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Summary

This paper uses the example of the EU race discrimination directive to consider how new governance methods interact with law, and in particular with legal ‘rights’. The merits of a new governance approach are sometimes contrasted with the merits of a human rights approach. The concern of the latter approach is that once important ‘rights’ are characterized primarily in terms of flexible goals, the important commitments they represent may become empty of content, and if not expressed in more substantive and specific terms, their delivery will not be susceptible to any meaningful accountability. The paper uses the example of EU anti-discrimination law in the field of race to outline a hybrid approach which jettisons neither the commitments of the rights approach nor the experimentalism of the new governance approach, but which seeks to combine the essential strengths of each.

Contents

I. INTRODUCTION*	3
II. RIGHTS VS GOVERNANCE?	3
III. THE RACE DIRECTIVE	4
IV. THE INSTITUTIONAL CONTEXT OF THE LEGISLATION:	8
IV.1 THE EVOLVING ROLE OF THE ACTION PROGRAMME	8
<i>a. strand one: analysis/evaluation</i>	10
<i>b. strand two: capacity-building</i>	13
<i>c. strand three: awareness-raising/promoting values</i>	14
IV.2 COMPLEMENTARY INSTITUTIONS: THE AGENCY AND THE NETWORKS	14
<i>a. The existing anti-discrimination agency: EUMC</i>	16
<i>b. The Networks</i>	17
IV.3 MAINSTREAMING ANTI-RACISM NORMS	19
V. A HYBRID MODEL	20

I. Introduction*

Taking the example of the EU race discrimination directive, this paper takes the basic intuition of the experimental governance literature, that in seeking to achieve public interest objectives and to provide for public welfare “instead of issuing detailed regulations, or specifying how services are to be provided, the state would set general goals, monitoring the efforts of appropriate actors to achieve those goals by means of their own devising”,¹ and contrasts this with what will be called a human rights perspective. From a human rights perspective, the experimental governance approach raises the concern that, once characterized primarily in terms of flexible goals, important commitments may become empty of content and, if not expressed in more substantive and specific terms, their delivery will not be susceptible to any meaningful accountability. Starting out from this point of contrast between the human rights approach and the new governance approach, the paper uses the example of EU anti-discrimination law in the field of race to outline a hybrid approach which jettisons neither the commitments of the rights approach nor the experimentalism of the new governance approach, but which seeks to combine the essential strengths of each.²

II. Rights vs Governance?

The tension depicted above between the rights model and the governance model overlaps with, although is not the same as, the contrast which has been drawn between a traditional lawmaking approach and a “new governance” approach in the EU.³ To take the most important features of the former: a human rights model is suspicious of voluntarism and of self-regulation and is premised on some element of hierarchy in terms of answerability for the pursuit of overarching norms, while an experimentalist governance approach is premised on a more heterarchical set of arrangements with an emphasis on peer or reputational accountability. Secondly, a human rights model places importance on a degree of definition and clarity in the content of the commitment in question, while an experimentalist governance approach prioritizes revisability and open-endedness in the specification of goals, with an emphasis on the role of ongoing processes to give content to those goals in changing circumstances. Thirdly, while the human rights model places importance on the role of bottom-up-actors (civil society) in monitoring, enforcing and developing the regime, it sees these crucially as relying on the existence of a set of vertical or formal norms and institutions with which to interact for both strategic (enforcement) and legitimacy-enhancing purposes. The experimentalist governance model on the other hand is more radically bottom-up in seeing social actors/stakeholders as generative of norms, and responsible for the spread and dispersal of these through their ongoing practices and activities. Fourthly, the human rights model posits a significant role for courts in ultimately enforcing the content of the legal commitment, while in the experimentalist model the role of courts is at best a residual one to monitor the adequacy of the processes established and to allow for their disruption where they are malfunctioning.

* Thanks to Nina Boeger for excellent research assistance

¹ C Sabel, “Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability” <http://www2.law.columbia.edu/sabel/papers/Sabel.definitief.doc>

² New and experimentalist governance approaches have emerged on both sides of the Atlantic, and indeed elsewhere, in part as a function of the search for better and more effective ways of tackling social and economic problems under conditions of complexity. However, the flexibility and adaptability characteristics of new governance modes also serve the related but distinct goal of coping with strong diversity within a federalized system.

³ J. Scott and D. Trubek “Mind the Gap: Law and new approaches to Governance in the EU” (2002) 8 ELJ 1.

The contrast between a commitment to securing well-defined, judicially enforceable individual rights and a belief in the virtues of open-ended and flexible policy-making with an absence of hierarchical monitoring, appears fairly stark. It seems highly unlikely that someone committed to the human rights paradigm as a means towards improving the personal and social conditions of disadvantaged persons would embrace the assumptions and prescriptions of the experimentalist governance approach. However, by focusing on what is quintessentially a human rights issue – that of race discrimination - I argue in this paper that the development and operation of EU legislation in this field provides the elements for an approach combining positive features of both models, and which does not lose the essential strengths of either. Of course it must be acknowledged that there is a risk of doing exactly the opposite, in the sense that by seeking to develop a form of hybrid model, the strengths of each of the two approaches would be lost. On the one hand it could shackle the openness and experimentalism of the governance approach to the perceived rigidity of the human rights approach; and conversely it could sacrifice the commitment to content and harder-line enforcement of agreed values under the latter, to a more elusive and less tangible pursuit of vague goals. Nevertheless, this paper argues to the contrary, that the model of an EU framework directive with broadly defined objectives, premised on the need for the involvement of intermediate institutions, backed up by a network of relevant institutions and stakeholders, and supported by a set of programmes intended to mobilize and resource civil society actors and to generate a body of cross-national data and research, successfully combines significant elements of the experimental governance approach while retaining some of the incentive structure, and compliance back-up of the rights model with its legal framework, judicial interpretative role, and formal sanctions.

III. The Race Directive

The EU Council and Parliament in 2000, following many years of campaigning by NGOs and other interests, introduced a directive “implementing the principle of equal treatment between persons irrespective of racial or ethnic origin” in a wide range of social and economic settings.⁴ This directive was adopted as one of the three parts of an overall EU anti-discrimination package, the second being a framework employment directive which followed shortly afterwards, aiming to promote equal treatment in employment on grounds of age, disability, sexual orientation and religious belief, and the third part an action programme against discrimination. The two anti-discrimination directives were seen by some as the first steps towards a new kind of European social law, based on Article 13 of the EC treaty which had come into force in 1999 and which enabled the Council of Ministers to take action to prohibit discrimination on a number of specified grounds. The race directive in particular seemed to signal a move away from the previously omnipresent requirement to show a labour-market or internal-market justification for adopting legislation in the social realm, and contained several innovative features.

This directive has certainly not been free from criticism, and several weaknesses have been identified.⁵ These include the lack of positive obligations created under the directive, and its focus on individual rather than on group discrimination, since although the concept of indirect

⁴ Council Directive 2000/43/EC of 29 June 2000. See A Tyson “The negotiation of the EC Directive on Race Discrimination” (2001) 3 *European Journal of Migration and Law* 199, Mark Bell, *Anti-Discrimination Law and the European Union* (OUP, 2002)

⁵ See e.g. Bob Hepple “Race and Law in Fortress Europe” (2004) 67 *Modern Law Review* 1.

discrimination helps to identify and address collective disadvantage,⁶ the kinds of remedies and response mechanisms called for by the directive are primarily individually focused.⁷ Other criticisms concern the very category of ‘race’ on which the measure is premised, and the fact that although non-EU nationals are covered by the legislation, discriminatory treatment which is based on the person’s nationality rather than race - assuming that this distinction is actually workable - is not covered.⁸ However, the point of using the example of the directive here is not to appraise its various weaknesses and strengths but rather simply to use it deductively in sketching a possible approach which positively combines elements of the human rights and experimental governance paradigms in addressing complex social problems.

While all EC directives can in formal terms be described as framework laws, (since they are described in the EC treaty as binding only “as to the result to be achieved” but leaving “to the national authorities the choice of form and methods”), the EU’s use of directives did over time tend to become more detailed and less distinguishable in nature from the formally more prescriptive EC Regulations. This development gave rise to criticism and to proposals such as those which eventually appeared in the Protocol to the EC on the application of the principles of Subsidiarity and Proportionality, to adopt directives in less detailed form.⁹ The race directive, however seems to be more genuinely framework in nature, in so far as it contains a general prescription - in this case the elimination of direct and indirect discrimination on the ground of racial or ethnic origin - to which States must commit themselves, but without prescribing in detail how this is to be achieved. It is the procedural and enforcement provisions of the directive, rather than its substantive policy prescriptions, which are laid down in greater detail.

The first article of the directive states that “The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment” A broad definition of direct and indirect discrimination, which is derived in part from ECJ case law on sex equality, and which includes harassment, is given. Action to protect against the victimization of complainants is provided for, and the burden of proof on individual complainants is required to be lessened. States are not required but are permitted to pursue a degree of affirmative action in achieving the goals of the legislation. Further, the directive contains a qualified non-regression clause¹⁰ and an indication that it sets only a minimum standard, which can be seen as articulating a weak encouragement to states to ratchet their standards upwards.¹¹ In

⁶ Statistical evidence can be used to show that a particular practice ‘would’ (rather than does) disadvantage members of a particular ethnic group See however the critique by Damian Chalmers of the way in which the indirect discrimination criterion is used to challenge structural disadvantage, and his proposal for a dialogic (‘intercultural evaluation’) response: “The Mistakes of the Good European” in *Discrimination and Human Rights: The Case of Racism* (Sandra Fredman, ed) OUP 2001

⁷ See Mark Bell, “Walking in the Same Direction?: The Contribution of the European Social Charter and the European Union to Combating Discrimination” in G. de Búrca, B. de Witte and L. Ogertschnig (eds), *Social Rights in Europe* (OUP, 2005).

⁸ Mark Bell, *Anti-Discrimination Law and the European Union* (OUP, 2002), Chap. 7.

⁹ This protocol was added to the EC Treaty by the Amsterdam Treaty in 1997, and is available electronically at <http://europa.eu.int/eur-lex/en/treaties/selected/livre345.html>

¹⁰ It is qualified in the sense that it does not prohibit states from reducing their current standard of race equality provision, but it is a non-regression clause in the sense that it specifies that the directive itself cannot be used as justification for a reduction in their existing standards.

¹¹ Article 6(1) of the directive reads: “Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive”

addition to requiring the prohibition of direct and indirect racial discrimination across a range of social fields including access to housing, health, education, social assistance, employment, in both public and private spheres, the legislation requires that states disseminate information about the aims and content of the legislation to all persons concerned, and that they establish or designate equality bodies in each state to promote the principle of race equality, including by conducting studies, publishing research, and supporting complainants. The directive states that adequate administrative or judicial remedies, including conciliation procedures where considered appropriate, should be available to those seeking redress for discrimination, and sanctions, although not stipulated in more specific terms, are required to be ‘effective, proportionate and dissuasive’.

Apart from the deliberately framework or outline nature of the directive, some of its individual provisions are themselves resonant of a ‘new governance’ approach, to use the title of this volume. States are asked in article 11 to “promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices”. They are also obliged to encourage dialogue with relevant NGOs, and they must report every five years to the Commission on how they have implemented the various obligations contained in the directive. Finally, there is an express provision concerning the possible revision of the legislation in the light of the feedback received from the states. In proposing such a revision, the Commission must take into account the views of the EU’s own anti-racism agency (EUMC),¹² of NGOs and of labour and industry (the social partners).

Aside from its framework nature and from these particular provisions, on the other hand, the directive also reflects aspects of a more classical human rights instrument¹³: in particular with its focus on the individual right to complain, the unequivocal prohibition of discrimination, the emphasis on the need for enforcement of rights, as well as the emphasis on the burden of proof and adequacy of sanctions, and finally the extensive invocation of international human

¹² This is the Vienna Monitoring Centre on Racism and Xenophobia, which will be discussed further below. The Centre has not been altogether a success since its establishment. Having taken two years from the time of its establishment to actually begin operating, it has not had a high profile in Europe even amongst anti-racism NGOs, being outshone in this respect by the Council of Europe’s smaller but more active and focused European Commission on Racism and Equality. In 2002 the EU’s Vienna Monitoring Centre was subject to a critical external evaluation, and subsequently became the object of international media attention when its decision to suppress a controversial report on anti-semitism in Europe was leaked. Its future is at present uncertain since the decision of the heads of government in December 2003 to propose merging its functions into those of a broader EU human rights (later called “fundamental rights”) agency. The Commission’s proposal to establish such an agency was published following a consultation process: http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/analysis_written_contributions_en.pdf, see now COM(2005) 280. http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/report_public_hearing_en.pdf

¹³ See section 2.9 of the Commissions Green Paper on Equality and Nondiscrimination COM(2004)379, drawing attention to the international human rights context of the directive. Similarly, according to a report on *Strategic Litigation of Race Discrimination in Europe: from Principles to Practice*, (2004) “It should be remembered that while the Race Directive was a European creation, the human rights violations that it seeks to address are very international in character. The strong definitions and principles adopted in the Race Directive should be adopted and promoted in other fora. The Race Directive is particularly important in strengthening the largely weak discrimination jurisprudence of the European Court of Human Rights and the decisions of the UN Treaty bodies”. The latter report was published by the Migration Policy Group, Interrights and the European Roma Rights Centre as part of a 3-year project (funded by the Open Society Institute and others) on “Implementing European Anti-Discrimination Law”:

rights instruments in the recitals.¹⁴ The Commission in its recent Green Paper on equality and non-discrimination also described the directive as having introduced “a rights-based approach to discrimination”.¹⁵

In addition to the mixture of rights-oriented and new-governance-style provisions, however, a number of aspects of the directive’s interaction with other schemes and institutional arrangements have arguably helped to shape it into an interesting hybrid instrument. In the first place, the interaction of the legislation with the EU Action Programme against discrimination is significant.¹⁶ Secondly, the operation of the legislation takes place against the background of the establishment of a number of specific networks (in particular the RAXEN and ENAR networks, on which see more below) to promote anti-racism law and practice and to exchange information, knowledge and experience, and in the context of the existence of an EU Agency dealing with racism and xenophobia.¹⁷ A third feature is the move towards mainstreaming anti-racism norms and concerns within other EU policies,¹⁸ including integrating them into the so-called Lisbon agenda (i.e. the triangle of economic policy, employment policy and social policy coordination).¹⁹

Each of these aspects – the role of the Action programme, the interaction with related networks, and the move towards ‘mainstreaming’ -will be discussed further below. It will be clear that some of these developments are more advanced than others, that some operate more effectively than others, and that there are various inadequately functioning features. But the argument of this paper is not so much an empirical claim that the way in which the race directive is operating in the context of these other strategies, institutions and instruments forms a perfect hybrid of experimental governance and a human-rights approach, but rather that the

¹⁴ “ (2) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and should respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community Law. (3) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories”.

¹⁵ COM(2004)379.

¹⁶ The Programme follows the EU’s practice of supporting social legislation with a policy programme, for example the Gender Equality Programme (2001-2005), the Community action programme to encourage cooperation between the Member States to combat social exclusion (2002-2006), and Community incentive measures in the field of employment (2002-2005). Action programmes in other ‘social’ fields such as education and environmental policy have also been adopted.

¹⁷ This will probably soon be transformed into a broader human rights agency: see n. 12 above, and further below.

¹⁸ See COM(1998)183 An action plan against Racism. Also Article 8 of the Decision establishing a Community Action Programme to combat discrimination 2000/750/EC and para 11 of the preamble thereto; More recently, one of the ‘chapeau’ articles of part III of the ill-fated EU constitutional treaty, which was the part governing all of the EU’s substantive policies, Article III-3 provided: “In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

¹⁹ See the Commission’s Green paper on Equality, n. 13 above. More generally see Mark Bell “Combating Racial Discrimination through the Employment Strategy” (2003-4) 6 Cambridge Yearbook of European Law , forthcoming.

combination of the different features described provides the framework for a hybrid model which potentially combines the strengths of both approaches.

IV. The Institutional Context of the legislation:

IV.1 The evolving role of the Action Programme

Due in part to force of circumstance rather than design, and in particular on account of a changing political climate which is increasingly unenthusiastic about further attempts to regulate discrimination by legislating, the EC Commission has been concentrating its energies on the race directive and the framework employment directive rather than on proposing new legislation²⁰ as had previously been contemplated, or seeking to broaden or amend the existing measures. While the race directive itself was negotiated and adopted in record time, apparently because of member states' wish that year to appear to take rapid action in response to Jorg Haider's rise to power in Austria, the high political momentum rapidly ebbed away. This was particularly evident given the growing emphasis on anti-terrorism after September 11, and many EU states delayed in implementing the directive properly or at all.²¹ Any new initiatives in the anti-discrimination field seem likely to take the form of 'incentive measures' (which require only a qualified majority rather than unanimity amongst the twenty-five states in the Council) rather than legislation.²² The political will which led to the adoption of a measure as broad in scope as the race directive, which unlike all EU other anti-discrimination laws is not confined to employment-related discrimination, seems unlikely to revive for quite some time; and while this has disappointed those campaigning for similar legislation in relation to the other grounds (such as disability, sexual orientation, age etc), it has arguably had the unanticipated effect of channeling much of the Commission's energy and focus into rendering more effective and operative, in interesting ways, the existing legislation.

In using the EU 'action programme to combat discrimination' to support the implementation and development of the race directive, together with the framework employment directive, the Commission has promoted the involvement of civil society actors, it has openly acknowledged the inadequacy of its understanding of the set of problems which the directive seeks to regulate, it has commissioned and funded the gathering of a broad set of data from all states, and has encouraged the establishment of transnational networks of NGOs to participate in monitoring and making operational the legislation. While the action programme was not initially conceived specifically as a support for the directives, but rather as the third and distinct part of a European anti-discrimination package alongside the two directives, it has increas-

²⁰ An exception is the recently adopted directive on gender equality in access to goods and services, Directive 2004/113, OJ [1994] L 373/37, which had a difficult journey through the legislative process, apparently on account of the lobbying power of the insurance and advertising industries which objected to the proposal to prohibit the use of sex-based actuarial factors.

²¹ The Commission brought infringement proceedings against nine Member States (Austria, Germany, Greece, NL, UK, Ireland, Belgium, LUX, Finland), following their failure to notify implementation of the Directive on time, and recently the ECJ ruled against several of these states for failing to adopt the Directive: see C-329/04, *Commission v Germany*, judgment of 28 April 2005, C-335/04, *Commission v Austria*, judgment of 4 May 2005, C-320/04, *Commission v Luxembourg*, judgment of 24 February 2005, C-327/04, *Commission v Finland*, judgment of 24 February 2005

²² Equality Green Paper, p. 15. A European Action Plan on disabilities was also adopted in October 2003, COM (2003) 650 final, setting out a number of initiatives to promote access of people with disabilities to employment, lifelong learning, development of new technologies and accessibility to the built environment.

ingly been used to support and develop the legislation, so that the strategies under each can be seen as complementary and mutually reinforcing.

The objectives of the action program²³ – which correspond broadly to the three strands of action funded under it²⁴ – are firstly analysis and evaluation (conducting research, gathering data), secondly developing the capacity to combat and prevent discrimination (funding the activities of NGOs, spreading best practices), and thirdly ‘promoting the values underlying the fight against discrimination’ (promoting awareness through publicity, seminars, providing information). Amongst the activities which it is to support are the development and dissemination of quantitative indicators and benchmarks, and the promotion of networking and transnational cooperation. The Commission is required to cooperate regularly with NGOs and the social partners in the context of the action programme, to promote dialogue between all parties, and to encourage “an integrated and coordinated approach” to combating discrimination. Access to the programme is open to all bodies, public and private, who are ‘involved in the fight against discrimination’.

There are only passing references to legislation in the decision setting up the Action Programme and its priorities, one being in the first strand of action (analysis/evaluation) which mentions the evaluation of legislation in the field, and the other in the third strand (promoting values/awareness-raising) which mentions “the organization of seminars in support of the implementation of Community law in the field of non-discrimination”. Despite this initial failure to conceive of a structured relationship between the directives and the programme, however, there has been an evolution of the action programme in practice towards a more sustained support for the operation of the legislation, and a more organized interaction between the two instruments. At least one impetus in this direction has probably come from an initial external evaluation of the action programme in 2003 which reached the conclusion that a more integrated anti-discrimination strategy was needed, and specifically that a better interaction between the directives and the programme (or in the terms of the report, between the legislative and the programmatic aspects of the strategy) should be developed.²⁵ On the other hand, the evaluation report also noted that despite the lack of clarity and planning, that there had in fact been a degree of interaction in practice between the directives and the programme, at least in the area of awareness-raising. And in a follow-up evaluation report in 2004, it was said that “the link between the programme and the strategy, and in particular between the programme and the legal approach, has been reasserted” and that “the programme now appears to be more in line with the life cycle of the legal approach”.²⁶

Under its three strands of analysis/evaluation, capacity-building, and awareness-raising, the principal ways in which the action programme has interacted with the legislation have been through the funding of transnational networks of or umbrella NGOs active in the field of anti-

²³ See Article 2 of the Council Decision 2000/750 EC establishing a Community action programme to combat discrimination (2001 to 2006) OJ L 303/23 [2000].

²⁴ Article 3, *ibid.*

²⁵ The Report concluded that “the programme must have a clearly defined role in relation to the two directives, the link between the programme-planning tool (concrete actions) and the legislative tools (directives) must be clear, and both approaches should be mutually supportive”.

The evaluation report was prepared in 2003 by Deloitte & Touch, and published by the Commission’s Government Services in April 2004.

²⁶ See the report, available online at http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/eval/grepexsum_en.pdf

discrimination, to develop their capacity and expertise further,²⁷ the funding of research and data-collection²⁸ and the publicizing of the EU legislation and its potential.

a. strand one: analysis/evaluation

Under the action programme's first strand, the Commission provided funding for the establishment of a network of equality bodies which the member states were required under the directive to establish or designate in order to provide support to victims of discrimination, and to issue reports and recommendations. The network was intended to promote exchanges of experience and good practice between these equality bodies. The funding was put towards a project entitled *Towards a uniform and dynamic implementation of EU anti-discrimination legislation: the role of Specialised Bodies*,²⁹ coordinated by the Migration Policy Group NGO and led by the Dutch Equal Treatment Commission. It is a network of approximately twenty national monitoring bodies covering some or all of the grounds of discrimination listed in Article 13 EC, established with the aims of "promoting the uniform interpretation and application of the anti-discrimination legislation, and stimulating the dynamic development of legal equal treatment in Member States, as permitted by Art. 6(1) of the Race Equality Directive".³⁰ This combination of a commitment to 'uniformity' and 'dynamism' will be discussed further below, but for present purposes a significant factor is the encouragement via the action programme of actors other than courts to become involved in both the interpretation and the development of the legislative standards. The participants in the network are not only the staff of national equality bodies but also invited experts and others who can usefully advise on their work. Finally, the action programme also funded an assessment of the equality bodies established, which was provided in a 2000 report.³¹

²⁷ See, for a more critical evaluation by the external evaluators of the initial tranche of funding of this second strand, http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/eval/casestudta_en.pdf

²⁸ The funding available under the Programme is however limited when compared e.g. to the EQUAL initiative on employment-related equal opportunities which is backed by the European Social Fund EUR 98,4 million over 5 years, as compared with. Euro 3,000 million for EQUAL for 6 years (2000 – 2006) http://europa.eu.int/comm/employment_social/equal/index_en.html

²⁹ *Towards the Uniform and Dynamic Implementation of EU Anti-discrimination Legislation: the Role of Specialised Bodies* <http://www.migpolgroup.com/programmes/default.asp> ("specialised bodies"), also available on the the Social Affairs Directorate General of Commission's website on the Europa server, http://www.europa.eu.int/comm/employment_social/ "Action Programme at a glance"

³⁰ Meetings of the network have so far been held or scheduled within this project on the following topics: proving discrimination (monitoring, statistics, situation testing); how to meet the requirements of protection against discrimination and gender equality; equal pay; enforcement and remedies against discrimination in working life; goods and services; strategic enforcement.

³¹ Promoting Diversity: 21 bodies promoting diversity and combating discrimination in the European Union: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/equalitybodies_exec_en.pdf.

The Report assesses of the 21 bodies chosen on the basis of:

- (i) their structure, mandate and legal basis, their independence and budget.
- (ii) their competences in providing services directly to victims, i.e. whether they are restricted to an advisory role or have formal powers to investigate reported cases of discrimination (UK and Ireland), whether they have standing to bring court cases (Belgium) or can act as formal quasi-judicial decision making bodies (e.g. Ireland (legally binding rulings) or Holland (advisory rulings)).
- (iii) Their role in the political process and how far that role is formalised.
- (iv) Their role in information spreading, research and awareness raising.

The report concludes that whilst a small number of Member States (e.g. UK, Ireland) were "willing to go beyond the minimum standards set out in Community law" by setting up bodies with competences for all grounds of discrimination within Art. 13 EC Treaty, in most states there are shortfalls.

As far as the funding of research and data-collection is concerned, the Commission has used the programme to underpin the directives by setting up groups of legal and other experts to provide it with data, including comparative information on the situation in the different Member States, as well as information about the problems encountered by each state with regard to data-collection itself. Whilst the Commission is the coordinator of the action programme, the work is carried out primarily at national and at local level. The Commission seems clearly conscious of the limits of its information and the importance of continuous sources of reliable information in order to address the problems in practice. It seems indeed sceptical about its own capacity and that of national authorities to “assess the real extent of the challenges that exist and to measure the effectiveness of legislation and policies to tackle discrimination,”³² due to the lack of adequate mechanisms to collect data and to monitor trends and progress in Member States. One of the problems is that much of the data on discrimination, and in particular on race discrimination, is difficult to access. Other difficulties are created by privacy and data protection laws.³³ The Commission however is advocating, despite these sensitivities, “a dialogue with national authorities and other stakeholders on possible ways to improve data collection in this area”.³⁴

With a view to the development of indicators and benchmarks, which was one of the specific projects identified in the action programme, the Commission established a Working Group on data collection in 2003, led by the Finnish government and working in conjunction with the European Monitoring Centre on Racism and Xenophobia (EUMC),³⁵ in order to develop indicators to measure the existence and causes of discrimination. Two reports were commissioned and published in 2004, one a comparative study of data-collection on discrimination in the US, Canada, Australia, UK and the Netherlands,³⁶ and the other a study on data-collection to measure the impact and extent of discrimination in Europe.³⁷

The other major part of the analysis/evaluation strand of the action program which is relevant to the interaction with the race directive concerns the funding of ‘independent experts’ to assist in monitoring the transposition of the directives. The Programme has funded three working groups of independent experts, coordinated by the Migration Policy Group (on racial and religious discrimination), the University of Leiden (on sexual orientation discrimination) and

³² Equality Green Paper, p. 15;

³³ The Commission sent out questionnaires to all Member States in 2001 to find out what Member States did to collect data on discrimination, and what particular difficulties they encountered. These were followed up in 2003 in discussions with the Directors of Social Statistics in Member States. The Commission highlighted the following difficulties

1. Data on discrimination is generally measured by proxy indicators (e.g. employment and unemployment rate) indicating the impact of discrimination rather than directly.

2. Specific data will only be made available if there is a clear legal mandate on the part of the recipient to have it disclosed.

3 Data on some groups will be scarce for cultural reasons and to avoid risk of stigmatisation, e.g. information on sexual orientation or the collection of data desegregated in respect of racial or ethnic origin

4 Data, even though it may be useful, will be collected in a piecemeal manner (e.g. number complaints filed may give an indication but depends on how many people actually file them).

5. The issue of data protection is reinforced by EU Directives on the subject.

See the Discussion paper on the collection of data to measure the extent and the impact of discrimination, http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/glance/discuspap_en.pdf

³⁴ Equality Green Paper, p. 16

³⁵ See n.12 above, and n.57 below.

³⁶ See http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/compstud04_en.pdf

³⁷ http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/compstud04fin.pdf

University of Galway (on disability) respectively, to examine the transposition of the Directives into national legislation in all twenty-five member States. The initial ‘country reports’ which were produced on racial and religious discrimination were fairly factual, concentrating on describing the situation under national law and the extent to which it corresponds with the terms of the directives.³⁸

Within the Commission at the same time, a "legal working group" of civil servants representing the member states was also working on transposition, but it seems that these state representatives were not particularly active in promoting and developing the legislation. The aim was for them to (1) develop good practice and (2) exchange experiences over the legislation, but according to a key Commission official working in the relevant unit, many states showed little interest in their neighbour’s legislation and no real benefits came out of three years of the legal working group’s operation: in her view it had therefore ‘outlived its life’.³⁹ The external evaluation report on the programme indeed had already drawn attention to and criticized the “limited exchanges between groups of experts and between the latter and the legal working group.”⁴⁰ As a consequence, the separate expert groups were merged in 2004⁴¹ so that there would henceforth be one set of twenty-five experts, with one person each responsible for all the different grounds of discrimination within a given member state. The information which has emerged from this process of monitoring the legislative implementation so far gives a mixed picture, according to the Commission.⁴² While the deadline for transposition of the directives passed on 19 July 2003,⁴³ many states had not used the three preceding years following the adoption of the Directive to introduce the necessary provisions, and representatives of civil society have been critical of the lack of consultation in several states during the process of implementation. Indeed, this links with one of the interesting findings of the 2003 evaluation report of the action programme, which was that the member states had not been active participants under the ‘awareness-raising’ strand of the programme either – only nine out of twenty-five having sought funding which was available for this purpose. These results so far suggest on a range of fronts that the non-state actors – the NGOs, ‘experts’ and other civil society actors - are the more dynamic and committed interlocutors in the promotion of

³⁸ Available at

http://www.europa.eu.int/comm/employment_social/fundamental_rights/legis/msleglnraceequal_en.htm These reports overlap to some extent with earlier reports produced outside the Programme, as part of *Implementing European Anti-Discrimination Legislation*, a joint initiative by MPG, ERRC and Interrights, which does not receive Commission funding. See link at <http://www.migpolgroup.com/programmes/default>. From the individual EUMC reports, a *Comparative analysis of national and European law* was drawn up 2002 by MPG, ERRC and Interrights.

³⁹ Barbara Nolan, Comment at Prague Anti-Discrimination Conference, July 2004

⁴⁰ See above, n. 25

⁴¹ http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/prog/budgetwork2003_en.pdf, p. 2

⁴² In some countries in 2004, draft legislation was still under discussion or had not yet even been formally tabled, or the legislation did not yet cover all of the territory of the Member State or all of the relevant levels of government. In countries where national legislation had been adopted, there was often evidence that this did not fully transpose all of the provision of the Directives. Particular problems seemed to include the new definitions of direct and indirect discrimination, the notion of harassment, the introduction of novel legal concepts, and the requirement to ban racial discrimination in areas outside employment. See the Commission’s Equality Green Paper, p. 14

⁴³ The deadline for the Race Directive was 19 July 2003, for the Employment Directive 2 December 2003 although some Member States have opted to avail of the right to request an addition of up to three years to implement the provisions relating to age and disability.

EU anti-discrimination legislation, thus supporting one of the assumptions on which the new governance approach is premised.

b. strand two: capacity-building

The largest proportion of the action programme budget is spent on activities under this second strand, which essentially concern the funding of NGOs, public authorities, social partners, universities and other intermediate institutions of various kinds. The largest proportion of the strand two budget in turn is spent on some twenty-seven “transnational partnerships” for the exchange of information and good practice in fighting discrimination.⁴⁴ To qualify, there must be a range of actors from at least three States, and the activities must involve the transfer of information, lessons learned and good practices developed, and they must include a comparison of the effectiveness of processes, methods and tools related to the chosen themes, as well as exchanges of personnel, the joint development of processes, strategies and methodology, and the adaptation to different contexts of the methods, tools and processes which have been identified as good practices.⁴⁵

Despite rising levels of interest and participation in this part of the programme,⁴⁶ the Commission was critical of the quality of the projects, although it seems likely that at least two of the reasons for this lack of quality may have lain in the criteria of eligibility for funding. On the one hand, the ‘broad approach’ (ie targeting all grounds of discrimination and not only one such as race), and on the other hand, the strictly cross-border approach made it difficult for good organizations used to working with particular target groups to qualify for project funding.⁴⁷ Dissatisfaction with the effectiveness of the first set of transnational partnerships was also expressed in a critical interim report by external evaluators.⁴⁸ In the second batch of projects selected for funding in 2004, the focus of the funding this time around was on three key sets of activities: the training of legal practitioners and NGO representatives, the development of monitoring and data collection tools, and thirdly networking amongst equality bodies, researchers, public authorities or civil society actors

In addition to the funding of these transnational projects, the capacity-building strand of the action programme also provides core funding to a group of four European umbrella NGOs: the European Disability Forum (EDF), the European Network Against Racism (ENAR), the European Older Persons Platform and ILGA-Europe (International Lesbian and Gay Association) Funds are used to “allow these organisations to tackle discrimination, promote equality and involve their members in a range of activities.”⁴⁹ One example where an umbrella organi-

⁴⁴ To give an idea of the scope of the funding, among the twenty-seven projects selected for funding, their focus included: (i) combating discrimination in public administration including health and social care, policing, trade unions, education and local authorities (ii) equal access to goods and services (iii) discrimination in the media (iv) improvement of training for lawyers (v) discrimination specifically on grounds of disability and mental health or against specific religious beliefs (vi) Multiple discrimination situations (vii) racism in football.

⁴⁵ This is a description of the compendium of transnational actions funded in 2001: http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/prog/compendium2001_en.pdf, p. 3

⁴⁶ See newsletter “Equal Rights in Practice”, available from the Commission at www.stop-discrimination.info, spring 2004 (the ‘newsletter’), noting a 22 per cent increase in applications to the Commission’s call for tender in 2003, compared with the first call in 2001.

⁴⁷ Equality Green Paper, p. 16

⁴⁸ See n.27 above.

⁴⁹ Equality Green Paper, p. 17; (see Action Plan Report, 2000, , where the aim was to “mainstream” the fight against racism by integrating it into many other Community policies and programmes

zation does not exist and where the Commission declared an interest in funding one, on the basis that ‘existing needs are not being met by current organizations’ is that of a transnational Roma rights organization. Finally, in a separate initiative carried out by the Migration Policy Group, one of the major NGOs which works with the Commission on anti-racism and which has been funded to carry out various projects under the action programme, a report on strategic litigation of the Race Directive which was not funded under the action programme but which clearly engages with many of the same themes and problems was undertaken.⁵⁰

It seems in general that the capacity-building funds have greatly helped the NGOs to build up independent lobbying power at national level. Umbrella NGOs are also more likely to bring test case litigation before national courts to have them referred to the ECJ in order to test the interpretation of the directives.

c. strand three: awareness-raising/promoting values

In addition to a ‘Europe-wide information campaign’ there are three areas of activity under this final strand of the action programme: conferences, seminars for judges and practitioners, and ‘special events’ at national level through funding provided to ministries, NGOs and other intermediate organizations. Also in 2003 the Commission began a five-year publicity campaign under the slogan “For Diversity – against Discrimination”, with a view to heightening sensitivity towards discrimination and the benefits of diversity, and to draw attention to the existence of new legal rights against discrimination. The campaign has its own website www.stop-discrimination.info and a newsletter, and national working Groups consisting of national authorities, social partners and NGOs are brought together at various times to develop awareness raising activities.

In general, there seems to be some disappointment so far with this particular strand of activities: both in terms of a lack of adequate response to some of the tenders for funding, and also because of the failure (due to the conditions for eligibility set by the Commission) to target specific groups and messages in a more focused way. As noted above, too, the states themselves have not availed of the opportunities to apply for funding to promote awareness of race-discrimination issues and of the legislation. The potential for use of this kind of funding, however, is evident.

IV.2 Complementary institutions: the Agency and the Networks

In addition to the support provided – albeit in an originally unplanned way – by the Action Programme to the functioning of the Directives, the second relevant feature of the anti-discrimination regime is the operation of other institutional supports, in particular the EU agency dealing with racism and xenophobia and the various networks which have been established to tackle the same subject. While some of these have existed for a number of years – the EUMC and the RAXEN network, for example – others, including some of the networks funded by the action programme have only recently been established, and yet others – such as the European Fundamental Rights Agency – are still in the pipeline.

⁵⁰ *Strategic litigation of race discrimination in Europe: from principles to practice*, 2004, report prepared by the MPG, Interrights and the European Roma Rights Centre as part of a 3-year programme on “Implementing European Anti-Discrimination Law” (2001 – 2004); see link on <http://www.migpolgroup.com/programmes/default.asp>;

The rise of agencies – and more particularly their rapid proliferation in recent years - has been identified as one of the manifestations of a transformation in European governance.⁵¹ Of course, this phenomenon has not necessarily been greeted as a positive or even neutral development by all. For some, the accountability of agencies raises significant questions,⁵² and the suspicion has been expressed that the creation of new agencies and the delegation of tasks to them could be a way for the main political institutions to evade political responsibility.⁵³ Yet agencies in the EU context, by comparison with the US where they tend to be autonomous and powerful decision-making bodies ('the fourth branch of government') have until recently tended to be institutions whose powers were primarily information-based.⁵⁴ More recently, however, the Commission has proposed the establishment of 'regulatory agencies' in the sense of agencies which would have power either to take binding decisions or to carry out or implement policies which have been adopted by others.⁵⁵ A number of EU agencies with particular powers of this kind already exist, for example the Office for Harmonisation in the Internal Market, the Community Plant Variety Office, and the European Agency for the Evaluation of Medicinal Products. Apart from these, most of the previously established agencies at EU level – including the Vienna EMUC - are charged with gathering, analysing and disseminating information on the policy area with which they were concerned, and they have also been mandated to liaise with or to coordinate networks of actors in the relevant policy field, and they have sometimes been required to conduct research and to make proposals. Without necessarily having binding decision-making powers, EU agencies can feed into policy making in more or less influential ways by the data they gather, the expertise they marshal, the actors they mobilize and the advice they provide. A great many scholarly categorizations and taxonomies of EU agencies have been proposed,⁵⁶ analysing 'three waves of agencification' which are said to have occurred so far. Yet whichever taxonomy is preferred, it is undeniable that the establishment of agencies is a rapidly proliferating phenomenon in the EU context. For all their variety and range, their spread can be seen as one manifestation or dimension of the new governance trend in so far as they are transnational, information-based, largely non-hierarchical, network-coordinating organs, operating in a multi-level context and feeding into the policy-making process in different ways.

⁵¹ R. Dehousse "Misfits : EU Law and the Transformation of European Governance" Jean Monnet Working Paper 2/2002 <http://www.jeanmonnetprogram.org/papers/02/020201.html>

⁵² D. Curtin "Mind the Gap: The Accountability of the EU executive" (2003 Walter Van Gerven lecture), Europa Law Publishing, Groningen 2004.

⁵³ C. Harlow, *Accountability in the European Union* (OUP, 2002), pp 75-78

⁵⁴ G. Majone "The new European agencies: Regulation by Information" (1997) 4 *Journal of European Public Policy* 262-275

⁵⁵ See COM(2002)718,"The Operating Framework for European Regulatory Agencies" and the subsequent report of the European Parliament A5 0471/2003 of December 2003, and the Conclusions of the Council of 29 June 2004.

⁵⁶ Some examples are E. Vos, "Reforming the European Commission: What role to play for EU agencies?" (2000) 37 *Common Market Law Review* 1113, M. Everson "Independent Agencies: Hierarchy Beaters?" (1995) 1 *European Law Journal* 180, A. Kreher "Agencies in the European Community- a step towards administrative integration in Europe" (1997) 4 *Journal of European Public Policy* 225, M. Shapiro "The problems of independent agencies in the United States and the European Union" (1997) 4 *Journal of European Public Policy* 276, M. Flinders "Distributed public governance in the European Union" (2004) 11 *Journal of European Public Policy* 520, D. Geradin and N. Petit "The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform", Jean Monnet Working Paper 1/2004.

a. The existing anti-discrimination agency: EUMC

The European Union Monitoring Centre on Racism and Xenophobia – one of the seventeen EU Agencies at present - was established in 1997 by an act of the Council of Ministers,⁵⁷ even before Article 13 of the EC Treaty was in existence and at a time when the EC's legal competence to act in the field of anti-racism and indeed to set up such a centre was called into question.

The main task it was given was to provide the Community and its Member States with “objective, reliable and comparable information and data on racism, xenophobia and anti-Semitic phenomena at the European level in order to establish measures or actions against racism and xenophobia”. On the basis of the data collected, the EUMC was expected to study the extent and development of the phenomena, to analyse their causes, consequences and effects, to work out strategies to combat racism and xenophobia and to highlight and disseminate examples of good practice regarding the integration of migrants and minority groups. One of its core activities has been to coordinate the European Information Network on Racism and Xenophobia (RAXEN), a network designed to collect data and information at national as well as at the European level, and to disseminate it in cooperation with the EUMC.

The EUMC has been dogged by various difficulties since it began its activities in 1998. It did not actually have fixed premises from which to operate until 1999 and was not fully staffed until 2000, and it has not had a high profile in the field of European anti-racism activities. The smaller Council of Europe body, the European Commission on Racism and Intolerance (ECRI) – with which the EUMC is called on in its founding regulation to cooperate closely - is generally acknowledged to have been more successful in carrying out very similar tasks in the ‘wider Europe’, despite having fewer resources. According to the external evaluation report of the EUMC which was carried out in 2002, despite the fact that almost six years had passed since the adoption of the Regulation establishing the agency, it remained impossible to measure the effect or impact of its output, so that it could not demonstrate ‘value for money’ for the budget which it had committed.

The Commission subsequently acknowledged most of the criticisms made by the external evaluators, and proposed some changes to the regulation which established the EMUC agency. In the first place the Commission accepted that with regard to the agency's data-collection function, the objective of comparability had not yet been achieved to any substantial degree, nor had any assessment of the effectiveness of the anti-racist policies of individual member states been possible on the basis of its work.⁵⁸ Part of the reason for this was delay – both in the establishment of the Agency itself and in the coming into operation of the RAXEN network, so that very little had yet been done in terms of overcoming the problem of the very different definitions across Member States in relation to racism and xenophobia. Another of the difficulties faced by the Agency was the variability of member state responses to the Agency's attempt to hold regular round tables, to bring together national civil society actors, researchers, governments etc. The lack of a communications strategy for disseminating information and data was also criticised. Significantly, one of the proposals made by the Commission in response to the evaluation was for the Agency's reports to be increasingly focused on and better linked to the EU's priorities in the fields of employment, social inclusion and anti-discrimination. Also, the Commission proposed that the Agency's mandate – which was

⁵⁷ Regulation (EC) No 1035/97 of 2 June 1997 ([OJ L 151, 10 June 1997](#))

⁵⁸ Commission Communication on the European Monitoring Centre on Racism and Xenophobia, COM(2003)483

established before Article 13 EC or the anti-discrimination directives were adopted – should be amended to reflect the new legal competences.

A final criticism made by the evaluators concerned the structure and membership of the management board, which the evaluators felt was insufficiently skilled for the tasks faced by the board. Consequently, they recommended that the board should consist of member state representatives. The EMUC board itself resisted this recommendation strongly, on the grounds of the need for independence, and the Commission eventually proposed a compromise solution (mirrored in its recent proposal for the establishment of an EU Fundamental Rights agency) whereby the membership of the management board could draw on the expertise of the existing heads of national specialised bodies (whether equality agencies, ombudspersons etc) which were required to be set up under the Race Directive.

Following the findings of the external evaluation, the Commission initially published a proposal to amend the regulation establishing the EMUC Agency to reflect the various changes proposed.⁵⁹ In particular the proposal for involvement in the management board of key personnel from the national equality bodies required under the Race Directive, and the requirement of a closer link between the activities of the Agency and the priorities of the EU in anti-discrimination, social exclusion and employment, were aimed at strengthening the interaction between the race directive and the activities of the EMUC.

However, the proposal to amend the EUMC's framework and functioning was abruptly overtaken by more recent events. In late 2003, the European Council quite suddenly decided that EUMC's mandate should be extended to become a general European human rights agency.⁶⁰ This came as a surprise to many, since although there had been external pressure for some years on the EU to establish a fully-fledged human rights agency, the Commission had consistently rejected this proposal, including in its response to the external evaluation of the EMUC in 2002. However, following the European Council's decision to extend the Agency's mandate, the Commission published a consultation document on the subject, followed by a consultation process, and ultimately by the publication of a proposal for the establishment of a new fundamental rights agency.⁶¹ Several commentators warned of the risk that the broadening of the Agency's competences would make it less likely to be capable of acting effectively against racism given the dilution in focus, but the Commission in the explanatory memorandum to its proposal for a general human rights agency refers expressly to these fears and emphasizes a continuing commitment to anti-discrimination policy. In general, it appears that – despite the EUMC's own concerns - reaction to the proposal to expand the anti-racism agency to cover human rights more generally has been favourable, provided the Agency is properly resourced, well-managed and that its remit is strong enough to allow it to play a robust supporting role to the legislative and other strategies for protecting and promoting human rights.

b. The Networks

In addition to the network of equality bodies funded by the Commission under the Action programme (Equinet),⁶² there are at least two other relevant anti-racism networks, as well as a general human rights network, which support the race discrimination legislation and policy of

⁵⁹ Proposal for a Council Regulation on a European Monitoring Centre on Racism and Xenophobia (Recast version) COM(2003)483

⁶⁰ European Council decision of 13 December 2003

⁶¹ See n.12 above.

⁶² See <http://www.migpolgroup.com/programmes/default.asp?action=displayprog&ProgID=15> and above nn. 29-31.

the EU. The first is the RAXEN network mentioned above, the coordination of which has been one of the core tasks of the Vienna agency, the EUMC. The second is the more recently established transnational network of anti-racism NGOs, known as the European Network Against Racism (ENAR), which is one of the five umbrella NGOs funded under the second strand of the action programme. The third is the EU Network of Independent Experts on Fundamental Rights, which was set up by the Commission at the request of the European Parliament in 2002.

RAXEN has been one of the central tools for the EUMC in carrying out its role of providing the European Union and the Member States with objective, reliable and comparable data including examples of and models for "good practices" at the European level on the phenomena of racism, xenophobia and anti-Semitism. The RAXEN network is composed of twenty-five national focal points (NFPs), one in each state, which are the entrance points of the EUMC at national level regarding the data and information collection. The NFPs are the main player in the network for collecting information, data and statistics. Within the national context, they are required to set up a national information network, which includes cooperation with the main actors in the fields of racism, xenophobia and anti-Semitism, - ie mainly governmental organs, NGOs, research bodies, specialised bodies or social partners. Three coordinating meetings of the RAXEN network are held each year.

The second major anti-racism network is ENAR, the network of European NGOs working against racism in all the EU member states, which was established in 1998. ENAR's activities cover information exchange on EU policy developments and its anti-racism legislation, exchange of experiences and know-how, developing common strategies, inputting into the reporting done by the Vienna EMUC, the UN Commission on the Elimination of All Forms of Racial Discrimination, and the Council of Europe. Many of its activities are focused on the EU race directive, on developing positive action, and on ensuring that the EU 'mainstreams' anti-race discrimination norms into its other policies. The ENAR specifically seeks to cooperate with the EMUC and with other existing European and international networks and organizations.

The third relevant network, which was created in 2002 to monitor the situation of fundamental rights in the EU member states, and which has become increasingly active and prominent, is the Network of Independent Experts on Fundamental Rights.⁶³ Although it is not restricted to anti-discrimination law, this group of experts selected from across the Member States on the basis of their expertise in human rights issues, has every year reported on discrimination problems arising in various states, as well as making a number of specialised reports which include aspects of racism, such as in its Thematic Report on the Protection of Minorities in the European Union in 2005.⁶⁴ While the exact relationship of this network with the soon-to-be-established Fundamental Rights Agency remains unclear, it is expected that the network will continue to play an important monitoring and informational role.

As in any field of human rights policy, the role of NGOs and other civil society actors is crucial in providing information, spreading awareness, facilitating dialogue and debate, and lobbying for change. The specifically transnational dimension of the European anti-discrimination NGO networks is designed to enable such actors to share their experiences and pool relevant resources so that a Europe-wide anti-discrimination policy can be effectively pursued. The relationship between the various networks and the new and existing agencies

⁶³ See http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

⁶⁴ http://europa.eu.int/comm/justice_home/cfr_cdf/doc/thematic_comments_2005_en.pdf

and institutions is obviously also crucial to the success of attempts to identify, collect and publicize comparative data on the existence of discrimination as well as the means used to tackle it in different states and regions. Thus far, the working of the various European anti-racism networks is in its early stages, but it is clear from the mandates of the networks themselves,⁶⁵ from the way in which they have been connected through action program funding with the legislative strategy, and from the fact that the directives themselves expressly envisage a role for NGOs in their promotion, appraisal and advice on revision, that they are key players in the operation of the EU's anti-discrimination regime.

IV.3 Mainstreaming anti-racism norms

A third, although as yet less well-developed, feature of the anti-discrimination regime which is a central dimension of a new governance approach is that of mainstreaming.⁶⁶ Sometimes referred to as 'policy integration', the idea of mainstreaming is that a policy issue or area should not be treated as a compartmentalized problem or set of problems to which a solution should be found, but rather that it is to be dealt with as part of all other relevant policies, and its goals and methods should be built into those other policies. The strategy of mainstreaming seeks not only to counter the compartmentalization of policy design and implementation, but also to take a more pro-active and preventative rather than ex-post-facto problem-solving approach. The idea of mainstreaming has been most actively pursued and developed in the EU in the field of gender, where for some years the 'mainstreaming of gender' has been pursued as a strategy by the EU institutions, supported now by an explicit treaty mandate in Article 3(2) EC and by successive action programs and 'framework strategies'.⁶⁷ Another area of EU policy in which a mainstreaming approach has been pursued for some years is that of the environment. Again, this approach is supported by a legal mandate in Article 6 of the EC Treaty which specifies that "environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities..". There are also indications of a mainstreaming or integration approach being introduced in various other fields such as disability discrimination, social inclusion, and development policy.

In the field of race discrimination, this approach is still in its infancy,⁶⁸ and does not rest the explicit legal support given to areas such as environmental or gender mainstreaming. No reference is made either in the treaty or in any of the anti-discrimination legislation to the objective of integrating anti-racism concerns into other related policies, although the (for now) abandoned EU constitutional treaty, had it been successfully ratified, would have introduced such a clause.⁶⁹ However, from the time of the 1998 Action Plan against Racism, the Com-

⁶⁵ See <http://www.enar-eu.org/en/about/mission.shtml> for further information on the functioning of ENAR, including its recent work programs, which and for RAXEN <http://www.antiracisme.be/raxen/raxen.htm>

⁶⁶ See e.g. Mark Bell "Combating Racial Discrimination through the European Employment Strategy" (2004-5) *Cambridge Yearbook of European Law*, forthcoming; and "Mainstreaming Equality Norms into the E.U. Asylum Law" (2001) 26 *European Law Review* 20.

⁶⁷ See e.g. Mark Pollack Emilie Hafner-Burton "Mainstreaming Gender in the European Union" Jean Monnet Paper 2/00, www.jeanmonnetprogram.org, and the special issue (Vol 3, no. 10, 2002) of the journal *Feminist Legal Studies on gender mainstreaming in European public policy*.

⁶⁸ According to the European Network against Racism (ENAR, see n.65 above) in its July 2004 newsletter, despite the rhetoric of the Action Plan Against Racism and other EU documents, "there has been little solid action in practice to integrate anti-racism work in a coherent and strategic manner throughout all EU policy areas. Steps have often been small and isolated."

⁶⁹ Articles 115-122 of part III of the treaty establishing a Constitution for Europe in fact introduced a whole series of mainstreaming-type clauses, with Article III-118 focusing specifically on various forms of discrimi-

mission committed itself to a mainstreaming approach in seeking to challenge and address race discrimination in all of the activities and policies of the EU. Thus far, specific steps to do so can be seen in the context of the European Employment Strategy,⁷⁰ and in the area of the Structural Funds, with further initiatives promised in the field of immigration and asylum.⁷¹ However, even if this is an approach whose potential has yet to be realized in the context of anti-discrimination, the philosophy and practice of mainstreaming is one which is increasingly taking hold across various areas of EU policy including race discrimination and human rights, and which not only has broad political support but also resonates clearly in many respects with the premises of a new governance approach.

V. A Hybrid Model

The above analysis of the EU race discrimination regime – which examined the functioning of the Directive in its institutional context, including the support and resources of the Action programme on the one hand, the European agency and various national and transnational networks on the other hand, together with the gradual moves towards a mainstreaming approach, suggests that the tension between the rights model and the governance model outlined at the start of the paper does not necessarily preclude a successful combination of these approaches. While it is too early to appraise the concrete success or otherwise of the EU's race discrimination regime in terms of addressing the social reality of racism, it is clear that the regime has evolved into one which combines reliance on a conventional legal rights-based instrument at its core with a broader framework which embodies many of the features and premises of a new governance approach. The legislation lays down a basic legal right, but in broad and open-ended terms. Recourse to a judicial remedy is provided for – and funding has been provided for information on litigation strategies – but at the same time a whole array of other actors is drawn into the process of elaboration and enforcement of the directive both by the terms of the legislation itself as well as by the gradual evolution of the action programme and its funding priorities. While the directive contains an uncompromising legal prohibition directed to public and private actors alike, the preferred approach of the Commission is to adopt a 'dynamic' approach to its implementation,⁷² and the importance of reliable comparable information, and in particular from well-informed grass-roots actors on the actual phenomenon of racism and the current methods for tackling it in each state, is treated throughout the anti-discrimination regime more generally as crucial to both the diagnosis and the treatment of this particular social problem. A mainstreaming approach, which treats race discrimination not as a self-contained social problem but as an issue integrally related to a whole range of other policies and concerns, such as immigration, employment, and anti-poverty, has begun to appear. The overall 'hybrid regime' of EU anti-discrimination is thus not a twin-track approach, with a new governance strategy providing an alternative option should the legal approach fail

nation, including on the grounds of ethnicity or race: "In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

⁷⁰ See Mark Bell, n.66 above.

⁷¹ See the Commission's Green Paper on Equality, above n.13.

⁷² Professor Christopher McCrudden, speaking at a conference organized in the context of the Action Programme in Prague in July 2004, (see http://europa.eu.int/comm/employment_social/fundamental_rights/events/prag04_en.htm) argued against an emphasis on uniformity and homogeneity in interpreting and implementing the directives, stressing that they should be seen as "incomplete agreements" and that a diversity of approaches should be accepted, provided that all are bona fide and within the wording of the legislation.

to achieve its desired results, but rather the different approaches are yoked together in a single and increasingly integrated framework. Whether the two approaches prove to be incompatible – for example if test-case litigation leads to judicial rulings which subsequently prove to freeze rather than to strengthen the more grassroots-generated and diversity-tolerant dimensions of the strategy – remains to be seen at a point when the regime has become more operational and the legal norms can be said to be more embedded at a social and practical level. For now, however, the argument can be made that the EU anti-discrimination regime in the field of race provides a potentially promising example of a hybrid regime which constructively seeks to combine elements of a rights model and a new governance model which might otherwise be thought of as fundamentally incompatible in their methods and their aims.