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**ECRI GENERAL POLICY  
RECOMMENDATION NO. 14**

**ON  
COMBATING RACISM AND RACIAL  
DISCRIMINATION IN EMPLOYMENT**

**ADOPTED ON 22 JUNE 2012**

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**The European Commission against Racism and Intolerance (ECRI):**

Recalling that Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights;

Having regard to the European Convention on Human Rights, in particular its Article 14 which contains a non-discrimination clause concerning the enjoyment of the rights set forth in the Convention and its Protocol No. 12 which contains a general clause prohibiting discrimination;

Having regard to the case-law of the European Court of Human Rights;

Having regard to the European Social Charter (revised), in particular its Articles 1, 19 and E;

Having regard to the case law of the European Committee of Social Rights;

Having regard to the Framework Convention for the Protection of National Minorities, in particular its Articles 4 and 15;

Having regard to the work of the Advisory Committee on the Framework Convention for the Protection of National Minorities;

Having regard to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and its related instruments;

Having regard to the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

Having regard to the International Convention on the Elimination of all Forms of Racial Discrimination, in particular its Articles 1 and 5;

Having regard to the International Covenant on Economic, Social and Cultural Rights, in particular its Articles 6, 7 and 8;

Having regard to the International Labour Organisation Discrimination Convention (n. 111) and Domestic Workers Convention (n. 189);

Taking into account the Charter of Fundamental Rights of the European Union;

Taking into account Directive 2000/43/EC of the Council of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of the Council of the European Union establishing a general framework for equal treatment in employment and occupation;

Recalling that ECRI is entrusted with the task of combating racism, racial discrimination, xenophobia, antisemitism and intolerance in greater Europe from the perspective of the protection of human rights;

Recalling ECRI's General Policy Recommendation No. 1 on combating racism, xenophobia, antisemitism and intolerance, ECRI's General Policy Recommendation No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level, ECRI's General Policy recommendation No. 7 on national legislation to combat racism and racial discrimination as well as ECRI's General Policy Recommendation No. 13 on combating anti-Gypsyism and discrimination against Roma;

Stressing that, in its country-by-country reports, ECRI regularly recommends to member States the adoption of effective legal measures aimed at combating racism and racial discrimination in employment;

Recalling the Committee of Ministers Recommendations Rec(89) 2 on the protection of personal data used for employment purposes, Rec(2001)17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe, Rec(2004) 2

on the access of non-nationals to employment in the public sector and CM/Rec(2008)10 on improving access of migrants and persons of immigrant background to employment;

Having regard to the so called Paris Principles on minimum standards concerning national human rights institutions adopted unanimously by the UN General Assembly in 1993;

Having regard to the UN Refugee Convention Relating to the Status of Refugees of 1951, in particular its Article 3;

Having regard to the rights of minorities to effectively participate in economic life as protected by the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, in particular its Article 2(2), and to the UN Human Rights Council recommendations in particular A/HRC/16/46 *“Recommendations of the Forum on Minority Issues at its third session, on minorities and effective participation in economic life”* 14 and 15 December 2010;

Recalling that the fight against racism, racial discrimination, xenophobia, antisemitism and intolerance is an integral part of the protection and promotion of universal and indivisible human rights of every human being with no distinction whatsoever;

Aware of the multiple forms of discrimination against groups of concern to ECRI including on the basis of age, disability, gender, gender identity or sexual orientation, and that ethnic minority, migrant, asylum-seeking and refugee women face additional barriers in relation to access to, participation and advancement in employment;

Aware that laws alone are not sufficient to eradicate racism and racial discrimination, but convinced that laws are essential in combating racism and racial discrimination in employment;

Stressing that to be effective, action to combat racism and racial discrimination in employment requires sufficient human and financial resources;

Stressing the importance of the role of local and regional authorities in employing and providing services to members of groups of concern to ECRI;

Aware that eliminating racial discrimination, achieving equality in the field of employment and creating an integrated workforce requires member States to collaborate with the social partners, particularly with employers, trade unions and civil society organisations;

Stressing the importance to successful businesses of creating workplace environments where workers are respected and their contributions valued, regardless of their “race”<sup>1</sup>, colour, language, religion, nationality or national or ethnic origin;

Emphasising that eliminating racial discrimination and providing equality of access to employment and to promotion can result in the creation of a diverse workforce which offers an unlimited pool of talent to employers and stressing that an inclusive working environment which promotes and respects diversity is of benefit to employers, employees and the whole of society;

Emphasising that the promotion of non-discrimination is a corporate social responsibility and a good marketing tool for employers and that a reputation for discrimination could have a negative impact on a company’s profitability;

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<sup>1</sup> Since all human beings belong to the same species, ECRI rejects theories based on the existence of different races. However, in this Recommendation ECRI uses this term “race” in order to ensure that those persons who are generally and erroneously perceived as belonging to another race are not excluded from the protection provided for by the Recommendation.

Emphasising that employing people with the knowledge of the culture, language and networking in the countries of foreign trading partners is of benefit to employers;

Aware that knowledge of the right to equality and to be protected from unlawful discrimination as well as knowledge of the existence of specialised bodies or of complaint mechanisms are low across the Council of Europe member States and that this

lack of awareness is more acute among particularly disadvantaged groups;

Stressing the importance of ensuring that individuals who complain of discrimination, or people who provide them with support to complain or who act as witnesses in discrimination cases must be protected from reprisals and are entitled to legal protection against any adverse treatment which may result from their actions;

Recommends that the governments of member States:

1. Take all necessary action to eliminate de jure and de facto racism, racial discrimination and racial harassment on grounds such as "race", colour, language, religion, nationality, or national or ethnic origin (hereafter: racism, racial discrimination and racial harassment) in employment in both the public and private sectors and adopt national law and enforcement mechanisms which ensure the active enforcement of rights and full equality in practice.
2. Adopt, under a national plan, a comprehensive multidisciplinary strategy to promote equality and eliminate and prevent racism, racial discrimination and racial harassment in employment, including strategies for improving the integration of groups of concern to ECRI and their equal participation in employment and economic activity.
3. Take into account the provisions of the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive 2000/78/EC in particular:
  - a. the requirements to disseminate information on discrimination law and
  - b. promote dialogue with the social partners with a view to fostering equal treatment.
4. Adopt a national plan for all national government departments, regional and local authorities, and state agencies to enable the social partners and civil society organisations articulating the interests of groups experiencing inequality and disadvantage to be consulted and provide expertise on the most effective methods to promote equality and eliminate racial discrimination and racial harassment in employment.
5. With a view to ensuring full equality in practice, adopt legislation permitting positive action and promote and provide clear guidance on positive action measures in employment which prevent or compensate for disadvantages linked to the enumerated grounds.
6. Ratify Protocol No. 12 to the European Convention on Human Rights, the Framework Convention for the Protection of National Minorities, the European Social Charter (Revised) (accepting the system of collective

complaints), the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, as well as the International Labour Organisation Convention Concerning Decent Work for Domestic Workers.

## **1) LEGAL REVIEW**

Ensure that national legislation affords genuine protection against direct and indirect discrimination in employment and that it is implemented in practice, *inter alia* through encouragement of self-regulation of the private sector, and, accordingly:

- a) Ensure that national anti-discrimination employment law applies to all employers, including public authorities, natural and legal persons, and guarantees equality in all spheres of public and private employment and occupation.
- b) Ensure that the scope of national anti-discrimination employment law includes membership of and involvement in professional organisations and trade unions and the enjoyment of the benefits provided by such organisations, collective bargaining, remuneration, vocational training and guidance, social protection and the exercise of economic activity.
- c) Enact legislation against discrimination on more than one ground to provide protection from multiple forms of discrimination.
- d) Ensure that discriminatory provisions which are included in individual or collective contracts or agreements, internal regulations of enterprises, and rules governing the independent professions, access to credit and loans, and workers' and employers' organisations are amended or abrogated.
- e) Drawing upon regular monitoring of equality data relating to employment, provide the necessary legal tools to review the compliance of all laws, regulations and administrative provisions at the national and local level with the prohibition of racial discrimination in employment. Laws, regulations and administrative provisions, including obstacles to the hiring of workers from the groups of concern to ECRI, found not to be in conformity with the prohibition of discrimination, should be amended or abrogated.

### **Public procurement**

- f) Enact legislation permitting contracting authorities additional possibilities of imposing sanctions in the public procurement process on economic operators who have violated international obligations regarding non-discrimination, including EU standards in the field of social and labour law or international social law.

### **Legal duties on public authorities**

- g) Enact legislation requiring public authorities when carrying out their functions, including their employment functions, to promote equality and prevent and eliminate racism, racial discrimination and harassment on the enumerated grounds.

### **Legal duties on employers**

- h) Enact legislation requiring all employers to promote equality, prevent and eliminate racism, racial discrimination and racial harassment in employment.
- i) Enact legislation ensuring that harassment is prohibited in employment and all employers are required to ensure that the work place is free from racial harassment or intolerance.
- j) Enact legislation making the employer liable for acts of unlawful racial discrimination or racial harassment committed in the course of employment. The employer will be liable unless he or she can prove that he or she took such steps as were reasonably practicable to prevent the unlawful acts.
- k) Reinforce the work of existing labour inspection services and provide them with sufficient resources to deal effectively with the elimination and prevention of racism, racial discrimination and racial harassment in employment.

### **Reprisals**

- l) Enact legislation providing protection against dismissal or other retaliatory action for workers who complain of racial discrimination or racial harassment and ensure that those who act as witnesses or provide support to them including employees or others who report such acts or provide evidence are protected from any adverse treatment as a result.

## **2) KNOWLEDGE OF LEGISLATION**

Take steps to improve knowledge of equality rights and of the existence of specialised bodies and complaint mechanisms, including provisions for mediation, reconciliation and arbitration, among groups of concern to ECRI and to improve knowledge of anti-discrimination law and practice among judges and lawyers and, accordingly:

- a) Promote the engagement of civil society groups representing the interests of those who experience racial inequality in the national strategy to eliminate racial discrimination.
- b) Develop a national education and capacity building strategy to enhance the capacity of members of groups of concern to ECRI to challenge racism, racial discrimination and racial harassment in employment.
- c) Protect and support the advocacy work of civil society organisations working to eliminate racial discrimination and advance equality.
- d) Provide training for judges, prosecutors, lawyers as well as all relevant government officials in anti-discrimination law and practice.
- e) Provide training for employers in their duties and responsibilities under national anti-discrimination law including in the rights of workers to be treated with respect and to be free from racial discrimination or racial harassment in employment.

### **3) ACCESS TO JUSTICE**

Improve the access of victims of discrimination to justice and ensure that accessible legal or administrative processes providing prompt and effective remedies are available to them and, to that end:

- a) Review access to judicial and/or administrative proceedings dealing with complaints of employment discrimination to ensure that these are easily accessible to groups of concern to ECRI, including reviewing time limits.
- b) Enact legislation to require a sharing of the burden of proof between complainants and respondent employers, and provide practical guidance and training for judges and lawyers in its application.
- c) Establish procedures which require the employer to provide the complainant with an explanation of the facts in dispute in a prospective or actual discrimination complaint.
- d) Provide that the law should guarantee free legal aid<sup>2</sup> for racial discrimination and racial harassment cases in the field of employment before the competent tribunal and, where necessary, a court-appointed lawyer, for victims who wish to go before the courts as applicants or plaintiffs and who do not have the necessary means to do so. If necessary, an interpreter should be provided free of charge.
- e) Ensure that the national anti-discrimination legislation enables specialised bodies or other similar institutions, trade unions, associations and non-governmental bodies, which have, according to the criteria laid down by the national law, a legitimate interest in combating racism and racial discrimination, to bring employment discrimination cases to the relevant tribunal. The law should permit such bodies to bring cases either on behalf of or in support of the victim, provided the victim gives his or her consent in writing.
- f) Establish accessible procedures for resolving employment discrimination complaints through alternative dispute resolution processes such as mediation, conciliation and arbitration.
- g) Enable the competent tribunals to consider evidence obtained as a result of situation testing in accordance with the national legal system.

### **4) RECRUITMENT**

Take action to eliminate racial discrimination from all recruitment and selection procedures and ensure that such procedures guarantee equal opportunities for all applicants and, accordingly:

- a) Ensure that employers test and review their recruitment and selection procedures to eliminate racism and direct and indirect racial discrimination, including reviewing their conditions for access to employment, selection criteria, recruitment processes, as well as selection for promotion and access to training opportunities and practical work experience.

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<sup>2</sup> In line with General Policy Recommendation No. 7 and in accordance with the national eligibility criteria.



- b) Encourage employers to ensure that their recruitment and selection criteria focus on the experience, qualifications and competencies required for each post.
- c) Enact legislation making it unlawful to publish or to cause to be published an advertisement which has a discriminatory purpose or effect.
- d) Empower the specialised body to monitor and take action to prevent discriminatory advertisements.

## **5) EQUALITY OF OPPORTUNITY**

Take action to eliminate barriers to employment for members of groups of concern to ECRI which result from racism and racial discrimination and work to create an integrated workforce and, accordingly:

- a) Ensure that individuals of working age who are legally permitted to reside in the member State are entitled to a work permit, within a reasonable time period.
- b) Promote the development of mentoring and shadowing programmes to facilitate engagement between employers and members of groups of concern to ECRI.
- c) Enact legislation to establish national transparent mechanisms for the assessment, certification and recognition of qualifications including prior learning and previous experience, irrespective of the countries in which they were acquired and whether they were acquired formally or informally, without prohibitive translation or notary costs.
- d) Promote through campaigns and other means, the adoption and implementation of good anti-discrimination practice and equality and diversity standards across all areas of employment, including promoting the benefits to employers of a diverse and multicultural workforce.
- e) Establish language courses for members of groups of concern to ECRI free of charge whenever possible and encourage campaigns to enable their integration in the workplace.
- f) Ensure equal access to self-employment opportunities, such as access to finance and credit, for groups of concern to ECRI.
- g) Ensure that all employers provide equal opportunities for the progression of all members of groups of concern to ECRI in their careers and to that end provide them with the necessary in-service and other training.
- h) Ensure that management and human resources personnel receive the necessary initial training and professional support to be able to interact with ethnically, religiously and linguistically diverse employees and to eliminate and prevent racial discrimination and racial harassment.

## **6) RACIAL DISCRIMINATION**

Take steps to eliminate racial discrimination in the work place. In particular, take specific steps to eliminate racial harassment in employment and, to that end, conduct campaigns against racial harassment in employment and encourage employers to establish mechanisms to prevent such harassment, racism and intolerance in the workplace, including the adoption and implementation of anti-harassment policies and the appointment of appropriate staff and establishment of procedures, including mediation, to deal sensitively and quickly with harassment complaints.

## **7) POSITIVE ACTION**

Make full use of the provision for positive action measures in international and European anti-discrimination law and, to that end:

- a) Promote a labour market which adequately reflects the diversity of the population and take all necessary steps to overcome barriers to access to employment experienced by groups of concern to ECRI by, among others, investing in programmes that build employability skills for such groups.
- b) Enact legislation permitting employers to adopt temporary special measures designed either to mitigate or compensate for disadvantages suffered by persons designated by the enumerated grounds or to facilitate their full participation in employment. These measures should not be continued once the intended objectives have been achieved.
- c) Provide clear guidance, including practical examples, on the scope for employers to take specific positive action measures in employment.

## **8) SANCTIONS**

Ensure that the law provides victims of discrimination with effective remedies and that sanctions for unlawful racial discrimination and racial harassment in employment and recruitment are effective, proportionate and dissuasive and, accordingly:

- a) Review sanctions available to the relevant courts and tribunals to ensure they include powers, among others, to:
  - i. make a declaration on the rights of the complainant and the employer;
  - ii. order the employer to pay compensation for material and moral damages to the complainant;
  - iii. punish persistently offending employers through imposing additional fines;
  - iv. where appropriate, order the reinstatement of the unlawfully dismissed complainant into the employer's work place;
  - v. make recommendations to employers and/or order change, within a specified period, in the employer's future practice and impose sanctions on employers who fail to comply.
- b) Empower relevant state bodies to suspend licences and permits, make declarations of non-compliance with anti-discrimination law and disqualify employers from tendering for public contracts.

## **9) STRENGTHEN POWERS AND ROLE OF SPECIALISED BODIES**

Ensure that the specialised bodies and other national institutions that combat racism and racial discrimination have the appropriate organisational structures, accountability mechanisms, leadership and adequate resources to be independent and effectively deploy their functions and use their resources strategically in accordance with the standards set by ECRI's General Policy Recommendations No. 2 and No. 7; to that end: review the powers of these institutions to enable them to work more effectively in the field of employment towards combating racial discrimination and racial harassment and to promote equality of opportunity including by empowering the bodies to bring cases before the courts and to intervene in legal proceedings as an expert.

## **10) GENERAL PROVISIONS**

Ensure that the national strategy to promote equality and eliminate and prevent racism, racial discrimination and racial harassment in employment is implemented at all government levels and supported with equality data and sufficient allocation of resources, and, accordingly:

### **Data collection**

- a) Implement effective monitoring and accountability of the national anti-discrimination strategy by developing indicators and setting benchmarks, gathering and monitoring equality data, establishing criteria for measuring and evaluating the impact of actions undertaken and, accordingly:
  - i. invest in, and create initiatives for, gathering and analysing employment equality data with compliance of data protection rules and consistent with the principles of confidentiality, informed consent and individuals' voluntary self-identification as members of a particular group, and in consultation with the groups concerned;
  - ii. require public authorities to monitor their workforce composition and make reports available on request to the specialised body;
  - iii. enable the specialised body to publish disaggregated data regularly on employment which is benchmarked and disaggregated by, among others, "race", colour, language, religion, nationality or national or ethnic origin.

### **National employment contract**

- b) Develop and promote the adoption by all employers of a national model employment contract which requires employers to meet minimum legal labour law and anti-discrimination standards and promote equality and diversity in employment.

### **Codes of conduct and equality plans**

- c) Develop and promote codes of conduct for good practice in employment and equality plans in order to create a diverse working environment which encourages respect for all. These will support employers to promote equality and eliminate and prevent racial discrimination and racial harassment in the workplace, including, among others, in recruitment and selection, in access to opportunities for training and promotion, and in termination of employment.

- d) Enable the specialised bodies to monitor the implementation of such codes and plans, and provide practical support to employers through the provision of training and materials, practical guidance on equality matters such as procurement, positive action and recruitment, and by encouraging employers to adopt equal opportunities and anti-harassment policies.

**Incentives**

- e) Develop incentives to encourage employers to embrace good practice in employment, for example official recognition awards, tax reductions for employers with a multicultural workforce or for those undertaking agreed positive measures such as employing members of groups of concern to ECRI.

## EXPLANATORY MEMORANDUM

### Introduction

This General Policy Recommendation (hereafter: the Recommendation) focuses on combating racism, racial discrimination and racial harassment in the field of employment. It aims to develop and strengthen ECRI's General Policy Recommendation No. 7 which sets out the elements that need to be included to ensure that national legislation to combat racism and racial discrimination is as comprehensive as possible. In particular, this Recommendation aims to ensure that adequate legislation is in place for combating racial discrimination and promoting equality in the field of employment. ECRI believes that both adequate legislation and the active promotion of equality are essential to enable groups of concern to ECRI to overcome barriers to employment and achieve full participation in the labour market. It recognises the important role public authorities, employers and the social partners play, in partnership with the national authorities, in achieving this goal through, among others, programmes for integration, good practice and positive action.

While positive outcomes from legislation outlawing discrimination in the field of employment are noted, ECRI's country monitoring work observes barriers to its implementation and effectiveness in most Council of Europe member States. Recalling that non-enforcement of relevant existing legislation discredits action against racism and intolerance in general, this Recommendation also provides guidelines to ensure that legal remedies are made accessible and are used in practice.

ECRI has also observed that racism and racial discrimination in employment manifest themselves in many different forms, including harassment, victimisation, discrimination by association, perceived discrimination, multiple discrimination, instructions to discriminate, aiding and abetting discrimination, and segregation. Therefore, this Recommendation emphasises the importance of ensuring equal opportunities in employment for all persons in practice, irrespective of the specific form in which racism and racial discrimination takes place.

The Recommendation covers the following phases of employment: conditions for access to employment, to self-employment and to occupation, including selection criteria as well as recruitment and promotion conditions, whatever the branch of activity and at all levels of the professional hierarchy; vocational guidance and training; conditions of employment, including remuneration; membership of trade unions and enjoyment of benefits of collective bargaining; working conditions; career development and advancement; and termination of employment.

The Recommendation is addressed to the governments of all Council of Europe member States, which are responsible for establishing an effective legal and political framework for combating racism, racial discrimination and racial harassment in society in general and in the field of employment in particular. It is their duty to ensure that all the relevant actors in this field, including public authorities and bodies (among others specialised bodies mandated to combat racism, xenophobia, antisemitism and intolerance at national level), social partners (among others, trade unions and employers' associations), NGOs and public and private employers take effective action against racism, racial discrimination and racial harassment in the field of employment.

In line with ECRI's mandate, the Recommendation concentrates on instances of racism and racial discrimination on the grounds of "race", colour, language, religion, nationality or national or ethnic origin (the enumerated grounds). However, ECRI is aware that discrimination, as well as harassment, in the field of employment also occurs on other

grounds, such as age, disability, gender, gender identity or sexual orientation. Attention should be drawn to the fact that many of the recommendations contained in this text could be applied *mutatis mutandis* to these other grounds.

## **Definitions**

### ***“Racism and racial discrimination”***

In its General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination, ECRI defines racism and racial discrimination as follows:

a) *“racism” shall mean 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.*

b) *“direct racial discrimination” shall mean any 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. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*

c) *“indirect racial discrimination” shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as “race”, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*

### ***“Groups of concern to ECRI”***

In its country-by-country monitoring work, as well as in its work on general themes, ECRI has dealt with the situation of numerous groups which are particularly vulnerable to acts of racism, xenophobia, antisemitism and intolerance. In ECRI's General Policy Recommendation No. 4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims, it is suggested that identification of such categories *“will depend according to national circumstances, and may include for example immigrant groups, national minorities and/or other vulnerable groups”*. ECRI's annual reports have listed under the category of “vulnerable groups” Roma<sup>3</sup>, migrants, Muslims, refugees and asylum seekers, members of Black and Jewish communities, as well as other religious minorities.

## **Paragraph 1 of the Recommendation (Legal Review)**

The Recommendation emphasises at paragraph 1(a) that the prohibition of racial discrimination in employment applies to all employers regardless of size, whether in the public or private sector. In its country-by-country monitoring ECRI notes that some national anti-discrimination law does not make it clear that employers who are natural or legal persons are liable for acts of unlawful discrimination. The Recommendation stresses that the prohibition on discrimination applies to employers that are either

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<sup>3</sup> In its General Policy Recommendation No.13 on combating anti-Gypsyism and discrimination against Roma, ECRI states that the term “Roma” includes not only Roma but also Sinti, Kali, Ashkali, “Egyptians”, Manouche and kindred population groups in Europe, together with Travellers, so as to embrace the great diversity of the groups concerned. The term of “Roma” used in this Recommendation refers to the same definition.

natural or legal persons.

The guarantee of equality and protection from racism, racial discrimination and racial harassment at paragraph 1(a) is intended to apply to all workers, however defined by national law. From its country-by-country monitoring ECRI is aware that national anti-discrimination law in some member States does not provide adequate protection against discrimination or harassment for workers such as contract workers, seasonal workers, agency workers, agricultural labourers, seafarers, military personnel and statutory officeholders. In addition, workers in certain sectors do not enjoy the protection of the law, for example, domestic workers undertaking work in private households. In many countries, domestic workers do not have the protection of national employment law and, as a result, they are particularly vulnerable to racial discrimination and racial harassment in respect of conditions of employment and work.

Paragraph 1(b) recommends member States to ensure that the scope of national anti-discrimination employment law has a broad application. The exercise of economic activity includes, among others, the issuing of permits to carry on a trade, for example street vending.

### ***Multiple discrimination***

Paragraph 1(c) sets out a recommendation for member States to provide legal protection from multiple forms of discrimination. Some people experience disadvantage because of discrimination on several enumerated grounds. For instance, ethnic minority people may find themselves discriminated against not only because of their racial or ethnic origin but also because they are women, or disabled, or LGBT or old or any combination of these factors. “Multiple discrimination” refers to discrimination suffered on two or more enumerated grounds, for example, on the grounds of religion and gender as experienced by a Muslim woman.

“Intersectional discrimination”, which is a different concept and has only recently been recognised, at least in international fora, refers to a situation where several grounds interact with each other at the same time in such a way that they become inseparable and their combination creates a new ground. For instance an employer promotes both Black men and White women in his employment but never promotes Black women. The employer is not discriminating on grounds of “race” or gender, but may be doing so on grounds of a combination of “race” and gender. The concepts of multiple or intersectional discrimination are rarely covered by national discrimination law which tends to focus on one ground of discrimination at a time.

### ***Equality data***

Paragraph 1(e) sets out a recommendation for member States, drawing on equality data, to provide the necessary legal tools to review the compliance of all laws, regulations and administrative provisions, as well as policies, with the prohibition on discrimination. ECRI has noted that relevant data broken down by different categories such as “race”, colour, language, religion, nationality or national or ethnic origin can provide important baseline information on the situation of vulnerable groups to inform social policies targeted at equality in employment and also to evaluate the impact of such policies so that any necessary changes and adjustments may be made.

The collection of such data should be systematically carried out in accordance with the principles of confidentiality, informed consent and individuals’ voluntary self-identification as members of a particular group and with full respect of data protection principles established in the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has set out the principles governing the processing of personal data and taking account of

recommendations adopted by the Committee of Ministers developing guidelines for the implementation of the Convention in specific sectors or circumstances.

### ***Public procurement***

The Recommendation in paragraphs 1(f) aims to ensure that public procurement is in conformity with the relevant commitments within WTO or EU standards, which require that all considerations in public procurement, including social considerations be linked with the subject matter of the contract. In addition to sanctioning, public authorities may be required to monitor and promote implementation of these contract clauses. Contractors may be further required to provide the contracting authority with an equality plan which should identify how the contractor promotes equality and non-discrimination in employment and in the provision of their services. The competition authorities or national specialised bodies may be involved in the process of evaluating and assessing these equality plans. Public authorities may also set exclusion criteria allowing them to take into account the previous record of the contractor in the field of non-discrimination, for instance a final judgment for offences relating to discrimination or the equal treatment of workers.

### ***Legal duty on public authorities***

In paragraph 1(g) it is recommended that the law should require public authorities when carrying out their functions, including their employment functions, to promote equality and prevent and eliminate racism, racial discrimination and racial harassment. This Recommendation aims to impose an obligation on public authorities actively to promote equality in employment and not merely to avoid discrimination.

ECRI recognises that public authorities, including local and regional authorities, act as major employers in many member States and as such should eliminate discrimination and promote equality in their employment practice. They also have an important role to play in providing a model of good employment practice to the public and private sectors.

The duty on public authorities to promote equality requires them to create and implement “equality programmes” drawn up with the assistance of the specialised body. Such equality programmes should include the public authorities’ employment function and require an assessment of the impact of all the authorities’ employment policies and decisions on the promotion of equality and the elimination of racism, racial discrimination and racial harassment. Understanding the potential impact of employment policy and decision-making on different groups in society will assist public authorities to make informed decisions and to eliminate any discrimination on the enumerated grounds.

Assessing the impact of employment policy or decision-making on equality may require an assessment or analysis of good equality data, gathered by a variety of means including consultation with the affected groups. The results of the assessment should inform and improve the authorities’ decision-making processes.

For instance, where a public authority suspects that the proportion of ethnic, religious or linguistic minorities in its employment is low in comparison to the ethnic, religious or cultural profile of the society in which it operates, it should undertake an assessment of its staff by collecting equality data on the “race”, colour, language, religion, nationality, and national and ethnic origin of its existing workforce. On the basis of this information, the authority could identify a number of gaps, such as an under-representation of vulnerable groups in its overall employment, or an under-representation at particular grades or levels of seniority within the authority. It should then undertake an analysis of its employment policies and practices and set objectives, within a specified timeframe,



to meet the gaps identified, putting in place systems to monitor and evaluate equality data in targeted areas such as the success rates of job applicants, take-up of training opportunities, applications for promotion and success rates, grievances and complaints, dismissal, redundancy, retirement, and the length of service or time spent on different pay grades. Finally, it should monitor and evaluate over time its progress in achieving its equality objectives.

### ***Legal duty on employers***

In paragraph 1(h) it is recommended that the law should require employers to promote equality, prevent and eliminate racism, racial discrimination and racial harassment in employment. The employer could fulfil this duty by implementing an equality action plan which sets a timetable within which, among others, to develop or review equality and anti-harassment policies and procedures, review recruitment, selection and redundancy procedures, develop appropriate positive action measures, and develop and implement a programme of equal opportunities and harassment training for all staff. The equality action plan should set targets for achieving the actions and for monitoring and evaluating progress.

Promoting equality and preventing and eliminating racial discrimination in employment could include action to remove or minimise disadvantages experienced by groups of concern to ECRI. This could include identifying and removing barriers that prevent individuals from groups experiencing inequality from accessing employment, for example, because the job selection criteria include mother tongue language skills which are not necessary to do that particular job effectively and which act as a barrier to migrant workers or religious or ethnic minorities. Other examples include taking steps, within reasonable time limits, to meet the particular needs of religious minorities such as making a room available to staff for prayer, or, if the employer provides refreshments or meals for staff, meeting dietary requirements. Taking steps to meet the particular needs of linguistic minorities might include providing or translating essential employment documents into relevant minority languages. Other steps might include ensuring that workplace dress codes do not indirectly discriminate against vulnerable groups and that any restrictions on dress, including hairstyles, are justifiable.

### ***Harassment***

The Recommendation at paragraph 1(i) makes employers responsible for ensuring that the workplace is free from racial harassment. Harassment is one of the major forms of discrimination and it is difficult to prove. Racial harassment occurs when unwanted conduct related to the enumerated grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. For instance, if an employer mocks his/her employee's religious practice and beliefs and makes derogatory statements to him/her about his/her faith, these statements may amount to harassment on the grounds of religion.

Harassment can occur at the hands of the employer, his or her employees, agents, customers, service users or clients. Harassment by customers, service users or clients is a frequent occurrence in many workplaces which provide services to the public; for instance medical staff are particularly vulnerable to harassment when providing emergency or other health care services. The law should ensure that all workers are protected from unlawful harassment, whether at the hands of the employer, his or her employees, agents or the public who are customers, service users or clients.

### ***Vicarious liability***

The Recommendation provides in paragraph 1(j) that law be enacted which makes employers liable for acts of unlawful racial discrimination or racial harassment which are done in the course of employment. The employer will be liable unless he or she can prove that he or she took such steps as were reasonably practicable to prevent the unlawful acts.

The aim of vicarious liability is to make employers, not taking the necessary measures, legally responsible for acts of unlawful racial discrimination or racial harassment which are carried out by employees, agents, customers, service users or clients.

For instance, if a shopkeeper goes on holiday and an employee, who is left in charge of the shop, unlawfully harasses a colleague by making him the butt of racial jokes and insults, the shopkeeper could be held legally responsible for the actions of the employee.

Employers who use recruitment agencies or similar services are responsible for others' actions, so they must be sure that these services act appropriately and in accordance with the relevant equality and diversity policies. Therefore, the vicarious liability of employers should apply also on behalf of agents for their unlawful acts of racial discrimination or racial harassment against agency workers working for the employers.

However, the employer will not be legally responsible if he or she can show that they took all reasonable steps to prevent the unlawful acts of racial discrimination or racial harassment. Reasonable steps require the employer to be aware of what employees, agents, customers, service users or clients are doing and to take active measures to implement the employer's equality duty, such as having and putting into action an equality policy or providing equality training for workers.

### ***Labour inspection services***

The Recommendation provides in paragraph 1(k) that the work of existing labour inspection services should be reinforced and sufficiently resourced to effectively deal with the elimination and prevention of racism, racial discrimination and racial harassment in employment. By regularly visiting workplaces, labour inspectors can monitor and promote legal compliance with employment rights legislation. They can provide impartial information on a wide variety of employment rights legislation to employees, employers and the public through awareness raising programmes. They can monitor employment rights for all workers and seek redress. The Recommendation also provides that member States, if necessary, ought to review and increase existing labour inspection services assigning greater importance to their enforcement and advisory services. These powers are essential if employees keep quiet about discriminatory practices because they fear losing their jobs. Effective labour inspection services can reduce the need for victims to take legal action through the courts or even to give evidence.

### ***Reprisals***

In paragraph 1(l) it is recommended that the law should provide protection against dismissal or other retaliatory action for workers who complain of racial discrimination or racial harassment. Protection against victimisation, as a consequence of making a complaint or acting as a witness or otherwise in support of a person who has experienced discrimination, is essential if discrimination is to be eliminated from the workplace.

## **Paragraph 2 of the Recommendation (Knowledge of Legislation)**

Paragraph 2 sets out a recommendation for member States to take steps to improve knowledge of equality rights and of the existence of specialised bodies and complaint mechanisms among groups of concern to ECRI. ECRI's country's monitoring has often reported the lack of awareness among vulnerable groups of how to bring discrimination complaints and of sources of help in obtaining redress and this lack of awareness inhibits the reporting of discrimination complaints and the effectiveness of legal protection. This view is supported by research from other international organisations indicating that persons with an ethnic minority or immigrant background are often either unaware or unsure about the existence of anti-discrimination legislation, including in the field of employment, and about organisations that could offer support to victims of discrimination – be this a government-based or an independent institution such as specialised body or NGO.

To overcome these barriers to accessing justice, ECRI has often recommended that national authorities conduct appropriately targeted information and awareness-raising campaigns in the private and public sectors in order to make the relevant anti-discrimination legislation and existing remedies known, especially among the most vulnerable, and to improve its implementation. This could include initiating national and local information campaigns and other awareness activities on the relevant provisions of national anti-discrimination legislation among workers, especially among groups of concern to ECRI, as well as employers, employment agencies, national and decentralised public authorities. To overcome lack of knowledge of their right to protection, training should also target vulnerable groups, including migrant and other workers, in partnership with specialised bodies and trade unions. Information on relevant legislation should be made available in multiple languages to reach a wider audience and to ensure that ethnic minority groups and migrants are also aware of their rights.

Training should also be offered to judges, prosecutors and lawyers to enhance understanding of European anti-discrimination standards and support the development of professional, impartial and independent adjudication of complaints in accordance with a fair procedure by properly qualified personnel.

Specialised bodies and others should provide support for employers on statutory duties, legal responsibilities, positive action and procurement. Action should be taken to encourage employers to disseminate information about workers' rights to equality and protection from discrimination and the available remedies in cases of discrimination.

Training for national, regional and local government officials, and civil servants on equality and non-discrimination linked to their specific job functions should also be provided. Recognising the powerful role of the media in influencing public opinion, ECRI recommends that journalists should also be trained in order, among others, to counter negative and stereotypical views of Roma and other vulnerable groups appearing in the media.

## **Paragraph 3 of the Recommendation (Access to Justice)**

The Recommendation provides in paragraph 3(a) that member States should review access to judicial and/or administrative proceedings dealing with complaints of employment discrimination to ensure that these are accessible to groups of concern to ECRI, including reviewing time limits, with a view to ensuring that complainants have access to justice.

ECRI considers that member States should ensure that, in practice, members of such groups should be able to make complaints, and that the judicial or administrative mechanisms are free, accessible and rapid. A low cost public advice service staffed by specialist advisors as well as, in urgent cases, fast-track procedures leading to interim decisions should be available to victims of discrimination. ECRI considers that, bearing in mind the complexity of anti-discrimination law, the lack of adequate representation and financial resources available to complainants and the unavailability of state funded legal aid, time limits for lodging complaints should permit complainants to obtain adequate specialist advice, prior to submitting complaints to the relevant tribunal.

### ***Burden of proof***

The Recommendation provides in paragraph 3(b) that law be enacted to require a sharing of the burden of proof between complainants and respondent employers.

A shared burden of proof means that the complainant should establish facts from which it may be presumed that there has been direct or indirect discrimination, whereupon the onus shifts to the respondent to prove that there was no discrimination. The employer must prove that he or she has not acted unlawfully and that any differential treatment was objectively and reasonably justified by reasons unrelated to the enumerated grounds.

For instance, in a situation where the owner of a small manufacturing company only allows staff to take annual leave during designated shutdown periods in August and December, a Muslim worker who is refused holiday time to undertake the Hajj considers that he has been subjected to unlawful indirect discrimination on the grounds of religion. The worker must establish facts that demonstrate that the employer's annual leave policy adversely affects Muslim workers. The onus is then on the employer to prove that the annual leave policy has an objective and reasonable justification, such as the legitimate operational needs of his business. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's case that he or she has not breached the principle of non-discrimination.

Member States should provide practical guidance and offer training in the application of the shared burden of proof for judges and lawyers.

### ***Procedures regarding explanation of facts***

The Recommendation provides in paragraph 3(c) that member States should establish procedures which require the employer to provide the complainant with an explanation of the facts in dispute in a prospective or actual discrimination complaint. From its country-by-country monitoring ECRI is aware that complainants face difficulties in collecting the necessary evidence to prove discrimination complaints. Requiring the respondent in a discrimination complaint to provide, prior to the submission of the complaint, an explanation for the treatment complained of would reduce these difficulties and improve access to justice. The procedure could include powers to require the respondent employer to answer questions about the treatment complained of and power for the relevant tribunal to decide that, if the respondent deliberately, and without reasonable excuse, omitted to reply within a reasonable period or that his/her reply is evasive or equivocal, the tribunal could draw any inference from that fact that it considers it just and equitable to draw, including an inference that the employer committed an unlawful act.

For example, the legislation of a certain member State allows job applicants, who have a plausible claim that they have been discriminated in a recruitment process, to request that the employers provide information in writing concerning the education, working experience and other clearly ascertainable qualifications of the appointee for the post in question. However, the Court of Justice of the European Union concluded in a case referred by the German Federal Labour Court<sup>4</sup>, that EU non-discrimination legislation does not entitle a worker, who has a plausible claim that he/she meets the requirements listed in a job advertisement and whose application was rejected, to have access to information indicating whether the employer engaged another applicant. The Court concluded, however, that a refusal by the employer to disclose any such information may be one of the elements to take into consideration when establishing the presumption overturning the burden of proof (on the burden of proof see above).

### **NGOs**

The Recommendation provides in paragraph 3(e) that national legislation should enable trade unions, associations and NGOs to bring employment discrimination cases where there has been a breach of discrimination law. It can be in the public interest to challenge such violations even in cases when the unlawful conduct has no specific victim; for instance, the publication by an employer of a job advertisement discouraging “immigrants” from applying.

In employment cases victims of discrimination are in a vulnerable situation as the employment relationship is one of unequal power. Research shows that victims are also concerned about the negative consequences of bringing complaints, they do not know how to go about reporting complaints, are sometimes unaware of their rights, or they are discouraged by the complaints procedure. Free legal aid and the support of civil society groups may be critical in ensuring “equality of arms” between victims and employers. In certain member States both trade unions and public interest NGOs have standing to bring “actio popularis” discrimination cases which enables them to focus on institutional and structural discrimination where the rights of many are affected.

### **Mediation and conciliation**

In paragraph 3(f) it is recommended to establish accessible procedures for resolving employment discrimination complaints through alternative dispute resolution processes such as mediation, conciliation or arbitration. The aim is to resolve disputes without recourse to legal procedures, thus avoiding costs, delay and a breakdown in employment relationships. The process of mediation uses a neutral mediator to assist the parties involved in a workplace dispute to reach a satisfactory solution which both sides are able to agree to. Mediation can involve face-to-face meetings between the parties with the assistance of the mediator. The process of conciliation involves an independent conciliator who works with the parties in dispute to find a solution that both sides find acceptable. Arbitration involves the appointment of an independent arbitrator who decides how the dispute is to be settled.

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<sup>4</sup> Galina Meister case (C-415-10)

### ***Situation testing***

Paragraph 3(g) sets out a recommendation for member States to enable the competent tribunals to consider evidence obtained as a result of situation testing in accordance with the national legal system. Situation testing is an experimental method which aims to establish evidence of discrimination in practice. It consists in the process of creating artificially similar fact evidence that are based on circumstances similar to those which the actual victim experienced. The process tests the actions of the alleged discriminator analysing the employer's response to the employee's personal characteristics.

For instance, in one member State where a pharmacy was suspected of discrimination against Roma, a Roma woman applied for a job advertised by the pharmacy. She was told that it had already been filled. A non-Roma woman of the same age, acting as a tester and carrying a hidden cassette recorder, was offered an interview only minutes later and, even though she said that she had neither training nor experience, the employer indicated that she might be accepted. The Roma woman brought a claim before a court with the support of a NGO. The evidence from the test was declared admissible and she won her case. The respondent was ordered to apologise and pay damages to the claimant.

Situation testing can be a useful tool to overcome denials of the existence of discrimination. The evidence from the test can be admissible in court to support a claim that the employer behaved in a discriminatory manner. It can also be a useful tool for specialised bodies, NGOs, or researchers to raise awareness or as a quality control with regard to existing anti-discrimination practices.

### **Paragraph 4 of the Recommendation (Recruitment)**

The Recommendation in paragraph 4 addresses recruitment and selection procedures to ensure that they guarantee equal opportunities for all applicants and that employers use a fair and objective procedure to recruit and select employees. In particular, paragraph 4(b) encourages employers to ensure that their recruitment and selection criteria focus on the experience, qualifications and competencies required for each post. A competency is an ability, skill, knowledge or attribute that is needed for successful performance in a job and is often defined in terms of behaviours, e.g. communication skills. The aim is to ensure that the employer uses justified criteria objectively to select employees which are based on the applicant's ability to effectively perform the tasks required.

Paragraph 4(c) sets out a recommendation for member States to enact legislation making it unlawful to publish or cause to be published an advertisement which has a discriminatory purpose or effect. It is good practice for employers to advertise widely for jobs so that they can attract and select staff from a wide and diverse pool of talent. The practice of recruitment from within the existing work force or on the basis of recommendations made by existing staff, rather than through advertising, can lead to discrimination. For example, where the workforce is drawn largely from one ethnic group, this practice can lead to continued exclusion of other ethnic groups. An advertisement can include a notice or circular, whether to the public or not, in any publication, on radio, television or in cinemas, via the internet or at an exhibition. Advertisements should not include any wording that suggests the employer might directly or indirectly discriminate by, for example, including words which suggest criteria that would disadvantage members of groups of concern to ECRI, unless the criteria can be objectively justified.

## **Paragraph 5 of the Recommendation (Equality of Opportunity)**

Paragraph 5 sets out a recommendation for member States to take action to eliminate barriers to employment and paragraph 5(b) encourages them in particular to promote the development of mentoring and shadowing programmes.

Workplace mentoring is a learning partnership between employees for the purposes of sharing technical information, institutional knowledge and insight with respect to a particular profession. Formal mentoring programs allow organisations to create and nurture those relationships by matching more experienced employees (mentors) with less experienced employees to meet specific occupational objectives while helping those individuals in the mentoring relationship to identify and develop their own talents. Mentoring can be adapted to create an integrated workforce.

For instance, to address the under-representation of Black and other minority ethnic groups at senior levels in the broadcast media industry, a senior mentoring scheme was established with the aim to provide members of these groups with the support, encouragement and guidance necessary to reach the most senior roles in the industry. Participants were teamed up with a mentor for 12 months during which period they met with their mentor on a number of occasions to discuss where they were, where they would like to be in their career and how to get there. Targeted at talented staff, the scheme focused on overcoming barriers to progress, developing confidence, enhancing skills and finding ways to forward the participant's career, and educational and professional development.

Work shadowing is the process of accompanying and observing someone in work in order to train or gain an insight into a particular area of employment. Offering work shadowing or mentoring opportunities to people from a particular vulnerable group aims to raise aspirations and build knowledge and confidence among members of the group about applying for work or promotion opportunities, because they will know more about what is involved.

For instance, a judicial shadowing scheme could provide junior lawyers with an opportunity to gain insight into the reality of holding judicial office by allowing them to work shadow a serving judge. The experience could provide them with the opportunity to gain a better understanding of the role and responsibilities of judges and would open up the potential of applying for judicial office to individuals who might otherwise not consider this as a career path.

### ***Mechanism for recognition of qualifications***

In paragraph 5(c) it is recommended that member States enact legislation to establish a national transparent mechanism for the assessment, certification and recognition of qualifications. In the field of employment, groups of concern to ECRI experience additional discrimination in relation to the recognition of qualifications obtained abroad. Members of these groups tend to be employed in jobs that do not reflect their qualifications and they face barriers to progression within the job. Although employment in low paid sectors can be regarded as an entry point to higher wage levels, in practice this rarely happens. Employers justify this underemployment by pointing out that immigrants do not have sufficient national language skills despite the fact that many of the job opportunities denied to immigrants do not require higher level language requirements. Because of difficulties they experience in finding a job, members of groups of concern to ECRI may be forced to accept lower wages. ECRI considers that the underutilisation of the skills, qualifications and experience of such workers is a waste of talent and expertise. In certain countries, projects have been put in place to assist migrants by assessing their skills and giving them expert advice and

guidance on recognition of their qualifications. At the same time specialised government agencies may exchange information internationally and assist in the establishment of appropriate and relevant standards for equivalent qualifications and skills in different national contexts. For instance, the remit of the National Academic Recognition Information Centres<sup>5</sup> could be extended to cover not only academic qualifications but also non-academic qualifications, including those obtained outside the European Union. These centres should be staffed and financed appropriately

### ***Good anti-discrimination practices and equality and diversity standards***

Paragraph 5(d) recommends the promotion of the adoption and implementation of good anti-discrimination practice and equality and diversity standards across all areas of employment.

Implementing good equality practices in the workplace greatly reduces the likelihood that employers will unlawfully discriminate and thereby face legal claims against them. Good practice can also help the employer conduct his/her core business better. Organisations have found that taking positive steps to promote equality and diversity has benefits which include;

- greater worker satisfaction, which helps attract new staff and retain those already there, reduced recruitment costs and increased productivity;
- improved understanding of the experience of their existing or potential customers, clients or service users;
- filling skills gaps.

Member States can assist employers to implement equality in the workforce, in the workplace and in customer and supplier activities by providing funding for the implementation of diversity taskforces in the workplace, including training and awareness raising activities on non-discrimination, equality and diversity management and by promoting the benefits to employers of a diverse and multicultural workforce.

### **Paragraph 6 of the Recommendation (Discrimination in Employment)**

Paragraph 6 sets out a recommendation for member States to take steps to eliminate discrimination in employment. Racism and racial discrimination are not limited to the fringes of society and have many faces: in particular racial harassment in the workplace. Members of groups of concern to ECRI may be scapegoated for economic difficulties. If racism is to be rooted out completely, its manifestations such as ethnic slurs or verbal abuse in the workplace must be challenged.

Harassment adversely affects not only the victim, who may be unable to develop or function properly at work, but can also have a negative effect on the work environment. Employers should clearly communicate to all employees - through a written policy or other appropriate mechanisms - that harassment such as ethnic slurs or other verbal or physical abuse related to the enumerated grounds is prohibited. An employer also should have effective and clearly communicated policies and procedures for addressing complaints of harassment and should train managers on how to identify and respond effectively to harassment.

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<sup>5</sup> National Academic Recognition Information Centres and National Information Centres on academic recognition and mobility were established by the European Commission, the Council of Europe and UNESCO/CEPES to facilitate recognition of foreign diplomas, degrees and other qualifications.



### **Paragraph 7 of the Recommendation (Positive Action)**

Paragraph 7 sets out a recommendation for member States to make full use of the provision for positive action measures in international and European anti-discrimination law. Positive action includes temporary and proportionate measures or strategies to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity. Paragraph 7(a) sets out a recommendation for member States to enact legislation permitting employers to adopt special temporary positive action measures. Positive action can be critical in encouraging members of groups of concern to ECRI to participate in employment or economic life, particularly in areas where their participation is disproportionately low. Examples of positive action by member States include the development of programmes that build employability skills, such as apprenticeships and traineeships for vulnerable groups; the provision of adult education in areas where such groups live including vocational training and qualifications for higher-skilled sectors; targeted scholarships and research fellowships for higher education; free access to language and literacy training; ensuring equal access to new technologies, or training programmes (with provision for child care) targeted at women from vulnerable groups. Positive action aimed at improving Roma's participation in employment includes developing employment projects which are highly practical and offer flexible training adjusted to their lifestyle and specific needs. The existing skills of Roma, which may have been acquired informally through experience and family transition, should be taken into account and accredited,

Positive action by employers includes, for instance, advertisements or other promotional work aimed at encouraging applications for jobs from members of groups of concern to ECRI as well as setting targets for recruitment and monitoring attainment of these targets.

### **Paragraph 8 of the Recommendation (Sanctions)**

Paragraph 8 sets out a recommendation for member States to ensure that the law provides victims of discrimination with effective, proportionate and dissuasive remedies. At the same time it is important to convey a message to all employers and employees that discrimination will not be tolerated. These remedies include powers to the competent tribunal to make recommendations to employers and/or order change, within a specified period, in the employer's future practice. Such recommendations could include recommending or ordering the employer to adopt equality policies, end discriminatory practices, or train staff on anti-discrimination law and on good practice in employment.

### **Paragraph 9 of the Recommendation (Specialised Bodies)**

The Recommendation in paragraph 9 focuses on strengthening the powers and the role of specialised bodies as envisaged by ECRI's General Policy Recommendations No. 2 and No. 7. Specialised bodies in different member States engage a wide range of powers in the fight against discrimination. These include the power to investigate complaints of discrimination and enforce compliance with the results of their investigations. Some specialised bodies have powers to take legal action in the public interest or to initiate an "actio popularis" to protect the rights of groups or individuals whose rights have been, or could be, violated by a particular course of action. Other examples include the legal standing to bring complaints to the relevant tribunal or court for discriminatory advertisements, discriminatory collective agreements, patterns of discrimination, persistent breaches of discrimination law, or a failure to implement an agreed equality programme or comply with a relevant statutory equality duty.

In its General Policy Recommendation No. 2 ECRI has acknowledged that *“according to the legal and administrative traditions of the countries in which they are set up, specialised bodies may take different forms. The role and functions of such institutions should be fulfilled by bodies which may take the form of, for example, national commissions for racial equality, ombudsmen against ethnic discrimination, Centres/Offices for combating racism and promoting equal opportunities, or other forms, including bodies with wider objectives in the field of human rights generally”*. However, recently ECRI has nevertheless been concerned about disproportionate reductions in the budgets of national specialised bodies. In ECRI’s view, when assessing such bodies’ need for funding, one must bear in mind the crucial role they are called upon to play, in particular in times of economic difficulty. Particular care should, therefore, be taken not to hamstring their efforts and undermine their credibility by scaling down their staff costs and general level of financing. Preserving their effectiveness should, on the contrary, be the overriding objective.

In relation to the equality duty on public authorities, ECRI has recommended that the law should provide effective implementation mechanisms, including the option of legal enforcement of equality programmes notably through the national specialised body.

Concerning discrimination in employment, specialised bodies or other similar institutions should have the legal means to be able to conduct independent surveys including opinion polls on the perception by the general population of racial discrimination in employment; these institutions should ensure adequate monitoring of the situation of all groups of concern to ECRI in the field of employment. In addition such Institutions should be able to conduct ex officio investigations, or investigations at request to establish whether the obligations of equal treatment in employment have been violated on grounds such as “race”, colour, language, religion, nationality or national or ethnic origin and be able to make decisions on the basis of the investigations.

An equality ombudsman should be identified within the organisation to whom people can turn for advice and support in discriminatory cases. This person should be well-rehearsed and knowledgeable of the individual’s rights and options for attaining protection.

The role of specialised bodies should be known to workers, victims of racial discrimination and other interested parties through relevant awareness raising activities. Specialised bodies should be able to undertake outreach work and provide independent assistance to victims of racial discrimination or racial harassment to enable them to pursue their complaints including legal advice, support to take legal action and legal representation.

Specialised bodies should have the power to make recommendations to national, regional and local government bodies, public authorities and employers. They should monitor media practice, undertake advocacy work with national associations, trade unions, civil society actors working on anti-discrimination in employment and with the media, professional and regulatory bodies for journalists, and promote best practice in the training of journalists, including on the reporting of “race” issues.

Specialised bodies should have sufficient resources in order to be able to advise and guide public authorities and employers on their legal equality duties and take legal action to enforce those duties. These institutions should establish dialogue with groups of concern to ECRI to learn from their experience in order to build mutual trust and develop effective methods of working.

## **Paragraph 10 of the Recommendation (General Provisions)**

The Recommendation in paragraph 10 covers miscellaneous measures promoting non-discrimination in employment. A national employment contract can be a model employment contract which requires employers to meet minimum legal labour and anti-discrimination standards and promote equality and diversity in employment. It can be developed in consultation with business and trade unions. Codes of conducts provide practical guidance on how to implement anti-discrimination standards and to promote equality and diversity in employment. Once adopted by employers, they signal commitment on the part of employers to the principle of non-discrimination. They facilitate self-regulation and may attract a diverse workforce.

Besides systems of quota or fines, governments may develop positive incentives to encourage employers to embrace non-discrimination in employment. The incentives can be of financial nature, for instance tax or insurance reductions for employers with a multicultural workforce or funding for training programs. They can also be of non-financial nature, such as recognition awards or certificates.

Governments can also publish research on concrete examples of employees with a foreign background being of value to a company trading with the country in question. This will help highlight the benefit of employing people with the knowledge of the culture, language of and networking in the countries of foreign trading partners.



