

RECOMMENDATIONS for Lithuanian Presidency of the EU Council regarding the implementation of the principle of equal treatment in the European Union

16 July, 2013

Algimanta Pabedinskienė

Minister of Social Security and Labour of the Republic of Lithuania

CC

Viviane Reding

Vice-President in charge of Justice, Fundamental Rights and Citizenship, European Commission

Juan Fernando Lopez Aguilar

Chairperson, Committee on Civil Liberties, Justice and Home Affairs, European Parliament

Henri Malosse

President, European Economic and Social Committee

Morten Kjaerum

Director, European Union Agency for Fundamental Rights

Vitalijus Novikovas

Attaché, Social Security and Labour Coordination of social security systems in the EU, Gender Equality, Equal treatment, Rights of people with disabilities, Immigrants' social rights

About the Working Group Making the Case for Equality: Legal Responses to Discriminatory Practices

We, the drafters of this paper, are the participants of the working group *Making the Case for Equality: Legal Responses to Discriminatory Practices* (Working Group) which produced the following analysis and recommendations as a follow-up to the international conference *Rethinking Diversity: Challenges for Equality in Europe and New Responses*¹ organized by the *UNITED for Intercultural Action* - a European network bringing together over 550 civil society organisations active in promoting equality and fighting against racism in 48 European countries.² The conference took place on 26-31 May in Lithuania and its closing ceremony was attended by Mr. Aivaras Tušas,

¹ The at the conference attendees included the representatives from the EU Fundamental Rights Agency, Swedish Equality Ombudsperson, the Council of Europe and the OSCE Office for Democratic Institutions and Human Rights. For more information on the conference see <<http://www.unitedagainstracism.org/pages/Lithuanian.htm>> and <<http://fra.europa.eu/en/news/2013/fra-speaks-civil-society-conference-equality-and-non-discrimination>>.

² For more information about UNITED for Intercultural Action see <<http://www.unitedagainstracism.org/>>.

a Vice-Minister of Social Security and Labour and Ms. Vaida Vincevičiūtė, an Advisor of the Minister of Social Security and Labour.

In his speech, Mr. Tušas highlighted the underlying principles of equality and non-discrimination and called for active participation of civil society in their implementation. Mr. Tušas indicated that negotiations regarding *Horizontal Directive*³ will be one of the most important questions within the competence of the Ministry of Social Security and Labour during Lithuanian Presidency of the EU (Lithuanian Presidency, Presidency).

The Working Group brought together representatives of eleven European legal systems (Albania, Czech Republic, Belgium, Finland, Germany, Latvia, Lithuania, Malta, Sweden, Turkey, Ukraine), including eight legal systems of the EU member states. The Working Group comprised of legal experts, advocates, researchers and experts providing psycho-social assistance to the victims of unequal treatment.

Through intensive discussions, comparative analysis of national, European and international legal framework, case-studies and best practices, the Working Group identified uneven protection of non-discrimination grounds (so-called “hierarchy of equality”) as one of the main weaknesses of the EU equality legislation. The current non-discrimination legal framework consists of the Race Directive,⁴ the Framework Employment Directive⁵ and a number of Gender Equality Directives⁶, however the area of their application differs.⁷ It leads not only to the situation where an individual is not protected outside the realm of employment and occupation against discrimination on the grounds of religion or belief, age, disability or sexual orientation, but also to the fact that the victims of multiple discrimination⁸ are deprived from seeking relief and justice. Our work and studies have shown that across the EU:

- Every fourth ethnic minority or immigrant respondent indicated they had felt discriminated on at least two of the following grounds in the last 12 months: ethnic or immigrant origin, gender, sexual orientation, age, religion or belief, disability, or for ‘other’ reasons;⁹
- Twice as many ethnic minority/immigrant women compared with ethnic minority/immigrant men indicated that they experienced discrimination on the basis of gender;¹⁰

³ Referring to the “Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”, COM (2008) 426, available at: < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF>>.

⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁶ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204/23; Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373/37; and Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, [2010] OJ L 180/1.

⁷ For a comprehensive legal analysis of the problem, see Lisa Waddington and Mark Bell, *Reflecting on Inequalities in European Equality Law* [2003] 28 *European Law Review* 349 p. 369.

⁸ For the purpose of these recommendations multiple discrimination is it is used as an umbrella-term which refers to all situations where discrimination occurs on two and more grounds. It covers both compounded (additive) discrimination and intersectional discrimination cases. For more on differences between compounded (additive) and intersectional discrimination, see European Union Agency for Fundamental Rights (FRA), *Inequalities and multiple discrimination in access to and quality of healthcare* [2013], available at <http://fra.europa.eu/sites/default/files/inequalities-discrimination-healthcare_en.pdf> p.13.

⁹ FRA, *Data in Focus Report: Multiple Discrimination* [2010], available at <http://fra.europa.eu/sites/default/files/fra_uploads/1454-EU_MIDIS_DiF5-multiple-discrimination_EN.pdf>, p. 4.

¹⁰ *Ibid.*

- Unemployment of Roma women is on average one third higher than those for Roma men, while in the case of non-Roma the gap between female and male unemployment rates is considerably lower;¹¹
- The healthcare users had experienced unequal or unfair treatment in relation to access and quality of healthcare. They experienced this either directly as a form of alleged direct multiple discrimination on the basis of more than one ground or as a barrier to accessing healthcare, when they were treated equally but inappropriately for their specific situation.¹²
- Only 6 of the 27 EU Member States address multiple discrimination in their national laws, often with unclear definitions;¹³
- Legal experts can rarely build cases for multiple discrimination, due to the difficulties in offering judges proof of discrimination, with particular respect to proof of 'less favourable treatment' and choice of a comparator. Sometimes 'multiple comparisons' cannot be made under applicable law and judicial practice.¹⁴

Recommendations for Lithuanian Presidency

On July 1st 2013 Lithuania took over the Presidency of the Council of the EU from Ireland. The Working Group strongly believes that the Presidency is “an opportunity to prove that the country is an honest and reliable partner, in order to enhance its positive image. The rotating Presidency also provides a chance to promote the interests of society in EU membership, and to involve citizens in the decision making process.”¹⁵ Therefore, we strongly encourage the Lithuanian Government taking the following actions during the Presidency:

(1) Take the leadership to facilitate the adoption of the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

In 2008, the European Commission proposed a progressive EU anti-discrimination law which would ban discrimination on grounds of religion or belief, disability, age or sexual orientation in areas including education, housing, and access to goods and services (Horizontal Directive)¹⁶ thus remedying the lacunae in the existing legal framework and allowing the law to respond effectively to situations where individuals face discrimination on more than one ground.¹⁷ The need for Horizontal Directive was recognized and its text was endorsed by a variety of actors in the field, including the European Parliament's Committee on Civil Liberties, Justice and Home Affairs,¹⁸

¹¹ FRA, *The situation of Roma in 11 EU Member States. Survey Results at a Glance* [2012], available at <http://fra.europa.eu/sites/default/files/fra_uploads/2099-FRA-2012-Roma-at-a-glance_EN.pdf>, p. 17.

¹² FRA, *Inequalities and multiple discrimination in access to and quality of healthcare* [2013], available at <http://fra.europa.eu/sites/default/files/inequalities-discrimination-healthcare_en.pdf> p. 7.

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 9.

¹⁵ What is the Presidency of the Council of the European Union? [1 7 September 2013] <<http://www.eu2013.lt/en/presidency-and-eu/what-is-the-presidency>>.

¹⁶ European Commission, “Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”, COM (2008) 426, available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF>>.

¹⁷ Mark Bell, *Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive* [2009], available at <<http://www.equalrightstrust.org/ertdocumentbank/mark%20bell.pdf>>, p. 9.

¹⁸ The Committee on Civil Liberties, Justice and Home Affairs, *Draft opinion on the implementation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2013-05-14], available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2bCOMPARL%2bPE-510.768%2b01%2bDOC%2bPDF%2bV0%2F%2FEN>>.

individual members of the European Parliament,¹⁹ the EU Fundamental Rights Agency,²⁰ think-tanks and research institutes,²¹ civil society organizations and European networks representing the interests of vulnerable individuals, such as European Network Against Racism (ENAR), Amnesty International, ILGA-Europe, European Disability Forum, AGE Platform European, European Women's Lobby,²² the Platform of European Social NGOs.²³

Despite the wide support for this legislative initiative, it has been pending before the Council for five years. Eleven Council meetings produced no results with an excuse of unanimity principle.²⁴ The European Parliament has made constructive proposals to the draft Horizontal Directive, however, the opposition of several member states prevents effective progress and *de facto* vetoes a comprehensive piece of legislation addressing the needs and hopes of many EU citizens and beyond, as the previous analysis has shown.

The EU must fully commit itself to the principle of equality as enshrined in Article 10 of the EU Charter of Fundamental Rights, and Lithuanian Presidency in this regard should:

- Lead the Council by reviewing the Commission's proposal for Horizontal Directive to
 - (i) incorporate the prohibition of multiple discrimination and provide a definition transposable to national laws;²⁵
 - (ii) broaden the mandate of the body or bodies for the promotion of equal treatment to address the issues of multiple discrimination;
 - (iii) include a duty of Member States to mainstream equality and address situations of individuals facing multifaceted disadvantage;²⁶
 - (iv) include the prohibition of discrimination by association and assumption;²⁷

¹⁹ Michael Cashman MEP, Lack of progress on horizontal directive after five years is 'deeply worrying' [2013-06-27], available at < <http://michael-cashman.eu/2013/06/lack-of-progress-on-horizontal-directive-after-five-years-is-deeply-worrying-cashman/>>.

²⁰ FRA found that "[t]he adoption of the 'Horizontal directive' would remove the 'hierarchy of grounds' allowing Member States to tackle multiple discrimination issues more effectively through national law". In *Inequalities and multiple discrimination in access to and quality of healthcare* [2013], available at <http://fra.europa.eu/sites/default/files/inequalities-discrimination-healthcare_en.pdf> p. 97.

²¹ The Danish Institute for Human Rights found that EU and national anti-discrimination and equal treatment legislation should cover the grounds of age, disability, religion/belief and sexual orientation also outside employment and occupation, i.e. in the fields of: (a) social protection, including social security and healthcare; (b) social advantages; (c) education; (d) access to and supply of goods and services which are available to the public, including housing. The new legislation must also provide provisions to address intersectional discrimination." In *Tackling Multiple Discrimination: Practices, policies and laws* [2007], available at < <http://ec.europa.eu/social/BlobServlet?docId=2026&langId=en>> p. 53.

²² See e.g. the Joint Press Statement of the listed organizations, *EU leaders must protect discriminated groups in all walks of life* [2012-01-12], available at < http://www.ilga-europe.org/media_library/ilga_europe/how_we_work/working_with_the_european_institutions/anti_discrimination_directive/joint_ngo_statement_january_2012> .

²³ The Platform of European Social NGOs, *Happy 5th anniversary of the equal treatment directive proposal!* [2013-07-02], available at < <http://www.socialplatform.org/News.asp?news=32772>>.

²⁴ The Committee on Civil Liberties, Justice and Home Affairs, *Draft opinion on the implementation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2013-05-14], available at < <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-510.768%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>>.

²⁵ See the European Parliament, *Legislative resolution of 2 April 2009 on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, available at < <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0211&language=EN>>, Amendment 17.

²⁶ *Mutatis mutandis* see Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 29 which reads "Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive."

²⁷ European Commission, *How to Present a Discrimination Claim: handbook on seeking remedies under the EU non-discrimination directives* [2011], available at <http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf>, p. 25 and Mark Bell, *Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive* [2009], available at <<http://www.equalrightstrust.org/ertdocumentbank/mark%20bell.pdf>>, pp. 8-9.

- (v) ensure that rights under the Directive are practical and effective by providing a legal standing for organizations representing victims of discrimination to defend the rights of their members and clients before the judicial and quasi-judicial institutions;²⁸
 - In order to ensure the adequate legal basis for tackling discrimination across all grounds, urge Commission to revise directives prohibiting discrimination on the ground of sex and put forward a legislative proposal expanding their field of application to include all areas covered by Racial and Horizontal Directives.²⁹
 - Convene the 12th meeting of the Council *with the purpose of finalizing the text of the Horizontal Directive and putting it for a vote.*

The Working Group calls upon the history of Race Directive, where “unanimity of Council decisions” (Article 13 of EC Treaty) was regarded as an obstacle ever until the directive was set forward for voting and adopted in 2000, during the Presidency of Portugal.³⁰ We call Lithuanian Presidency to repeat this legendary act and to champion the equality at the EU level. We believe, that this time also „with presumably no state wishing to be regarded as blocking new laws combating racism“ and in this case – equality for all.³¹

(2) Take the stance to ensure access to justice of victims of multiple discrimination through adequate funding schemes for non-governmental organizations providing legal advice and assistance

The practice of the Working Group members has shown that non-governmental organizations are commonly the first-stop-shop for victims who experience discrimination, harassment, victimisation or treatment which they cannot define, but intuitively feel undermining their dignity. The organizations become the intermediaries between the victims and judicial and quasi-judicial structures by providing legal advice and, where the national rules provide for, legal representation. Case studies have shown that legal advice and representation is “an absolute necessity for complainants, both to navigate the intricacies of access to justice and to be on an equal footing with the opposing side” which is often in a better position both financially and psychologically.³² Access to timely, effective and free legal services is crucial for ensuring that non-discrimination legislation takes effect and serves its purpose.

However, the underreporting of discrimination remains wide-spread, one of the main reasons being inaccessibility of legal advice due to the financial constraints faced by non-governmental

²⁸ FRA has pointed out that: “Consideration could be given to taking measures that widen access to complaints mechanisms, including: (...) relaxing the rules on legal standing for NGOs and other civil society organisations (...). In light of the fact that victims are often reluctant to bring claims, allowing civil society organisations, including equality bodies, to act of their own motion in bringing claims to court or conducting investigations, without the consent of a victim, or without an identifiable victim, could constitute an important step towards facilitating enforcement.” *In Access to justice in cases of discrimination in the EU: Steps to further equality* [2012], available at <<http://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf>>. See also FRA, *Combating racial discrimination* [2012], available at <http://fra.europa.eu/sites/default/files/fra_uploads/1915-FRA_Factsheet_RED_EN.pdf>, p. 2.

²⁹ The prohibition of sex discrimination currently applies in a considerably narrower field, namely employment and occupation, including equal pay and occupational social security (Article 157 TFEU, Directive 2006/54 or Recast Directive); statutory social security (Directive 79/7); self-employment, including agriculture (Directive 86/613, as of 5 August 2012: Directive 2010/41); and access to, and supply of, goods and services available to the public (Directive 2004/113).

³⁰ Erica Howard, *The EU Race Directive: Developing the Protection against Racial Discrimination within the EU*, Taylor & Francis [2013], p. 22: “This led the Portugal Presidency to fast-track the Race Directive as a sign of the Union's commitment to combating racism. It also pressurized the individual Member states to be more flexible in their negotiating positions - 'with presumably no state wishing to be regarded as blocking new laws combating racism' (Bell, *Ibid.* 180)”.

³¹ Mark Bell, “The New Article 15 EC Treaty: A Platform for a European Policy against Racism” in Moon, G. (ed.) *Race Discrimination. Developing and Using a New Legal Framework*. Oxford: Hart Publishing [2000], p. 180.

³² FRA, *Access to justice in cases of discrimination in the EU: Steps to further equality* [2012], available at <<http://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf>>, p. 43.

organizations. The 2012 study has shown that “[a]lthough civil society organisations appear to play an important role in referring cases to equality bodies and participating in litigation, a lack of human and financial resources constitutes a significant limitation on their capacities, and public funding is mostly sparse or unavailable.”³³

The EU must make the right to non-discrimination real and enforceable, by ensuring that victims are provided with quality legal advice and assistance, and Lithuanian Presidency in this regard should:

- Encourage member states to allocate adequate funding for non-governmental organization providing specialized legal assistance to victims of discrimination;
- Call upon the Commission to increase financial support to national activities aiming at the identification of good practices in combating discrimination and promoting equality, and, in particular, aiming at providing legal advice and assistance to victims of multiple discrimination;
- Call upon the Commission to pledge its commitment and safeguard financial support to the activities mainstreaming diversity beyond one particular identity across different settings.³⁴ Financial instruments available to civil society groups should include, but be not limited to, PROGRESS, Fundamental Rights and Citizenship Funding Programme, Daphne III, Civil Justice Programme and Criminal Justice Support Programme.

Conclusions

As Lithuania assumed the Presidency of the Council of the European Union, Linas Linkevičius, Minister of Foreign Affairs, has urged all Member States to work in concert for the benefit of EU citizens, and to foster the EU values that form the basis for a shared European future.

“This year is the European Year of Citizens as well as the 20th anniversary of EU citizenship. I invite you to concentrate on efforts to ensure the well-being of all EU citizens. I hope that as the Lithuanian Presidency of the Council of the EU comes to an end, I will be able to say that this was a successful year for EU citizens. It is for their benefit that our Presidency will seek to accomplish a reliable, growing and open Europe,” he stated.³⁵

The Working Group respectfully reminds the Lithuanian Presidency that the EU is founded on the shared principles of liberty, democracy, respect for human rights and fundamental freedoms. Common to all our European societies is a fundamental recognition that every individual is of equal worth and should have fair access to the opportunities of life. Discrimination undermines these shared values.³⁶

³³ FRA, *The Racial Equality Directive: application and challenges* [2012], available at <http://fra.europa.eu/sites/default/files/fra_uploads/1916-FRA-RED-synthesis-report_EN.pdf>, p. 14.

³⁴ In the 2008 (renewed) commitment to non-discrimination and equal opportunities, the Commission committed to “raise awareness of multiple discrimination through financing activities and providing funding for smaller networks of NGOs representing intersectional groups” in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Non-discrimination and equal opportunities: A renewed commitment {SEC(2008) 2172}, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0420:en:NOT>>, para. 3.2.

³⁵ Linas Linkevičius: *It's Time to Concentrate for the Benefit of EU Citizens* [2013-07-13] <http://www.eu2013.lt/en/news/pressreleases/linas-linkevicius-its-time-to-concentrate-for-the-benefit-of-eu-citizens>>, pp. 11-12.

³⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Non-discrimination and equal opportunities: A renewed commitment

It is the time to take a sound action to reaffirm fundamental rights as priority within the EU. The EU Council not only has to acknowledge, but also has to confront the ever worsening fundamental rights situation in the EU due economic crisis and austerity measures and raising right wing nationalism that have impacted disproportionately the most vulnerable members of society.³⁷

The Working Groups calls upon the Lithuanian Presidency to honour its own commitments and, as part of a dialogue decision-makers and civil society, to implement the proposed recommendations. The Working Group stands ready to assist the Presidency in this endeavour.

Respectfully,

Working Group Facilitators

Lina Vosyliūtė
Roma Integration House/
Romų integracijos namai
E-mail: lina.vosyliute@gmail.com
Tel. +370 671 01230

Natalija Bitiukova
Human Rights Monitoring Institute/
Žmogaus teisių stebėjimo institutas
E-mail: natalija.bitiukova@hrmi.lt
Tel. +36705885170
Web: www.hrmi.lt

Working Group Participants

<i>Aleksandrs Kuzmins</i>	Latvian Human Rights Committee	Latvia
<i>Alistair Saviour de Gaetano</i>	Matters Human/ Opportunity Knocks Ethiopia Trust	Malta
<i>Arber Kodra</i>	Albanian Human Rights Group	Albania
<i>Gökçen Yılmaz</i>	Association for Solidarity with Asylum-seekers & Migrants	Turkey
<i>Linda Awerstedt</i>	Anti-Discrimination Office Uppsala	Sweden
<i>Mirek Prokes</i>	DUHA – Rainbow Association	Czech Republic
<i>Oleksandra Sverdlova</i>	No Border Project –Social Action Centre	Ukraine
<i>Oto Skale</i>	European Centre for Minority Issues	Germany
<i>Roh Petas</i>	International LGBTQ Youth and Student Organisation	Belgium/Finland

{SEC(2008) 2172}, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0420:en:NOT>>, para. 1.

³⁷ FRA, *Annual report 2012 "Fundamental rights: challenges and achievements in 2012* [2013], available at <http://fra.europa.eu/sites/default/files/annual-report-2012_en.pdf>.