*HELLENIC REPUBLIC*

**GREEK NATIONAL COMMISSION FOR HUMAN RIGHTS**

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# *Comments regarding Law 3304/2005 «Implementation of the principle of equal treatment irrespective of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation» and recommendations for its amendment*

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## I. Introduction

Law 3304/2005 "Implementation of the principle of equal treatment irrespective of racial or ethnic origin, religious or other beliefs, disability, age or sexual preferences" incorporated in the Greek legal Directive 2000/43/EC «implementing the principle of equal treatment between persons irrespective of racial or ethnic origin» and Directive 2000/78/EC «establishing a general framework for equal treatment in employment and occupation».

Greece belongs to the majority of member states which, prior to the adoption of the two directives, did not have specialized legislative framework establishing equal treatment and prohibiting discrimination. Nevertheless, Greece did not incorporate correctly the two EU legislative instruments.

### *A) The comments of the National Commission for Human Rights in 2003*

The National Commission for Human Rights took the initiative, in 2003, to comment upon the Bill incorporating the two directives into the Greek legal order. In its Advisory Opinion it underlined several provisions which were directly opposed to the letter of the two directives. The NCHR recommended a number of amendments to the Bill so as to comply with the letter and the *ratio* of the two directives.

Few of the recommendations were followed by the State. However, they were crucial for the compliance with the EU law. Specifically, the law prohibits expressly, as it ought to, every direct or indirect discrimination. Moreover, the law defines correctly the terms of «direct» and «indirect» discrimination, «harassment», as well as the requirements of limited exceptions to the principle of equal treatment.

Nevertheless, since the enactment of Law 3304/2005 until today, the majority of the recommendations of the NCHR, regarding the correct adjustment of Greek law to the letter and ratio of the two directives, has not been taken into account.

### *B) The comments of the Economic and Social Committee*

The Economic and Social Committee (hereafter ESC) -designated by Law 3304/2005 as the body for social dialogue aiming at the implementation of Law 3304/2005, the promotion of the principle of equal treatment and the taking of measures to combat discrimination- ascertains that the population of the country is «composed» of groups with distinctive cultural, linguistic and religious features and that «the problems that hinder» the equal treatment of the members of «*special*» and «*vulnerable*» social groups (such as the migrants, ethnic minorities, Romas, people with disabilities, the elderly) are due to «*mistaken stereotypes (of the majority) towards the others*».

The ESC holds the view, in its Annual Reports regarding the implementation of Law 3304/2005, that the substantive application of the equal treatment principle requires initiatives and actions on the part of the State, which will not be restricted simply to the enactment of rules for the legal protection of those social groups, but they will provide for cohesive practices aiming at combating social and labour inequality and the positive support of the «*different*» social groups.

### *C) The need to amend Law 3304/2005*

The NCHR, taking into account a) the existing situation in Greek society regarding the treatment of «different» national (migrants), ethnic, social groups and categories of persons falling under the scope of the law, and b) the fact that the majority of its 2003 recommendations for the full compliance of Law 3304/2005 with the directives were not followed, feels the need to repeat some of its recommendations and to propose the amendment of the current legal framework on equal treatment.

## II. Incorporation into the Greek law of the substantive provisions of the Directives concerning equal treatment

### *A) The prohibition of multiple discrimination*

Directives 2000/43/EC and 2000/78/EC, have partly a common field of application regarding the activities in which discrimination is prohibited (access to employment, vocational training, terms and conditions of employment, unions, etc.). However, they cover different grounds of discrimination.

This differentiation has generated the impression that the Directives do not prohibit multiple discrimination, i.e. actions or omissions entailing discrimination on more than one grounds (e.g. due to racial origin and religion or age and/or sex, which is common). By a teleological interpretation of the directives, and in the light of the principle of non discrimination provided for expressly by

article 10 of the Treaty on the Functioning of the EU, the prohibition of multiple discrimination against persons belonging to the vulnerable groups protected by the directives may be deduced. This interpretation is corroborated by the following:

The preamble of both directives refers to several international human rights treaties (CEDAW, CERD, ICCPR, ICESCR) ratified by all member states. These instruments provide interpretational tools and are directly binding to Greece. Furthermore, the respective treaty bodies require from states parties to eliminate multiple discrimination.

The recent International Labour Conference of ILO (June 2009), in its report for gender equality strongly urges public authorities to adopt policies and programs combating multiple discrimination, victims of which are mainly women.

Moreover, the EU Commission in its proposal to the Council, in June 2008, regarding the so-called «horizontal directive» which expands beyond labour market the principle of equal treatment irrespective of religion or beliefs, disability, age or sexual orientation, moved towards a more general prohibition requiring protection from discrimination «*irrespective of grounds*». The European Parliament, in its relevant legislative resolution recommended the inclusion of the explicit prohibition of multiple discrimination.

The NCHR, in its 2003 advisory opinion had recommended that par. 1 of article 2 should establish the prohibition of discrimination "on all grounds provided for in article 1" of the bill and not just "on one of the grounds".

Taking into account the aforementioned, the NCHR recommends the amendment of article 2, par. 1 of Law 3304/2005 in order to provide for the prohibition of direct or indirect discrimination ***«on one or more of the grounds enumerated in article 1»***.

***B) Discriminatory treatment of third country nationals***

Law 3304/2005, in articles 4 and 8, provides that it does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence and the legal status of third country nationals and stateless persons on the territory of Greece. However, according to the preambles of Directives 2000/43 and 2000/78: "*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*". Therefore,

if a discriminatory treatment is based on one of the prohibited grounds by the Directives, the nationality of the victim should not be examined.

The NCHR notes that different treatment based on nationality often conceals discriminatory treatment due to the racial or ethnic origin of the affected person. The NCHR takes the view that the law should prohibit the pretextual invocation of nationality covering up racial or ethnic grounds of discrimination.

***C) The scope of application of equal treatment, positive action and occupational requirements***

In order for Law 3304/2005 to comply fully with the Directives, articles 4 and 8 (scope), 6 and 9 (positive action) and 9 (occupational requirements) need to be amended:

(a) In articles 4, par. 1(a) and 8, par. 1(a), after the word "*employment*" the words ***"self-employment and occupation"*** should be added.

(b) Articles 6 and 8 of the Law concerning positive action, should begin with the phrase "***With a view to ensuring full equality in practice*** ...", which clarifies that positive measures are the means to substantial equality.

(c) Article 9, par. 2 concerning occupational requirements, in order to be consistent with article 4, par. 2 of Directive 2000/78, should be phrased as follows: "***This difference of treatment shall be implemented taking account of the provisions of the Constitution and the consistent with it laws …***».

***D) Different treatment due to age***

The NCHR reiterates its 2003 observation that article 11 of Law 3304/2005 (justification of differences of treatment on grounds of age) does not incorporate correctly article 6 of Directive 2000/78.

The NCHR, once more, highlights that a special legislative provision already exists, which was enacted on the basis of the said directive. Article 10, par. 11 of Law 3051/2002 abolishing maximum age limits for hiring employees in the public sector, should be repeated in Law 3304/2005 while at the same time expanding its scope of application in the private sector and the other activities covered by the Law.

**III. Incorporation in the Greek law of increased and effective legal protection of the right to equal treatment**

***A) Incorporation of the procedural provisions of the directives in the codes of procedure***

The NCHR, in 2003, has underlined the need for the procedural provisions of the two directives (*locus standi* of legal entities and burden of proof) to be incorporated in the Code of Civil Procedure and the Code of Administrative Procedure, after their phrasing is improved. However, the relevant provisions of Law 3304/2005 are still defective and have not been incorporated in the Codes of Procedure. Consequently, judges and other competent authorities, lawyers, employees and their organizations ignore these provisions and they are not applied in practice. Thus, very few cases have been filed in courts. Therefore, the NCHR reiterates its previous recommendation for the incorporation of the relevant provisions on the Codes of Procedure.

***B) The locus standi of organizations in the context of judicial protection of discrimination victims and for the recourse to administrative authorities***

As the NCHR underlined, in 2003, the number of legal entities which are given the right to defend discrimination victims is *very* limited, since it includes only those which, according to their statutes, state the safeguard of the equal treatment principle as one of their purposes. So far, the implementation of the Law does not indicate a broad interpretation of the relevant provision in order for every organization defending human rights to have *locus standi.*

Moreover, in order for the aims of the relevant provision to be fulfilled, it does not suffice for the aforementioned legal entities to be able to represent discrimination victims, but they should also be able to act in their own name. In that way discrimination victims will be encouraged to report their rights without fear of retaliation by their employers. The NCHR had also emphasized that it needs to be explicitly provided that a negative *res judicata* in a case that was filed by a legal entity in its own name will not be binding for the discrimination victim

Furthermore, the requirements in order for legal entities to represent discrimination victims provided for in article 13, par. 3 of Law 3304/2005 (*prior* consent of the discrimination victim given before a notary or in writing signed and having the authenticity of the signature certified) hinder the application of the provision. The Directives require the victim's "*approval*", which can be given later on, and not his/her "*consent*", which must be given in advance. Moreover, with the requirement of "consent" there is the risk that the deadline for recourse to the court or to another competent authority will elapse.

Therefore, the NCHR recommends the amendment of article 13, par. 3 of the Law on the basis of the aforementioned.

Lastly, if the State wishes to ensure the administrative review of the administrative acts violating Law 3304/2005, a special provision should be added in par. 1 of article 13, which will expressly provide for the right to have administrative recourse to the administrative authority issuing the act entailing discrimination. This recourse will result in the review of both the legality of the act and the substance of the case by the administrative authority, and the latter will be able to abrogate the act, in whole or in part, or to modify it. This amendment is procedurally necessary, because through the special administrative recourse provided for in article 25, par. 2 of the Code of Administrative Procedure (to which article 13, par. 1 of Law 3304/2005 refers) only a legality review is permitted. Moreover, according to the Code of Administrative Procedure, only the victim may exercise the administrative recourse. The NCHR asks for a provision according to which the legal entities of article 13, par. 3 may exercise the administrative recourse for violations of Law 3304/2005.

## IV. Compliance of domestic law with the requirement for social regulation of equal treatment and combating discrimination

### *A) The Commission for Equal Treatment of the Ministry of Justice*

There is no doubt that the Greek legislator did not interpret correctly the institutional provisions of Directive 2000/43/EC – especially article 13 which requires the establishment, in every member state of the E.U., of an equality treatment body.

The NCHR, in its 2003 opinion, criticized the fact that the Commission for Equal Treatment, founded by Law 3304/2005 as the Greek equality body, functions simply as an advisory body of the State –only for the interpretation of the law- and as a conciliatory body between the parties in cases of discrimination, although the Directive does not provide for similar duties. Moreover, the independence of the Commission for Equal Treatment is debatable since its members are appointed by the Minister of Justice and it is chaired by the Secretary General of the Ministry. Therefore, it could not be given the competence of providing independence assistance to victims of discrimination (article 13, Directive 2000/43/EC). The independence of the Labour Inspectorate- designated as an equality body for employment and occupation in the private sector- is also debatable.

### *B) The need to institutionalize a central and independent action for the promotion of the equal treatment principle - The role of the Greek Ombudsman*

Taking into account, the need for the effective promotion and application of the principle of equal treatment and the problems of discrimination that segments of the population face because of their racial or ethnic origin, age, religion, disabilities or sexual orientation, as well as the delay on the part of the State to shield the society with public institutions able to combat effectively discrimination, the NCHR recommends that the Greek Ombudsman be given the primacy in promoting and monitoring the implementation of the equal treatment principle. To this end the NCHR also recommends the necessary readjustments of the competences of the other designated equality bodies.

Although Directive 2000/43/EC does not require the equality bodies to be set up as independent authorities, the relevant features are "indirectly" required given the emphasis it places on the condition of independence.

In particular, the NCHR recommends:

(a) The expansion of the competence of the Ombudsman in the private sector, apart from the case of access to and supply of goods and services, which should be assigned to the Ombudsman for Consumers. Moreover, every public authority, which receives complaints or information regarding the violation of the equal treatment principle, including the Labour Inspectorate, should communicate them to the Ombudsman (or the Ombudsman for Consumers) for investigation and mediation. The respective competences of the Labour Inspectorate and the Commission for Equal Treatment of the Ministry of Justice should, therefore, be abrogated.

(b) The provision of independent and specialized assistance by the Ombudsman (and the Ombudsman for Consumers) to victims of discrimination. Furthermore, the Codes of Procedure should be amended in order to provide for the *locus standi* of the Ombudsman (and the Ombudsman for Consumers) as a third party before civil or administrative courts or as a civil party before criminal courts.

(c) The expansion of the *ratione temporis* "jurisdiction" of the Ombudsman over cases which have been filed in courts until the first hearing of the case or the issuing of interim measures. Given that a complaint submitted to the Ombudsman does not suspend the deadlines for judicial remedies, if the mediation of the Ombudsman is not fruitful, the discrimination victim might be deprived of his/her right to judicial protection. This expansion might encourage discrimination victims to have recourse to the Ombudsman and limit the number of potential cases before the courts, a procedure which is more time-consuming and costly.

(d) The systematic monitoring by the Ombudsman, in cooperation with the Labour Inspectorate, the Department for Equal Opportunities of the Ministry of Labour and the Organization of Mediation and Arbitration, of the developments in employment and occupation, collective agreements, codes of ethics and practices regarding combating discrimination.

(e) Given that none of the aforementioned may be successfully fulfilled without the systematic communication of the State with the NGOs, unions, and the society, the NCHR deems necessary for the role of the ESC to be enhanced. To this end, the NCHR recommends the creation, within the ESC, of a permanent consultative body, composed of representatives of NGOs and organizations in general, with the participation of the Ombudsman, which will conduct with the plenary of the ESC the social dialogue concerning equal treatment.

Finally, the NCHR considers that, as a result of the recommended expansion of the Ombudsman's competences, its budget and staff should be increased accordingly.

## V. NCHR's recommendations

The NCHR, on the basis of all the above, recommends the following:

**1.** The expansion of the competence of the Ombudsman also in the private sector, apart from the case of access to and supply of goods and services, which should be assigned to the Ombudsman for Consumers.

**2.** The amendment of Law 3304/2005 so as to prohibit multiple discrimination.

**3.** The amendment of several articles so as to prevent the prohibited discriminatory treatment against third country nationals by invoking their different nationality.

**4.** The amendment of a number of articles concerning the scope of the Law, positive actions, the occupational requirements and the different treatment due to age in order for the Law to comply fully with the Directives.

**5.** The improvement of the phrasing and the incorporation of the procedural provisions of the directives (*locus standi* of the organizations and burden of proof) in the Code of Civil Procedure, the Code of Administrative Procedure and the Code of Administrative Process.

**6.** To provide for the recourse to administrative authorities by NGOs in their own name.