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Antidiscrimination: A European perspective.

Bernhard Perchinig

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Institut für Europäische Integrationsforschung
Institute for European Integration Research

Österreichische Akademie
der Wissenschaften
Prinz-Eugen-Straße 8-10
1040 Wien

fon: +43(1) 515 81-75 65
fax: +43(1) 515 81-75 66
mail: eif@oeaw.ac.at
http://www.eif.oeaw.ac.at

Antidiscrimination: A European perspective.

Abstract

The paper discusses the impact of European antidiscrimination legislation on the European Employment Strategy and the debate on European Corporate Responsibility Standards. Although in these fields antidiscrimination policies gained growing importance, the lack of protection on third country nationals is considered as a major shortcoming. It is discussed, if the suggestion of the European Commission to develop a status of "civic citizenship" for third country nationals might be able to overcome these deficiencies.

1 What already has been achieved[1].

It is now about four years since the two Antidiscrimination – Directives have been passed by the Council of the European Union. The Racial Equality Directive and the Employment Equality Directive, which were unanimously adopted by all Member States in 2000, set forth a common set of antidiscrimination provisions in Europe. They not only provide specific minimum requirements facilitating the enforcement of the prohibition of discrimination, but also provide an active role to civil society organisations such as Social Partners and NGOs in supporting victims of discrimination. Although the directives only mark the lowest common denominator all Member States' governments could agree upon, they constitute a pivotal step forward in regard to outlawing various forms of discrimination, particularly in the employment sector. Despite the sometimes hesitant and clumsy implementation of the Directives in the Member States, this common framework for the fight against racial discrimination and discrimination on a variety of other grounds will trigger relevant decisions of the ECJ and will lead to further legal developments on the level of the European Union and the Member States.

But despite these successful developments, there is no reason for contemplation. All over Europe immigrants still carry a disproportionate share among the unemployed or are concentrated in the low-income sectors and report high incidences of discrimination in employment, promotion or access to leading positions. Although it is too early to evaluate the effect of the directives in practice, even a cursory view highlights the need for further strengthening measures against discrimination of

[1] This paper is based on a lecture given at the conference "Fighting Against Racism and Xenophobia in Europe – Actions for Equal Opportunities in Employment Access", Cedias Musée Social, Paris, November 4-5, 2004

immigrants on the labour market. In this respect, legal enforcement only is one side of the medal. In order to become everyday practice, antidiscrimination has to become a major element in European labour market policies. In this area, the recent developments give rise to hope as well to concern. Let me therefore shed a light to the recent debates on the "European Employment Strategy" and on the debate on "Corporate Social Responsibility" and their link to the issue of antidiscrimination.

2 The European Employment Strategy

The major European labour market policy instrument is the European Employment Strategy, which has been crated in by the Amsterdam European Council (June 1997), when the heads of states agreed on new employment provisions in the Treaty of the European Communities. While the Council confirmed national competence for employment policy, it declared employment a matter of common interest and called on Member States to develop a coordinated employment-strategy on EU-level. The new title on employment (Art 128) created a framework for developing national employment policies on the basis of shared European priorities and interests and set a legal basis for the exchange of good practices in employment. With this new Article the "social dimension" of Europe had become a concrete political dimension of European integration for the first time (European Commission 2000, 8). In November 1997, the Luxembourg "Jobs" Summit passed the first guidelines for employment policies in the Member States. Although the thematic priority "Employability" included the task to prevent the long-term unemployed and other disadvantaged groups from becoming increasingly excluded, measures against discrimination only were to be included into the National Action Plans on Employment in 2000, when the European Council of Lisbon embarked on the challenging project to prepare the EU "become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion" (European Council 2000, 15).
In order to become the leading region of the world in the coming "knowledge society", a fairer balance between economic integration and social cohesion should be reached. In this context, employment levels and employment quality should be improved. Now full employment and quality of employment, not only the fight against unemployment, were defined as main political targets for the first decennium of the 21st century. For the first time, quantitative targets were set: The employment rate in the EU should be raised from an average of 61% to 70% by the year 2010, and the proportion of women in employment should increase from an average of 51% to 60%, and overall economic growth should reach 3% each year (Lisbon European Council Presidency Conclusions 2000, 15). The Council also defined lifelong learning, the improvement of employability and the promotion of all aspects of equal opportunities, including the reduction of occupational segregation, as major political targets, but did not define concrete and measurable targets in this respect.

The Member States were interested in putting employment on the EU-agenda for a variety of reasons. On the one hand, they envisaged that this move could help them transfer good practices and learn from experiences in other countries; on the other hand they also preferred implementing unpopular labour

market and social policy reforms with reference to European decisions (Goetschy 2003, 8ff.). Nevertheless, they did not want the traditional "Community Method", whereby European directives have to be implemented in the Member States, to govern labour market policies. Although convinced that European labour market policies would need stronger coordination, their main concern during the preparation of the Luxembourg Summit in 1997 was to prevent the adoption of a fixed common target on unemployment, like it had been set with regard to budgetary discipline in the Maastricht criteria. Thus, fearing the imposition of fixed and easily measurable quantitative targets, they agreed on setting more qualitative guidelines instead, which would allow for more flexibility in allowing unemployment and less rigid mechanisms of control in the fight against unemployment (Rodriguez 2001, 101):

The "Open Method of Coordination", whereby Member States implement targets set at European Union level in a framework of loose policy coordination, was born. The Presidency Conclusions of the Lisbon Council describe the new method of governance as a means of spreading best practices and "achieving greater convergence towards the main EU goals" (European Council 2000, 16). The method, which according to the Conclusions, was "designed to help Member States to progressively develop their own policies" (ibid., 37), was not, like the Community Method, aimed at reaching the harmonisation of legal rules. Instead, Member States should achieve targets set by the European Union by developing their own policies. Common targets, not common rules, should lead to the integration and coordination of different policies in the Member States. The OMC should be implemented through domestic policies and legislation aimed at reaching the goals set, not through implementation of European law. The Commission should secure coordination by constant monitoring and comparing the progress of the Member States. Although the Council did not define the "main EU goals", employment and social policies soon became the main arena for the implementation of the Open Method of Coordination.

This move from "governance by legislation" to "governance by objectives" should allow the Member States to develop common policies in areas with different national traditions and policies without being forced to transfer national competence to the Union level. This new European "governance architecture" (Radaelli 2003, 1) was strongly imbedded into the discourse of competitiveness reframing European policies in the language of management.

According to the Commission's evaluation of the Employment Strategy in 2002 (European Commission 2002a), measures against discrimination of minorities and immigrants did not have a high rating in the Action Plans of the Member States. Consecutive Joint Employment Reports concluded that a comparative analysis of the progress made by Member States would not be possible because of lack of data, non comparable definitions of target groups and the lack of targets set by the Member States. According to the European Commission's "Green Paper on Equality and Non-Discrimination in an Enlarged European Union" (European Commission 2004) most of the Member States continued to place their main emphasis on the need for migrants and ethnic minorities to adapt to mainstream

society through measures like language and integration-courses.

"There is a lack of measures addressing the potentially discriminatory behaviour, attitudes or practices of the *majority* of the population, which can prevent a migrant or member of an ethnic minority from accessing a job or service or training course irrespectively of his or her qualifications, experience or language ability. Member States should be encouraged to make greater use of the European Social Fund to tackle discrimination, as well as more traditional integration measures such as the provision of training," the Green Paper critically comments (European Commission 2004, 19).

In reaction to the critical evaluation of the Employment Strategy, the Council of the European Union amended the Employment Guidelines in 2003. Following the principles of the Open Method of Coordination, three overarching objectives - *full employment, quality and productivity at work* and – for the first time - *social cohesion and inclusion* – were set. The new guidelines also defined ten priorities of action and auxiliary quantitative targets. For the first time, action to promote the integration of immigrants and ethnic minorities was mentioned, directly forging a strong link between labour market integration and antidiscrimination. In Guideline 7, Member States are summoned to foster "the integration of people facing particular difficulties on the labour market, such as early school leavers, low-skilled workers, people with disabilities, immigrants and ethnic minorities, by developing their employability, increasing job opportunities and preventing all forms of discrimination against them" (Official Journal of the European Union 2003, L197/13).

"Supporting integration and combating discrimination in the labour market for people at a disadvantage" has also been defined as a key priority for the future of the European Employment Strategy (European Commission 2003, 16). Member States are motivated to develop quantified targets for their inclusion into the labour market and to implement measures against discrimination based on the Council-Directives (ibid.). The recent Third Report on Social Cohesion of the European Union (Council of the European Union 2004) has also highlighted that support for disadvantaged groups will stay a priority in the funding of the Structural Funds.

Although social cohesion and inclusion are firmly linked with antidiscrimination as a key priority in several programmes, the lack of European-wide targets, as they have been developed e.g. in the area of active ageing, still gives the Members States much leeway in defining what they regard as success in relation to combating discrimination in employment.

Like in the fight against unemployment, where the Member States did not accept the setting of quantitative targets like in the European Monetary Union, there is much reluctance against clear targets and benchmarks, which would allow comparing Member States with regard to their success in the fight against discrimination. There is the serious risk that the Member States will continue to focus their activities on general integration measures, but neglect antidiscrimination and the setting of clear equality targets. As in many Member States NGOs have not been adequately integrated into the

national coordination structures for the Employment Strategy their voice and knowledge in this field stay unheard. Thus the stakeholders of the debate will have to put continuous pressure on the Member States to gain a voice in the development of national programmes within the Employment Strategy to ensure that the fight against discrimination in practice will live up to the promises of the programme documents and that the advantages of the OMC will be used in their interest.

3 The debate on corporate responsibility

The fall of the Berlin Wall in 1989 and the end of the cold war not only reshaped the political geography of the world but also led to increased discussion about the role of business in society. This was reflected by the Earth Summit in Rio in 1992, where the Agenda 21 was adopted, which defined "sustainable development" as a main principle of economic relations. This idea was reflected in the growing debate on "Corporate Social Responsibility", which developed since the 1990s.
The debate on CSR was taken up by the European Commission at the end of the 1990s with the development of a Green Paper on "Promoting a European Framework for Social Responsibility" (2001), which opened an intense discussion between the business world, Trade Unions, civil society organisations and governments. The Green Paper defined CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis" (European Commission 2001, 5). The Lisbon European Council linked the issue with the strategic goal of making Europe the most competitive and dynamic knowledge-based economy by 2010, and demanded the Union to develop a common framework for CSR in Europe.

In the following discussion, a major dividing line between enterprises on the one hand and Trade Unions and civil society organisations on the other developed. Whereas enterprises emphasised the voluntary nature of CSR and argued against a regulations at the EU-level, Trade Unions and NGOs stressed that voluntary initiatives would not be sufficient to protect workers' and citizens´rights, and pressed for the development of a regulatory framework setting minimum standards. This debate between a voluntary and a rights-based approach has not been decided yet, although in its latest Communication on Social Responsibility the Commission proposed to build a strategy based on the recognition of the voluntary nature of CSR, compatible with existing international agreements and instruments (European Commission 2002b, 8).

At the end of the 1990s, the general debate on CSR has been followed by the development of tools for implementation. A wide array of mechanisms for measuring, evaluating, improving and communicating corporate performance has been developed, which range from broad guidelines, codes of conduct, and best practice guidelines to screening mechanisms, standards and benchmarks. Only a few of them take antidiscrimination directly into account. One of the best known standards so far, the ISO 9000 (quality management) standard, which, according to the International Organisation for Standardisation, has been implemented in some 610,000 organisations in 160 countries. However, it

does not include issues of labour conditions or corporate social responsibility[2]. Among the standards sensitive to social responsibility, the "Social Accountability (SA) 8000", a certification procedure published by the US-based non-profit organisation "Social Accountability International" in 1998, is most directly geared at labour conditions and covers inter alia discrimination in employment using a detailed questionnaire[3]. Most of the other instruments covering antidiscrimination are aspirational principles and Codes of Practice, like e.g. the "Amnesty International Human Rights Guidelines for Companies"[4], the OECD "Guidelines for Multinational Enterprises"[5] or the UN "Global Compact"[6]. Although all of them cover the implementation of antidiscrimination measures in the company, they neither have a common understanding of the issue nor do they provide evaluation and certification procedures. Furthermore, the implementation of CSR-standards in one company does not protect the employees of its suppliers and thus might only cover a small part of the chain of production.

A specific standard on antidiscrimination has not been developed yet, and the issue is not reflected widely in the ongoing discussion on quality management. Thus there are no studies on the effect of the implementation of CSR-standards and certificates with regard to discrimination. Even if CSR-tools may help to prevent discrimination and may be a valuable tool in awareness raising, they cannot replace a rights-based approach: Whereas the development and implementation of CSR-instruments depends on decisions of business associations and the management and do not allow for individual complaint procedures, a rights-based approach relies on state law and gives the potential victim the possibility to approach judicial complaint procedures for course of action and remedies, which may be enforced from outside the company.

Reliance on voluntary measures would not only weaken the victim, but would also release the state from its responsibility to guarantee equal treatment and freedom from discrimination for all people under its legislation. Nevertheless, CSR-tools may complement legally binding antidiscrimination provisions, as they focus on the business case of equality and can enhance public understanding of the issue. European NGOs and trade unions will have to link their debates on antidiscrimination more intensively with the CSR-debate and pressure for the development of a measurable, common European standard on discrimination-free employment to secure, that measures against discrimination become a major part in the ongoing debate on Corporate Social Responsibility and European Corporate Standards.

4 Diversity Management

In the recent years, the debate on CSR has been increasingly linked with discussions on "Diversity Management". Diversity management is geared at the recruitment, retaining and development of staff

[2] http://www.iso.org/iso/en/iso9000-14000/index.html
[3] http://www.cepaa.org/SA8000/SA8000.htm
[4] http://www.amnesty.org.uk/business/pubs/hrgc.shtml
[5] http://www.oecd.org/daf/investment/guidelines/
[6] http://www.unglobalcompact.org

from a diverse social and ethnic background. The development of business practices and culture prone to a strengthening of human, organisational and knowledge capital should help to better adapt to globalisation and changing product and labour markets. Recognising diversity thus should involve a combination of activities to promote non-discriminatory practices and positive action and to capitalise on the diverse backgrounds, knowledge and skills of individuals or groups as resources for development (European Thematic Group 1 2003, 3).

It is exactly this broader approach, which raises criticism on diversity management thinking. On the one hand, antidiscrimination and affirmative action may conflict with the idea to capitalise on the diverse cultural capital of staff, as exactly this move might entail further discrimination reducing people to representatives of real or imagined groups. On the other hand, the focus on gaining from diversity may move existing inequalities into the shadow and prevent a change of discriminatory practices, if it is not accompanied by measures against discrimination. Furthermore, antidiscrimination and affirmative action aim at the implementation of enforceable measures at company level irrespective of economic considerations. A focus on "gaining from diversity" may easily be misused for rejecting measures that are seen as costly, non-profitable or challenging established powers within a company. Recent studies support a critical view on diversity management in Europe. As business cultures are strongly influenced by local and national traditions, the understanding of diversity management varies considerably and ranges from minimalist approaches like the organisation of language training and the adaptation to religious dietary requirements to a broader concept including monitoring of recruitment and promotion of staff with minority background (Wrench 2002, 8). In absence of a common understanding of diversity management and established monitoring procedures, the risk of window-dressing and negligence of antidiscrimination within diversity management exists. It will be the task of NGOs and Trade Unions to pressure for clearer rules and definitions in order to prevent diversity management to become a surrogate for non-existing measures against discrimination.

5 The challenge of citizenship

Both the Racial Equality Directive and the Employment Equality Directive provide for a problematic exception: discrimination on the ground of nationality and in relation to immigration policies are not prohibited. Whereas EU citizens can refer to Art 12 TEC, which protects them against any form of discrimination on the ground of their Member States' nationality, this is not the case for third country nationals. If non-EU citizens feel themselves wronged due to their nationality, they have to refer to the grounds of either racial or ethnic origin, religion or belief. For example, if an employer pays non-EU citizens less than domestic nationals for equal work and justifies this treatment on the ground of the employees' third country nationality, this might constitute a form of indirect discrimination based on racial or ethnic origin (Bell 2002, 77). Furthermore, both directives neither cover provisions and conditions determining entry and residence status of third-country nationals nor stateless persons nor treatment arising from the legal status of the third-country nationals or stateless persons concerned. Furthermore, third country nationals do not enjoy the unrestricted right to free movement comparably

to Union-citizens,.

Although according to European law, exceptions to general principals, like in this case the principle of equal treatment, should be interpreted strictly and narrowly, this lack of protection of third country nationals is a serious drawback in the fight against discrimination. Particularly in countries following a "guest – worker" tradition, access to the labour market, to a variety of social rights, studying subsidies or council housing still are depending on nationality, and in many Member States third country nationals are excluded from voting. Although the Directive on the Status of long – term residents, which has to be implemented in the Member States until 2006, improves their status considerably, it does not include the right to vote in local elections, and all third country nationals resident in EU-states for less than 5 years remain unprotected.

With regard to the status of third country nationals, it is worth to consider the idea of a "civic citizenship", which recently has been brought up by the European Commission. In its Communication on a Community integration policy of 2000 (COM (2000) 757), the Commission has suggested a new approach on the integration of immigrants. Following the ideas of the Tampere Conclusions to approximate the status of long term resident third country nationals with Union citizens, the Commission introduced a concept of **civic citizenship**, defined as guaranteeing certain core rights and obligations to immigrants which they would acquire gradually over a period of years, so that they are treated in the same way as nationals of their host state, even if they are not naturalised.

The Communication reads as follows:

The Charter of Fundamental Rights could provide a reference for the development of the concept of civic citizenship in a particular Member State (comprising a common set of core rights and obligations) for third country nationals. Enabling migrants to acquire such a citizenship after a minimum period of years might be a sufficient guarantee for many migrants to settle successfully into society or be a first step in the process of acquiring the nationality of the Member State concerned. (....) The Commission proposes that a common legal framework for admiss ion of third country nationals should be developed, in consultation with the Member States, which would be based on the principles of transparency, rationality and flexibility. The legal status granted to third country nationals would be based on the principle of providing sets of rights and responsibilities on a basis of equality with those of nationals but differentiated according to the length of stay while providing for progression to permanent status. In the longer term this could extend to offering a form of civic citizenship, based on the EC Treaty and inspired by the Charter of Fundamental Rights, consisting of a set of rights and duties offered to third country nationals.

The reference to the EC-Treaty and the Charter of Fundamental Rights are worth a closer look. What are the basic rights conferred to Union-citizens in the Charter of Fundamental Rights ?

Basically, they include the right to free movement and residence (Art 15.2), the right to work, to establish oneself and to provide services (Art. 45), the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections (Art. 39, 40), the right to diplomatic and consular protection (Art. 46) as well as the right to petition and to access documents and the right to non-discrimination on the basis of nationality (Art 21.2). The Directive on the Status of Long Term Residents already confers some of these rights to third country nationals, but it does not include the right to vote and stand as a candidate in elections to the European Parliament and municipal elections (Art. 39, 40) and the right to non-discrimination on the basis of nationality (Art. 21.2). Enabling migrants to acquire civic citizenship after a certain period of years could overcome these weaknesses and close the gap the Antidiscrimination directives have left with regard to protection against discrimination based on nationality. Thus pressuring for Civic Citizenship also would enhance the position of third country nationals on the labour market, as the prevention against discrimination based on nationality includes all labour market related aspects except the first entry into the labour market of a European country.

6 Conclusions

Currently, issues of antidiscrimination, corporate social responsibility and citizenship mostly are unrelated to each other in the European discourse. They resort to different directorates of the European Commission, involve different NGOs, different social partner organisations and a different set of researchers and experts. This division seriously hampers progress covering major areas of persistent discrimination. In order to overcome this weakness, there is the need for the inclusion of European NGOs working in the field of antiracism into the existing fora for CSR and citizenship issues. Also the European Commission has not yet brought forward a compelling approach linking these issues together, and, following the recent developments, it might be necessary for the following years to put stronger pressure on the Commission in order to remind it that the European citizens want to have strong protection against racial discrimination in place. In this respect, European cooperation of NGOs can play a decisive role as a main tool of linking antidiscrimination with the wider issues of citizenship and corporate responsibility. Your conference is an important step into this direction, as its focus is exactly on the issue of mainstreaming discrimination and brings together researchers, NGOs and practitioners to share their ideas and experiences. I hope, that my lecture could contribute to this important task and thank you for your attention.

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