

Combating Racial Discrimination Through The European Employment Strategy

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ABSTRACT

EU anti-racism policy is most closely identified with the Racial Equality Directive. The Commission has also expressed its commitment to adopting the mainstreaming approach, that is, integrating race equality objectives across other areas of EU policy. This article examines an associated policy field, the European Employment Strategy, for evidence of race equality mainstreaming. It compares the response of the Employment Strategy to the situation of ethnic minorities and immigrants in the labour market with the approach found in the Directive. Specifically, it considers three themes where divergences emerge: the concept of racial discrimination; the balance between combating discrimination and promoting integration; and monitoring and data collection.

INTRODUCTION

During the last decade, the European Union has taken a variety of initiatives that together form a policy on combating racial discrimination. Understandably, legal academics have so far devoted greatest attention to the legislative initiatives, most notably, the EU Race Directive.¹ The Directive is striking, both because of its broad material scope (covering areas such as employment, education, housing and healthcare), but also as a result of the new directions that it introduced into EU anti-discrimination law.² Whilst it is certainly the centrepiece of EU anti-racism policy, it is part of a broader policy framework. This includes other, less auspicious legal instruments,³ as well as various public expenditure programmes.⁴ The EU Monitoring Centre on Racism and Xenophobia provides an institutional dimension to the anti-racism policy.⁵

The connecting point between anti-racism policy and other areas of EU policy is the mainstreaming principle. This approach focuses on the integration of race equality objectives into all aspects of policy formulation, implementation and evaluation. Article 3(2) EC already places the Union under a duty to promote equality

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¹ Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22. There is a substantial body of literature on the Directive: *inter alia*, G Toggenburg, 'The Race Directive: a new dimension in the fight against ethnic discrimination in Europe' (2001/2) 1 *European Yearbook of Minority Issues* 231; C Brown, 'The Race Directive: towards equality for all the peoples of Europe?' (2002) 21 *Yearbook of European Law* 195; T Jones, 'The Race Directive: redefining protection from discrimination in EU law' (2003) *European Human Rights Law Review* 515.

² For example, the definition of harassment or the requirement to establish a body for the promotion of equal treatment.

³ e.g. the Joint Action concerning action to combat racism and xenophobia, [1996] OJ L185/5.

⁴ e.g. the Community Action Programme to combat discrimination (2001 – 2006), [2000] OJ L303/23.

⁵ The European Council has decided in principle to transform this body into a broader 'human rights agency'; EU Monitoring Centre, 'Future EU human rights agency must not detract from urgent fight against racism', Press Release, 10 March 2004, available at: http://eumc.eu.int/eumc/material/doc/404f01c1a6196_doc_EN.pdf

between women and men throughout all its activities. In respect of combating racism, there is no legally-entrenched mainstreaming duty. Nonetheless, the Commission has been committed to following this approach since its 1998 “action plan against racism”.⁶ Indeed, the draft EU Constitution proposes to transform this policy pledge into a constitutional duty to combat discrimination on grounds of “racial or ethnic origin” in all the Union’s policies and activities.⁷

In examining the progress already made in mainstreaming race equality, the European Employment Strategy makes a logical starting point. There are a number of obvious overlaps between anti-racism policy and the Employment Strategy. The Race Directive tackles barriers to participation in the labour market experienced by ethnic minorities and this dovetails with the objective of increasing participation in employment; a link noted in the Directive’s preamble.⁸ Similarly, the EQUAL programme (part of the European Social Fund) is designed to identify new methods of tackling discrimination in the labour market.⁹ It is structured around the goals of the Employment Strategy, yet clearly also contributes to the objectives of anti-racism policy. At an institutional level, both the Employment Strategy and anti-racism policy fall under the remit of DG Employment and Social Affairs, making this a matter of intra-departmental policy coordination.

This article examines the extent to which race equality objectives have been integrated into the fabric of the Employment Strategy. It begins with a brief overview of the evolution of the Strategy and its principal features. This is followed by a specific analysis of its response to issues of racial discrimination. The approach of the Employment Strategy gives rise to a number of contrasts with the philosophy underpinning the Race Directive. Specifically, differences can be detected with regard to the concept of racial discrimination; the balance between combating discrimination and promoting integration; and the need for monitoring and data collection. The concluding discussion considers how the Employment Strategy might be best adapted to ensure that it harmoniously complements EU anti-racism policy.

THE EUROPEAN EMPLOYMENT STRATEGY

The origins of the Employment Strategy lie in the high and persistent levels of unemployment experienced in the 1990s.¹⁰ Traditional projects to relaunch the European economy through new public expenditure programmes proved difficult to reconcile with the budgetary discipline imposed by the single currency convergence criteria and gradually a new approach to employment policy emerged.¹¹ In its substance, policy shifted from a dominant emphasis on reducing unemployment to a focus on increasing participation in the labour market.¹² In particular, it was noted that the Union had significantly lower rates of economically active persons in employment when compared to certain other economies, especially the United States

⁶ COM (1998) 183.

⁷ Article III-3, Draft Treaty establishing a Constitution for Europe [2003] OJ C169/1.

⁸ Recital 8.

⁹ See further: http://europa.eu.int/comm/employment_social/equal/index_en.html

¹⁰ J Kenner, ‘Employment and macroeconomics in the EC Treaty: a legal and political symbiosis’ (2000) 7 *Maastricht Journal of European and Comparative Law* 375 at 378.

¹¹ D Ashiagbor, ‘EMU and the shift in the European labour law agenda: from “social policy” to “employment policy”’ (2001) 7 *European Law Journal* 311.

¹² E Szyszczak, ‘The evolving European Employment Strategy’ in J Shaw (ed.), *Social law and policy in an evolving Union* (Oxford, Hart Publishing, 2000).

and Japan.¹³ The efforts to raise employment rates centred around a number of poles. For example, the idea of ‘activation’; this stressed the need for tailored, proactive interventions to assist the return of individuals to employment, often leading to the restructuring of public employment services.¹⁴ Another key theme was ‘flexibility’; leading to more diversified forms of employment contract and working arrangements.¹⁵

Alongside the shifts in the content of employment policy, new policy-making processes evolved. Building on the new methods of economic policy coordination, the Employment Strategy crystallised in Title VIII EC inserted by the 1999 Treaty of Amsterdam. This inaugurated a cyclical process of policy development. A set of annual ‘Employment Guidelines’ are adopted by the Council, identifying the primary orientations for European employment policies. Member States report annually in the form of ‘National Action Plans’ (NAPs) on the measures taken in response to these guidelines, which in turn gives rise to an annual Commission and Council ‘Joint Employment Report’ synthesising the evidence from the NAPs. Finally, a new cycle begins with another set of guidelines, complemented by targeted recommendations to specific states based on the evaluation of the NAPs.

As many observers have commented, this process marked a shift from the traditional ‘Community method’ of policy-making and it was later baptised as the ‘open method of coordination’ (OMC).¹⁶ The distinctive qualities of the Employment Strategy, and the OMC, include an emphasis on policy learning, ‘soft’ coordination of objectives combined with space for adaptation to national diversity.¹⁷ Whilst the guidelines are legal, Treaty-based instruments, they do not rely on judicial process for enforcement. Instead, the levers to promote convergence are the agreement of common targets, shared indicators of progress and multilateral peer review.¹⁸ The Member States have voluntarily adhered to external policy benchmarks and expose their national policies to public audit.¹⁹ It is possible to exaggerate the degree to which these methods are truly ‘new’. Exchange of experience, review of national practices and the use of non-binding legal instruments were already hallmarks of European social policy.²⁰ Nonetheless, the techniques and style of the OMC seemed

¹³ Kenner, *supra* n. 10.

¹⁴ R van Berkel and I Hornemann Møller, ‘The concept of activation’ in R van Berkel and I Hornemann Møller (eds), *Active social policies in the EU: Inclusion through participation?* (Bristol, Policy Press, 2002).

¹⁵ M Biagi, ‘The impact of European Employment Strategy on the role of labour law and industrial relations’ (2000) 16 *International Comparative Labour Law and Industrial Relations* 155 at 172; S Ball, ‘The European Employment Strategy: the will but not the way?’ (2001) 30 *Industrial Law Journal* 353 at 368.

¹⁶ S Regent, ‘The open method of coordination: a new supranational form of governance?’ (2003) 9 *European Law Journal* 190; P Syrpis, ‘Smoke without fire: the social policy agenda and the internal market’ (2001) 30 *Industrial Law Journal* 271.

¹⁷ J Scott and D Trubek, ‘Mind the gap: law and new approaches to governance in the European Union’ (2002) 8 *European Law Journal* 1 at 6.

¹⁸ S Sciarra, ‘Integration through coordination: the Employment Title in the Amsterdam Treaty’ (2000) 6 *Columbia Journal of European Law* 209 at 222.

¹⁹ C de la Porte, P Pochet and G Room, ‘Social benchmarking, policy-making and the instruments of new governance in the EU’ (2001) 11 *Journal of European Social Policy* 291; B Lundvall and M Tomlinson, ‘International benchmarking as a policy learning tool’ in M Rodrigues (ed.) *The new knowledge economy in Europe – a strategy for international competitiveness and social cohesion* (Cheltenham, Edward Elgar, 2002).

²⁰ D Wincott, ‘Beyond social regulation? New instruments and/or a new agenda for social policy at Lisbon?’ (2003) 81 *Public Administration* 533 at 537.

to breathe fresh air into European employment policy. Indeed, this method has been emulated in various other areas of EU policy.²¹

RACIAL DISCRIMINATION AND THE EMPLOYMENT STRATEGY

The relevance of equality issues to achieving the goals of the Employment Strategy has been recognised in various forms. From the outset, one of the four pillars of the guidelines was “equal opportunities”. This pillar initially referred to both gender equality and also “the integration of people with disabilities into working life”.²² Since the 1999 guidelines,²³ however, the equal opportunities pillar has been exclusively devoted to gender equality, with other groups vulnerable to discrimination dealt with elsewhere. The attention to people with disabilities was retained and, in addition, the situation of older workers has significantly risen in prominence.²⁴ Whilst a range of equality issues have thus been included, the treatment of gender equality is distinguished by the commitment to gender mainstreaming, first expressed in the 1999 guidelines. This requires Member States not only to respond to the specific guidelines on equal opportunities for women and men, but also to adopt a gender perspective on all dimensions of the Employment Strategy.

In attempting to trace the presence of race equality issues within the Employment Strategy, the 1999 guidelines can be highlighted as a starting point. Under the heading “promoting a labour market open to all”, Member States were requested to:

“give special attention to the needs of the disabled, ethnic minorities and other groups and individuals who may be disadvantaged, and develop appropriate forms of preventive and active policies to promote their integration into the labour market.”²⁵

In 2001, this was developed into a reference to “ethnic minorities and migrant workers”.²⁶ Despite the explicit inclusion of ethnic minorities within the guidelines, the response of the Member States varied greatly. The Joint Employment Report for 2000 noted the lack of data provided in the NAPs and the general absence of national targets on improving the employment rates of ethnic minorities.²⁷ The poor response from most Member States is also reflected in subsequent reports. The 2002 Joint Employment Report appears resigned to the marginalisation of this aspect of the guidelines, reiterating that evaluation was “severely hampered by differences in the definition of the groups and a lack of statistical data”.²⁸

Surprisingly, the Commission and Council did not then seek to prioritise ethnic minority employment issues in the annual recommendations to the Member States. Unlike the guidelines, the recommendations present a short analysis of the

²¹ C de la Porte, ‘Is the Open Method of Coordination appropriate for organising activities at European level in sensitive policy areas?’ (2002) 8 *European Law Journal* 38.

²² Pillar IV, Council Resolution on the 1998 Employment Guidelines, [1998] OJ C30/1.

²³ Council Resolution on the 1999 Employment Guidelines, [1999] OJ C69/2.

²⁴ Commission, ‘Draft Joint Employment Report 2003/2004’ COM (2004) 24 final/2 at 13.

²⁵ Guideline 9.

²⁶ Guideline 7, Council Decision on guidelines for Member States’ employment policies for the year 2001, [2001] OJ L22/18.

²⁷ Para. 3.1.5, Commission and Council, ‘Joint Employment Report 2000’, available at: http://europa.eu.int/comm/employment_social/employment_strategy/report_2000/jer2000_en.pdf

²⁸ Commission and Council, ‘Joint Employment Report 2002’, p. 38, available at: http://europa.eu.int/comm/employment_social/employment_strategy/report_2002/jer2002_final_en.pdf

See also, Commission and Council, ‘Joint Employment Report 2001’, p. 25, available at: http://europa.eu.int/comm/employment_social/employment_strategy/report_2001/jer2001_en.pdf

labour market situation in each state and then a small number of sharp, specific recommendations on where states ‘could do better’. This public criticism of national policies is one of the more uncomfortable dimensions to the Employment Strategy for national authorities.²⁹ Nonetheless, ethnic minority employment is mentioned for the first time in the 2001 recommendations and then only as part of the analysis of the labour market situation in the Netherlands.³⁰ In 2002, recommendations on increasing ethnic minority and immigrant employment were made for the first time and directed at Denmark and Germany, whilst problems in this area were noted in the situation analysis for Austria, Sweden and the UK.³¹ Similarly, in 2003, recommendations on immigrant employment were made to Denmark and Sweden, whilst the barriers experienced by ethnic minorities in the labour market were mentioned in respect of the Netherlands and UK.³²

Simply counting the number of references to ethnic minorities in the NAPs, joint reports, guidelines and recommendations does not provide a sufficient means of assessing the full extent to which race equality issues have been integrated into the Employment Strategy. In particular, an assessment of the NAPs needs to be cautious. Various observers have noted the qualitative differences between the way in which states compile their NAP. Whilst some adopt an open process and invite the participation of the social partners,³³ in other cases it is treated as “a bureaucratic reporting task”.³⁴ There is also an evident risk of showcasing by Member States, leaving the reader with an unduly favourable assessment of government initiatives and their relationship to the Employment Strategy.³⁵ Nevertheless, as key tools in the OMC process, the documentary trail provides an indication of policy development and policy priorities. The sparse references to this issue within the recommendations illustrates the barriers to making progress. Where states have not provided any data and the labour market situation is unclear, it becomes difficult for the institutions to formulate detailed recommendations.³⁶ Paradoxically, several of those states which provided more information on ethnic minority and immigrant employment in their NAPs (for example, Denmark, Netherlands and the UK) have then found this issue highlighted in the national recommendations. It can also be observed that these states have frequently surpassed the headline targets on overall employment, female employment and older workers’ employment, thus permitting the institutions to devote more attention to less high profile elements of the Employment Strategy, such as ethnic minority employment.³⁷

²⁹ Szyszczak, *supra* n. 12.

³⁰ Para. X, Council Recommendation on the implementation of Member States’ employment policies, [2001] OJ L22/27.

³¹ Council Recommendation on the implementation of Member States’ employment policies, [2002] OJ L60/70.

³² The text in relation to the Netherlands refers more vaguely to ‘minorities’; Council Recommendation on the implementation of Member States’ employment policies, [2003] OJ L197/22.

³³ C de la Porte and P Pochet, ‘The European Employment Strategy: existing research and remaining questions’ (2004) 14 *Journal of European Social Policy* 71 at 74.

³⁴ J Mosher and D Trubek, ‘Alternative approaches to governance in the EU: EU social policy and the European Employment Strategy’ (2003) 41 *Journal of Common Market Studies* 63 at 79.

³⁵ P Skidmore, ‘The European Employment Strategy and labour law: a German case-study’ (2004) 29 *European Law Review* 52 at 72; J Rubery, ‘Gender mainstreaming and gender equality in the EU: the impact of the EU employment strategy’ (2002) 33 *Industrial Relations Journal* 500 at 511.

³⁶ Commission, ‘Assessment of the implementation of the 2002 Employment Guidelines: supporting document to the Joint Employment Report 2002’ SEC (2002) 1204/2 at 76.

³⁷ Thanks to Sarah-Jane King for bringing this to my attention.

Racial discrimination and the revised Employment Strategy

In 2002, a review of the first five years of the Employment Strategy provided an opportunity to revisit some of its fundamentals. Studies for the Commission on specific strands of the guidelines revealed areas of weakness, amongst which the situation of ethnic minority and immigrant employment was highlighted.³⁸ The review resulted in a restructuring of the guidelines around three “overarching and interrelated objectives of full employment, quality and productivity at work, and social cohesion and inclusion”.³⁹ Evidently, issues of race discrimination and ethnic minority employment relate to each of these broad themes. Indeed, the guidelines expressly link the “quality” agenda to issues of “diversity and non-discrimination”.⁴⁰ As before, a specific guideline is dedicated to “people facing particular difficulties on the labour market”, including “immigrants and ethnic minorities”.⁴¹ It remains too early to conclude if the new guidelines will make a substantial change to the centrality of race issues in the Employment Strategy. It can be noted, however, that ethnic minority and immigrant employment matters are considered more extensively in many of the 2003 NAPs, although they remain absent in the reports from Greece and Luxembourg.⁴²

Taking an overview, it is clear that race equality issues have been on the agenda of the Employment Strategy for some time, albeit as part of the broader detail rather than flagship commitments. The revised guidelines appear to bring these issues closer to the mainstream and certainly acknowledge their relevance to the foundational goal of raising the rate of employment participation. It is less manifest how this dimension to the Employment Strategy relates to and interacts with the other branches of EU anti-racism policy, in particular the implementation of the Race Directive. The following sections of this article examine three prominent themes in anti-racism policy and consider the different responses found between the Employment Strategy and the Directive.

THE CONCEPT OF RACIAL DISCRIMINATION

The first distinction that may be identified between the Directive and the Employment Strategy regards the boundaries of racial discrimination. The Directive forbids discrimination on the grounds of “racial or ethnic origin”.⁴³ This definition proved controversial in two respects. First, the reference to “racial” origin provoked concern amongst some Member States that the law could be interpreted as supporting the existence of separate ‘races’ within humanity.⁴⁴ Yet, to omit reference to race would present an unusual contrast with pre-existing international instruments, most notably the International Convention on the Elimination of All Forms of Racial

³⁸ Commission, ‘Impact evaluation of the EES. Background paper: social inclusion’ (2002), available at: http://europa.eu.int/comm/employment_social/employment_strategy/eval/papers/inclusion_en.pdf

³⁹ Council Decision on guidelines for the employment policies of the Member States, [2003] OJ L197/13. See also, Commission, ‘The future of the European Employment Strategy: a strategy for full employment and better jobs for all’ COM (2003) 6.

⁴⁰ See also, Commission, ‘Employment and social policies: a framework for investing in quality’ COM (2001) 313 at 8.

⁴¹ Guideline 7.

⁴² The 2003 NAPs are available from:

http://europa.eu.int/comm/employment_social/employment_strategy/03_national_en.htm

⁴³ Article 1, Directive 2000/43.

⁴⁴ A Tyson, ‘The negotiation of the European Community Directive on Racial Discrimination’ (2001) 3 *European Journal of Migration and Law* 199 at 201.

Discrimination. The final compromise balances the reference to “racial” origin with a statement in the preamble that denies the existence of separate races,⁴⁵ whilst the Directive clearly recognises that people may be treated differently as a result of another’s perception of racial difference.

Secondly, and more problematically, the Race Directive excludes “difference of treatment based on nationality” from its concept of discrimination.⁴⁶ On the one hand, nationality is a legal criterion and all states draw a variety of distinctions between nationals and non-nationals, most obviously with regard to the right to enter and reside on the territory of the state. On the other, it is evident that many of those who experience racial discrimination in the European Union are also third country nationals. This is especially true in states, such as Germany, where historically restrictive laws on access to naturalisation have resulted in the presence of large communities of non-nationals resident for long periods of time.⁴⁷ If an Algerian man is denied an apartment available to rent, it can be tenuous in practice to distinguish between impermissible treatment based on his north African ethnic origins and permissible treatment based on his nationality.

The different nature of the Employment Guidelines means that there is not a specific definition of discrimination as found in the Directive. Nonetheless, under the heading of “combating discrimination”, the guidelines have addressed the need for measures in respect of “ethnic minorities and migrant workers”,⁴⁸ or “immigrants and ethnic minorities”.⁴⁹ On the face of it, the use of these categories addresses two issues that are often obscured within the Race Directive. First, there is an implicit assertion that those vulnerable to discrimination are not all third country nationals and hence the term “immigrant” is not sufficient in scope. In addition, the guidelines flag up the problem of discrimination linked to immigrant status. Yet, the two dimensions identified in the guidelines often fail to be reflected in the NAPs.

The initial response to the reference in the 1999 guidelines to “ethnic minorities” was one of divergence. The 2000 Joint Employment Report observed that certain states understood this to refer to people vulnerable to discrimination based on their ethnic origin (e.g. Netherlands, UK); some states interpreted this as a reference to third country nationals (e.g. Germany, Spain); whilst others made reference to historical national minorities (e.g. Austria, Ireland).⁵⁰ The different national approaches continue to be evident, even in the most recent set of NAPs from 2003. A number of states (e.g. Spain, Portugal, Italy) discuss only the situation of immigrants. Others, in particular the UK and the Netherlands, frame the discussion around ethnic minorities, regardless of nationality. Finally, several states address the situation of both ethnic minorities, who may be citizens, and immigrants, who are third country nationals. For example, Sweden provides statistics on the employment rates of those who are Swedish nationals since birth; those born with another nationality, but who became Swedish nationals; and those who remain non-nationals.⁵¹ Alternatively, the

⁴⁵ Recital 6.

⁴⁶ Article 3(2).

⁴⁷ In 2002, there were 7.3 million non-nationals resident in Germany, around 9% of the population: Federal Republic of Germany, ‘National action plan for employment policy’ (2003), p. 26: http://europa.eu.int/comm/employment_social/employment_strategy/nap_2003/nap_de_en.pdf

⁴⁸ 2001, guideline 7.

⁴⁹ 2003, guideline 7.

⁵⁰ Commission and Council, *supra* n. 27. e.g. Federal Ministry for Economic Affairs and Labour, ‘Implementation report 2002 on the national action plan for employment: Austria’, pp. 37-38, available at: http://europa.eu.int/comm/employment_social/employment_strategy/nap_2002/nap_austria_en.pdf

⁵¹ Sweden, ‘Sweden’s action plan for employment’, p. 38, available at:

Danish report distinguishes between “immigrants and descendants from third countries”.⁵²

The variation in the groups targeted by the Directive, the Employment Guidelines and the NAPs is not entirely surprising. The terms of the Directive were pre-empted by its Treaty base, Article 13 EC, which already referred to “racial or ethnic origin”. Nationality discrimination, in respect of third country nationals, has been dealt with in a more fragmented manner elsewhere in EU law. Agreements between the EU and third countries have provided one avenue of protection for certain nationals.⁵³ A more coherent right to non-discrimination is contained in the Long-Term Residents Directive, which will apply to many third country nationals with more than five years of legal residence in a Member State.⁵⁴ The differences in the NAPs in part reflect divergences in the national frameworks on immigration and race discrimination issues. For example, the UK ‘model’ has been based around the explicit recognition, indeed affirmation, of different ethnic communities.⁵⁵ In contrast, the French ‘model’ has placed greater emphasis on a common, national identity and has tended to exclude official acknowledgement of minority communities.⁵⁶

The presence of diversity between the Race Directive and the Employment Strategy is not problematic *per se*. The former is a specific legislative act, whereas the latter is a broad policy process. Indeed, the nature of the OMC is not to prescribe detailed and inflexible requirements for national policy, but to provide space for adaption to the national context. To the extent that the Employment Strategy is bringing third country nationals back into the picture, then it offers a valuable complement to the limits of the Race Directive. At the same time, the trend in some Member States, and also within the Strategy, to focus more heavily on the situation of third country nationals tends to lead policy in a different direction. In particular, an emphasis on immigration adopts a set of policy tools distinct from those designed to combat discrimination. This gap is explored further in the next section.

COMBATING DISCRIMINATION AND PROMOTING INTEGRATION

There are a number of strands to the strategy of the Race Directive for combating discrimination. The most prominent element is undoubtedly the option of individual litigation. States must provide “judicial and/or administrative procedures” to allow individuals to enforce the right to equal treatment.⁵⁷ There are complementary measures to support individuals in litigation, in particular, the right for associations to bring cases on their behalf⁵⁸ and the establishment of an equal treatment body (or bodies) to provide “independent assistance to victims of discrimination in pursuing their complaints”.⁵⁹ Alongside the individual litigation path, the Directive promotes a role for the social partners and highlights the possible contribution of collective

http://europa.eu.int/comm/employment_social/employment_strategy/nap_2003/nap_sv_en.pdf

⁵² The Government, ‘Denmark’s national action plan for employment 2003’, para. II.7.2, available at: http://europa.eu.int/comm/employment_social/employment_strategy/nap_2003/nap_da_en.pdf

⁵³ e.g. Case C-438/00 *Deutscher Handballbund eV v Kolpak* [2003] ECR I-4135.

⁵⁴ Article 11, Directive 2003/109/EC concerning the status of third country nationals who are long term residents, [2004] OJ L16/44.

⁵⁵ S Poulter, ‘Muslim headscarves in school: contrasting legal approaches in England and France’ (1997) 17 *Oxford Journal of Legal Studies* 43 at 48.

⁵⁶ *Ibid* at 51.

⁵⁷ Article 7(1), Directive 2000/43.

⁵⁸ Article 7(2).

⁵⁹ Article 13(2).

agreements, codes of conduct and workplace monitoring.⁶⁰ A less precise role is assigned to non-governmental organisations,⁶¹ whilst there is an anticipation that the equal treatment body will be instrumental in combating discrimination through research, surveys and recommendations.⁶² In general, however, the Directive places an accent on individual rights rather than positive obligations for states.

The Employment Strategy configures the policy terrain from a different starting point. The underpinning objective is raising employment participation, therefore, the emphasis is on removing existing barriers. Originally, this was evident from the location of ethnic minority issues within the “employability” pillar of the guidelines, rather than the “equal opportunities” pillar. Whilst the text of the specific guideline has varied over the years, there is a constant linking of combating discrimination to the promotion of integration. In the revised guidelines, Member States are under a duty to “foster the integration of people facing particular difficulties on the labour market” through three pathways: “developing their employability, increasing job opportunities and preventing all forms of discrimination against them”.⁶³ Again, the different tone of the Employment Strategy can be seen as providing a useful complement to the Race Directive. Whilst the Directive stresses the right of individuals to challenge discrimination where it has occurred, the Strategy places a duty on public authorities to make positive interventions to increase labour market participation.

The NAPs provide a thick source of evidence on the range of interventions taken in this area. In certain states, the NAP gives an impression of a policy mix between measures to combat discrimination and initiatives designed to promote integration. For example, the 2003 Belgian NAP refers to the adoption of new anti-discrimination legislation (in part, in order to implement the Race Directive) as well as other measures, such as a programme by Flemish trade unions to establish “plans de diversité” for at least 1000 enterprises by the end of 2004.⁶⁴ At the same time, there are initiatives more clearly targeted at integrating migrants; for example, an awareness-raising campaign in the Brussels region on the conditions for obtaining a work permit.⁶⁵

Policies for integration are reflected most commonly in measures such as regularisation programmes (Greece, Italy, Portugal, Spain); recognition of non-EU qualifications (Portugal); and language training (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Portugal). Whilst such policies will address the needs of some ethnic minority and/or third country national persons, in some states it appears that the discrimination dimension has almost entirely disappeared. The 2003 German NAP confidently states that the reasons for the labour market problems of “young people and adults with a foreign background ... often lie in language problems and lack of school and professional qualification”.⁶⁶ Given this diagnosis, the medication prescribed concentrates on language courses and greater assistance from the Federal Employment Service. Similarly, the 2003 Danish NAP assumes that a primary source of disadvantage is the personal skill profile of ethnic minorities and immigrants. In the measures listed to improve integration, language training features

⁶⁰ Article 11.

⁶¹ Article 12.

⁶² Article 13(2).

⁶³ 2003, guideline 7.

⁶⁴ Belgium, ‘Stratégie européenne pour l’emploi: plan d’action national 2003 pour l’emploi’, p. 29, at: http://europa.eu.int/comm/employment_social/employment_strategy/nap_2003/nap_be_fr.pdf

⁶⁵ *Ibid.*

⁶⁶ *Supra* n. 47.

prominently, but also “lower benefits and allowances as an incentive to find a job” and an “an emphasis on foreigners’ own responsibility for their own integration”.⁶⁷ Finally, it is worth noting that the discrimination perspective is also weak in the 2003 report of the Employment Taskforce. This high-level group was created by the European Council to make a wide-ranging review of national employment policies and the progress being achieved through the Employment Strategy. On “minorities and immigrants”, the report acknowledges the disadvantages experienced by “migrants or non-EU nationals” in the labour market. However, it concludes “the main causes of this situation are inappropriate or low levels of skills in general, as well as cultural or language barriers.”⁶⁸ The strong emphasis on integration measures tends to imply that ethnic minorities and immigrants are themselves responsible for their own disadvantage in the labour market. There is insufficient acknowledgement of the role played by discrimination by employers. Other NAPs openly concede that even where ethnic minorities and immigrants are well-qualified, discrimination prevents equal participation in the labour market.⁶⁹

The emphasis on employment participation also obscures the treatment of ethnic minorities and immigrants once inside the labour market. The Race Directive is not only concerned with access to employment, but also equal treatment in all the conditions of employment. After several years, there was an attempt to incorporate this broader agenda within the Employment Strategy under the banner of “quality in work”. The 2002 guidelines included quality in work as a horizontal objective⁷⁰ and the Commission initiated a debate on the development of indicators of work quality.⁷¹ Perhaps surprisingly, the quality agenda became focused on the identification of quantitative indicators.⁷² As will be examined further in the next section, this remains a stumbling block when analysing the situation of ethnic minorities within the labour market.

The combination of combating discrimination and promoting integration, as suggested by the Employment Guidelines, should act as a valuable complement to the Race Directive, with its reactive focus on discrimination litigation. Yet, the agenda of immigrant integration risks becoming myopic in certain states and fails to make sufficient links with action against discrimination. In theory, all states should have already taken new measures to combat discrimination in order to complete the implementation of the Race Directive by 19 July 2003. In practice, implementation of the Directive remains incomplete in many states.⁷³ Prioritising transposition of the Directive could help contribute to its effectiveness, as well as a more balanced response to the Employment Guidelines.

MONITORING AND DATA COLLECTION

⁶⁷ *Supra* n. 52.

⁶⁸ Employment Taskforce, ‘Jobs, jobs, jobs – creating more employment in Europe. Report of the Employment Taskforce chaired by Wim Kok’ (2003), p. 44, available at: http://europa.eu.int/comm/employment_social/employment_strategy/pdf/etf_en.pdf

⁶⁹ Belgium, *supra* n. 64 at 30; Sweden, *supra* n. 51 at 38.

⁷⁰ Paragraph F, Council Decision on guidelines for Member States’ employment policies for the year 2002, [2002] OJ L60/60.

⁷¹ Commission, *supra* n. 40.

⁷² See also, Commission, ‘Improving quality at work: a review of recent progress’ COM (2003) 728.

⁷³ For reports on national implementation of the Race Directive, see:

http://europa.eu.int/comm/employment_social/fundamental_rights/legis/msleglnraceequal_en.htm

One of the more controversial aspects of anti-racism policy in Europe is the value of ethnic monitoring. In the employment sphere, this involves the collection of data on the ethnic composition of the workforce, possibly extending to other categories, such as job applicants. The utility of such data collection lies in its potential to expose areas where certain ethnic groups are under-represented. In this respect, the underlying logic is the same as that supporting the compilation of statistics on gender balance within enterprises, an approach encouraged in the 2002 amendments to the Equal Treatment Directive.⁷⁴ Nonetheless, ethnic monitoring provokes sensitivities not encountered with regard to gender. In some states, ethnic monitoring evokes memories of racial categorisation during the Second World War.⁷⁵ In others, it is contrary to rules on data protection and even explicitly forbidden as an element of anti-discrimination law.⁷⁶ At a practical level, the utility of the data in part depends on the existence of broader population statistics permitting firms to know the relative proportions of different ethnic groups. Without this information, it will be difficult to determine which groups are under-represented and to what extent.

The Netherlands and the UK are the only states that have attempted to establish ethnic monitoring as a more common practice. In the Netherlands, legislation from 1994 requires firms to retain statistics on the ethnic composition of their workforce.⁷⁷ In the UK, ethnic monitoring has become a legal duty for certain public authorities as part of the implementation of the Race Relations (Amendment) Act 2000.⁷⁸ Moreover, the 2001 UK national census contained questions on ethnic origin, as well as religious belief. During the negotiation of the Race Directive, the European Parliament adopted an amendment that would have required firms to monitor the ethnicity of their workforce, but unsurprisingly this was not adopted by the Council.⁷⁹

One of the hallmarks of the Employment Strategy has been its focus on identifying quantitative targets against which progress can be measured. In addition to European level targets, Member States are encouraged to develop national targets within the NAPs. The emphasis on quantitative analysis already presented a challenge in respect of gender mainstreaming, where many Member States had to develop gender disaggregated statistics.⁸⁰ With respect to ethnic minorities, the barriers have proven even greater. The Joint Employment Reports have regularly noted that there is a lack of data in this area, with the main exceptions being the UK and the

⁷⁴ Article 8b(4), Directive 2002/73/EC of the European Parliament and Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [2002] OJ L269/15.

⁷⁵ F Glastra, P Schedler and E Kats, 'Employment equity policies in Canada and the Netherlands: enhancing minority employment between public controversy and market initiative' (1998) 26 *Policy and Politics* 163.

⁷⁶ Ethnic monitoring is forbidden in Denmark: M Bell, *Anti-discrimination law and the European Union* (Oxford, Oxford University Press, 2002) at 169.

⁷⁷ Glastra et al, *supra* n. 75 at 169.

⁷⁸ For example, universities are under a duty to monitor the ethnicity of their staff and students according to the specific duty on higher education institutions: Race Relations Act 1976 (Statutory Duties) Order 2001, no. 3458.

⁷⁹ Amendment 44, European Parliament legislative resolution on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2001] OJ C59/271.

⁸⁰ J Rubery, D Grimshaw, C Fagan, H Figueiredo and M Smith, 'Gender equality still on the European agenda – but for how long?' (2003) 34 *Industrial Relations Journal* 477 at 484.

Netherlands.⁸¹ Even when the analysis is broadened to include immigrants, only a minority of Member States have any targets for progress.⁸²

The 2002 five year review of the Employment Strategy confronted this information deficit and focused on indicators based on EU and non-EU national employment rates. This is an area where (incomplete) information does already exist and it reveals the challenges facing the Union. According to the available data, in 2002 the employment participation rate for EU nationals across the Union was 66.4%, compared with 52.6% for non-EU nationals.⁸³ Moreover, for women the respective rates are 58.8% (EU) and 41.2% (non-EU). In certain states, the gap in employment rates between EU and non-EU nationals is quite extreme: for example, Belgium (60.6% EU, 30.7% non-EU); Netherlands (75.3% EU, 48.6% non-EU). Yet, in Greece, Spain and Portugal, the employment participation rate of non-EU nationals is *higher* than that for EU nationals.

Looking at unemployment rates, the data is more sparse, covering only eleven EU states in 2002.⁸⁴ Across these eleven states, the EU national unemployment rate is 7.1% and the non-EU national unemployment rate is 15.8%. Again, there are sharp divergences between the Member States. Greece is the only state to report a slightly higher unemployment rate amongst EU nationals (9.9% EU, 9.6% non-EU), but there are very large gaps in Belgium (6.3% EU, 33.5% non-EU); France (8.1% EU, 24.9% non-EU); and Sweden (4.8% EU, 15% non-EU).

These data should probably be treated with some caution. In particular, the hidden element is evidently irregular migration and undocumented work. Moreover, the stage at which non-EU nationals become entitled to register as unemployed and yet remain within the national territory is likely to vary. Even if the data available only present a partial picture, they serve to highlight the very substantial disparities in the labour market situation of EU and non-EU nationals. Moreover, the data also reveal evidence of occupational segregation (a strong over-representation of non-EU nationals in the category “hotels, restaurants and private households”),⁸⁵ as well as significantly lower employment rates for non-EU nationals at all skills levels. In fact, the largest gaps are between highly qualified EU and non-EU nationals.⁸⁶

The issue of data collection remains a stumbling block for attempts by the Employment Strategy to address ethnic minorities in the labour market. The 2002 five year review confirmed the priority on quantitative indicators without confronting the difficulty in dealing with those areas where progress cannot be reduced to a number.⁸⁷ Regardless of one’s perspective on the merits of ethnic monitoring, it is evident that most Member States are not going to possess such data in the near future. Instead, the revised Employment Strategy has given greater visibility to disaggregating employment data by nationality. The 2003 guidelines call for a “significant reduction in each Member State in the unemployment gaps between non-EU and EU nationals, according to any national targets”.⁸⁸ On the one hand, this remains unduly vague and

⁸¹ Commission and Council, *supra* n. 27; Commission and Council, *supra* n. 28.

⁸² Commission, *supra* n. 24 at 31.

⁸³ This data covers fourteen EU states from 2002, with no data available from Italy. Commission, *Employment in Europe 2003* (Luxembourg, Office for the Official Publications of the European Communities, 2003) at 190.

⁸⁴ *Ibid.* Italy, Ireland, Luxembourg and Portugal are not included.

⁸⁵ *Ibid.* at 194.

⁸⁶ “High qualified” EU nationals had an employment participation rate of 83.4% in 2002, against 66.9% for high qualified non-EU nationals, *ibid.*

⁸⁷ Commission, *supra* n. 39 at 6.

⁸⁸ Guideline 7.

it may be contrasted with the Commission's proposal that states should reduce by 50% the EU/non-EU unemployment gap by 2010.⁸⁹ On the other, it holds the promise of increasing attention to third country nationals' labour market position. Given the problematic treatment of nationality discrimination by the Race Directive, this may prove a complementary development. Yet, there remains a risk that the situation of ethnic minorities, as distinct from immigrants, will drift further away from the Employment Strategy agenda.

CONCLUSION

The relationship between the Race Directive and the Employment Strategy appears far from straightforward. The basic objective of the Employment Strategy, to raise employment participation, fits comfortably with the Race Directive, which, in part, seeks to combat discrimination that excludes people from employment. Yet, as the strategies and premises of the two are explored further, a number of points of divergence can be identified. The Employment Strategy, with its focus on setting quantitative targets, increasingly frames its analysis by reference to the labour market situation of non-EU nationals. This does not conflict with the Race Directive; indeed, it may be viewed as tackling one of the deficiencies of the Directive. Nonetheless, this perspective has coincided with a greater emphasis on the integration of immigrants into employment.⁹⁰ The concentration on issues such as language training in the NAPs may be valuable, but it takes the Strategy in a different direction from combating discrimination.⁹¹ Crucially, the dominant concern with issues of labour supply locates the 'problem' in terms of immigrants' skills and aptitudes leaving insufficient attention to barriers in the demand side arising from discrimination by employers.⁹²

From the perspective of mainstreaming, issues of racism have certainly figured in the policy discourse of the Employment Strategy, but the effect seems marginal. In part, it is difficult to reach a definitive assessment because of the obstacles to any clear picture of the overall impact of the Strategy on national employment policies.⁹³ By their nature, OMC processes provide space for deliberation and adjustment to national contexts, therefore the lines of cause and effect are inherently fuzzy. It is particularly hard to decipher which national policies would have emerged irrespective of the Strategy, even though they may be presented in the NAP as direct response. Indeed, the NAPs reveal a tendency to continue with established national policy frameworks.⁹⁴ Whilst the UK and the Netherlands have been comfortable with presenting data by reference to ethnic origin, many other states have continued to concentrate on third country nationals.

Even if combating racial discrimination has been considered as a specific element of the Employment Strategy, there is very little evidence that race equality has been mainstreamed into the Strategy's other elements. In contrast, there has been

⁸⁹ Commission, 'Proposal for a Council Decision on guidelines for the employment policies of the Member States' COM (2003) 176 at 13.

⁹⁰ Commission, 'Communication on immigration, integration and employment' COM (2003) 336.

⁹¹ B Brüggemann and R Riehle, 'The integration of ethnic minorities in Germany and the influence of the European Employment Strategy' (2003) 9 *Transfer* 525 at 530.

⁹² Skidmore, *supra* n. 35 at 58. See also, Commission, 'Taking stock of five years of the European Employment Strategy' COM (2002) 416 at 12.

⁹³ Mosher and Trubek, *supra* n. 34 at 75.

⁹⁴ de la Porte, *supra* n. 21 at 50; Commission, *supra* n. 38 at 10.

a visible commitment to the principle of gender mainstreaming, although its implementation remains patchy.⁹⁵ The experiences with gender mainstreaming certainly offer an insight into areas where race equality mainstreaming could be applied. These include ensuring equal access to job activation programmes⁹⁶ and addressing the specific barriers that ethnic entrepreneurs can face, for example, in raising investment capital.⁹⁷ Moreover, the revised Employment Strategy gives much greater prominence to the situation of persons in undeclared work, an issue with relevance to certain ethnic minority communities in the EU.

The possibility of learning from gender mainstreaming also reveals the need to consider further the interaction between the various equality issues falling within the framework of the Employment Strategy. Issues of gender, age, disability and race are all addressed in the Employment Guidelines, yet there is limited analysis of the extent to which they overlap. Few of the NAPs currently even bring a gender perspective to the situation of ethnic minorities and immigrants.⁹⁸

One of the values of the OMC process is its evolutionary, interactive and discursive nature. The regular opportunities to reflect on policy direction allow for steady adjustments rather than the more abrupt process of legislative amendment. Mainstreaming remains an under-developed aspect of EU anti-racism policy and, similarly, there is space for a more comprehensive response to issues of racial discrimination within the Employment Strategy. Making a better connection between the overlapping objectives found within the Race Directive and the Employment Strategy, and the duties these place on Member States, would make a valuable contribution to the development of the Strategy as well as EU anti-racism policy.

⁹⁵ U Behning and A Serrano Pascual, 'Comparison of the adaptation of gender mainstreaming in national employment strategies' in U Behning and A Serrano Pascual (eds), *Gender mainstreaming in the European Employment Strategy* (Brussels, European Trade Union Institute, 2001); Rubery, *supra* n. 35; Rubery et al, *supra* n. 80.

⁹⁶ Commission, *supra* n. 38 at 9.

⁹⁷ This has been the subject of a study financed by DG Enterprise. Centre for Enterprise and Economic Development Research, 'Young entrepreneurs, women entrepreneurs, co-entrepreneurs and ethnic minority entrepreneurs in the European Union and Central and Eastern Europe' (2000), available at: <http://europa.eu.int/comm/enterprise/entrepreneurship/craft/craft-studies/entrepreneurs-young-women-minorities.htm>

⁹⁸ One exception is Sweden: *supra* n. 51.