New Institutions for Human Rights Protection

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A Comparative and European Examination of National Institutions in the Field of Racism and Discrimination

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1. Introduction

The twenty first century is far from marking the end of inequality. Discrimination remains a widespread phenomenon across Europe and stereotypes are hard to overcome. In March 2007, the Deputy Prime Minister and Minister for Education of the former Polish Government, with the public support of the Prime Minister, announced a draft law punishing 'homosexual propaganda' in schools, which was to provide for dismissal, fines, or imprisonment for school heads, teachers, and pupils. They also expressed a desire to promote the adoption of similar laws at European level.[1] During the communist government period and the 1990s, numerous Roma women were sterilized without consent in public Slovak hospitals. In 2003, Amnesty International and other Non-Governmental Organizations (NGOs) denounced the fact that investigation into the allegations was not being conducted independently, thoroughly, and impartially as required by international law.[2] And this is but one instance of many concerning Roma, whose place is described by the United Nations Committee on the Elimination of All Forms of Racial Discrimination as being 'among those most disadvantaged and most subject to discrimination in the contemporary world'.[3] In the UK, a 2001 research study on religious discrimination showed that Muslims, Sikhs, and Hindus frequently experience unfair treatment in

[1] See the reaction of the European Parliament in a Resolution on homophobia in Europe, 26 April 2007, P6TA-PROV(2007)0167. See also the European Parliament Resolution on the increase in racist and homophobic violence in Europe, 15 June 2006, P6TA(2006)0273.

[2] Amnesty International, *Slovakia: Failing to Ensure an Impartial and Thorough Investigation into Allegations of Illegal Sterilization of Romani Women* (2003), AI Index: EUR 72/002/2003.

[3] General Recommendation No 27, Discrimination against Roma (57th session, 16 August 2000), UN Doc A/55/18. In the EU, see the policy documents and the various declarations available on the website of the European Commission, DG Employments, Social Affairs and Equal Opportunities, under the heading 'the EU and Roma' (<http://ec.europa.eu/employment_social/fundamental_rights/roma/rpub_en.htm>).

education, employment, housing, criminal justice, and local government.[4] In 2008, the European Commission stressed that many gender gaps remain: 'The indicators for pay, labour market segregation and the number of women in decision-making jobs have not shown any significant increase for several years.'[5] And these are only random examples illustrating specific cases of discrimination or structural discriminatory practices, as the number of cases seems infinite.[6]

Creating stronger legal instruments is one solution to tackling these issues and to achieving more equality. Bearing this in mind, EU non-discrimination law has developed tremendously in recent years, with a focus on efficiency and the establishment of bodies to promote equality of treatment at national level. The first part of this chapter aims at giving a succinct account of how the general principle of equality, which is deeply embedded within EU law, has received new applications in order to go far beyond the primary concern of removing barriers to free movement within the internal market. However, despite the supranational character of EU law, one cannot grasp its impact on national laws through a top-down model of regulation. Implementation of EU law is often entangled in national traditions and always anchored in national legal cultures. This is particularly the case when member states are required to set up institutions which, by definition, have to fit within the national legal system. Accordingly, the second part of this chapter seeks to show the broad range of equality bodies now in place in European countries, with an emphasis on models that have been of significant influence.[7] Part 3 addresses the various missions that equality bodies are undertaking and tries to provide some insight into the paths that might be considered to achieve effective enforcement of the principle of non-discrimination in day-to-day life. Finally, the key question of independence of such bodies will be discussed taking into account international standards, such as the 'Paris Principles',[8] to fill the gaps of EU law in this respect.

2. A Glimpse at EU Anti-Discrimination Law

From the outset, anti-discrimination has been a key element of European integration.[9] On the one hand, a common market relying on free movement could not be consistent with discrimination based on nationality. In line with this, the primary

[4] P Weller, A Feldman and K Purdam, *Religious Discrimination in England and Wales* Home Office Research Study 220 (2001). See also *Fairness and Freedom: the Final Report of the Equalities Review: A Summary,* Equalities Review Panel (2007).

[5] 'Report on Equality Between Women and Men' (2008), at 8.

[6] See *Discrimination in the European Union,* (Special Eurobarometer 263, 2007) and the Gallup Organization's analytical report (2008).

[7] The national 'Country Reports on Measures to Combat Discrimination' issued by the European Network of Legal Experts in the Non-discrimination Field were a crucial source of information to account for the national situations (available on the website of the European Commission, DG Employment, Social Affairs and Equal Opportunities).

[8] See pt 2 below, especially n 33.

[9] See, for instance, M Bell, *Anti-discrimination Law and the European Union* (2002); D Martin, *Egalité et non-discrimination dans la jurisprudence communautaire* (2006); Bribosia, 'La lutte contre les discriminations dans l'Union européenne: une mosaïque de sources dessinant une approche différenciée', in C Bayart, S Sottiaux, and S Van Drooghenbroeck (eds), *Les nouvelles lois luttant contre la discrimination* (die Keure-La Charte, Brugges-Brussels, 2008) 31–62.

EEC Treaty included a number of provisions forbidding discrimination against EU nationals living or working in another member state. On the other hand, the principle that men and women should receive equal pay for equal work was considered necessary to avoid distortions of competition between member states. Over the years, discrimination in payment, and more generally discrimination against women, was also recognized as a social problem and as a breach of fundamental human rights.[10]

Despite the solitary nature of the provision governing discrimination based on gender in the 1957 Treaty of Rome[11] and its market-oriented background, a body of law on gender equality has progressively grown within the EU to constitute a 'separate citadel in the fortress of Community law', as Lord Wedderburn put it.[12] The movement started in the early 1970s and over the years, a significant body of European legislation has been put in place. At the same time, the European Court of Justice has refined and strengthened this legal framework tackling gender discrimination related to pay, working conditions, and social security.

The emergence of EU citizenship and the need for more popular legitimacy of the EU called for broader equal opportunities policies. Since the early 1990s, civil society organizations have been eager to drive the debate forward: they have pressed the European Community to tackle discrimination on a number of additional grounds, notably race and ethnicity.[13] The result of this process was the inclusion of Article 13 in the EC Treaty, following the entry into force of the 1997 Amsterdam Treaty. This provision is the cornerstone of potentially wide-ranging European anti-discrimination laws, as it empowered the Community 'to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. The adoption of Article 13 suggests a growing recognition of the need to develop an integrated approach towards the fight against discrimination and to benefit from exchanges of experience and good practice across the various grounds.

Although Article 13 represents a fundamental step forward in the implementation of the principle of equal treatment within Europe, this provision lacks direct effect and, as such, does not oblige the European institutions to act.[14] The approval of

[10] See the landmark decisions of the European Court of Justice: Case 43/75 *Defrenne II* [1976] ECR 455; Case 149/77 *Defrenne III* [1978] ECR 1365.

[11] Art 119, pt 1 of the EEC Treaty (now embodied in Art 141.1 of the EC Treaty) states that 'Each Member State shall... ensure... the application of the principle that men and women should receive equal pay for equal work.'

[12] *Labour Law on Freedom: Further Essays in Labour Law* (1995) at 265.

[13] For instance, the Starting Line Group, a coalition, created in 1991, of more than 400 non-governmental actors active in the anti-discrimination field and originating from all across Europe. On the Starting Line Group's activities, see, for instance, Chopin, 'The Starting Line: A Harmonised Approach to the Fight against Racism and to Promote Equal Treatment', 1 European Journal of Migration and Law (1999) 111–29.

[14] See, for instance, E. Dubout, *L'article 13 du traité CE. La clause communautaire de lutte contre les discriminations* (2006). For recent applications of Art 13 EC as a guide for interpreting secondary EC law, see, Advocate General Maduro in Case C-303/06 *Coleman*, opinion delivered on

appropriate legal measures to combat discrimination entails unanimity within the Council on a proposal from the Commission, after consultation with the Parliament. Because of the unanimity requirement, many shared the view that nothing was likely to happen within years, if ever. Two directives were, however, adopted in 2000, the year following the entry into force of the Amsterdam Treaty: Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive)[15] and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation with respect to religion or belief, disability, age and sexual orientation (Employment Equality Directive).[16] Such a speedy achievement was the result of years of civil society campaigning which prepared the ground for broad support for legislative measures. Exceptional political circumstances also played a decisive role. Oddly enough, Jörg Haider, the leader of the FPÖ (an Austrian extremist right wing political party), boosted the process. His participation in the Schüssel Government in 2000 caused deep concern in other EU member states at the time. Implementing concrete measures against racial discrimination was considered to be a priority in Europe and Austria, facing political confinement, could not afford to vote against the adoption of anti-discrimination legislation.

The Racial Equality Directive and the Employment Equality Directive significantly raise the level of legal protection against discrimination across the EU. They prohibit four forms of unlawful discrimination: direct and indirect discrimination, harassment, and instructions to discriminate. Direct discrimination deals with situations where 'one person is treated less favourably than another is, has been or would be treated in a comparable situation' because of a prohibited ground of discrimination.[17] This is, for instance, the case when an advertisement for renting a flat bluntly says 'foreigners not welcome'.[18] Conversely, indirect discrimination is not necessarily linked to any discriminatory intent.[19] It occurs where 'an apparently neutral provision, criterion or practice' would put persons of a particular racial or ethnic origin, religion or belief, age, disability, or sexual orientation at a particular disadvantage, unless it can be 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.[20] A company dress code could amount to indirect discrimination based on religion when it is incompatible with the wearing of the headscarf, the kippa, or the turban without proper justification (ie safety for jobs requiring wearing of a helmet,

31 January 2008, especially points 7–14 and Case C-54/07 *Feryn*, opinion delivered on 12 March 2008, especially point 14.

[15] OJ 2000 L180/22. [16] OJ 2000 L303/16.

[17] Art 2(2)(a) of the Racial Equality and the Employment Equality Directives.

[18] Difference of treatment based on race or ethnicity can never be justified except when it constitutes 'a genuine and determining occupational requirement' (Racial Equality Directive, Art 4). The classical instance concerns a film maker who intends to hire an actor playing Martin Luther King or Muhammad Ali.

[19] In EU law, the concept of indirect discrimination was originally built by the European Court of Justice in equal payment cases. See the following landmark decisions: Case 96/80 *Jenkins* [1981] ECR 911; Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607.

[20] Art 2(2)(b) of the Racial Equality and the Employment Equality Directives.

public health for jobs in the food industry, etc). Compared to direct and indirect discrimination, harassment entails unwanted conduct which lasts for a certain period of time. The behaviour amounts to harassment where it has the purpose or effect of violating the dignity of a person and creates an intimidating, hostile, degrading, humiliating, or offensive environment.[21] An employee in a same sex couple partnership is, for instance, being harassed when he has to face recurring homophobic remarks from his boss or colleagues. Finally, the ban on instructions to discriminate means that the mere act of enjoining a third party to discriminate on prohibited ground equals unlawful discrimination.[22] Accordingly, an employer giving instruction to a temping agency only to hire 'white people' is in breach of EU anti-discrimination law as is the temping agency.

It should be stressed that the Racial Equality Directive and the Employment Equality Directive do not have the same material scope. With respect to race and ethnic origin, employment, training, education, social security, healthcare, housing, and access to goods and services are covered. As to religion or belief, disability, age, or sexual orientation, the protected area is confined to employment and occupation, as well as vocational training.[23] However, concerning the level of protection, EU law lays down minimum standards, thus giving the member states the option of introducing or maintaining more favourable provisions.[24] This has been the case in a number of member states where provisions were beyond the requirements of the Employment Equality Directive.[25]

The Racial Equality Directive and the Employment Equality Directives were built on the gender experience and the case law of the European Court of Justice. In contrast to the 1976 Gender Equal Treatment Directive[26] which mainly focused on forbidding discrimination between women and men in all aspects of the employment relationship, the 2000 Directives also pay particular attention to issues related to remedies and enforcement, mainly defence of rights, burden of proof, and sanctions. EU practice with gender discrimination has clearly shed light on the need to put emphasis on an effective mechanism for enforcement, to allow successful litigation and operative implementation of the principle of equal treatment.[27] Recent directives that strengthen and expand the legal framework

[21] Art 2(2)(3) of the Racial Equality and the Employment Equality Directives.

[22] Art 2(2)(4) of the Racial Equality and the Employment Equality Directives.

[23] Human European Consultancy and Migration Policy Group (eds), in Reports VT/2005/062 prepared for the use of the European Commission, 'Comparative analyses on national measures to combat discrimination outside employment and occupation: Mapping study' (2006).

[24] Recital 25 of the Preamble to the Racial Equality Directive; Recital 28 of the Preamble to the Employment Equality Directive.

[25] M Bell, I Chopins, and F Palmer, in Report prepared for the European Commission, *Developing Anti-Discrimination Law in Europe* (2007) at 38.

[26] Council Dir 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L39/40.

[27] On the wide range of obstacles women faced in bringing successful litigation, see, for instance, J Blom and ors in Report V/782/96-EN prepared for the use of the European Commission, *The Utilisation of Sex Equality Litigation in the Member States of the European Community: A Comparative Study* (1995).

implementing the principle of equal treatment between women and men follow this approach.[28]

The establishment of 'bodies for the promotion of equal treatment'[29] is undoubtedly one of the measures designed to improve the implementation of equality norms. In many member states, experience from anti-racist and gender laws has shown that too often the latter remain only on paper. According to the European Commission, 'it is clear that legislation alone is not sufficient to tackle discrimination. Take for example the experience from the gender equality field, where there is still a gender pay gap of some 20 per cent despite legislation on equal pay since the 1970s.'[30] As the Preamble of the Racial Equality Directive puts it: '[p]rotection against discrimination based on racial or ethnic origin would itself be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.'[31] This is in line with General Policy Recommendation No 2 that the European Commission against Racism and Intolerance of the Council of Europe (ECRI) issued in 2001.[32] In turn, the latter invokes the United Nations 'Paris Principles' which underline 'the significant role that institutions at the national level can play in promoting and protecting human rights and fundamental freedoms and in developing and enhancing public awareness of those rights and freedoms'.[33] Even though these principles were originally set out to provide a basic framework for Commissions on Human Rights, they are, as we shall see, widely referred to as setting the standards for equality bodies.

[28] See Council Dir 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L373/37 ('Gender Goods and Services Directive'); Dir 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L204/203 ('Recast Gender Employment Directive').

[29] Expression used in the title of chs III of the Racial Equality Directive and the Gender Goods and Services Directive. The Recast Gender Employment Directive speaks of 'equality bodies' (Art 20). In the literature 'equality bodies', 'specialized bodies', 'independent bodies', or 'enforcement bodies' are all used to describe those institutions.

[30] Nolan, 'EU Anti-Discrimination Policy', in J Cormack (ed), Report of the sixth experts' meeting—Towards the Uniform and Dynamic Implementation of EU Anti-Discrimination Legislation: The Role of Specialised Bodies, *Strategic Enforcement and the EC Equal Treatment Directives* (2004) 58 at 60.

[31] Recital 24. To the same effect, see Recital 25 of the Preamble to the Gender Goods and Services Directive.

[32] General Policy Recommendation No 2 on Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level, Council of Europe, 13 June 1997, ECRI(97)36.

[33] In 1992, the United Nations Commission on Human Rights determined the first substantial set of principles for human rights bodies, known as the 'Paris Principles'. They enshrine guidelines on the status, powers, and modes of operation of national human rights institutions. These recommendations were endorsed by the UN General Assembly in its resolution A/RES/48/134 of 20 December 1993. See McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality', in S Fredman (ed), *Discrimination and Human Rights. The Case of Racism* (2001) 251 at 282–5.

The paramount importance of equality bodies for the implementation of non-discrimination legislation whatever the grounds concerned is well documented 'given the role they can play in supporting victims of discrimination, giving guidance to Government and other public and private bodies on how to work towards equality, providing other stakeholders and the public with information on anti-discrimination rights, and conducting specialized surveys and research into discrimination and ways of eradicating it.'[34]

However, at present EU laws only require the designation of bodies for the promotion of equal treatment in relation to *race or ethnicity* and *gender*. In this respect, the Racial Equality Directive states that:

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:
   - ...providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
   - conducting independent surveys concerning discrimination, publishing independent reports and making recommendations on any issue relating to such discrimination.[35]

Equivalent provisions are enshrined in the Gender Equality Directives which cover employment and occupation as well as goods and services.[36] On this matter, the Racial Equality Directive had a 'snowball effect' on EC gender law, where the equality body requirement only appeared in 2002.[37] Conversely, the Employment Equality Directive does not require member states to set up any equality body competent to tackle discrimination based on religion or belief, disability, sexual orientation, or age. This fact is often pinpointed as regrettable and as 'a disappointing perpetuation of hierarchy among discrimination grounds'.[38] However, a significant number of states have chosen to go beyond the EU law

[34] Niessen and Cormack, 'National Specialised Equality Bodies in the Wake of the EC Anti-Discrimination Directives', in J Cormack (ed), Report of the seventh experts' meeting—Towards the Uniform and Dynamic Implementation of EU Anti-Discrimination Legislation: The Role of Specialised Bodies, *Considerations for Establishing Single Equality Bodies and Integrated Equality Legislation* (2004) 20 at 21.

[35] Racial Equality Directive, Art 13.

[36] Gender Goods and Services Directive, Art 12(1), Recast Gender Employment Directive, Art 20.

[37] Dir 2002/73/EC of 23 September 2002 amending Council Dir 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002 L269/15 (new Art 8a inserted in Dir 76/207/EEC).

[38] Niessen and Cormack, 'National Specialised Equality Bodies', n 34 above, at 25. See, however, the Commission's Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 2 July 2008, COM (2008) 426 final.

requirement and have empowered equality bodies to monitor additional grounds of discrimination other than ethnicity and gender.[39]

3. An Equality Body Model at National Level?

A. A Broad Range of Practices

As Rikki Holmaat put it, '[t]he spread of equality bodies throughout the European Union has been rapid, like a field of mushrooms appearing on the ground overnight.'[40] In this respect, the EU law requirement is certainly innovative and many national authorities had to start from scratch. Across Europe, less than one third of states appointed existing institutions with a renewed mandate and the others established new institutions. Today, most member states have designated a specialized body for the promotion of equal treatment irrespective of racial or ethnic origin and one for gender. Even though such a designation relies on EU directives, one can only be puzzled by the variety of national practices and the differences in the form, mandate, competences, functions, size, and effectiveness of these equality bodies. As a matter of fact, equality bodies are intrinsically linked to their individual national context and are the result of differing political, historical, and legal circumstances. The lack of one single format for an equality body should not necessarily mean that no general trends or possible classifications can be identified. Any attempt at rationalization, however, has its difficulties. A possible division could be made between *ombuds-type bodies* and *commissions* in the sense that Ombudsmen traditionally tend to be more complaint-focused while commissions, which are constituted by a plurality of members often representing particular interests or components of society, are usually eager to develop equality promotion work. However, such a division occurs to be unsatisfactory as these are far from being unwavering categories and 'many of the roles undertaken by bodies which fall within the two broad categories will overlap'.[41]

Another possible division rests on the various *models* of equality bodies. Sophie Latraverse of the French High Authority against Discrimination and for Equality (HALDE) identifies four.[42] The *Scandinavian model* of the Ombudsman relies

[39] See the examples given in Bell, Chopin, and Palmer, n 25 above, at 66.

[40] In the report of the European Network of Legal Experts in the Non-discrimination Field for the European Commission, *Catalysts for Change? Equality Bodies According to Directive 2000/43/EC—Existence, Independence and Effectiveness* (2006) at 28. For a systematic survey on equality bodies, see Network of Legal Experts on the Application of Community Law on Equal Treatment Between Women and Men (European Commission), *Report on Gender Equality Bodies* (2004); ECRI, *Examples of Good Practices: Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level* (2006), CRI(2006)5. See also the country-by-country details provided on the website of the DG Employment, Social Affairs and Equal Opportunities of the European Commission.

[41] Moon, 'Enforcement Bodies', in D Schiek, L Waddington, and M Bell (eds), *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law* (2006) 871 at 880.

[42] 'Organismes nationaux de lutte contre les discriminations: les défis posés aux organismes nationaux', paper presented in *The Fight Against Discrimination in Practice*, Seminar organized by the Academy of European Law (ERA), Trier 18–19 June 2007.

on an approach based on individual requests, mediation, and recommendations. It favours a culture of consensus. The *Dutch model* of a quasi-judicial body focuses on the need for alleged victims of discrimination to have access to law. To a large extent, it has recourse to the moral weight of non-binding rulings and on the building of precedents. The *Belgian model* of a public agency (Centre) seeks a balance between the promotion of equality and strategic litigation. A substantial amount of its resources is allocated to providing assistance to individuals and to reaching informal settlements. The *British model* of a Commission is the oldest in Europe in the field of anti-discrimination. It dedicates a large amount of effort towards the promotion of equality, the monitoring of practices of public authorities as well as those of private stakeholders. Support for litigation is strategically oriented to enhance substantial changes in society.

Beyond the difficulties in categorizing equality bodies, it is clear that those which were established prior to the adoption of the Racial Equality Directive in 2000 have had a profound influence in member states lacking such an equivalent institution. In this respect, the European Network of Equality, Equinet,[43] has played a decisive role, enhancing the exchange of experience, information, and best practices.[44] As Niall Crowley, the former CEO of the Irish Equality Authority, put it, '[T]he key element is that we face similar challenges. There are persistent inequalities across the grounds covered by European Directives. We need to be a part of the solution to that problem. To do that, we look at how we use our powers and, increasingly, how we can support changes in attitudes.'[45] Cooperation through Equinet is still fruitful for European equality bodies. In practical terms, it is mainly based on working groups focusing on specific issues. These include groups working on 'strategic enforcement' and 'dynamic interpretation' of equality laws, 'policy formation' with a view to developing equality mainstreaming and 'promotion of equality'.

B. Influential Models of Equality Bodies

Five models of equality bodies have mostly retained the attention of policy makers: the British Commission for Racial Equality and its counterparts for gender and disability equality, now brought together in the Commission for Equality and Human Rights; the various Swedish Ombudsmen, currently in the process of merging

[43] See Equinet's website <http://www.equineteurope.org>.

[44] Equinet began as a cooperation between a few equality bodies. The cooperation became formalized in a 2003–4 project funded under the EU's Community Action Programme to combat discrimination: 'Towards the Uniform and Dynamic Implementation of EU Anti-discrimination Legislation: the Role of Specialised Bodies'. This led to the 'Equinet' trans-national project, bringing together 20 EU equality bodies. The network now comprises 27 equality bodies, in addition to the Migration Policy Group, an international NGO based in Brussels, which acts as a partner of the network and as its Secretariat.

[45] Cited in 'October 2007 spotlight: Equinet', the European Commission's website, DG Employment, Social Affairs and Equal Opportunities: <http://ec.europa.eu/employment_social/fundamental_rights/spot/oct07_en.htm>.

within one ombuds-institution; the Belgian Centre for Equal Opportunities and Opposition to Racism; the Dutch Equal Treatment Commission, and the Irish Equal Authority. All of them (or the bodies they were replacing) had at least several years of experience handling individual complaints and working on equality law enforcement at the time of the adoption of the directives implementing Article 13 of the Amsterdam Treaty. It is worth noting that, apart from the Irish Equal Authority which came into being in 1999, they all went through substantial changes in their institutional set-up or mandate as a result of the development of EC equality law.

1. The British Commission for Equality and Human Rights

In Great Britain, bodies promoting equality had already been established in the 1970s and their long expertise made them very influential in Europe. Until recently, the institutional set-up of equality bodies was made up of three commissions: the Equal Opportunities Commission (EOC, competent for gender, established in 1975), the Commission for Racial Equality (CRE, competent for colour, race, nationality, citizenship, and ethnic or national origin, established in 1976), and the Disability Rights Commission (DRC, established in 1999). On 30 October 2003, the Government announced its intention to set up a single Commission for Equality and Human Rights (CEHR). The 'vision' behind this process was based on the belief 'that fairness for all is the basis for a healthy democracy, economic prosperity and the effective delivery of... public services. Equality and human rights therefore matter to all..., not just those who experience discrimination and unfair treatment.'[46] While paying tribute to the three Commissions for having contributed to challenging discrimination and promoting equality, the Government stressed that 'change is not happening quickly enough' and that a substantial step forward is necessary in how equality and human rights are promoted, enforced, and delivered.[47]

After two years of a wide consultation process, a new single equality and human rights body for Great Britain[48] was established in the Equality Act 2006. From 1 October 2007, the CEHR[49] has taken on the role and functions of the EOC, CRE, and DRC. Additional grounds of discrimination have been added to the mandate of the new Commission, namely sexual orientation, religion and belief, and age.

[46] White paper: 'Fairness for All: A New Commission for Equality and Human Rights' (2004) at 11, point 1.2.

[47] Ibid at 12, point 1.4.

[48] The Commission's mandate extends to England, Scotland, and Wales but not Northern Ireland which has separate institutions. The Equality Commission for Northern Ireland (ECNI) is also the result of a process of integration. In 1999, the four bodies that existed at that time (the Commission for Racial Equality for Northern Ireland, the Equal Opportunities Commission for Northern Ireland, the Fair Employment Commission, and the Northern Ireland Disability Council) merged. In 2003, sexual orientation was added to the grounds of race, religious belief or political opinion, sex, marital status, and disability when the 2003 Employment Equality (Sexual Orientation) Regulations (Northern Ireland) entered into force. See <http://www.equalityni.org>.

[49] See the website of the CEHR at <http://www.equalityhumanrights.com/en>.

The Equality Act 2006 gives the CEHR a wide range of powers and functions similar to those that were exercised by the former Commissions, but broader in certain areas. The CEHR has a duty to consider applications by victims of discrimination seeking legal redress and power to provide such assistance in a variety of forms, including legal representation in court. It may conduct formal investigations for any purpose connected with its duties. In the case of investigation based on a suspicion of unlawful discrimination, it can use statutory powers to obtain documents and information. It is also entitled to institute proceedings in relation to discriminatory advertisements and instructions to discriminate. The CEHR has the general responsibility of advising the Government on the working of the anti-discrimination law. It organizes training sessions for public authorities and private stakeholders on how to avoid discrimination and promote equal opportunities. More generally, it gives advice and guidance to businesses, the voluntary and public sectors, and also to individuals. It may issue codes of practice which enter into force after approval by Parliament and the Secretary of State. One of the new powers available to the CEHR under the Equality Act 2006 is to seek injunctive relief to prevent discriminatory acts and to bring judicial review proceedings in its own name in relation to human rights.

As with the members of the equality bodies it is replacing, the 17 Commissioners of the CEHR are appointed by the Secretary of State to serve for a fixed term. The CEHR is a non-departmental public body and receives funding out of the Secretary of State's departmental budget, to whom it reports annually. To conform with the 'Paris Principles', which stress the importance of guaranteed funding to national human rights institutions,[50] the Equality Act 2006 provides that the CEHR should have funding which is '*reasonably sufficient* for the purpose of enabling [it] to perform its functions'.[51]

The three previous Commissions were, in general, perceived as being largely independent of government interference. As the remit of the CEHR also includes human rights, there was concern during the consultation process that real independence might be more difficult to achieve and that the new body should report directly to Parliament instead of to the executive. To provide reassurance on the Commission's independence, the following provision was inserted into the Equality Act 2006: 'The Secretary of State shall have regard to the desirability of ensuring that the Commission is under a few constraints as reasonably possible in determining (a) its activities, (b) its timetables, and (c) its priorities.'[52] The drafting of this duty by parliamentary counsel should have relevance for other statutory bodies.

[50] See pt 5 below.

[51] Equality Act 2006, para 38, sched 1, (author's emphasis). Initially the Bill stated that the Secretary of State shall pay to the Commission such sums as appear to the Secretary of State appropriate for the purpose of enabling the Commission to perform its functions.

[52] Equality Act 2006, para 42(3), sched 1. See B Cohen, *United Kingdom Country Report on Measures to Combat Discrimination* (2007) at 86.

2. The Swedish Ombudsmen

At present, there are still four single ground Ombudsmen in Sweden: the Ombudsman against Ethnic Discrimination (DO, established in 1986, competent for ethnicity and religion or other beliefs),[53] the Equal Opportunities Ombudsman (JämO, established in 1991, competent for gender),[54] the Disability Ombudsman (HO, established in 1994)[55] and the Ombudsman against Discrimination on grounds of Sexual Orientation (HomO, established in 1999).[56]

For the last several years, a parliamentary enquiry has been looking into the benefits of an integrated anti-discrimination Act to replace the seven pieces of current legislation[57] as well as into the advantages of an integrated equality body combining the existing Ombudsmen and adding age discrimination. A Bill to this effect is currently pending in Parliament and the proposed reform enjoys wide support from the political parties. It should lead to the establishment of an integrated equality body on 1 January 2009, the Ombudsman against Discrimination.

Each of the current Ombudsmen has the power to investigate complaints concerning discrimination and to represent individuals in settlement proceedings or, ultimately, before a court.[58] This last course of action is only open if no settlement can be reached. Usually, the Ombudsman initiates the process of settlement by contacting the alleged discriminator. As a matter of policy, the Ombudsmen represent individuals in court mostly in cases with broad social impact or with potentially important value as precedents. More generally, the Ombudsmen have duties to give advice and support to individuals or institutions, to supervise employers' compliance with legislation, to raise awareness through training and campaigning, to carry out independent surveys, to make recommendations to the Government in order to keep the law under review, and to monitor international developments.

Though accountable to the Ministry of Justice, the Ombudsmen have an independent status. The Government is precluded from giving directions on how the law should be applied or on how individual cases should be handled.[59]

[53] See the website of DO at <http://www.do.se>.

[54] See the website of JämO at <http://www.jamombud.se>.

[55] See the website of HO at <http://www.ho.se>.

[56] See the website of HomO at <http://www.homo.se>.

[57] The Equal Opportunities Act (1991), the Act on Measures against Discrimination in Working Life on Grounds of Ethnic Origin, Religion or other Belief (1999), the Prohibition of Discrimination in Working Life on Grounds of Disability Act (1999), the Act on a Ban against Discrimination in Working Life on Grounds of Sexual Orientation (1999), the Equal Treatment of Students at Universities Act (2001), the Act Prohibiting Discriminatory and Other Degrading Treatment of Children and Pupils (2006), and the Prohibition of Discrimination Act (2005).

[58] Note that the competence of the Ombudsman is subsidiary. In employment cases, when the person making a complaint is a trade union member, the competent Ombudsman is entitled to investigate the complaint only if the union is not willing to take the case. This should be put in perspective with the very high degree of affiliation in Sweden (roughly 85% of the workers).

[59] A Numhauser-Henning, *Sweden Country Report on Measures to Combat Discrimination* (2007) at 57.

3. The Belgian Centre for Equal Opportunities and Opposition to Racism

The Centre for Equal Opportunities and Opposition to Racism[60] was set up by an Act of Parliament in 1993[61] replacing the Royal Commissariat for Immigration Policy.[62] To start with, the Centre had two fields of action: promoting equal opportunities (preventive mission) and combating racism on the basis of criminal law and punishing discrimination based on so-called race, colour, descent, ethnic origin, or nationality (repressive mission). In the course of time, its remit was extended to embody genocide denial (a criminal offence in Belgium), human trafficking, poverty, aliens law and, finally, 'non-racial' discrimination. The latter covers sexual orientation, marital status, birth, fortune, age, religion or philosophical convictions, current and future state of health, physical disability traits or genetic characteristics, or political opinion.[63] These grounds of discrimination were introduced in Belgian law in the process of transposing the Employment Equality Directive.

According to its mandate, the Centre is in charge of producing studies and reports, making recommendations to public authorities and private individuals or institutions, helping any person seeking advice on his or her rights and obligations, taking legal action, collecting and analysing statistics and case law relating to its fields of competence, and obtaining information in order to make enquiries when it has reasons to believe that discrimination may have occurred.

The Centre is responsible to the Prime Minister of the Belgian federal Government and the 21 members of its administrative board are nominated by the Council of Ministers. At the same time, statutory law provides that it fulfils its duties in all independence which seems to be largely the case in practice. For example, the Centre publicly defended a different position than the Flemish Minister for Housing and Home Affairs on a recent controversial issue. That concerned regional legislation adopted on 15 December 2006 restricting access to social housing to persons who speak or make the commitment to learn Dutch.[64]

4. The Dutch Equal Treatment Commission

The Equal Treatment Commission (CGB)[65] was established in 1994 to deal with unequal treatment on the grounds of gender, race, religion, belief, political opinion,

[60] *Centre pour l'égalité des chances et la lutte contre le racisme/Centrum voor Gelijkheid van Kansen en Racismebestrijding*—see <http://www.diversite.be>.

[61] Act of 15 February 1993 pertaining to the foundation of a Centre for Equal Opportunities and Opposition to Racism, as subsequently amended.

[62] The Royal Commissariat for Immigration Policy was established in 1989 following the rise of extreme right-wing parties in Belgium.

[63] Federal Act of 25 February 2003 against discrimination, now replaced by the Federal Act of 10 May 2007 against certain forms of discrimination.

[64] On this issue known as the '*Wooncode*' question (ie Flemish Code of Housing), see the Committee on the Elimination of Racial Discrimination (72nd session), *Considerations of Reports Submitted by States Parties under Article 9 of the ICERD. Concluding Observations: Belgium* (7 March 2008), point 16 (CERD/C/BEL/CO/15).

[65] *Commissie Gelijke Behandeling*—see <http://www.cgb.nl>.

nationality, sexual orientation, civil status, full and part-time work, and the permanent or temporary nature of a labour relationship. In 2003 and 2004, disability, chronic illness and age were added as protected grounds to its mandate. The CGB is a *quasi-judicial body*. Its principal function is to investigate alleged cases of discrimination and to issue non-legally binding opinions.[66] In addition, it may investigate structural instances of discrimination in its own right. It may also provide advice to public authorities or private stakeholders who wish to know whether their policies are in accordance with the law. Additionally, it may make recommendations to the Government on discrimination issues, including legislative proposals.

The Commission receives funding from several departments of the Government and is accountable to the executive. The nine Commissioners are appointed by the Government and have an independent status.

5. *The Irish Equality Authority and the Irish Equality Tribunal*

In 1999, two independent bodies were established in Ireland under the Employment Equality Act 1998:[67] the Equality Authority and the Equality Tribunal. They are involved in the promotion of equal treatment irrespective or racial or ethnic origin (including membership of the Traveller Community), gender, disability, age, sexual orientation, religion, marital status, and family status.

The Equality Authority replaced the Employment Equality Agency and has a greatly expanded role and functions. It is an independent statutory body in charge of a dual mandate: to combat discrimination and to promote equality and opportunity. The legislation provides the Equality Authority with a large range of powers. At its discretion, it may assist those who consider that they have been discriminated against. Its other means of action include research and awareness-raising, review of legislation and drafting of statutory codes of practice. It also carries out independent reports on thematic issues and may conduct inquiries.[68] The Equality Authority is headed by a Board of Directors consisting of 12 members appointed by the Minister for Justice, Equality and Law Reform. Each year, the Chief Executive Officer of the Equality Authority submits estimates of income and expenditure to that Minister.

The Equality Tribunal (formerly the Office of the Director of Equality Investigations) is a statutory body as well as an independent and impartial forum for hearing or mediating alleged discrimination. Equality Officers investigate complaints and issue a legally reasoned and public decision. This decision is *binding*, but is also subject to appeal. A mediation process comes before the investigation providing there is consent from both parties. A mediated settlement agreed by the parties is also binding.[69] For a couple of years, there have been clear

[66] For more details, see pt 4.B.3 below.

[67] The Equal Status Act 2000 extended the material scope of their remit.

[68] S Quinlivan, *Ireland Country Report on Measures to Combat Discrimination* (2007) at 71.

[69] See pt 4.B.2 below.

concerns about the funding of the Equality Tribunal. These concerns relate to the extension of its mandate, the increase in its workload, leading to a significant backlog of cases without any significant extension to its budget.[70]

C. Single or Multiple Equality Bodies?

There has been substantial discussion in Europe about whether it is more *effective* to have separate specialized equality bodies for each type of discrimination or to set up one comprehensive equality body at national level covering multiple grounds. The arguments for a 'horizontal approach' to discrimination take into account the experience of all-encompassing commissions present mainly in common law jurisdictions such as Australia, Canada, Ireland, Northern Ireland, or New Zealand.[71] These are several, depending on the point of view considered.[72]

As to *victims*, it appears more straightforward to approach one equality body (a 'one-stop shop') and more acceptable to have, when relevant, the various aspects of their identity recognized. Any individual is likely to present a combination of protected characteristics (ie an Islamic woman, a homosexual black man, a disabled and elderly worker, a young Rom) and it is well known that concrete cases of unequal treatment could be based on a combination of grounds. When different equality bodies are competent for each protected ground, they are only entitled to deal with one aspect of the case, leaving aside the special issues of social stereotyping disclosed by such a situation.[73]

Accordingly, the issue of multiple discrimination[74] shows that, from *practitioners' point of view*, a single equality body allows an integrated method of work

[70] Quinlivan, n 68 above, at 74.

[71] See, for instance, C O'Cinneide, in EOC Working Paper Series No 4, *Single Equality Bodies: Lessons from Abroad* (2003).

[72] This account of the arguments is based, in part, on PLS Ramboll Management A/S, in Report prepared for the European Commission, *Specialised Bodies to Promote Equality and/or Combat Discrimination* (2002) at 8 and 59–67; Niessen and Cormack, 'National Specialised Equality Bodies', n 34 above, at 27–8; McCrudden, 'The Contribution of the EU Fundamental Rights Agency to Combating Discrimination and Promoting Equality', in P Alston and O De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (2005) 148–51; Jacobsen and Rosenberg Khawaja, 'Legal Assistance to Individuals. Powers and Procedures of Effective and Strategic Individual Enforcement', in Report by Equinet Working Group 2 on Strategic Enforcement, *Strategic Enforcement: Powers and Competences of Equality Bodies* (2006) 9 at 11–12. See also the UK Government's justifications for its decision to amalgamate the different equality Commissions into the Commission for Equality and Human Rights, which are summed up in the White Paper: 'Fairness for All: A New Commission for Equality and Human Rights' (2004).

[73] Gerards, 'Discrimination Grounds', in D Schiek, L Waddington, and M Bell (eds), *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law* (2006) 33 at 172. For instances of multiple discriminations addressed by a comprehensive equality body, see: in Ireland, *Maughan v The Glimmer Man*, Equality Tribunal, 18 December 2001, DEC-S2001–020; in the Netherlands, the opinion 1998–48 of the Equal Treatment Commission.

[74] Within the category of multiple discrimination, two subcategories can be distinguished. First, 'cumulative' or 'additive' discrimination which refers to situations where adverse treatment is

which appears necessary to achieve consistency in policy and legal construction. A cross-grounds approach enables a more efficient handling of multiple discrimination cases[75] as long as the internal organization of the institution avoids compartmentalization based on discrimination grounds. In this respect, the Dutch Equal Treatment Commission's experience is worthy of note. It abandoned a division into several chambers competent to deal with specific grounds of discrimination for the reason that such a sharing out of tasks was inappropriate to address the increasing number of intersectional cases of discrimination.[76] Furthermore, in a comprehensive equality body, cross-fertilization, transfer of knowledge, and good practices among sectors seem easier. Consider, for instance, the issue of 'reasonable accommodation' which is only addressed with respect to disability in European law[77] although its application in other fields seems promising and actually, to a certain extent, unavoidable.[78] Could indirect discrimination based on religion, (eg a regulation in a laboratory preventing a Muslim woman from wearing the *hidjab*), be justified on the basis of safety when a reasonable accommodation is suggested and could easily be implemented (ie wearing a fireproof headscarf)?[79]

based on a *concurrence* of grounds. Second, 'intersectional discrimination' where adverse treatment is based on a *unique combination of factors* (ie black women can be stereotyped as such and be discriminated against because they are *black women*, not because, one the one hand, they are women and, on the other, they are black). See Gerards, n 73 above, at 171. See also Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', 23 Oxford Journal of Legal Studies (2003) 68; Fredman, 'Double Trouble': Multiple Discrimination and EU Law', 2 European Anti-Discrimination Law Review (2005) 13; Danish Institute for Human Rights, in Report prepared for the use of the European Commission, *Tackling Multiple Discrimination: Practices, Policies and Laws* (2007).

[75] O'Cinneide, 'The Racial Equality Directive as a Basis for Strategic Enforcement', in J Cormack (ed), Report of the sixth experts' meeting—Towards the Uniform and Dynamic Implementation of EU Anti-Discrimination Legislation: The Role of Specialised Bodies, *Strategic Enforcement and the EC Equal Treatment Directives* (2004) 48 at 50.

[76] PLS Ramboll Management A/S, n 72 above, at 6. For other instances of equality bodies which are organizing their work by function rather than according to the field of discrimination, see, among others, the Equality Authority in Ireland and the High Authority against Discrimination and for Equality in France. Both organizations have integrated more grounds of discriminations than those listed in Art 13 EC.

[77] Employment Equality Directive, Art 5.

[78] For instance, the Irish Equality Tribunal has applied the interpretation of reasonable accommodation normally only used in relation to disability to migrant workers. See J Cormack (ed), Report of the seventh experts' meeting—Towards the Uniform and Dynamic Implementation of EU Anti-Discrimination Legislation: The Role of Specialised Bodies, *Considerations for Establishing Single Equality Bodies and Integrated Equality Legislation* (2004) at 31.

[79] On the use of 'reasonable accommodation' in religious cases in Europe, see, for instance, L Vickers, in Report prepared for the European Commission, *Religion, and Belief Discrimination in Employment—The EU Law* (2006) at 19–23; Bribosia, Ringelheim and Rorive, 'Aménager la diversité : le droit de l'égalité face à la pluralité religieuse', *Revue trimestrielle des droits de l'homme* (2009) 319–73. In Canada, see, J Woehrling, 'L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse', 43 (1998) McGill Law Journal 325–401; 'Neutralité de l'Etat et Accommodements : Convergence ou Divergence' (2007) Options Politiques 20–7.

In its relations with *other equality stakeholders* and decision-makers, a single equality body is likely to have a stronger impact as it is a larger organization representing the interests of more people. More specifically, particular equality agendas may gain in strength from being associated with those which have the political priority. According to Christopher McCrudden, in some jurisdictions 'the movement against disability discrimination might have stronger political weight if it were associated with gender equality, which is perceived to be given greater political priority at the present time, and therefore benefit from greater financial resources'.[80] Generally speaking, a cross-grounds approach is considered more suited to 'educate people at large as to the common principle of equality that underlies all forms of equality legislation, and may increase popular support and understanding'.[81] In addition, in the search for renewed approaches to tackle racism, it has been stressed that '[e]xploring the common links as well as the overlap between different forms of group discrimination may help to release the subject of racism and racial discrimination from its historical and politicized past.'[82] Finally, as to the use of *resources*, a comprehensive equality body is cost-saving as it allows economies of scale.[83] This is not insignificant in an area where resources are limited, both in terms of expertise and finances.

The arguments favouring a single equality body have, however, to be assessed in light of the challenges and pitfalls facing such an institution.[84] First, the danger of establishing a hierarchy of interests raises a major concern, the risk being that one or two discrimination grounds (usually race and gender) attract the most attention to the detriment of other issues. Conversely, those opposing the merging of equality bodies consider that there is a hierarchy of inequalities and that some types of discrimination require special attention.[85] In EU law, they rest

[80] 'The Contribution of the EU Fundamental Rights Agency', n 72 above, at 148.

[81] O'Cinneide, 'The Racial Equality Directive', n 75 above, at 50.

[82] Boyle and Baldaccini, 'A Critical Evaluation of International Human Rights Approaches to Racism', in S Fredman (ed), *Discrimination and Human Rights. The Case of Racism* (2001) 135 at 189.

[83] In Great Britain, according to the White Paper: 'Fairness for all: A New Commission for Equality and Human Rights' (2004), a comprehensive body is estimated to cost 15–25% less than six separate commissions (app B, para 19).

[84] This account is based, in part, on Moon, n 41 above, at 876; McCrudden, 'The Contribution of the EU Fundamental Rights Agency', n 72 above, at 150–1; Niessen and Cormack, 'National Specialised Equality Bodies', n 34 above, at 28–9; Collins, 'Challenges and Choices—Establishing a Single Equality Commission in Northern Ireland', in J Cormack (ed), Report of the seventh experts' meeting—Towards the Uniform and Dynamic Implementation of EU Anti-Discrimination Legislation: The Role of Specialised Bodies, *Considerations for Establishing Single Equality Bodies and Integrated Equality Legislation* (2004) 4 at 6–9; Choudhury, 'The Commission for Equality and Human Rights: Designing the Big Tent', 13 Maastricht Journal of European and Comparative Law (2006) 311–22.

[85] In 1998, Michael Head, the Vice Chairman of the European Commission against Racism and Intolerance (ECRI) of the Council of Europe stated that 'it seems inconceivable to us in ECRI that any national body, irrespective of its precise form and remit, should not have within it at least a section dedicated to dealing with problems of discrimination on the grounds of race' (in *The Place and Role of National Specialised Bodies in Combating Racism*, Lausanne, Switzerland 22–4 October 1998, Summary of the Proceedings, CRI(98)85 at 8, quoted by McCrudden, 'The Contribution of

their position on the more far-reaching protection of race equality in the Racial Equality Directive and on the long-standing place of gender equality in the main body of the EC Treaty.[86] Outside the EU, they also rely on specific UN instruments fighting racism and inequalities between women and men.[87] Behind these debates lies the practical issue of the allocation of resources between the grounds of discrimination. Secondly, the necessary balance between the horizontal implementation of the principle of equality and the characteristics of each ground of discrimination is not an easy one to achieve. For instance, the approach of indirect discrimination in terms of 'disproportionate impact' largely depends on the availability of statistics although the latter raises different issues when it concerns sensitive data (eg race or ethnicity, disability, religion) or non-sensitive data (eg gender, age).[88] Thirdly, in a single equality body, instances of grounds of discrimination working against each other (eg religion versus sexual orientation) are more likely to be accounted for. In this respect, the limits of 'genuine and determining occupational requirements' as well as 'ethos-based organizations' are still to be thought through and will not be easy to handle.[89] Fourthly, many countries have several pieces of legislation implementing the principle of equal treatment and often the protection varies (in scope and/or level) according to the grounds of discrimination considered. On the whole, the benefits of a single equality body appear illusory if the statutory provisions differ widely when dealing with gender, race, religion, disability, or other grounds.[90] Building an integrated equal treatment statute (a 'Single Equality Act') seems to be the more effective answer. In Great Britain, Northern Ireland, the Netherlands, and Sweden, such a step forward, nevertheless, has given rise to much political debate.

In addition, there are special pitfalls to overcome when merging single ground equality bodies together. As it involves major reorganization and numerous adjustments (new staff, increased workload, decrease in resources allocated to the original

the EU Fundamental Rights Agency', n 72 above, at 150). With respect to gender, where equality bodies deal with multiple grounds of discrimination, there are fears that this might lead to gender discrimination being marginalized. See *Report on Gender Equality Bodies*, n 40 above, at 4.

[86] This debate should be widened in the light of the recent case law of the European Court of Justice searching for a proper implementation of the general principle of equality. See Case C-144/04 *Mangold* [2005] ECR I-9981; Case C-411/05 *Palacios de la Villa*, judgment of 16 October 2007, and the opinion of Advocate General Mazak not yet published in the ECR; Advocate General Colomer, in Cases C-55/07 and C-56/07, *Subito*, opinion of 24 January 2008; Advocate General Sharpston, in Case C-427/06, *Bartsch*, 22 May 2008. See also the Commission's Proposal adopted on 2 July 2008, n 38 above.

[87] International Convention on the Elimination of all Forms of Racial Discrimination (1969); International Convention on the Elimination of all Forms of Discrimination against Women (1981).

[88] See, for instance, J Ringelheim, in J Monnet Working Paper 08/06, *Processing Data on Racial or Ethnic Origin for Antidiscrimination Policies: How to Reconcile the Promotion of Equality with the Right to Privacy* (2006).

[89] Employment Equality Directive, Art 4.

[90] For an example in Sweden, see PLS Ramboll Management A/S, n 72 above, at 37.

discrimination grounds, etc), the process could lead to dissatisfaction.[91] From a strategic point of view, it could also appear counter-productive. As a matter of fact, the strength of separate agencies could be intrinsically linked to the identification of a specific group with the organization and be diluted as a result of the merging.

Nowadays, there is a clear tendency for European states to go for one comprehensive equality body over several bodies in charge of specific discriminatory grounds. The UK and Sweden are examples of countries familiar with multiple equality bodies which are currently in the process of merging. Amongst the institutions prior to the EU directives, it is striking to note that the integrated model is often favoured.[92] However, political considerations and pressure from lobbies can lead to the reverse situation. Thus in Belgium, whereas the mandate of the Centre for Equal Opportunities and Opposition to Racism was enlarged with numerous grounds of discrimination in 2003,[93] no agreement could be reached on the issue of gender and a separate Institute for the Equality of Women and Men was created.[94] One of the major justifications for this outcome was that the situation of women is entirely different as they do not represent a *minority* group of the society which is stigmatized. Neither practitioners nor academics found the argument convincing and the effectiveness of this Institute is still much doubted.[95] It is striking to note that in Sweden, the only institution which has voiced strong concerns against the amalgamation of the four Ombudsmen, is JÄmO, the Equal Opportunities Ombudsman which fears that gender discrimination issues might be marginalized as a result of the process.

4. What Do Equality Bodies Do?

A. EU Requirements

To meet EU standards, national equality bodies in the field of race and ethnicity, as well as gender, should play a triple role:

1. to provide 'independent assistance to victims of discrimination in pursuing their complaints about discrimination';

[91] For an account of the history of the Equality Commission for Northern Ireland which came to existence in 1999 from the merging of four equality bodies, see Collins, n 84 above, at 5–9.

[92] Consider, for instance, the Bulgarian Protection against Discrimination Commission, the French High Authority against Discrimination and for Equality, the Hungarian Authority of Equal Treatment, and the Romanian National Council for Combating Discrimination.

[93] See pt 3.B.3 above.

[94] Federal Act of 16 December 2002 establishing the Institute for the Equality of Women and Men.

[95] See, for instance, van der Plancke, 'Organismes indépendants: une exigence européenne', 470/471 *Après-demain* (2005) 38 at 39. During the parliamentary debates which led to the establishment of the Institute for the Equality of Women and Men, there were voices strongly advocating the conclusion of an agreement protocol between the two federal equality bodies. Such a formal step has not yet been taken, but in practice the two institutions seem to work together. In light of this, the Director of the Centre for Equal Opportunities and Opposition to Racism is entrusted with a deliberative vote in the administrative board of the Institute for the Equality of Women and Men.

2. to conduct 'independent surveys concerning discrimination';
3. to issue 'independent reports' and make 'recommendations on any issue relating to such discrimination'.[96]

The Recast Gender Employment Directive also requires from the member states that the competences of these bodies include 'at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality.'[97] This fourth competence seems to reflect in part the work done by the network Equinet[98] to encourage information exchange between equality bodies.

These provisions are of considerable importance as they anchor already established national equality bodies in EU law and compel the setting up of such agencies in member states where they were lacking. Compliance with the Directives requires that these bodies should carry out their tasks in an *independent* manner.[99] It also implies that equality bodies are given *formal powers* to perform their functions and the *necessary resources* to enable them to carry out these functions effectively. The language and wording of the directives in outlining the mandate of equality bodies has been criticized as excessively vague.[100] Many questions are left open. For instance, what precisely does 'assisting victims' involve? Does it include representing them in court or is the provision of advice sufficient? What kind of 'surveys' should be done? To whom should 'reports and recommendations' be issued?[101] What seems to be at stake is a combination of two objectives: *enforcing* anti-discrimination law and *promoting* equality.

As Colm O'Cinneide emphasizes :

> complex questions of tactics and strategy arise in trying to combat discrimination, especially when it is deep-rooted and systematic in nature. Equality bodies will inevitably have to struggle with limited resources and questions of how best to deploy these resources.... Comparative experience from different countries as to which strategies work will be of great value in identifying appropriate approaches to combating inequality.[102]

[96] Racial Equality Directive, Art 13(2); Gender Goods and Services Directive, Art 12(2); Recast Gender Employment Directive, Art 20(2).

[97] Art 20(2)(d). See Parliament and Council Reg 1922/2006 on establishing a European Institute for Gender Equality, OJ 2006 L403/9. Art 2 of this Regulation provides that '[t]he overall objectives of the Institute shall be to contribute to and strengthen the promotion of gender equality, including gender mainstreaming in all Community policies and the resulting national policies, and the fight against discrimination based on sex, and to raise EU citizens' awareness of gender equality by providing technical assistance to the Community institutions, in particular the Commission, and the authorities of the Member States'. The Institute was formally set up on 20 December 2006. It will be located in Vilnius. See <http://europa.eu/scadplus/leg/en/cha/c10938.htm>.

[98] See nn 43 and 44 above.

[99] On the independence requirement, see pt 5 below.

[100] O'Cinneide, 'The Racial Equality Directive', n 75 above, at 49.

[101] R Holtmaat, 'Netherlands Country Report on Measures to Combat Discrimination' (2007), in *Catalysts for Change? Equality Bodies According to Directive 2000/43/EC—Existence, Independence and Effectiveness* (2006) at 16.

[102] O'Cinneide, 'The Racial Equality Directive', n 75 above, at 49.

To the extent that there is no single model of how an equality body should assist victims, conduct surveys, or make recommendations on any issue relating to race and gender discrimination, a comparative approach is undoubtedly useful to identify good practices in strategic enforcement of equality law and to provide some insight on the pitfalls that could be avoided.

B. Assistance to Victims and Legal Casework

Whilst requiring equality bodies to provide 'independent assistance to victims of discrimination in pursuing their complaints about discrimination',[103] the Racial and Gender Equality Directives do not define the nature or form of this assistance. Their Preamble speaks of 'concrete assistance'[104] and most equality bodies provide some kind of *legal* support. Once again, their mandates are very diverse and span a broad range of activities which go beyond assistance to victims as such, while falling under the larger heading of 'legal casework'.[105] These activities include providing information about the existence of anti-discrimination legislation and the possibility of taking legal action; referring the victim to an organization (trade union, NGO, anti-discrimination bureau, etc) that could assist with formulating an official complaint; helping the victim and the perpetrator to come to an amicable settlement (eg mediation); hearing and investigating complaints; issuing opinions (advisory rulings) or binding decisions; going to court either on behalf of a victim, or in the name of the equality body, or even as an *amicus curiae*. With the support of some examples and good practices, this section aims to examine how equality bodies are using legal actions to work towards a more inclusive society.

1. Strategic Litigation

In handling their tasks when assisting victims of discrimination, equality bodies should be eager to find a good balance between two objectives. On the one hand, they should bear in mind that assistance in discrimination cases is a precondition for effective enforcement of anti-discrimination law. 'Experience has shown that few individuals who feel they have been discriminated against take their claims to court themselves—presumably because legal action is too strenuous, expensive and time-consuming a process to embark on.'[106] On the other hand, equality bodies should take care not to engulf themselves in individual cases to the extent that they are left with no resources to carry out other functions. In this respect, 'it has [also] been the experience of equality bodies that handling

[103] nn 35 and 36 above.

[104] Recital 24 of the Preamble to the Racial Equality Directive; Recital 25 of the Preamble to the Gender Goods and Services Directive.

[105] Moon, n 41 above, at 891–914. PLS Ramboll Management A/S, n 72 above, at 69–94.

[106] Jacobsen and Rosenberg Khawaja, n 72 above, at 10.

individual complaints is a resource-intensive process that is not always in proportion to the results achieved on a larger scale. [In addition] some types of discrimination, e.g. systemic discrimination, cannot be combated effectively solely by individual enforcement'.[107] Finding the right balance between the two objectives is not an easy task.[108]

Strategic litigation seems particularly useful for equality bodies that are competent to represent complainants in courts, acting as advocates for them.[109] This approach focuses on cases that have a wider impact than those of just one individual. Classically, they are cases that could lead to sustainable changes in various respects. First, they may contribute to the stabilization and clarification of a point of law; secondly, they may relate to an area concerning a large number of people; thirdly, they may have a strong likelihood of success and are valuable in order to set up a precedent and/or to change public attitudes; fourthly, even when the lawsuit is unlikely to succeed, they may contribute to documenting institutionalized injustices.[110]

With the raising of public awareness about the existence of anti-discrimination laws and the establishment of organizations to promote equality, the challenge of an increasing caseload is one that should be seriously considered. In order to avoid a backlog of cases which would result in significant delay and could discredit the institution,[111] some well-established equality bodies have developed a policy of strategic litigation which involves *triaging complaints*. A policy of triaging complaints complies with EU directives which do not require that 'the equality body assist all cases where discrimination is alleged to have occurred'.[112] In national legal systems, the scale of assistance to be given in each single case is often left to the discretion of the equality body.

In Ireland, for instance, much emphasis is put on developing a clear and coherent policy of strategic litigation.[113] According to its mandate, the Equality

[107] Ibid.

[108] The policy of the UK Commission for Racial Equality was to finance racial equality councils or complainant aid organizations. It faced criticism for not taking on enough individual cases of discrimination. See Cohen, n 52 above, at 84.

[109] This is not the case for all equality bodies (eg the French Authority against Discrimination and for Equality). For other instances, see Jacobsen and Rosenberg Khawaja, n 72 above, at 22 fn 61.

[110] European Roma Rights Center, Interights, Migration Policy Group (eds), *Strategic Litigation of Race Discrimination in Europe: From Principle to Practice. A Manual on the Theory and Practice of Strategic Litigation with Particular Reference to the EC Race Directive* (2004), at 34–65, especially 37. For examples of the strategy changing legislation or current practice through lost cases, see PLS Ramboll Management A/S, n 72 above, at 84–5.

[111] The experiences of the US Equal Employment Opportunity Commission and, from time to time, that of the Canadian Human Rights Commissions are classical examples of institutions substantially overloaded.

[112] Moon, n 41 above, at 892.

[113] See also the new UK Commission for Equality and Human Rights, n 48 above. On its website, one can read: 'Our priorities for 2008/2009 ... Prioritise legal cases in new areas of equality in order to build case law. Address gaps in our knowledge base including pay gaps across all equality groups.'

Authority grants assistance, at its discretion, if it is convinced that the case raises an important point of principle or if it is unreasonable to leave the person without assistance to present the case.[114] In practice, the Equality Authority provides assistance only in a small percentage of cases on the basis of criteria set down by its Board.[115] These criteria include :

1. The capacity of the individual to represent himself/herself.
2. The complexity of the issues involved.
3. The availability of material which would assist the individual in bringing the case.
4. The availability of trade union, legal, or advocacy assistance.
5. The possibility of alternative remedies.
6. The extent to which serious injustice has been perpetrated.
7. The impact/effect of the discrimination on the individual.
8. The potential beneficial impact:
   - for others
   - for change in practice by employers or service providers
   - for development of equality practices.
9. The geographical spread of claims.
10. Whether the issue applies to:
    - areas such as health, education, welfare, accommodation, and transport
    - multiple discrimination.
11. Whether a substantial body of precedent has been developed.
12. Whether the claim is reasonably likely to succeed.
13. The resources available to the Equality Authority.[116]

A recent example of the importance of test case litigation, and the role of equality bodies in this respect, is provided by the reference for a preliminary ruling to the European Court of Justice in the case *Centre for Equal Opportunities and Opposition to Racism v Feryn*.[117] It began in April 2005 when a journalist contacted the Feryn company about massive advertisements placed along a

[114] Barry, 'Strategic Enforcement—From Concept to Practice' in J Cormack (ed), Report of the sixth experts' meeting—Towards the Uniform and Dynamic Implementation of EU Anti-Discrimination Legislation: The Role of Specialised Bodies, *Strategic Enforcement and the EC Equal Treatment Directives* (2004) 4 at 13. For the experience of the Commission for Racial Equality in Great Britain, see Karim, 'A Legal Strategy to Combine and Coordinate Different Tools Available', ibid at 30–2; as to the Equality Commission for Northern Ireland, see O'Neill, 'Positive Duties and Strategic Enforcement', ibid at 19–21.

[115] Quinlivan, n 68 above, at 70. Note that the Irish Equality Authority has overtly acknowledged that such a policy comes from a lack of resources (Holtmaat, *Catalysts for Change?*, n 101 above, at 48).

[116] Barry, 'Strategic Enforcement', n 114 above, at 14. In its strategic plan for 2006–8, *Embedding Equality*, the Irish Equality Authority gives as one of its major objectives 'to maintain and further develop a culture of compliance with the equality legislation'.

[117] Case C-54/07.

motorway to find garage door fitters. After the publication of articles in several newspapers where Mr Feryn, the director of the company, was reported to have said that his firm would not recruit persons of Moroccan origin, he participated in an interview on Belgian national television where he publicly stated :

[W]e have many of our representatives visiting customers... Everyone is installing alarm systems and these days everyone is obviously very scared. It is not just immigrants who break in. I won't say that, I'm not a racist. Belgians break into people's houses just as much. But people are obviously scared. So people often say: 'no immigrants'.... I must comply with my customers' requirements. If you say 'I want a particular product or I want it like this and like that', and I say 'I'm not doing it, I'll send these people', then you say 'I don't need that door.' Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? I must do it the way the customer wants it done![118]

Following mediation with the Centre for Equal Opportunities and Opposition to Racism, the Feryn company committed itself to change its discriminatory recruitment policy but failed to do so. Consequently, the Centre launched a civil action in emergency proceedings to obtain a judge's order according to which Mr Feryn should end his discriminatory recruitment policy. On appeal, important issues were raised and the Centre asked the Employment Court to bring the case before the European Court of Justice. The reference for preliminary ruling brought up crucial questions on how the shift of the burden of proof should operate in practice.[119] Furthermore, one of the key questions addressed to the European Court of Justice was whether it constitutes direct discrimination for the purposes of the Racial Equality Directive if an employer publicly states, in the context of a recruitment drive, that applications from persons of a certain ethnic origin will be turned down. In short, *can words amount to discrimination*? Is the principle of equal treatment violated when the *victim* is only *hypothetical*? On 10 July 2008, the European Court of Justice gave a decision of great significance in construing EU equality law.[120] It followed the core of the opinion of Advocate General Maduro:

[A]n interpretation that would limit the scope of the Directive to cases of identifiable complainants who have applied for a particular job would risk undermining the effectiveness of the principle of equal treatment in the employment sector. In any recruitment process, the greatest 'selection' takes place between those who apply, and those who do not.

[118] Advocate General Maduro, opinion delivered on 12 March 2008, point 4. See para 25 of the decision of the Court.

[119] Racial Equality Directive, Art 8; Framework Equality Directive Art 10; Gender Goods and Services Directive Art 9; Recast Gender Employment Directive, Art 19. On the issue of the burden of proof in discrimination cases, see among others, I Rorive, *Proving Discrimination Cases. The Role of Situation Testing* (Migration Policy Group, Centre for Equal Rights, 2008); Rorive and van der Plancke, 'Quels dispositifs pour prouver la discrimination?', in C Bayart, S Sottiaux, and S Van Drooghenbroeck (eds), *Les nouvelles lois luttant contre la discrimination* (die Keure-La Charte, Brugges-Brussels, 2008) 415–61.

[120] Case C-54/07 *Feryn* 10 July 2008.

Nobody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin, they stand no chance of being hired. Therefore, a public statement from an employer that persons of a certain racial or ethnic origin need not apply has an effect that is anything but hypothetical. To ignore that as an act of discrimination would be to ignore the social reality that such statements are bound to have a humiliating and demoralising impact on persons of that origin who want to participate in the labour market and, in particular, on those who would have been interested in working for the employer at issue.[121]

The *Feryn* case also illustrates another competence granted to some equality bodies, ie *taking action in the absence of individual litigants*. The competence of the Centre for Equal Opportunities and Opposition to Racism is, however, dependent on the *consent* of the victim where the alleged violation has an identifiable victim.[122] Such a condition does not circumscribe the power of the Irish Equality Authority to bring a case in its own right before the Equality Tribunal.[123] For those equality bodies that have no explicit powers to take action in their own name, it remains to be assessed against relevant national procedural law whether a *locus standi* could not be inferred from their general mandate.[124]

Finally, *interventions* and *amicus curiae* applications are other paths that equality bodies may consider in pursuing strategic litigation. Classically, parties apply to intervene in a case in protection of their own interest, while an *amicus curiae* ('friend of the court') exclusively intends to assist the court in its determination of a particular point of law. Nowadays, the *amicus curiae* is rarely wholly disinterested in the outcome of the litigation.[125] This is well-illustrated in the case law of the US Supreme Court and, more recently, of the European Court of Human Rights.[126] While the practice of 'interventions' is more familiar in common law jurisdictions, it is facing a growing success in civil law countries and this capacity has been expressly granted to some equality bodies.[127] Generally speaking,

[121] Opinion delivered on 12 March 2008, point 15.

[122] Art 31 of the Belgian Federal Act of 15 February 1993 pertaining to the foundation of a Centre for Equal Opportunities and Opposition to Racism, as subsequently amended.

[123] Irish Employment Equality Acts 1998–2004, ss 85–6.

[124] See *R v Secretary of State for Employment ex parte Equal Opportunities Commission and anor* [1994] ICR 317 (HL), commented on in Moon, n 41 above, at 902–3.

[125] Note that in some countries, as in Ireland or the UK, interventions are distinguished from *amicus curiae*. See Moon, n 41 above, at 904. Barry, 'Interventions and Amicus Curiae Applications. Making Individual Enforcement More Effective', in Report by Equinet Working Group 2 on Strategic Enforcement, *Strategic Enforcement: Powers and Competences of Equality Bodies* (2006) 31 at 36–8. In England and Wales, the court may ask for a barrister to assist it with research and to offer an independent legal point of view. See, for instance, on the issue of prospective overruling before the House of Lords, *National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41.

[126] In the field of discrimination, two recent decisions of the European Court of Human Rights are emblematic of the increasing weight of *amicus curiae* briefs on the case law of the court: *DH v The Czech Republic*, ECHR (Grand Chamber), 13 November 2007; *EB v France*, ECHR (Grand Chamber), 22 January 2008.

[127] For instance, the Belgian Centre for Equal Opportunities and Opposition to Racism, the Hungarian Equal Treatment Authority, and the French High Authority against Discrimination

equality bodies' intervention in key cases is not a widespread phenomenon in Europe, although there are voices to suggest that this is a strategic role that these institutions ought to pursue.[128]

In Great Britain, *Igen Ltd v Wong*[129] is an influential case where the Commissions for Equal Opportunities, Racial Equality and Disability Rights made a joint intervention before the Court of Appeal for England and Wales. There were actually three cases of alleged discrimination in the workplace (on the ground of sex for two of them and on the ground of ethnicity for one of them)[130] concerning the application of the shift of the burden of proof provisions[131] introduced into domestic law as a result of the implementation of the EU directives. The Court of Appeal took the opportunity to examine earlier guidance provided in a judicial precedent and to set it out again with the amendments suggested by the Commissions.[132] This ruling has had a widespread impact in the UK and is referred to in other national jurisdictions across Europe.

2. *Settling Cases Outside Court*

Alternative dispute resolution mechanisms, such as conciliation or mediation, have well-known advantages over classical litigation. Chiefly, they are considered less time-consuming, much less costly, and they should ideally lead to solutions which have no winner or loser, allowing the relationship between the parties to be restored. On the other hand, some concern has been voiced that people might lose their rights if they engage in a legally-binding mediation process without knowing their actual legal position in the case.[133] More broadly, '[f]rom an equality law perspective, the main risk is that, in the process of negotiation, concessions have to be made in line with the essentials of the law.'[134] Furthermore, others underline that mediation is by definition not public and allows discriminatory practices to remain concealed. Equality bodies should, therefore, be aware of the fact that strategic enforcement may require emblematic cases of discrimination to

and for Equality (HALDE). See Moon, n 41 above, at 908–9. Note that in France, the HALDE is the only non-judicial institution with such a power.

[128] Barry, 'Interventions and Amicus Curiae Applications', n 125 above, at 39–41; Moon, n 41 above, at 904.

[129] *Igen Ltd & Others v Wong, Chamberlin and anor v Emokpae, Webster v Brunel University* [2005] EWCA Civ 142, reported in issue 2 of the *European Anti-Discrimination Law Review* (2005) at 77. See also Brown, Erskine, and LittleJohn, 'Review of Judgments in Race Discrimination Employment Tribunal Cases', in Employment Relations Research Series (2006) 64, at 33–5.

[130] The Disability Rights Commission intervened because a key point of anti-discrimination law was at stake, although the cases did not concern the ground of disability as such.

[131] On this issue, see n 119 above.

[132] See also *Madarassy v Nomura International plc* [2007] EWCA Civ 33 (CA, petition to the HL refused on 17 May 2007).

[133] PLS Ramboll Management A/S, n 72 above, at 78. This report refers especially to concern expressed by trade unions in Ireland.

[134] Goldschmidt, 'Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Developments in the Supervision of Equality Law in the Netherlands', 13 Maastricht Journal of European and Comparative Law (2006) 323 at 328.

be fought in courts. A fair number of equality bodies provide support to victims in seeking to facilitate the resolution of disputes out of court.[135] This approach of conciliation can be informal. For instance, the Belgian Centre for Equal Opportunities and Opposition to Racism has developed the practice of writing a complaint to the alleged perpetrator on behalf of the victim in order to try to reach a 'friendly settlement'.

In a typical case of an individual person asking the Centre to intervene in an instance of discrimination, the Centre will appraise the facts given, and in most cases where the allegation is not ill-founded it will seek to obtain an amicable settlement with the alleged discriminator. Because the discriminator may fear the bad publicity a suit for alleged discrimination would bring, he may be tempted to accept this, even in situations where it may be difficult to prove that discrimination has occurred. Where such an amicable settlement seems unsatisfactory, because the discrimination is flagrant or because the defendant does not cooperate, the Centre may propose to the victim to file a suit. If the victim consents, the Centre will proceed, as the law authorizes it to do.

The Centre for Equal Opportunites and Opposition to Racism has been particularly efficient in providing advice and legal assistance to victims of discrimination. It is particularly noteworthy for its practice of seeking to assist the victim in having the alleged perpetrator of the discrimination to agree to some form of amicable settlement in which the Centre, albeit in a discrete fashion, has developed significant expertise.[136]

In contrast, in Ireland, the Equality Tribunal offers a legally-binding mediation service[137] besides its quasi-judicial capacity. Providing that none of the parties object, every case is allocated for mediation by a trained Equality Mediation Officer who assists the parties to reach a mutually acceptable agreement. If the mediation succeeds, the agreement is signed by both parties and can be enforced through the civil courts. If the mediation fails, either of the parties can ask for a ruling. The case is then allocated to a different Investigating Equality Officer to insure impartiality.

In France, the High Authority against Discrimination and for Equality (HALDE) which began functioning in June 2005 was granted a new power in 2006: that of proposing a so-called '*transaction pénale*'—a form of negotiated criminal sanction—to perpetrators of direct discrimination. Accordingly, if an investigation of a complaint results in a finding of direct intentional discrimination, the HALDE may suggest a specific criminal sanction for the perpetrator. This could be a fine or a press release of the fact that discrimination has taken

[135] Jacobsen and Rosenberg Khawaja, n 72 above, at 21 fn 58.

[136] O De Schutter, *Belgium Country Report on Measures to Combat Discrimination* (2007) at 90. In Sweden, the DO (Ombudsman against Ethnic Discrimination) follows a similar procedure: see PLS Ramboll Management A/S, n 72 above, at 77.

[137] See the principles of the mediation process as reported in PLS Ramboll Management A/S, n 72 above, at 78.

place and, if relevant, an award of compensation to the victim. The perpetrator is not obliged to accept the 'transaction'. In case of rejection, the HALDE can initiate a criminal prosecution, in place of the public prosecutor, before the criminal court.[138]

3. *Quasi-Judicial Functions*

Several equality bodies have quasi-judicial functions. While some have the power to issue legally binding rulings, others issue opinions or advisory rulings. In the EU, the Irish Equality Tribunal has become a classical model of a body vested with the power to make binding legally reasoned decisions.[139] In the employment context, the Equality Tribunal may provide for a broad range of sanctions: compensation awards, arrears of payment, ordering employers to take specific courses of action (eg to fix a ramp for a disabled employee), re-instatement and re-engagement.[140] The Dutch Equal Treatment Commission is also a classical model within the EU, but of a body issuing non-binding opinions. The procedure is designed to facilitate access to victims of discrimination. The hearings are staged in a fairly informal setting and a large place is dedicated to informing the parties on the law and its implications.[141] This has proven to be of great value in ensuring a high degree of compliance[142] with the Commission's opinions as well as the substantial legal reasoning supporting them. After the Commission has rendered an opinion, a complaint may still be lodged before the relevant civil or administrative law courts to obtain a binding decision. In court, the Commission's opinion will constitute part of the evidence. Although the *Hoge Raad*, the Dutch Supreme Court, held that considerable weight must be attached to the Commission's opinions,[143] it appears that lower courts do not follow this guidance sufficiently.[144]

4. *Investigations and Inquiries*

An investigation usually requires a belief that discrimination has taken place and is directed towards a specific party. On the contrary, an inquiry is more general and can concern a whole sector (eg social housing). While the former could lead

[138] S Latraverse, *France Country Report on Measures to Combat Discrimination* (2007) at 67. Note that this system has much in common with the procedures followed by other administrative authorities, which have the power to propose on-the-spot fines for an infringement of criminal law, such as tax, customs, water, or woodland authorities.

[139] See the description in pt 3.B.5 above and in pt 4.B.2 above. In Hungary, the Equal Treatment Authority, established in 2005, also issues legally binding rulings and can impose severe sanctions (see A Kadar, *Hungary Country Report on Measures to Combat Discrimination* (2007) at 77).

[140] Quinlivan, n 68 above, at 73.

[141] For a description of how hearings are conducted, see PLS Ramboll Management A/S, n 72 above, at 86.

[142] Compliance with opinions of the Commission amounted to 84% in the first half of 2004. See Goldschmidt, n 133 above, at 327.

[143] *St Bavo v Gielen*, 13 November 1987, Nederlands Jurisprudentie (1989) 698.

[144] Moon, n 41 above, at 920.

to the issue of a finding of unlawful discrimination, the latter could only lead to recommendations.[145] Investigations and inquiries are valuable tools in situations where an equality body receives many complaints of a similar nature. More especially 'formal "belief" investigations are most effective in situations where the party under investigation is a repeat offender or in situations where prior litigation has been unsuccessful in instigating the desired cultural and organizational change, for example the [British] Commission for Racial Equality's investigation into the Prison Service in 2000'.[146]

As a matter of principle, the investigation ability requires, to be efficient, appropriate means of action to be given to the equality body. For instance, the French High Authority against Discrimination and for Equality may request explanations from any public or private person, including the communication of documents and the hearing of relevant witnesses. In the case of non-cooperation with the investigation services of the High Authority, a court order can be issued.[147]

To date, most experience and expertise has been within the UK (and mostly that of the Commission for Racial Equality[148]) where it appears that the mandate of the equality body in this respect is one of the broadest in the EU. Although investigations and inquiries provide an alternative way for individual complaints to be solved, they are expensive and resource-intensive. As a result, equality bodies use them sparingly and in situations where numerous complaints have been made.[149]

C. Surveys, Reports, Recommendations, and Promoting Good Equality Practices

Apart from providing guidance to victims of discrimination, investigating complaints, and dealing with legal case work more generally, equality bodies also have a duty to tackle situations beyond individual cases. These mainly relate to the role of government advisor and to various means of action to promote equality and raise awareness.

In order to put in place effective measures to counter discrimination and to define priorities, national authorities need to have a clear idea about where and

[145] White, 'Formal Investigations and Inquiries', in Report by Equinet Working Group 2 on Strategic Enforcement, *Strategic Enforcement: Powers and Competences of Equality Bodies* (2006) 25 at 27.

[146] Ibid at 28.

[147] See Latraverse, n 138 above, at 67. On the contrary, in Denmark, the Complaints Committee for Ethnic Equal Treatment 'has no power to demand information from the accused and it cannot hear witnesses'. As a result, many cases cannot be pursued (Holtmaat, *Catalysts for Change?*, n 101 above, at 54).

[148] For a comment on the experience of the Commission for Racial Equality, see Karim, 'A Legal Strategy to Combine and Coordinate Different Tools Available', in J Cormack (ed), Report of the sixth experts' meeting—Towards the Uniform and Dynamic Implementation of EU Anti-Discrimination Legislation: The Role of Specialised Bodies, *Strategic Enforcement and the EC Equal Treatment Directives* (2004) 26 at 33–5.

[149] Moon, n 41 above, at 929.

how discrimination is operating. Targeted research is therefore essential. The kinds of surveys and reports the equality bodies effectively carry out to fulfil the requirement of EU directives vary greatly. Some merely consist in analysing the results of their work (eg presenting statistics on complaints investigated according to the discrimination or the field concerned). Others are more ambitious and look into the impact of anti-discrimination legislation or study the prevalence and forms of discrimination. Universities, research institutes, or *ad hoc* institutions may be commissioned to undertake research or study. In Sweden, for instance, the 2005 survey consists of a general inquiry into the experience of discrimination on the grounds of disability, sexual orientation and/or ethnicity.[150] It was carried out by the Swedish Central Bureau of Statistics on behalf of the three Ombudsmen (HO, HomO, DO).[151] On the basis of reports assessing the existing anti-discrimination legislation, equality bodies are usually eager to make recommendations for new legal provisions and, most often, they issue comments on legislative proposals to promote equality of treatment.[152]

Recommendations are not limited to legislation. When it issues a 'deliberation',[153] the French High Authority against Discrimination and for Equality (HALDE) is concerned to address its recommendation to all relevant stakeholders. For instance, in 2007, HALDE received complaints from eight mothers of school pupils who were prevented from assisting, on a voluntary basis, teachers in school trips because they were wearing the *hidjab*. According to the school concerned, this was contrary to the principle of secularism in public education. On the basis of a legally reasoned examination of the complaints, HALDE considered that the decision of the school were discriminatory. It advised public school boards to revise their internal regulations on this matter. The schools were also asked to inform HALDE on their follow-up to the case within four months. At the same time, HALDE advised the Minister for Public Education on the need to ensure the implementation of the principle of equal treatment in this respect.[154] The wide publicity given to the deliberations of HALDE, their presentation similar to court rulings, and their easy access on-line all favour the building of jurisprudence and the promotion of good equality practices. The same is also true for the opinions of the Dutch Equal Treatment Commission and, to a certain extent, the rulings of the Irish Equality Tribunal.

In addition to standard ways of promoting equality, such as organizing workshops, awareness-raising campaigns, issuing leaflets, and setting up informative web sites, some equality bodies use other tools such as codes of practice, a manual of good practices, or even an assessment of the lawfulness of the practices of

[150] Holtmaat, *Catalysts for Change?*, n 101 above, at 51–3.
[151] See, pt 2.B.2 above.
[152] For examples, see Moon, n 41 above, at 930–2.
[153] On the legal status of the 'deliberations' of the HALDE, see D Borillo (dir), *HALDE: Actions, Limites et Enjeux* (2007) at 53–4.
[154] *Deliberation* No 2007/117, 14 May 2007.

specific organizations when asked to do so.[155] To give some examples, the Dutch Equal Treatment Commission advises hotels, restaurants, and discotheques on the practices that amount to unlawful discrimination against people of a non-Dutch ethnic background. In 2006, the British Commission for Racial Equality issued a statutory Code of Practice on Racial Equality in Housing.[156]

Finally, the application of a positive duty to promote equality is another promising tool that equality bodies are beginning to use. 'A positive duty is a requirement that organizations promote equality and diversity in all aspects of their work, in a manner that involves employees, employers and service-users alike. It is a proactive approach, with an emphasis on achieving results backed by enforcement mechanism and the measurement on outcomes.'[157] Positive duties aim at going beyond the breaking down of visible prejudices to tackle more deep-rooted patterns of exclusion and inequality.

Generally speaking, however, it should be kept in mind that many equality bodies lack social science competence to measure outcomes and they face a shortage of resources which prevent them from going far beyond their core duties of assisting victims of discrimination.[158]

D. ECRI Guidelines

As the EU requirement concerning the mandate of equality bodies is imprecise and leaves many questions open, especially in relation to the nature and the extent of assistance to be provided to victims, the ECRI General Policy Recommendation No 2 on Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level[159] provides a valuable benchmark to construe EU law. Although this recommendation is soft law and prior to the Racial Equality Directive, it codifies best practices in relation to equality bodies by pursuing the same path as this Directive: 'according the highest priority to measures aiming at the full implementation of legislation and policies intended to combat racism, xenophobia, antisemitism and intolerance'. In this way, ECRI, just as the European authorities, is '[c]onvinced that specialised

[155] Moon, n 41 above, at 933.
[156] The adjective 'statutory' refers to the fact that this Code of practice was approved by the Secretary of State and laid before Parliament. Although statutory codes of practice are non-legally binding documents, courts and tribunals are required to take them into account in deciding discrimination cases.
[157] Griffiths, 'Positive Duties to Promote Equality', in Report by Equinet Working Group 2 on Strategic Enforcement, *Strategic Enforcement: Powers and Competences of Equality Bodies* (2006) 43 at 44. The UK is a leading example of the development of positive duties. The Race Relations (Amendment) Act 2000 imposes a positive *general* duty on all authorities to 'have due regard to the need to eliminate unlawful discrimination and promote equality of opportunity and good relations in the carrying out of their functions'. A similar step was made with respect to disability (2006) and Gender (2007).
[158] Holtmaat, *Catalysts for Change?*, n 101 above, at 40.
[159] ECRI, Council of Europe, 13 June 1997, CRI (97) 36.

bodies...at national level can make a concrete contribution in a variety of ways to strengthening the effectiveness of the range of measures taken in this field and to providing advice and information to national authorities'.

In order to give equality bodies their full potential, it is therefore worth bearing in mind Principle 3 of ECRI Recommendation No 2 concerning the functions and responsibilities of specialized bodies:

Subject to national circumstances, law and practice, specialised bodies should possess as many as possible of the following functions and responsibilities:

a. to work towards the elimination of the various forms of discrimination set out in the preamble and to promote equality of opportunity and good relations between persons belonging to all the different groups in society;
b. to monitor the content and effect of legislation and executive acts with respect to their relevance to the aim of combating racism, xenophobia, antisemitism and intolerance and to make proposals, if necessary, for possible modifications to such legislation;
c. to advise the legislative and executive authorities with a view to improving regulations and practice in the relevant fields;
d. to provide aid and assistance to victims, including legal aid, in order to secure their rights before institutions and the courts;
e. subject to the legal framework of the country concerned, to have recourse to the courts or other judicial authorities as appropriate if and when necessary;
f. to hear and consider complaints and petitions concerning specific cases and to seek settlements either through amicable conciliation or, within the limits prescribed by the law, through binding and enforceable decisions;
g. to have appropriate powers to obtain evidence and information in pursuance of its functions under f. above;
h. to provide information and advice to relevant bodies and institutions, including State bodies and institutions;
i. to issue advice on standards of anti-discriminatory practice in specific areas which might either have the force of law or be voluntary in their application;
j. to promote and contribute to the training of certain key groups without prejudice to the primary training role of the professional organisations involved;
k. to promote the awareness of the general public to issues of discrimination and to produce and publish pertinent information and documents;
l. to support and encourage organisations with similar objectives to those of the specialised body;
m. to take account of and reflect as appropriate the concerns of such organisations.[160]

On this basis, it has been argued, for instance, that given that the *raison d'être* of national equality bodies in EU law is the promotion of equal treatment, they should have the competence to do things necessary to that end, including taking part in litigation concerning the directives in support of a party or to appear as *amicus curiae* in proceedings on the true meaning of EU equality law.[161]

[160] CRI (97) 36, (author's emphasis).
[161] Barry, 'Interventions and Amicus Curiae Applications', n 125 above, at 41.

5. Equality Bodies and Independence: A Key Question

The EU Directives do not require equality bodies to be independent as such but to work in an independent manner, ie free from governmental or other influence. The explicit use of the word 'independent' three times in the relevant EU provisions[162] highlights the paramount importance of this feature. There are, however, no guidelines or further clarification in the directives. Additional guidance should be found in traditional instruments addressing the issue,[163] chiefly the 'Paris Principles'[164] and their application in other soft law instruments, namely Recommendation No 17 of the UN Committee on the Elimination of Racial Discrimination[165] and General Policy Recommendation No 2 of the ECRI.[166]

The 'Paris Principles' define several main preconditions for the independent and effective operation of human rights bodies: the independence of the body should be guaranteed by a constitutional or legislative framework; the body should have autonomy from the government and be based on pluralism; the body should have a broad mandate, adequate powers of investigation, and sufficient resources.

On this basis, Janet Cormack and Jan Niessen identify three facets of independence: 'first, independence as the authority to implement its mandate free from state interference; second, independence as neutrality, enabling the body to act without being overtly influenced by any interest group; and third, independence in terms of competence and capacity to act.'[167]

A. Independence from Government

Independence from governmental interference requires a constitutional or statutory legal basis to prevent an unsympathetic government from abolishing or weakening the equality body without parliamentary debates. It also calls for detailed legal provisions on mandate, powers, composition, and appointment procedures so as to enable the equality body to act as a 'watchdog' for actions of public authorities and private actors alike. The legal status of the equality body should be independent from governmental structures so as to avoid any subordination to a particular minister. The equality body should have a distinct legal

[162] pt 2 above, nn 35 and 36.
[163] See Cormack and Niessen, 'The Independence of Equality Bodies', 1 European Anti-Discrimination Law Review (2005) 23 at 23–4; Holtmaat, *Catalysts for Change?*, n 101 above, at 33.
[164] n 33 above. See also, Murray, 'National Human Rights Institutions. Criteria and Factors for Assessing their Effectiveness', 25/2 Netherlands Quarterly of Human Rights (2007) 189–220.
[165] General Recommendation No 17, Establishment of National Institutions to Facilitate Implementation of Convention (42nd session, 25 March 1993), UN Doc A/48/18.
[166] n 32 above.
[167] Cormack and Niessen, 'The Independence of Equality Bodies', n 163 above, at 24. See also *Report on Gender Equality Bodies*, n 40 above, at 3–4. PLS Ramboll Management A/S, n 72 above, at 30–57.

personality and be accountable to Parliament. It should report periodically on its actions and favour periodical external evaluation to ensure full transparency.

These are only indicators however; independence is actually very difficult to measure. It should not only be guaranteed formally but also be operative in practice. From the 'influential models' of equality bodies described above in this chapter it appears, for instance, that many are accountable to Government, not to Parliament. And there are concrete issues concerning independence of equality bodies from governmental interference in member states. In Denmark, the Board for Ethnic Equality was closed in 2002 following the withdrawal of its funding.[168] In Italy, there has been severe criticism of the National Office against Racial Discrimination (UNAR) established in 2004, because it is physically located within the Ministry for Equal Opportunities (no adequate premises with a 'neutral face') and under the political responsibility of the Minister for Equal Opportunities. In addition, members of the Council that supervises the work of the Office are all part of the Government.[169] In 2006, there was a serious attack on the independence of the Dutch Equal Treatment Commission (CGB) by the Minister of Integration and Immigration at the time, Rita Verdonk. She publicly disagreed with one of the opinions issued by the Commission. It concerned the case of a Muslim teacher at a school for vocational education who had decided that she would no longer shake hands with men. The school board did not agree, stating that shaking hands was a basic requirement of respectful manners. Both the school and the teacher requested the CGB to investigate whether the school's decision was against the equal treatment law. According to the CGB, the requirement to shake hands with others, irrespective of sex, constitutes indirect discrimination on the ground of religion. It considered that the school's arguments failed to lead to an objective justification.[170] The Minister stated that children should learn what 'respect for both sexes' means and that in the Netherlands respect is shown by shaking hands. She called for the abolition of the CGB. The Minister got considerable support on this issue, both in public debate as well as from Members of Parliament.[171] In 2007, following federal elections in Belgium, the programme of the first coalition government suggested a very serious reduction of the mandate of the Centre for Equal Opportunities and Opposition to Racism.[172] And the French High Authority against Discrimination and for Equality, effective since 2005, had

[168] Cormack and Niessen, 'The Independence of Equality Bodies', n 163 above, at 24.

[169] Holtmaat, *Catalysts for Change?*, n 101 above, at 34–5. There are similar concerns for the Slovenian and Spanish equality bodies (see Bell, Chopin, and Palmer, n 25 above, at 69).

[170] CGB, Opinion 2006–220/221, 7 November 2006.

[171] R Holtmaat, *Netherlands Country Report on Measures to Combat Discrimination* (2007) at 63–4. Note that Rita Verdonk quit the VVD (Conservative Party) in 2007 and officially launched a populist movement, 'Proud of the Netherlands' (*Trots op Nederland*) in April 2008.

[172] The other coalition Government which was set up in the end abandoned this project. In this respect, on 7 March 2008, the Committee on the Elimination of Racial Discrimination 'expresses its satisfaction for the work of the Centre for Equal Opportunity and Action to Combat Racism, especially in bringing cases of racial discrimination to court, *as well as the assurances given by the delegation that there is no intention to narrow its mandate*' (n 64 above, CERD/C/BEL/CO/15, point 5, author's emphasis).

recently to face the process of the reform of the institutions that President Sarkozy is promoting and has potentially to adjust to the creation of a new Ombudsman (*Défenseur des droits*).[173] Serious concerns over the drawbacks of the reform were voiced as it is suspected to weaken the standard of protection previously offered.

B. Independence as Neutrality

This aspect of independence underlines the fact that equality bodies should also be independent from special interests.[174] This means that they should let representative organizations, trade unions, and NGOs act as the voice of their communities[175] and not appear to take sides or to be labelled as supporters of one interest. In practice, the right balance between equality bodies and NGOs is not an easy one to achieve.[176] On the one hand, too many links with NGOs may undermine the equality body's neutrality and objectivity. On the other hand, not enough links with NGOs puts in jeopardy a fruitful collaboration, on assisting victims of discrimination for instance, or a valuable source of information about the prevalence and forms of discrimination.

C. Effective Independence

The competence and capacity of equality bodies to act independently requires appropriate composition, appropriate powers, and sufficient resources.[177] As for *composition*, this particularly entails that the Board (or Commissioners) and the key staff should be chosen with a view to insure pluralism; appointment should be made through strict terms of reference laid down by law; and there should be appropriate safeguards against arbitrary dismissal and arbitrary non-renewal of appointment.[178] This also means that equality bodies should be entrusted with appropriate *powers*. They should not only be provided with sufficient powers to carry out their mandate effectively, but a clear focus should also be put on the need to avoid conflicts between powers that could lead to a confusion of roles.

This issue has been much debated in the Netherlands, where the Equal Treatment Commission has a quasi-judicial role in giving advisory rulings on

[173] In the process of the reform of the institutions in France, a Committee was set up in 2007 (*Comité de reflexion sur la modernisation et le rééquilibrage des institutions*). In its report, it recommends the establishment of an Ombudsman for Human Rights which should take over the mandate of several institutions. As part of a more inclusive Bill, this proposition was presented in Parliament on 23 April 2008 (*Projet de loi constitutionnelle de modernisation des institutions de la Vème République*, No 820) and adopted on 23 July 2008 (*Loi constitutionnelle No 2008–724* which inserts a Title XI *bis* in the Constitution dedicated to a new Ombudsman: the '*Défenseur des droits*').

[174] Cormack and Niessen, 'The Independence of Equality Bodies', n 161 above, at 26.

[175] O'Cinneide, 'The Racial Equality Directive', n 75 above, at 51.

[176] Holtmaat, *Catalysts for Change?*, n 101 above, at 36.

[177] Cormack and Niessen, 'The Independence of Equality Bodies', n 161 above, at 26–7.

[178] This seems not to be the case in Hungary, where the President's appointment of the Equal Treatment Authority may be withdrawn at any time without any justification. See Kadar, n 138 above, at 74.

equality cases and can also assist victims in bringing cases to court. The power to take legal action in court was given to the Dutch Commission to counterbalance the absence of enforceability of its rulings. Actually, since its establishment in 1994, the Commission has never taken any case to court, and does not assist victims, to avoid confusion between its missions.[179] As a matter of principle, '[d]oubts of a body's independence may be raised if, for example, it is acting as investigator of allegations of discrimination one minute, defending victims the next and adjudicating breaches of legislation after that.'[180] The Irish equality bodies avoid such criticism. There is a clear division of functions between the Equality Authority as a proactive body working to promote equality and to assist victims and the Equality Tribunal as a quasi-judicial body processing individual cases and issuing legally-binding decisions. The Dutch Equal Treatment Commission 'also has concerns around drafting codes of conduct or recommendations, and then being asked to interpret and apply these in a case, thereby acting as both judge and legislator (even if the codes of practice are not legally binding)'.[181] From a general point of view '[t]here are sometimes conflicts between the powers of a specialised body such as the roles of adjudicator, promoter of equal treatment and investigator and exercising those powers simultaneously. The competences should be clearly categorised and where necessary on the basis of the separation of powers, some competences should be undertaken externally.'[182]

Adequate financial *resources* are directly linked to staffing, as substantial resources are needed to appoint experienced and trained staff. The Government generally provides most of the budget. Staff shortage is a key difficulty that equality bodies are encountering in many member states. And the allocation of resources is a typical area in which the state may attempt to exert control. This was, for instance, the danger that the Hungarian Equal Treatment Authority was facing, where, at one point, its annual budget, although determined by Parliament, was actually in the hands of the Minister accountable for it who had the right to modify the Authority's budget during the year.[183]

6. Conclusion

Broad EU anti-discrimination law has only developed recently with the impulse of the Treaty of Amsterdam. From an institutional point of view, it has had a major impact,

[179] PLS Ramboll Management A/S, n 72 above, at 84. In the Netherlands, there are other institutions funded by the Government which assist victims, mainly the local Anti-Discrimination Bureaus (Holtmaat, *Netherlands Country Report*, n 169 above, at 63).

[180] Cormack and Niessen, 'The Independence of Equality Bodies', n 163 above, at 27.

[181] Ibid.

[182] J Cormack (ed), *Considerations for Establishing Single Equality Bodies and Integrated Equality Legislation*, n 78 above, at 32.

[183] Kadar, n 139 above, at 74.

being at the source of the setting up of many specialized bodies for the promotion of equal treatment and the reshaping of existent agencies. The spectrum of models of equality bodies found across Europe is large, but there are general trends beyond the differences and a high number of member states go further than EU law standards. First, more grounds of discrimination than race and gender often fall within the mandate of national equality bodies, thus filling the gap of the Employment Equality Directive. In this respect, the tendency is clearly not to multiply agencies, but rather to foster the establishment of a comprehensive equality body allowing a cross-grounds approach. Secondly, the powers granted to equality bodies to combat discrimination are not limited to assisting victims or making surveys, reports, and recommendations. Equality bodies develop alternative dispute resolution mechanisms; investigate complaints; go to court; issue opinions and recommendations; advise governments; assess the practices of public and private stakeholders; launch inquiries; enforce positive duties; highlight good practices; organize training; sustain education programmes; and initiate campaigns promoting equal opportunities.

The EU has undoubtedly given a strong boost to the flourishing and growth of specialized equality bodies across Europe. In some countries these bodies had roots in deep-seated national traditions which greatly influenced the Racial Equality Directive and its focus on enforcement bodies. During the stages of the implementation of EU law, these 'influential models' were of great help to other member states and the added value of the Equinet network was significant in this respect. On the other hand, it is striking to note that this process of cross-fertilization gave fresh impetus to most of these pre-existing models which joined in the momentum that the EU initiated. Following the implementation of the directives, such a process is still ongoing and will hopefully be reinforced by the new European Institute for Gender Equality[184] and the new EU Fundamental Rights Agency.[185]

Although impressive forward steps have been taken to enhance the implementation of the principle of equal treatment in Europe, the challenges that remain are significant. As regards the effectiveness of equality bodies, independence from governmental interference may prove delicate and should be carefully monitored. The issue of resources is also critical and one can only doubt the efficiency of equality bodies which only comprise a handful of staff members. In addition, equality bodies should pay particular attention to the dangers of becoming bogged down in the support of routine anti-discrimination cases. Their mission is not to replicate activities undertaken by individuals but to promote social changes by distinctive means. The focus should be on strategic enforcement and this calls for a definition of priorities and action plans that go far beyond individual litigation.

Brussels, May 2008

[184] n 97 above.

[185] See ch 4 in this volume.