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THE ROLE OF THE SPECIALISED BODIES IN THE CONTEXT OF THE NEW ANTI-DISCRIMINATION LEGISLATION IN THE EU

COMPARATIVE STUDY OF SPECIALISED BODIES TO COMBAT RACISM IN THE UK, THE NETHERLANDS AND IRELAND IN THE LIGHT OF IMPLEMENTATION OF THE EU RACIAL EQUALITY DIRECTIVE

by

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ABSTRACT

It was not until 1997, when the Treaty of Amsterdam amended the Treaty of Rome, that anti-discrimination was included as a basic founding principle of the European Union. During 2000, three important new measures to combat discrimination, based on Article 13 of the Treaty of Amsterdam, were adopted by the Council of Ministers. As a result, we will have, for the first time, a comprehensive set of anti-discrimination measures and a minimum standard of legal protection against discrimination that shall apply across the EU. The three measures include Racial Equality Directive, Employment Directive and an Action Program.

The Racial Equality Directive requires Member States to make discrimination on grounds of racial or ethnic origin unlawful in the areas of employment, training, education, access to social security and health care and access to goods and services, including housing. The Directive specifically excludes protection against discrimination on grounds of nationality, which is dealt with separately in the Treaty. The Member States are required to implement the Directive by the year 2003 and are also free to introduce greater degrees of protection, in accordance with their individual legal and administrative traditions.

Article 13 of the Directive requires Member States to designate specialised bodies for the promotion of equal treatment. The competences of these bodies include: providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports and making recommendations on any issue relating to such discrimination. In the United Kingdom, the Netherlands, Ireland, Belgium and Sweden such bodies already exist, but their mandates vary. In the other EU Member States new institutions must be created or the existing institutions' mandates must be modified in order to make them in compliance with the Directive.

This thesis is a comparative study of the legal anti-discrimination frameworks and the specialised bodies operating within them in the UK, the Netherlands and the Ireland. The primary scope of the thesis is to highlight good practices of the existing specialised bodies in these three Member States as they could point into the right direction the creation of the specialised bodies in the other Member States. The secondary scope of the thesis is to point out some weaknesses of the three bodies scrutinised, as the new specialised bodies would benefit from avoiding. The first Chapter introduces the Racial Equality Directive. The second, third and the fourth Chapters respectfully examine the specialised bodies for the promotion of equal treatment in the UK, the Netherlands and Ireland. These three Chapters identify the strengths and the weaknesses of the three bodies scrutinized. Concluding Remarks offer a list of features of a model specialised body that emerges from this study and some comments on an effective anti-discrimination law.

INTRODUCTION

The European Union is inextricably linked to and characterised by the dynamics of global exchanges between people and cultures, posing challenges to Europe's traditional boundaries and frontiers. Racial and ethnic discrimination, never totally eliminated in Europe, are resurfacing at this time when European societies are becoming increasingly diverse as a result of continuous intra and extra European migration. This is manifested by ethnic tensions, outbreaks of violent racism, persistent patterns of direct and indirect discrimination and virulent xenophobia across Europe[1].

Discrimination based on racial or ethnic origin may undermine the objective of developing the European Union (EU) as an area of freedom, security and justice[2], based on respect for diversity, which implies equality, tolerance and non-discrimination. The Amsterdam Treaty, which amended the Treaty establishing the European Community and the Treaty on European Union, provides the European institutions with considerable new powers to act on discrimination[3]. The new Article 13 of the EC Treaty empowers the European institutions to adopt legislative and other appropriate measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation[4]. Preceding the Article 13, only the gender discrimination was addressed on the EC level by the two Council Directives, the 1976 Directive[5] implementing the principle of equal treatment for men and women in the field of employment and 1997 Directive[6] on the burden of proof in cases of discrimination based on sex.

Having regard to Article 13, the European Union (EU) adopted two directives concerning equal treatment and anti-discrimination in the year 2000, namely the Council Directive implementing the principle

[1] J. Niessen, The EU Racial Equality Directive: Completing the common market and renewing human rights commitments, paper presented at the workshop *Legal and institutional measures to fight racial discrimination in the labour market*, Vienna, May 2001, p.1 (Hereinafter Niessen, The EU Racial Equality Directive).

[2] Clause 9 of the Preamble to the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of ethnic and racial origin referring to Article 29 of the Treaty on European Union (previous Article K.1).

[3] J. Niessen, The further development of European Anti-discrimination Policies, in "The Starting Line and incorporation of Racial Equality Directive into the national laws of the EU Member States and accession states", Brussels/London, I. Chopin and J. Niessen eds., 2001, p. 7 (Hereinafter Niessen, The European Anti-discrimination Policies).

[4] Further amendments introduced by the Treaty of Amsterdam that grant additional powers to the European Institutions to act on discrimination include: 1) the new Title IV in the EC Treaty providing a legal basis for the adoption of measures promoting equal treatment between EU citizens and third-country nationals, (the inclusion of Title IV extends the scope of the EC Treaty which may lead to a reinterpretation of Article 12 of the EC Treaty, which prohibits discrimination on the basis of nationality); 2) Article 137 providing a legal basis for action concerning employment conditions for third-country nationals legally residing in Member States; 3) amendment to the Treaty on European Union to the effect that police and judicial co-operation on criminal matters (within the framework of the third pillar) now include the prevention, and combating, of racism (Adopted from Niessen, The European Anti-discrimination Policies, p. 7).

[5] Council Directive 76/207/EEC of 9th February 1976, OJ L 001, 13/01/1994 p.484.

[6] Council Directive 97/80/EC of 2nd August 1997, OJ [1998] L, 14/06/1998 p.89.

of equal treatment between persons irrespective of ethnic and racial origin[7] and the Council Directive establishing a general framework for employment equality[8]. The two Directives, together with the Council Decision establishing a Community Action Programme to combat discrimination[9], form "Article 13 package"[10], a response to persistent discrimination and outbreaks of racist violence across the EU[11]. These instruments shall have an enormous and positive impact towards more effective prohibition of discrimination in the EU and are invaluable tools for those who are involved in the fight against discrimination and racism[12].

The Racial Equality Directive, to be implemented at national level by 19th July 2003, prohibits racial discrimination in the areas of employment, education, social security, health care and access to goods and services and ensures that victims of discrimination shall have the right of redress in all Member States. The Directive also requires Member States to designate a body or bodies for the promotion of equal treatment[13] that will provide independent assistance to victims of discrimination on the grounds of racial or ethnic origin in pursuing complaints[14]. Specialised bodies to combat racism and intolerance at national level are crucial for the effective implementation of anti-discrimination legislation. In Belgium, Ireland, the Netherlands, Sweden and the United Kingdom such bodies already exist but their mandates vary. These Member States have gained considerable experience with these bodies that may be of use to the Member States that have to establish them[15].

The goal of this thesis is to examine and compare the practices of the Commission for Racial Equality in the United Kingdom, the Equal Treatment Commission in the Netherlands and the Equality Authority and the Office of the Director of Equality Investigations in Ireland. These specific specialised bodies were chosen because legislation in the UK, the Netherlands and Ireland is more advanced than in Belgium and Sweden, in the sense that racial discrimination is prohibited also in the field of services. Therefore the specialised bodies' mandates in these three countries extend further than the mandates of the Centre of Equal Opportunities and Opposition to Racism in Belgium and the Ombudsman against Ethnic Discrimination in Sweden. The scope of this comparative analysis is twofold – primarily to identify

[7] Council Directive 2000/43/EC of 29th June 2000; OJ L 180, 19/07/2000 pp. 0022 – 0026 (Hereinafter the (EU) Racial Equality Directive or the Directive).
[8] Council Directive 2000/78/EC of 27th November 2000; OJ L 303, 02/12/2000 pp. 0016 – 0022.
[9] Council Decision 2000/750/EC of 27th November 2000; OJ L 303, 02/12/2000 pp. 0023 – 0028.
[10] The first implementing measures taken under Article 13.
[11] In this context it is important to note that in the year 2000, the Council of Europe adopted Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Protocol broadens the scope of Convention's Article 14 that prohibits discrimination in the enjoyment of only those rights which are enumerated in the Convention. It is another important instrument to combat racial discrimination in Europe and its ratification offers another opportunity to put anti-discrimination and anti-racism on the national agendas of the EU Member States. (Adopted from Niessen, The European Anti-discrimination Policies, p. 8).
[12] Niessen, The European Anti-discrimination Policies p. 5.
[13] Hereinafter the specialised bodies (to combat racism and intolerance).
[14] The European Commission Web site: http://www.coe.int.
[15] Niessen, The European Anti-discrimination Policies, p. 13.

features of these three bodies, considered as good practices, that may form a valuable heritage for the other Member States in establishment of similar bodies and to a lesser extent to point out some shortcomings of these bodies that the other Member States should avoid repeating. The first Chapter presents the distinctive features of the Racial Equality Directive. The second, third and fourth Chapters, respectfully examine the British Commission for Racial Equality (CRE), the Dutch Equal Treatment Commission (ETC) and the Irish Equality Authority (EA) and the Office of the Director of Equality Investigations (ODEI). Concluding Remarks offer a list of features of a model specialised body that emerges from this study and further, some comments on an effective anti-discrimination law. This thesis does not aim to be exhaustive in respect of thorough examination of these specialised bodies' practices, but to highlight the most significant characteristics of those practices, which could be of practical assistance to the Member States that must institute bodies for the promotion of equal treatment in the near future.

CHAPTER 1. THE EU RACIAL EQUALITY DIRECTIVE

The Racial Equality Directive has been adopted as response to rampant racial and ethnic discrimination. It is a renewal of Europe's human rights commitments[16] in a globalising world, that strategically lays the foundation for policies that value diversity[17]. The aim of the Directive is to put in place and maintain a common minimum level of protection and to apply the principle of equal treatment to individuals irrespective of their racial or ethnic origin[18]. The Directive legally came into force on 19th July 2000, and its implementation into the laws of the Member States before July 2003, is the beginning of the design or amendment of national legislation against racial and ethnic discrimination. As a part of the *acquis communautaire*, the Directive must also be incorporated into the laws of the Accession States.

Like all other European measures, and especially those requiring unanimity, the Directive is the result of negotiations between the Member States and therefore a compromise. It is possible that individual governments would be willing to apply – in general or on specific issues – higher standards than those required by the Racial Equality Directive. The Article 6 of the Directive leaves that possibility explicitly open[19]. In only a limited number of Member States the transposition of the Directive will take only minor adaptations of national legislation. In most Member States new legislation will have to be enacted,

[16] Article 6 of The Treaty on European Union.
[17] Niessen, The EU Racial Equality Directive, p. 2.
[18] I. Chopin, Campaigning Against Racism and Xenophobia: from a legislative prospective at European level, Brussels, European Network Against Racism (ENAR) ed., 1999, p. 10 (Hereinafter Chopin, Campaigning Against Racism).
[19] P. Yu and I. Chopin, Introduction to "The Starting Line and incorporation of Racial Equality Directive into the national laws of the EU Member States and accession states", Brussels/London, I. Chopin and J. Niessen eds., 2001, p. 6.

or existing legislation will require major changes in order to comply with the Directive[20]. Therefore Member States can profit from consultation and co-operation among each other and at the EU level. This would further aid the adoption of national anti-discrimination legislation which would offer the same minimum protection in each and every Member State[21].

In order to understand more thoroughly the importance of the EU Racial Equality Directive we shall examine its precise terms[22]. One of the great merits of the Directive is that it gives a definition of discrimination based on racial or ethnic origin. Article 2 defines not only direct discrimination, but also indirect discrimination while stating that the principle of equal treatment shall mean absence of the either type of discrimination. Article 2.2 (a) reads, '*direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin*'. Article 2.2 (b) reads, '*indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or provision is objectively justified by a legitimate aim and a means of achieving that aim are appropriate and necessary*'. While five out of the Member States have defined in their legislation direct and indirect discrimination that is similar to the definitions given by the Directive[23], some of the remaining Member States have stated that the absence of a European definition was a reason for the absence of a legal definition of these terms on the national level[24]. Article 2.2 certainly provides a clear standard for those Member States. Article 2.3 states that discrimination shall include harassment and provides a relatively broad definition of it. In particular, harassment occurs where either this is the intent or the effect of the behaviour in question[25]. Article 2.4 includes prohibition of '*instruction to discriminate*'. This most frequently arises in relation to employment placement agencies, where employers request agencies to send only workers of a particular ethnic origin[26]. Victimization is not treated as a further category of discrimination, but under the provisions on enforcement in the Article 9. It is defined as '*adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment*'. As shall be pointed out later, Article 8 of the Directive permits a shift in the burden of proof in cases alleging a

[20] That was the outcome of a research carried out by the Migration Policy Group in Cooperation with the European Monitoring Centre on Racism and Xenophobia. Project period May 1999 – January 2000. The second phase of the project will be completed in 2001. (Adopted from Niessen, The EU Racial Equality Directive, p. 2).

[21] Niessen, The EU Racial Equality Directive, at p. 2.

[22] Following are some distinct features of the Directive, and not a comprehensive analysis of its provisions and their possible deficiencies since such an examination would be beyond the scope of this study.

[23] Namely the UK, the Netherlands, Ireland, Spain and Sweden.

[24] Niessen, The EU Racial Equality Directive, p. 3.

[25] M. Bell, Meeting the Challenge? A comparison between the EU Racial Equality Directive and the Starting Line, in "The Starting Line and incorporation of Racial Equality Directive into the national laws of the EU Member States and accession states", Brussels/London, I. Chopin and J. Niessen eds., 2001, p. 26 (Hereinafter Bell, Meeting the Challenge).

[26] Idem.

breach of the principle of equal treatment. However the text of the Directive does not clearly apply the burden of proof provisions to Article 9 on victimization[27].

The personal scope of the Directive has two aspects, its application to third-country nationals and its application to both natural and legal persons. European Union law varies in its effects between certain provisions which only apply to citizens of Member States[28], and other provisions which apply to all persons residing in the territory of the EU[29]. This issue is especially salient in the context of laws against racial discrimination, where high proportions of the potential victims of such discrimination are also third-country nationals[30]. The Racial Equality Directive follows a broad approach and applies to '*all persons*'[31]. While the difference of treatment on the ground of racial or ethnic origin is absolutely prohibited, and therefore applies to the third-country nationals as well, Article 3.2 clearly states that the Directive '*does not cover difference of treatment based on nationality*'. The exclusion of rules regarding entry into a Member State, and granting of the residence and work permit to the third-country nationals from the scope of the Directive largely keeps in line with the existing case law of the European Court of Justice (ECJ)[32]. Article 3.2 is best understood as protecting differences in treatment in law that are linked to citizenship/residential status from allegations of unlawful discrimination. The second aspect of the personal scope of the Directive is its application to both natural and legal persons. Article 3.1 suggests that the Directive does apply generally to legal and natural persons by virtue of the expression '*this Directive shall apply to all persons*'[33]. As is the case with the definition of harassment, this provision accords a significant degree of latitude to the national legislator in determining how implementing laws shall protect legal persons[34].

Let us turn now to the material scope of the Directive. The EU is a body of limited powers[35], and does not enjoy an unlimited competence to regulate discrimination. Therefore, the desire for an "all-embracing" ban on discrimination must be balanced against the realities of the EU's legal powers. Article

[27] Idem, p 28.
[28] Most notably a right to free movement.
[29] Such as the right to equal treatment of women and men.
[30] Bell, Meeting the Challenge, p. 30.
[31] Article 3.1 of Racial Equality Directive. The Preamble to the Directive provides further clarification of this statement in the paragraph 3. While this Section of the Directive is not binding, it is highly persuasive evidence of the intended interpretation of the Directive. European Court of Justice regularly attaches importance to the preambles in determining the meaning of the EU legislative provisions. One example is C-269/97, *Commission v Council* (beef labelling), judgement of 4 April 2000. (Adopted from Bell, Meeting the Challenge, p. 30).
[32] For example, C-262/96, *Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685 and C-269/97, *El-Yassini v Secretary of State for the Home Department* [1999] ECR I-1209 (Adopted from Bell, Meeting the Challenge, p. 30). Further, the Article 1.3 of the 1969 UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) states that nothing in the Convention '*may be interpreted as affecting in any way the legal provisions of the States Parties concerning nationality, citizenship or naturalization [and therefore the immigration policies], provided that such provisions do not discriminate against any particular nationality*'.
[33] Recital 16 of the Directive further clarifies that '*it is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member states should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origins of their members*' (Adopted from Bell, Meeting the Challenge, p.32).
[34] Bell, Meeting the Challenge, p. 32.
[35] Article 5 of the Treaty establishing the European Community.

3.1 lists eight areas to which the Directive applies: (a) conditions for access to employment, to self-employment and to occupation; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining; (c) employment and working conditions; d) membership of and involvement in an organization of workers or employers, or any organization whose members carry on a particular profession; (e) social protection, including social security and healthcare; (f) social advantages; (g) education and (h) access to and supply of goods and services which are available to the public. As we can see the Directive applies only to a closed list of areas, and therefore any extension of its application will require future amendment[36]. The Racial Equality Directive also includes two exceptions to the ban on discrimination in the above listed areas. The first exception regards genuine occupational requirements[37] and is designed to provide for very specific circumstances where racial or ethnic origin could be a legitimate consideration in employment[38]. The second exception regards positive action[39]. The Directive permits, but does not oblige Member States to adopt positive actions schemes. The experience of the EU Sex Equality Directive[40] has already provided an indication of the scope of such measures in employment.

Learning from the negative experience of the 1976 EU Sex Equality Directive[41] that did not specify in detail mechanisms for its enforcement, nor the remedies to which victims of discrimination would be entitled, the Racial Equality Directive puts emphasis on effective mechanisms for its enforcement. There are three issues to be considered in the context of remedies and Directive's enforcement: defence of rights, burden of proof and sanctions[42]. First, regarding defence of rights, Article 7 states that Member States shall ensure that judicial and/or administrative enforcement procedures are available to all persons concerned. In addition, associations, organizations and other legal entities (which have a legitimate interest) may engage on behalf of or in support of the complaint (with plaintiff's approval) in any judicial and/or administrative procedures provided for the enforcement of the obligations under the Directive[43]. Second, Article 8 is about the sharing of the burden of proof[44]. Member states have to ensure that persons

[36] Bell, Meeting the Challenge, p. 34.
[37] Article 4 of the Racial Equality Directive.
[38] For example, a project to improve awareness of breast cancer among women of Chinese ethnic origin might be more effectively conducted by health professionals from within the Chinese ethnic community (Adopted from Bell, Meeting the Challenge, p. 38).
[39] Article 5 of the Racial Equality Directive.
[40] The full name is Council Directive 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. Council Directive 76/207/EEC of 9 February 1976, OJ L 039, 14/02/1976 pp. 0040 - 0042.
[41] Racial Equality Directive has built on and learned from both positive and negative aspects and outcomes of the Sex Equality Directive. In regard to principles, definitions and only in part implementation it was modelled on its predecessor (Adopted from Chopin, Campaigning Against Racism, p.10).
[42] Bell, Meeting the Challenge, p.40.
[43] Niessen, The EU Racial Equality Directive, p. 3.
[44] Mr Niessen states that the standard set for the burden of proof is often erroneously referred to as a shift from plaintiff to defendant. This is not correct. The plaintiff has to establish before a court or another competent authority facts from which it may be presumed that there has been direct or indirect discrimination. It is then for the defendant to prove that no

who consider themselves wronged can bring a case before a court or other competent authority. The complainant should provide evidence of discrimination as to establish *prima facie* case of discrimination. It shall be for the respondent to prove that there has been no breach of the principle of equal treatment. Article 8.3 emphasizes that this principle does not apply to criminal procedures. Third, regarding sanctions, Article 15 obliges Member States to lay down rules on (pecuniary and non-pecuniary) sanctions and ensure that they are applied and are effective, proportionate and dissuasive[45].

Finally, the Racial Equality Directive prescribes mechanisms through which its implementation shall be controlled. The primary focus will naturally be on the "bodies for the promotion of equal treatment" required in Article 13. Secondly, the European Commission retains its oversight role, reinforced by a periodic reporting obligation[46]. The Member States must provide the Commission with all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of the Directive[47]. The Commission's report shall take into account the views of the European Monitoring Centre on Racism and Xenophobia (EUMC)[48], the social partners and relevant non-governmental organizations. The first report is due in July 2005 and thereafter every five years. The reports may lead to revisions and updates of the Directive[49].

We shall now look at Article 13 that provides for the establishment of bodies for the promotion of equal treatment in some more detail, as to understand what the Directive prescribes before we proceed to examine how the British CRE, the Dutch ETC and the Irish EA and ODEI, specialised bodies scrutinised by this study meet the standards set by the Directive. No later than mid July 2003, Member States must designate a body or bodies for the promotion of equal treatment without discrimination on the grounds of racial and ethnic origin. Article 13 states that these bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights. The mandate of these bodies must include providing assistance to victims of discrimination, conducting independent surveys, publishing independent reports and making recommendations on any issue related to discrimination on the grounds of racial or ethnic origin. As the term '*include*' suggest, Member States are free to give a broader mandate to such bodies. This is very important to keep in mind because Article 13 is rather general as to allow the Member States, in respect of the principle of subsidiarity, sufficient discretion to implement it in accordance with the national legal orders.

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discrimination has taken place. It is therefore better to speak of sharing of the burden of proof (Adopted from Niessen, The EU Racial Equality Directive, pp. 3-4).

[45] Niessen, The EU Racial Equality Directive, p.3.

[46] Bell, Meeting the Challenge, p.46.

[47] Article 17 of the Racial Equality Directive.

[48] EUMC was established in 1997, with the headquarters in Vienna. Its prime objective is to provide the Community and its Member States with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence (Article 2 of the Council Regulation (EC) No 1035/97 of 2 June 1997 establishing European Monitoring Centre on Racism and Xenophobia).

[49] Bell, Meeting the Challenge, p. 3.

Experiences of the British CRE, the Dutch ETC and the Irish EA and the ODEI in different legal contexts with such issues as indirect discrimination, the sharing of the burden of proof, the collection of information, complaint procedures and the balance between judicial action and conciliation procedures, may prove a valuable asset for the establishment of specialised bodies in the other Member States. It is on this premise that the present thesis embarks to comparatively examine the bodies for the promotion of equal treatment in the UK, the Netherlands and Ireland.

CHAPTER 2. THE COMMISSION FOR RACIAL EQUALITY IN THE UK

It is generally accepted that the United Kingdom has one of the most advanced institutional frameworks to combat racism and discrimination[50]. This chapter addresses the role of the Commission of Racial Equality in that framework. The first part gives an overview of the civil and administrative body of law concerning racial discrimination. The second part presents the CRE duties, powers and practices. The third part offers an evaluation of particularly positive aspects of the CRE practice in the light of providing examples of good practices for the new specialised bodies. An additional item addressed in the third part includes the main weaknesses of the Great Britain's anti-discrimination law as they make a strong impact on the CRE practice. Case Law is an integral element of this Chapter as it serves the scope to illustrate points made.

2.1. THE RACE RELATIONS ACT

The UK legislation specifically concerning racism in the civil and administrative spheres is 1976 Race Relations Act[51]. It is considered one of the most comprehensive pieces of legislation dealing specifically with racial discrimination[52]. The Act repealed the Race Relations Acts of 1965 and 1968[53], and applies in England, Wales and Scotland (Great Britain). Legislation applying in Northern Ireland, Race Relations (Northern Ireland) Order 1997, is this Act's almost identical counterpart. However there are some significant differences between the two pieces of legislation. The Order also prohibits discrimination on the ground of religious believes and identifies Irish Travellers as a racial group for the purposes of the

[50] The European Commission against Racism and Intolerance (ECRI), First Report on the United Kingdom (adopted on 6th March 1998 and made public on 25th January), p.2 (Hereinafter ECRI First Report on the UK).
[51] Hereinafter referred to as the Act or RRA.
[52] ECRI First Report on the UK, p.4.
[53] Guide To The RRA, The United Kingdom Home Office Web site: http://www.homeoffice.gov.uk/raceact.htm. To the extent that principles have been taken over from those previous Acts, judicial decisions on the interpretation and application of those Acts are still relevant to the legislation currently in force (Adopted from The United Kingdom, in LEGAL MEASURES TO COMBAT RACISM AND INTOLERANCE IN THE MEMBER STATES OF THE COUNCIL OF EUROPE, Report prepared by the Swiss Institute of Comparative Law, Lausanne for European Commission against Racism and Intolerance, Strasbourg, 1998, p.520).

Order. Further, in the Order, public order and safety are two additional grounds for exemption from prohibition of racial discrimination in addition to the ones already enshrined in the RRA. Finally, while the Act established Commission for Racial Equality, the Order established Commission for Racial Equality for Northern Ireland, which in 1988 became integrated in the Commission for Racial Equality for Northern Ireland instituted by the Northern Ireland Act of 1988[54].

The RRA makes discrimination on the grounds of colour, race, nationality (including citizenship) or ethnic or national origin, unlawful in employment, training and related matters, in education, in the provision of goods, facilities and services, and in the disposal and management of premises. The Act applies both in public and private sectors. It gives individuals the right of direct access to the Civil Courts and Industrial Tribunals for legal remedies for unlawful discrimination. The act offers an interpretation of the term race, but this issue is dealt with at greater length later in this Chapter. The Act covers direct discrimination, indirect discrimination and victimization. While the definitions of direct discrimination and victimization are similar to those of the Directive, the definition of indirect discrimination is worded differently[55]. Racial harassment is also prohibited in any of the areas covered by the Act. Outside of these areas racial violence and harassment are criminal offences under 1998 Crime and Disorder Act. The Act does not cover incitement to racial hatred, which is criminalized by the 1986 Public Order Act[56]. Provisions specifically concerning racism in the criminal law are beyond the scope of this thesis, but shall be referred to where relevant to the present topic Although the Act does not allow affirmative action it permits certain forms of positive action by training bodies, by employers and by trade unions, in order to prevent discrimination or overcome past discrimination. In addition to the exceptions to the application of the Act, regarding fields of education, employment and goods, facilities and services, the Act provides for some general exceptions in relation to all the provisions of the Act. These concern the areas of charity activities, sport, special needs of racial groups in regard to education, training or welfare and education or training of persons not ordinarily resident in the Great Britain[57].

Specific provisions of the Act of major relevance for the topic of this thesis, namely those treating the burden of proof and the meaning of the term 'race' are discussed in detail further down.

[54] B. Cohen, United Kingdom, in RESEARCH ON NATIONAL AND EUROPEAN LEGISLATION COMBATING RACISM, Joint Project of The Migration Policy Group and The European Monitoring Centre on Racism & Xenophobia (EUMC), May 1999 -January 2000, p.2 (Hereinafter Cohen, The UK Legislation Combating Racism).

[55] RRA, Section 1(1)(b) reads *'A person discriminates against another ... if he applies to that other requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but - (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it and (ii) which he cannot show to be justifiable irrespective of the colour, race nationality or ethnic or national origins of the person to whom it is applied; and (iii) which is to the detriment of that other because he cannot comply with it.*

[56] The RRA: Your Rights, The United Kingdom Home Office Web site: http://www.homeoffice.gov.uk/raceact.htm.

[57] Idem.

2.1.1. THE RACE RELATIONS (AMENDMENT) ACT 2000

The Race Relations (Amendment) Act 2000 (the 2000 Act) came into force on 2nd April 2001. The new Act amends RRA and strengthens its application to public authorities in several important ways[58]: **(a)** it extends the scope of the RRA to cover areas that were previously excluded, and makes it unlawful for public authorities to discriminate on racial grounds in carrying out any of their functions[59]; **(b)** it places a general statutory duty[60] on a wide range of public authorities[61] to promote racial equality and prevent racial discrimination; **(c)** it gives the Home Secretary the power to make Orders imposing specific duties on all or some public authorities bound by the general duty[62]; these specific duties will be enforceable by the Commission for Racial Equality, serving compliance notices, backed up by court orders, if necessary and **(d)** it gives the Commission for Racial Equality powers to issue statutory Codes of Practice, providing practical guidance to public authorities on how to fulfil both their general and specific duties to promote racial equality.

Like the Human Rights Act 1998[63], the new Act defines public authority widely – anyone whose work involves functions of a public nature. Thus the 2000 Act applies also to any private or voluntary agency carrying out any public functions. The main exemptions to the 2000 Act are: parliamentary functions, judicial proceedings, functions of the security services, decisions not to prosecute and certain immigration and nationality functions, where it will remain lawful to discriminate on grounds of nationality or

[58] The General Duty to Promote Racial Equality: Guidance for public Authorities on their obligations under the Race Relations (Amendment) Act 2000, Commission for Racial Equality publication, April 2001, p.5 (Hereinafter The General Duty to Promote Racial Equality).

[59] While the RRA outlawed discrimination by public authorities in relation to their employment practices and their activities in the areas of education, housing and the provision of goods, facilities and services, the new Act outlaws discrimination in carrying out any of public authorities' functions. For the first time the full force of the RRA shall apply to these authorities (Adopted from The Race Relations (Amendment) Act 2000: Strengthening the Race Relations Act, Commission for Racial Equality publication, December 2000, p.3).

[60] The Act replaces Section 71 of the RRA with a new general duty. This requires the public authorities listed in the Schedule 1 to the Act to have due regard to the need to eliminate unlawful discrimination and promote equality of opportunity and good race relations in carrying their functions. This duty differs from the duty under Section 71 of the RRA, which it replaces in the sense that it is enforceable (Adopted from The Race Relations (Amendment) Act 2000: Strengthening the Race Relations Act, Commission for Racial Equality publication, December 2000, p.4).

[61] Public authorities subject to the general duty, as listed in schedule 1A to the Amended RRA: Ministers of the Crown and government departments, Scottish Administration, National Assembly for Wales, Armed Forces, National Health Service (NHS), Local government, Educational and Housing bodies and Police. There is also an extensive list of public authorities proposed for addition to schedule 1A.

[62] Scottish Ministers can impose specific duties on devolved authorities.

[63] 1998 Human Rights Act implemented on the 2nd October 2000, gives further effect in domestic law to the rights and freedoms set out in the European Convention on Human Rights (ECHR). On the one hand, the Act requires all legislation to be interpreted as far as possible in a way which is compatible with the ECHR. On the other hand, the Act makes it unlawful for the public authorities to act in a way which is incompatible with the rights set out in the ECHR (Adopted from the Second ECRI Report on the United Kingdom (adopted on 16th June 2000 and made public on 3 April 2001), pp. 1-2). In the Human Rights Act 'the Convention rights' include Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of the First Protocol and Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention (Article 1.1 of the Human Rights Act 1998).

ethnic or national origin – but not race or colour[64]. This radical piece of legislation was enacted in response[65] to the Stephen Lawrence Inquiry Report (the Inquiry Report), published in February 1999[66]. While the Inquiry was concerned primarily with policing, the Inquiry Report made it clear that few institutions in the UK had room for complacency. The Inquiry Report put forward a definition of 'institutional racism'[67] that could be applied to any institution as well as seventy wide-ranging recommendations for improving the handling of racial crime[68] One of the recommendations reads: *it is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging against any Section of communities*[69]. The new positive duty on public authorities to promote racial equality gives statutory force to this Inquiry's recommendation.

In the long term, the new positive duty on public authorities may be the most significant aspect of the amended RRA, because it gives statutory force to the imperative of tackling institutional racism.

2.2. THE COMMISSION FOR RACIAL EQUALITY

Now that we have an overall picture of the 1976 RRA as amended by the 2000 Act let us take a closer look at the RRA provisions regarding the CRE. The Commission for Racial Equality (CRE) is established by Part VII, Section 43 and Schedule 1 of RRA. It is a corporate body that the Act specifies as not being a government department or part of government departments. It must have between eight and fifteen members, who are appointed by the Home Secretary (Minister of Interior). The headquarters of the CRE is in London, but it maintains five regional offices, one in Scotland, one in Wales and three in England[70]. The CRE presently employs 216 staff and was reorganised in 1994 into three principal divisions: equality assurance (including employment in the public and private sectors, local government

[64] The Race Relations (Amendment) Act 2000: Strengthening the Race Relations Act, Commission for Racial Equality publication, December 2000, p.2 (Hereinafter Strengthening the Race Relations Act).
[65] Recommendations of CRE in its third review of the RRA have also served as a catalyst for much needed change.
[66] The Inquiry Report is a result of Home Secretary judicial inquiry into the death of Stephen Lawrence, a young African student who was murdered in Greenwich in 1993. The terms of reference of the Inquiry were 'to enquire into the matters arising from Stephen Lawrence's death, in order particularly to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes'. The Inquiry Report found that 'institutional racism' played a part in the flawed investigation by the Metropolitan Police Service of the murder of Stephen Lawrence, notably in the treatment of the family of the victim, in the failure of officers to recognise the murder as a racially motivated crime and in the lack of urgency and commitment in some areas of the investigation (Adopted from the ECRI Second Report on the United Kingdom (adopted on 16th June 2000 and made public on 3 April 2001), p.2).
[67] Institutional racism is 'the collective failure of an organization to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people'. The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny, February 1999, Paragraph 6.34.
[68] The Home Secretary has produced an Action Plan in 1999 in response to these recommendations and established a Steering Group for the oversight of this Plan. The Second Annual Report on Progress of Home Secretary's Action Plan has been published in February 2001.
[69] The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny, February 1999, Paragraph 46.27.
[70] Edinburgh, Cardiff, Birmingham, Manchester and Leeds.

services, criminal justice and immigration); law enforcement (including complaints, assistance to complaints and formal investigations) and corporate standards (administrative and planning functions)[71]. The Commission is funded by an annual grant from the Home Office (Ministry of Interior)[72], but works independently of government[73]. The CRE budget has increased gradually, from 14,825,000 in 1998/99 to 16,420,000 in 1999/2000 and further to 19,852,000 in 2000/01. The CRE has a number of statutory duties and powers, which I have grouped under the following headings.

2.2.1. PROMOTION OF RACIAL EQUALITY AND REVIEW OF THE RRA

The duties of the CRE are listed in the RRA Section 43 (1) and they include: **(a)** work towards elimination of discrimination; **(b)** promotion of equality of opportunity, and good relations, between persons of different racial groups; and **(c)** keeping under review the working of the RRA and drawing up proposals for its amendments.

The first two of these duties are essentially of promotional and preventive nature. To the ends of their fulfilment, the CRE is accorded certain powers. Section 45 RRA allows the CRE to undertake research and to engage in educational activities. In addition, the CRE may provide financial and other assistance to third parties who wish to engage in research and education. In the same vein, Section 44 RRA empowers the CRE to accord financial assistance to other organizations '*concerned with the promotion of equality of opportunity, and good relations, between persons of different racial groups*[74]'. In fact, the CRE spends several million pounds every year funding Racial Equality Councils (RECs), a network of voluntary associations of persons interested in race relations[75].

Fields in which the CRE exercises its preventive duties are many and range from secondary school education[76] to small enterprises[77]. Forms of the exercise of these duties are in the same fashion

[71] The United Kingdom, in LEGAL MEASURES TO COMBAT RACISM AND INTOLERANCE IN THE MEMBER STATES OF THE COUNCIL OF EUROPE, Report prepared by the Swiss Institute of Comparative Law, Lausanne for European Commission against Racism and Intolerance, Strasbourg, 1998, p.530 (Hereinafter The Swiss Institute Report – the UK).

[72] Data for the years 1998/99 and 1999/2000 obtained from REPORT SUBMITTED BY THE UNITED KINGDOM PURSUANT TO ARTICLE 25 OF THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, Part II, CRE, p. 3. Data for year 2000/01 obtained at the presentation regarding CRE practice delivered by Mr. Gurbux Singh, CRE Chairman, at Workshop: Legal and Institutional Measures to Fight Racial Discrimination (The Cases of Belgium, Ireland, the Netherlands, Sweden and the UK), held in Vienna from 17th to 18th May 2001, organised by European Centre for Social Welfare Policy and Research, affiliated to the United Nations.

[73] The Swiss Institute Report – the UK, p. 530.

[74] Idem.

[75] In the fiscal year 1999/2000 the CRE's financial assistance to 100 RECs around the country amounted to £4,321,000. CRE funding relates to salaries and pensions of Racial Equality Officers employed in RECs. In addition, RECs receive funding from local authorities and private sector to cover project aid and administrative costs (Adopted from the Annual Report of the CRE – January 1999/March 2000, p. 55).

[76] In November 1999, the CRE published the first national standard for racial equality in schools in England and Wales, *Learning for All*, that provides a framework within which schools can plan for and mainstream racial equality in their work. (Adopted from the Annual Report of the CRE – January 1999/March 2000, p. 17).

numerous[78]. Among numerous successful initiatives of the CRE for the irradiation of discrimination one that stands out is the Leadership Challenge. It targets leaders in public, private and voluntary sectors, inviting them to make personal commitment to promote racial equality, both in their own organizations and more widely throughout their sector. Signatories gain access to advice and support from the CRE in the form of the Leadership Challenge network, where they are instructed on how to create and successfully implement corporate racial equality action plans[79]. This particular initiative is a result of CRE's experience that the pace and quality of progress in anti-discrimination struggle are manifestly determined by the degree of commitment at the top of an organization and further by efficient communication of the need to eliminate discriminatory attitudes to staff at all levels.

On a different level, Section 47 of the RRA empowers the CRE to issue Codes of Practice for the elimination of discrimination and the promotion of equality of opportunity in the fields covered by the RRA[80]. As regards the legal value of the codes issued, subsection 47(10) provides that:

> "A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Act before an industrial tribunal, a county court, or in Scotland, a sheriff court, any code of practice issued under this Section shall be admissible in evidence and if any provision of such a code appears to the tribunal or the court to be relevant to any question arising in the proceedings it shall be taken into account into determining that question".

The CRE has in fact issued seven Codes of Practice for the Elimination of Racial Discrimination and Promotion of Equality of Opportunity to date. Areas addressed include: employment[81], rented and non-rented housing, education, maternity and primary health care services.

The third duty of the CRE requires it to keep the working of the Act under review and '*when required by the Secretary of State or otherwise think it necessary*' to submit the proposals for its amendment. So far CRE has made three reviews of the Act. In fulfilling this duty, the CRE has made three reviews of the Act so far. The first review, in 1985, never even received a reply and the second one, in 1992, was comprehensively rejected after a two-year delay. The CRE's third review, presented in 1998, and reinforced by the recommendations of the Stephen Lawrence Inquiry Report, resulted in the government introducing a race Relations (Amendment) Act in the House of Lords in 1999[82]. Among broad

[77] Speedy Self Drive Limited, like many other small firms in the north of England and elsewhere, adopted an equal opportunities policy, with the CRE guidance. The company's policy includes monitoring of car rental requests, to identify any discriminatory patterns. (Adopted from the Annual Report of the CRE – January 1999/March 2000, p. 23).

[78] They range from drafting and publication of Codes of Practice for the specific service providers to on the road shows for the promotion of the new 2000 Act.

[79] The Annual Report of the CRE, 1999/2000, p.16.

[80] These Codes must be approved by the Home Secretary and are thereafter subject to annulment by a resolution of either House of Parliament.

[81] Industrial tribunals often refer to the employment Code of Practice when granting relief in the form of a recommendation addressed to the respondent. It is thus recommended that the respondent implement the Code (Adopted from The Swiss Institute Report – the UK, p.531.

[82] S. Parsons, CRE Chief Executive, Preface to the Annual Report of the CRE, 1999/2000, p.4.

ranging proposals for amendment to the Act[83], the review included the following two proposals: affirming the right of every person not to be discriminated against on racial grounds by any public body and a new duty on public authorities to promote racial equality: When the bill was announced in the Queen's speech in November 1999, the CRE realised that the proposed extension to the RRA did not include indirect discrimination. The CRE joined forces with ethnic minority and community organizations in an 'Act Against Racism' campaign to mobilise support for a stronger bill and succeeded in persuading the government to reconsider the legislation. The CRE took a leading role in briefing members of the House of Lords on this issue[84]. By the time the bill reached the House of Commons the government had also agreed to include in the bill not only indirect discrimination prohibition but also an enforceable positive duty on public authorities to promote racial equality, for which the CRE had long been arguing. As the bill continued its passage in parliament the CRE was optimistic that, with its two-pronged approach – the outlawing of discrimination and obligations to promote equality – it could provide the legislative means to achieve real and significant change throughout British society[85]. On the 2 April, 2001 the 2000 Act came into force. The fact that it outlaws both direct and indirect racial discrimination in public functions not previously covered by the RRA, and in addition imposes an enforceable duty to promote racial equality on number of those functions, makes the Act an advanced piece of race relations legislation.

Besides duties of the CRE listed in Section 43, Section 45 requires CRE to deliver annual reports '*including general survey of developments, during the period to which it relates, in respect of matters falling within the scope of the Commission's functions*'. CRE reports highlight also significant cases that have come before the Courts or Industrial Tribunals and set out the most important findings and recommendations arising in connection with Commission's formal investigations.

2.2.1.1. INNOVATIVE APPROACH TO FULFILMENT OF THE STATUTORY DUTIES

Broad scope of the CRE preventive duties gives the CRE the possibility to interpret them in such a way as to address efficiently current issues in the equal treatment field. As a result the CRE has introduced some innovative approaches in its work aimed towards elimination of racial discrimination. The CRE involvement with immigration legislation on the national level and anti-discrimination legislation on the EU level are described below as to illustrate these innovative approaches.

In both of its reports on the UK, ECRI was concerned that the frequent changes in immigration and asylum policies designed to increasingly deter these categories of persons from coming to the UK

[83] Including broadening of the RRA scope and enhancing the powers of the CRE and Employment Tribunals (Adopted from REPORT SUBMITTED BY THE UNITED KINGDOM PURSUANT TO ARTICLE 25 OF THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, p.3).
[84] Annual Report of the CRE, 1999/2000, p.29.
[85] Idem.

have played a fundamental role in reinforcing attitudes of hostility and suspicion towards members of minority groups[86]. Particular concern was expressed in relation to Section 8 of the 1996 Asylum and Immigration Act[87], which makes it a criminal offence for employers to take an employee whose immigration status prevents them from working in the UK. ECRI noted that there was a risk that these provision could lead to the development of a perception that employment of any person who might be an immigrant is per se problematic and therefore to an increased likelihood of racial discrimination at point of recruitment[88]. ECRI urged the government to take all possible measures to make sure that this is actually avoided. Although recognising potential abuse, the British authorities maintained that this provision is a useful tool against unscrupulous and exploitative employers[89].

Although the duties and powers ascribed to the CRE by the RRA fall short of the review of immigration legislation[90], the CRE has used its authority as to lobby along the lines of the ECRI Reports recommending measures that would circumcise abuse and malpractice in regard to the Section 8 of the Immigration and Asylum Act. During the drafting of the new 1999 Immigration and Asylum Act, the CRE submitted written evidence to the House of Commons Special Standing Committee on the Immigration and Asylum Act, and subsequently briefed MPs in relations to those provisions that were seen as likely to have negative impact on racial equality by leading to prejudice on grounds of race, nationality or religion. Finally, the CRE was invited by the Home Office to develop alternative proposals to the employer's sanctions in Section 8 of the 1996 Immigration and Asylum Act[91]. Although the result of those proposals does not match fully CRE's call to repeal the Section 8, the Immigration and Asylum Act 1999 includes a proposal for a statutory Code of Practice to provide guidance to employers in the avoidance of racial discrimination when securing the defence under Section 8. Given the CRE's practice with drafting statutory Codes of Practice and the new powers ascribed to it by the 2000 Act, namely drafting of Codes of Practice for the public authorities fulfilling their general and specific duties regarding promotion of racial equality, this

[86] Second ECRI Report on the United Kingdom (adopted on 16th June 2000 and made public on 3 April 2001), p.10 (Hereinafter ECRI Second Report on the UK).

[87] Section 8 remained identical in the new 1999 Immigration and Asylum Act therefore is relevant to discuss in this context.

[88] ECRI First Report on the UK, p. 11.

[89] Idem.

[90] This is logical for two reasons. First of all the immigration legislation is wholly based on the principle of distinction among people on the basis of their citizenship, and intervention with this basic principle would in a way render null the whole body of immigration law. Second, this basic principle of immigration law is recognised in the international law of human rights as the one to which non-discrimination on the ground of nationality/citizenship does not apply. Article 1.3 of the International Convention on the Elimination of All forms of Racial Discrimination reads *'Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality'*. In Article 3.2 the Racial Equality Directive contains the same principle, but goes even further by stating that it does not cover '*any treatment which arises from the legal status of the third-country nationals and stateless persons*' by a Member state ether. As these two authoritative sources best exemplify differential treatment on the grounds of nationality in the immigration law is internationally accepted. As in international, this is also the case in national law, therefore it's not surprising that RRA stands on the same level of the Immigration and Asylum Act without interfering with it, nor granting RRA duties or powers to do so.

[91] Annual Report of the CRE, 1999/2000, p.30.

proposal shall most probably result in the CRE drafting statutory Code of Practice regarding Section 8 of the 1999 Asylum and Immigration Act.

Second illustration of the CRE innovative approach to elimination of racial discrimination regards the fact that it has been at the forefront of efforts to introduce a legal right not to be discriminated against in all 15 Member States of the EU. Article 13 of the Treaty of Amsterdam provided the EU with the legal basis for the first time to take action to combat discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 13 is implemented by coming into force of the two new Directives, first on the Racial Equality and the second on the Equality of Opportunity. CRE pressed for the ratification of the Directives by the British government intensively[92].

2.2.1.2. WORKING IN PARTNERSHIP

In spite of its authority both on national and international level and comprehensiveness of the legal framework within which it operates the CRE cannot succeed alone in elimination of racial discrimination. For this reason the CRE's vision is 'to work in partnership with individuals and organizations for a fair and a just society which values diversity'[93]. The CRE's coordination and joint action with different agencies in execution of its duties has come to be recognised as essential in effective tackling of racial discrimination[94]. In her preface to the 1999/2000 CRE Annual Report, Susie Parsons, the CRE Chief Executive, has stressed that a major theme in the CRE's work in this period has been the strong partnerships the CRE has forged with the Equal Opportunities Commission, Equalities Commission Northern Ireland and Disability Rights Council[95] (now superseded by the Disability Rights Commission). The most significant example of this cooperation regards the development of 'one-stop shops', joint representation units dealing with race, sex and disability discrimination. These units would both focus scarce specialist resources more effectively and enable multiple discrimination cases to be handled better[96]. Further example concerns publication of *Equal Opportunities is Your Business Too*, a first document offering 'joined-up' advice for the businesses on the three equality issues presently covered by anti-discrimination legislation. Yet another example regards a new joint project launched with

[92] It should be noted that although the UK race relations law provided a partial model for the Racial Equality Directive, the RRA must be amended to bring in line with the Directive. Possible changes to existing race relations legislation to comply with the Directive include also: incorporation of the new, wider definition of indirect discrimination – which is similar to the definition which the CRE proposed in its proposals for reform of the RRA, incorporation of the shift in the burden of proof once a *prima facie* case is established – which the CRE has already recommended in its proposals for reform of RRA and removal of any exceptions that are not permitted in the Directive, or define more restrictively the exceptions which in the Directive are permitted in very limited, specific circumstances only, for example the exception for genuine occupational qualification in UK laws must be much tighter (Adopted from The European Union, The Race Directive , the CRE Web site: http://www.cre.gov.uk,).

[93] Commission for Racial Equality's Mapping Exercise serving the purpose of formation of RAXEN, EUMC Network, 28th February 2001 (Hereinafter The UK Mapping Exercise).

[94] R. Oakley, United Kingdom, in Racial Violence and Harassment in Europe, Strasburg 1992, p.20.

[95] The Annual Report of the CRE, 1999/2000,p. 5.

[96] Idem, p. 11.

local authorities that establishes a generic equality standard covering race, sex and disability that should be applied by them[97].

Further evidence of the CRE's commitment to fight racism in partnership comes from the CRE's well-established collaboration with racial equality councils (RECs), voluntary anti-discrimination organizations operating on at regional and local levels. One example of this partnership regards the publication of *Racial Equality Matters – An Agenda for the Scottish Parliament*, produced by Scottish RECs and the CRE. The publication has been very influential in focusing the attention of the Scottish Parliament on racial equality. During 1999/2000, the Home Office provided a special funding allocation to the CRE for an important development programme improve the work of RECs and its collaboration with them. The Regional Racial Equality Development Programme focused on developing and strengthening of the network of 102 RECs around the country and has already had notable success in the first year of operation.

The CRE is concerned to provide effective support for RECs as to help them deliver high quality service. In 2000 CRE launched core standards for RECs. By April 2003, following a three-year training programme, all RECs will have to demonstrate their competence in each of the twenty CRE core standards. Through this work, RECs will be in a position to meet the demands of a quality agenda set by the government for local authorities.

RECs also play an important role in dealing with racial incidents. RECs are part of multi –agency panels involving close cooperation at local level between the police, local authority housing, education and social services departments, the Crown Prosecution Service and the RECs, as a way to develop an effective response to racial incidents[98]. This multi-agency approach to racial incidents has been repeatedly praised by ECRI as innovative and highly effective in countering racial incidents.

In the future RECs continue to play an increasingly important role in combating racial discrimination. The new 2000 Act imposes a general duty to eliminate racial discrimination and promote equality also on local government, local education authorities, local health authorities, housing departments and employment services. The CRE together with RECs, will need to work closely with all these organizations to make sure they are in tune with the demands of the new legislation.

Complaint Aid Development Programme, also funded by the Home Office in 1999/2000, aims to maximise access to representation for victims of racial discrimination, to pilot 'safety net' provision for complaints whose requests for representation cannot be met directly by the CRE or by CRE-funded

[97] The Annual Report of the CRE, 1999/2000, p.19.
[98] ECRI Second Report on the UK, p. 3.

organizations and to examine feasibility of establishing 'one-stop shops' for representation in race, sex and disability discrimination cases. In accordance with these aims, the CRE and RECs examined a new civil procedures being operated by county courts[99]. A strategy has been developed for taking certain non-employment racial discrimination cases under 'small claims' procedures. This offers a cheaper, less complex and quicker procedure than using the county courts. Under the Lay Representatives (Rights of Audience) Order 1999, lay representatives (who can include RECs staff) can represent clients in small claims courts. The use of small claims procedure to hear racial discrimination cases was given a boost with the successful hearing of a CRE-supported case by Newcastle Small Claims Court. Regional CRE officers are now working with RECs on mechanisms to enable them to represent clients in small-claims actions at county courts[100].

2.2.2. THE INVESTIGATIONS

In the course of its promotional and reviewal duties, the CRE naturally investigates many issues and allegations. Without limiting the power of informal investigations, the RRA creates a special procedure of formal investigations. The CRE's power to conduct formal investigations is the most powerful weapon it has to enforce changes in policy and practice. The Commission may on its own initiative conduct formal investigations, and it must conduct them if required to do so by the Home Secretary[101]. These investigations can be carried out for any purpose connected with the Commissions' duties. The RRA gives the Commission the power to conduct two types of formal investigation: named person investigations and general investigations. In a named person investigation a named respondent will usually be an organization or a company, not an individual. General investigations do not focus on a particular company but are usually conducted to promote equality of opportunity and good race relations in a specific area of work or to establish whether discrimination is occurring in a particular sector.

The formal investigation procedure is quasi judicial. Section 49 RRA prescribes drawing of the terms of reference of a formal investigation as a prerequisite to its the commencement. For example, if the terms of reference from the Home Secretary name individual persons and the CRE, in the course of investigation, proposes to consider whether such persons have committed unlawful acts, then those persons must be notified of the investigation. They must be given the opportunity to make oral or written representations to the CRE and may choose to be represented by a council[102]. Although the CRE must set out the grounds for its belief that discrimination might have occurred in sufficient detail and confine the

[99] Annual Report of the CRE – January 1999/March 2000, p. 12
[100] Idem.
[101], The Swiss Institute Report – the UK, p. 532.
[102] Idem.

terms of reference for the proposed investigation to matters covered in those grounds[103], the practice shows that those terms of reference are prone to larger interpretation. Section 50 RRA gives the CRE fairly wide powers to obtain information in the course of a named person investigation. The CRE may require any person to provide written evidence or to appear as a witness. Where any person fails to do so, the CRE may apply to the court for a compulsion order. Where any person recklessly provides false evidence, he commits a criminal offence. The CRE powers in a general investigation are less extensive. They include ordering respondents to produce documents and give evidence, only with the authorisation form the Home Secretary, and making recommendations. Section 51 RRA requires the CRE to make findings as a result of each formal investigation and to prepare reports of these findings, which are to be published. The reports may further contain recommendations, directed either to persons whose activities were found to effect equality between different racial groups, or to the government, especially in respect of changes in the law[104].

If a named person investigation results in a finding that the contravention of the Act has occurred, the CRE may issue a non-discrimination notice (NDN). NDNs are orders directed to persons or organizations that have committed or are in a course of committing any of the actions violating the RRA, requiring them to cease such actions. Before issuing a non-discrimination notice, the CRE must further notify the person or organization to whom it is addressed of the grounds on which the notice is proposed to be issued and to give them an opportunity to make written or oral, or both kinds of submissions. Once a non-discrimination notice has been issued, the persons or organization to which it is addressed have a right to appeal. The Court or Tribunal is empowered by Section 59 RRA either to quash or amend the notice under challenge.

Once final, an NDN may be enforced by the CRE where it appears that it is not being observed. The Commission has various powers to enforce NDNs. It can: obtain a court order if there is a breach of a requirement in a notice, conduct another formal investigation to see if the requirements of the notice are being carried out and apply for a court order or injunction if, within five years of the notice becoming final, it appears that further unlawful acts will be committed[105]. In this last case we are dealing with so called persistent discrimination. The CRE is further empowered to combat persistent discrimination by the RRA Section 62. It can seek an injunction or restraining order wherever a court or industrial tribunal have found any acts in contravention of the RRA to have occurred and the Commission believes that those acts would otherwise be repeated. A limitation period of five years from the decision of the court or tribunal is again applicable.

[103] Enforcing the Race Relations Act: A code of practice for the CRE, the CRE Web site: http://www.cre.gov.uk, p. 5 (Hereinafter Enforcing the Race Relations Act).
[104] The Swiss Institute Report – the UK, p. 532.
[105] Enforcing the Race Relations Act, p. 6.

However, non-discrimination notices are only used by the CRE in the last resort. The two examples of use of NDNs regard Mobile Doctors Ltd and the Hackney Council. In the first case the NDN was served because the company complied with a racially discriminatory instruction from a customer. In the second case the NDN was served because the Council failed to implement 'Action Plan for Eliminating Racial Discrimination' imposed on it in 1996 by the CRE as a trade of for non-serving an NDN at the time[106].

The latest investigations conducted by the CRE have also involved Crown Prosecution Service, Ford Motor Co Ltd and the Ministry of Defence. All of these organizations agreed to collaborate with the CRE and implement measures designed to irradiate discriminatory practices at the initial stages of the formal investigations[107]. The strong investigatory powers of the CRE and the bad publicity a formal investigation may bring to an organization are the main causes for the organizations' disponibility to alter its practices as soon as the CRE announces or initiates a named person investigation. The CRE investigatory powers combined with its power to issue binding NDNs sends a clear message to anyone perpetuating discriminatory practices warning them that they may find themselves subject of the powerful machinery of the CRE formal investigation. Because of this, these powers of the CRE have acquired over time a value of preventive measures as well.

2.2.3. ENFORCEMENT OF THE GENERAL DUTY TO PROMOTE EQUALITY

Under the 2000 Act the CRE is granted three new powers in addition to those provided for by the 1976 RRA. The first one of them is the power to issue Codes of Practice to provide practical guidance to public authorities in relation to carrying out their duties to promote racial equality[108]. The CRE Codes of Practice shall contain practical examples of how different types of public authorities can comply with their general and specific duties. It is intended that there will be codes for central government departments, local government, educational bodies, the police and the NHS as well as a general code for all other authorities. Once they come into force, their breach would not be actionable as such, but they would be admissible in evidence where it is relevant in any issue in proceedings before the court. The CRE is consulting widely before submitting the codes to the Home Secretary, and has already published non-

[106] Tough measures in Hackney, in Connections, Quarterly magazine of the CRE, winter 2000-2001, p.17.
[107] The Annual Report of the CRE, 1999/2000, p.24.
[108] General duty places specified public authorities under a duty to have due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity. Specific duties imposed by the Home Secretary state what each public authority listed in Schedule 1 to the 2000 Act, must do to comply better with the general duty. The CRE expects that the specific duties on public authorities could include: a duty on all public authorities to monitor their staff by ethnicity, a duty to assess the impact on racial equality of proposed policies, and to consult on them and a duty to monitor the impact on racial equality of existing policies and practices (Adopted from Strengthening the Race Relations Act, p.5).

statutory guidance to help authorities understand what they will be expected to do to comply with general duty[109].

The second is the CRE power to issue a compliance notice if it is satisfied that a public authority has failed to comply with any of its specific duties imposed on the public authority by the Home Secretary after consultation with the Commission. A compliance notice would require the public authority to comply with the duty and to inform the CRE of the steps it has taken to do so. It could also require the public authority to give the CRE other information to verify that the duty has been complied with[110].

The third new power of the CRE regards application for a court order requiring a public authority to provide information required by a compliance notice if that authority has failed to do so, or if the CRE has a reason to believe it does not intend to do so. It also provides for the CRE to apply for the court order where the CRE considers that the public authority has not complied with it within three months of the compliance notice having been served. The court may grant the order in the terms applied for or in more limited terms[111].

2.2.4. LEGAL ACTION POWERS

Legal action powers of the CRE reviewed here include: **(a)** provision of assistance to complainants, **(b)** litigation by the Commission and **(c)** judicial review. The larger part of this section address the CRE's assistance to complainants as well as some additional issues connected to this function, because this CRE function plays is essential in the CRE's role of a specialised body.

The CRE is specifically asked to provide assistance to individuals alleging racial discrimination and wishing to obtain a legal remedy. It is important to note that the CRE's assistance, independently of the form it takes, is always free of charge. Subsection 66(2) RRA allows the CRE to provide assistance in any form it considers appropriate, but in particular: it may give advice or provide an advocate, barrister or solicitor to give advice to the complainant, it may attempt to procure settlement of the claim and it may provide for the claimant to be represented in proceedings before an industrial tribunal or county court. It should be noted that assistance in industrial tribunal decisions is of particular importance as standard legal aid is not available in that forum[112]. What the Commission does not have power to do is to pursue complaints from individuals itself, it can in the above listed manners assist an individual to bring his or her own case[113].

[109] Strengthening the Race Relations Act, p.5.
[110] Explanatory Notes to Race Relations (Amendment) Act 2000, the Home Office Web site: http://www.hmso.gov.uk (Hereinafter Explanatory Notes to the 2000 Act).
[111] Idem.
[112] The Swiss Institute Report – the UK, p. 534.
[113] Cohen, The UK Legislation Combating Racism, p. 20.

Budgetary limitations placed upon the CRE obviously prevent it from extending assistance to everyone who requests it[114]. Priorities must therefore be set. Initial criteria for the selection of complaints to be assisted are listed in subsection 66(1). The first criterion is '*whether the case raises question of principle*' and the second one, independent of the first, is whether it would be unreasonable to expect the complainant to deal with the case unaided, having regard to any matter including the complexity of the case or '*the applicants position in relation to respondent*'. However subparagraph 66 (1)(c) allows the CRE to extend assistance on the basis of '*any other special consideration*' as well[115]. In reliance to this last point, the CRE has released its own list of criteria for priority in respect of assistance. The factors listed include the chances of success of the claim, the likelihood that the case will settle an important point of law and the number of other people who benefit from that clarification. In effect, the CRE tends to adapt its assistance decisions to its educational and promotional programmes and to the fields on which it concentrates its resources from time to time[116].

The number of applications assisted by the CRE from January 1999 till March 2000 was 418, and 168 of them were settled in mediation[117]. This is a significant indicator of the importance of mediation services offered by the CRE. Mediation diminishes the costs, the time and the stress in obtaining a remedy. Although mediation does not provide a judicial remedy, its outcome is binding on both parties, and therefore it contributes to the elimination of racial discrimination. Naturally, where the parties are not in favour of settling the dispute in the way of mediation, or when discrimination occurred is of serious nature the CRE does not consider mediation as an alternative to litigation.

Relevant point to address in the context of CRE's legal assistance to the victims of racial discrimination is that of the burden of proof. As a matter of legal principle, the burden of proof is always upon the party who alleges racial discrimination to prove that prohibited acts have occurred[118]. Proof of discrimination is often difficult to bring forth, both in indirect and direct discrimination cases. Regarding indirect discrimination difficulties tend to arise in proving that a relatively small proportion of the members of a particular racial group can comply with a condition or requirement. These difficulties can usually be overcome by a combination of expert witness evidence as to the conditions and customs of the racial group in question and the presentation of statistical or survey evidence. The courts have recognised that It can be very difficult to adduce any objective evidence of the motives of the defendant in dealing with persons belonging to a particular racial group[119]. Indeed, the defendant often honestly believes that his conduct was unbiased or even to the advantage of the plaintiff (*King* v. *The Great Britain -China Centre*). To reduce these practical obstacles, the courts have adopted

[114] In the practice all applicants receive assistance or advice about their complaint, but only a small proportion receive legal representation.
[115] The Swiss Institute Report – the UK, p. 534.
[116] Idem.
[117] The CRE Annual Report, p. 8.
[118] The Swiss Institute Report – the UK, p. 529.
[119] Idem.

rather lenient rules of evidence on complaints of discrimination. Where it is shown that the defendant actually made a distinction between persons who belonged to different racial groups, the court may infer that it was made on racial grounds and thus constituted discrimination. The burden of proof is then upon the defendant to provide an explanation of his conduct which convinces the court that it was not racially motivated *(Baker* v. *Cornwall County Council*). This leads to the conclusion that in practice the burden of proof in the UK is usually divided between the plaintiff and the respondent, and therefore does not represent an obstacle to successful litigation in cases of racial discrimination. However, there are some obstacles to succesful litigation that arise from the limited scope of the anti-discrimination legislation. It is namely the fact that the RRA prohibits discrimination only on the racial ground.

This CRE power regards: publishing of advertisements with discriminatory connotations (Section 29), instruction or putting pressure on a person to discriminate on racial grounds (Sections 30 and 31). Further, the CRE is empowered to bring legal proceedings under Section 28. Section 28 RRA prohibits 'discriminatory practices', defined as the application of conditions or requirements which have either resulted in acts of discrimination deemed to be unlawful by the RRA, or are potentially applicable to particular racial groups and would result in such acts of discrimination if they were so applied. In effect, Section 28 allows action to be taken in respect of indirect discrimination that cannot be proved to have had any individual victims.

In practicing its sole power to enforce the Act's prohibition of discriminatory advertisements and pressure or instructions to discriminate, the Commission may: **(a)** apply to an industrial tribunal or a county or sheriff court for a declaration that an unlawful act of discrimination has occurred; **(b)** decide to conduct a formal investigation into the alleged contravention; or **(c)** settling the matter informally by negotiation; this usually leads to the Commission accepting an undertaking that there will be no repetition of the discriminatory act.

The Commission has the power to apply to the High Court for judicial review of the decisions and acts of public bodies. It can also assist individual applicants to seek judicial review where delay (or other procedures) would cause substantial hardship to any party involved or be detrimental to good administration. The Commission will not take legal enforcement action in such cases without: giving the respondents an opportunity to respond to the facts by setting them out in sufficient detail; or making clear to the respondents the options for further action which the Commission will consider in the light of the information and argument that has been put forward.

2.2.4.1. THE INTERPRETATION OF 'RACE'

Section 3 of the RRA, reads in relevant part:

> (1I) In this Act, unless the context otherwise requires -
> 'racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins;
> 'racial group' means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.
> (2)The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act".

These definitions are partly tautological and leave many questions unanswered. The most important contribution to the understanding of the concept of "ethnicity" is the judgment of Lord Fraser of Tullybelton in the case of *Mandla* v. *Lee.* It is worth quoting from the judgment:

> For a group to constitute an ethnic group in the sense of the RRA, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: 1) a long shared history, of which the group is conscious as distinguishing them from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily, associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups".

In *Lambeth London Borough Council* v. *Commission for Racial Equality*, the Court of Appeal interpreted the concept of "colour" against the background of these evaluations of race and ethnicity. The Court held that physical appearance is an additional characteristic upon which protected group identity may be based. Thus, a group which was composed of several distinct ethnic groups under the test of Lord Fraser set out above, could nevertheless constitute a single racial group defined by colour[120].

The above is the evidence of the fact that although the RRA prohibition of discrimination on the ground of race stretches a long way as to protect various groups of people, the effectiveness of the RRA is dependent on the interpretation of the term race. Since the RRA prohibits discrimination on the ground of race only, it automatically obliges those that interpret it, the judges, as well as the CRE, to interpret what the race is as to assure protection for various groups, targets of discrimination. This very process of the interpretation of what the race is and what it is not reinforces the idea that the 'races' do exist. An illustration of the interpretation is found in *Dawkins v. Department of the Environment* where the court pointed out that the term "ethnic origins" must be interpreted with a "racial flavour", as it is included in the RRA in order to explain the term "racial group".

[120] The Swiss Institute Report – the UK, p. 522.

In application of the principles established in *Mandla* v. *Lee*, it has been found that Roma/Gypsies constitute a racial group only in so far as they belong to the tribe known in England as the Romany and that it is not enough for a person to have simply adopted a nomadic way of life. Similarly, Jews constitute a racial group only in so far as they are descendants of the Israelite tribes and it is not enough for a person simply to profess Judaism as a religion (*Seide* v. *Gillette Industries Ltd.*). It is important to note that religious confession is not in itself a characteristic sufficient to identify a racial group under the RRA[121].

In both of its reports on the UK, ECRI has expressed concern at the lack of legal protection against religious discrimination in Great Britain[122]. The first report underlines that although this situation affects all communities whose defining features are perceived to be primarily or wholly connected with religious observance and belief, it is of particular concern for the Muslim community[123], against which there appears to be a rather widespread hostile sentiment, also shown by negative stereotypes in the media[124]. Currently, members of religious communities may enjoy legal protection against discrimination inasmuch as they are deemed by the courts to constitute a 'racial group' under 1986 Public Order Act (POA) and the RRA[125]: Whilst the courts have not, to date developed much case law under the POA, a number of cases have arisen in civil law under the RRA. As the civil law currently stands, Jews and Sikhs are considered as 'racial group' under the RRA, but, for example, Muslims, Christians or Buddhists are not. ECRI believes that, although an effective fight against religious discrimination requires a wide range of policy responses, legislation is necessary both as an effective tool to address concrete cases of religious discrimination and as an awareness raising measure[126].

If we keep in mind that religious discrimination often occurs in the form of the more insidious types of discrimination, particularly indirect discrimination and that indirect discrimination is persisting in the UK[127], we can understand better the consequences of the absence of prohibition of this discrimination in the UK. The RRA falls short of adequate protection of a group that is primarily discriminated against because of its religion. While the RRA protects Muslims that come from Pakistan, it does not protect British Muslims. Therefore a Muslim woman wearing a headscarf, indirectly discriminated by a dress code that prohibits wearing of a head gear in the office, may claim protection under RRA only if she is Pakistani and not

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121 Idem.

122 Although such protection exists in Northern Ireland.

123 In 1997 the Runnymede Trust published a report entitled 'Islamophobia: Its Features and Dangers'. The report brought forth the evidence of widespread hostility against Muslims that is forcing them out of the mainstream of British society and preventing them from playing a proper part in national debates (Adopted from 1988 Report on the United Kingdom by the Institute for Jewish policy Research, the Institute's Web site: http://www.axt.org.uk).

124 ECRI First Report on the UK, p. 4.

125 ECRI Second Report on the UK, p.7.

126 Idem. The adoption of legislation in this field could either take a form of an extension of the RRA to cover religious discrimination, at least in certain areas, or of separate legislation (Adopted from the ECRI Second Report on the UK, p.7).

127 Although there seems to have been a decline since the original anti-discrimination legislation of the 1960s in the grosser and more overt forms of racial discrimination, there is a worrying persistence of the more insidious forms of discrimination, particularly indirect discrimination (Adopted from the ECRI First Report on the UK, p.2).

British native. Perhaps we could say that the RRA discriminates itself against specific groups of Muslims, those that do not belong to the ethnic groups originating from a part of the world where Islam is a traditional religion. In reality a British Muslim is no less Muslim than a Pakistani one and does not suffer less when being discriminated against on the basis of her, his religion, yet the RRA would protects only Pakistani Muslims[128]. The 'racial flavour' introduced in *Dawkins v. Department of the Environment,* plays a significant role here as well.

We can see from the above examples that the approach of the RRA on one hand reinforces the idea of existence of races while at the same time fails to provide protection to the groups that are clearly distinct, and discriminated because of their distinction, like the Muslims. Entrance into force of the 1998 Human Rights Act may render situation better in the Great Britain regarding religious discrimination. However its scope is limited at the time, since it does not incorporate general prohibition of religious discrimination embodied by the Protocol 12, but only Article 14 of the ECHR, that prohibits religious discrimination only in regards to the Convention rights. Further change that may improve the situation in the Great Britain regards implementation of the EU Employment Directive that would requires introduction of the prohibition of religious discrimination in the field of employment. However the employment Directive applies only to the field of employment and would not cover acts of religious discrimination outside of it. Although these changes may prove beneficial to the improvement of this significant flaw of the RRA, they cannot have an impact as strong as a specific legislation or provisions in the RRA prohibiting discrimination on the ground of religious beliefs.

Under the RRA the CRE has the power, in certain circumstances, to bring legal proceedings in its own name. This power is normally used only as a final resort: either when there is evidence of persistent discriminatory practice or, exceptionally, when proceedings are justified as a matter of principle.

2.2.4.2. CASE FOLLOW-UPS

The CRE tries to follow up every case, which results in a significant finding of racial discrimination, whether or not it was involved with it. The aim is to ensure that poor practice is systematically addressed and real changes introduced to prevent future discrimination. In some cases the CRE's purpose is much wider, seeking to influence the entire sector within which the particular respondent operates[129]. For example, Guardian Newspapers strengthened safeguards against accepting discriminatory advertisements, taking action on the specific issue arising from the case against it. The other example

[128] Only Pakistani Muslims are referred to for the sake of clarity of the argument. However it must be clear that this stands for the members of all communities coming from the parts of the world where Islam has been dominant religion over the centuries.

[129] The Annual Report of the CRE, 1999/2000, p.21.

regards the Civil Service where follow up extended to the rest of the respondent's sector. A case against the Scottish Office concerning equal treatment of applicants with English educational qualifications led not only to safe guards in the Department concerned, but also to Civil Service Commission guidance on equality in respect of those with English, Scottish and overseas qualifications. This approach guarantees further impact of the CRE in the areas where discrimination has occurred.

2.3. EVALUATION

This section primarily draws attention to those powers and practices of the CRE that represent its strengths and secondarily outlines some of its weaknesses. But first we shall take a brief look at two features that are very important for everything the CRE does, namely its budget and its independence. The CRE's budget provided by the Ministry of Interior has progressively grown over time. For the year 2000 the CRE's budget is nearly £20 million. This large amount of money together with the extensive CRE statutory powers and its 25-year-long expertise enables the CRE to do a good job in fighting racial discrimination. The second notable feature of the CRE is its independence. The independence is necessary precondition for the credibility of everything the CRE does. The CRE has extensive powers to scrutinise practices of public authorities and independence is a prerequisite to exercise these powers transparently and efficiently.

In the sphere of prevention of racial discrimination number of the CRE practices and powers represent its great assets. The list includes: research, educational activities, funding of research by third parties, financial assistance to other anti-discrimination organizations like RECs, numerous promotional initiatives directed at the wide spectrum of audiences and drawing up of the Codes of Practice. Codes of Practice, preventive measures of administrative nature that provide guide to equality of opportunity to those operating in the fields of employment, housing, education and health, are the most notable among the CRE preventive powers. The fact that they are further admissible in evidence in the Court proceedings gives them a legal value and enhances their authoritativeness.

Further assets of the CRE are its power of review of the RRA and drawing up of the Annual Reports. The story of the enactment of the 2000 Act testifies to the importance of the CRE's duty to review the RRA. In its third review made in 1998, the CRE had proposed inclusion of an enforceable duty for the public authorities to promote equality which influenced the amendment of the Act, now including this advanced mean for the elimination of discrimination. Drafting of the Annual Reports is important because

they are the principle source of information about the amended RRA[130]. The Reports also make the CRE work transparent, which contributes to its credibility.

CRE's innovative approach to fulfilment of its statutory duties is its next notable strength. The CRE efficiency in combating evolving forms of discrimination is enhanced by these approaches that adopt fight against racism to current problems in the equality field. The CRE involvement with the immigration issues on the national level is an illustration of this. After persistent lobbying, the CRE has been put in charge of drawing up the Codes of Practice aimed to eradicate the abuse of the 1999 Asylum and Immigration Act by the employers. If we keep in mind that anti-discrimination and immigration are inherently two separate bodies of law, we can appreciate fully the CRE efforts to mainstream the issue of elimination of racial discrimination in the immigration law.

Further strength of the CRE is represented by its practice to work in partnership. During its 25 years of practice the CRE has gained insight in the limitations of its mandate, namely the fact that the RRA prohibits only racial discrimination. In 1999 the CRE has joined forces with the Equal Opportunities Commission and the Disability Rights Commission, in order to fight discrimination in a more comprehensive and more efficient manner. The development of the 'one-stop-shops' joint representation units dealing with race, sex and disability discrimination is a valuable product of the CRE's cooperation with the other two agencies.

Other than with these two agencies, the CRE is working in partnership with RECs, voluntary associations of persons interested in race relations. Through its collaboration with these grass-roots organizations the CRE succeeds to address racial discrimination on the local level more efficiently. Closely working with RECs also enables the CRE to have an up-to-date picture of the various forms racial discrimination assumes in the every day life. This is particularly important for the development of succesful strategies to counteract racial discrimination. The importance of the collaboration with RECs is also illustrated by the fact that under the Lay Representatives Order 1999, RECs staff can represent clients in small-claims actions outside of the field of employment. This is very important if we keep in mind that the CRE cannot satisfy all applications for legal representation.

The development of the small-claims actions in the field of anti-discrimination litigation represents a general strength of the equality infrastructure in the UK. To understand the importance of small-claims actions we should know the following. First, the CRE's criteria for providing legal representation would usually exclude petty cases. Second, members of minorities, often targets of racial discrimination, are

[130] Next to the explanatory material regarding the Act, that the CRE publishes from time to time (Adopted from Good Practices: Specialised Bodies to combat Racism, Xenophobia, anti-Semitism and intolerance at national level, ECRI Web site: http://www/ecri.coe.int).

often unemployed and therefore their complaints are outside of the field of employment[131]. Third, even though financial assistance for filing complaints is provided in the UK system[132], it is not readily available for everyone and members of minorities, often in the underprivileged financial position, cannot easily afford to file a complaint. Keeping all these aspects in mind, we can understand how the establishment of small claims procedures opens new possibilities for more effective protection of the members of minorities, often marginalized and targets of the racial discrimination.

Let us take a look now at the investigative powers of the CRE as they represent another of its important assets. Named person investigations are an especially valuable CRE tool in the fight against racial discrimination because they can result in issuing of binding NDNs. In formal investigations the CRE has a power to summon witnesses. If a witness refuses to deliver requested information or does so falsely s/he has committed a criminal offence and further may be obliged by the Court order to respond to the CRE's request for the information. Considerable power of the CRE in obtaining information is its important asset because it enables the CRE to obtain accurate information important for the correct assessment of the practices under examination and further for their effective elimination. When a named person investigation results in a finding that discrimination has occurred, the CRE may issue binding NDNs. If it appears to the CRE that the terms of an NDN are not respected it may apply to the Court to issue an injunction obliging the organization to comply with the NDN. Further, in the instances of persistent, the CRE has a power to apply for the Court injunction as to put stop to recurrent discrimination in an organization to which the NDN has been issued in the previous five years. NDNs are the strongest enforcement measure that the CRE adoperates and have greatly contributed to building up of the CRE's authority in implementing the non-discrimination law. The strength of the CRE's investigative powers and the authoritativeness of the NDNs has contributed to their gaining preventive measure features. This is reflected in the fact that organizations readily collaborate with the CRE requests to irradiate discriminatory practices, as to avoid a formal investigation, and when it is already under way, as to avoid its resulting in an NDN.

Another very important CRE power of enforcement is that regarding public authorities' positive duty to promote racial equality. This power is ascribed to the CRE by the 2000 Act that gives the CRE the central role in enforcing positive duty of the public authorities to promote equality. The enforceable positive duty to promote equality imposed on the public authorities by the 2000 Act is of advanced nature and unique in the field of anti-discrimination legislature; likewise is the role given to the CRE to enforce this duty. The enforcement powers of the CRE include: power to issue a compliance notice when satisfied that

[131] ECRI First Report on the UK, p. 7.

[132] Public funding (legal aid) is only available for representation in county court or sheriff court cases, not for hearings at employment tribunals. Public funding is only available for all the appeal stages of a case (Adopted from Making a complaint, the CRE Web site, http://www.cre.gov.uk).

a public authority has failed to promote equality and a power to apply for a Court order obliging the public authority to comply with the compliance notice. Having a central role in enforcing this advanced measure for achieving equality is a very significant CRE asset. This asset greatly contributes to building up of the CRE's authority as a powerful specialised body. In the context of Great Britain the importance of this new power lies in the fact that it greatly strengthens the CRE role in combating widely present 'institutionalised discrimination' among public authorities. Concluding, I would just say that the new powers of the CRE under the 2000 Act exemplify an important characteristic of specialised bodies in general, that to acquire more powers with acquiring experience and authority over time.

Let us turn now to the legal action powers of the CRE. The CRE's power to assist complainants is essential feature of the CRE nature as a specialised body for elimination of racial equality. In this context it is important that the CRE is accessible to the victims of discrimination as its services and legal representation are free of charge. The CRE cannot provide legal representation to everyone but it assists everyone who applies to it. It may advise clients whose complaints do not qualify for the CRE legal representation to seek the representation from the RECs in non-employment cases and the Unions in employment cases. The power to provide legal assistance and representation to its clients is a very powerful tool of the CRE in eliminating racial discrimination. An important issue to address in the context of bringing cases to the Court regards the burden of proof. The fact that the courts practice the partition of the burden of proof is a general strength of the anti-discrimination litigation in the UK and further aids the CRE to have greater prospects of success in anti-discrimination litigation.

Other than taking the case before a Court, legal assistance of the CRE may take the form of mediation. Mediation services are also an important asset of the CRE, because they provide CRE clients with a possibility to obtain a satisfactory remedy in a brief period of time and without stress that accompanies proceedings before the Court. In spite of opinions that mediation may be an insufficient mean for condemning racial discrimination, the fact that its outcome is binding does contributes to elimination of racial discrimination. Further, high percentage of cases settled through mediation testifies to the fact that mediation is a good and desirable mean for addressing racial discrimination. We can conclude that the CRE powers to give legal advise, settle cases before the Court or through meditation are essential aspects of its work not only because they are effective means to combat racial discrimination, but also because through exercise of these powers the CRE assists directly victims of racial discrimination.

Further strength of the CRE legal action powers is embodied by the CRE powers to present cases in its own name. Considering that the CRE has these powers in regard to discriminatory practices that can adversely influence lives of many people, like discriminatory advertising (RRA Section 29) and indirect discrimination (Section 28) we understand that they are notable means for condemning discrimination that threatens more than just single individuals. The CRE power to bring cases in its own name under Section

28 is of special importance because it enables the CRE to act in a fashion of class action. The CRE does not have to present an actual case of indirect discrimination before the Court in order to obtain the ruling that certain practices constitute indirect discrimination. In its power to apply for the judicial review of decisions and actions of the public bodies the CRE has an additional powerful mean for fighting racial discrimination. The wide spread 'institutionalised discrimination' in the UK is currently the most topical issue in the equality discourse and this power of the CRE is an important tool to detect and condemn the discriminatory practices of the public bodies. An important practice of the CRE that further enhances its successful litigation is that of the case follow-ups. This practice is important because it ensures supervision over the changes in discriminatory practices that ought to follow the Court rulings.

Now that we have an overall picture of the strengths of the CRE let us take a look at some of its weaknesses. It is important to note that the weaknesses addressed here do not originate from the CRE's practices but from the scope of the RRA. The main weakness of the anti-discrimination infrastructure in Great Britain is that the RRA is limited to prohibiting discrimination on the ground of race. In order to provide protection to various groups of people that are discriminated in Great Britain, the Courts has been constrained to interpret the term race extensively. This practice of interpretation of race has two negative aspects. On one hand the very process of defining the race, provides evidence that such a thing as a race exists. This may contribute to fuelling racist beliefs and is contrary to the principle of equality that does not recognise the existence of categories of human beings. The second negative aspect of the RRA is that in spite of extensive definition of the term race that the Courts may provide, it does not grant protection to certain groups widely discriminated in the UK, namely the Muslims. This need to interpret race as to extend the protection of the RRA is directly connected to the fact the RRA does not condemn discrimination on other grounds. If the RRA also included ground of religion for example, the UK anti-discrimination infrastructure would be more adequate in protecting minorities that often beside racial experience religious discrimination. Further, the way the race is interpreted in the UK in accordance with Section 3 of the RRA cannot be seen as a good model for the rest of the EU Member States. Countries like Austria and Germany, with a Nazi past could not have a statutory interpretation of race as this would immediately bring back memories of the Nazi past.

These two interlinked weakness of the RRA certainly offer a new image of it. However, an objective evaluation of the anti-discrimination infrastructure operating in the UK must have due regard of the numerous strengths of the CRE as the main agency of that infrastructure, before taking into account these weaknesses.

CHAPTER 3. THE EQUAL TREATMENT COMMISSION IN THE NETHERLANDS

In the Netherlands there has been no special civil anti-discrimination law to protect the principle of equality until 1994[133] when Equal Treatment Act[134] was enacted. This chapter addresses the role of the Equal Treatment Commission[135], established by the Act, in implementing the Act and combating discrimination in Netherlands. The first part gives an overview of the Act. The second part describes the statutory functions of the Commission and the main features of its work. The third part offers an evaluation of particularly positive aspects of the ETC practice in the light of providing examples of good practices for the new specialised bodies. An additional item treated in the third part addresses the main weaknesses of the Dutch anti-discrimination law as that makes a strong impact on the ETC practice. Case Law is an integral element of this chapter as it serves the scope to illustrate points made.

3.1. THE EQUAL TREATMENT ACT

According to Article 1 of the Constitution all persons in the Netherlands should be treated equally in equal circumstances and distinctions on grounds of religion, belief, political opinion, race, sex, or any other grounds are prohibited[136]. The principle of equal treatment and non-discrimination on Constitutional level works in the same fashion as human rights, in the relationship between the government and the individual. This is also true for Article 1 of the Constitution, that is not directly applicable in lawsuits between civilians. Nonetheless, human rights can have effect for the relations between individuals.

This so-called horizontal effect is explained and covered by the Equal Treatment Act [137]. The Act specifies the non-discrimination principle as laid down in the constitution for civil law relations[138]. Its aim is to prevent discrimination on grounds of religion, belief, political opinion, race[139], sex, nationality, hetero- or homosexual preference or civil status in the following areas (Article 5-7): **(a)** employment and professions (advertisement, selection procedure, commencement of an employment relationship, terms and conditions of employment including salary, on the job training, promotion and dismissal); **(b)** supply of goods and services and the conclusion of agreements in the course of conducting business or exercising a

[133] P. R. Rodrigues, Experience with the Dutch Equal Treatment Act, Seminar Vienna, Austria, *Draft of an Austrian Equal Treatment Act,* 12th March 2001, p.1 (Hereinafter Rodrigues, Experiences with ETA).
[134] Hereinafter ETA or the Act.
[135] Hereinafter ETC or the Commission.
[136] In 1983 the principle of equal treatment was introduced into the Dutch Constitution.
[137] Rodrigues, Experiences with ETA, p. 1.
[138] It is noteworthy that the ETA does not speak of discrimination. The neutral term 'differentiation' is used, so it is differential treatment and not discrimination that is prohibited under the ETA. This is not merely a question of semantics: differential treatment can be unlawful even in the absence of an intention to discriminate, whereas under criminal law the intent has to be proven. Nevertheless, for the clarity of the argument, we shall use the more common expression discrimination, referring to differential treatment (Adopted from Rodrigues, Experiences with ETA, p.2).
[139] The Equal Treatment Act adheres to the ICERD in respect to the definition of the term 'race'.

profession, by the public service and institutions working in housing, welfare, health care, culture and education; **(c)** public supply of goods and services and the conclusion of agreements concerning these matters by private persons; **(d)** school and career advice. ETA mainly provides protection against discrimination within the area of private law and most of the public law sector is excluded[140].

The Act provides for only two remedies: standard terms that violate the Act are void (Article 9) and termination of an employment contract in defiance of the Act is also void[141] (Article 8). The intention is to enable a party whose rights have been violated to initiate tort proceedings[142]. The Act explicitly prohibits direct and indirect discrimination, except in a number of specified cases in which unequal treatment is considered to be objectively justified. The law is drafted according to a so-called closed system, which forbids direct discrimination, allowing only statutory exceptions. These exceptions are therefore explicitly incorporated in the Act. This system relies on the development of the concept of direct discrimination in European Community law, both case law and directives. Direct discrimination is related to distinctions directly based on one of the grounds of discrimination covered by the law. The concept of indirect discrimination is designed to uncover systemic forms of discrimination. Statistical evidence is often involved. The concept has been elaborated in the case law of the European Court of Justice (EJC) in Luxembourg. Indirect discrimination is forbidden, unless it can be justified on grounds unrelated to any form of discrimination. The specific measure must correspond to a genuine need of the employer or the one responsible for the discrimination. The objective justification test is developed by the ECJ and incorporated in Dutch legislation. Examples of established indirect discrimination are criteria like language requirements, which may have a disparate impact on minorities. Racial harassment as such is not separately conceptualised and identified, but is subsumed within the concept of racial discrimination. This reflects the fact that currently 'racial harassment' is not seen as a distinct from 'racial discrimination'.

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[140] P. R. Rodrigues, The Dutch Experience of Enforcement Agencies: Current Issues in Dutch Anti-Discrimination Law, in "Anti-Discrimination Law Enforcement: A Comparative Perspective", Aldershot, Avebury, Martin MacEven ed., 1997, pp. 50-64 (Hereinafter Rodrigues, The Dutch Experience).

[141] In practice, invoking the invalidity of the dismissal is not often a real alternative for the dismissed person. The invalidity of the dismissal being established by court order, the dismissed person is entitled to the payment of all salaries due. As the employment agreement is still in force a victim of discrimination has to resume his position with the same employer. It does not need further explanation that in such situations, especially when a small company is involved, the continuation of the employment relationship is almost impossible. For this reason the invalidity of discriminatory dismissal is rarely invoked (Adopted from Rodrigues, Experiences with ETA, p.6).

[142] Racial discrimination can be resisted by means of Article 162, Book 6 of the Civil Code *(Burgerlijk Wetboek)* on tort. Under this Article anyone who has committed wrongful acts may be obliged to remedy the resulting damage. In a number of summary proceedings on discrimination in the catering industry, it was decided that discrimination on grounds of race has to be considered as a tort. The norms of international conventions, the Dutch Constitution as well as criminal legislation have an impact on the tort article. There is no need to prove an infringement of the Criminal Code to be able to plead a tort. The relatively open norm of torts has proved to be effective before the courts in obtaining remedies in some discrimination cases. The advantage of combating racial discrimination through a civil law procedure is that an investigation by the police and the Public Prosecutions Department is bypassed. However the procedural costs have to be paid by the victim in case the suit is lost. These potential costs often prevent a victim from initiating summary proceedings (Adopted from The Netherlands, LEGAL MEASURES TO COMBAT RACISM AND INTOLERANCE IN THE MEMBER STATES OF THE COUNCIL OF EUROPE, Report prepared by the Swiss Institute of Comparative Law, Lausanne for European Commission against Racism and Intolerance, Strasbourg, 1998, p. 347).

Affirmative action on grounds of race and sex is permitted. However, religious, philosophical or political organizations are allowed to incorporate special requirements in their employment policies concerning the respective religious, philosophical or political beliefs of their employees if these beliefs constitute a genuine occupational qualification for a particular job[143].

The Act does not define race, but generally in Netherlands the concept is interpreted in accordance with the Article 1 of the ICERD, and is taken to include colour, descent and national or ethnic origin[144]. The Act does not provide for a shift of the burden of proof and only solves few of the problems of victimization in employment cases. Significantly, the Act does not cover incitement to racial hatred or discrimination in scientific research and private clubs. Possible discrimination in those areas still may be punished by tort procedure in civil law[145].

3.2. THE EQUAL TREATMENT COMMISSION

Chapter 2 of the Act provides for the establishment of an Equal Treatment Commission, which was instituted on 1 January 1995. This part shall give a general overview of the Commission presenting its structure and the budget, its objectives and the functions and the distinctive features of its practice.

3.2.1. THE STRUCTURE AND THE BUDGET

The ETC is an independent body[146] of nine members and nine deputy members. The Minister of Justice appoints these after consultation of four other Ministers[147]. They can be reappointed, and their legal position is similar to that of the judiciary (including the specific procedure for dismissal applied to judges). The chair and co-chairs must fulfil the requirements for appointment as a district court judge. All members are selected because of their expertise in the field of equality and the legal protection thereof[148].

The ETC has a staff of approximately 30 people. Moreover, the ETC may seek assistance of civil servants of departments concerned with anti-discrimination law. This possibility has been used to call in the expertise of job evaluation experts in equal pay cases. The ETC was initially divided into three Chambers, dealing with different discriminatory grounds. By the end of the first term, daily routine within the ETC became more flexible and commissioners and staff work for all Chambers currently[149].

[143] Rodrigues, The Dutch Experience, p. 52.
[144] Commentary of the Netherlands Equal Treatment Commission on the Draft of the Racial Equality Directive presented by the European Commission, April 2000, p. 4 (Hereinafter The Commentary).
[145] Idem.
[146] Article 16 of the ETA provides the legal basis for the Commissions guaranteed independence.
[147] Minister of Internal Affairs, Minister of Education, Culture and Science, Minister of Social Affairs and Employment and Minister of Health, Welfare and Sports.
[148] Rodrigues, The Dutch Experience, p. 5.
[149] Idem.

Five different Ministries, each of which has some responsibility for the implementation of the equal treatment legislation, are currently involved in agreeing and contributing to the Commission' s budget. This involves the Ministry of Justice, the Ministry of Internal Affairs and Kingdom Relations, the Ministry of Education, Culture and Science, The Ministry of Social Affairs and Employment, and the Ministry of Health, Welfare and Sports. As this procedure is somewhat time-consuming and inefficient, the ETC recommended, in its evaluation report, that only one Ministry be responsible for the budget in the future. For the year 2001, the Commission' s total budget is 3.5 million Euros[150].

3.2.2. THE COMMISSION'S OBJECTIVE AND FUNCTIONS

The objective of the Commission is to interpret and promote optimum enforcement of equal treatment legislation within the judicial framework of this legislation[151]. The tasks of the Commission which are specified in the Act can be summarized as follows: **(a)** investigation of complaints in order to deliver rulings and assistance to requests for an assessment of one's own practice; **(b)** investigation on its own initiative resulting in recommendations; **(c)** recommendations in addition to its rulings; **(d)** bringing cases to court; **(e)** reporting annually on its activities and drawing of a report on the ETA's, the EOA's and the CC's[152] operation in practice. Section 20 of the ETA requires the Commission to publish a report of its activities every year and every five years a report of its finding of the operation of ETA, EOA and article 1637ij of the CC.

Although the Act does not specifically empower the Commission to mediate cases, mediation has a part in the Commission's practice[153]. The powers to investigate, mediate and judge on one hand and the power to initiate legal procedures before a court result in a Commission with two faces: first, the Commission as an independent semi-judiciary body in charge of making independent rulings and second, the Commission as an independent prosecutor[154]. It is important to note that the Commission does not have the power to provide legal representation for the individuals who decide to take their case to court. However, in the Netherlands there is a significant infrastructure of NGOs that provide legal representation

[150] R. Holtmaat, The Equal Treatment Commission, *A Draft for a Brochure*, Utrecht, 2001, p. 5 (Hereinafter Holtmaat).
[151] This legislation includes ETA, the Equal Opportunities Act (EOA) and 1637ij of the Civil Code (CC) (ETA Section 12.1).
[152] 1637ij.
[153] The equal treatment legislation does not specifically mention mediation as a task of the ETC. Mediation can be effective to enforce anti-discrimination law and to prevent unnecessary escalation of conflicts. However, there are also disadvantages: mediation requires the entitlement to take into consideration both equality law and other relevant facts and circumstances. This may go much further than the equality aspects of the case. Furthermore, mediation implies the matter can be negotiated and discrimination cannot under all circumstances be negotiated. Thus, the ETC practises some caution before mediating in a specific case and is planning to design procedural guidelines in case of mediation. Nevertheless, several cases have been settled successfully (Adopted from Rodrigues, Experiences with ETA, p. 9).
[154] J. E. Goldsmith and L. Gonçalves-Ho Kang You, Enforcement of Equal Treatment: The Role of the Equal Treatment Commission in the Netherlands, in "Anti-Discrimination Law Enforcement: A Comparative Perspective", Aldershot, Avebury, Martin MacEven ed., 1997, pp. 141-148 (Hereinafter Goldsmith and Gonçalves-Ho Kang You).

to the victims of discrimination. The most important among them is the National Bureau against Racial Discrimination (LBR) together with forty local Anti-discrimination Bureaus. LBR is an independent organization funded by the Department of Justice. The general aim of the LBR is to prevent and combat all forms of racial discrimination in Netherlands, using the available legal means. It has a legal section that follows developments in case law, provides advice on legal issues and represents victims of discrimination before the courts. The LBR maintains close contact with local lawyers and local Anti-discrimination Bureaus, spread throughout Netherlands. The Bureaus were either established by private initiatives or set up and subsidised by the local authorities. The services offered by these Bureaus include legal representation, mediation, providing information on how to prevent racial discrimination and local research[155]. Now we shall take a closer look at above listed functions of the ETC[156].

3.2.2.1. INVESTIGATION OF COMPLAINTS AND REQUESTS FOR ASSESSMENT

The essence of the Commission's functions is to consider complaints. Section 12 of the ETC states that they can be filed by: individuals who believe they are suffering discrimination under the relevant laws, by persons deciding on disputes concerning discrimination, by specific works councils or civil servants' committees and by legal persons or incorporated associations which promote the interests of those whose protection is the objective of the anti-discrimination legislation. In this context it is noteworthy that Dutch law[157] provides for class actions, a provision which is unique in the European Union[158]. Additionally, the Commission assists requests for assistance from a natural or legal person or agencies wishing to know whether their practices are in accordance with the ETA, the Equal Opportunities Act or article 1637ij of the Civil Code. As we can see the ETC's accessibility is wide, and that is essential because the ETC is meant to be an easily accessible body, a semi-judicial alternative for judicial review. Further distinctive features of the ETC, that should be underlined include: the fact that the ETC assists all the complaints and requests directed to it; its proceedings are free and legal assistance is not required or even necessary as the ETC itself plays an active role in the investigation of complaints[159].

Once the ETC receives a complaint or a request for assessment, it may embark on investigation. Article 19 of the ETA provides that it is compulsory for everyone to give the Commission the information it requests and that refusal to do so constitutes a criminal offence[160]. In practise it is generally sufficient to ask for cooperation[161]. If necessary, just mentioning the risk of criminal sanctions is sufficient to receive the

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155 Rodrigues, The Dutch Experience, p.3.
156 The function to deliver recommendations, shall be addressed both under the subtitle 3.2.2.1. and 3.2.2.2.
157 Civil Code Section 3: 305a and 3:305b.
158 Goldsmith and Gonçalves-Ho Kang You, p. 143.
159 Rodrigues, Experiences with ETA, p 5.
160 Section 184 of the Netherlands Penal Code.
161 Goldsmith and Gonçalves-Ho Kang You, p. 148.

required information[162]. In case of a complaint, generally, both parties are invited to deliver their points of view in writing. When the ETC has collected sufficient information, parties are questioned at a hearing. Witnesses can also be invited or summoned to attend the hearing, both by the parties and by the ETC. The ETC cannot hear parties under oath. The ETC appraises the hearings greatly as they provide an opportunity to discuss arguments as well as to explain the scope and relevance of anti-discrimination law[163].

After the investigation and the hearings the ETC discusses the case in a closed meeting and the ruling is given within 8 weeks. In urgent cases emergency procedures are possible (for example in cases of short-term dismissal). Rulings of the ETC have a status of non-binding opinions. The rulings may also include, and often do include, recommendations how to comply with the law. These recommendations can contribute to translate legal prescriptions into actual concrete practice, and to ensure that anti-discrimination law becomes part of a larger policy. Often parties also ask the ETC to provide such recommendations, to prevent further discrimination[164].

Recommendations are also part of the assessments requested by individuals or organizations wishing to know whether their own conduct, policies or regulations fall within the scope of the equal treatment laws. Under Section 12 of the ETA, they have the right to ask the Commission to give an expert opinion on such matters. The Commission receives several such requests each year. The fact that every now and then individuals or organizations turn to the Commission for help and advice is a positive sign that the ETC is increasingly being seen as an authoritative and expert body[165].

Once the investigation is concluded the Commission delivers its ruling. An important issue to address in the context of rulings is that of the burden of proof. The ETA does not provide for a shift of the burden of proof, but the ETC does apply it by means of interpretation of EC case law. In the EU Directive on the burden of proof in sex discrimination cases [166] it has been regulated that both in cases of direct and indirect discrimination on the ground of gender the burden of proof shifts and thus lies with the defendant. The ETC relies on EJC-case law that had already established a doctrine on shifting the burden of proof[167]. If, for example, the plaintiff holds that his race or descents was reason to refuse a promotion, and he can prove his credentials where sufficient to pass the requirements, the defendant has to deliver evidence

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[162] In the six years of its existence, the ETC has only once taken proceedings against a person who refused to cooperate with the Commission during the investigation phase of the case before the ETC. It was an employer who refused to disclose salary data of his employees. The District Court of Assen ruled that legal obligation to deliver necessary information prevails over the right of privacy of the employees, that the employer was invoking (District Court Assen, 14th October 1997, JAR 1997,240 – Adopted from Rodrigues, Experiences with ETA, p. 6).

[163] Rodrigues, Experiences with ETA, p. 6.

[164] Idem.

[165] Holtmaat, p. 12.

[166] Council Directive 97/80 on the burden of proof in cases of discrimination based on sex, OJ [1998] L 14/6.

[167] ECJ Danfoss, 109/88, JUR 1989, 3199.

proving there were other relevant reasons that justified the refusal. If the employer cannot clarify his decisions in an adequate manner, a violation of the law will be established[168].

This shifting the burden of proof is common practice for the ETC, considering all grounds of discrimination, prohibited under ETA. Reversal of the burden of proof by the ETC does help, but the plaintiff still needs to claim that there is a serious suspicion of discrimination, a claim that needs to be underpinned with *prima facie* evidence. Such *prima facie* evidence can come from an empirical test (i.e. where persons of different ethnic backgrounds pose as job applicants) or statistical data (e.g. if an employer employs considerably fewer persons of a certain ethnic background compared to other employers) may be used as admissible evidence for demonstrating discrimination[169].

3.2.2.2. INVESTIGATIONS ON THE COMMISSION'S OWN INITIATIVE

The Commission does not have to wait for complaints or requests for assessment in order to embark on an investigation Section 12(1) of the ETA entitles the ETC to investigate on its own initiative in specific areas where systematic patters of discrimination are suspected. This entitlement is designed to counterbalance the strong emphasis on individual rights in Dutch law[170].

In practice investigation of public sectors is a massive operation, at which the ETC succeeded only a couple of times during its practice. Examples include collective agreement provisions on pre-pension facilities and the access to fertility treatment trough IVF in hospitals. The ETC is now seeking support for expansion of its investigative authority to individual or smaller groups of companies[171]. As the outcome of these investigations, the ETC delivers recommendations that offer guidance to the sector examined as how to achieve greater level of equality.

3.2.2.3. BRINGING CASES TO THE COURT

The ETC may bring legal action with a view to obtaining a court ruling that certain conduct is contrary to the ETA or other equal treatment legislation and is therefore unlawful. Article 15 of the ETA establishes this power of the Commission, which can thereby request that such conduct be prohibited or request a court order stating that the consequences of such conduct be rectified. The Commission has

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168 The Commentary, p.7.

169 M. Zwamborn, The Netherlands in RESEARCH ON NATIONAL AND EUROPEAN LEGISLATION COMBATING RACISM, Joint Project of The Migration Policy Group and The European Monitoring Centre on Racism & Xenophobia (EUMC), May 1999 -January 2000, p.2 (Hereinafter Zwamborn, The Dutch Legislation Combating Racism).

170 Idem.

171 Especially in the field of equal payment, the ETC expects enhancing structural improvements will benefit of such investigations.

been awarded this power to compensate for the fact that its own opinions are not legally binding or enforceable[172].

Such competence is a clear example of the Commission's proactive role. The Commission should, according to the Government, thus play an active part in abolishing discriminatory practices in society[173]. The Commission has not yet taken any case to court. There are certainly some advantages of the use of this instrument in cases of serious discrimination, in order to establish a precedent. A court action could also be instrumental where certain individuals or groups would not have appropriate opportunities to challenge certain forms of inherent discrimination.

3.2.3. THE COMMISSION'S MAIN FEATURES

Now that we have reviewed the functions and the powers of the ETC let us take a look at the three of its features that characterise the exercise of all its functions. They include: the horizontal approach to discrimination, effectiveness of a non-binding semi-judicial approach and accessibility and efficiency.

3.2.3.1. THE HORIZONTAL APPROACH

The full name of the ETA is General rules providing protection against discrimination on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status. The very name of the Act, and later on its Section 1, set out that this legislation addresses different grounds of discrimination in a so-called horizontal manner. In practice this means that an ETC decision can involve pronouncements on number of grounds of discrimination[174]. The ETC has seen in practice that bringing together different discriminatory grounds within a statutory framework provides good opportunities for enforcement, particularly where the forms of discrimination are current or related[175]. The following case best illustrates how this approach is a comprehensive one and therefore effective in fighting discrimination in general.

> The petitioner is a law student and wears a headscarf because of her religious beliefs. She applied to the opposing party for the position of assistant clerk of the court. The opposing party did not offer the petitioner employment due to the clothing regulations under the Legal Dress Code.The Commission states that the Judicature Act is the law in its formal sense on which Regulation II is based. The law under the relevant Article 19 of the Judicature Act does not make a distinction. For this reason, this older law does not conflict with the examination of the petition in accordance with the Equal Treatment Act.
> The Commission states that the headscarf is not in itself the reason for the discrimination. Moreover, the clothing regulations do not contain any reference to religious beliefs. It is for this reason that there is no question of direct discrimination. Nevertheless, as a consequence of the interpretation and the application of the clothing regulations as practiced by the opposing party, mainly those people are put at a disadvantage who wear a headscarf because of their religious

[172] Holtmaat, p. 13.
[173] Idem.
[174] Equal Treatment Commission, The Annual Report for 1998, p.7.
[175] The Commentary, p.3.

> beliefs. Therefore, the dress regulations provide a basis for indirect discrimination based on religious beliefs. The Commission judges the objective of the dress regulations, namely to express the independence and impartiality of the judicial power, as legitimate and free from any form of discrimination. At the same time, this serves a serious purpose. The Commission judges that the need for clothing rules is a relative one in respect of current developments. The Commission considers the exclusion of all applicants who wear a headscarf, based on the dress regulations, to be going too far. Furthermore, the Commission is of the opinion that, in view of the nature of the function of an assistant clerk of the court, the application of the dress regulations is not necessary. It is for this reason that the discrimination thus undertaken is not objectively justified. In breach of the law[176].

As this case exemplifies the ETC has a very powerful tool in the ETA's horizontal approach to prohibition of the discrimination. Having at its disposal different grounds of prohibited conduct the ETC can effectively condemn both direct and indirect discrimination as well as multiple discrimination. This testifies to the fact that horizontal approach is more effective in countering discrimination in general, especially since certain forms of discrimination are inherently interconnected. Further, cases that are especially significant are those dealing with discrimination on the grounds of nationality, race or religion, because these cases often contain an anti-minority element, like the controversy raised by the wearing of headscarves[177].

3.2.3.2. THE SEMI-JUDICIAL BODY

The ETC is a semi-judicial body with the power to deliver judgements in cases of discrimination brought before it. However the rulings of the ETC have no legally binding character[178]. Party found in the breach of ETA cannot be forced by the ETC to change or stop its discriminatory practice. We have seen that the ETC has a power to instigate judicial procedure as to obtain an injunction prohibiting conduct contrary to the relevant anti-discrimination laws. Yet, this power has not been used so far for the above illustrated reasons. One might conclude from this that the lack of binding force of its judgements, makes ETC a weak body. However, such a conclusion would be a precautious one, because the effectiveness of a specialised body must be evaluated in the context of political and legal culture within that body operates. Before we take a look at examples of effectiveness of the ETC judgements, in spite of their non-binding character, we shall understand that the status of these judgements, as considered by judiciary, is not defined yet.

As of now the Supreme Court has not pronounced itself on the status of ETC rulings. However it has done so in regard to the ETC predecessor's rulings (Commissions dealing with 1975 Equal Pay Act (CEPA)) stating that 'taking into account the specific expertise of the Commission and the weight that the law attaches to its advice, a judgement contrary to the Commission's rulings can only be given on well-

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176 Decision 2001-53. Translation from Dutch original by LINGUALEX, Juridische und kaufmännische FACHÜBERSETZUNGEN GMBH.
177 J. Van Donselaar and P.R. Rodrigues, Mapping Exercise Final Report (updated), performed for the purpose of forming EUMC RAXEN Network, Amsterdam, Leiden, April 2001, p. 42 (Hereinafter The Mapping Exercise-the Netherlands).
178 Rodrigues, Experiences with ETA, p.7.

founded reasons'[179]. There were two instances in which the Supreme Court declared the judgement of the lower courts, which were contrary to the CEPA's rulings, null and void[180], Although not certain it is highly probable that the Supreme Court shall pronounce itself in the same manner on the rulings of the ETC. Further, an explicit expression of opinion by the ETC is of great value in court procedures the victim of discrimination or unequal treatment instigates to claim damages or to get an injunction[181]. Presently the ETC is seeking support for the idea of giving its rulings the statutory status of an expert opinion that cannot be overruled without well-founded reasons[182].

This present uncertainty can be given due weight only in the light of the impact of the ETC rulings, documented so far. The research conducted by the University of Nijmegen on the social effect of equal treatment legislation, concluded that the most rulings of the ETC have been followed[183]. Further, the ETC tries to strengthen the impact of its work by actively following up on its opinions. It asks the parties involved in a case to provide information on the action they have taken after the opinion has been issued. The evaluation of the Commission's first term (1995-2000) brought to light the fact that, in a substantive number of cases, in which the Commission concluded that the complaint was well founded, the defendant observed the opinion. In one out of three cases, concrete and structural measures were also taken to improve the practices or regulations in such a way that unequal treatment would be avoided in the future. Some examples of practices and rules that have been altered following the Commission's opinions include the revised banking procedures for giving credit to non-residents; changes to some large companies' selection procedures to avoid sex discrimination; and the inclusion of same-sex partners in the travel benefits for employees of the National Railway Company[184].

In the absence of enforceability, the impact of the Commission's rulings depends on the authority of the ETC. This is not something that comes by itself, but depends on the quality of the rulings to convince the parties involved as well as the judiciary[185]. Keeping this in mind, the ETC has concentrated in its first period (1995-2000) on its semi-judicial task of actively investigating complaints about alleged discrimination and on writing high-quality opinions[186]. Besides high-quality opinions, further qualities of the ETC that have contributed to the building up of its authority, its accessibility and efficiency, are discussed in the following Section.

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[179] The Supreme Court judgement of 13th November 1987.
[180] Goldsmith and Gonçalves-Ho Kang You, p. 7.
[181] Holtmaat, p. 10.
[182] Rodrigues, Experiences with ETA, p. 8.
[183] Idem.
[184] Holtmaat, p. 17.
[185] Rodrigues, Experiences with ETA, p. 7.
[186] Holtmaat, p. 13. This is an additional reason for the Commission not exercising its powers to instigate legal procedures.

3.2.3.3. ACCESSIBILITY AND EFFICIENCY

Peter Rodrigues[187] concludes that the enforcement of anti-discrimination law is optimum when civil law regulations provide for less formal complaint procedures[188]. The ETC provides easy access to an independent and expert opinion in matters of alleged unequal treatment and/or discrimination, both for individuals and for private and public organizations and institutions. There are no registry fees, legal representation is unnecessary and the procedure is less formal than a court procedure[189]. Most importantly the ETC considers every complaint presented to it. This is important for the complainant, because aggravated by the discrimination undergone[190], one feels taken care of when his/her circumstances are looked at by the ETC, and he/she is not sent somewhere else down the line of possible assistance. We have seen that the list of the list of those who can direct their complaint to the ETC is long. Among them there are also individuals and organizations that wish to know whether their own conduct, policies and regulations are in accordance with the ETA. The fact that the ETC may conduct an investigation and delivers an expert opinion on such matters is a great preventive measure. This practice is more effective in the sense of prevention than general codes of practice issued for a particular branch industry for example, because in this way the ETC deals with the specific organization and may deliver recommendations tailored for their specific activities. Recently the Commission has introduced an additional measure to enhance its accessibility, targeted at the most vulnerable groups of complainants. It regards in house interviews with complainants who have difficulties in filing a complaint in writing, as the Section 12 of the ETA requires[191].

The ETC's possibility to deliver rulings in instances of class action complaints further testifies to its accessibility. The aim of the right of group action is that alleged unequal treatment can be assessed by the Commission independently of the special circumstances of the individual case. This provides for the possibility of combating structural forms of discrimination. The right of group action also makes it possible for interests which individual victims do not pursue before the Commission to be represented jointly. Finally, organizations can act in cases where individuals dare not do so for fear of reprisals, for example by their employer[192] In the first period of the Commission's practice (1995-2000) one of the ten plaintiffs was an organization that filed a collective complaint[193]. The ETC considers that in view of the positive

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187 Former commissioner of the ETC and a lawyer at the Anne Frank House, a large NGO operating in the field of equality.
188 Rodrigues, The Dutch Experience, p. 7.
189 Holtmaat, p.5.
190 An act that is only perceived as discrimination has the same devastating effect on a victim.
191 The author herself had a very positive experience with the staff members of the Commission who were very helpful with obtaining limited specific material on the ETA and the ETC in English language.
192 The Commentary, p. 7.
193 Rodrigues, Experiences with ETA, p. 9.

experience gained from the ETA in this respect the new anti-discrimination laws across the EU should contain a collective right of action[194].

Another characteristic of the ETC that complements its accessibility regards its efficiency. The standard procedure including filing of a complaint, investigation, hearings and delivery of the ruling lasts two months. In addition to the standard procedure, rather speedy in itself, there are two additional procedures. When dealing with petitions that must be dealt with speedily such as imminent dismissal, the Commission uses a rush procedure. The Commission will try to reach a decision as soon as possible but adopting the rush procedure is subject to the condition that the case is not too complex. Rush procedures are based on very summary investigations after which the hearing and decision follow as speedily as possible. Further, in some cases, violation of the law may be clearly in evidence. Take the case of an advertisement where, without exceptions to the law being stipulated, only men are invited to respond. Such cases can be dealt with using the simplified procedure in which case the investigation is less in-depth and there is no sitting[195]. ETC's speedy dealing with the complaints adds value to the quality of its work, in the light of the fact that even a semi-judicial proceedings considerable amount of stress for the complainant.

3.3. EVALUATION

Now that we are familiar with the ETC characteristics and practices let us assess them. This part presents an account of those practices that the Dutch experience has proven particularly positive and that the other Member States could benefit from, in constructing their specialised bodies. In the second half this part refers to some weaknesses of the ETA and consequently the ETC.

The first asset of the ETC is its independence. Five Ministers[196] appoint the ETC members and deputy members who are selected for their expertise in the field of equality and legal protection thereof. Once selected these members are independent in making investigations, delivering rulings, and assisting mediations as well as in any decision-making and exercise of the ETC functions. The fact that in Netherlands five Ministers consult on selecting the ETC members makes the process of selection more transparent and democratic than if the Minister of Justice performed it alone. However, there is one disadvantage and it regards the fact that the ETC is also funded by the five ministries. Procedure on deciding and delivering the funds to the ETC is somewhat time-consuming and inefficient. In its first review of the ETA the ETC has recommended that only one Ministry be responsible for the budget in the future. The power to review the anti-discrimination legislation is a further asset of the ETC as it enables it to 'up-date' the law and make it efficient in condemning discrimination.

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[194] The Commentary, p. 7.
[195] The Equal Treatment Commission, Annual Report 1998, p. 11.
[196] Minister of Justice, Minister of Internal Affairs, Minister of Social Affairs, Minister of Education and Minister of Health.

The ETC preventive powers represent its second asset. The most significant among these powers is the power to assess conduct, policies or regulations of individuals or organizations who wish to know if their practices are in accordance with the equal treatment legislation. An important aspect of this preventive power is that the ETC delivers an expert opinion and recommendations tailored specifically for these organisations to help them eliminate discriminatory practices if any are found by the ETC. The increasing number of the organisations that request the ETC evaluation testifies to the importance of this ETC power.

Besides organisations who request from the ETC an assessment of their practices, the list of clients of the ETC includes: individuals who believe they are suffering discrimination, persons deciding on disputes concerning discrimination, work councils or civil servants' committees and legal persons or incorporated associations which promote the interests of those whose protection is the objective of anti-discrimination legislation. The length of this list is a testimony to one of the most significant strengths of the ETC, its accessibility. Elements of this accessibility of further significance are: the fact that the ETC practices are free, the fact that the ETC considers every complaint or request for assistance brought before it and finally the fact that legal representation is not obligatory as the ETC plays an active role in the investigation of complaints. These facts enable us to understand fully the extensiveness of the ETC accessibility. The ETC capacity to deliver rulings in class action cases brought before it is notable feature of the ETC accessibility. Class action is an important mean to restore the balance of power between the parties involved in cases of unequal treatment and also the most effective mean to avoid victimization in employment cases.

Further strength of the ETC lies in its power to deliver rulings in the cases brought before it.. The main purpose of the Commission is the examination of complaints brought before it. The ETC is a semi-judicial body independent from judiciary that delivers rulings in the cases of discrimination. Once the ETC receives a complaint it may embark on investigation. Very important power regarding investigations is the ETC power to obtain information from individuals, that also may be summoned to witness. The refusal to collaborate with the ETC constitutes a criminal offence. This gives authoritativeness to the ETC power to obtain information, but the ETC had to resort to criminal procedure only once, because its requests for collaboration are usually respected. One important issue to note in regard to ETC's dealing with complaints is that it cannot provide representation to victims of discrimination that want to present their case before the Court. This is a weakness of the ETC in the light of providing an example for the EU Member States that must establish specialised bodies under the Directive. In the Dutch system this characteristic of the ETC does not result in inadequate provision of legal assistance to the victims. The numerous Anti-discrimination Bureaus as well as the LBR create a powerful infrastructure of organizations that provide legal representation. This infrastructure represents a general strength of the Dutch equality

scene. However if the ETC were the only actor on that scene, its incapacity to provide legal representation before the courts, would make the outlooks for the succesful anti-discrimination litigation rather grim.

A significant feature of the ETC that makes it a powerful institution for elimination of discrimination regards the fact that it operates within ETA that has a horizontal approach to discrimination. ETA prohibits discrimination on the following grounds: religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status. This is very important for the ETC's dealing with complaints because its rulings can involve pronouncements on number of these grounds. This results in a comprehensive approach to irradiation of the discrimination, and can also result in a decision that is more satisfactory to the victim of multiple discrimination.

Another important issue that arises in dealing with individual complaints regards the burden of proof. One of the great obstacles for complainants in cases of alleged discrimination is the fact that often they find it hard to prove that the contested conduct, practice or regulation is indeed discriminatory[197]. In Netherlands the burden of proof lies very broadly with the person who alleges discrimination. The ETC practice of reversing (sharing) the burden of proof, thereby alleviating the requirements of the proof for a victim[198], can be seen as its strength because it eliminates one of the main obstacles to initiating anti-discrimination litigation. Further the admittance of empirical tests and statistical figures can be judged as positive developments in facilitating the establishment of *prima-facie* case of discrimination, especially since the Directive prescribes this as well. However, although the ETC opts often for sharing of the burden of proof, the issue of burden of proof remains problematic in the general civil law system in Netherlands since the ETC cannot award material or immaterial damages[199].

Following the investigation the ETC delivers its ruling. The ruling is delivered within eight weeks. of the conclusion of the investigation. This speedy delivery of the ruling is a sign of the ETC efficiency, which represents another one of its important assets. The efficiency of the ETC is further enhanced by the existence of the summary proceedings that the client may resort to in the cases of imminent dismissal and clearly evident discrimination. The ETC efficiency adds value to the quality of its work, in the light of the fact that even semi-judicial proceedings bring considerable amount of stress to the complainant.

The rulings delivered by the Commission do not have legally binding character. While at first sight it might seem that because of this, the ETC rulings may not be effective in eliminating racial discrimination, the practice in the Netherlands has proven the contrary. The ETC case follow-ups as well as the research conducted by the University of Nijmegen conclude that the most rulings of the ETC have been followed.

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[197] Holtmaat, p. 14.
[198] Idem.
[199] M. Zwamborn, The Dutch Legislation Combating Racism, p. 24.

Further, in one out of three cases, concrete and structural measures were also taken to improve the practices or regulations in such a way that unequal treatment would be avoided in the future. Having account of the evidence of the consistent positive impact of the ETC's rulings we can con conclude that the non-binding nature of its rulings cannot be considered a disadvantage. The role of a specialised body cannot be judged outside of the specific legal and political culture within which it operates. Therefore the only valid conclusion that can be drawn from the Dutch experience is that the ETC's rulings of non-binding nature are its asset because they do contribute effectively to the elimination of discrimination in Netherlands. Of course, this may not be the case in the other Member States searching for a suitable structure for the new specialised bodies. The ethos of tolerance and of avoiding of conflict that prevails in Netherlands plays a significant role in the formation of an environment where non-binding rulings are an effective mean to combat discrimination[200]. Of course in other Member States the non-binding decisions might prove unsuccessful for the implementation of the equal treatment principles.

The ETC can conduct investigations on its own initiative without having to wait for a complaint or a request for assessment of an organization's policies. Section 12(1) of the ETA empowers the ETC to investigate on its own initiative in specific areas where systematic patterns of discrimination are suspected. This power represents a significant asset of the ETC since it enables it to condemn the situations of aggravated racial discrimination. The fact that the ETC further has a power to issue recommendations designed to irradiate these practices adds importance to this ETC power. The ETC further has a power to bring legal action with a view to obtain a court ruling that certain conduct is contrary to the ETA or other equal treatment legislation and is therefore unlawful. This power is a further resort that the ETA may turn to in regard to fight systematic patterns of discrimination.

However in its six-year long practice the ETC has not utilised this power. The main reason for this is that there are two sides to this important power of the ETC. A successful case might in general enhance the status of the Commission's rulings, which is important in the absence of enforceability. The disadvantages are also evident. An unsuccessful party might feel betrayed, when he has cooperated in the investigation by the Commission, and the information is used against him in court. Here the two different positions of the Commission might collide (that of a judge and prosecutor at the same time). It needs no explanation that an unsuccessful action would damage the Commission's image[201]. Moreover, one of the purposes of establishing the Commission is to prevent cases being taken to Court[202].

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[200] Racial Violence and Harassment in Europe, Council of Europe, p, 36.
[201] Goldsmith and Gonçalves-Ho Kang You, p.144.
[202] This is sometimes also judged as a disadvantage because the judiciary does not get enough cases of discrimination to acquire experience and expertise in the field (Adopted form Rodrigues, Experiences with ETA, p. 7).

Let us turn now to the weaknesses. The weaknesses individualised in the practice of the ETC do not originate in the ETC practice but are connected to the weaknesses of the ETA. The issues addressed below include: limited application of ETA, restricted principle of victimization and the interpretation of 'race'.

The ETA refers only to employment, education and the provision of goods and services. Consequently the ETA mainly provides protection against discrimination within the area of private law and most of the public law sector is excluded[203]. For example, a complaint regarding a refusal by local authorities to let a house to a woman, member of an ethnic minority, can be considered by the ETC. However, if this woman complains that she is unjustly excluded from obtaining a housing permit she cannot lodge a petition at the ETC because the ETA or any other equal treatment law currently does not cover the application of specific public powers by civil servants[204]. While the first example regards the sphere of the private law, in as much as the public authority is acting as a contractual party on the same level of the complainant, the second example refers to the sphere of the public law, because the authority is above the woman since it is exercising its public power to issue housing permits. This limitation was brought to the attention of the Committee on the Elimination of Racial Discrimination (CERD), that in its concluding observations, of 19th March 1998, with regard to the periodic reports of the Netherlands[205], drew attention to the proposals to extend the Commission's competence.

The main obstacles in initiating a procedure regarding a breach of an anti-discrimination norm in the civil law are fear of victimization, costs and the time and trouble of filing a lawsuit. This is especially true in cases where the victims have no financial interest, but an immaterial claim, as is the case in point under the ETA[206]. We have seen above that the ETC is equipped to superate the last two obstacles and it does so rather successfully. However the ETC's capacity to deal with victimization is limited since the ETA provides protection against victimization only in the cases of dismissal. There are no further provisions, other than the general recourse to the tort provisions[207]. The ETC considers that the right of group action is an adequate instrument to provide protection against victimization[208], but I would disagree since even group action would be limited to the cases of dismissal.

The ETA does not define race but the ETC, as well as the Dutch Supreme Court[209], interprets race in accordance with Article 1 of the UN Convention on the Elimination of All Forms of Racial Discrimination (ICERD), defining race as including colour, descent or national or ethnic origin. Although

[203] Rodrigues, Experiences with ETA, p. 6.
[204] Holtmaat, p. 6.
[205] CERD/C/304/Add. 46.
[206] Rodrigues, The Dutch Experience, p. 7.
[207] M. Zwamborn, The Netherlands, The Dutch Legislation Combating Racism, p. 7.
[208] The Commentary, p. 8.
[209] The Supreme Court decision of 15th June 1976.

the ETC sees its adherence to the ICERD Article 1 as positive[210] there are some problems in saying that one adheres to the ICERD interpretation of race, namely because the ICERD does not provide one. Article 1(1) of the ICERD reads *'In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'*. It is clear that Article 1(1) defines what 'racial discrimination' is and not what the race is. However we cannot hold this fallacy against the ETC strongly because it is not alone when it asserts that ICERD interprets race. More authoritative forums than the ETC have stated the same: the Dutch Supreme Court for example following the European Court of Human Rights (Jersild Case) and the Human Rights Committee (General Comment 128 (37))[211].

CHAPTER 4. THE EQUALITY AUTHORITY AND THE OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS IN IRELAND

Enactment of the Employment Equality Act in 1998 and the Equal Status Act in 2000, together with the establishment of the equality infrastructure consisting of the Equality Authority and the Office of the Director of Equality Investigations, put in place what many commentators regard as the most comprehensive and progressive anti-discrimination legislation in the EU[212]. In the first part this chapter gives an overview of both pieces of equality legislation existing in Ireland. In the second part it describes powers and functions given to the two specialised bodies, the Equality Authority and the Office of the Director of Equality Investigations, responsible for the enforcement of existing legislation. The final part evaluates the two specialised bodies on the basis of their statutory powers and functions. It should be noted that limited availability of the documentation of the bodies' practice up to day[213], makes the primary sources, namely the two Acts, the best basis for their evaluation at the moment.

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[210] The Commentary, p. 4.

[211] The Commentary, p. 4.

[212] J. O'Donoghue, Minister for Justice, Equality and Law Reform, Speech in the occasion of the commencement of the Equal Status Act, 2000, 25th October 2000, Irish Government Web site: http://www.irlgov.ie/justice .

[213] Only two reports about the Equality Authority's practice are presently available. They both regard the period from 18th October to 31st December 1999. While the first report treats primarily organizational issues, the second one illustrates Authority's program for anti-racism work. As far as the Office of the Director of Equality Investigations is concerned, the Annual Report for the year 1999 reviews first three months of the Office's operation. As all three reports regard the very beginning of the specialised bodies' work they are not sufficiently illustrative of their practices. At the time of completion of this thesis the Annual Report of the Office of the Director of Equality Investigations for the year 2000 has been released. Due to the thesis deadline it has been referred to only in regard to the budget.

4.1. THE EMPLOYMENT EQUALITY ACT 1998

The Employment Equality Act[214] outlaws discrimination in employment on nine distinct grounds – gender, marital status, family status, sexual orientation, religion, age, disability, race (including colour, nationality and ethnic or national origin) and membership of the Traveller Community (Section 6). Some of the terms used in the Act are defined in the first part. Direct and indirect discrimination, as well as harassment and victimization are prohibited by the Act.

The Act protects employees in both, the public and private sectors as well as applicants for employment and training. It outlaws discrimination on any of the discriminatory grounds in all areas relevant to employment as follows: **(a)** discrimination by employers (Section 8); **(b)** discrimination in collective agreements (Section 9); **(c)** discriminatory advertising (Section 10); **(d)** discrimination by employment agencies (Section 11); **(e)** discrimination in the provision of vocational training (Section 12); **(f)** discrimination by trades unions (Section 13). The Act may not be construed as requiring the recruitment, retention or promotion of anyone not available or willing to do, or fully capable of doing, the particular job (Section 16)[215].

Part three of EEA includes specific provisions as to equality between women and men. This Part of the Act deals in detail with the requirements of the EU Equal Pay and Equal Treatment Directives which apply in relation to the gender discrimination ground. The Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act, 1977 are repealed and replaced by the EEA (Section 5). The Act codifies for the first time in Irish Law indirect discrimination so far as remuneration is concerned. The Act defines sexual harassment for the first time in Irish law[216].

The Act allows an employer to put in place positive action measures to promote equal opportunities. The Act extends protection to the Defence Forces for the first time in Irish law. There are exclusions from the scope of the Act in the following circumstances: **(a)** where sex amounts to an occupational qualification, **(b)** special beneficial treatment of women connected with pregnancy and maternity or adoption, **(c)** the performance of services of a personal nature, **(d)** limited exclusions for prison service in the interests of privacy and decency[217].

Part four of the EEA includes specific provisions as to equality between other categories of persons. It deals in detail with the new discriminatory grounds. An entitlement to equal pay for work of equal value is established from the date of coming into force of the legislation. In addition, an equality

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[214] Hereinafter the EEA or the Act.
[215] Explanatory notes on the Employment Equality Act 1988, p. 1 (Hereinafter The EEA Explanatory Notes).
[216] Idem, p.2.
[217] Idem, p.3.

clause is inserted into every contract of employment and discrimination, both direct and indirect, is outlawed (Sections 29 - 31). A person is said to be discriminated against if s/he is treated less favourably than another is, has been, or would be treated on any of the nine grounds. Indirect discrimination occurs when practices or policies which do not appear to discriminate against one group more than another actually have a discriminatory impact. The Act also defines victimization[218].

The Act allows positive action specifically geared towards the integration into employment of disadvantaged groups (Section 33). The Act also outlaws harassment, related to any of the new discriminatory grounds, in the workplace and in the course of employment whether by an employer, another employee or by clients, customers or business contacts of the employer.[219].

The Act provides for the following general exemptions (Sections 36 and 37) that apply to: **(a)** requirements as to residency, citizenship and proficiency in the Irish language for public service employment; **(b)** requirements as to educational qualifications which are generally accepted for particular jobs; **(c)** posts where the presence or absence of a particular characteristic related to a discriminatory ground is an occupational qualification; **(d)** differentiation by religious, educational and medical institutions run by religious bodies; **(e)** employment for the purposes of a private household. Further, the Act provides for additional exceptions regarding the age, family grounds and the disability ground[220].

Parts five and six regard the establishment, the structure and the functions of the Equality Authority, replacing Employment Equality Agency, and shall be described in the Section dedicated to the Equality Authority. Part seven regards establishment and powers of a new statutory body, the Office of the Director of Equality Investigations, and shall be described in detail in the Section dedicated to this body.

4.2. THE EQUAL STATUS ACT 2000

The Equal Status Act[221] complements the EEA 1998, outlawing discrimination outside of the field of employment on the same nine grounds. The Act provides for: **(a)** the promotion of equality and the prohibition of discrimination, harassment and related behaviour in non-employment areas and **(b)** remedies and enforcement measures. The Act outlaws both direct and indirect discrimination in the provision of goods and services, accommodation, disposal of premises and education. All services

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[218] Enforcing your rights under the Employment Equality Act, A publication of the Equality Authority, Series: Equality in a Diverse Ireland, Equality Authority Web site: http://www.equality.ie (Hereinafter Enforcing Rights Under EEA).
[219] The EEA explanatory notes, p. 4.
[220] Idem, p. 5.
[221] Hereinafter the ESA or the Act.

generally available to the public are covered, including facilities for refreshment and entertainment, credit facilities and transport services[222].

Part one of the ESA defines discrimination for the purpose of the Act and some of the terms used in the Act. "Service" is widely defined to cover all services or facilities generally available to the public or a Section of the public, including facilities for: banking, insurance, grants, loans, credit or financing, entertainment, recreation or refreshment, cultural activities, transport or travel. The Act also covers services of professional or trade nature and services provided by a club, which are available with or without payment, to the public or a section thereof.

The definition of discrimination is broader than the one found in the EEA 1998 and includes direct discrimination, indirect discrimination, victimization and discrimination by association and/or by imputation. Discrimination shall be taken to occur where on any of the discriminatory grounds that exist at present, which previously existed but no longer exist, or which may exist in the future, or which is imputed to the person concerned, a person is treated less favourably than another person is, has been, or would be treated. Less favourable treatment of a person, because of their association with a person in one of the categories covered by the legislation, is likewise discrimination. Indirect discrimination takes place where the requirement to comply with a condition has a substantially more adverse effect on one category of persons than on others and the obligation to comply with that condition cannot be justified as being reasonable in all the circumstances of the case. The Minister for Justice, Equality and Law Reform can assess, within two years after the Act commences, the need to add new discriminatory grounds[223].

Part two, entitled 'Discrimination and Related Activities' prohibits discrimination in: the disposal of goods or the provision of a service, with special emphasis on clubs, accommodation and education. For the purpose of the ESA, it is irrelevant that the goods or service are provided for payment, or only to a section of the public. A club found to discriminate is denied the licence to serve the alcohol. There are also a number of exemptions, and they include: disposal of goods by will or gift, accommodation intended for use by persons of one gender and differential treatment by denominational education institutions. ,

Further, the part two of the ESA deals with sexual and other harassment in the areas covered by the Act. Harassment is defined as an offensive, humiliating or intimidating act or conduct based on any of the discriminatory grounds. Section 14 exempts from the scope of the Act actions which are required to be done under any enactment or by court order, EU law or pursuant to an international convention[224].

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[222] Explanatory and Financial Memorandum – Equal Status Act, p.1 (Hereinafter The ESA Explanatory Memorandum).
[223] Idem, p. 2.
[224] Idem, p. 5.

Parts three and four treat respectively the functions of the Equality Authority and the Office of the Director of Equality Investigations under the Act and shall be addressed in detail in Sections dealing with these two bodies.

4.3. THE EQUALITY AUTHORITY

The Equality Authority[225] is an independent statutory body established under the terms of the EEA 1998, on the 18th October 1999. The Authority replaced the Employment Equality Authority, which operated under the previous Employment Equality Act from 1977. The first part of this Section addresses the functions and the structure of the Authority. The second part reviews specific powers of the Authority that regard: drafting of the Codes of Practice, conducting of inquiries, exercising legal action and conducting of equality reviews and making of equality action plans.

4.3.1. FUNCTIONS AND STRUCTURE

The functions of the Authority under the EEA and ESA are: **(a)** to work towards elimination of discrimination in employment, provision of goods and services; **(b)** to promote equality of opportunity in relation to matters to which EEA 1998 and the ESA 2000 apply; **(c)** to work towards elimination of conduct prohibited by the EEA and ESA; **(d)** to monitor and review the EEA 98, the ESA 2000, the Maternity Protection Act (MPA 1994), the Adoptive Leave Act (ALA 1995) and the Pensions Act (PA 1990), and whenever it thinks necessary to make proposals to the Minister for Justice (in case of the Pensions Act to the Minister for Social Affairs) for amendments and **(e)** to provide information to the public on the EEA 1998, the ESA 2000, the MPA 1994 and the ALA 1995[226].

A sizable task that the list of the Authority's functions places upon it is achieved through the Authority's Strategic plan, which is renewed every three years. The plan comprises: key objectives, outputs and related strategies. The plan is approved by the Minister of Justice. The Minister also has the sole responsibility in appointing and removing the twelve Board members of the Authority, including an Independent Chair and Vice-Chair. Board Members are drawn from employer organizations, employee organizations, and organizations and groups who have knowledge of, or experience in, equality issues relating to gender, marital status, family status, sexual orientation, religion, age, disability, age, race or membership of the Traveller Community. Board members serve a four-year term and can be reappointed.

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[225] Hereinafter the EA or the Authority.

[226] About Us, A publication of the Equality Authority, Series: Equality in a Diverse Ireland, Equality Authority Web site: http://www.equality.ie (Hereinafter About Us).

The Minister for Justice together with the minister for Finance decides on the budget of the Authority, which in 2000 amounted to £ 3.7 million[227].

The Equality Authority consists of four distinct but integrated sections: legal, development, communications and administration. Through the Legal Section, the Equality Authority provides a free confidential advisory and information service to people who feel they have been discriminated against, employers, service providers, trade unions, the general public and the legal profession on the implementation of equality legislation. The Legal Section handles enquiries and complaints in relation to equality and discrimination. A number of these complaints proceed for investigation. In some instances complaints can be resolved through mediation without proceeding to a full hearing. Decisions regarding the Authority's representation take due account of the Equality Authority's priorities. Given the Authority's resources, it is not possible to represent all those who request it. In addition, the Legal Section provides information and advice to the customers on the operation of the MPA 1994, the ALA 1995, and the Parental Leave Act 1998[228].

The Development Section is responsible for ensuring that the Authority takes a proactive role in the development of the equality agenda. Its principal functions include the development of codes of practice setting out how best to meet the requirements of equality legislation, undertaking equality reviews and action plans which evaluate the equality situation in an organization and set out actions to improve this, developing positive action measures to promote equal opportunities and undertaking research projects into equality issues. The Communications Section deals with all aspects of the profile of the Authority and the promotion of the Equality Authority's work. The Administration Section has overall responsibility for the management and maintenance of the public office[229].

4.3.2. CODES OF PRACTICE AND RESEARCH

The Authority may draft Codes of Practice in furtherance of its goals to eliminate the discrimination and to promote equality of opportunity in the fields covered by the EEA and the ESA. The Codes are drafted on the initiative of the Authority or that of the Minister for Justice. After receiving the draft of a Code, the Minister may amend it after consultation with the Authority. An approved Code of practice is admissible in evidence and, if any provision of the Code appears to be relevant to any question arising in any criminal or other proceedings, it shall be taken in account in determining that question. The Minister may, after consulting, the Authority, revoke or amend an approved Code of practice (EEA Section 56). The Authority may undertake or sponsor such research and undertake or sponsor such activities

[227] Idem.
[228] The Equality Authority's Customer Service Action Plan, p. 7.
[229] Idem, p. 9.

relating to the dissemination of information, as it considers necessary and as appear evident, for the purpose of performing any of its functions (EEA Section 57).

4.3.3. THE INQUIRIES

The Authority may, for any purpose connected with the performance of its functions, conduct an inquiry, and shall do so if requested by the Minister of Justice. Preconditions for conducting such an inquiry are: that terms of reference for the inquiry have been drawn up by the Authority, or by the Minister, and that notice of intention to conduct the inquiry has been announced by the Authority (EEA Section 58). For the purpose of an inquiry the Authority may: require any person, by notice delivered to that person, to supply to the Authority such information as it specifies in the notice; require any person, by notice delivered to that person, to produce to the Authority or to send to it, any document specified in the notice and in that person's power or control; summon witnesses and administer oaths and affirmations to witnesses and examine witnesses attending before the Authority.

The notice of an inquiry shall be delivered only after the EA has obtained the Minister's consent and when it believes that the person named in the term of reference of the inquiry: **(i)** has discriminated or is discriminating, **(ii)** has contravened or is contravening Section 8(4), 10 or 14 of the EEA, or **(iii)** has failed or is failing to comply with an equality clause or an equal remuneration term (EEA Section 59). Anyone who: **(a)** fails or refuses to supply to the Authority information required by it; **(b)** fails or refuses to produce or send to the Authority any document in that person's power or control; **(c)** on being duly summoned as a witness, fails or refuses to attend before the Authority; **(d)** being in attendance as a witness before the Authority, refuses to take an oath or affirmation when required by the Authority to do so or to answer any question to which the Authority may require an answer; **(e)** does anything which, if the Authority were a court of justice having power to commit for contempt of court, would be contempt of court; **(f)** makes a false statement when supplying the Authority information or **(g)** alters, suppresses, conceals or destroys a document, shall have committed an offence. Every person found to have committed an offence may be required by the Court to comply with the Authority's request for information (EEA Section 60).

As a result of an inquiry, the Authority might issue recommendations to any person, including the Minister, for the purpose of elimination of discrimination and promotion of equality of opportunity. Following an inquiry the Authority shall make a report. Confidential information obtained during the inquiry shall not be included in the report without consent of the organization or person subject of the inquiry.

Where the Authority is satisfied that any person, subject of the inquiry: **(i)** has discriminated or is discriminating, **(ii)** has contravened or is contravening Section 8(4), 10 or 14 of the EEA, or **(iii)** has failed or is failing to comply with an equality clause or an equal remuneration term, the Authority may serve a

non-discrimination notice (NDN) on that person. Before an NDN is served, that person shall be notified of the EA's intention to serve the NDN. Notification shall specify the act or omission constituting discrimination, contravention or failure and inform the person of the right to make representations to the EA. These representations shall be considered before serving the NDN. The NDN shall: **(a)** specify the act or omission constituting the discrimination, contravention or failure to which the non-discrimination notice relates, **(b)** require the person on whom it is served not to commit the act or omission constituting the discrimination or contravention or, where appropriate, to comply with the equality clause or equal remuneration term, **(c)** specify, in the case of a discrimination, what steps the Authority requires to be taken by the person on whom the NDN is served in order not to commit the discrimination in the future, **(d)** require the person on whom it is served, within a period specified in the non-discrimination notice, to inform the Authority, of the steps taken in order to comply with the notice, and **(e)** require the person on whom it is served, within a period specified in the non-discrimination notice, to supply the Authority with any additional information so specified (EEA Section 62).

A person on whom an NDN has been served may appeal to the Labour Court, within 42 days of the date of service, against the notice or any requirement of the notice. Where an appeal, is not made, a non-discrimination notice shall come into operation on the expiry of the 42 day (EEA Section 63).

If in the period of five years, beginning on the date on which an NDN came into operation, the Authority satisfies the Circus Court or the High Court that there is likelihood of further discrimination, contravention or failure by the person or organization on whom the notice was served, the Court may, on the motion of the Authority, grant an injunction to prevent discrimination by the person specified in the order of the Court (EEA Section 65). A person on whom an NDN is served who, at any time within the period of 5 years, beginning on the date on which the notice comes into operation, does not comply with the notice, shall be found to have committed an offence (EEA Section 66).

4.3.4. LEGAL ACTION

The Authority's power of legal action has two aspects. The first one concerns the EA's assistance and representation in regard to individual complaints and the second one concerns the EA's capacity to take cases to the Office of the Director of Equality Investigations.

A person who considers that discrimination has been directed against the person by another person, or s/he has been discriminated against by another person, may make a request to the Authority for assistance in taking proceedings in respect of which redress is provided for under the EEA and the ESA. Where, having considered a request, the Authority is satisfied that the case to which the request relates raises an important matter of principle, or it appears to the Authority that it is not reasonable to expect the person making the request adequately to present the case without assistance, the Authority may at its

discretion provide assistance to the person: **(a)** in making the reference or application, and **(b)** in any proceedings resulting from or arising out of the reference or application. Assistance by the Authority shall be in such form as the Authority at its discretion thinks fit (EEA Section 67). Important issue to address in the context of individual complaints brought to the Court is the Burden of Proof. Although there are no provisions addressing this issue in the EEA or the ESA, division of the burden of proof is practices by the Courts, following the practice of the ECJ that was first applied in the gender discrimination cases. Therefore we can conclude that the burden of proof does not represent an obstacle to bringing cases under the existing anti-discrimination legislation in Ireland.

Section 85 of the EEA and Section 24 of the ESA address the instances when the Authority may refer the cases to the Office of the Director of Equality Investigations. Those instances in both Acts include: **(a)** discrimination or victimization generally practiced against persons; **(b)** discrimination or victimization having as a subject a particular person who cannot reasonably be expected to make his/her own case and **(c)** publishing or display of a discriminatory advertisement. Further, the EEA 1998 includes instances where: **(d)** a person incites or attempts to incite another person to victimize or discriminate **(e)** there is a failure to comply with an equal remuneration term or an equality clause either generally in a business or in relation to a particular person who cannot reasonably be expected to make his/her own case and **(f)** a person has procured or attempted to procure another to brake an equal remuneration term or an equality clause. The ESA 2000 adds the instances when the person has contravened: **(g)** Section 19 regarding provision of kerb ramps and **(h)** Sections 17 and 18 regarding transport accessibility. It is important to note that the EA's powers to bring cases that regard discrimination generally practiced against persons and discrimination having as a subject a particular person who cannot reasonably be expected to make his/her own case, amount to the power to bring class action complaints.

4.3.5. EQUALITY REVIEWS AND ACTION PLANS

Sections 69 to 72 of the EEA deal with another important power of the Authority, that to conduct equality reviews and to make equality action plans. An equality review is an audit of the level of equality of opportunity which exists in employment in a particular business, group of businesses or the businesses making up a particular industry or sector thereof, and an examination of the practices, relevant to determine whether those practices, procedures or other factors are conducive to the promotion of equality of opportunity in that employment. An equality action plan is a programme of action to be undertaken in employment, in a business or businesses, to further the promotion of equality of opportunity in that employment. The Authority may invite a particular business, group of businesses or the businesses making up a particular industry or sector thereof, to do either or both of the following: carry out an equality review in relation to their business or businesses and prepare and implement an equality action plan in

respect of that business or those businesses. The Authority may, if it thinks it appropriate, itself carry out an equality review and prepare an equality action plan in relation to a particular business, group of businesses or the businesses making up a particular industry or sector thereof. The Authority does not have the power to carry out an equality review nor to prepare an equality action plan in relation to any business which has less than 50 employees, but it has the power to invite such a business to carry out the reviews and prepare action plans itself (EEA Section 69).

If it appears to the Authority appropriate to do so for the purpose of an equality review or the preparation of an equality action plan, the Authority may do either or both of the following: require any person, by notice (substantive notice), to supply to the Authority such information as it specifies in the notice and require any person, by notice so served, to produce to the Authority or send to it such document as it specifies in the notice. Further, if it appears to the Authority that there is a failure in any business or businesses to implement any provision of an equality action plan, the Authority may require any person, substantive notice, to take such action as: is specified in the notice, is reasonably required for the implementation of the plan, and it is within that person's power to take. Before serving a substantive notice on any person, the Authority shall give that person notice in writing (an advance notice) of the proposal to serve the substantive notice and of the proposed contents of that notice. Where the Authority has given an advance notice to any person, and within 28 days from the date of receipt of the advance notice, that person makes representations to the Authority about the proposed substantive notice, the Authority shall have regard to those representations before deciding whether or not to proceed with service of the proposed substantive notice and, if so, as to its contents (EEA Section 70). If the Authority concludes that the person, on whom the substantive notice has been served, has failed to comply with it, the Authority may apply to the Circuit Court or the High Court for an order directing the person on whom the substantive notice has been served, to comply with it (EEA Section 72).

4.4. THE OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

The EEA 1998 provides for the establishment of the Office of the Director of Equality Investigations[230] as the primary forum of redress for unlawful discrimination. While the EEA provides for the ODEI functions in the employment equality area, the ESA 2000 extends those functions to equal status matters[231]. The ODEI is an independent body operating under the aegis of the Department of Justice, Equality and Law reform, whose role is specifically to deal with claims of discrimination under EEA and ESA. The ODEI powers include investigating and passing of binding judgements in the claims as well as the mediation of cases. In order to fulfil these functions the ODEI staff is divided in the Investigating and

[230] Hereinafter the ODEI or the Director.
[231] The ESA Explanatory Memorandum, p. 5.

Mediating sections. The ODEI services are free and claimants are not required to be formally represented. Claimants before ODEI may be individuals or the Authority. The ODEI budget for the year 2001 is £1,335 million[232]. Let us now take a closer look at the functions of ODEI as specified by the EEA and ESA.

Part VII of EEA entitled 'Remedies and Enforcement' treats the establishment of ODEI, its functions and powers. This part of the EEA at the same time addresses Labour Courts and Circuit Courts[233].

All cases, other than those involving dismissal and gender discrimination, must be referred in the first instance to the Director. Dismissal cases may be referred in the first instance to a Labour Court, while the gender discrimination cases may be referred directly to the Circuit Court. The Director will investigate each case (except those resolved by mediation) submitted to it and will issue a binding decision. Section 76 of the EEA establishes right of information for a claimant. A person who considers to have been discriminated has the right to approach the person (for example an employer) who may have discriminated against them, for information. In response, the employer is obliged to give the sufficient information as to allow the person seeking the information to formulate and present a case in an effective manner. If the employer fails to give the information sought, the ODEI may draw inferences as seem appropriate[234]. A person may not refer a complaint to the Director, if a court has already begun hearing a case which they have brought concerning the same issue, claiming damages at common law for breach of an equal remuneration clause, or an equality clause, in their employment contract. Similarly, a person who has referred a claim to the Director may not also recover damages at common law through court proceedings in respect of the same issue, once the Office of the Director has begun an investigation of their complaint or it has been settled by mediation[235]. The 1998 Act provides that a claim of discrimination or victimization must be referred to the Director within six months of the date when it occurred (or, in the case of a repeated act, last occurred)[236].

When the Director receives a complaint, s/he will arrange for it to be acknowledged promptly. S/he will normally refer it within her Office to an Equality Officer for investigation. If it seems that the case could be resolved by mediation, and only if both parties agree, s/he will refer it to an Equality Mediation Officer in the section for Mediation. The Director, Equality Officers and Equality Mediation Officers are independent in the performance of their functions. Section 78 of the EEA points out that mediation is an

[232] The ODEI Annual Report for 2000, p. 4.
[233] This Section of the thesis shall make references to these Courts, only to the extent of their importance for the presentation of the ODEI work.
[234] The EEA Explanatory Notes, p.7.
[235] Guide to Procedures under the Employment Equality Act, 1998, the ODEI Web site: http://www.odei.ie (Hereinafter The EEA Guide to Procedures).
[236] The Director may extend the time limit up to a maximum of twelve months, but only if the complainant can satisfy the Director that exceptional circumstances prevented them from referring the case within the normal six months limit (Adopted from the EEA Guide to Procedures, p.4).

alternative method of resolving complaints, seeking to arrive at a solution through an agreement between the parties, rather than through an investigation and decision. A case is not sent for mediation if either party to the claim objects to the case being dealt with in that way. Mediation is conducted in private, and takes place directly between the parties concerned, with the support of the Equality Mediation Officer (the Mediator), who act as an independent facilitator. If the mediation process results in an agreement acceptable to both parties, the Mediator draws up a written record of the terms of the settlement for signature by the complainant and the respondent. Once signed, a mediated settlement is legally binding on both parties, and if not complied with may be enforced through the Circuit Court. If a claim is not resolved through mediation, the complainant may re-lodge the claim with the Director[237].

When the Director receives a complaint that is to follow the regular procedure, s/he usually assigns it to an Equality Officer (the Officer) or deals with it her/him self. When the case is assigned to an Officer, s/he exercises full powers of investigation and the final decision delivery. First of all, the ODEI contacts both parties to the case requesting them to supply initial information regarding the complaint. After receiving the initial information, the ODEI may request the parties to supply further information. Where the respondent does not cooperate with this request, the ODEI may use special investigatory powers set in the EEA Section 94. For the purpose of obtaining information ODEI may do any one or more of the following: **(a)** at all reasonable times, peaceably enter premises; **(b)** require any person **(i)** to produce to the ODEI any records, books, documents or other things which are in that person's power or control and which the ODEI has reasonable grounds for believing to contain material information and **(ii)** to give the ODEI such information and access as may reasonably be required in relation to the contents of any such records, books, documents or other things; **(c)** inspect and copy or take extracts from any such records, books, documents or other things; **(d)** inspect any work in progress at any premises. These powers shall not be exercised unless the Minister for Justice certifies in writing that there are reasonable grounds for believing that there is in the dwelling information which is material to the investigation of a case, or the consideration of an appeal. Further, if a judge of the District Court is satisfied by information on oath from the ODEI that there is reasonable cause for suspecting that any records, books, documents or other things containing material information are to be found at any premises, the judge may issue a search warrant. A search warrant so issued authorises the ODEI: **(a)** to enter the premises named in the warrant, if necessary by force, **(*b*)** to search these premises, and **(*c*)** to exercise any such power as is described above in relation to persons and records, books, documents or other things found at the premises.

It is important to note that the ODEI applies the division of the burden of proof in deciding in the cases brought before it. The ODEI divides the burden of proof in such a way that part of the burden shifts

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[237] Mediation Services, ODEI Web site: http://www.odei.ie.

to the defendant. The European Court of Justice initiated this practice in cases in which discrimination on the ground of sex was under discussion, and the Irish courts and the ODEI follow this practice. The ODEI is further empowered to call on witnesses, who are to answer fully and truthfully any questions put to them by the ODEI and if so requested to sign a declaration of the truth of their answers. If the ODEI concludes that the person requested to supply information, documents, or records has failed to do so or has done it falsely it may apply to the Circuit Court for an order obliging that person to comply with the ODEI requirement. Under EEA Section 99, it is an offence to obstruct or impede the ODEI in the exercise of his/her powers, or to fail to comply with a requirement of the ODEI. The penalties provided by the Act are as follows: on summary conviction, a fine of up to £l,500 or imprisonment for up to one year or both and on conviction on indictment, a fine up to £ 25,000 or imprisonment for up to 2 years or both. Where the offence continues after conviction, a further fine up to £250 per day on summary conviction and up to £1,500 per day on conviction on indictment[238].

As soon as practicable after the completion of an investigation, the ODEI issues a written decision which includes a statement of the reasons for that decision. Where the Director finds that there has been discrimination, s/he may order: in an equal pay case: equal pay and arrears in respect of a period not exceeding three years preceding the reference of the case and in other cases: equal treatment and compensation of up to a maximum of two years pay (or £10,000 where the person was not an employee). In addition, the Director may order any person to take a specified course of action to avoid future discrimination[239]. Either party may appeal the ODEI decision to the Labour Court. If no appeal is lodged, the decision is legally binding and may be enforced through the Circuit Court. The Circuit Court has the power to make an order for costs against a party not complying with the decision, to award additional compensation or to award further interest under the Courts Act[240].

Besides the power to deliver binding decisions in individual cases the ODEI has a power to deal with discriminatory collective agreements that are rendered null and void under the EEA. The Director, on application, is empowered to identify the provisions of such agreements and offer guidance as to alternative provisions that would be lawful.

As to the functions and powers ascribed to the ODEI by the ESA, as well as the procedural issues, they are essentially the same as those found in the EEA. There are few differences and they regard the following Sections. Under the ESA Section 21, a person who claims that prohibited conduct under the ESA has been directed against any person may refer the case to the Director, but no claim will be investigated unless the two following conditions are satisfied. First, the complainant must give the respondent an initial notification in writing within two months of the alleged act of discrimination, containing: **(i)** the nature of

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[238] The EEA Guide to Procedures, p. 10.
[239] The EEA Explanatory Notes, p.7.
[240] The EEA Guide to Procedures, p. 7.

allegation, **(ii)** the remedy sought by the complainant in respect thereof and **(iii)** the complainant's intention to refer the matter to ODEI if the complainant is not satisfied with the respondent's response to the allegation. Second, the respondent must fail to reply to the satisfaction of the complainant within the reasonable time. Concerning the types of redress under ESA, the Director may order one or both of the following: **(a)** an order for compensation for the effects of discrimination (to the maximum amount that may be awarded by the District Court in civil cases in contract, currently £5.000) and **(b)** an order that the persons as specified in the order shall take a specific course of action. Further difference regards the nature of cases which may be referred to the Director by the Authority. This has been described above in the Section treating the legal action powers of the EA. In regard to the instances when the EA brings the cases that regard discrimination generally practiced against persons and discrimination having as a subject a particular person who cannot reasonably be expected to make his/her own case, it is important to note that the ODEI has the power of hearing and ruling on the class action cases.

Now that we are familiar with functions of the two statutory bodies operating in Ireland, let us evaluate them on the basis of the powers ascribed to them by the EEA 1998 and the ESA 2000.

4.5. THE EVALUATION

This Section shall in the first part outline the main strengths of the existing anti-discrimination legislation in Ireland since that has bearing on the operation of the two statutory bodies, the EA and the ODEI. The second part and the third part address the strengths of the EA and the ODEI respectfully. The weaknesses are not addressed due to the fact that the practices of these bodies have not been extensive enough as to bring to the surface weaknesses of the legislation, if there are any. Further, the practice of the statutory bodies, existing only since 1998, has been limited, and has not given evidence of further weakness of the equality infrastructure operating in Ireland.

4.5.1. THE ANTI-DISCRIMINATION LEGISLATION

The existing anti-discrimination legislation in Ireland is the most comprehensive in the EU presently to the extent that it includes the most extensive list of grounds on which discrimination is prohibited. By specifying the gender, the marital status, the family status, the sexual orientation, the religion, the age, the disability, the race, and the belonging to the Traveller community, as grounds on which the discrimination is prohibited, the legislation applies a horizontal approach to the discrimination. This enables the two statutory bodies, the EA and the ODEI, as well as the Courts to address adequately the multiple discrimination and the indirect discrimination that is often combined with the more explicit forms of discrimination. The number of fields in which it prohibits discrimination further complements the comprehensiveness of this legislation. While the EEA addresses all aspects of the employment, from

advertising for an opening to discrimination by the trade unions, the ESA addresses wide variety of non-employment areas, from education to transport. Further, the two pieces of legislation also reflect the fashion in which the EU has chosen to fight discrimination, by issuing two distinct Directives[241], one regarding the field of employment and the other regarding non-employment areas.

The legislation offers wide definition of discrimination including: direct discrimination, indirect discrimination, discrimination by imputation and by association, harassment and victimization. The extensiveness of this list is an important feature of this legislation because the Identification of all these types of discrimination is a precondition for prescription of adequate measures for combating them.

The law further permits affirmative action and this can be seen as positive in two senses. The first one regards the modern interpretation of the Article 26 of the ICCPR[242], affirming that positive action has an important part in equality discourse. The second one regards the fact that the Directive itself obliges the Member States at least not to prohibit the affirmative action, and the Irish legislation is in this sense in line with the Directive. However it should be noted that the two Acts constituting anti-discrimination legislation in Ireland may have to be amended in the light of the Directive, regarding remedies and exemptions[243].

The legislation establishes the two independent specialised bodies in charge of its enforcement, the EA and the ODEI. The independence of these bodies is their essential feature as they are free to impartially practice their functions. While the EA functions are broad and regard promotion of equality of opportunity, prevention of discrimination and enforcement of the law, the ODEI main function is the enforcement of the law through mediation, investigation and issuing of the binding judgements. This partition of duties enables the two bodies to concentrate in their respective fields of operation while cooperating in some of the more problematic areas, like persistent discrimination. This unique approach to the promotion and enforcement of the anti-discrimination principles has a potential to prove the most effective in suppression of racial discrimination. The following paragraphs list the EA's and the ODEI's powers that represent their assets and argument their significance.

4.5.2. THE EQUALITY AUTHORITY

The first evidence of the EA's strength is found in the composition of its Board. The Board members are chosen for their expertise and experience in equality issues related to the nine grounds on which the discrimination is outlawed in Ireland as well as in the employment and non-employment areas in

[241] The EU Employment Directive, 2000/750/EC and the EU Racial Equality Directive, 2000/43/EC.
[242] The Article 26 of the ICCPR reads '*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*'
[243] Anti-Racism in the Workplace: Resource Pack, A Publication of the Equality Authority, 9th January 2000, p. 8.

which the discrimination is prohibited. The people working in a specialised body represent its main asset as the decisions made by them are fundamental for the effective use of the body's powers and further for the building up of the body's authority in the society. The composition of the Authority's Board also reflects commitment to effective and high-quality service to its clients.

The Authority's powers that primarily have preventive nature regard drafting and publishing of the Codes of Practice, conducting of equality reviews and making of the equality action plans, sponsoring of the research and activities relating to the promotion of equality and. The first three of these powers have an added value because they have aspects that give them weight in the legal sense. The Codes of Practice are admissible in evidence in criminal or any other proceedings, and are taken in account in determining questions arising in such proceedings. Regarding the equality reviews and the equality action plans, the Authority has a power to issue the substantive notices **(a)** requiring a person or a business to deliver information necessary for the carrying of an equality review or making of an equality action plan or **(b)** requiring that person or business to implement adequately an equality action plan. The significant feature of the substantive notices is that they can be enforced through the Circuit Court. The fact that the preventive measures regarding Codes of practice, equality reviews and equality action plans, have aspects that can be legally enforced, makes them advanced and potentially very effective in preventing discrimination. However the full extent of their effectiveness will be seen only once the Authority puts in practice these measures.

The Authority's powers that primarily have enforcement nature regard conducting of enquiries and exercising of its legal action powers. The two most significant features of the Authority's power to conduct enquiries for any purpose connected to its functions are: the power to request relevant information from any person or organization and further summon witnesses and the power to issue non-discrimination notices (NDNs). The Authority's request for collaboration to any person or organization, subject or in any way connected to an enquiry, is legally enforceable through the Circuit Court. If the person or organization in question refuses to provide requested information or does so in a false manner, they are found to have committed an offence and further can be obliged to collaborate with the Authority by the Circuit Court ruling. The same applies to the witnesses summoned by the EA. An important aspect of the EA's dealing with the witnesses is that they are questioned by the EA under an oath as if they were before a Court. This and the fact that the mare request for adequate collaboration in an inquiry can be enforced through a Court ruling shows the significant weight the Authority's enquires are given by the law. This is extremely important for the quality of these enquiries as well as for their outcomes. Not only the persons and organizations subject to an enquiry, but also the society at large are made aware of the importance of the Authority's work, since it is clear that everyone must respond truthfully to the Authority's request of the collaboration in the course of an enquiry.

Where a person or an organization, subject of an enquiry, has been found to have practiced discrimination the Authority has the power to issue an NDN. NDNs oblige the subject of an inquiry: **(a)** to stop discriminatory acts, **(b)** to introduce the measures contained in the NDN aimed at the prevention of the future occurrence of the discriminatory acts and **(c)** to report to the Authority about the progress of introduction of the measures specified in the NDN. In the case of non-compliance with an NDN, in the period of five years starting from the moment in which an NDN is served, the Authority may request the Court to grant an injunction to prevent further acts of discrimination. When the subject issued an NDN does not comply with it, they have committed an offence. The power to issue NDNs is a very significant EA power since through it the EA condemns discrimination in the strongest manner to it available outside of the legal action powers. The fact that NDNs are legally enforceable enhances their significance as well as that of the Authority's role in the society.

Another notable power of the Authority is that of legal action. The power of legal action has two aspects. On one hand the Authority can advise, assist or represent a victim of the discrimination to bring the case before the Court and on the other the Authority itself can bring the case before the ODEI. The fact that the EA's services are free is an important aspect of the exercise of this power. The victims of the discrimination are often members of disadvantaged groups and are not very well financially situated as to be able to afford costly legal advice or representation. The fact that in deciding on granting legal representation the Authority also takes in account the victims' capacity to present the case without its assistance further testifies to the EA accessibility. It is also important to remember that the EA assistance may take the form of mediation, because mediation is an important tool in dealing with discrimination.

The Authority's power to bring the cases before the ODEI in its own capacity is another important aspect of the EA legal action powers. The very important feature of this power is that the EA can bring the cases regarding generally practiced discrimination and cases where a person cannot reasonably be expected to take a case themselves. The significance of this feature lies in the fact that the EA is practically empowered to take class action cases before the ODEI that delivers legally binding decisions. The importance of class action cases in the field of anti-discrimination jurisprudence has been affirmed, since often victims of discrimination are dependent on those who discriminate against them and therefore are reluctant to file complaints. The fact that the EA has a power to initiate proceedings in these instances can be seen as an important asset of the entire equality infrastructure in Ireland. In addition to this, the fact that not any organization, but the Authority itself, is given this power adds weight to the strong stand anti-discrimination law has in regard to these instances.

The final important characteristic of the EA's work regards monitoring of the anti-discrimination legislation and provision of information to the public. Monitoring of the EEA and ESA and their review that may result in suggestions for their amendments are essential for having an efficient legislation.

The final important characteristic of the EA's work regards monitoring of the anti-discrimination legislation and provision of information to the public. Monitoring of the EEA and ESA and their review that may result in suggestions for their amendments are essential for having an efficient legislation. Discriminatory practices may vary over time and the law cannot afford to lag behind those practices and not condemn them properly. Only regularly reviewed law may be considered a living law that can efficiently fight discrimination. The EA's power of reviewal that can be exercised also on its own initiative, is a powerful tool in its possession enabling it to contribute to an up-to-date and strong anti-discrimination legislation. The EA function to provide information to the public is very important preventive measure since its proven that ignorance is often the main source of prejudices, that may develop into racism and discriminatory practices.

4.5.3. THE OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

The ODEI is the most innovative and powerful specialised body presently existing in any of the EU Member States. Its strength results in the first place from its power to deliver the binding judgements in the cases of alleged discrimination. It is an independent body highly accessible to the public because its services are free, it processes every complaint brought before it and the claimants are not required to be formally represented. Therefore, the ODEI enables every victim of discrimination to obtain a legally binding remedy. This makes the ODEI unique and at the same time potentially the most effective type of the specialised body in charge of the enforcement of the anti-discrimination law. It complements the EA whose functions incorporate the promotion of equality and prevention of discrimination, and together with it forms so far the most advanced and potentially the most efficient equality infrastructure presently existing in the EU.

Let us take a look at those powers of the ODEI that are the main sources of its strength. After receiving a complaint the ODEI collects the information necessary for assessment of the complaint. The ODEI has extensive powers to obtain information which it may require in order to carry out its functions. It is enough to recall the ODEI's power to enter and search the premises, if necessary by force, to understand the extensive nature of these powers. For the purpose of an investigation the ODEI may summon witnesses who may be convinced for up to two years imprisonment if they refuse to collaborate with the ODEI or witness falsely. This further testifies to the authority of the ODEI and shall result in the most serious consideration of its role in the society. Once the investigation is over the ODEI delivers its judgement. In deciding the cases the ODEI applies the partition of the burden of proof and this is important because evidence of discrimination is hard to come up with. When the burden is fully with the plaintiff, this often discourages victims of discrimination to bring cases. Shifting of the burden of proof further enhances the accessibility of the ODEI.

The ODEI judgements are binding and may contain considerable pecuniary damages and a specific course of action to be taken by the convicted party to the proceedings. The judgements can be enforced through the Circuit Court that may further order for costs against a party not complying with the ODEI decision and award additional compensation. From the above described it is clear that the ODEI has been given by the EEA and ESA very imposing powers. These powers should on one hand enable the ODEI to efficiently suppress the discrimination in the Irish society through its judgements and on the other prevent further discrimination as their strength is a clear warning to any person or organization that practices any prohibited form of discrimination.

Besides delivering the binding decisions, the ODEI also provides mediation services to its clients, when both parties to the complaint agree to proceed in this manner. The agreements obtained in such a manner are binding and can be enforced through the Circuit Court. This combination of the soft and the hard law approach render the ODEI mediations an effective mean to suppress discrimination.

Further two functions that represent the ODEI assets regard the delivery of judgements in the cases of class action and the assistance to revise the collective agreements that are found discriminatory. Both of these functions are very important because they contribute to the establishment of equal treatment for large numbers of people.

CONCLUDING REMARKS - HERITAGE FOR THE NEW SPECIALISED BODIES

The Article 13 of the Directive providing for the establishment of bodies for promotion of equal treatment in the EU Member States is very broad. Practices of the CRE, the ETC, the EA and the ODEI can provide valuable guidance to the EU Member States in understanding what kind of body the Commission had in mind when asking the States to establish specialised bodies for the promotion of equal treatment. It is in that sense that the experiences of the CRE, the ETC, the EA and the ODEI represent a valuable heritage for the new specialised bodies. Here we shall see what is the content of that heritage by individualizing characteristics of the specialised bodies examined in this thesis that are considered necessary for an effective specialised body to posses. As specialised bodies to combat racism and intolerance are statutory bodies and cannot be separated from the legal framework within which they operate the characteristics of the anti-discrimination legislature are an important issue to address. The second part of this final section shall review some characteristics that the anti-discrimination law should posses as to enable a specialised body to function efficiently.

To begin with, a specialised body must be independent. The fact that its Commissioners, deputy or board members, are appointed by the Minister of Justice does not endanger their independence. On the contrary appointment by the Minister gives weight to the authority of the Commissioners or the deputy members. Further, if the Commissioners or the deputy members are appointed by more than one Minister, as is the case of the ETC in Netherlands, this is even better because the process of selection of the deputy members is more transparent and democratic. In one word, the independence of a specialised body means that once appointed the Commissioners or deputy members are independent in their decision making and using of the powers of a specialised body.

Staff of a specialised body is its most important asset because the quality of its performance is fully dependent on the expertise and professionalism of its staff. Starting with board members the staff should posses expertise and experience in equality issues related to the grounds on which the discrimination is outlawed as well as in the fields in which discrimination is outlawed.

Further precondition for the good functioning of a specialised body is an adequate budget. The example of the CRE in UK is a good one that shows how far powers of a specialised body may reach with a support of an adequate budget. An adequate budget is further important for the independence of a specialised body.

Once these preconditions are fulfilled a specialised body must be given duties and powers enabling it to effectively fight racial discrimination. The duties of a specialised body should comprise prevention of racial discrimination, enforcement of anti-discrimination legislation and the review of that legislation. In order to fulfil these duties a specialised body should be given the bellow described functions and powers.

In order to work towards elimination of discrimination and promotion of equality of opportunity , a specialised body should be empowered to: conduct research, finance assistance to other anti-discrimination organisations, engage in educational activities, assess practices of businesses and organizations upon their request, perform Equality Reviews and draw up Equality Action Plans and Codes of Practice. These preventive functions should have legal value, as is the case with the Codes of Practice in the UK and Ireland, or have some legally enforceable features, as is the case with substantive notices in Ireland, because these 'legal accessories' make the preventive measures more effective.

Further, a specialised body should be empowered to perform independent investigations or inquiries for any purpose connected to its functions. In this context, a specialised body should have the power to require information from any person and summon witnesses. As to assure an effective

collaboration of those asked for information or summoned to witness, the law should criminalize the failure to deliver the information requested or a false delivery thereof. Further, a specialised body should be empowered to apply to the Court for an injunction as to oblige a person in possession of the information, valuable for the inquiry, to deliver it to the specialised body. These measures are important because they assure that a specialised body receives accurate information, which is fundamental for the quality of its investigations and their final outcome.

If the outcome of an investigation is that the racial discrimination has occurred, the specialised body should have a power to issue a binding NDN. NDNs should be enforceable through the court order obliging the party, found in contravention of the anti-discrimination legislation, to comply with the terms of the NDN. Further, if in a five-year period following the issuing of an NDN, a specialised body concludes that the discriminatory practices are persisting, it should have the power to apply for a Court injunction obliging the party, subject to the NDN, to stop the discrimination immediately. It is very important to make NDNs very strong, because next to the legal action powers they are the strongest tools of specialised bodies in implementation of the anti-discrimination legislation.

A specialised body should be empowered to provide assistance to victims of discrimination. This assistance may take various forms such as informing the victim of her/his rights under anti-discrimination legislation, providing legal advice, mediation and legal representation. A specialised body should be accessible to the victims of discrimination in the sense that its assistance must be free of charge and that it must assist every application brought before it in the suitable manner, keeping account of the special needs its clients may have (disability, language proficiency, etc.). It is very important that a specialised body has a power to mediate in instances of racial discrimination, because mediation has proven an important method for settling disputes in these instances.

A specialised body should be granted legal action powers. These powers should essentially be of two types: power to represent individuals before the Court and the power to initiate judicial proceedings in its own name. In both instances a specialised body should be empowered to conduct investigations, request any person to provide information and summon witnesses. Refusal to collaborate with a specialised body should be criminalized. Specialised body should be empowered to apply for a Court order obliging the person in question to deliver requested information. The power to initiate legal proceedings in its own name should essentially regard the situations of generally practiced discrimination and class action. It is very important that a specialised body has a power to bring class action cases because class action is a powerful instrument in re-establishing the balance of power in an environment where victims of discrimination do not bring individual complaints because they are afraid of victimization. Further, a specialised body should practice case follow-ups as to assess the impact of rulings.

A specialised body should be empowered to review the anti-discrimination legislation at its own discretion and draw up suggestions for amendments. This is very important because through reviews a specialised body can assess if the legislation is effective and reflects the current issues in the equality field. Only through a periodic review and amendment can a law be a living instrument that can efficiently condemn and suppress discriminatory practices. Further, a specialised body should on regular basis fulfil its duty to issue annual reports. Annual reports are important for two reasons. First, they are main sources of information on the anti-discrimination law and a state of discriminatory practices in the country. Second, they make specialised body's work more transparent and this contributes to its credibility.

A specialised body can also be empowered to deliver rulings in cases of discrimination. When this is the case this body should have additional characteristics, in respect to those above described. It should be empowered to deliver binding decisions and award both pecuniary and non-pecuniary damages. Although the practice of the ETC in Netherlands shows that non-binding decisions issued by the ETC are implemented and therefore effective in combating racial discrimination, this may not be the case outside of the Netherlands. It may prove more effective in variety of legal and political cultures across the EU to have a specialised body that delivers binding rulings that could be enforced through a Court judgement. Further, this specialised body should not require parties to be represented formally before is, as to increase its accessibility. This body should be given investigative powers as to conduct investigations in the cases brought before it. These powers of investigation should be extensive as to provide evidence necessary for the delivery of quality decisions. Special investigative powers of the ODEI are an excellent example how these bodies should be empowered for the purpose of effective investigations. These bodies should further be empowered to hear class action cases and to provide mediation, outcome of which can be enforced through a Court order.

If a legislator opts to empower a specialised body to deliver rulings it is of crucial importance that s/he should remember the following. Preventive duties of a specialised body are equally important as those of enforcement and in order to fulfil the scope of elimination of discrimination a specialised body must fulfil both of its duties. Establishing a specialised body that fulfils only the duty of enforcing anti-discrimination legislation through delivery of the rulings in cases of discrimination, would defeat the purpose of the institution of specialised body. Wishing to establish this kind of a specialised body, a legislator could learn from the examples of the Netherlands or Ireland, how to go about it. In the Netherlands the ETC itself does both, delivers rulings and carries out the preventive duties. In Ireland on the other hand, there are two specialised bodies. While the EA carries both types of duties, the ODEI is primarily empowered to deliver rulings and mediate in cases of discrimination. Considering the extensiveness of preventive and enforcement duties and the number of functions that a specialised body

has in order to fulfil them, it would appear that the Irish model might be a more practical one for establishing an effective anti-discrimination infrastructure.

The Irish model of two specialised bodies designed to complement each other in fighting discrimination embodies a very important principle that the new specialised bodies should always have present. Discrimination is an extensive malign phenomenon that no specialised body, no matter how advanced, should pretend to fight alone. Work in partnership in the field of anti-discrimination is essential element of successful fight against discrimination. The collaboration of the CRE with the Equal Opportunities Commission, the Disability Rights Commission and the RECs in the UK and the collaboration of the ETC with the LBR and local Anti-discrimination Bureaus in the Netherlands exemplify the importance of joining forces to fight discrimination effectively.

Besides the practice of existing specialised bodies, the legislators designing new specialised bodies have at their disposal two important documents that can provide them with guidance for their task. They are the ECRI General Policy Recommendation n°2[244] and the Starting Line proposal for the EU Racial Equality Directive[245].

Let us take a closer look now at some features that an anti-discrimination legislation should posses in order to provide a legal framework within which a specialised body can effectively operate. The issue of the content of anti-discrimination legislation is important to address, also because we have seen that the weaknesses of the specialised bodies examined always reflected the weaknesses of the legal framework within which they operate.

First of all, the anti-discrimination legislation should apply to a wide variety of fields; both employment and non-employment fields should be covered. This enables a specialised body to mainstream equality issues in a number of fields of our daily life and over time that results in an overall improvement of quality of life. The anti-discrimination law should apply both in private and public spheres. The 2000 Act in the UK is the most advanced example of the prohibition of racial discrimination in the public sphere we have so far. The Act does not only prohibit racial discrimination by a number of public authorities, but it goes further, obliging those authorities to promote equality.

Second, the legislation should prohibit discrimination as comprehensively as possible. Legal code that prohibits discrimination on grounds of religion, race, gender, age, disability, sexual orientation, marital

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[244] ECRI General Policy Recommendation n°2: Specialised bodies to combat Racism, Xenophobia, Anti-Semitism and Intolerance at national level.

[245] The Starting Line proposal was extensively consulted by the European Commission in drafting the Racial Equality Directive. Article 4(4)(e) of the proposal treats the establishment of specialised bodies.

status or political opinion spreads a wide net capable of capturing different types of discrimination. The anti-discrimination legislation in Ireland and the Netherlands provide very good examples of horizontal approach in prohibiting discrimination. We have seen that such approach is very effective in protecting number of groups, targets of discrimination. On the other hand, we have seen that the RRA, prohibiting only racial discrimination, provides protection only to those groups whose identity possesses 'racial flavour'. This makes the CRE worse equipped than the ETC, the EA and the ODEI in fighting discrimination in general. The equality is not divisible and that is the reason why a horizontal approach is a better solution for fighting discrimination and achieving equality. In the EU today there is a further reason for establishing a comprehensive anti-discrimination legislation. By the year 2003 the EU Member States will have to implement the Council Directive establishing a general framework for employment equality. This means that the Member States will have to prohibit discrimination in the field of employment on all the grounds listed in the Article 13 of the Amsterdam Treaty, except for the ground of gender that has been regulated since 1976 by the Council Directive 76/207/EEC.

Anti-discrimination legislation should provide for removal of the main obstacles to litigation in anti-discrimination cases. Namely it should provide for the shifting of the burden of proof, possibility of class action and prohibition of victimization. Further the law should prohibit more than one form of racial discrimination. Besides already mentioned victimization the law should prohibit the following forms of racial discrimination: direct discrimination, indirect discrimination, racial harassment, discrimination by imputation and discrimination by association.

In conclusion, I would like to refer to the wider context within which both the anti-discrimination legislation and specialised bodies operate, namely that of the international law of human rights. The ICERD provides us with the definition of what racial discrimination is and not of what the race is. I believe the reason for this is the fact that 'race' does not exist. However we continue using the term, some affirming that 'race' does not exist and some certain that there are four 'races' of people: black, red, yellow and white. The usage of the term race by both groups strengthens prejudices, racism and racial discrimination. A solution to this is yet to be found. In this direction I believe the word race should first of all be erased from the ICERD definition of racial discrimination. Further reason for this, is that it renders the ICERD definition of racial discrimination tautological. The Article 1 of the ICERD should be amended to read 'The term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on ~~race~~, colour, descent or national or ethnic origin...'. Perhaps such an amendment cannot take place in the near future, but that does not mean that it cannot happen. For the time being we need to be aware of this problem that is more than a semantic one.

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