints, conducts investigations (with and without individual complaints); provides decisions which are not legally binding, but are usually complied with. Commission can take cases to court on own initiative (this power is given to compensate the non-binding character of its own decisions).[235] **Discrimination grounds covered:** Religion, belief, political orientation, race, sex, nationality, sexual preference, marital status, working hours or temporary contract.[236]	Commission members (9), deputy members (12), appointed by Ministry of Justice for a 6-year period; 36 staff members.[238]	Commission is financed through five ministries from the fiscal budget, for 2001 the budget for all activities was € 1.8 million.[240]
National Bureau against Racial Discrimination[233] (LBR)	**Legal basis:** NGO, no legal basis. **Tasks:** Training, policy advice (comments on new legislation), advice to individuals, research and studies.[237]	Board of 6-7 persons (3-year period), advisory board of 15 members appointed by the LBR. Staff: 25-30 people.[239]	About € 1.2 million, government funds the LBR, main funding from Ministry of Justice; also project-based grants and small portion are self-generated resources.[241]

232 Also established: *Anti-discrimination Bureaus (ADBs)* http://www.lbr.nl (07.08.2003).

233 www.lbr.nl (07.08.2003).

234 www.cgb.nl (07.08.2003).

235 Equal Treatment Commission, The Netherlands. p. 4f, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/nl_equaltreat_en.pdf (07.08.2003).

236 http://www.cgb.nl/english/default.asp (12.08.2003).

237 http://www.lbr.nl/euroinfo/english/folderengl.html (07.08.2003).

238 Equal Treatment Commission, The Netherlands. p. 2, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/nl_equaltreat_en.pdf (07.08.2003).

239 National Bureau against Racial Discrimination (LBR), Netherlands. p. 1. available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/nl_lbr_en.pdf (07.08.2003).

240 Equal Treatment Commission, The Netherlands. p. 8, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/nl_equaltreat_en.pdf (07.08.2003).

241 National Bureau against Racial Discrimination (LBR), Netherlands. p. 6f. available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/nl_lbr_en.pdf (07.08.2003).

Country/body	Remit/Areas of activity and legal basis	Board and staff	Financial resources
PT[242]			
High Commissioner for Immigration and Ethnic Minorities (ACIME)	**Legal basis:** Decree-Law 3-A/96; since November 2002, Law-decree No. 251/2002 changed the High Commissioner into a broader structure. **Tasks:** Information campaigns, improve (living) conditions of immigrants, promote equal opportunities of all citizens, research, capacity of a consultative governmental institution,[243] may impose sentences/fines (Law No. 134/99) after consultation with the Commission on Equality and against Racial Discrimination.	Presidency of the Council of Ministers is in charge of the High Commissioner; he is appointed by the Prime Minister.[246]	
Commission for Equality and against Racial Discrimination	**Legal basis:** Law No 134/99, 28 August (date of publication), governed by Decree-Law No 111/2000. Set up in 2001, it is presided by ACIME **Tasks:** Collect information on discriminatory acts and apply relevant sanctions, policy advisor through recommendations, conducts and promotes research, investigations, publishes annual report **Discrimination grounds covered:** Race, colour, ethnicity, origin[244] Victims can directly complain to the High Commissioner and the Commission[245]	High Commissioner is the chairperson, 2 members each appointed by government and parliament, 13 members with various backgrounds.[247]	No figures available. However, law states that government must make appropriate funds to the Commission; receives annual allocation from the Prime Minister's Office.[248]
ES			
	NO		

[242] The following bodies were also established: Inter-ministerial Commission to monitor the immigration policy, Consultative Council for Immigration-Related Issues.

[243] Commission for Equality and against Racial Discrimination, Portugal. p. 6, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/pt_equalcom_en.pdf (27.08.2003).

[244] http://www.acime.gov.pt/ (12.08.2003).

[245] Information provided by the National Focal Point. (26.08.2003).

[246] Commission for Equality and against Racial Discrimination, Portugal. p. 3, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/pt_equalcom_en.pdf (08.08.2003).

[247] Commission for Equality and against Racial Discrimination, Portugal. p. 3, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/pt_equalcom_en.pdf (08.08.2003).

[248] Commission for Equality and against Racial Discrimination, Portugal. p. 9, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/pt_equalcom_en.pdf (08.08.2003).

Country/body	Remit/Areas of activity and legal basis	Board and staff	Financial resources
SE			
Ombudsman against ethnic discrimination (DO)	**Legal basis:** Measures to Counteract Ethnic Discrimination in Working Life Act,[249] in the area of higher education the Ombudsman's work is regulated by the Equal Treatment of Students at Universities Act,[250] and in other areas of society the Law on the Ombudsman against Ethnic Discrimination[251] is applicable. New act prohibiting discrimination.[252] Established as government authority in 1986. **Tasks:** Reviewing legislation, campaigns and training, policy advisor, research, advice to individuals, investigations, mediation, may take cases to court at the victims request, review of legislation; predominantly labour-related competences[253] The new act prohibiting discrimination, which has to be supervised by the DO, extends its power to new areas of society[254] **Discrimination grounds covered:** Race, skin colour, national or ethnic origin or religious faith.[255]	No board. 15 staff members[258]	Entirely financed by fiscal budget; annual allocation of about € 1.3 million[260]
Board against Discrimination	**Legal basis:** Measures to Counteract Ethnic Discrimination in Working Life Act.[256] **Tasks:** (As outlined in the law) takes decisions on issuing civil fines, may hold hearings, examines appeals of orders (on civil fines) passed by the DO. **Discrimination grounds covered:** Race, skin colour, national or ethnic origin or religious faith.[257]	The DO summons the meetings of the board which comprises 13 members[259]	

249 SFS 1999:130.

250 SFS 2001:1286.

251 SFS 1999:131.

252 The new Act came into force on 1 July 2003.

253 Ombudsman against ethnic discrimination, Sweden, p. 3-5. available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/sv_ombuds_en.pdf (07.08.2003).

254 The Ombudsman is entitled to raise actions for damages on behalf of individuals who feel that they have been discriminated against, and this right also applies to the new areas. The Ombudsman has to try to induce parties covered by the prohibitions of discrimination to follow the new Act voluntarily. Legal proceedings have to be initiated within two years from the date of the action in question or from the last date on which an obligation should have been fulfilled. Otherwise, the right to initiate legal proceedings is lost. Available at: *Extended protection against discrimination*, Fact Sheet, Ministry of Justice, Sweden, Ju 03.12e, June 2003, available at: (10.09.2003).

255 http://www.do.se/o.o.i.s?id=625 (12.08.2003).

256 SFS 1999:130.

257 Measures to Counteract Ethnic Discrimination in Working Life Act, available at: http://www.do.se/o.o.i.s?id=624 (22.08.2003).

258 Ombudsman against ethnic discrimination, Sweden. p. 2. available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/sv_ombuds_en.pdf (10.09.2003).

259 Information provided by the Office of the Ombudsman against ethnic discrimination (22.08.2003).

260 Ombudsman against ethnic discrimination, Sweden. p. 9. available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/sv_ombuds_en.pdf (10.09.2003).

Country/body	Remit/Areas of activity and legal basis	Board and staff	Financial resources
UK			
Commission for Racial Equality (CRE)	**Legal basis:** Race Relations Act 1976; independent, non-government body.[261] **Tasks:** The CRE has 3 main duties: To work towards the elimination of racial discrimination; to promote equality of opportunity and good relations between people of different racial groups; to keep the Act under review and to make proposals to the Secretary of State for amending it. This includes publication of guidance, formal investigations, legal advice and assistance.[262] **Discrimination grounds covered:** Race.	Commission consists of 8-15 Commissioners; each appointed the Home Office for 5 year term. Around 200 staff, including regional.[266]	Budget 2001-2002: € 30 million, almost entirely in form of grants from the Home Office. Project based grants of less than € 800 000.[268]
Equality Commission for Northern Ireland (ECNI)	**Legal basis:** Northern Ireland Act 1998, independent public body. **Tasks:** Formal consultative status, public campaigns and training, legal advice, formal investigations and non-discrimination notices[263]. The Commission does not decide whether discrimination occurred; this is for independent industrial tribunal or court to decide. Assistance on victim's request only in court cases of strategic importance.[264] **Discrimination grounds covered:** Between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation, between men and women generally; between persons with a disability and persons without, and between persons with dependants and persons without.[265]	14-20 commissioners appointed for 3-year period by Secretary of State. 143 staff members on normal contractual basis, plus subcontracted external solicitors.[267]	Entire budget is the grant from the Office of the First Minister and Deputy Minister, for 2002: € 8.98 million.[269]

261 http://www.cre.gov.uk/about/about.html (12.08.2003).

262 Commission for Racial Equality, UK. p. 6. available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/uk_comracequal_en.pdf (27.08.2003).

263 PLS Ramboll management (2002) *The European Union against discrimination. Specialised bodies to promote equality and/or combat discrimination, Final Report*, p. 29, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/equalitybodies_exec_en.pdf, (06.08.2003).

264 Equality Commission for Northern Ireland, p. 6f. available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/uk_equalcomnirl_en.pdf (27.08.2003).

265 http://www.equalityni.org/yourrights/equality_law.htm (12.08.2003).

266 Commission for Racial Equality, United Kingdom. p. 1f. available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/uk_comracequal_en.pdf (08.08.2003).

267 Equality Commission for Northern Ireland, United Kingdom. p. 1f, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/uk_equalcomnirl_en.pdf (08.08.2003).

268 Commission for Racial Equality, United Kingdom. p. 8f. available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/uk_comracequal_en.pdf (08.08.2003).

269 Equality Commission for Northern Ireland, United Kingdom. p. 8, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/uk_equalcomnirl_en.pdf (27.08.2003).

Ombudsmen

All member states have established institutions/offices to which individuals can generally present complaints about acts or omissions of public bodies.[270] In most countries those offices have the characteristic of an Ombudsperson (or a similar/comparable set-up, facility, office).

Complaints concerning discriminatory acts due to race or ethnic origin can also be brought to these institutions, although the handling of such acts has no explicit priority within the mandate (among all the other tasks under the broad mandate). In countries where specialised anti-discrimination bodies have not yet been established, Ombudsperson's bureaux are often the sole body for individual persons to address complaints to, besides courts. This applies to Austria (although a draft law for the implementation of the Racial Equality Directive exists), France, Germany, Greece and Spain.

The Austrian **People's Advocate** is restricted to monitoring the performance of the federal public administration and dealing with complaints of persons who feel to be adversely affected by decisions or actions of public bodies if all other available remedies are exhausted. Its powers do not go beyond investigation and issuing recommendations.[271] The draft act on the implementation of the two Equality Directives extends the competences of the Office of the Ombudsman for Equal Treatment Opportunities to deal also with discrimination on the ground of race, ethnic origin, religion, age and sexual orientation.

In **France,** 'Le Médiateur de la République', is an institution (set up in 1973) to assist and help people who protest against a decision or behaviour of the public administration. In order for a claim to be eligible it must be referred to the Mediator through the intermediary of a senator or a member of the Parliament after the concerned administrative entity was approached by the individual with the complaint. [272]

In **Germany,** the Committee on Petitions may control laws on which contested acts or judgments are based. However, mostly this does not constitute help in individual cases, but might prevent future repetition of similar cases. The Committee may issue recommendations on acts, which were contested by a complaint of the public administration.[273]

In **Greece** the Ombudsman investigates individual administrative acts or omissions or actions taken by government departments or public services that infringe upon the personal rights or violate the legal interests of individuals or legal entities; he mediates between public authorities and individuals in order to protect citizens' rights and combat maladministration, however, without any jurisdiction over the administration of justice or over the court decision processes.

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[270] http://www.euro-ombudsman.eu.int/links/en/natomeu1.htm (19.08.2003).

[271] Austria – A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief, with the Council Directives. EUMC, Vienna 2002. p. 33. available at: http://eumc.eu.int/eumc/material/pub/Art13/ART13_Austria-en.pdf (27.08.2003).

[272] http://www.mediateur-de-la-republique.fr/mediateu/institu/index.htm (19.08.2003).

[273] http://www.bundestag.de/gremien/a2/a2_a.html (19.08.2003).

In **Spain** the Defensor del Pueblo (Ombudsman) is charged (Basic Law 3/1981, April 6) to ensure compliance of all public authorities with the constitution. The Ombudsman conducts inquiries on its own initiative. Reacting to individual complaints, he may also bring an appeal in case of unconstitutionality and presents an annual report to Parliament.[274] He has the power to request collaboration of regional ombudsmen (on autonomous community level) and has access to information from all administrative bodies. Although the Ombudsman may bring forward recommendations of his findings, he cannot modify acts, regulations or consider complaints concerning the functioning of authorities competent for the administration of justice.[275]

While in **Luxembourg** currently there exists no national ombudsman,[276] there is a right of petition at the national level; and individual complaints can be presented to the Chamber of Deputies where the Committee on Petitions[277] examines the claims.

In **Portugal,** the constitution makes provision for the Provedor de Justica (Ombudsman). Individuals may present complaints against public authorities, although the Ombudsman may intervene in relationships between private individuals if the case has a special connection with areas of the Ombudsman's responsibility concerning the protection of rights, freedoms and guarantees. Therefore, issues of discriminations are included, although the Ombudsman is not exclusively concerned with discriminatory practices.[278]

[274] Spain – A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief, with the Council Directives. EUMC, Vienna 2002. p. 30. available at: http://eumc.eu.int/eumc/material/pub/Art13/ART13_Spain-en.pdf (10.09.2003).

[275] ECRI – Second Report on Spain, adopted on 13 December 2002, p. 10. available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/Spain/Spain_CBC_2en.asp#TopOfPage (27.08.2003).

[276] http://europa.eu.int/scadplus/citizens/en/lu/00193.htm (19.08.2003).

[277] http://www.euro-ombudsman.eu.int/links/en/lu.htm (19.08.2003).

[278] Portugal – A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief, with the Council Directives. EUMC, Vienna 2002, p. 26f., available at: http://eumc.eu.int/eumc/material/pub/Art13/ART13_Portugal-en.pdf (27.08.2003).

5. Other legal basis for anti-discrimination[279]: constitutional provisions

This section provides a brief overview of the Member States' constitutional provisions dealing with equality, anti-discrimination, minorities and related issues.

In **Austria,** Art. 7 (1) of the 1920 constitution, *Bundes-Verfassunggesetz (B-VG), states, 'All citizens are equal before the law. Privileges based upon birth, sex, estate, class or religion, are excluded. No person may be discriminated against on the grounds of his or her disability. The Republic (Federation, provincial authorities and local authorities) undertakes to guarantee the equal treatment of disabled and non-disabled persons.'* The constitution does not explicitly include provisions prohibiting discrimination on grounds of 'race' or 'ethnic origin'. However, Austria is party to the ICERD and has transposed the agreement at constitutional level.[280] In addition, Arts. 6 and 8 of the Vienna State Treaty prohibit further forms of discrimination, for example on the grounds of race, language or religion.

In **Belgium,** Art. 10 of the constitution of Belgium February 17, 1994 states that *'All Belgians are equal before the law; they alone are eligible for civil and military posts, with some exemptions, which may be established by law in particular cases.'* The principle of non-discrimination is enshrined in Art. 11, which states *'Enjoyment of rights and liberties to which Belgians are entitled must be safeguarded without discrimination. To this end, laws and decrees shall guarantee particularly the rights and the liberties of ideological and philosophical minorities.'* Art. 191 states *'Any foreigner present in Belgian territory shall enjoy the protection granted to persons and goods, subject to exemptions laid down by law.'* Individuals may apply to the Court of Arbitration for enforcement of these provisions.

In **Denmark,** the deprivation of civil and political rights on the basis of origin or religion is prohibited by the constitution: Art. 70 of the Constitution of the Kingdom of Denmark Act of 5 June 1953 states that *'No person shall for reasons of his creed or descent be deprived of access to complete enjoyment of his civic and political rights, nor shall he for such reasons evade compliance with any common civic duty.'* Art. 71 (1) states, *'Personal liberty shall be inviolable. No*

[279] This study does not cover the legal basis of anti-discrimination in employment; please refer in this respect to EUMC (2003) *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-Discrimination in 15 Member States of the European Union*, Principal authors: Michael Jandl, Albert Kraler and Anna Stepien, EUMC Equal Opportunities for an Inclusive Europe Series, Vienna 2003.

[280] Austria, BGBl. 390/1373.

Danish subject shall in any manner whatever be deprived of his liberty because of his political or religious convictions or because of his ethnic origin.' These provisions are guiding principles for the legislature in the adoption of legislation; for the administrative authorities in issuing general and concrete legal acts and for the courts in settlement of legal disputes between individuals. However, it has to be stated that no direct constitutional prohibition against discrimination exists.

According to section 5 para. 2 of the constitution of **Finland** *'No one shall, except on reasonable grounds, be afforded a different status on account of sex, age, origin, language, religion, conviction, opinion, state of health, disability or any other reason related to the person.'*[281]

Art. 1 of the **French** constitution states, *'France is a Republic, indivisible, secular, democratic and social. It shall ensure the equality of all citizens before the law, without distinction on the basis of origin, race or religion'.* In addition, the preamble of the constitution specifies, *'no-one shall be mistreated in their work on grounds of their origin, opinion or belief*'.

Art. 3 (1) of the Basic Law of the Federal Republic of **Germany** states, *'All people are equal before the law'.* Art. 3 (3) states, *'No person shall be advantaged or disadvantaged on the basis of sex, parentage, race, language, homeland and origin, faith or religion or political opinion'.*[282]

Art. 3 of the **Italian** constitution states *'All citizens are invested with equal social status and are equal before the law, without distinction as to sex, race, language, religion, political opinions and personal or social conditions'.* The same article also states *'It is the responsibility of the Republic to remove all obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, prevent the full development of individuals and the participation of all workers in the political, economic and social organisation of the country'.*[283]

In **Ireland,** the constitution, in Art. 40.1, provides the principle of equality for all citizens before the law.

The State, according to Art. 40.3.1, guarantees in its laws to respect, and, as far as practicable, by its laws to defend the personal rights of the citizens. Furthermore, as stated in Art. 40.3.2, the State shall protect by its laws from unjust attack every citizen for the exercise of his rights. Art. 44.3.3 is the constitutional guarantee of the State that it will not discriminate on the grounds of religious profession, belief or status.[284]

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[281] Available at: http://www.europarl.eu.int/en/discrimi/ssi/race/summaries/default.shtm (10.09.2003).

[282] Until August 2002, in only 5 of the 16 states legal provisions regarding minority protection were established: Art. 25 of the constitution of Brandenburg, Art. 18 of the constitution of Mecklenburg-West Pomerania, Art. 5.2 and 6 of the constitution of Saxony, Art. 37.1 of the constitution of Saxony-Anhalt and Art. 5 of the constitution of Schleswig-Holstein. However, none of these articles specifically mentions Sinti and Roma, although the other three recognised minority groups (Danes, Friesians, and Sorbs) are specifically mentioned in the legislation of the states in which individuals belonging to these groups reside.

[283] Available at: http://www.europarl.eu.int/en/discrimi/ssi/race/summaries/default.shtm (10.09.2003).

[284] EUMC (2002) *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the council Directive – Ireland*.

Art. 10 b of the Constitution of the Grand Duchy of **Luxembourg** states, *'All Luxembourgers are equal before the law. They are eligible for all public, civil and military posts; the law determines the eligibility of non-Luxembourgers'.*[285] As concerns the legal effect of the constitutional provision, Art. 2 of the Act of 27 July 1997 on the organisation of the Constitutional Court states that the Court shall rule on whether legislative acts — with the exception of acts concerning approval of treaties — are in compliance with the constitution.

In the **Netherlands,** in addition to the equality legislation, the constitution protects the equal status of all individuals living in the Netherlands vis-à-vis the state:[286] The principle of equal treatment and non-discrimination applies to every person residing in the Netherlands under Art. 1 of the Constitution of the Kingdom of the Netherlands which states that *'All persons in the Netherlands shall be treated equally in equal circumstances'* and forbids discrimination, including racial discrimination.

In **Portugal,** the constitution includes a number of provisions endorsing the principle of equal-treatment and non-discrimination.[287] Art. 15 endorses that legally resident non-citizens — and in some cases also to foreign citizens whose situation in Portugal is irregular — enjoy the same rights as citizens.[288]

The principle of non-discrimination is given a wider scope by virtue of Art. 8 of the Portuguese constitution. Art. 8 provides that the rules and principles of general or ordinary international law are an integral part of Portuguese law and that rules provided for in duly ratified or approved international conventions apply under national law following their official publication. This applies, for example, to the ICERD. Both Art. 13 of the Portuguese constitution and the rules provided for in international conventions are directly applicable and may be invoked before the courts.

In **Spain,** Art. 14 of the constitution of Spain, 27 December 1978 states that *'Spaniards are equal before the law, without any discrimination on the basis of birth, race, sex, religion, opinion or any other personal or social condition or circumstance'.* The principle of equality and non-discrimination is protected in

[285] Furthermore, a ruling of the Court of Appeal acknowledged that a constitutional principle on equality was applicable to any individual affected by the Luxembourg legislation (ruling of the 15 July 1999 N° 21871 of the cause list).

[286] However, it cannot be directly invoked in horizontal relationships between individuals.

[287] For example, Art. 13 states that all citizens have the same social dignity and are equal before the law. Nobody may be privileged, favoured or disadvantaged, deprived of a right or excused from performance of a duty by virtue of ancestry, race, language, religion or place of origin. Art. 35 notes that the computerising of personal data of an ethnic nature is prohibited, unless the owners explicit authorisation is given or in cases legally authorised. Art. 46 prohibits all organisations with a racist ideology. Finally, Art. 59 specifically protects workers against discrimination on grounds of nationality, place of origin, religion or political or ideological opinion.

[288] Art. 15 of the constitution foresees that 'foreigners and stateless people that reside or are in national ground held the same rights and are subject to the same duties as Portuguese citizens'. Albeit it's not undisputable in terms of the legal doctrine, the majority doctrine has understood that this legal instrument also covers foreigners in irregular situation, since foresees that this constitutional norm both applies to all those that reside in Portugal (meaning all legal foreigners) and those that are in national ground (meaning illegal foreigners).

two ways. First, the principle of equality and non-discrimination is binding on all public authorities. Second, any citizen may make a claim to enforcement of this principle before the regular courts and the constitutional Court. Art. 13.1 provides that aliens shall enjoy the public freedoms guaranteed by this Title, under the terms established by treaties and the law. Finally, Art. 10.2 states that the principles relating to the fundamental rights and freedoms recognised by the constitution shall be interpreted in compliance with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.

In **Sweden,** there is a prohibition of discrimination on the basis of racial or ethnic origin in the Swedish constitution (Instrument of Government). According to Chapter 2, section 15 *'No law or other decree may imply the discrimination of any citizen on the grounds of his belonging to a minority on account of his race, colour, or ethnic origin'.* Under Chapter 2, section 22, non-Swedish citizens enjoy the same right to non-discrimination. The anti-discrimination provisions are directed towards the legislator, i.e. Parliament. Therefore, an individual cannot refer to the provisions in proceedings against another individual. However, the provisions apply to the relationship between the individual and the state. In public employment, therefore, there is a statutory requirement that decisions on offers of employment shall be based solely on objective grounds and it is, therefore, never justifiable to treat any job applicant unfavourably because of his ethnic background.[289]

Three Member States **(Austria, Finland and Greece)** have a special constitutional obligation towards autochthonous minorities.

In Art. 8 of the constitution, **Austria** (the Federal Government, the federal states and the municipalities) declares its commitment to respect, safeguard and promote the continued existence, preservation, linguistic and cultural diversity of its autochthonous minorities. Art. 7 of the *Austrian State Treaty,*[290] includes provisions to ensure equal treatment for autochthonous minorities (Slovenes and Croats in Carinthia, Burgenland and Styria) as other Austrian nationals enjoy it. This comprises e.g. the right to establish their own organisations and own press and the right to their language, equal participation in cultural, administrative and judicial system, and elementary instruction in the Slovene or Croat languages (including a proportionate number of secondary schools). Equally in the administrative and judicial districts with mixed populations, Slovene and Croat languages shall be accepted as official languages besides German, this includes topographical terminology and inscriptions in Slovene or Croat in those districts.[291]

Section 17 of the **Finnish** constitution grants the Sami as autochthonous minority the constitutional right to maintain and develop their own culture and language. The same rights apply however also for Roma and other minorities.

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[289] Available at: http://www.europarl.eu.int/en/discrimi/ssi/race/summaries/default.shtm (10.09.2003).

[290] Austria, Vienna Treaty of 15 May 1955, BGBl. 152/1955.

[291] For further information on the Austrian legal framework on autochthonous minorities see chapter 8.2.

Furthermore, Art. 4.1 of the constitution of **Greece** states, *'All Greeks are equal before the law'*. Art. 5.1 states, *'Every person shall have the right to develop his or her personality freely and to participate in the social, economic and political life of the country, insofar as it does not infringe upon the rights of others or violate the constitution and moral values'*. Art. 5.2 states, *'All persons living within Greek territory shall enjoy full protection of their life, honour and freedom, irrespective of nationality, race or language and religious or political beliefs. Exceptions shall be permitted only in cases provided for by international law.'*[292] A constitutional reform of March 2001 extended the protection of human rights in respect to discrimination in the legal relations between private legal persons. Therefore the anti-discrimination provisions of the constitution concern also discrimination by for example individual employers or companies towards their employees.

6. Criminal law, penal provisions, racial motivation as aggravating circumstance

In many Member States, the major focus while combating racism and discrimination during the last years was put on penal laws, therefore a variety of provisions in this field exists, which this section wants to outline. Furthermore in some countries racial motivation is regulated as aggravating circumstance.

Recently, the concept of 'hate crimes' has been adopted in Member States, such as the United Kingdom, including racist crimes but also other crime categories. It does not follow automatically that hate crimes include racist crimes.

In **Greece, Netherlands, Portugal** and **United Kingdom,** wearing neo-Nazi symbols can also be punished under the incitement to hatred provision.

In **Austria,** wearing neo-Nazi symbols is prohibited under the Insignia Act *(Abzeichengesetz*[293]*)*. Sec. 1 and 3 penalise to publicly wear, display, depict or disseminate insignia of an organisation that is prohibited under Austrian law.[294] Furthermore, the Austrian Penal Code penalises incitement to hostile action if someone publicly induces or incites — in a manner likely to endanger public order — the commission of a hostile act against a church or religious community

[292] Available at: http://www.europarl.eu.int/en/discrimi/ssi/race/summaries/default.shtm (10.09.2003).

[293] Austria, BGBl 84/1960, amended version BGBl 117/1980.

[294] Insignia include emblems, symbols and signs. This prohibition also applies to insignia that, because of their similarity or their evident purpose, are used as substitutes for one of the above mentioned insignia.

existing in the state or against a group determined by appurtenance to such a church or religious community, race, nation, ethnic group or state.[295] Public agitating against such a group or insulting or disparaging it in a manner violating human dignity is equally forbidden.[296] Also, racist or xenophobic verbal attacks directed against an individual person are prohibited under the Austrian Penal Code.

In **Belgium,** along the lines of the 1981 *Law on the Suppression of Racist Acts,*[297] the anti-discrimination law from February 2003 establishes incitement to discriminatory acts as an offence under criminal law.

In **Finland,** two provisions in the Penal Code address discriminatory practices.

In **France,** a proposal to amend the penal code to strengthen its provisions to deal with racist, anti-Semitic and xenophobic offences was adopted in first reading by the National Assembly in December 2002. It introduces the concept of membership or non-membership, real or assumed, of the victim with regard to his/her ethnicity, nationality, race or religion.

In **Germany,** Section 130 of the Criminal Code makes it an offence to incite hatred against certain sections of the population, to incite violence against such groups, or to attack the human dignity of others by insulting, maliciously bringing into contempt or defaming such groups, provided that the perpetrator acts in a way liable to disturb the public peace. Under the same section, it is also an offence to incite racial hatred.[298]

In **Greece,** criminal law aims to prohibit acts or activities involving racial discrimination. The legislation punishes the following acts by imprisonment and fine:

- to publicly incite or provoke discrimination, hate or violence in regard to individuals or groups solely because of their race, ethnicity or religion;
- to organise or participate in organisations making propaganda or activities involving racial discrimination;
- to publicly express offensive ideas in regard to individuals or groups because of their race, ethnicity or religion;
- to refuse goods or services to someone on the sole ground of their race or ethnicity or to impose conditions for the same reason.[299]

In **Luxembourg,** in 1997, on occasion of the European Year against Racism, Parliament adopted various amendments to the Penal Code, bringing in comprehensive anti-discrimination legislation. The long list of categories in Art. 454 of the Penal Code refers to discrimination on grounds of, among others, race or ethnic origin.

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[295] Section 283 Penal Code, Austria, BGBl 60/1974 (01.01.1975), amended version BGBl I 134/2002, (13.08.2002).

[296] Perpetrators can face up to two years' imprisonment.

[297] This law has in the past also been invoked to challenge discriminatory practices in employment.

[298] Available at: http://www.europarl.eu.int/en/discrimi/ssi/race/summaries/default.shtm (10.09.2003).

[299] Available at: http://www.europarl.eu.int/en/discrimi/ssi/race/summaries/default.shtm (10.09.2003).

In **Ireland,** the *Prohibition of the Incitement to Hatred Act* 1989 makes it an offence to incite hatred against any group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, or membership of the Traveller community. Because of perceived weaknesses in the legislation, including lack of successful convictions, a review of the Act was announced in 2001. This review has been delayed to enable the government to assess the impact of the recent EU Directives on possible amendments to this legislation.

Regarding **Spain,** the following provisions in the Penal Code should be mentioned: Art. 314 imposes a period of imprisonment from six months to two years or a 6-12 months' fine (the total fine is based on a daily rate that varies according to the offender's economic situation) on persons who are responsible for serious discrimination at work in the public or private sector against any person on grounds of, among others, his or her membership of an ethnic group or race. Art. 510 imposes a penalty of between one and three years' imprisonment and a 6-12 months' fine on those who incite discrimination, hatred or violence against groups or associations on grounds of, among others, the belonging to an ethnic group, race or national origin. Under Art. 512, anyone who, in the course of his professional or business activities, refuses to grant a person a benefit to which that person is entitled, because of his or her membership of an ethnic group or race or nation, is disqualified from pursuing his profession or trade or from carrying on business or trading for a period of between one and four years.[300]

Legislation in all Member States gives protection from racist offences, but not all Member States consider the racist motive behind a violent act an aggravating factor.

In **Austria, Portugal, Sweden,** and in the **United Kingdom** the Penal Codes have articles on aggravated punishment for a racist motive. The **Austrian** Penal Code Section 33 No. 5[301] provides that in cases of offences committed for racist or xenophobic reasons, the motivation is to be investigated in court and considered as an aggravating factor in determining the particular sentence. In **Portugal,** according to Art. 132, under the terms of Art. 146, no. 2 of the Penal Code, punishment for physical offences other than homicide can also be aggravated when racial hate is proved to be the motivation.[302]

[300] Available at: http://www.europarl.eu.int/en/discrimi/ssi/race/summaries/default.shtm (10.09.2003).

[301] Austria, Strafgesetzbuch, BGBl 60/1974 (01.01.1975), amended version BGBl I 134/2002, (13.08.2002).

[302] When determining the length of a sentence, the court has to take account, among other aspects, of the purpose of or the motives behind the crime. The offence of murder is more severely punished if racially motivated.

In **Sweden,** chapter 29 of the Penal Code prescribes in sentencing the consideration of whether a crime against a person, ethnic group or some other similar group of people was motivated by race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance.[303] According to this provision the sentencing court shall take it as an aggravating circumstance and increase the sentence of the perpetrator, if, for example, the offender on the basis of racist or xenophobic motives assaults a victim of non-European origin.

In **Great Britain** promotion of racial hatred was outlawed in the Race Relations Acts of 1965 and 1976 subsequently replaced by provisions of the Public Order Act 1986.

The Public Order Act 1986 defines the offence of incitement to racial hatred where a person a) publishes or distributes written matter which is threatening, abusive or insulting; or b) uses in any public place or at any public meeting words which are threatening, abusive or insulting (Section 70). There is no single criminal offence of racist or religious crime. There are, however, a range of statutes that effectively prohibit 'hate crime', a term increasingly used by the police and other agencies although it is not defined in law. In the relevant legislation, the crucial piece is the Crime and Disorder Act 1998 that defines the offence of 'racial aggravation' of a range of basic offences and specifies additional sentencing tariffs where this is proven.

The Crime and Disorder Act 1998 created offences of racially aggravated wounding, assault (actual bodily harm), common assault (Section 29); racially aggravated fear/provocation of violence, intentional harassment/alarm/distress (Section 31); racially aggravated harassment and stalking (Section 32). The Act defines increased tariffs for successful prosecutions of racially aggravated offences.

An amendment to the Public Order Act (s. 4A, introduced in 1995) referred to *intentional* causing of alarm, harassment or distress, and was intended to apply in particular to racist behaviour which was not covered by the prohibition on racial hatred *per se.*

Following attacks on Muslims and Jews after the terrorist attacks of 11 September 2001, and activities of the British National Party specifically directed against Muslims, Part 5 (Sections 37-42) of the Anti-terrorism, Crime and Security Act 2001 extended the laws against racially aggravated crimes to a new category of 'religious crime'. As with the racially aggravated offences, religious aggravation applies to a closed list of pre-existing offences — assault, criminal damage, public order offences and harassment.

The 2001 Act also amended the Public Order Act 1986 to increase the maximum penalty for incitement to racial hatred from 2 years to 7 years and extended the provision to include incitement to racial hatred against groups abroad. Section 39 amends the Crime and Disorder Act 1998 to include in addition to each racially aggravated offence the crime of religiously aggravated offences and applying the

[303] SFS 1994:306.

same sentencing duty to all other offences where there is evidence of religious aggravation.

Additionally, section 153 of the Powers of Criminal Courts (Sentencing) Act 2000 (replacing section 82 of the 1998 Crime and Disorder Act) imposes a duty on sentencing courts to treat evidence of racial aggravation as an aggravating feature, increasing the seriousness of the offence and the sentence to be imposed, in cases where offences are not specifically charged under the 1998 Crime and Disorder Act.

More Member States might develop their legislation in this direction. In **Finland** the Government submitted a draft law in 2002 aiming at reforming the general principles of criminal law,[304] introducing crimes for racist and equivalent motives as a new severing motive when measuring punishments. According to the draft law *'an aggravating circumstance in punishment would be committing a crime against a person, because of his national, racial, ethnical or equivalent group.'* This Penal Code reform was adopted by parliament on 31 January 2003.[305]

In **Belgium,** the introduction of reprehensible motives as aggravating circumstances has not been adopted in the new anti-racism law which included amendment to the anti-racism law of 1981, but included in the general anti-discrimination law: For certain articles of the Penal code such as murder, injuries, indecent assault, fire-raising, destruction of somebody's property, the law provides aggravating circumstance if the criminal offence has been committed on one of the racial (a so-called race, skin colour, origin or national or ethnic origin) or non-racial grounds of discrimination.

In **Sweden,** the *Provision on Agitation against a National or Ethnic Group* is regulated in parallel in the Penal Code (Chapter 16, section 8, the Freedom of the Press Act Chapter 7, section 4) and the Fundamental Law on Freedom of Expression (Chapter 5, section 1).

In 1948 the *Provision on Agitation against a National or Ethnic Group* was introduced into the Penal Code. The provision meant that anyone who in public threatened slandered or insulted a population group of certain origins or beliefs would be sentenced to fines or prison for agitation against a national or ethnic group.

In 1970 the area of legal application for agitation against national or ethnic groups was expanded. The purpose was to align Swedish legislation to the

[304] HE 44/2002, Draft Law on reform of general principles of criminal law, available at: http://www.finlex.fi/esitykset/index.html (14.08.2003).

[305] http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=1322 (14.08.2003).

UN-International Convention on the Elimination of all forms of Racial Discrimination (ICERD).[306] An offence is regarded as agitation against a national or ethnic group if three criteria are fulfilled. The first is that the deed must contain a threat or express contempt. Threats are to be understood by common use of language, which means a wider definition than those of unlawful threat or unlawful coercion. Contempt not only refers to smearing or slander, both punishable by law, but also to other abusive expressions which degrade or ridicule the group concerned. Criticism based on facts is allowed though.

Further, the criminal act shall consist of a disseminated statement or communication. And finally, it shall be directed against a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation.

The Provision on Agitation against a National or Ethnic Group protects people defined as a collective. Therefore an individual person aggrieved can report the crime to the police but is not regarded as a plaintiff and entitled to compensation in the criminal proceedings.

The punishment for agitation against a national or ethnic group is imprisonment for a maximum of two years, and fines if the crime is considered minor. On 1 January 2003 a new provision entered into force, introducing an aggravated form of this crime prescribing a penalty from six months up to four years imprisonment. Under this provision the crime may be deemed aggravated e.g. if the dissemination of racist material, such as racial propaganda activities by a racist organisation, has been extensive.

The **Danish** Criminal Code contains no explicit anti-discrimination provision, instead, however, a provision according to which a person who publicly or with the intention of wider dissemination makes statements or imparts other information by which a group of people are threatened, insulted or degraded — dissemination of hate-speech and derogatory remarks — on account of, among other grounds, their racial or ethnic origin, is liable to a fine, simple detention or imprisonment for up to two years. When determining the punishment it shall be considered an aggravating factor if the conduct is characterised as propaganda. In commercial or non-profit activity, any person who declines to serve an individual on the same basis as other persons on grounds of, among others, racial origin or ethnic origin, is liable a fine, simple detention or imprisonment for up to six month. This provision also applies to any person who in similar circumstances denies access to a place, performance, exhibition etc.[307]

[306] According to Art. 4 of the UN-International Convention on the Elimination of all forms of Racial Discrimination (ICERD) the ratified states condemn all organisations and all propaganda based on views or theories that any race or group of people of certain ethnic origin or colour of skin are superior to any other, or those who strive to justify or promote racial hatred and discrimination in any form. This shall among other things be upheld by the states taking the actions stipulated in the article. However, at the same time the convention states must, considering the principles expressed in the Universal Declaration of Human Rights, not infringe upon freedom of opinion and assembly by imposing Art. 4.

[307] Available at: http://www.europarl.eu.int/en/discrimi/ssi/race/summaries/default.shtm (10.09.2003).

7. Special legislation

In the broad concept of equality and non-discrimination most of the Member States developed a specific focus on legal provisions due to their historical, political or social backgrounds and situations. This section presents some prominent features and special legal occurrences in the national contexts.

The political experiences of Nazi and fascist regimes in the past as well as the present experiences of neo-Nazi and racist organisations and movements have obliged Member States to take legal measures, and criminalise racist or fascist organisations in order to prevent their activities. Besides general norms punishing defamation and laws prohibiting instigation to crime there is also special legislation against racist speech in the Member States, usually prohibiting activities of racist or right wing organisations and punishing incitement to hatred or additionally prohibiting the denial of the Holocaust and the display or wearing of racist symbols (Belgium,[308] Denmark,[309] Germany,[310] Greece,[311] France,[312] Luxembourg,[313] Netherlands, Austria,[314] Portugal,[315] Finland,[316] Sweden[317] and United Kingdom[318]).

[308] Law of 23 March 1995 prohibiting the denial, devaluation, justification or approval of the genocide committed by the national-socialist German regime during the Second World War (Moniteur belge du 30.031995).

[309] Penal Code para. 266b on hate speech focusing on race, colour, national or ethnic origin, faith or sexual orientation. There is no explicit prohibition against Nazi symbols or Holocaust denials in Denmark.

[310] Penal Code (*STGB*) para. 130 ('incitement of the people'), Penal Code (*STGB*) para. 86a Penal Code ('Using of symbols of anticonstitutional organisations'), Penal Code (*STGB*) para. 131 ('glorification of violence').

[311] Law 927/1979 – Greece, No. 927/1979 (FEK 139A/28-06-1979).

[312] Law of 29 July 1881.

[313] Penal Code Art. 457-1 (*Code pénal – loi du 19 juillet 1997*). Available at: http://www.coe.int/T/F/Droits_de_l'Homme/Ecri/1-ECRI/3-Th%E8mes_g%E9n%E9raux/3-Mesures_juridiques_nationales/1-Mesures_contre_le_racisme/Luxembourg/Luxembourg_RS.pdf (10.09.2003).

[314] See: Constitutional Act prohibiting the National-Socialist German Workers' Party (Prohibition Statute, Verbotsgesetz: Austria, StGBl 13/1945, amended version BGBl 148/1992); Insignia Act (Abzeichengesetz, Austria, BGBl 84/1960, amended version BGBl 117/1980); Penal Code sec 283 (Strafgesetzbuch, BGBl 60/1974 (01.01.1975), amended version BGBl I 134/2002); Introductory Provisions to the Code of Administrative Procedures art IX (1) no 3 (Einführungsgesetz zu den Verwaltungsverfahrensgesetzen; EGVG, BGBl 50/1991, amended version BGBl I 97/2002).

[315] Penal Code Art. 240 No. 2.

[316] Penal Code Chapter 11 Art. 8. Available at: http://www.coe.int/t/e/human_rights/ecri/1-ECRI/3-General_themes/3-Legal_Research/1-National_legal_measures/Finland/Finland_Legal%20Measures.asp (10.09.2003)

[317] Covered by Provision on Agitation against a National or Ethnic Group, regulated in parallel in the Penal Code Chapter 16, section 8, the Freedom of the Press Act Chapter 7, section 4 and the Fundamental Law on Freedom of Expression Chapter 5, section 1.

[318] Covered in the *Race Relations (Amendment) Act 2000.*

Austria's and **Germany's** National-Socialist historical past largely explains the emphasis laid on suppressing National-Socialist activities and the prohibition of all activities linked to former National-Socialist and fascist ideology. Part of such legislation in **Austria** is the Constitutional Act Prohibiting the National-Socialist German Workers' Party (Prohibition Statue, the so-called *Verbotsgesetz*), of May 1945. The most recent amendment of the Prohibition Statue,[319] dating from 19 March 1992, introduced para.3h, which expressly penalises the denial or trivialisation of the National-Socialist genocide. Since racism was and still is a key element of National-Socialist ideology, this law provides a legal basis for sanctions against racist actions and incitement in the context of (neo-) National-Socialist ideology. Racist ideas and actions, which are not linked to National-Socialist ideology, do not fall under the quite detailed provisions of this law. In both Austria's and Germany's legislation emphasis has so far been put on penal law to fight racism, as for example **Germany's** para.131 'Glorification of violence', para.86 'Distribution of propaganda material of anti-constitutional organizations' or para.86a 'Using of symbols of anti-constitutional organisations' of the Penal Code (STGB).

Besides **Austria** and **Germany,** [320] again, in other Member States such as **Greece** [321] **and Portugal**[322] racist and/or fascist organisations and parties are prohibited. In some Member States (Austria, Germany, Sweden) these organisations are also observed by surveillance agencies, by offices or branches of the police for the protection of the constitution. In Portugal the punishment for establishing or participating in or supporting of a racist or fascist organisation that campaigns propaganda which either incites or encourages discrimination, hate or religious violence, can be a prison sentence of between one and eight years.[323]

[319] Amending legislation of 6 February 1947, as last amended by *BGBl. 82-1957.*

[320] According to Art. 21, (2) of the Basic Law "Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality." Available at: http://www.oefre.unibe.ch/law/the_basic_law.pdf (23.08.2003). In addition, according to para. 33 (Ban of Replacement Organisations), Art. 1 of the Law on political parties (Parteiengesetz) 'It is forbidden to form organisations (replacement organisations), which pursue further anti-constitutional aims in place of a party banned under Art. 21, para. 2 of the Basic Law in conjunction with Art. 46 of the Law of the Constitutional Court, or to continue existing organisations as replacement organisations." Available at: http://www.nizkor.org/hweb/people/r/rushton-reginald/rushton-report-2.html (23.08.2003).

[321] (2) of Law 927/1979 (Greece, No. 927/1979 [FEK 139A/28-06-1979]).

[322] Art. 46, no. 4 of the constitution.

[323] Penal Code Art. 240 No. 1.

Similarly to **Finland, Austria** and **Greece** have autochthonous minorities protected not only by international agreements but also by the constitution. In **Austria** the legal recognition of the autochthonous minorities Croats and Slovenes is recognised by the constitution (Austrian State Treaty Art. 7[324]). **Greece's** historical past largely explains the emphasis laid on regulating the rights and obligations of Greece's Muslim Minority whose legal status and rights are governed by the 1923 Lausanne Treaty.[325] Besides affirmative action,[326] the specific legislation affects several legal areas in terms of minority rights especially in education, administration, use of language, religion, anti-discrimination legislation, etc. Section 17 of the **Finnish** constitution grants the Sami as an autochthonous minority the constitutional right to maintain and develop their own culture and language. The same rights apply however also for Roma and other minorities.

Germany, Finland and **Greece** have special legislation for co-ethnic immigrants. In **Germany** 'ethnic German immigrants' are legally considered as German nationals or immigrants of German descent *(Aussiedler),* thus they are entitled to enter German territory. Of importance in this context are the Federal Law on displaced persons *(BVFG*[327]*)* and the 1993 *Law on Resolving Long-term Effects of World War II (Kriegsfolgenbereinigungsgesetz*[328]*).* These legal provisions do not only affect immigration regulation but also measures in integration through the introduction of an integration model developed specifically for the ethnic German immigrants. In **Finland,** Ingrian Finn immigrants (previously living in the former Soviet Union) have a unique position, as they can obtain residence permits on the basis of their ethnic background.[329] In **Greece,** the most important legislation concerning the 'repatriated' ethnic Greeks from the Newly Independent States is the enactment of law No. 2790/2000[330] regulating the repatriation procedures and establishing special rights, privileges and social support structures for repatriates to facilitate their social integration through special provisions in acquiring Greek citizenship. For 'Albanian citizens of ethnic Greek descent' special residence and work permits are provided (Ministerial Decision 4000/3/10-e).[331]

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[324] Austria, BGBl. 152/1955, available at: http://www.bka.gv.at/bka/dokumente/art7SV.pdf, (23.08.2003). For further information on the Austrian legal framework on autochthonous minorities see chapter 8.2.

[325] *Convention Concerning the Exchange of Greek and Turkish Populations (Appendix A, Art. 2), Lausanne January 30, 1923 between the Government of the Grand National Assembly of Turkey and the Greek Government* (Lausanne Treaty). English text available at: http://www.hri.org/docs/lausanne/ (23.08.2003).

[326] As for example Law 2341/1995 (Greece, No. 2341/1995 [FEK 208A/06-10-1995]) introduced the notion of affirmative action in favour of a socially excluded minority: According to the provisions of the law a specific number of places at every university department are reserved for Muslim minority students.

[327] 02.06.1993, last amended 06.09.2001.

[328] 03.09.1971, last amended 21.12.1992.

[329] Finnish Aliens Act, 22.2. 1991/378 (last amended 537/1999) Section 18a (511/1996). Act available at: http://www.uvi.fi/englanti/pdf/laki.pdf – English – (23.08.2003).

[330] FEK 24A/16-02-2000.

[331] FEK234B – 15/04/1998.

In **Finland, Portugal** and the **Netherlands** the equal status of all individuals residing on the national territory is protected by the constitution. In **Portugal,** this holds even for people whose situation is irregular.[332]

Until the recent introduction of the notion of discrimination, in the **French** legal approach to racism, anti-Semitism and xenophobia penal repression has been preponderant, and racism has traditionally been defined in terms of criminal offences and penalties.

Besides the other eight distinct grounds of discrimination, in legislation covering discrimination in **Ireland** the membership of a Travellers Community, as an indigenous Irish group, is specifically mentioned and provides for specific positive action.

On 11 June 2001, the **Dutch** government promoted a legislative proposal to increase sentences in cases of structural discrimination by presenting a bill for the amendment of the Penal Code (Sr) to the Lower House of Parliament.[333] The bill would change the offences involving personal expression in Art. 137c, d and e of the Penal Code. If the offence is committed by a person who has turned it into a profession, or who commits it habitually, or in association with one or more persons, the sentence is to be doubled. This ruling refers to the remarks of extreme right wing organisations and the way freedom of speech challenges the limits of the ban on discrimination.

Portuguese legal provisions ensure support of immigrants associations. Decree-Law No. 39/98, 27 February 1998, altered by Law No. 115/99, 03 August 1999,[334] establishes the Consultative Council for Immigration-Related Issues, whose aim is to ensure participation of associations of immigrants and social partners for social integration and fight against exclusion. Law No. 20/96, July 6, constitutes the legal base for the participation of immigrant associations, anti-racism or human rights organisations in penal proceedings.

In **Swedish** legislation *the Female Genital Mutilation Act* (1982) prohibits any incisions of the female outer genitalia with the purpose of mutilating or creating permanent changes. In 1999 (Government Bill 1998/99: 70) the principle demanding that a crime must be punishable in both Sweden and the country where the crime took place was abolished in order to prevent girls from being taken to a different country for genital mutilation.

An outstanding feature in **German** legislation is the Life Partnership Act *(Lebenspartnerschaftsgesetz)* of 1 August 2001, granting equal rights to non-German same sex partners who officially registered their partnership. In future registered non-German partners will be equal to non-German husbands or wives in terms of immigration and residence titles.

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[332] Portuguese constitution (CPR), Art. 15: 'foreigners and stateless people that reside or are in national ground held the same rights and are subject to the same duties as Portuguese citizens.'

[333] Parliamentary Documents II, 2000/01, 27 792, No. 1-2.

[334] Governed by Decree-Law No. 75/2000, April 14, published in the official gazette on May 9, 2000.

8. The Member States' legal framework

8.1. Recent developments in aliens legislation

Against the background of an increasing number of asylum applications and a remarkable proportion of populations with a migrant background, policies in EU Member States focus on a further restriction of new immigration and better integration of migrants already settled. The systems are shaped by national policy on the one hand and the obligations of international treaties and commitments such as *Schengen* or (proposed) EU Directives on the other. This explains why more restrictive rules are very often accompanied by less rigid ones. Especially in cases with humanitarian impact, such as family reunification or detention of asylum seekers more lenient measures were introduced in several EU Member States.

However, this is not the place for an extensive report on migration and asylum policies and legislation. The following brief overview only sketches general trends and significant exceptions in order to allow a better understanding of the national legal frameworks concerning migrants and asylum seekers.

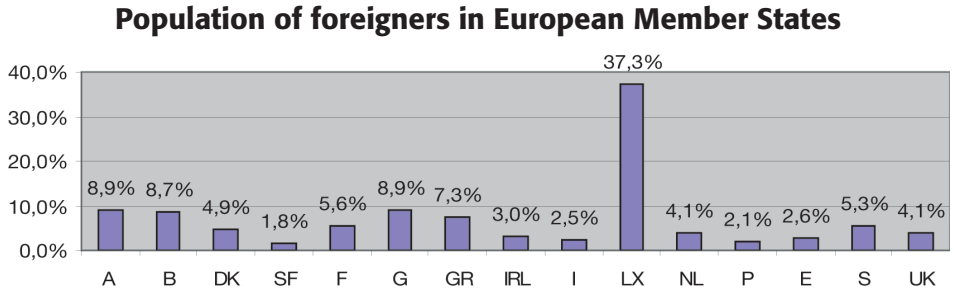
8.1.1. Immigration

Immigration policies in EU States regulate the access, entry, residence and employment of aliens who are citizens of third-countries, not of EU or EEA citizens.[335] This chapter will therefore focus on immigration policies towards non-EU aliens. However, significant proportions of aliens are in fact citizens from other EU States and therefore basically enjoy the same rights as national citizens. In the EU, their proportion ranges from 11 % (Italy) to 87 % (Luxembourg) of all aliens.[336] The share of all foreigners in the general population varies from 1.8% in Finland and 37,3% in Luxembourg (see table below). The net migration rate[337] in the EU-15 amounted to 2.6 per 1.000 habitants in 2002.

[335] Since June 2002, following an agreement between Switzerland and the EU, Swiss citizens have an equal status as EEA and EU citizens as far as employment is concerned.

[336] Information taken from the EUMC (2003) *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-Discrimination in 15 Member States of the European Union*, Principal authors: Michael Jandl, Albert Kraler and Anna Stepien, EUMC Equal Opportunities for an Inclusive Europe Series, Vienna 2003.

[337] Net migration is estimated on the basis of the difference between population change and natural increase (corrected net migration). The figures are rates per thousand inhabitants. Data taken from: (21.08.2003).



(EUMC (2003) *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-Discrimination in 15 Member States of the European Union,* Principal authors: Michael Jandl, Albert Kraler and Anna Stepien, EUMC Equal Opportunities for an Inclusive Europe Series, Vienna 2003).

In general, alien's legislation got more restrictive in regard to immigration: the rules for new immigration are tightened and in at least one case the cooperation between immigration and intelligence services is strengthened in order to deny entry to persons that allegedly present a potential danger to national security and order. The latter can be seen as a reaction to the terrorist attacks of 11 September 2001.

In general a distinction is being made between short-term residence permits for certain purposes and long-term residence permits. The latter usually require qualifications such as gainful work/self maintenance or certain skills needed by the national labour markets. In **Austria,**[338] **Denmark,**[339] **Germany**[340] and **Greece,**[341] residence permits are generously distributed to high-qualified workers and specialists. Sometimes only those with a defined minimum income (e.g. Austria) receive a permit. Good health is one of the requirements e.g. in Austria and Germany.[342] Usually it is easier for high qualified or self-employed workers (with means for a required minimum-investment) to obtain residence and working permits. The need for lower qualified workers is satisfied by the stipulation of an exact profile matching the current needs of the national economy, by allowing seasonal work outside the classical seasonal work branches for a longer period of time or by extending the commuters' status. A very flexible system for the import of temporary workers is achieved by these adjustable measures.

[338] Austria, BGBl. 126/2002, (13.08.2002), in effect since 01.01.2003.

[339] Denmark. Government's policy for foreigners launched 17.01.2002.

[340] The new Migration Law ('Zuwanderungsgesetz') was supposed to take effect on 01.01.2003. However, the law has been rejected by the Federal Constitutional Court for formal reasons on 12.08.2002. The Federal Government re-introduced the bill, unchanged, into parliament in January 2003. It was passed by the 'Bundestag' on 08.05.2003, but rejected by the 'Bundesrat' on 20.06. 2003 and has, therefore, not gone into effect. (Information taken from on 18.08.2003).

[341] Greece, Law No. 2910/2001, amended by Act No. 3013/2002 (implemented on 15.07.2002).

[342] According to the Migration Law, which has not passed yet (see footnote 6).

Recently, more restrictive rules for labour migration were introduced in **Greece**[343] and **Italy:**[344] In order to legally migrate to one of these countries, persons need not only obtain a work contract before entering the state, but the future employers also have to prove their commitment by certain actions: In Greece the prospective employers are obliged to deposit a number of monthly salaries as guarantee; in Italy they must find an adequate living situation for the worker and pay the travel expenses for the return trip. In Italy the duration of residence permits is shortened and for the extension a minimum income is required. Greece and Italy also passed several laws[345] in order to reduce illegal migration.[346]

In **Ireland,** recent legislative developments include the introduction of a carrier liability provision, and provision for the Minister for Justice, Equality and Law Reform in consultation with the Minister for Foreign Affairs to 'designate a country as a safe country of origin'.[347]

In most Member States, extensions of residence permits are only granted if the alien succeeded in finding gainful work for a minimum of time during his legal stay and fulfils other conditions — such as owing no money to the national government (e.g. Denmark) or having fulfilled the integration agreements (e.g. Austria). If the foreigner has committed a crime within the first years of residence, this is generally a reason for refusing further residence rights. If aliens are not able to manage their living without public maintenance this is a reason for expulsion for foreigners without a permanent residence permit in Denmark.[348]

Moreover, in Denmark a maintenance condition must be fulfilled in all cases of reunification of spouses, which is — according to the new legislation — no longer automatically granted.[349] Many countries target the abuse of family reunification by punishing 'false adoption' and limiting the age of children that may be unified with their parents. In Austria family reunification is additionally limited by quotas.[350]

The Danish 'anti-terror package'[351] contains several changes for tightening the Aliens Act, including a strengthening of the cooperation between the immigration and the intelligence services, especially by ensuring a more extensive access to exchange information between authorities without prior consent from the

[343] Greece, Law No. 2910/2001, amended by Act No. 3013/2002.

[344] Italy, Law No. 189, Bossi-Fini law (named after the 2 ministers who sponsored the bill in the parliament, 30.07.2002), came into force in September 2002.

[345] Greece, Act No. 2800/2000, 3030/2002 (15.07.2002). Italy Act No. 189 (30.06.2002).

[346] Estimating the clandestine population is a delicate exercise, involving problems of legal definitions and statistical methods, see for example: Migration News, 02/02, Vol. 9, No. 2, http://migration.ucdavis.edu/mn/archive_mn/feb_2002-14mn.html (26.08.2003).

[347] Immigration Act 2003, available at: www.gov.ie, (12.07.2003).

[348] Denmark. Government's policy for foreigners launched 17.01.2002.

[349] Family reunification got more restrictive in Denmark with the recent amendments. Denmark, Act No. 365 (06.06.2002).

[350] Austria, BGBl. 466/1992 (31.07.1992), amended BGBl. 351/1995 (19.05.1995).

[351] Denmark, Act No. 362 (06.06.2002).

foreigner concerned. Thus, the focus of attention is on foreigners who may constitute a risk to national security and hence should be denied a residence permit.

However, recent developments not only focus on more restrictive policies towards third-country-nationals. A reinforced residence right for already settled migrants and certain integration measures indicate a change of emphasis in immigration policies. As an example, the new German residence law comprises generous interim regulations for third-country nationals who are already resident in **Germany.**[352] **Austria,** too, reinforced residence rights for aliens, by weakening the chance of expulsion for persons legally resident for longer than five years even if self-maintenance is not achieved, or after eight years of residence even if a crime was committed.[353] In **France,** where special rules towards nationals from Algeria and Tunisia,[354] Andorra and Monaco exist, a Franco-Algerian agreement[355] harmonised the immigration status of Algerian nationals. In particular, Algerians entering France with a short-stay visa were no longer *ipso facto* ineligible for a residence permit and may apply for a one-year 'family' permit.

A better situation on the labour market for non-EU-citizens was achieved in France after a ministerial instruction on 22 October 2001. The RATP (Paris Public Transportation system) announced on 5 December 2002 that permanent positions *('emplois statutaires')* previously restricted to French or EU nationals would henceforth be unrestricted.

In Spain and Italy it is the immigration legislation which also provides anti-discrimination measures and stipulates the creation of regional discrimination observatories.

Several new bodies dealing with migration issues were recently founded: **France** introduced in October 2002 a new body, the *High Advisory Board for Integration* ('Haut Conseil à l'Intégration'), which was defined as advising the government on immigration, asylum and anti-discrimination policy. In November 2000, a new appeals commission was created to deal with appeals against refusals by French consulates to grant visas.

[352] According to para.99 Par.1 AufenthG, unlimited residence permits and entitlements that have been granted to these persons will remain in force. In effect, this regulation would "improve the legal status of about 2 million third-country nationals over night" (cf. Davy 2002, p.174; as to distribution of various residence titles, cf. Table 1).

[353] Austria, BGBl. 75/1997 (14.07.1997).

[354] The most significant special condition for Tunisians is that evidence of legal entry into France is not required (according to the Franco-Tunisian Agreement of 17.03.1988).

[355] The revision of the Franco-Algerian agreement was ratified by Algeria in September 2001, but by France only on 29 October 2002.

The new migration law in **Germany**[356] envisions a new *Federal Office for Migration and Refugees* (Bundesamt für Migration und Flüchtlinge, BAMF), which will succeed the *Federal Office for the Recognition of Foreign Refugees* (Bundesamt für die Anerkennung ausländischer Flüchtlinge, BAFL), and will be — amongst others — responsible for the following issues: allocating Jewish immigrants from the former Soviet Union to federal states, co-ordinating the exchange of data on labour migrants between local authorities, labour offices and German embassies abroad, processing applications for labour migration under the points system, updating the Central Register on Foreigners and implementing programmes for the voluntary return of migrants and others. A new independent *Council of Experts for Immigration and Integration* ('Zuwanderungsrat'), which will publish an annual report on migration in- and outflows and the current capacity for inflows and integration, was established on 26 May 2003 by a decree of the Federal Minister of the Interior.[357] The expert panel will publish a regular report on whether it is advisable to allow inflows of labour migrants according to the points system, and recommend a maximum number of migrants.

Denmark established *The Council of Ethnic Minorities,* which is directly linked to the Minister of Refugee, Immigration and Integrations Affairs — and supported by a ministerial secretariat — and, thus, has the possibility to engage in discussions with the Minister and submit opinions and recommendations on issues related to immigrants and refugees.

Spain founded the *High Council for Immigration Policy* and the *Sub commission of Coordination of the Canaries* that create a working frame to coordinate policies and actions towards immigration with the regional government of the Canaries and Catalonia. Moreover, the *Sub commission of Coordination of Catalonia,* the *Forum for the social integration of immigrants* and the *Permanent Observatory of Immigration* were set up, the last of which publishes legislation concerning Immigration and Asylum policies and governs a documentation centre.[358]

Two new bodies were established in **Portugal.** In 1996 the *High Commissioner for Immigration and Ethnic Minorities' Cabinet* ('ACIME'), which targets the elimination of discrimination and fighting against racism and xenophobia, was launched. It also distributes information about legal changes concerning immigrants and ethnic minorities.[359] In 2001 the *Interministerial Commission* to monitor the immigration policy, which approves the annual forecast for job opportunities, was founded.[360]

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[356] The new Migration Law ("Zuwanderungsgesetz") was supposed to take effect on 01.01.2003. However, the law has been rejected by the Federal Constitutional Court for formal reasons on 12.08.2002. The Federal Government re-introduced the bill, unchanged, into parliament in January 2003. It was passed by the "Bundestag" on 08.05.2003, but rejected by the "Bundesrat" on 20.06. 2003 and has, therefore, not gone into effect. (Information taken from on 18.08.2003).

[357] http://www.zuwanderungsrat.de/ (18.03.2003).

[358] http://www.ulb.ac.be/assoc/odysseus/organismispuk.html (18.08.2003)..

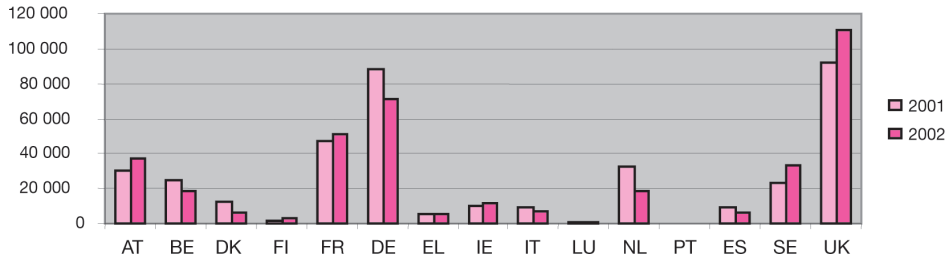
[359] Portugal, Decree-Law 3-A/96 (26.01.1996) and Decree-Law 296-A/95 (17.11.1995).

[360] Portugal, Resolution, Cabinet, No. 14/2001 (14.02.2001).

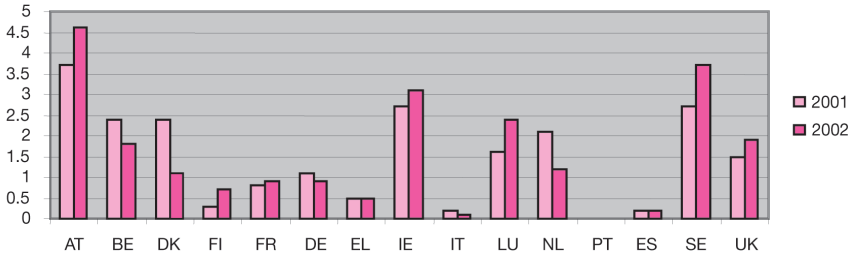
8.1.2. Asylum

With few exceptions, the EU Member States receive a rather high number of asylum applications (see table below). In 2002 the UK received 110,700 asylum applications, Germany 71,130 and France 50,800. The UK received the biggest share with 29%, Portugal the lowest with 0.1%. In proportion to the population, Austria was confronted with the highest number of asylum seekers with 4.6 applications per 1.000 inhabitants, followed by Sweden with 3.7 applications per 1 000 inhabitants.[361]

Asylum applications in EU-15 in 2001 and 2002



Asylum applications per 1 000 inhabitants



(Austria: in 2001 5.622 asylum applications from embassies included: These persons, primarily Afghans, could not enter Austria; Germany: only first applications, Denmark: including asylum seekers from safe third countries or whose application were processed under the Dublin Treaty.)[362]

European Member States have harmonised their asylum procedures, by first checking the responsibility (safe third-country, Dublin Treaty) and improving the exchange of information. However, there are often long delays in processing the applications of asylum seekers. In order to reduce reception costs, accelerated procedures have been introduced in case of manifestly unfounded or apparently founded applications. In Austria[363] and Denmark[364] procedures are terminated if the applicant is not available.

[361] Data taken from UNHCR Aktuell, 18.03.2003 http://www.unhcr.de/pdf/227.pdf (26.08.2003).
[362] Data taken from UNHCR Aktuell, 18.03.2003 http://www.unhcr.de/pdf/227.pdf (26.08.2003).
[363] Austria, BGBl. 75/1997 (14.07.1997).
[364] A new policy for foreigners. The original document is accessible on www.inm.dk (02.06.2004).

Against the background of the 'Proposal on a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States'[365] reception systems in many member states need improvement. In **Austria** asylum seekers not identifying their travelling route or their identity were excluded from the federal health care system and moreover, certain nationalities were generally excluded.[366] In **Belgium** in 2001 financial assistance was terminated for asylum seekers waiting for a decision on the admissibility of their applications or their appeals.[367] France, on the other hand, extended social benefits to all asylum applicants.

Generally applied detention of (rejected) asylum seekers, especially in the case of minors, is another problematic issue. Austria targeted this problem by introducing more lenient measures.[368] The Swedish law clearly states that children are to be relieved from detention. **Belgium** shortened the maximum length of detention from eight to five months.[369] The **UK** increased the use of detention.

Some member states also focus on a more extensive examination of identity. In **Austria** x-ray examinations of the wrist may be conducted in order to ascertain the age of asylum seekers since 1998. According to the **Danish** 'anti-terror-package' finger prints and personal photographs, which are secured as evidence in a criminal case or are received as a part of an international warrant, may without any limitations be compared to finger prints and personal photographs taken of asylum seekers and other foreigners.

Some changes concerning the status of refugees took place: As stated in a Council Directive from 20 July 2001,[370] European Member States should establish a temporary protection system in case of mass influx of persecuted persons. The Member States had to implement the provisions of the Directive by 31.12.2002.[371]

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365 COM/2001/0181 final – CNS 2001/0091, *Official Journal C 213 E, 31/07/2001 P. 0286 – 0295,* http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2001&nu_doc=181 (10.09.2003).

366 Austria, Federal Care provision Decree from 01.10.2002 (Zl 97.201/64-SL III/02). However, this Federal Care provision Decree was declared unlawful in a recent decision by the Supreme Court (No. 16c318/03). According to this decision, the Decree is contradictory to the basic values including the non-discrimination principle of the Federal Law regulating the Provision of Federal Care for asylum seekers *('Bundesbetreuungsgesetz').* Furthermore, according to the Supreme Court the Federal Government is not entitled to deny an asylum seeker federal care in the first place without the existence of an objectively justified differentiation. (Der Standard, 12.09.2003).

367 http://www.refugees.org/world/countryrpt/europe/2001/belgium.htm (18.08.2003).

368 Austria, BGBl. 75/1997 (14.07.1997).

369 An assessment of the impact of asylum policies in Europe. 1990-2000. part 2. (Home Office Online Report 17/03) edited by Roger Zetter, David Griffiths, Silva Ferretti and Mrtyn Pearl. p. 9.

370 Council Directive 2001/55/EC (20.07.2001).

371 http://europa.eu.int/comm/justice_home/fsj/asylum/temporary/wai/fsj_asylum_temporary_en.htm (18.08.2003).

In **Germany** the new residence law[372] confers the same labour market entitlements on recognised asylum seekers and foreign nationals who are legally protected against deportation. **Denmark** abolished the concept of de facto refugees. Only individuals entitled to protection under international conventions will be allowed to live in Denmark. The 2002 Act[373] abolished the possibility for foreigners to apply for asylum in Denmark from another country through Danish representations abroad. Asylum-seekers whose applications for asylum are refused must leave the country immediately. The Government proposes a swift working permit procedure for specially qualified asylum-seekers: Asylum seekers will be obliged to work and will obtain pocket money. Recent amendments in Italy allow expulsion immediately, even if an appeal has been lodged. The time periods of an appeal remain very brief, but appeals can be lodged from abroad. The planned German *Federal Office for Migration* (BAMF) will also be concerned with processing asylum-applications.

An important aspect of **French** asylum policy has been transit through France by persons seeking asylum in the UK. The Sangatte hostel, near Calais in Northern France, which was opened under Red Cross management in September 1999 and housed some 1,500 people, mostly Iraqi Kurds and Afghans, became the focus of major debate and mobilisation. The French government closed it in November 2002. The French *High Advisory Board for Integration ('Haut Conseil à l'Intégration'),* is now also responsible for advising the government on asylum policy.

Some new boards - several of them were already mentioned — dealing with asylum were founded: In **Austria** the *Federal Asylum Review Board* (Unabhängiger Asylsenat, UBAS) for appeals against decisions of the Federal Asylum Office was created on 1 January 1998.[374] As a second new Austrian board the *Human Rights Advisory Board* ('Menschenrechtsbeirat') was established as an independent body situated in the Ministry of Interior. The Advisory Board is primarily focusing on the monitoring of activities of the security authorities, the authorities under the Minister of the Interior and of other bodies vested with direct administrative powers of command and enforcement.

In **Denmark,** the composition of the *Refugee Board* changed (now a judge, a ministerial representative and a representative appointed by the General Council of the Bar and Law Society).

[372] The new Migration Law ('Zuwanderungsgesetz') was supposed to take effect on 01.01.2003. However, the law has been rejected by the Federal Constitutional Court for formal reasons on 12.08.2002. The Federal Government re-introduced the bill, unchanged, into parliament in January 2003. It was passed by the 'Bundestag' on 08.05.2003, but rejected by the 'Bundesrat' on 20.06.2003 and has, therefore, not gone into effect.
(http://www.bundesregierung.de/Themen-A-Z/Innenpolitik-,6812/Zuwanderung.htm on 18.08.2003).

[373] Denmark, Act No. 365, (06.06.2002).

[374] Austria, BGBl. I/126/2002, (13.8.2002).

8.1.3. Integration/regularisation

Several Member States recently passed laws concerning the integration of aliens. The term 'integration' includes a variety of aspects. Whereas many countries emphasise the importance of language skills (e.g. Austria, France, Germany,[375] Italy, Netherlands) and sometimes also of cultural knowledge, others primarily focus on the social inclusion of ethnic minorities (e.g. UK, Greece, Portugal) or value the integration in the labour market the highest (e.g. Denmark, Netherlands). It is important to notice that some states oblige immigrants to participate in integration programmes (e.g. Austria), while others also create incentives (e.g. Denmark, Finland, Germany, Netherlands). Incentives are financial benefits, shorter waiting periods for permanent residence permits or acquiring citizenship.

The Austrian 'integration agreement' *(Integrationsvereinbarung)*[376] is compulsory for migrants having come to **Austria** after 1 January 1998. Failure to fulfil the requirements of a 100-hours-language-course within a certain timeframe entails penalty fees and might even lead to the expiry of the right to abode in Austria.

In 2002 **Denmark** launched a new policy aiming at a more successful integration of immigrants into the labour market by creating special incentives for enterprises: Companies can offer on-the-job-training, while the maintenance during the trainee period corresponds to the benefits for which the particular person is already eligible. Also special starting wages or salaries are allowed. A combination of language courses and traineeship/introduction programmes for ordinary employment at the enterprise shall improve the access to the labour market. As part of the strengthening of Danish courses, it is also proposed that unjustified absence from language courses will lead to a reduction of the introduction allowance. The language courses also include lessons in the understanding of society and information on how to set up a business. Immigrants who attend Danish language courses and are able to maintain themselves and their families are honoured by a shorter way to a permanent resident permit. As part of an efficient assessment of formal qualifications the Government improves the possibilities of mapping and recognising the formal qualifications brought by new citizens, as well as their actual competencies through testing of their working capacity, especially of persons without any formal educational background.

Finland passed a law on integration and reception of Asylum-seekers in 1999 that obliged unemployed immigrants to participate in language courses. Foreigners taking part in the individual integration programme receive integration benefits, which are comparable with the lowest level of unemployment benefits. The

[375] The new Migration Law ('Zuwanderungsgesetz') was supposed to take effect on 01.01.2003. However, the law has been rejected by the Federal Constitutional Court for formal reasons on 12.08.2002. The Federal Government re-introduced the bill, unchanged, into parliament in January 2003. It was passed by the 'Bundestag' on 08.05.2003, but rejected by the 'Bundesrat' on 20.06.2003 and has, therefore, not gone into effect. (Information taken from http://www.bundesregierung.de/Themen-A-Z/Innenpolitik-,6812/Zuwanderung.htm on 18.08.2003).

[376] Austria, BGBl. 126/2002 (13.08.2002).

integration benefit consists of a labour market subsidy and living allowance. If he or she fails to participate in the programme, and the integration process is seen as interrupted, the benefits are reduced.

France implemented in 2003 a new 'Integration contract', which aims at a better integration of immigrants, refugees and regularised immigrants by providing French classes and civic education lectures (30 hours in total) dealing with republican values and institutions. The scheme is to be managed at the departmental level by the *Office des Migrations Internationales*. In addition, social and work-related support will be provided by a personal tutor, who will assist the new resident with legal, administrative and welfare issues.

The new **German** residence law[377] integrated for the first time the goal of fostering the economic, cultural and social integration of legal and long-term foreign residents of Germany. The law creates both an entitlement to participate in integration courses and an obligation to do so. All foreign residents who have been granted their first residence permit for reasons of employment, family migration or on humanitarian grounds are entitled to participate in such courses. Under certain circumstances also migrants who have been living in Germany for a longer period of time can be obliged to take part in integration courses. Third-country nationals who have been granted a permanent settlement permit, on the other hand, are under no obligation to participate. Integration courses comprise a German language course and a orientation course teaching the fundamentals of German law, culture and history. Migrants who participate successfully in these courses can have their waiting periods for naturalisation shortened from eight to seven years. A refusal to participate, on the other hand, will have an impact on administrative decisions to extend residence permits.

The **Italian** law[378] sketches measures of social integration, which have to be taken on by the state, the regions, the provinces and the local communities for the integration, the formation, the teaching of the Italian language and the cultural mediation.

The **UK** focuses on a conception of common citizenship that embraces multiple forms of cultural identity. The Government in its White Paper *Secure Borders, Safe Haven: Integration With Diversity in Modern Britain* acknowledged the multi-ethnic nature of Britain: 'our society is based on cultural difference, rather than assimilation to a prevailing monoculture. This diversity is a source of pride…'.[379] It also committed itself to engaging in a new debate on citizenship in the broader sense. A series of community cohesion initiatives have been

[377] The new Migration Law ('Zuwanderungsgesetz') was supposed to take effect on 01.01.2003. However, the law has been rejected by the Federal Constitutional Court for formal reasons on 12.08.2002. The Federal Government re-introduced the bill, unchanged, into parliament in January 2003. It was passed by the 'Bundestag' on 08.05.2003, but rejected by the 'Bundesrat' on 20.06.2003 and has, therefore, not gone into effect. (Information taken from http://www.bundesregierung.de/Themen-A-Z/Innenpolitik-,6812/Zuwanderung.htm on 18.08.2003).

[378] Italy, Law No.286/98, art 42.

[379] Home Office (2002c) Secure Borders, Safe Haven: Integration With Diversity in Modern Britain, Cm 5387, London: Home Office, p. 10. PUBUK0335

introduced, including extensive guidance for local authorities to on how to bring local communities together as well as the establishment of consultative panels and a Home Office Community Cohesion Unit to guide the development of anti-segregation policies.

The **Netherlands** has a comparatively long history of integration policy that dates back to the 1980ies. The integration course of about 600 lessons includes language and social courses as well as information about integration in the labour market. Neglecting the duty of participation is economically sanctioned.

Greece was focused on the integration of ethnic Greeks, especially those migrating from the Newly Independent States of the former Soviet Union by creating some special rights, privileges and social support structures for repatriates to facilitate their social integration.[380]

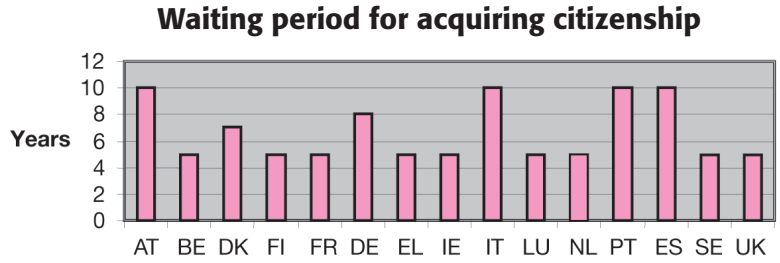
There has been comparatively little focus on integration policy in **Ireland.** The Reception and Integration Agency (RIA) is a Statutory Agency under the aegis of the Department of Justice, Equality and Law Reform, which has responsibility for planning and co-ordinating the provision of services to both asylum seekers and refugees; co-ordinating and implementing integration policy for all refugees and persons who, though not refugees, are granted leave to remain. These services include the provision of accommodation, health care, and education.

Luxembourg tries to ease the foreigners' integration process and organises favourable social action, namely in terms of housing, training, organisation of leisure, welcoming, travel or repatriation activities, participation activities oriented to social life, etc.[381]

Portugal passed a law in 1996 for the improvement of the living conditions of immigrants by providing the conditions for their integration in the society with full respect for original identity and culture; the full dignity of and identical opportunities to all citizens legally living in Portugal, in order to eliminate discrimination and fight racism and xenophobia.[382]

Naturalisation procedures also changed in some member states. In all but three countries (**Belgium**, **Italy**, **Sweden**), acquiring citizenship is linked to the condition of language skills.[383] In **Ireland,** additionally knowledge of history is required. The waiting periods vary between five and ten years (see table below). The conditions for acquiring citizenship vary in European Member States. **France** with a comparable liberal naturalisation policy automatically offers French citizenship to children of foreigners born in France at the age of 18.[384]

[380] Greece, Law No. 2790/2000 (FEK 24A/16-02-2000).
[381] Luxemburg, Law on Foreign Integration (27.07.1993).
[382] Portugal, Decree-Law No. 3-A/96 (26.01.1996).
[383] http://derstandard.at/druck.asp?id=1393012, (25.08.2003).
[384] http://www.vie-publique.fr/decouverte_instit/citoyen/citoyen_1_1_0_q3.htm (18.08.2003).



(In certain cases the waiting period amounts to only four years in Austria. Data from http://derstandard.at/druck.asp?id=1393012, 25.08.2003)

The already described tightening of the Danish legislation also affects the naturalisation rules: A law on naturalisation was passed in order to reduce the number of persons from the Nordic countries with double citizenship.[385] The act lays down that a Nordic citizen who is naturalised in **Denmark** must give up his or her citizenship in another Nordic country. Besides, the Act abolishes the automatic naturalisation of children born in bigamist marriages in foreign countries by Danish fathers.

The Finnish government submitted a draft law on citizenship to the Parliament in November 2002, which has come into force on 1 June 2003. According to the law, double citizenship is possible and persons who have already given up Finnish citizenship could reclaim it under certain conditions. There are also changes in the requirements for naturalisation. The general requirement for the period of staying in **Finland** prior to applying for citizenship is now six years instead of previously five years.

The **German** Citizenship and Nationality Act[386] partly changed *ius sanguinis* into *ius solis* in 2000. Before the new legislation took effect, foreign nationals were granted entitlement to naturalisation only after 15 years of residence in Germany. Now, a foreign national is entitled to naturalisation after lawfully residing in Germany for eight years.[387]

The **Italian** law of 1992 on the acquisition of Italian citizenship has reaffirmed the *ius sanguinis* and has set up extremely rigid conditions for the acquisition of citizenship for foreign immigrants (immigrants not of Italian descent), with a strong discrimination between EU and non-EU citizens. Many Roma and Sinti face a particularly serious situation. Even though having been born and raised in Italy, they cannot accede to citizenship through naturalisation due to the fact that they often are not uninterruptedly inscribed in the register office of a city.

[385] Denmark, Act No. 366 (06.06.2002).

[386] Germany, BGBl. 1999 I, 1618 (15.07.1999).

[387] If he or she meets the following requirements: is in possession of a residence permit or the right of unlimited residence, professes loyalty to the free democratic order laid down by Germany's constitution and has not been involved in any activities that are hostile to the constitution. In addition, applicants must not have a criminal record, have to be able to support themselves and dependent family members without the help of welfare benefits or unemployment assistance and, finally, have to have an adequate command of the German language.

Spain established the possibility of a double nationality.

Swedish citizenship is attained by being born to a Swedish mother or by having a Swedish father living in Sweden (or abroad in a marriage to a foreigner), by adoption, by application or through notification (which means a right to become a Swedish citizen if certain conditions are fulfilled for children with a Swedish father, children and youth who are either stateless or foreign citizens who have lived in Sweden for a certain period of time and Nordic citizens. The Swedish Migration Board is — with certain exceptions concerning Nordic citizens — the authority that handles cases of citizenship.

For foreign citizens legal residence constitutes an indispensable prerequisite in order to be able to benefit from the existing measures aimed at their integration. For this and other reasons, the status of illegal immigrants has been regularised in several EU-member states (**Belgium**, **France**, **Greece**, **Italy**, **Luxemburg**, **Netherlands**, **Portugal**, and **Spain**).

'Notably in **Italy** during 1987/88, 1990 and 1995/96 600.000 workers were regularised, in 1998/99 a campaign that was meant to regularise 38,000 labour migrants actually regularised 250.000. In **Spain**, similarly in 1985/86, 1991 and 1996 180.000 illegal workers were regularised, whilst in 2000, 164,000 were regularised, and 152,000 applied during a 2001 campaign. In **Portugal**, in 1992/93, 1996 and 2001 180,000 persons were regularised and in 1998 **Greece**[388] saw 220.000 provided with the opportunity to legalise their status, whilst in 2001[389] 350,000 applied.0146'[390] In Spain, 4 processes of regularisation of documentation took place between 2000 and 2001. In Portugal in this context Law No. 17/96 of 24 May 1996 was passed – this process of regularisation ended, as the law established, on 11 December 1996. Decree-Law No. 4/2001 of 10 January 2001 led to a new process of regularisation, which ended on 30 November 2001 with the Resolution taken in Cabinet No. 164/2001 of 30 November 2001.[391]

[388] The restrictions placed by law 1975/1991 to legal migration, led to a growing number of undocumented migrants. In 1998 the first regularisation process was implemented on the basis of Presidential Decrees 358/1997 and 359/1997 led to almost 371,641 applications from migrants, although many could still not secure the minimum legal documents required. The first regularisation process was carried out by the by the Manpower Employment Organisation.

[389] This regularisation process was provided for by law 2910/2001. The Ombudsman report and reports from several NGOs stressed certain negative aspects of the law noting serious problems with its implementation and especially the migrant registration process by the Prefectures (local authorities responsible for the registration process).

[390] http://www.ecre.org/factfile/realfacts.shtml (26.08.2003).

[391] The National Focal Point noted that an undetermined number of illegal citizens were unable to regularise their situation due to the fact that their employers did not formalise their work ties through a work contract in writing as the law demands. In some cases the employers themselves were in an irregular situation in relation to the demands posed by the General Labour Inspection.

In **Belgium** a regularisation procedure was organised by the Law of 22 December 1999.[392] By 31 January 2000, 33.000 applications had been submitted.[393]

By means of a regularisation procedure implemented in 2001 in **Luxemburg**, approximately 2.000 people, immigrants without working papers or asylum seekers, were able to settle their status.

In **France** about 300.000 'sans papiers' have been regularised until 2001.[394]

Several new bodies dealing with integration were founded recently: **Belgium** established the *Centre for Equal Opportunities and the Fight Against Racism*, which is responsible for drawing up advice regarding immigration, integration, training and raising awareness in the wider areas of migration, integration and racism. The **Danish** Act on Integration establishes *Advisory Municipal Councils of Integration*[395] and the *Council of Ethnic Minorities*.[396] The local integration councils enable persons belonging to ethnic minorities to get access to local decision-making bodies and thereby provide the chance to influence the agenda, activities and other municipal initiatives involving issues relevant to ethnic groups. **Finland** created several advisory boards for ethnic minorities and the *Ombudsman for Ethnic Minorities*, whose task it is to monitor, report and improve the situation of ethnic minorities. The **French** *High Integration Board* is also concerned with integration, as well the **German** *Federal Office for Migration and Refugees* (BAMF). It will be responsible for conducting integration courses via private and public institutions, advising the Federal Government in integration programmes and compiling information packages on integration projects for foreign residents and ethnic German immigrants ('Aussiedler'). Also, the new migration law calls for setting up a new independent *Expert Panel for Migration and Integration* ('Zuwanderungsrat'), which will publish an annual report on migration in- and outflows and the current capacity for inflows and integration. **Italy** founded the *Italian Commission for Integration Policies of Immigrants* and the *National Body of Coordination of the Policies of Social Integration of Foreign Citizens on a Local Level*. **Spain** created within the consultative organism *The Forum for the Social Integration of Immigrants*, which will ensure effective configuration and operation of the Integration Forum as a body for consultation, information and advice on immigrant integration matters. **Portugal** founded the aforementioned *High Commissioner for Immigration and Ethnic Minorities' Cabinet* (ACIME). **Sweden** established the *National Integration Board* in 1998, which is responsible for monitoring and evaluating trends in Swedish society from

[392] Aliens were authorised to apply for an unlimited residence provided that they were already staying in Belgium on 1 October 1999 and came under one of the following categories: asylum seekers whose application is still pending after four years of procedure, or three years for families with school-aged children, aliens who, for reasons beyond their control, are unable to return to their country of origin, or in their last country of residence before arriving in Belgium, aliens who are seriously ill, aliens who may invoke humanitarian reasons and have long-time social links in Belgium, for instance if they have been in the country for more than six years, or five years for families with school-aged children.

[393] http://www.ecre.org/conditions/2000/belgium.shtml (26.08.2003).

[394] http://www.sans-papiers-basel.ch/grundtexte/analysen/zahl_der_papierlosen.htm (27.08.2003).

[395] which have become voluntary.

[396] Denmark, Act No. 792 (18.09.2002).

an integration standpoint, promoting equal rights and opportunities for everyone, regardless of ethnic and cultural background and preventing and combating xenophobia, racism and discrimination.[397]

8.2. Autochthonous and 'co-ethnic' minorities

Many member states provide laws for the protection of their autochthonous and their co-ethnic minorities.[398] In **Austria**, there are six national or autochthonous minorities namely Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma recognised either directly by constitutional provisions (Croats and Slovenes) or according to para. 2 *Volksgruppengesetz* (National Minorities Act) of 1976[399] by decree of the Federal Government[400] (Hungarians, Czechs, Slovaks and Roma).[401] The *Volksgruppengesetz* (National Minorities Act) defines national minorities as comprising groups of Austrian citizens with first language other than German and a common autonomous cultural heritage who have their residence and home in a part of the Austrian federal territory. The law explicitly states that no one belonging to an ethnic group must be put at disadvantage as a result of the assertion or non-assertion of their rights as members of that ethnic group. Moreover, nobody can be forced to provide evidence of his or her affiliation with an ethnic group. The legal status and rights of the national minorities in Austria is guaranteed by the various constitutional provisions and partly implemented by the *Volksgruppengesetz*[402] through decrees on schooling in the minority language, bi-lingual topographical signs. Furthermore, the *Volksgruppengesetz* provides for the right to use one of the minority languages before the courts and administration in order to ensure the continuing existence of the ethnic minority group, their characteristics and rights. The *Volksgruppengesetz* also provides for the establishment of National Minority Advisory Councils for all officially recognised minority groups. Their competences are, however, restricted to non-binding advisory activities.

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397 http://www.sweden.se/templates/Article_2283.asp (26.08.2003)

398 Autochthonous minorities are ethnic minorities that are historically resident in the territory of the nation state. Co-ethnic minorities are settled outside the nation state, but are descendants of nationals of the nation state, like the German "Aussiedler". In many cases they enjoy special rights in acquiring citizenship.

399 Austria, BGBl. 396/1976, last amended by BGBl. 35/2002, (31.01.2002).

400 Austria, BGBl. 38/1977 as last amended by BGBl. 895/1993, (23.12.1993).

401 Self-estimates of the size by representatives of the autochthonous minorities in Austria: Slovene minority about 50,000, Croat minority 40,000-50,000, Hungarian minority 30,000-50,000, Czech minority 15,000-20,000, Slovak minority 5000-10,000, Roma and Sinti minority 10,000-20,000 persons. Österreichisches Volksgruppenzentrum (2000) Volksgruppenreport 2001. Zur Lage der ethnischen Minderheiten in der Republik Österreich (Minorities report 2001. On the situation of ethnic minorities in the republic of Austria). Österreichisches Volksgruppenzentrum, Vienna, available at: http://www.demokratiezentrum.org/search_agent/display_ARTIKEL1.asp?ID=32, (10.09.2003) and Baumgartner, G./ Perchinig, B. (1995) 'Minderheiten in Österreich (Minorities in Austria)', in: Baumgartner, G.: *6 x Österreich. Geschichte und aktuelle Situation der Volksgruppen*, edited by U. Hemetek on behalf of the Initiative Minderheiten. Drava, Klagenfurt. A summary is available at: http://www.initiative.minderheiten.at/Service/volksgruppen.htm, (10.09.2003).

402 Austria, VfGH W I-9/79 (05.10.1981).

The **Danish** integration policy focuses explicitly on minorities – also expressed by establishing the *Council for Ethnic Minorities* with advisory functions towards the municipal councils and the Minister of Refugee, Immigration and Integration Affairs. The local integration councils enable persons belonging to ethnic minorities to get access to local decision-making bodies and thereby provide the chance to influence the agenda, activities and other municipal initiatives involving issues relevant to ethnic groups.

Finland's small indigenous population known as the Sami, and other traditional minorities such as the Roma, Tatars, Jews, and a long-established Russian population, amount to less than 25,000 persons.[403] Section 17 of the constitution guarantees that Sami, Roma and other minorities have the right to develop and maintain their language and culture. There are several institutions dealing with minority issues. The newest institution is the *Ombudsman for Ethnic Minorities*, established in September 2001; others are the Advisory Board for Roma, *Romaniasiain neuvottelukunta*, the Advisory Board for Sami, *Saamelaisasiain neuvottelukunta*, and the *Advisory Board for Ethnic Relations* (ETNO).[404] *The Advisory Board on Sami Affairs* serves as a consultative body, with representatives of central government, the County of Lapland and the Sami Parliament. It works to improve the social, cultural, educational, legal and economic situation of the Sami. Together with the Sami Parliament, which promotes Sami interests, the Advisory Board has publicly taken a stance in questions such as Sami land-ownership and reindeer herding.

In **Germany**, national minorities are those groups of German citizens who are traditionally resident in the Federal Republic and live in their traditional/ancestral settlement areas, but who differ from the majority population through their own language, culture and history — i.e. an identity of their own — and who wish to preserve that identity. These are: the Danish minority, the Sorbian people, the Friesians, and the German Sinti and Roma, who were in 1997 recognised as a minority.[405] The Danes, the members of the Sorbian people, and the German Sinti and Roma are designated as national minorities, while the term of "Friesian ethnic group" reflects the wish of the large majority of Friesians not to be classed as a national minority, but as a Friesian ethnic group. The *Framework Convention for the Protection of National Minorities* (FCNM), in force since 1998, and the *European Charter for Regional and Minority Languages* (CRML), in force since 1999, are subordinate to the Basic Law, although as Federal Laws they take precedence over State Laws, and as the more specific laws override other Federal laws. Aside from these conventions, there is no specific Federal legislation

[403] The Sami population amounts to 10,000 persons, the Roma also to approximately 10,000. In addition, circa 3.000 Finnish Roma reside in Sweden.

[404] In August 2001, the Council of State appointed the Advisory Board for Ethnic Relations (ETNO) for one term, lasting from August 2001 to August 2004. ETNO is as a broad-based expert consultative organ, which gives statements on matters relating to refugees and migration, and on racism and ethnic relations. The Board is composed of governmental and municipal officials, labour market organisations, and representatives of minority language groups.

[405] Estimation on the number of persons belonging to minorities in Germany: Danish minority: some 50,000 persons, Sorbs: about 60,000, Friesans: 60,000 to 70,000, Sinti and Roma: about 70,000 and about 100,000 Roma without German citizenship.

stipulating the rights of minorities, with the exception of the *Declaration on the Rights of the Danish Minority* of 29 March 1955. On the basis of this declaration the *Südschleswigsche Wählerverband SSW* (Electoral association of Southern Schleswig) is exempted from the 5% clause, which is obligatory for political parties to enter the state parliament. In addition, the German Danes run schools and kindergartens of their own.

Greece grants special rights to the autochthonous Muslim minority in Thrace (composed of Turks, Pomaks and Roma) whose legal status and rights are governed by the 1923 Lausanne Treaty[406] and other subsequent bilateral agreements. Apart from the right of religious freedom, the Treaty also settles issues of linguistic diversity. Art. 41 guarantees the right of a minority member to use his/her native language during a judicial process. The government is obliged to provide teaching of the native language of Muslims[407] in the public primary schools of Thrace. The Treaty also protects the right of minority members to establish and manage private schools and educational foundations. There is a law regulating the education of the Muslim minority;[408] one on affirmative action in favour of a socially excluded minority[409] and one on the establishment of non-Christian Orthodox places of worship.[410] 'Repatriated' ethnic Greeks from the NIS and migrant ethnic Greeks from Albania as a co-ethnic minority acquire Greek citizenship through a special process. Migrant Greeks from Albania[411] were discouraged from acquiring Greek citizenship, while distinguishing them from other foreign nationals through a special residence and work permit of unlimited duration.[412] In this way Greece can still claim the existence of a substantial ethnic Greek minority in Albania.

The Traveller community, an indigenous **Irish** group with an estimated population of 24,000 people, remains the largest minority ethnic group in Ireland. There has been a long established Jewish community and growing Islamic, Asian and Chinese communities in Ireland.

In the **Netherlands**, the Act on the Promotion of Ethnic Minorities in the Labour Market obliges enterprises (the government included) in which at least 35 persons are employed to target a representation of minorities that is proportional to their share in the regional population. On 4 December 1999, the bill for the approval of the Framework Convention for the Protection of National Minorities was

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406 *Convention Concerning the Exchange of Greek and Turkish Populations (Appendix A, Art. 2), Lausanne January 30, 1923 between the Government of the Grand National Assembly of Turkey and the Greek Government.* English text available at: http://www.hri.org/docs/lausanne/ (09.09.2002).

407 The language taught is Turkish, although part of the minority defines itself as Pomak speaking a Bulgarian dialect.

408 Greece, No. 694/1977 (FEK 244A/01-09-1977).

409 Greece, No. 2341/1995 (FEK 208A/06-10-1995).

410 Greece, Act 1672/1939.

411 Official Albanian statistics puts the number of ethnic Greeks at 35.000, while various Greek sources claim that 200.000 – 400.000 ethnic Greeks reside in regions of Southern Albania.

412 Official data concerning the number of special permits issued are not available.

presented to the Lower House.[413] In this bill, the term 'national minorities' was understood to mean Frisians as a linguistic minority and persons authorised to reside in the Netherlands who belong to the groups targeted by integration policy.

Portugal's minority protection focused on Roma[414] and established the *High Commissioner for Immigration and Ethnic Minorities*.[415]

Sweden's national minorities are Roma, Swedish Finns, Tornedalers, Jews and Sami. The latter group is also a native population. The aim of strengthening the national minorities and provide the support needed to maintain their languages is among other things ensured by special legislation, education in the mother tongue and bilingual education, but also by providing extra support for literature and Culture Magazines.[416] By special legislation[417] individuals have among other things been given the rights to use the minority languages Sami, Finnish and Meänkieli (used by Tornedalers) in their contacts with courts and authorities in the geographical areas where these languages traditionally have been and still are used. The municipalities in these geographical areas are also obliged to provide pre-schools and care for the elderly that are wholly or in part managed with the use of these languages.[418]

In **France** unequal treatment on grounds of race or origin is rejected and thus, no section of the French population may claim to be a 'people', a 'minority', or a 'group', with cultural or other rights attached to such status. The law grants to all individuals, and to their beliefs and allegiances, its uniform and impartial protection, but does so solely to them as individuals. For legal purposes, groups defined by such beliefs or allegiances simply do not exist.[419] As a consequence, as mentioned before, France has systematically rejected clauses in international conventions or declarations that imply that individuals should be granted rights on the basis of their membership of a minority.

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413 Parliamentary Documents II, 1998/99, 26 389, No. 1-3.

414 Resolution No. 18/2000, March 22 (official gazette no. 88 Series I-B, April 13).

415 In November 2002, Law-decree No. 251/2002 changed the High Commissioner to a broader structure, now named High Commissariat.

416 The basis of the Swedish minority policy can be found in the Public Bill 1998/99:143, National Minorities in Sweden. The Ministry of Justice has co-ordinating responsibility for questions relating to national minorities.

417 Swedish Code of Statutes 1999:1175 and 1176.

418 A summary on Swedish Policy on National Minorities 2001, .

419 In its Annual Report for 2001, the advisory *Haut Conseil à l'intégration* underlined the particular problems this creates for addressing or even identifying discrimination suffered by French citizens from the overseas departments and territories. Anecdotal evidence suggests that the problem is significant. See also the Conseil d'Etat's judgment of November 29 2002 voiding a ministerial instruction (*circulaire*) relating to bilingual Breton-French 'immersion' teaching in Diwan schools (suits n° 248192 and 248204 brought by the Conseil national des groupes académiques de l'enseignement public).

International treaties on the protection of migrants/minorities and on discrimination

Measure	Date of treaty (opening for signature)	Member States who are party to the instrument	Remarks
UN-International Convention on the Elimination of all forms of Racial Discrimination (ICERD) *The Convention is monitored and reviewed by a Committee on the Elimination of all Forms of Racial Discrimination (CERD) comprised of international experts.*	1966 Entry into force: 1969	All Member States: Austria, rat. 1972; Belgium, rat. 1975; Denmark, rat. 1972; Finland, rat. 1970; France, rat. 1971; Germany, rat. 1969; Greece, rat. 1970; Ireland, rat. 2000; Italy, rat. 1976; Luxembourg, rat. 1978; Netherlands, rat. 1972; Portugal, rat. 1982; Spain, rat. 1969; Sweden, rat. 1972; UK, rat. 1969.[420]	**Austria:** Austria: adopted at constitutional level *(BGBl. 390)* 1973. In February 2002 the Republic of Austria made a declaration under Art 14 of ICERD recognising the competence of the Committee for the Elimination of Racial Discrimination to examine individual complaints. **Denmark:** Act No. 459 of 12 June 1996 on prohibition of differential treatment in the labour market was adopted as a consequence. **Germany:** Art. 14 signed: 31 August 2001. **Greece:** Ratified and enacted by law No. 494/1970. **Ireland:** Ratified 19 December 2000, entered into force on 28 January 2001. **Italy:** Implemented by law No. 654 of 13 October 1975. **Portugal:** Enacted by law No. 7/82, April 29 1982.
Council of Europe's Framework Convention for the protection of National Minorities	1995 Entry into force: 01.02.1998	Austria, in force since 1998; (Belgium, 2001); Denmark, in force since 1998; Finland, in force since 1998; Germany, in force since 1998; (Greece, 1997); Ireland, in force since 1999; Italy, in force since 1998; (Luxembourg, 1995; Netherlands, 1995;) Portugal, in force since 2002; Spain, in force since 1998; Sweden in force since 2000; UK, in force since 1998.[421]	**Germany:** Took obligation to support the four recognised minorities. **Netherlands:** *Wet SAMEN* Act (1998) is an implementation of section 2.2 of the ICERD.[422] **France:** The *Conseil d'État* considered, in its advice to the government of 6th July1995, that the Convention was incompatible with the constitution.
International Covenant on Civil and Political Rights (CCPR)	1966 Entry into force: 23.03.1976	All Member States: Austria, rat. 1978; Belgium, rat. 1983; Denmark, rat. 1976; Finland, rat. 1976; France, rat. 1981; Germany, rat. 1976; Greece, rat. 1997; Ireland, rat. 1990; Italy, rat. 1978; Luxembourg, rat. 1983; Netherlands, rat. 1979; Portugal, rat. 1978; Spain, rat. 1977; Sweden, rat. 1976; UK, rat. 1976.[423]	**Greece:** Ratified by law 2462/1997 (FEK 25A/26.2.1997)

[420] *Source:* UNHCR, 2003. Available at: http://www.unhchr.ch/pdf/report.pdf (28.08.2003).
[421] *Source:* Council of Europe. Available at: http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm (28.08.2003).
[422] Available at: http://www.lbr.nl/internationaal/antidisclaw.html.
[423] *Source:* UNHCR, 2003. Available at: http://www.unhchr.ch/pdf/report.pdf (28.08.2003).

Measure	Date of treaty (opening for signature)	Member States who are party to the instrument	Remarks
International Covenant on Economic, Social and Cultural Rights (CESCR)	1966 Entry into force: 03.01.1976	All Member States: Austria, rat. 1978; Belgium, rat. 1983; Denmark, rat. 1976; Finland, 1976; France, rat. 1981; Germany, rat. 1976; Greece, rat. 1985; Ireland, rat. 1990; Italy, rat. 1978; Luxembourg, rat. 1983; Netherlands, rat. 1979; Portugal, rat. 1978; Spain, rat. 1977; Sweden, rat. 1976; UK, rat. 1976.[424]	
European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) *The Secretary-General may request parties to provide explanations on the manner in which their domestic law ensures the effective implementation of the Convention.*	1950 Entry into force: 03.09.1953	All Member States: Austria, into force since, 1958; Belgium, into force since 1955; Denmark, into force since 1953; Finland, into force since 1990; France, into force since 1974; Germany, into force since 1953; Greece, into force since 1974; Ireland, into force since 1953; Italy, into force since 1955; Luxembourg, into force since 1953; Netherlands, into force since 1954; Portugal, into force since 1978; Spain, into force since 1979; Sweden, into force since 1953; UK, into force since 1953.[425]	**Austria:** Entire convention is transposed on constitutional level. **Denmark:** Incorporated in law 1992 law, Act No 285 of 29 April 1992. **Ireland:** Incorporation into Irish legislation in progress. **Luxembourg:** Approved by a Law of 29.08.1953. **UK:** Incorporated into UK Law by the *Human Rights Act* 1998.
Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms	04.11.2000 Not entered into force yet	(Austria, 2000); (Belgium, 2000), (Finland, 2000); (Germany, 2000); (Greece, 2000); (Ireland, 2000); (Italy, 2000); (Luxembourg, 2000); (Netherlands, 2000); (Portugal, 2000).[426]	**Denmark:** Protocol 12 has not yet been signed. **Ireland:** Protocol 12 has been signed, but not ratified. **Luxembourg:** Protocol 12 has been submitted to Parliament for approval in 2003. **UK:** Protocol 12 has not yet been signed.

[424] *Source:* UNHCR, 2003. Available at: http://www.unhchr.ch/pdf/report.pdf (28.08.2003).
[425] *Source:* Council of Europe. Available at: http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm (28.08.2003).
[426] *Source:* Council of Europe. Available at: http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm (28.08.2003).

Measure	Date of treaty (opening for signature)	Member States who are party to the instrument	Remarks
European Social Charter *The Charter establishes a supervisory system of national reports submitted every two years for examination by a committee of seven independent experts, which is then presented by the Governmental Committee to the Committee of Ministers of the Council of Europe. The Committee of Ministers may make any necessary recommendations to the governments concerned.*	1961 Entry into force: 26.02.1965	All Member States: Austria, into force since 1969; Belgium, into force since 1990; Denmark, into force since 1965; Finland, into force since 1991; France, into force since 1973; Germany, into force since 1965; Greece, into force since 1984; Ireland, into force since 1965; Italy, into force since 1965; Luxembourg, into force since 1991; Netherlands, into force since 1980; Portugal, into force since 1991; Spain, into force since 1980; Sweden, into force since 1965; UK, into force since 1965.[427]	
European Charter for Regional and Minority Languages (CRML) *Enforcement of the Charter is under control of a committee of experts which periodically examines reports presented by the Parties.*	1992 Entry into force: 01.03.1998	Austria, into force since 2001; Denmark, into force since 2001; Finland, in force since 1998; (France, 1999); Germany, in force since 1999; (Italy, 2000); (Luxembourg, 1992); Netherlands, in force since 1998; Spain, in force since 2001; Sweden, into force since 2000; UK, in force since 2001.[428]	**Germany:** Took obligation to support the four recognised minorities.
Geneva Convention on the Status of Refugees and the 1967 New York Protocol	Entry into force: 22.04.1951 (Convention) 04.10.1967 (Protocol)	All Member States[429]	
ILO Convention 97 on Migration for employment Convention (revised)	1949 Entry into force: 22.01.1952	Belgium, rat. 1953; France, rat. 1954; Germany, rat. 1959; Italy, rat. 1952; Netherlands, rat. 1952; Portugal, rat. 1978; Spain, rat. 1967; UK, rat. 1951.[430]	

[427] *Source:* Council of Europe. Available at: http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm (28.08.2003).

[428] *Source:* Council of Europe. Available at: http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm (28.08.2003).

[429] *Source:* UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. As of June 2003. Available at: http://www.unhcr.ch/cgi-bin/texis/vtx/protect (28.08.2003).

[430] *Source:* International Labour Organisation (ILO). Available at: http://www.ilo.org/ilolex/english/convdisp1.htm (28.08.2003).

Measure	Date of treaty (opening for signature)	Member States who are party to the instrument	Remarks
ILO Convention 111 on Discrimination (Employment and Occupation)	1958 Entry into force: 15.06.1960	All Member States: Austria, rat. 1973; Belgium, rat. 1977; Denmark, rat. 1960; Finland, rat. 1970; France, rat. 1981; Germany, rat. 1961; Greece, rat. 1984; Ireland, rat. 1999; Italy, rat. 1963; Luxembourg, rat. 2001; Netherlands, rat. 1973; Portugal, rat. 1959; Spain, rat. 1967; Sweden, rat. 1962; UK, rat. 1999.[431]	**Greece:** Ratified by law 1424/1984 (FEK 29A/14-03.1984).
ILO Convention 117 on Social Policy (Basic Aims and Standards)	1962 Entry into force: 23.04.1964	Italy, rat. 1966; Portugal, rat. 1981; Spain, rat. 1973.[432]	
ILO Convention 143 on Migrant Workers (Supplementary Provisions)	1975 Entry into force: 09.12.1978	Italy, rat. 1981; Portugal, rat. 1978; Sweden, rat. 1982.[433]	**Italy:** Already covered by laws 943/86 and 286/98.
European Convention on the Legal Status of Migrant Workers *A Consultative Committee was instituted to examine parties' reports on the application of the Convention. On the basis of these documents, the Consultative Committee draws up reports for the attention of the Committee of Ministers.*	1977 Entry into force: 01.05.1983	(Belgium, 1978); France, 1983; (Germany, 1977); (Greece, 1977); Italy, in force since 1995; (Luxembourg, 1977); Netherlands, in force since 1983; Portugal, in force since 1983; Spain, in force 1983; Sweden, in force since 1983.[434]	

[431] *Source:* International Labour Organisation (ILO). Available at: http://www.ilo.org/ilolex/english/convdisp1.htm (28.08.2003).
[432] *Source:* International Labour Organisation (ILO). Available at: http://www.ilo.org/ilolex/english/convdisp1.htm (28.08.2003).
[433] *Source:* International Labour Organisation (ILO). Available at: http://www.ilo.org/ilolex/english/convdisp1.htm (28.08.2003).
[434] *Source:* Council of Europe. Available at: http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm (28.08.2003).

9. Jurisdiction: complaints about and court cases concerning discrimination

9.1. Anti-discrimination cases

In a comparative perspective the level of complaints also tends to reflect large national differences in recording mechanisms. In some countries (e.g. France, Ireland, the Netherlands, Portugal and Sweden) there are special public bodies registering complaints by victims of discrimination. In others (e.g. Austria, Finland and Spain), NGOs try to compensate for the absence of such a body by collecting information on individual cases. In still other countries, (e.g. Luxembourg, Italy and Denmark) no nation-wide reporting mechanisms are in place, and in Greece it was reported that the complete absence of public monitoring or complaints mechanisms hinders both the collection of data on racial discrimination, and efforts to combat it. Statistics on discrimination complaints and court cases unfortunately are therefore quite rare in some EU Member States. In those Member States where there are established and tried mechanisms of complaint for victims, complaints are more likely to come to public attention. However, in reality, only a fraction of victims of discrimination in EU Member States may in fact lodge complaints. As for court cases, victims of discrimination may be sceptical as to the efficiency of lodging a complaint, may fear dismissal or may simply not be aware of existing complaint mechanisms. Hence the importance of all Member States improving their anti-discrimination legislation and developing victim support mechanisms along the lines is indicated by the new Equality Directives, which come into force during 2003.

Even in countries where a complaint mechanism exists, assumingly only a fraction of victims of discrimination lodges complaints.[435] An even smaller number of complaints eventually lead to formal court cases. This does not necessarily mean that reporting mechanisms are ineffective, as other means (e.g. mediation) might be a more appropriate way to intervene. At the same time, court cases may not be initiated for other reasons, e.g. low expectation of achieving redress, lack of protection against victimisation and because the burden of proof makes it hard to win cases.

The major problems for a comparative analysis of data on complaints about discrimination are: lack of official sources on complaints, non-existence of relevant institutions and of systematic monitoring on cases where immigrants are discriminated. Having this in mind, we can now turn to the country-specific data on complaints.

In **Ireland**, the Office of the Director of Equality Investigations (ODEI) registers complaints and regularly produces statistics on the basis of complaints lodged.

[435] For example, only 4% of people subjected to discrimination are thought to have reported to the Ombudsman in Sweden. See: Ombudsman against Ethnic Discrimination, Newsletter 2002:1.

Under the Equal Status Act the highest number of cases in 2001 came from the sector pubs/hotels/night-clubs (632 cases). In the first six months of 2002 459 such cases were counted.

In **Belgium**, the Centre for Equal Opportunities and Opposition to Racism (CEOOR) supports victims of discrimination and racial harassment as part of its duties. In addition, it records and analyses statistics on the complaints lodged. The CEOOR has observed an increasing number of complaints in the last years (919 in 1999 and 1246 in 2001). Throughout the six-year period between 1997 and 2002, complaints concerning public services have ranked first, followed by the employment sector.[436] A significant number of complaints on racism in 2001 and 2002 was related to the behaviour of law enforcement officials and a high number of complainants came from North Africa.[437] The CEOOR registered a total of 1316 complaints on racism in 2002.[438] Complaints concerning the media sector increased in 2001. This section included in the last year's racism on the Internet (propaganda). For 2002, the complaints on racism on the Internet were recorded for the first time separately and represented a quite high percentage. A constant increase of complaints of racism in the Internet was noticed. [439]

In **Greece,** the main reason why victims of racism were reluctant to address the courts in accordance to Greece's anti-racist law 927/1979, at least until 2001, was the requirement for the wronged party to file a complaint, a costly and uncertain procedure. Moreover, the absence of free legal aid dissuades victims of discrimination from resorting to justice since they cannot afford to do so. Greek anti-discrimination legislation puts strong emphasis on discrimination on religious grounds and to a certain extent in education especially by legislation on "minority protection".

Another example of a country having national institutions, which deal with complaints about discrimination, is **the Netherlands**: complaints are registered by the Anti-Discrimination Offices (ADB).[440]

In the **United Kingdom**, the Commission for Racial Equality (CRE) publishes data on formal applications for assistance and applications for legal representation; the Arbitration and Conciliation Service (ACAS) publishes data about complaints of racial discrimination in employment.[441]

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[436] Annual reports from Centre for Equal Opportunities and Opposition to Racism (CEEOR), available at: http://www.antiracisme.be (14.08.2003).

[437] CEEOR, *Égalité et Diversité, Annual Report 2001*, and *Vers la diversité, Annual Report 2002*, available at: www.antiracisme.be (14.08.2003).

[438] CEEOR, *Vers la diversité, Annual Report 2002*, available at: www.antiracisme.be (14.08.2003).

[439] CEEOR, *Vers la diversité, Annual Report 2002*, available at: www.antiracisme.be (14.08.2003).

[440] Anti-Discrimination Bureau.

In **Portugal**, in 2001 ACIME (High Commissariat for Immigrants and Ethnic Minorities)[442] received 12 cases (four from associations, four private, two from the High Commissioner, one from a public institution and one from the court).[443] The type of acts included: refusal to let houses; refusal of hotel service; job access; refusal of official documents by Parish Authorities; discriminatory treatment at a public service; refusal to provide a service of car rental; neighbourhood problems/exercise of rights; police aggression; refusal of admission in a place open to the public; aggression by a person, incitement and subsequent police aggression; freedom of circulation and stay – police action and refusal of services.

Of these processes, six were sent to the appropriate institutions for investigation, four had already been handled the appropriate inspection services and two were still being analysed by ACIME. Of the cases mentioned (comprising 15 cases since 2000), ten regarded discrimination based on nationality and four on ethnic origin, one belonged to the category "others".

The Permanent Commission of the Commission for Equality and Against Discrimination met in 2002 to decide on the cases handled by the general Inspections. They advised the application of a fine in one case and the closing of another two, which ACIME did, according to the current law.

Summing up, according to the ACIME until 2002, 30 cases were submitted under the law on anti-discrimination (Law 134/99). During the mandate of the previous High Commissioner[444] the number of complaints ascended to 16. During the new mandate 14 cases were brought to the attention of the High Commissariat. Taking into account that the new High Commissariat has been in function only since July – after a hiatus due to the change of Government – one may conclude that there is steady increase in the number of complaints. First and foremost this seems to imply that victims of racial an ethnic intolerance are beginning to turn to official channels. When looking at the numbers of complaints in a year-by-year base, one can note that the number of processes brought to light in 2000 was only two; in 2001 there was a leap to 12 cases and in the year 2002 the complaints ascended to 16. However, though one can identify an increase in the number of complaints, this is still considered to be distant from the reality.

In some countries, as already mentioned, the Ombudsmen play an essential role in this regard. In **Sweden,** for example, the Ombudsman against Ethnic Discrimination (DO),[445] established in 1986, faces during the past few years, a

[441] See: CRE, Annual Report 1 January to 31 December 2001, CRE, London; Employment Tribunal Service, Annual Report 2000-2001; ACAS, Annual Report 2001-2001 on employment related discrimination cases.

[442] Since November 2002, Law-decree No.º 251/2002 changed the High Commissioner for a broader structure now named High Commissariat.

[443] High Commissioner for Immigrants and Ethnic Minorities*, Minutes of the Technical Seminar on the Anti-discrimination law application*, Lisbon 2002.

[444] These two terms – High Commissioner and High Commissariat – are interchangeable. They represent the same public organisation the only difference being that previous was called High Commissioner.

[445] On the Internet site www.do.se (20.03.2003), there are statistics on complaints on ethnic discrimination in different sectors of society. Reports and studies can be downloaded.

dramatic increase in the number of complaints filed to the Ombudsman. The major part of complaints concerns direct discrimination, such as ethnic harassment, wage discrimination and post appointments. In 2001, 633 complaints of ethnic discrimination were filed.[446]

The **Greek** Ombudsman, on the contrary, has no power to intervene in cases of discrimination or harassment by physical or legal persons. As mentioned above, there are so far no other bodies formally dealing with complaints about discrimination on a systematic basis in Greece.

In Greece, according to the Ombudsman[447] the number of complaints registered by foreigners (mostly migrants) rose by 33.5% from 2000 to 2001. The Ombudsman's cases refer mostly to Roma and migrants discriminated against or mistreated by public authorities and not to discriminatory or racist acts perpetrated by persons or private organisations. The Roma population seems to suffer most from incidents of racist violence and harassment directed against them primarily by the police and local authorities. There is also evidence that ethnic Greeks from the former eastern block and Albania and the immigrant and refugee population suffers from varying degrees of racist violence, harassment and discrimination, not so much by individuals or groups in private sphere, but rather by indifferent public authorities and particularly by the police.

The Greek National Commission for Human Rights stressed in its Annual Report 2001:[448] "The violent and for modern Greek society shocking acts of Greek citizens and police officers mainly against foreign migrants legally resident in Greece, and also against members of the Roma community have made it clear that Greece must introduce new legislation for the protection from and the eradication of racial discrimination in Greece."

In some countries such as **Austria**, **Germany** and **Spain**, no official institutions that register and record complaints are in place; therefore, only some data on individual complaints from NGOs are available.

According to the NGO ZARA, 300 cases were dealt with and documented in Austria in 2002. It should be mentioned at this point that NGO reports such as ZARA's Racism Report cannot provide a quantitative picture of all forms of racist and xenophobic acts occurring in Austria. An increase of reported cases might, for example, stem from an increased number of incidents or might result from greater awareness concerning racist incidents or simply from the fact that every year more and more people know about the possibility to report discriminatory cases to ZARA. Therefore, no general conclusions or tendencies concerning the number of discriminatory acts can and should be deduced from these annual reports.

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446 Ombudsman against Ethnic Discrimination, Annual Report 2001, pp. 12-13.

447 The Ombudsman www.ombudsman.gr and the European Observatory of Discrimination in Secondary Education www.observatory.gr are not comparable to the public bodies Ombudsman (http://www.synigoros.gr, the Greek Ombudsman, an independent administrative body), but are bodies financed by EU as pilot projects.

448 National Commission for Human Rights Annual Report 2001, available at: http://www.nchr.gr/category.php?category_id=40 (14.09.2003).

In **Germany**, there are also no national statistics of cases of discrimination. Only some individual cases are documented by various organisations, which are consulted by people subject to discrimination.

A similar situation exists in **Spain**, where the NGO S.O.S. Racismo publishes an Annual Report on racism in Spain.[449] Its 2002 edition summarises all the information collected by the organisation through its claims office and its systematic monitoring of the mass media it undertakes. In 2001, 145 complaints were collected.

Furthermore, one has to mention the Regional Office for Immigrants of the Community of Madrid (OFRIM), which is a focal point working as a bridge between the regional and local administration in Madrid (capital and region), and immigrants' organisations as well as individual immigrants. They try to raise awareness in the public administration concerning the special needs as well as assets of immigrants. For this purpose OFRIM employs specialists focusing on different areas such as health, the labour market and racism. Since 2000, besides other things, OFRIM offers a telephone hotline for immigrants and persons working for the public service in Madrid. Support is provided for all kinds of legal questions and cases of discrimination, including issues concerning the labour market. This telephone hotline is run by two lawyers working for OFRIM. Furthermore, OFRIM organises intercultural training courses for members of the public service, especially for those working in the area of social welfare provisions.[450]

In **France**, since 2000, as mentioned afore, there is a free help-line (le '114'), set up as a general help line for victims of discrimination and racial harassment. It also registers formal complaints and brings cases registered as such to the attention of relevant local authorities. Between 16 May 2000 and 30 October 2001, the help-line received 35,454 calls; as a result 9,945 discrimination case files were transferred to the Departmental Commissions for Access to Citizenship (CODAC).[451] The CODAC may also launch a mediation initiative. If this turns out unsuccessful, or in case of grave incidences, charges may be brought against the offender.

Summarising the officially available data, *reported* complaints about discrimination have risen in Ireland (in 2001, 87% increase on the previous year under the *Employment Equality Act 1998*) and Sweden (by 60% in 2001 in comparison with the previous year).[452]

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[449] S.O.S. Racismo (2002) *Informe anual 2002 sobre el racismo en el Estado español (Annual report on racism in Spain),* Barcelona: Icaria Editorial.

[450] http://www.madrid.org/ofrim (19.08.2003).

[451] According to the CNCDH (Human Rights Commission), report 2001, *La lutte contre le racisme et la xénophobie. Rapport d'activité (The Fight Against Racism and Discrimination)*, Paris: La Documentation française.

[452] Ombudsman against Ethnic Discrimination, Newsletter 2002:1.

Court cases

Given the fact that discrimination against minority members is a rather widespread phenomenon and compared to the number of complaints lodged in countries with institutionalised complaint mechanisms, the number of court cases reported by the NFPs seems to be, at least at first sight, extremely low. The main reason for this may be the high degree of uncertainty as to the outcome of legal action, which usually makes it a measure of last resort, taken only if all other options are exhausted or not viable. At the same time, legal action requires considerably more efforts, financial costs and commitment as the stakes for both the plaintiff and the defendant are much higher than is the case in more low-profile forms of intervention.

In some countries the absence of specific anti-discrimination legislation and specialised bodies in recent years largely explains the absence of court cases, although sometimes cases of illegitimate unequal treatment are also brought to court on the basis of constitutional provisions. However, in such cases, access to legal redress may be more difficult than in cases where specialised institutions, operating within the framework of specific anti-discrimination legislation, can assist in gaining access and legal support. However, it has to be noted that in this regard some change has already occurred and is still evolving; therefore it will be interesting to see the impact of new legislation and institutions on the number of cases and the jurisprudence in general in regard to discrimination.

In some countries, specialised institutions, such as the Belgian CEOOR, the Northern Ireland Equality Commission and the Irish Equality Authority have already gained a long experience in bringing cases to court. In other countries, the lack of experience is often explained by the novelty of the anti-discrimination legislation, a lack of resources, and a strategic concern to ensure that the first case brought to court will be successful (thereby establishing a precedent). Among those institutions which bring cases to court, the Belgian CEOOR has a particularly strong mandate which allows court actions even where there is no direct victim of discrimination.[453]

In **Portugal**, the information about a discriminatory situation may be transmitted to the government member responsible for issues of equality, to ACIME (High Commissioner for Immigration and Ethnic Minorities), to the Commission for Equality and Against Racial Discrimination or to the General Inspection with competence in this issue. Once informed about the situation, the case is sent to the concerning General Inspection by any of the aforementioned institutions. After that, the process is sent to the Commission, and it is the High Commissioner for Immigration and Ethnic Minorities who is responsible for establishing the fines and additional punishments, after consulting the Commission for Equality and Against Racial Discrimination. If the discriminatory action constitutes a crime, the competence falls within judicial bodies.

[453] PLS Ramboll management (2002) *The European Union against discrimination. Specialised bodies to promote equality and/or combat discrimination, Final Report*, p. 12, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/equalitybodies_exec_en.pdf, (20.07.2003).

As there is no specific anti-discrimination legislation in Greece, potential plaintiffs have to resort to general legislation, which may not always be applicable on immigrants.

As noted, only a small percentage of discrimination cases result in formal complaints, and of these only a small part are further referred to the courts. The relatively low number of court procedures could be also explained by the difficulties faced by the victims in proving that racial discrimination took place. In this regard the sharing of the burden of proof prescribed in the Directive will play an important role in making it easier to prove acts of discrimination. For a victim of discrimination, who may often belong to a marginalised group in society, the step of seeking advice and reporting a discriminatory experience may be a rather difficult task. The lack of protection against victimisation may thus become a further obstacle for initiating even well founded legal action.

In the UK financial compensation is regularly awarded in cases of direct discrimination and in cases of intentional indirect discrimination, and can include injury to feelings and punitive awards.

9.2. Penal cases/racial crimes

Penal cases were in many countries for a long time the primary judicial approach to discrimination cases, resulting of course of the existing respectively non-existing legislation. But since these penal cases represent areas where victims do not have much power to act during the proceedings and are depending on the police and Prosecutor, this remedy has weaknesses, especially considering that the compensation aspect to be received by the victim is often marginal. Since penal law provides often quite severe sentences, prosecutors and judges are sometimes reluctant to apply relevant provisions.

In **Denmark**, in 2002 the police[454] received 36 complaints in connection with the Danish Criminal Code section para.266b on hate speech, compared to 65 cases registered in 2001.

In **Germany**, the number of criminal offences with a 'right-extremist' background recorded by the police has increased every year since 1995 until 2001,[455] where there was a significant decrease in offences.[456] However in 2002, there was a new increase in racist/xenophobic offences. Two thirds of these offences were propaganda crimes. The proportion of racist violent crimes in relation to all criminal offences were around 6-8 % and has been the same since 1995.

[454] See http://www.politi.dk/Statistik/Aarstabel02/Politiets%20aarstabel%202002.xls (16.08.2003).

[455] Although not continuously.

[456] For 2000, statistics recorded 15,951 criminal offences with a right wing extremist background, 998 of which were violent crimes. Due to a new system of registration, which was introduced in January 2001, the data cannot be directly compared.

In 2002 the total number of right wing extremist, xenophobic and anti-Semitic criminal offences registered in the category 'politically motivated criminality — right wing', was 10,902 (a rise from 10,054 in 2001), of which 772 (709 in 2001) were violent crimes (which, in turn, included 8 cases of attempted manslaughter[457]). 319 persons were injured in 2002. Violent crimes in 2001 comprised 9 attempted manslaughter incidences and 626 cases of grievous bodily harm.

In contrast to the general trend on racist violence, anti-Semitic offences continued to increase also in 2001, with the exception of the violent acts of anti-Semitism. In total 1,424 offences were registered as anti-Semitic in 2001. However it cannot be ruled out that this increase was due to the new registration system. The number of anti-Semitic crimes of violence, on the other hand, fell from 29 in 2000 to 18 in 2001.

Analysis of the victims of xenophobic offences shows that two thirds were foreign nationals. Almost half of victims of racist violence were asylum seekers. In addition, it has to be noted that persons who, because of their outward appearance, are 'easily identifiable' as non-Germans (e.g. Turks, people of African origin, Sinti and Roma, or Vietnamese nationals, particularly in Eastern Germany) are more likely to fall victim to right wing extremist violence. Another 10% of victims are *Spätaussiedler* (ethnic German immigrants), who are often labelled as foreigners ("Russians"). Almost one fifth of the victims of racist violence were German nationals (excluding *Spätaussiedler*).

Police reports have proven that the great majority of perpetrators are males between 15 and 24 years of age. Furthermore, their educational status is lower than the average of the respective age groups in the total population. Most of the suspects or perpetrators had already been registered by the authorities because of politically motivated or other criminal offences. It can therefore be concluded that there is a significant overlap between general youth delinquency and politically motivated criminality.[458]

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[457] Cf. *Bundestagsdrucksache 15/412: Extremistische Gewalttaten in Deutschland im Jahr 2002 (6. Februar 2003)* (Printed matter of the German Parliament 15/412: Extremist violent crimes in Germany in 2002). However; special reports compiled by the newspapers *Frankfurter Rundschau* and *Tagesspiegel* cited 5 cases of manslaughter with a possible right wing extremist background, which had not been included in the official statistics for the year 2002. For example, two ethnic German immigrants were beaten up by a group of youths in Wittstock/Alt-Dabern (a city in Brandenburg). The criminals threw a stone weighing about 20 kg on the stomach of one of the victims, resulting in severe internal bleeding which eventually caused the death of the victim on 23rd May 2002. The main perpetrator received a ten-year prison sentence for manslaughter; the other offenders received sentences between seven years in prison and one year on probation (*Frankfurter Rundschau* 6 March 2003, p. 2).

[458] Cf. Wahl, K. (ed.) (2001) *Fremdenfeindlichkeit, Antisemitismus, Rechtsextremismus. Drei Studien zu Tatverdächtigen und Tätern (Xenophobia, Anti-Semitism and Right-Wing Extremism. Three studies on suspected perpetrators and perpetrators*, Berlin; Landeskriminalamt Baden-Württemberg (2002) *Der politisch motivierte Gewalttäter in Baden-Württemberg. Eine tat-/täterorientierte Untersuchung der Jahre 1999 bis 2001 (The politically motivated violent criminal in Baden-Wurttemberg. A crime-/perpetrator-oriented study of the years 1999 to 2001),* Stuttgart 2002.

Based on different sources, the Dutch Monitoring Centre in the **Netherlands** reports that racist violent acts have increased every year since 1996 to 2000. The number of incidents of racist violence and violence incited by the extreme right was 201 in 1996, 298 in 1997, 313 in 1998, 345 in 1999 and 345 in 2000. In the year 2001, however, the data show a decrease to 316 incidents, mainly related to a decrease in reported racist graffiti incidents.

The records cover the following categories of violent acts: racist graffiti, threats, bomb scares, confrontations, vandalism, arson, assault and manslaughter. The most common incident has been the category of racist graffiti followed by racist threats. For 2001 the decrease of reported incidents related in particular to racist graffiti, from 157 acts in 2000 to 68 acts in 2001, while most other categories increased.

Violence committed by the extreme right has become more prominent over the years. More incidents are connected to asylum seekers. Not only are asylum seekers' centres frequent targets of violence, but individual asylum seekers are targets as well.

Nevertheless, figures like these have to be treated always with caution: they are often far away from real dimensions because the estimated number of unknown cases is often quite high, due to low reporting rates by the victims.

In **Austria**, the number of criminal offences with extreme right wing, xenophobic or anti-Semitic motivation has fluctuated over the 1990s but has practically remained the same for the last two years (2000: 336, 2001: 335),[459] whereas the general crime statistics showed a decrease of 7.7 percent.[460] Outstanding crimes with racist/xenophobic background, which were reported to the police in 2001, included three attempts of arson, the defilement of one Muslim and two Jewish graveyards.[461] In total, 39 cases of hate speech with a racist background were reported to the police in 2001 (compared to 27 in 2000). Compared to the year 2000, there has been a slight decrease in offences according to the Insignia Act (in 2001: 16 – in 2000: 22).

One of the most significant developments in recent years is the vast increase of crimes on the Internet. In 2001, racist crimes on the Internet accounted for one third of all right wing extremist crimes reported in this year.[462]

In **Portugal**, the main victims of racist crimes are Roma and people of African origin. Right wing skinhead groups are the main perpetrators. Discriminatory

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459 Austria, Federal Ministry of the Interior (2001) *Verfassungsschutzbericht 2000. Staats-, Personen- und Objektschutz. (Report on National Security 2000. Security of the state, people, and objects)*, Vienna, pp.19ff. available at: http://www.bmi.gv.at/downloadarea/staatsschutz/VerfSchutz2000-v4.pdf, (20.08.2003).

460 Federal Ministry of the Interior, 2002, Facts and Data 2001, p.5. Available at: http://www.bmi.gv.at/downloadarea/daten_fakten/Fakten2001Englisch.pdf (20.08.2003).

461 Der Standard, 03.01.2003, p. 7.

462 Austria, Federal Ministry of the Interior (2002) Verfassungsschutzbericht 2001, pp.30 and 35, available at: http://www.bmi.gv.at/downloadarea/staatsschutz/Verfassungsschutzbericht2001.pdf (20.08.2003).

police abuse and institutional racism were also reported. The most common offensive behaviour towards individuals was racist insult or defamation, and harassment as well as discrimination in access to an array of goods and services (such as housing or free movement as in the case of Roma communities in a couple of northern villages in Portugal). Most of the racist violent acts were related to skinheads, supporters of a neo-Nazi ideology.

In **Finland**, the most typical racially motivated crime is physical violence, an assault in a public place. In most cases the aggressor is unknown. Among the known cases, perpetrators are mainly young men (17-18 years old). Interestingly, the proportion of skinheads among the perpetrators is quite low in Finland. There is no systematic monitoring of how cases proceed, but according to lawyers involved, the number of racist crimes handled in courts has risen in recent years.[463]

In **Sweden**, the records kept by the Security Police[464] separate four categories of crimes: crimes with racist/xenophobic motives, crimes with anti-Semitic motives, homophobic motives and crimes connected to the so called 'white power world'. The trend is not linear, but over a ten year period there has been a steady growth of 'racially motivated crimes'.[465] In the last five years, the number of racist/xenophobic crimes has increased, the number of reported cases under the incitement legislation has increased markedly, and the number of crimes with anti-Semitic motives did increase every year from 1997 to 2000. However for 2001, the total number of recorded anti-Semitic crimes has slightly decreased.

Court cases

In **Austria**, in regard to violent crimes with a racist/xenophobic/right wing extremist background, alternative sanctions such as the attendance of seminars in history and democracy have already proved extremely efficient and are to be further promoted. Two university departments in Tyrol and Upper Austria, in cooperation with public prosecutors, have taken the initiative to organise seminars on history and democracy for young people who committed racist offences. Juvenile offenders who took part in these seminars either were sentenced by the criminal court to participate, instead of facing imprisonment, or in less severe cases they had the possibility of avoiding a criminal proceeding by attending the course. The effectiveness of these mediation measures indeed is convincing as only one participant out of around 80 became recidivistic and committed further racist crimes since these programmes were started.

In practice a racist motive might already lead to aggravated fines. In **Denmark**, during the last couple of years, individual cases illustrate that the racist character of violence has in some court cases been considered as an aggravating circumstance in sentencing.[466]

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[463] Makkonen, T. (2000) *Racism in Finland 2000, Helsinki: Finnish League for Human Rights*, p 23, available at: http://www.ihmisoikeusliitto.fi/php/index.php (10.09.2003).

[464] Security Police: Crime connected to Sweden's security, available on http://www.police.se.

[465] With regard to 'extremely violent crimes' it should be noted that over a longer period the number of cases seem to achieve their peak in certain years such as 1999.

As mentioned above, there were a number of important court cases in **Belgium** in 2002 with respect to instigation to discrimination, hate speech and violence, racism and holocaust denial. In the following some examples are presented:

Two persons were sentenced for making the Nazi salute, and a disc jockey was prosecuted because he had played a song which incites hatred and violence towards Moroccan people. In November 2002 the Magistrate's Court of Veurne sentenced 5 extreme-right persons who had beaten up an Egyptian to a fine and imprisonment of one year (partly postponed), and in February 2002 the Magistrate's Court of Tournai sentenced a man for slander and incitement to racism. In Bruges a group of people was prosecuted for distributing racist pamphlets, and in Liege the leader of an extreme right movement was sentenced to four months imprisonment for incitement to racial hatred.

In **Denmark**, very few of the racist incidents reported in 2001 and 2002 have so far been brought to trial. However, some of the convictions related not to the ordinary 'man-in-the-street', but to public figures connected with political parties. After 11 September 2001, several members of the Progressive Party were charged with making racist speeches against Muslims, many of these charges relating to statements made at the Annual Conference of the Progressive Party. So far none of the cases have been brought before court. In October 2002 the City Court in Hvidovre sentenced members of the Danish Peoples Party (youth organisation) for violation of Criminal Code section 266 b on hate speech. In 2001 they had placed an advertisement in a student magazine depicting three masked Muslims and proclaiming 'Gang rapes, brutal violence, fear for your safety, suppression of women — this is what you expect from a multi-ethnic society'. Two other members of the same party were charged with violations of section 266 b in relation to the party's national conference.

In **Greece**, there has never been a prosecution on the basis of the anti-racist criminal law 927/1979 for any reason including the wearing of neo-Nazi symbols and/or hate speeches. However, ultra nationalist symbols and covert hate or intolerant speech do appear in public, notably in broadcasts by small television stations. The absence of prosecutions under the existing anti-racist legislation means that in a strict sense, the extent of racist/xenophobic criminal behaviour cannot be established on the basis of existing jurisprudence. However, there has been a number of cases with racist motives brought to court that were prosecuted on the basis of other provisions of the Penal Code. The most notorious case concerns a man convicted for the murder of two and the serious injury of seven alien immigrants in October 1999. He was finally sentenced to serve two

[466] Utrykt afgørelse fra Lyngby ret den 22. december 1998, BS 3-1211/97. Afgørelsen blev stadfæstet af Østre Landsret den 27. september 1999. Decision from the Court of Lyngby from December 22, 1998. The decision was upheld by the Eastern High Court on September 27, 1999 Utrykt afgørelse fra Østre Landsret af 21. oktober 1998, B-2732-97. Unwritten decision from the Eastern High Court of October 21, 1998. – ENAR Shadow report 2002, Racism and Discriminatory Practices in Denmark; available at: http://www.enar-eu.org/en/national/Denmark%20Shadow%20Report%202002%20EN.pdf (14.08.2003).

consecutive life sentences by the Appeal Criminal Court of Athens in November 2002. Even in this case, though, he was not charged with violation of the anti-racist law 927/1979, although the Court, described him as a 'racist murderer'.

In **Italy**, the number of cases processed in the courts has varied very much over the last years, and ranged from 50 cases in 1996 to 3 cases in 1999. For 2001, the Ministry of the Interior reported a total of 75 racist crimes, which was a decrease from 2000, when 85 cases were recorded.[467]

Half (52%) of all cases in 2001 were threats and insults, 30% were physical assaults, 10% were cases of arson and 8% involved other kinds of material damages. Cases of arson reportedly have been carried out using incendiary bottles and for the most part, by groups of persons linked to extremist groups and acting collectively and with some planning. Physical attacks are attributed to 'ordinary citizens without any particular ideological inclinations' who are said to 'act in such ways because irritated by certain behaviour of non-EU citizens, who are often considered as the main causes of crime in the country'. Threats expressed through letters or graffiti are said to target particularly places of worship, reception centres, Roma camps or businesses owned by either members of Jewish communities or non-EU citizens. These acts are attributed, for the most part, to young people aged between 18 and 25 years who display and/or paint Nazi symbols on their targets or during sports events. According to government sources, all cases of racist crimes recorded in the year 2001 occurred in the central and northern regions of the country, with Lazio, the region where Rome is situated, registering the highest number of cases, followed by Veneto, Toscana and Emilia Romagna, respectively.

A Member of the European Parliament from the Northern League Party was sentenced to a 5 months jail term with a conditional suspension in October 2002, because he had been found guilty of involvement in a case of arson that destroyed the temporary shelter of some undocumented migrants in the city of Turin in the summer of the same year.

In **Portugal**, in 2002 there was one court case where racial discrimination was the indicted crime. The governor of a small village (Gandra-Paredes) who made a speech in which he described Roma people, and their activities, as mainly and naturally criminal was sentenced to nine months in prison, which was suspended for two years. The decision taken by the judge in this case, by considering the speech a crime of racial discrimination under Art. 240 of the Penal Code, constitutes an exception to what has been the tendency of the Portuguese courts' rulings in similar cases that had been presented to the Attorney General before.

According to the Portuguese NFP, after analysing the cases and the decisions taken on them, it can be said that if for violent crimes of a racist or xenophobic nature Portuguese courts have already shown, on various occasions, the capacity

[467] Italy, Ministry of the Interior (2002) *Direzione Centrale della Polizia di Prevenzione: EU – Osservatorio Europeo per il monitoraggio su razzismo, xenofobia e antisemitismo – richiesta dati, documento No.224/B1/16285*; pp. 2-8.

to punish them, the same has happened in relation to other cases in which the plaintiff is obliged to prove the 'racist motivation'.

In the **United Kingdom**, the Crown Prosecution Service (CPS) monitors prosecution decisions and outcomes in cases identified as racist incidents. In 2001/02, there were 3,728 defendants charged with an offence, which, in view of the police or CPS, met the definition of a racist incident. Of these, the police identified 89% and the CPS the remaining 11%. In 2001/02, 72% of cases were prosecuted compared to 76% in 1999/00. Of the cases prosecuted there were guilty pleas to 69% of the charges. The overall charge-based conviction rate for 2001/02 was 83%, compared to 79% in 1999/00. Of the cases prosecuted 58% were for specific racially aggravated offences under the Crime and Disorder Act 1998 and 60% of these were public order offences.[468]

A majority, 58%, of the 3,597 offences prosecuted were charged under the Crime and Disorder Act with the majority being racially aggravated public order offences. Although the remainder could not be prosecuted under the Act, a proportion contained admissible evidence of racial aggravation.

In cases where charges were dropped, 43% (932) were dropped because of insufficient evidence, 25% because of difficulties with witnesses and 15% were not pursued on public interest grounds, the most common reason being that the defendant was being tried for more serious offences or was serving a long prison sentence. 2,242 (62%) prosecutions were dealt with in the Magistrates Court (1% fewer than last year) as set against 836 charges handled by the Crown Court, a 1% increase. The 519 cases handled by the Youth Court represented an unchanged load.

In **Belgium**, it was suggested in 2002 that all court decisions concerning acts violating the anti-racism law, the law of the denial of the Holocaust and the future general anti-discrimination law should be transmitted to the CEOOR for monitoring purposes.

[468] Home Office (2003) Statistics on Race and the Criminal Justice System. A publication under section 95 of the Criminal Justice Act 1991, p. 64, available at: http://www.homeoffice.gov.uk/rds/pdfs2/s95race2002.pdf (21.08.2003).

In **Denmark** as mentioned before, during the last couple of years individual cases illustrate that in some court cases the racist character of violence has been considered as an aggravating circumstance in sentencing.[469] The Metropolitan Police Force in Copenhagen has consequently issued an instruction that in all cases of violence with a possible racist motive, the prosecutor must ask the court to consider this as an aggravating circumstance, according to section 80 of the Penal Code.[470]

In **France**, the Minister of Justice sent two urgent ministerial instructions, on April 2 and April 18, to public prosecutors to remind them of the necessity of a firm and dissuasive response directed at known perpetrators of racist/anti-Semitic offences. Additionally, the ministerial instruction spoke of the necessity to regularly make known the legal outcomes of such cases to the victims and to local Jewish organisations.[471]

[469] Utrykt afgørelse fra Lyngby ret den 22. december 1998, BS 3-1211/97. Afgørelsen blev stadfæstet af Østre Landsret den 27. september 1999. Decision from the Court of Lyngby from December 22, 1998. The decision was upheld by the Eastern High Court on September 27, 1999 Utrykt afgørelse fra Østre Landsret af 21. oktober 1998, B-2732-97. Unwritten decision from the Eastern High Court of October 21, 1998, – ENAR Shadow report 2002, Racism and Discriminatory Practices in Denmark; available at: http://www.enar-eu.org/en/national/Denmark%20Shadow%20Report%202002%20EN.pdf (14.08.2003).

[470] Hansen, N-E (2000), in B. Christensen, m.fl., 'Udlændingeret', Cph, p. 64.

[471] CNCDH (Commission Nationale Consultative des Droits de l'Homme) *Rapport annuel – La lutte contre le racisme 2002*, p 61-62, available at: http://www.commission-droits-homme.fr/binTravaux/ListeAvis.cfm?iClasse=1# (19.08.2003).

Part III: Common problems and conclusions

10. Common and specific problems

The still lacking or pending implementation of the Racial Equality Directive constitutes the major problem for some Member States. Some Member States, however, have made a — sometimes 'last minute' — effort to ensure the implementation in due time. As for other countries, the date of implementation is not yet foreseeable. Apart from existing and evolving legislation, another major concern generally occurs in the areas of complaints and court cases.

Additionally, the previously discussed diverse political, historical, social and economic contexts across the EU Member States and their impact on the existing legislations, complaint and court systems and relevant data in this regard, have created diversity that obviously still hinders, to some extent, a harmonised combat against discrimination on all levels.

Nevertheless, it can also be observed that groups of countries are in similar situations and have developed in analogous ways with regard to their anti-discrimination policies, and in connection with their integration and immigration policies.

In general, the question of availability of data for each group also depends on the specific concept of migrants and minorities used in a given Member State and on the type of information actually collected and the underlying intention. Thus, the quality of data varies considerably. Analysis in this field is therefore complex, influenced by various factors, and it depends naturally on the availability of data. The varying concepts used to account for minorities make any comparison difficult. It also becomes complicated to develop and evaluate policies which target an entire group (rather than a legal category) that may be subject to discrimination. The same applies to the development of policies aiming at reducing discrimination and removing more subtle obstacles to integration encountered by migrants and minority members alike.

There is an enormous variety between the Member States in their national reporting systems on discrimination and the legislations underlying them. Mechanisms for collection of data can be divided into three main groups: countries in which governmental institutions or bodies collect and register complaints more or less idiosyncratically; countries where NGOs try more or less successfully to fill this gap; and countries where effective collecting systems are still almost completely missing. Even where such registers of sufficient quality and efficiency exist, they are sometimes not easily accessible or available to a broader public.

Data on complaints and court cases reflect primarily the existing differences in recording mechanisms and legal systems to redress discriminatory behaviour. Generally, statistics from public institutions in charge of registering complaints by victims of discrimination are regarded as more objective (or official) than those collected by NGOs. Nevertheless, the latter can at least partly compensate for the absence of official bodies and provide important qualitative information on discrimination; whereas, as described previously, in some Member States there is no reporting mechanism at all which could provide such vital information.

It is understandable that those Member States with better registration systems in place are characterised by more complaints from victims, and more cases of discrimination coming to public attention. In other Member States cases remain invisible, which tends to lead to the obviously incorrect assumption that no or lesser problems exist in these countries.

11. Conclusions and recommendations

11.1. Options and strategies for improved data comparability

All the problems mentioned and discussed above demonstrate the importance of the two new Equality Directives. These set minimum standards for anti-discrimination legislation, share the burden of proof, and require the set up of body to receive complaints and provide support for victims. Hereby, the Racial Equality Directive contributes consequently to a harmonisation of anti-discrimination standards, legislation and accordingly, in the long run, to the creation and harmonisation of data. The reports of the NFPs have shown that during 2002 most Member States were engaged in preparatory activities for implementing these Directives, but that they often did so in different ways and to a varying extent. Some strengthened already existing legislation; others moved the main body of the respective legislation into the sphere of civil law. Some opted for a comprehensive anti-discrimination law covering all grounds of discrimination — sometimes even going beyond the grounds of the Directive and Art. 13 EC Treaty — and areas of society. Some Member States combined the Equality Directives with other Directives as part of an overall package of equal treatment legislation. Some countries went beyond the minimum standards set by the Directives; some established new equal treatment bodies to cover the legislative requirements of the Directive regarding racial or ethnic origin; others extended the remit of such bodies to cover even broader grounds of discrimination. Irrespective to what model was or is chosen, one of the long-ranging changes expected from these developments is a more accurate system of recording complaints. Victims then should feel confident that there is some point in complaining rather than remaining silent. Such recording of complaints will hopefully raise the level of meaningful comparability between EU Member States. However, it also has to be noted in this regard that far from all Member States had completed the transposition process of the Racial Equality Directive by the deadline of 19 July 2003.

As the individual EU Member States are the primary actors carrying the responsibility for anti-discrimination and integration policies, it is in their crucial interest to address deficiencies in regard to data on anti-discrimination acts, complaints and cases. To target this issue, for those EU Member States lacking appropriate systems a possible strategy, would be to set up data collection systems, notably electronically accessible databases. It is clear that, although considerable differences will remain for the foreseeable future (due to historical idiosyncrasies and differences in legal and administrative frameworks), there is room for improvement.

In order to widen the scope of research in this field, additional steps can be taken. A first possible step would be to enhance the knowledge on what data are, in fact, collected in the Member States and for what purposes these data can actually be used (for example by way of an inventory of available datasets in the Member States, a strategy that has been strongly recommended by a recent European research project).[472] In the same context, sharing experiences regarding implemented anti-discrimination legislation with those EU Member States with a longer tradition in this respect would be beneficial for improved legal reforms and policies in the field of anti-discrimination.

11.2. Conclusions and recommendations to the EU and its Member States

All in all, the legislation to combat discrimination at the national and European level will be considerably strengthened through the implementation of the two Equality Directives. Moreover, minimum standards have been set which will considerably influence the future developments on non-discrimination.

Due to the very nature of the subject, the recommendations provided in the Analytical Reports on Legislation by the 15 National Focal Points of the EUMC RAXEN network specifically targeted national legislation issues. Nevertheless, the present study attempts to make recommendations for the EU as a whole and all of its Member States. Consequently, the following 10 recommendations have been extracted and compiled from the recommendations outlined in the NFP reports, official documents of the EU and further research by the authors. Similar recommendations contained in several country reports have been prioritised.

1. Naturally, the first and predominant action to be taken should be the immediate transposition of the Equality Directives by those EU Member States, which so far have failed to do so, or which have carried out the transposition only partly. Furthermore, EU Member States should take the opportunity to go beyond the minimum requirements set by the Equality Directives.

[472] The COMPSTAT project provides an analysis of the availability and comparability of integration-related data in eight European countries. The project, which has been conducted within the European Union's 5th Framework programme, has established a meta-database containing full descriptions of over 300 micro-datasets with information on migrants. See: www.compstat.org, (12.05.2003).

2. Data comparability should be improved by setting up of competent institutions, an institutionalised monitoring system, or electronically accessible databases on cases and complaints in those Member States which lack such systems at present, as well as a regular exchange of information and experience.

3. A positive example is the duty of public authorities specified by law in the UK to work towards the elimination of discrimination, promote equality of opportunity and good relations between people of different racial and ethnic groups. Public authorities at the national, regional and local levels as well as other public and semi-public institutions should serve as a role model for anti-discrimination and equal opportunity policies. Furthermore, public authorities should consider adopting positive action programmes for especially vulnerable minority groups.

4. When implementing the Race Equality Directives, it should be kept in mind that anti-discrimination provisions always need to be seen in the broader context of integration of ethnic minorities into (civil) society. In particular, the example of those States should be followed which have introduced political rights for non-citizens resident on their territories.

5. Specific training programmes on anti-discrimination legislation and equal treatment should be initiated for judges, prosecutors, civil servants and other persons working within areas influenced by policies and legislation on integration, immigration and discrimination. This would ensure their proper and effective practical implementation.

6. Member States which have not already done so should establish specialised mediation or arbitration centres in due course — or make existing mechanisms more accessible to immigrants and minorities — that can help to mediate conflicts relating to discrimination sometimes before the parties actually have to face each other in court.

7. A regular dialogue and consultation between governmental and non-governmental organisations on issues of discrimination and integration on an equal footing could support further the fight against discrimination and racism.

8. The European Union should continue its work towards the harmonisation of national legislations, towards establishing a long-term resident status acknowledging that migrants who are legally resident in a Member State on a long-term basis should not be denied the civic, social and economic rights enjoyed by Union citizens.[473]

[473] Already in October 1999, the Presidency Conclusion of the European Council in Tampere stated that '[a] person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence.' Tampere European Council, Presidency Conclusion, III, 21, available under http://www.europarl.eu.int/summits/tam_en.htm, (22.04.2003).

Annex

Table A1 – Foreigners and immigrant minorities in EU Member States[474]

	Core definitions used for data collection	Immigrant minorities (absolute numbers)	Total population	Immigrants minorities in % of total population	Reference date
AT[1]	Foreign Citizens	710,926	8,032,926	8.9%	15.5.2001
BE[2]	Foreign Citizens	897,110	10,239,089	8.7%	31.1.2000
DK[3]	Foreign Citizens (FC); Immigrants and their descendants (ImD)	FC: 258,629 ImD: 419,308	5,300,000	FC: 4.9% ImD: 7.1%	FC: 1.1.2001 ImD: 1.4.2002
FI[4]	Foreign Citizens	91,074	5,181,115	1.76%	31.12.2000
FR[5]	Foreign Citizens (FC) Immigrants (Im), Foreigners by nationality or origin (FNO)[6]	FC: 3,263,000 Im: 4,310,000 FNO: 5,620,000	58,518,000	FC: 5.6% Im: 7.4% FNO: 9.6%	March 1999
DE[7]	Foreign Citizens	7,318,628	82,440,400	8.9%	31.12.2001
EL[8]	Foreign Citizens	797,093	10,964,080	7.3%	18.3.2001
IE[9]	Foreign Citizens	144,000	3,917,000	3.0%	FC: 1999, total 2002
IT[10]	Foreign Citizens	1,460,000	57,600,000	2.5%	FC: 2001, total: 2000
LU[11]	Foreign Citizens	164,700	441,300	37.3%	1.1.2001

474 Taken from EUMC (2003) *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-Discrimination in 15 Member States of the European Union*, Principal authors: Michael Jandl, Albert Kraler and Anna Stepien, EUMC Equal Opportunities for an Inclusive Europe Series, Vienna 2003.

1 Statistik Austria, Census 2001. See: Statistik Austria (2003) Statistisches Jahrbuch 2003/ Statistical Yearbook 2003, Tab. 2.14, available at: www.statistik.at/jahrbuch/pdfe/k02.pdf (25.04.2003).

2 NIS/INS (2000) Statistique Demographique. Population étrangère au 1.1.2000.

3 Foreign Citizens: Danmarks Statistik 2002, www.dst.dk, (25.04.2003); Immigrants and descendants: Nyt fra Danmarks Statistik No. 206, May 21st 2002.

4 Ministry of Labour for the OECD (2002) *Finland Country Report for the OECD's SOPEMI report 2001*, using figures of Statistics Finland, under: http://www.mol.fi/migration/finrep2001.pdf, (25.04.2003).

5 INSEE, Census 1999. See Julien Boeldieu et al. (2000) Recensement de la population 1999 – la population d'immigrés est stable depuis 25 ans, Insee Premier, No. 748, available at: http://www.insee.fr/fr/ffc/docs_ffc/IP748.pdf, (25.04.2003).

6 The category 'foreigner by nationality or origin' is a composite category, computed on the basis of the two variables used in the Census to account for immigrants, namely citizenship and country of birth.

7 Federal Statistical Office, 2002.

8 National Statistical Office, Census 2001.

9 Foreign Citizens: Eurostat; Total Population: Central Statistical Office, Provisional Census Results.

10 Foreign Citizens: ISTAT 2001; Total Population: Eurostat.

11 Statec, Annuare Statistique, available at: http://www.statec.lu/html_fr/annuaire/accueil.htm, (25.04.2003), (registration required).

	Core definitions used for data collection	Immigrant minorities (absolute numbers)	Total population	Immigrants minorities in % of total population	Reference date
NL[12]	Foreign Citizens. Persons with a foreign background: 1st generation (born abroad) 2nd generation (born in NL)	FC: 651,531 Total immigrants: 2,775,302 Born abroad: 1,431,122	15,863,950	FC: 4.1% total Immigrants: 17.5% Born abroad: 9.0%	1.1.2000
PT[13]	Foreign Citizens	223,000	10,356,000	2.1%	2001
ES[14]	Foreign Citizens	1,109,060	40,847,371	2.6%	2001
SE[15]	Foreign Citizens (FC) Foreign born (FB)	FC: 475,986 FB: 1,027,927	8,909,128	FC: 5.3% FB: 11.5%	31.12.2001
UK[16]	Foreign Citizens Ethnic Minorities (EM)	FC: 2,450,000 EM: 4,000,000	59,750,000	FC: 4.1% EM: 7.1%	FC: annual average 2000 EM: mid 2000

12 Central Bureau of Statistics/ STATLINE under: http://statline.cbs.nl/StatWeb/Start.asp?lp=Search/Search&LA=EN&DM=SLEN, (25.04.2003). Foreign citizens: Council of Europe (2002) *Recent Demographic Developments in Europe 2001*, Strasbourg.

13 Total: 2001 Census; all National Statistical Institute.

14 Census 2001, National Institute of Statistics.

15 Statistics Sweden, http://www.scb.se, (20.03.2003).

16 Office for National Statistics (ONS), Labour Force Survey Autumn 2001; Foreign Citizens: Council of Europe (2002) *Recent Demographic Developments in Europe*, Strasbourg.

Table A2 – Immigrants and minorities in EU Member States – Major countries of origin/major groups[475]

	EU nationals as percentage of foreigners (immigrants if available)	Labour migrants from EU countries (in % of all foreigners)	Third-country nationals, most important countries of origin	Recognised autochthonous minorities[476]
AT	15.0% (2001)[477]	–	FRY 21.3% BiH 13.2% Turkey 17%[477]	Croatians (40-50,000), Slovenes (50,000), Czechs (15-20,000), Slovaks (5-10,000), Hungarians (30-50,000), Roma (10-20,000)[478]
BE[479]	65.7%	Italy 22.7% Spain 5.6%	Morocco 12.4% Turkey 6.5% DRC 1.3%	
DK	Foreign born:[480] 22% Foreigners: 21%[479]		Foreigners:[479] Turkey 13.6 BiH 7.8 Somalia 5.6 Immigrants:[480] Turkey 7.2 BiH 6.1 Iraq 4.2	
FI[479]	18.3%		Russia 22.6% Estonia 11.9%	Roma (around 10,000), Sami (around 5,000)
FR[481]	Immigrants: 37.1%	Immigrants: Portugal 13.2% Italy 8.8% Spain 7.3%	Immigrants: Algeria 13.4% Morocco 12.1% Subsaharan Africa 9.3%	

475 Taken from EUMC (2003) *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-Discrimination in 15 Member States of the European Union*, Principal authors: Michael Jandl, Albert Kraler and Anna Stepien, EUMC Equal Opportunities for an Inclusive Europe Series, Vienna 2003.

476 As reported by the National Focal points. In any case, it is difficult to give a comprehensive overview of minorities. Although minorities may not have a special legal status, they may nevertheless be targeted by specific integration and anti-discrimination measures *qua minority*.

477 Census 2001, own computations (reference date: 15 May 2001).

478 Estimates: Österreichisches Volksgruppenzentrum (2000). Note: the estimates lie considerably above census results for 1991 (the 2001 results on ethnic groups are not yet published). Ethnic group membership is measured by a single question (on the 'colloquial language' of the respondent) in the census. Apparently, a significant number of minority members decline to state a minority language as one of their colloquial languages.

479 Council of Europe (2002) *Recent Demographic Developments in Europe 2001*, Strasbourg, Foreign citizens as of 01.01.2001.

480 OECD (2001), SOPEMI (2001) *Trends in international migration*, Paris (reference year: 1999).

481 INSEE, Census 1999. The figure refers to immigrants, defined as persons born abroad with foreign citizenship at birth. See: Boëldieu, J., Borrel, C. (2000) Recensement 1999. La proportion d'immigrés est stable depuis 25 ans. Insee Première No. 748.

	EU nationals as percentage of foreigners (immigrants if available)	Labour migrants from EU countries (in % of all foreigners)	Third-country nationals, most important countries of origin	Recognised autochthonous minorities
DE[482]	25.3%	Italy 8.4% Greece 5.0%	Turkey 28.8% Ex-Yugoslavia 9.8%	
EL	n.a.		Albania, Romania, Bulgaria, Philippines	Roma (150,000-300,000) – not recognised, Muslim minority of Thrace, approx. 100,000-300,000
IE	72.89%[483]		n.a.	Travellers (estimated 24,000)
IT[482]	11.13%		Morocco 13.5% Albania 10.0% Philippines 5.1%	
LU[484]	87.04%	Portugal 35.5% Italy 12.3%	Ex-Yugoslavia	
NL	30.7% (foreigners)[482]	Foreigners:[482] Italy 2.75% Spain 2.60% Immigrants:[485] Italy 1.22% Spain 1.10%	Foreigners:[482] Morocco 18.4% Turkey 15.5% Immigrants:[485] Indonesia 14.6% Turkey 11.1% Morocco 9.5%	
PT[486]	27.5		Cape Verde 22.3 Brazil 10.5 Angola 10.1	
ES[484]	34.2%		Morocco 22.3% Ecuador 3.5% China 3.2%	

[482] Council of Europe (2002) *Recent Demographic Developments in Europe 2001*, Strasbourg, as of 01.01.2000.

[483] Council of Europe (2002) *Recent Demographic Developments in Europe 2001*, Strasbourg, as of 15.04.2000.

[484] Council of Europe (2002) *Recent Demographic Developments in Europe 2001*, Strasbourg, Foreign citizens as of 01.01.2001.

[485] Central Bureau of Statistics as of 01.01.2000.

[486] National Statistical Institute, Demographic Statistics, 2002, according to the Ministry of Internal Affairs – Border and Alien Service.

	EU nationals as percentage of foreigners (immigrants if available)	Labour migrants from EU countries (in % of all foreigners)	Third-country nationals, most important countries of origin	Recognised autochthonous minorities
SE[484]	37.0%		Iraq 6.9% BiH 4.8% Poland 3.5%	
UK	EU Foreigners:[487] 34.9%		Foreigners[487]: India 6.1% Pakistan 2.6% Ethnic minorities[488] Black Caribbeans, Black Africans, Indians, Chinese, Pakistani, Bangladeshi (12.5% in England and Wales)	

[487] Council of Europe (2002) *Recent Demographic Developments in Europe 2001*, yearly average (based on LFS).

[488] Although (immigrant) minorities are primarily referred to as ethnic groups (or racial groups), the majority of them are immigrant in a narrow sense (born abroad, parent(s) born abroad), and therefore included in this table. The census 2001 in the UK was only carried out in England and Wales (leaving out Scotland and Northern Ireland). Three variables were used to 'measure' ethnicity: ethnic self-definition (5 categories), country of birth and religion. See ONS: http://www.statistics.gov.uk/census2001/profiles/commentaries/background, (20.04.2003).

Table A3 — State of implementation of the Racial Equality Directive
(every effort has been made to update this table up to December 2003)

Member State	State of implementation
AT	No: governmental legal initiative to be handled by parliament
BE	Yes, some aspects to be implemented regionally
DK	Yes
FI	Yes, both directives
FR	Partially implemented
DE	No: draft law has to be discussed
EL	No: in progress, to be handled by parliament
IE	In progress (in the form of amendments to existing legislation)
IT	Yes, both directives
LU	No (there are draft legislations for both directives)
NL	No: to be approved by parliament
PT	Partially implemented
ES	Yes, both directives
FI	Yes, both directives
SE	Yes
UK	Yes, amendments to existing legislation

Table A4 – Overview: Selected common elements of immigrant/minority policies in Europe[489]

Member State	Integration courses for new migrants	Recent regularisation	Ethnic minority protection
AT	Yes, mandatory	No	Yes, constitutional
BE	–	Yes	No
DK	Yes, mandatory	No	No
FI	Only unemployed newcomers	No	Yes (simple and constitutional law)
FR	Planned	Yes	No
DE	Planned, in most cases not voluntary	No	Yes (simple and constitutional law)
EL	No	Yes	No
IE	No	No	Yes
IT	No	Yes	No
LU	Yes, run by NGOs	Yes	No
NL	Yes, mandatory	No	Ethnic/racial equality
PT	No	Yes	No
ES	No	Yes	No
SE	In discussion	No	Yes (simple law)
UK	No	No	Racial equality

Naturalisation rates (1998)[490]

AT	BE	DK	DE	FI	FR	IT	LU	NL	ES	SE
2,49	2,72	4,11	1,45	4,98	3,34	0,99	0,51	8,73	2,16	8,91

Source: ICMPD, on the basis of a broad range of sources. LU: 1997; DE: excluding ethnic Germans.

489 Taken from EUMC (2003) *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-Discrimination in 15 Member States of the European Union*, Principal authors: Michael Jandl, Albert Kraler and Anna Stepien, EUMC Equal Opportunities for an Inclusive Europe Series, Vienna 2003.

490 Taken from EUMC (2003) *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-Discrimination in 15 Member States of the European Union*, Principal authors: Michael Jandl, Albert Kraler and Anna Stepien, EUMC Equal Opportunities for an Inclusive Europe Series, Vienna 2003.

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