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Race and Racism – Why does European Law have Difficulties with Definitions?

Abstract: Within Europe, a number of legislative instruments provide protection against racism and race/racial discrimination, but definitions of the terms race and racism are mostly absent from these instruments. This paper examines the different terms used in the different instruments and the definitions given. Particular attention is given to the question as to whether the grounds mentioned can be extended to cover discrimination based on race/racial or ethnic origin, colour, descent, nationality, national origin and religion or belief. Another question discussed is whether common definitions/interpretations of the terms race, racism and racial discrimination should exist in Europe and, if so, from which source these should be drawn.

1. INTRODUCTION

A number of legislative measures within greater Europe[1] and within the European Union (EU) prohibit racism and racial discrimination. Within greater Europe, the prohibition can be found in instruments from the Council of Europe, an organization, established in 1949, which focuses on the protection of fundamental rights. It has 47 Member States, including all the EU Member States. In 1950, the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This Convention contains a prohibition of discrimination in Article 14.

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1 The term greater Europe is used to indicate the whole of Europe as opposed to the EU.

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Since the adoption of the Race Directive[2] in 2000, the EU has had a legislative prohibition of racial discrimination. In April 2007, the EU also reached political agreement on the Proposal for a Council Framework Decision on combating Racism and Xenophobia.[3]

This paper gives an overview of the prohibition of racism and racial discrimination in the European measures. It examines the different terms used in these instruments and their definitions. Particular attention is given to the question as to whether the grounds mentioned can be extended to cover discrimination based on racial or ethnic origin, colour, descent, nationality, national origin and religion or belief. The paper provides an answer to the question as to whether common definitions/interpretations should be used and, if so, from which source they should be drawn.

2. Measures Prohibiting Racism/Racial Discrimination in Europe

Article 14 of the ECHR reads:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Not only does this article mention an extensive number of grounds, but the terms 'any ground such as' and 'or other status' indicate that the list is open-ended and can be further extended through case law.

However, Article 14 does not give an independent, freestanding right to non-discrimination as it only secures 'the enjoyment of the rights and freedoms set forth in this Convention' without discrimination. Therefore,

2 Council Directive 2000/43/EC implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin [2000] OJ L 180/22 (hereafter: the Race Directive).

3 Hereafter referred to as the Framework Decision. The proposal for this Decision is: COM (2001) 664, Proposal for a Council Framework Decision on Combating Racism and Xenophobia. Since important amendments have been made to the original proposal, the European Parliament must be consulted again. 'The Council will subsequently assess the European Parliament's observations before formally adopting the framework decision', Press Release: *EU: Common Criminal Provisions Against Racism and Xenophobia,* 20/04/2007, <www.eu2007.de/en/News/Press_Releases/April/0420BMJRassismus.html>. For the Decision as it stands now *see*: *Note from the Presidency to the Council of the European Union*, DROIPEN 34, 8544/07, 17/04/2007, <www.timworstall.typepad.com/timworstall/files/droipen_34_latest.pdf >.

discrimination can only be challenged in relation to the other Convention rights. To overcome this problem, the Council of Europe adopted, in 2000, an Additional Protocol 12 to the ECHR which provides an independent, freestanding right to non-discrimination in Article 1(1): 'The enjoyment of any right set forth by law shall be secured without discrimination on any grounds such as …' and then it mentions the same grounds as Article 14 ECHR.[4] Like the list in Article 14, the list in Protocol 12 is also open-ended and both instruments prohibit racial discrimination.

In 1993, the Council of Europe established the European Commission against Racism and Intolerance (ECRI). This monitoring body has as task to 'combat racism, xenophobia, antisemitism and intolerance at the level of greater Europe'.[5] ECRI's action covers 'all necessary measures to combat violence, discrimination and prejudice faced by persons or groups of persons, notably on grounds of "race", colour, language, religion, nationality and national or ethnic origin'.[6] Therefore, ECRI focuses specifically on the fight against racism and racial discrimination in greater Europe. One of its tasks is to adopt General Policy Recommendations. For this article, General Policy Recommendation 7,[7] on national legislation to combat racism and racial discrimination, is important. Adopted in December 2002, it recommends that Member States enact legislation against racism and racial discrimination, if such legislation does not already exist or is incomplete; and that they ensure that the key components set out in the Recommendation are included in such legislation.

Within the EU, the Race Directive puts a duty on the EU Member States to put in place national legislation against discrimination on the

4 To date (September 2007), Protocol 12 has been signed and ratified by 15 Council of Europe Member States, five of which are also Member States of the EU (Cyprus, Finland, the Netherlands, Luxembourg and Romania).

5 Article 1 of the Statute of ECRI, <www.coe.int/ecri>.

6 *ECRI and its Programme of Activities*, CRI (1999) 53 rev. 6, 1, www.coe.int/ecri>under 'Presentation of ECRI'.

7 General Policy Recommendation No. 7, *On National Legislation to Combat Racism and Racial Discrimination,* CRI (2003) 8 (Strasbourg: Council of Europe, 2003) (This includes the Explanatory Memorandum).

grounds of racial or ethnic origin in a wide number of areas.[8] The Framework Decision is a criminal law measure providing for 'minimum harmonization of the criminal provisions to combat racism and xenophobia' across the EU and covering 'a person or group of persons defined by reference to race, colour, religion, descent or national or ethnic origin'.[9]

The Charter of Fundamental Rights of the European Union[10] states, in Article II-80, that 'everyone is equal before the law' and contains a clear prohibition of discrimination on an extensive number of grounds in Article II-81:

> 1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
> 2) Within the scope of application of the Constitution and without prejudice to any of its specific provisions any discrimination on grounds of nationality shall be prohibited.

The legal status of the Charter is to be decided at the next Intergovernmental Conference. The Presidency Conclusions of the Council Meeting in Brussels in June 2007 contain a Draft ICG mandate which states that the 'Article on fundamental rights will contain a cross-reference to the Charter … giving it legally binding value and setting out the scope of its application'.[11]

One more measure needs to be mentioned: the International Convention for the Elimination of all Forms of Racial Discrimination

8 A similar duty exists for discrimination on the grounds of sex, religion or belief, disability, age and sexual orientation (although these duties do not cover all the areas covered by the Race Directive). *See*: 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 [1976] OJ L39/40; Council Directive 2002/73/EC amending Council Directive 76/207/EEC [2002] OJ L269/15; Council Directive 2004/113/EC implementing the Principle of Equal Treatment between Men and Women in the Access to and the Supply of Goods and Services [2004] OJ L373/37; Council Directive 2000/78/EC establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16 (hereafter, the latter is referred to as the Employment Equality Directive).

9 *See* Press Release, *op. cit*., n. 3.

10 Hereafter referred to as the EU Charter. For the complete text *see*: <http://europa.eu.int/eurlex/lex/LexUriServ/site/en/oj/2004/c_310/c_31020041216en00410054.pdf>.

11 Presidency Conclusions, Brussels European Council, 21-22/06/2007, Annex I: Draft ICG Mandate, point 9 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf>.

(ICERD). Although the ICERD is not limited to (greater) Europe, it is important because it deals specifically with racial discrimination and because most European States, including all EU Member States, have signed and ratified this Convention. Article 1 ICERD contains a prohibition of 'any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin'.

Therefore, in Europe, a number of measures exist against racism, xenophobia and intolerance and race/racial or ethnic origin. But do these instruments provide any definitions of these terms?

3. RACE

Article 14 ECHR, Protocol 12, the EU Charter, the Framework Decision and the ICERD all prohibit discrimination on the grounds of race. The Race Directive combats discrimination on the grounds of racial or ethnic origin or, as in some language versions, race or ethnic origin.[12] And the task of ECRI includes combating racism and discrimination based on race. But none of these instruments provide a definition of the term race and neither does the Statute of ECRI.

The reason for this might be that defining race is not easy. The literature on the subject suggests[13] that the term is changing over time, that it is not a static concept with a single meaning. It has had different meanings in different historical settings and we will therefore have to look, very briefly, at this history.[14]

The term race was hardly used before the eighteenth century, but when it was used it denoted nothing more than a group of people with a common line of descent, a common ancestry. When people came into

12 A. Tyson, 'The Negotiation of the European Community Directive on Racial Discrimination', *European Journal of Migration and Law*, Vol. 3, 2001, pp. 199-229, at p. 201.

13 *See*, for example, M. Banton, *Racial and Ethnic Competition* (Cambridge: Cambridge University Press, 1983); R. Benedict, *Race and Racism* (London: Routhledge & Kegan Paul, 1983); R. Miles*, Racism* (London/New York: Routledge, 1989); M. Banton, 'The Nature and Causes of Racism and Racial Discrimination', *International Sociology,* Vol. 17, No. 1, 1992, pp. 69-84; J. Solomos, *Race and Racism in Britain* (Basingstoke: MacMillan, 2nd edn, 1993); D. Mason, *Race and Ethnicity in Modern Britain* (Oxford: Oxford University Press, 1995); F. Furedi, *The Silent War: Imperialism and the Changing Perception of Race* (London: Pluto Press, 1998); M. Bulmer and J. Solomos (eds), *Racism* (Oxford: Oxford University Press, 1999); M. Banton, *The International Politics of Race* (Cambridge: Polity Press, 2002).

14 For reasons of space, this look at the history is necessarily very short. For more information on the history of the terms race and racism, the reader is referred to the authors in n.13.

contact with other people, race was used as a term to relate to these other people and to define themselves in relation to these other people. Race thus denoted observed variations between people.

Not until the eighteenth century did race become a biological term, a subject of the biological sciences. The world was seen as populated by distinct races, each with different biological and cultural characteristics. This biological distinction became linked to a hierarchy between the races, with some races being considered superior to others. This inferiority/superiority was used to justify exclusion, subordination and even extermination of certain groups considered to be inferior. Many people argue that race was used or 'reinvented' with this ranking attached to it to explain events in the eighteenth and nineteenth centuries like white domination, colonization, slavery and other forms of exploitation.[15]

Scientists in the 1930s disproved the theories about biological differences and most writers, after World War II, acknowledge that there is no scientific evidence to support any theory that there are different, separate, biological races. However, biological notions of race do still appear to be present in political discourse and popular thinking. The term is still used in everyday language to label differences between people, especially differences in skin colour.[16]

Race, therefore, has been and still is connected to the idea of a hierarchy between races. The hierarchy meant that some races were considered to be inferior and this has led to inferior treatment of people of certain races.

Connected to the fact that race is historically specific and should therefore be studied within the society in which it is used is the view that race is a social relationship and a social construct. Race is created in a particular society to justify differences in treatment or in position.

Race is thus a fluid concept changing over time and indeed changing with the use a person makes of it. It is suggested that there are no superior or inferior races, but that large numbers of people behave as if there are. In this sense, it is not relevant whether races exist or not, but it is important to observe that social actors treat races as real and organize their lives and exclusionary practices by reference to this. When studying race as a ground for discrimination, the perception in the minds of people is important; they discriminate against another person because they perceive him/her to be different and therefore inferior or threatening. In its everyday meaning, race is still often based on a difference between races, although these differences can be biological, cultural or both.

15 *See*, for example: Miles and Furedi, *op. cit*., n. 13.

16 *See* Miles, at 37-38; Banton (1992), at 78; Solomos, at 8; Mason, at 7; C. Guillaumin, 'The Changing Face of Race' in: Bulmer and Solomos, at pp. 355-362, all *op. cit*., n.13.

The terms ethnicity or ethnic origin are often used together with,[17] or as an alternative to, race or racial origin. It is difficult to draw a boundary between the concepts of ethnicity and race as they overlap in many aspects. It is suggested that the terms ethnic and ethnicity, when coupled with race, are used to clarify that cultural traits are also included. When used instead of race, it is often as a euphemism, to avoid the negative implications that the word race has. Ethnic and ethnicity are less negatively loaded.

Before we analyse the term race as it appears in the measures mentioned, we will examine the term racism because the two terms are closely linked.

4. RACISM

Like race, racism is difficult to define. Racism is also not a static phenomenon but is historically specific: it has to be studied in its historical and geographical setting. Although the history of notions about race can be traced back to ancient times, most writers place the emergence of what we now call racism at the end of the eighteenth century. That is when racial doctrines and ideologies began to develop. Most writers link this emergence to processes of European expansion, slavery, colonization and domination, which could all be seen as institutions of white supremacy. Racist theories, doctrines that some races – i.e. the white race – were superior, were used to rationalize why white people should exploit black people. The development of racism was linked with processes of economic expansion and capitalist development which were happening at the same time.[18]

Although racism emerged at the end of the eighteenth century, the term itself did not gain common currency until much later. The usage of the term is linked to the rise of Nazism in the 1930s. Prior to that decade the concept of racism was not used to identify theories about the superiority of certain races and the inferiority of others.

Racism is based on the belief that some races are superior to others. If it can be said that race has a negative link to such a hierarchy, it will be clear that this link is very much stronger with racism. The concept is, in Miles' words 'heavily negatively loaded. To claim someone has expressed a racist opinion is to denounce them as immoral or unworthy'.[19] Racism, therefore, has a strong negative connotation, and is often seen as socially unacceptable.

17 As in the title of the Race Directive.
18 *See* the authors, *op. cit*., n. 13.
19 *Op. cit*., n. 13, at p. 1.

Connected with its historically specific character is the fact that racism, like race, has been described as a social construct, as something that has been created within a society to justify inequality and to protect the political and economic interests of those who discriminate. Racism as it exists in modern-day society might not always be based on biological differences. Social and cultural differences are also used to differentiate between people, sometimes because biological differences have been rejected by science. But, as mentioned, ideas about biological differences are still widespread and are often at the basis of ideas about cultural and social differences.

The term xenophobia is often used coupled together with racism, especially within Europe.[20] Xenophobia appears to indicate a dislike or fear of foreigners and all things foreign. The term xenophobia is, however, also often used as a euphemism for racism, because of the negative connotation of racism and the links between racism and fascism and the holocaust. As Spencer writes:[21]

> Xenophobia … implies an irrational but more excusable sentiment, capable of being expressed as much by jokes about foreigners as by violent expressions of hatred. … In practice the two words express aspects of the same thing: a mistrust and fear of any person whose language, culture or appearance is different to that of the majority, allied with a conviction that one's own 'race', nation or culture is superior to any other.

Racism thus appears to be an even more contested and more negatively loaded concept than race, but both terms have a negative connotation.

The memory of the Holocaust and the abuse of theories about race made under Nazism in Germany were casting long shadows over the debates in the EU and wider Europe and, therefore, the use of the terms race and racism were and still are very sensitive for many European states. For example, during the negotiations about the Race Directive, the EU Member States faced 'a conundrum: how to speak about 'race' in a Directive which fights racism', as Tyson writes.[22] The negotiations show

20 *See* the mandate of ECRI and for the EU: Joint Declaration of the Institutions against Racism and Xenophobia [1986] OJ C 158/1; Declaration by the Council on Respecting Diversity and Combating Racism and Xenophobia [1998] OJ C 1/1; The institution set up to monitor racism was called the European Monitoring Centre for Racism and Xenophobia. (This has now become the EU Agency for Fundamental Rights).

21 M. Spencer, *States of Injustice. A Guide to Human Rights and Civil Liberties in the European Union,* London/Boulder Colorado: Pluto Press, 1995, at p. 127.

22 *Op. cit*., n. 12, at p. 201.

clearly that some Member States saw the use of the term race as 'tantamount to accepting racist theories that alleged the existence of separate human races'. However, other Member States wanted to use the word race rather than solely relying on ethnic origin in order to make clear that the Directive was combating racism. The compromise that was reached was the addition of a Recital 6 to the Preamble stating that the EU rejects theories which attempt to determine the existence of separate human races; and, that the use of the term racial origin in the Directive does not imply an acceptance of such theories.

In the Preamble of the ICERD, the States Parties also reject theories of racial superiority by stating that they are 'convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere'. In ECRI Recommendation 7[23] a footnote, added to para 1(a), states: 'since all human beings belong to the same species, ECRI rejects theories based on the existence of different "races"'. (Note the use of "race" in quotations marks!) While the ICERD dates from 1966, the Race Directive and the Recommendation were both adopted since 2000, but the European States still found it necessary even then to state their rejection explicitly!

Although none of the instruments defines race, some do give a definition of racism. The original proposal for the Framework Decision[24] defined, in its Article 3(a), 'racism and xenophobia' as meaning 'the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups'. The two EU measures aiming to combat racism, therefore, covered different aspects of racism. During the negotiations on the Proposal for the Framework Decision, which have taken place since 2001, the text was amended considerably and the text agreed upon in April 2007 is a much weakened version of the original.[25] The definition of racism has disappeared but the Decision still covers race, colour, religion, descent or national or ethnic origin (Article 1(a), (c) and (d)). Despite the change, the decision still covers more than the Race Directive, which covers only race/racial or ethnic origin, and the anomaly between the two measures remains.

23 *Op. cit*., n. 7.
24 COM (2001) 664, *op. cit*., n. 3.
25 DROIPEN 34, 8544/07, 17/04/2007, *op. cit*., n. 3.

ECRI Recommendation 7 contains the following definition of racism:

> the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons. [26]

This definition is provided for the purposes of the Recommendation and it is up to the States Parties to decide whether they want to include it in their national law. In contrast to this, the definition of racial discrimination has to be included.[27] Coomber[28] makes an interesting point in relation to this ECRI definition when she writes that, in the drafting of other international instruments, such as the ICERD and the Race Directive, the drafters avoided defining racism. She continues:

> ECRI's attempt at a definition indicates why it is perhaps wiser to define unlawful conduct rather than ambiguous concepts such as "racism". Moreover, by linking such activities to an ambiguous standard based on the 'belief' of the person, Recommendation 7 introduces a concept that it is difficult for any legal system to prosecute.

This suggests that it might be better for the legislator not to give a definition of racism, but to define racial discrimination only. It is submitted that prosecuting a person for his/her beliefs is problematic not only because it might be difficult to prove such beliefs, but, more importantly, because this would violate the fundamental human right to freedom of thought. Moreover, legislation will prohibit the practical occurrences of racism, such as (incitement to) racist violence, racist hate speech and racial discrimination in employment and other areas of life, rather than beliefs.

26 *Op. cit*., n. 7, para 1(a).
27 Explanatory Memorandum to the Recommendation, *op. cit*., n. 7, para 7.
28 A. Coomber, 'The Council of Europe: Combating Racism and Xenophobia' in: R. Nickel, A. Coomber, M. Bell, T. Hutchinson, and K. Zahi, *European Strategies to Combat Racism and Xenophobia as a Crime*, Brussels: European Network Against Racism (ENAR), 2003, pp. 17-26, at p. 23.

5. Racial Discrimination

Racism and racial discrimination are sometimes taken to be almost synonymous, because the term racism is often used to denote both beliefs and ideologies and the behaviour based on these beliefs. However, some writers define racism as beliefs, doctrines, views or ideologies and specifically exclude the actions or behaviour based on those doctrines. If a difference is made between the two terms, then racism is seen as an ideology or doctrine, as a theory about the existence of different races and a hierarchy between these races, while racial discrimination is seen as a practice, as actions/behaviour based on racist beliefs and feelings.

The term discrimination can be used in two different ways, firstly in the sense of discriminating between and, secondly, in the sense of discriminating against. 'Discriminating between' simply means making a distinction, but 'discriminating against' has a negative connotation. In everyday use the negative meaning of the term appears to have gained ground over the other meaning, and the term discrimination is thus more often than not tied up with a moral judgment that discriminating is unfair or bad.

There are a number of definitions of discrimination in the instruments mentioned in our introduction. Article 1(1) ICERD, for example, states that the term 'racial discrimination' in the Convention shall mean:

> any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 2 of the Race Directive gives definitions of direct and indirect discrimination based on racial or ethnic origin, similar to those used in the EU in the sex discrimination field. Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin (Article 2(a)). Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 2(b)). The EU Charter does not contain a definition of discrimination.

Para 1 of ECRI Recommendation 7 also defines both direct and indirect discrimination. According to Para 1(b), direct racial discrimination

shall mean differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. The definition of indirect discrimination in the recommendation is very similar to that of the Race Directive.

From the existence of these definitions, we can conclude that it appears to be easier to define racial discrimination. It is suggested that this is connected to the point raised by Coomber that it is easier to give a definition of unlawful conduct than it is to give a definition of unlawful beliefs. The instruments mentioned prohibit racial discrimination and, therefore, define what should be understood by this term.

6. Racial or Ethnic Origin

The term 'racial or ethnic origin' or similar terms are also mentioned in a number of instruments. Article 14 ECHR and Protocol 12 mention, among other grounds in their open-ended list, race, colour, religion and national origin, while ECRI Recommendation 7 for national legislation against racial discrimination includes race, colour, religion, nationality or national or ethnic origin. Racial discrimination under the ICERD includes discrimination based on race, colour, descent or national or ethnic origin. The EU Charter mentions, amongst other grounds, race, colour, ethnic origin and religion or belief, and the Race Directive deals with discrimination based on racial or ethnic origin. But how do we define race/racial or ethnic origin? The Race Directive has been widely criticized in the literature for the omission of definitions of key terms.[29]

29 *See*, for example, E. Guild, 'The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations', *ILJ,* Vol. 29, No. 4, 2000, pp. 416-423, at p. 418; C. Barnard, 'The Changing Scope of the Fundamental Principle of Equality?', *McGill Law Journal,* Vol. 46. No. 4, 2001, pp. 955-977, at p. 968; C. Brown, 'The Race Directive: Towards Equality for *All* the Peoples of Europe?', *Yearbook of European Law,* Vol. 21, 2002, pp. 195-227, at p. 204; F. Brennan, 'The Race Directive: Recycling Racial Inequality', *Cambridge Yearbook of European Legal Studies,* Vol. 5, 2002/2003, pp. 311-331, at pp. 320-324; T. Jones, 'The Race Directive: Redefining Protection from Discrimination in EU Law', *European Human Rights Law Review*, Vol. 5*,* 2003, pp. 515-526, at p. 517; S. Parmar, 'The European Court of Justice and Anti-Discrimination Law: Some Reflections on the Experience of Gender Equality Jurisprudence for the Future Interpretation of the Racial Equality Directive' in: J. Niessen and I. Chopin, (eds), *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 131-154, at p. 137; B. Liegl, B. Perching and B. Weyss, *Combating Religious and Ethnic Discrimination in Employment from the EU and International Perspective*, Brussels: ENAR, 2004, at p. 9.

According to Brown, the marked lack of key definitions 'may create uncertainty and generate a fair amount of litigation'.[30]

However, other documents within the EU, including the EU Charter, appear to show the same lack of definitions of key terms. The only exception to this appears to have been the Proposal for the Framework Decision, but, as mentioned, the definition of racism and xenophobia has now been removed from that Decision. One explanation for the lack of definition of key terms in the Race Directive might be that Article 13 EC, which formed the basis for its adoption, requires unanimity in the Council and it appears unlikely, from the problems about the wording during the negotiations touched upon above, that unanimous agreement about definitions of these terms could have been reached. The disappearance of the definition from the Framework Decision during the negotiations also suggests a lack of consensus among EU Member States.

But can 'racial or ethnic origin' in the Directive be taken to include colour, nationality or descent? Brennan mentions that 'a series of reports on Northern Ireland consider that characteristically the principal trigger for racially discriminatory behaviour is 'skin colour racism'. The reports show that 'in Northern Ireland discriminators do not generally know the ethnic or national background of victims' but they tend to 'discriminate on the basis of 'visible' characteristics'.[31] It could be argued that skin colour is included as a ground in the Race Directive, as it is used as an indication of a person's racial or ethnic origin, and it is hoped that the ECJ will decide that this is so. The fact that the EU Charter mentions both race and colour could be used as an argument to support this. It can also be argued that race/racial or ethnic origin include descent (or ancestry), as mentioned when looking at the definition of race. But it would have been clearer if the Directive itself had mentioned both colour and descent as grounds on which discrimination is prohibited. The Framework Decision states that descent 'refers mainly to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as race or colour)'.[32] This and the fact that some of the international instruments include colour and descent in the definition of racial discrimination could also support the argument that these are included in the Race Directive. It will, ultimately, be up to the European Court of Justice (ECJ) to interpret the extent of 'racial and ethnic origin'.

30 Brown, *op. cit*., n. 29.
31 Brennan, *op. cit*., n. 29, at pp. 320-321.
32 DROIPEN 34, 8544/07, Recital (5b), *op. cit*., n. 3.

7. Nationality and National Origin

Before we discuss nationality and national origin as grounds for discrimination, we must make it clear that a person's nationality and his/her national origin do not have to be the same. To illustrate this with an example, a person with Dutch nationality can be discriminated against because he/she is Dutch (nationality), or because he/she is from Indonesia (national origin). Of course he/she could also be discriminated against because he/she is darker-skinned (colour), because he/she is Moluccan (ethnic origin) or because he/she is Muslim (religion). As already mentioned, perpetrators of discriminatory acts do not usually distinguish between these grounds and are often led by visual characteristics. The example shows that all these grounds for discrimination are closely related and that it is often difficult to distinguish between them.

The ECHR, Protocol 12, the ICERD and ECRI Recommendation 7 all mention national origin, but the Recommendation is the only instrument mentioning nationality as well. The ECHR, does, according to the case law of the European Court of Human Rights, also prohibit discrimination on the grounds of nationality.[33] The interpretation of Protocol 12 will most likely follow this interpretation and, therefore, both Article 14 ECHR and Protocol 12 can be said to prohibit discrimination on the grounds of nationality and national origin.

The ICERD mentions national origin, but not nationality. Does it cover discrimination on the grounds of nationality as well? Article 1(2) allows for distinctions between citizens and non-citizens, while Article 1(3) recognizes a State's sovereignty in matters of nationality, citizenship or naturalization, but does put a proviso on this: such provisions should not discriminate against any particular nationality. This suggests that the ICERD will allow for distinctions based on nationality. However, the Committee on the Elimination of All Forms of Racial Discrimination[34] has brought out a General Recommendation on discrimination against non-citizens in which it affirms that the protection against discrimination covers, in principle, all persons and that the States Parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of human rights. Point 1,4 of the Recommendation reads:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objec-

33 *Gaygusuz v Austria* [1996] ECHR 36, para 42.
34 The Committee was established on the basis of Article 8 ICERD.

> tives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. …

Therefore, the ICERD does allow for distinctions based on nationality, but these are circumscribed: differential treatment of non-citizens under Article 1(2) will be considered discrimination unless it is objectively justified and Article 1(3) must not lead to discrimination against any particular nationality.

The Race Directive does not mention either national origin or nationality. Could these be said to be included under 'race/racial or ethnic origin'? In other words, does the Directive cover discrimination on the ground of nationality or national origin? National origin is not mentioned in the Directive at all, but there is an explicit exception for nationality in Article 3(2), which also adds a further proviso:

> This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of the Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Recital 13 determines that discrimination under the directive 'should be prohibited throughout the Community'. It then adds:

> This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.

The directive makes an exception for discrimination on grounds of nationality, because, as the Explanatory Memorandum to the Proposal for the Race Directive states, 'the Directive does not prohibit differences in treatment based on nationality, which is dealt with by separate Articles of the Treaty (in particular Articles 12 and 39) and by existing secondary legislation'.[35] But does it matter that the Directive does not cover nationality discrimination, as Article 12 EC contains a prohibition of such dis-

35 COM (1999) 566, Proposal for a Council Directive implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin, at p. 4.

crimination? The answer to this must be that it does matter for two reasons. Firstly, as already mentioned, it is not always easy to distinguish between race/racial or ethnic origin discrimination and discrimination on the grounds of nationality or national origin. Secondly, Article 12 has always been held to apply to nationals of EU Member States only and thus does not protect third-country nationals – nationals of other than EU Member States – against nationality discrimination. On top of this, the second part of Article 3(2) of the Race Directive also appears to limit the protection afforded to third-country nationals against racial discrimination in certain areas (provisions and conditions relating to entry and residence and legal status).

Article 3(2) and Recital 13 were not present in either the original or the amended proposals, but were added as a compromise during the negotiations on the Race Directive because some Member States were concerned about preserving their immigration and asylum systems. These Member States were not satisfied with the Commission's argument that admission policies were not included in the material scope of the Directive.[36] The exception in Article 3(2) reflects the fact that it is up to a state to decide on whether to admit a person to its territory and whether to give him/her a residence or work permit, as this is a power of the Member State and not of the Community. However, Article 3(2) has been severely criticized in the literature and many writers have called for a narrow interpretation of this paragraph, because a broad interpretation would greatly reduce the effectiveness of the directive for third-country nationals, who are often the main target of racial and nationality discrimination.[37]

36 Tyson, *op. cit*., n. 12, at pp. 209-210. *See also* Council of the European Union, Outcome of Proceedings of the Social Questions Working Party, 6435/00, Brussels, 1 March 2000, at 3 and Recital 10; and, Recitals 10 of Paper 6942/00 (31 March 2000) and Paper 8454/00 (16 May 2000).

37 *See* for example: Guild, *op. cit*., n. 29, at pp. 421-422; Tyson, *op. cit*., n. 12, at p. 209; A. Lester, 'New European Equality Measures' (2000) *Public Law,* pp. 562-567, at pp. 564-565; G. Toggenburg, 'The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe', *European Yearbook of Minority Issues,* Vol. 1, 2001/2002, pp. 231-244, at pp. 236-238; M. Bell, 'Meeting the Challenge? A Comparison between the EU Racial Equality Directive and the Starting Line' in: I. Chopin and J. Niessen, (eds) *The Starting Line and the Incorporation of the Racial Equality Directive into the National Laws of the EU Member States and Accession States,* London/Brussels: Commission for Racial Equality/Migration Policy Group, 2001, pp. 22-54, at pp. 31-32; P. Skidmore, 'EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?', *ILJ,* Vol. 30, No. 1, 2001, pp. 126-132, at 127-128; M. Bell, *Anti-Discrimination Law and the European Union*, Oxford: Oxford University Press, 2002, at pp. 76-77 and pp. 182-183; E. Ellis, 'The Principle of Non-Discrimination in the Post-

As mentioned, Article II-81(1) of the EU Charter prohibits discrimination on a large number of grounds. From the use of the words 'any ground such as' it will be clear that this is a non-exhaustive or open-ended list and that other grounds could be recognized through case law. Although this list is very extensive, it does not contain any reference to nationality or national origin, unlike Article 14 ECHR, upon which it draws. Discrimination on grounds of nationality is instead covered by the second paragraph, which according to the Updated Explanations to the EU Charter 'corresponds to Article I-4(2) of the Constitution and must be applied in compliance with that Article'.[38]Article I-4(2) echoes the present Article 12 EC, and, therefore, it is likely that the interpretation of this article and Article II-81(2) will follow the interpretation given to Article 12 EC. This suggests that the EU Charter, although it does explicitly prohibit nationality discrimination in Article II-81(2), does not extend the protection against such discrimination to third country nationals.

Neither the Race Directive nor the EU Charter mentions national origin as a ground for discrimination. It will be up to the European Court of Justice (ECJ) to decide on this. On the one hand, it could decide that national origin falls under race/racial or ethnic origin. The inclusion of national origin in the Framework Decision and in the international instruments – signed by all EU Member States – providing protection against discrimination can be used as an argument for such a decision. Such an interpretation would also have the advantage that no distinction needs to be made between national origin and race/racial or ethnic origin. On the other hand, the ECJ could interpret nationality in the Race Directive and in the EU Charter as including national origin. This would mean that the Directive would not cover national origin, but that Article II-81(2) would

Footnote 37 continued

Nice Era' in: A. Arnull and D. Wincott, (eds), *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, 2002, pp. 291-305, at p. 297; M. Sierra, (ed.), *Towards Equal Treatment Transposing the Directive –Analysis and Proposals,* Brussels: ENAR, 2002, at pp. 23-29; Brown, at pp. 209-215; Brennan, at pp. 324-329; Jones, at pp. 519-520, all *op. cit*., n. 29; S. McInerney, 'Legal Protection against Discrimination based on Racial or Ethnic Origin under European Union Law – Necessary but not Sufficient?', *International Journal of Discrimination and the Law,* Vol. 6, No. 1, 2003, pp. 3-43, at p. 14; B. Hepple, 'Race and Law in Fortress Europe', *Modern Law Review,* Vol. 67, No. 1, 2004, pp. 1-15, at pp. 6-7; E. Howard, 'Anti Race Discrimination Measures in Europe: An Attack on Two Fronts', *European Law Journal,* Vol. 11, No. 4, 2005, pp. 468-386, at pp. 477-479; E. Ellis, *EU Anti–Discrimination Law*, Oxford: Oxford University Press, 2005, at pp. 289-290.

38 CONV 828/1/03, REV 1, *Updated Explanations Relating to the Complete Text of the Charter of Fundamental Rights of the European Union (as amended by the European Convention and incorporated as Part II of the Treaty on a Constitution for Europe),* Brussels, 18 June 2003, at p. 24.

cover this, although the next question for the ECJ to decide would then be whether protection against national origin discrimination was limited to those who had their national origin in an EU Member State.

8. Religion or Belief

This ground for discrimination is also discussed because the ECHR, Protocol 12, ECRI, the EU Charter and the EU Framework Decision all provide protection against discrimination on this ground. ECRI and the Proposal for the Framework Decision actually include religion in their definitions of race and racism, while the Framework Decision as adopted in 2007, which aims to combat racism and xenophobia, covers religion as well. The ICERD and the Race Directive are exceptions, as neither mentions religion. Apart from the Framework Decision, none of the measures give a definition of religion. Recital 5c of the Preamble of the Framework Decision[39] states that 'religion broadly refers to persons defined by reference to their religious convictions or beliefs'. What must be understood by 'religious convictions or beliefs' is not further defined. Does this, for example, include philosophical beliefs?

The Race Directive covers discrimination on the grounds of racial or ethnic origin and does not mention religion or belief but the Employment Equality Directive does, so EU law does provide protection against discrimination based on religion or belief. It seems, therefore, unimportant that the Race Directive does not. However, the protection provided against discrimination by the Race Directive is more extensive than the protection provided by the Employment Equality Directive for three reasons: firstly, the Race Directive has a much wider material scope: both Directives cover access to employment; access to training; employment conditions; and, membership of professional organizations. But the Race Directive also covers social protection, including social security and health care; social advantages; education; and, access to and supply of goods and services which are available to the public, including housing.[40] In other words, the scope of the Employment Equality Directive is limited to the field of employment and occupation, while the Race Directive goes beyond that.

Secondly, the Race Directive only allows for two specifically mentioned exceptions: for genuine and determining occupational requirements (Article 4) and for positive action measures (Article 5). Direct

39 DROIPEN 34, 8544/07, *op. cit*., n. 3

40 The material scope can be found in Article 3(1) of both Directives.

racial or ethnic origin discrimination cannot be justified under any other circumstances. The Employment Equality Directive also allows for these exceptions (Articles 4(1) and 7, respectively), but it provides for a number of additional ones: Article 2(5) gives an additional general exception; Article 4(2) contains an exception for occupational activities of organizations with a religious ethos; Article 5 prescribes that reasonable accommodation must be made for disabled persons; Article 6 provides for a general justification and a number of exceptions in relation to age; and, Article 15 makes exceptions for the police service and for teachers in Northern Ireland.

Thirdly, the Race Directive makes it easier for victims to bring a case for discrimination because of the enforcement support it provides. Both Directives put a duty on Member States to make judicial and/or administrative procedures available to all persons who feel discriminated against. Both also provide that associations and organizations can support victims in bringing actions.[41] But only the Race Directive (in Article 13) puts a duty on Member States to 'designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin'.

This difference in protection and especially the limitation of the material scope of the Framework Directive to the employment sphere might create a loophole: perpetrators could claim that they discriminate against victims because of their religion rather than because of their racial or ethnic origin and so evade legal action. As ENAR states in the General Policy Paper on religious discrimination:[42]

> Religion or belief are often used to justify racial discrimination, and can be used to obscure racist motivations. This reality is compounded by the fact that the perpetrators of racist acts do not necessarily distinguish between nationality, culture or religious background.

The European Parliament appears to have been aware of this problem as it suggested the following addition to Article 2 of the Race Directive:

41 *See* Articles 7 Race and 9 Employment Equality Directives.
42 ENAR General Policy Paper No 1: *Fighting Religious Discrimination*, November 2005.

> Discrimination on the basis of racial or ethnic origin which is presented as a difference in treatment on the grounds of religion, conviction or nationality is deemed to be discrimination within the meaning of Article 1.[43]

It seems that the EU and its Member States are aware of this problem too as Article 1(1b) of the Framework Decision determines that:

> For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.

Does this also indicate that the EU and the Member States are aware that it is difficult to distinguish between race/racial or ethnic origin and religion or belief as grounds for discrimination?

This brings us to the other reason why it does matter that the Race Directive omits religion or belief from the grounds covered: racial discrimination may be interwoven with discrimination on grounds of a person's adherence to a (minority) religion or ethnicity. Therefore, it is often difficult to draw a clear and precise line between race/racial or ethnic origin and religion or belief.

This problem is exacerbated by the fact that discriminators more often than not do not distinguish clearly between race, colour, descent, religion, nationality or national origin when they discriminate and that their behaviour may spring from any one or more or all of these causes, as will be clear form the discussion so far and especially from the Reports Brennan writes about (quoted above): 'that discriminators do not generally know the ethnic or national background of the victim'[44] and the quote from ENAR 'that the perpetrators of racist acts do not necessarily distinguish between nationality, culture or religious background'.[45]

Will the inclusion of religion or belief in Article II-81(1) of the EU Charter make a difference once the Charter becomes legally binding? The Updated Explanations to the Charter[46] explain that there is no contradiction or incompatibility between Article 21(1) and Article [III-8] of the

43 Opinion European Parliament, 18/05/2000, on COM (1999) 566, A5-0136/2000, Amendment 29. It appears that the Parliament meant 'Paragraph 1' (of Article 2) rather than 'Article 1'.
44 Brennan, *op. cit*., n. 29, at pp. 320-321.
45 *Op. cit*., n. 42.
46 *Op. cit*., n. 38, at p. 24.

Draft Constitution.[47] Article [III-8], which corresponds to the present Article 13 EC, has a different scope and purpose. The Explanations continue:

> Article [III-8] of the Constitution confers power on the Union to adopt legislative acts … to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between individuals)… In contrast, the provision in paragraph 1 does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discrimination by the institutions and bodies of the Union themselves, … and by the Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of the powers granted under Article [III-8] nor the interpretation given to that Article.

As Article III-124 corresponds to Article 13 EC, the same explanation can be used to distinguish between Article II-81(1) and Article 13 EC. Therefore, Article II-81(1) addresses discrimination by the institutions of the Union and by the Member States when they are implementing Union law, while Article 13 EC and the directives enacted under this Article also prohibit discrimination on the listed grounds by the Member States and by individuals. The protection given by the EU Charter against discrimination is thus much narrower than that provided by the Race and Employment Equality Directives and the inclusion of religion or belief in the Charter will not extend the protection against discrimination on these grounds beyond what is provided by the Employment Equality Directive.

9. Common Definitions/Interpretations?

The EU Member States must provide at least the protection given by the Race and Employment Equality Directives, but these directives contain minimum requirements only[48] and, therefore, the States are free to go

47 In 2004 the Charter became part of the Draft Constitution for Europe, *see*: Treaty establishing the Constitution for Europe, [2004] OJ C 310/1. Article 21 became Article II-81(1), while Article [III-8] became Article III-124. This Draft Constitution was not adopted and is now to be replaced by a Treaty, *see* Presidency Conclusions, *op. cit*., n. 11.

48 Articles 6 Race Directive and 8 Employment Equality Directive.

beyond the provisions of the directives. The same is true for the Council of Europe Member States when following ECRI Recommendation 7.[49] Therefore, all European States could provide definitions of the terms race, racism and racial or ethnic origin discrimination in their national laws against race discrimination and they could include colour, descent, nationality, national origin and religion or belief as protected grounds.

But should the Member States provide definitions of these terms? And if the answer is yes, should common definitions and interpretations exist for the whole of Europe? And, again, if the answer is yes, from which source should these be drawn? It is submitted that the terms race and racism should not be defined because of the problem of defining these concepts in a way that would be useful in law. Instead the national legislative measures should define discrimination and either explicitly mention all the grounds covered by the legislation; or, they should include 'any grounds such as' and/or 'or other status' to indicate that the list is open-ended and can be extended through the case law. If all the grounds covered are explicitly mentioned, only the legislator can add other grounds.

The general anti-discrimination instruments all give an open-ended list of grounds, but the measures specifically targeting racism and racial discrimination – the ICERD, ECRI Recommendation 7, the Framework Decision and the Race Directive – all use the second alternative. The latter leaves less scope for the courts, although they can still be called upon to interpret the grounds mentioned. For example, the ECJ might well interpret race/racial or ethnic origin in the Race Directive as including colour and descent because these are so closely related to race/racial or ethnic origin. However, the ECJ could not expand the coverage of the Race Directive to nationality and/or religion or belief, because the EU legislator has specifically excluded nationality discrimination and provided for protection against discrimination based on religion or belief in a different instrument.

A Europe-wide, common legislative definition of racial discrimination would provide the strongest protection for all people in the whole of Europe, especially if it drew on the Race Directive's definitions of direct and indirect discrimination. The directive's definitions of these concepts are preferred over those of ECRI Recommendation 7, because the former, as mentioned, do not allow for justification of direct discrimination except in two specifically mentioned cases, while the latter allows for objective and reasonable justification of both direct and indirect discrimination.

49 Explanatory Memorandum, *op. cit*., n. 7, point 5.

National legislation against race/racial discrimination should draw for the grounds covered by such legislation on the ECRI Recommendation, so that race, colour, religion, nationality, national and ethnic origin are all covered. For the EU Member States, the latter can only be achieved by legislative amendment of the Directive but it remains to be seen whether the EU Member States can reach a unanimous decision on such an amendment. The present situation in (greater) Europe does, however, leave significant gaps in the protection of third-country nationals against race and nationality discrimination.

10. Conclusion

In this article we have analysed what is covered by the diverse measures against racism and racial discrimination within greater Europe and we have included the ICERD in this because this UN measure against racial discrimination is signed and ratified by most European States and is thus influential.

We can conclude that there is a distinct lack of definitions of the term race in all these measures, while racism is defined only in the ECRI Recommendation and in the Proposal for the Framework Decision. The latter definition is, however, not present in the Framework Decision as adopted in 2007. We briefly looked at the terms race and racism and concluded that both are difficult terms to define, which might explain the lack of definitions of these terms in the instruments mentioned.

The term discrimination, on the other hand, appears to be defined in most measures. This could be because, firstly, it is what most of the measures aim to combat and thus are directly involved with. And, secondly, because it is an easier term to define, because it refers to acts, practices and behaviour based on racist views and ideologies. Not only are people's inner beliefs and thoughts more difficult to ascertain and to prove, they are also more difficult to legislate against.

The international measures all prohibit discrimination based on race/racial or ethnic origin, but do not define these terms. We suggested that discrimination based on colour and descent would be included in these terms, as they are closely related to race/racial and ethnic origin. Colour is usually used as an indicator of race/racial or ethnic origin. Apart from the Race Directive, all the measures do include colour and the Framework Decision and the ICERD do also include descent.

We next looked at nationality and national origin, grounds that are mentioned in some of the instruments. National origin appears to be included in all measures apart from the Race Directive, but the situation is different when we look at nationality. The ECHR, Protocol 12, ECRI's

mandate and Recommendation 7 both cover nationality discrimination as well as national origin discrimination. The ICERD makes exceptions for some forms of discrimination on the ground of nationality, but these exceptions are circumscribed and are to be interpreted narrowly.

Nationality discrimination is also prohibited within the EU, but not through the Race Directive, which, in its Article 3(2), explicitly exempts nationality from its coverage. Instead, Article 12 EC prohibits discrimination on the grounds of nationality. The EU Charter seems to follow the same pattern: it prohibits discrimination in Article II-81(1) and then mentions nationality separately in Article II-81(2). The main problem is that Article 12 EC has always been interpreted as only covering discrimination based on the nationality of one of the EU Member States which means that third country nationals are not protected against nationality discrimination by this Article. This does not appear to change when the EU Charter will become legally enforceable, because the interpretation of Article II-81(2) will most likely follow that of Article 12 EC.

The last ground of discrimination examined is religion or belief. This ground is covered by the prohibition of discrimination in all instruments except in the ICERD and the Race Directive. Within the EU, it is instead covered by the Employment Equality Directive, but because there are differences in strength between the latter directive and the Race Directive, the protection provided against discrimination on the grounds of religion or belief is not as extensive as that provided against race/racial or ethnic origin discrimination, which could lead to problems.

The ECHR, Protocol 12 and Article II-81 of the EU Charter are general anti-discrimination measures rather than specifically prohibiting discrimination on grounds of race/racial or ethnic origin, but the ICERD, ECRI Recommendation 7, and, within the EU, the Framework Decision and the Race Directive specifically target racism and racial discrimination. Of these instruments, the coverage of the Race Directive is the narrowest, but this could be explained by the fact that it also provides the strongest protection. The Race Directive puts a clear, legally enforceable duty on EU Member States to enact legislation against discrimination (as does the Employment Equality Directive), while the Framework Decision aims to harmonize criminal law approaches to racism and xenophobia 'in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive sanctions are provided for natural and legal persons having committed or being liable for such offences'. The Preamble of the Framework Decision recognizes that 'since the Member States' cultural and legal traditions are,

to some extent, different, particularly in this field, full harmonization of criminal laws is currently not possible'.[50]

Therefore, the directives go much further and have much greater implications for the legislation of the EU Member States than the Framework Decision. It is thus likely to be more difficult to reach unanimous agreement on any changes to the directives. The difference in force between ECRI Recommendation 7 and the directives is even greater. Whereas the Directives are binding on the EU Member States, which have a legal duty to implement them and can be taken to the ECJ when not doing so, the Recommendation has no binding legal force, it merely advises the Member States of the Council of Europe to put effective legislation against racism and racial discrimination in place. The EU Directives are thus backed up by legal sanctions for non-compliance, while the Recommendation has no such backup, the pressure on Council of Europe Member States is more political in nature, and ECRI can exert it via its periodical country reports, in which it often criticizes governments for not taking (sufficient) action.

The European measures do not prevent the States of greater Europe from providing definitions of the terms race, racism, race discrimination and racial or ethnic origin in their national laws against race discrimination and they could include colour, descent, nationality, national origin and religion or belief as protected grounds.

We have argued that national legislation should not define race and racism because definitions that would be useful in law are difficult to provide. Instead, national law should define racial discrimination, drawing on the Race Directive's definitions of direct and indirect discrimination and drawing on ECRI Recommendation 7 for the grounds covered by such legislation, so that race, colour, religion, nationality, national and ethnic origin are all covered.

As the present situation in (greater) Europe does leave significant gaps in the protection of third-country nationals against race and nationality discrimination, a Europe-wide, common, legislative definition of racial discrimination drawing on the Race Directive and ECRI Recommendation 7 as advocated would provide the strongest protection for all people in the whole of Europe.

50 Recitals 5 and 5a, DROIPEN 34, 8544/07, *op. cit.*, n. 3.

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