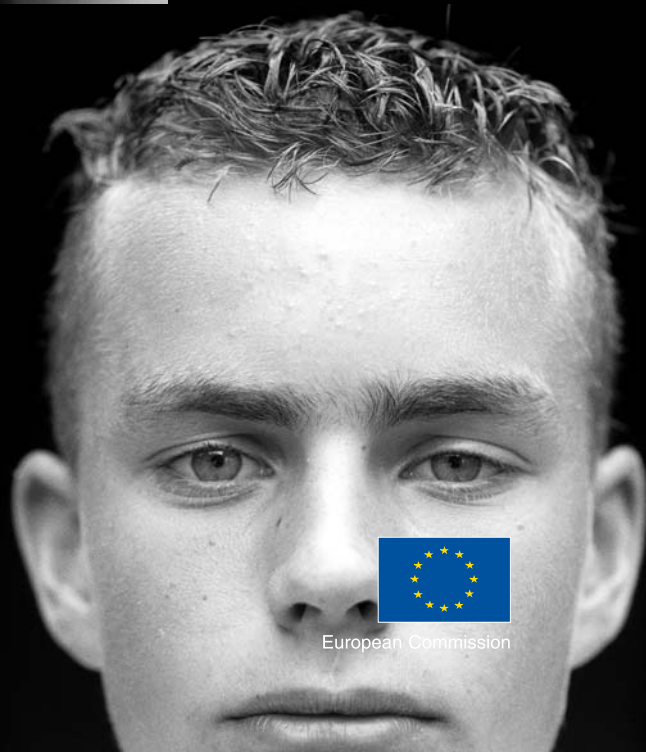
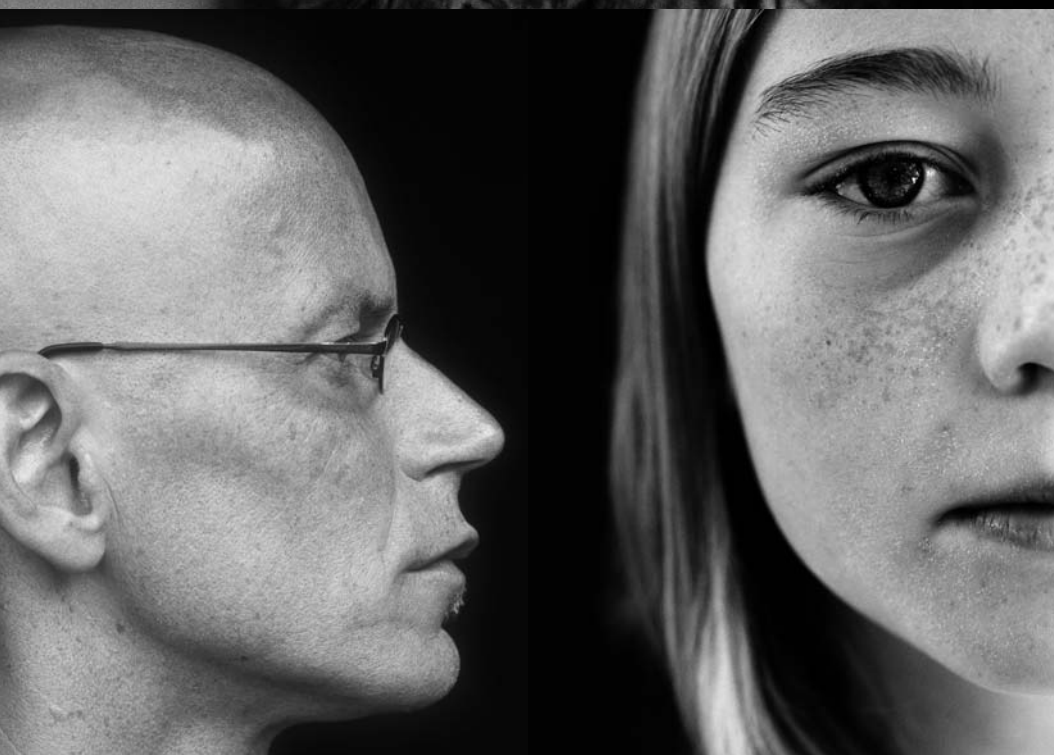




# Measuring Discrimination

## Data Collection and EU Equality Law



European Commission



# Measuring Discrimination Data Collection and EU Equality Law

Timo Makkonen

European Network of Legal Experts in the non-discrimination field

**European Commission**

Directorate-General for Employment, Social Affairs  
and Equal Opportunities

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**human european consultancy**

Hooghiemstraplein 155  
3514 AZ Utrecht  
Netherlands  
Tel +31 30 634 14 22  
Fax +31 30 635 21 39  
office@humanconsultancy.com  
www.humanconsultancy.com

**The Migration Policy Group**

Rue Belliard 205, Box 1  
1040 Brussels  
Belgium  
Tel +32 2 230 5930  
Fax +32 2 280 0925  
info@migpolgroup.com  
www.migpolgroup.com

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The Action Programme has three main objectives. These are:

1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
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Rivka | 1989



# Executive Summary

Protection from unequal treatment was significantly strengthened throughout the EU by virtue of the adoption and national implementation of two EU directives on equal treatment, namely the Racial Equality Directive and the Employment Equality Directive. A significant property of the two directives is that they do not just focus on individual prejudice and its consequences, but on institutional and societal patterns and practices. Group outcomes are emphasised, both in order to diagnose discrimination, and to discover whether remedial measures have been effective. This in turn makes it important to have access to statistical data and to be in a position to utilise such data in a way that is relevant for these purposes.

The objectives of this report are twofold: (i) to identify the ways in which statistical and other data can support the implementation of equal treatment law, and (ii) to examine how international and European law, in particular data protection law, regulates the collection of such data. This report takes also a look at the extent to which the EU Member States currently engage in the collection of data and whether statistical data is made use of in legal proceedings.

This report deals with the grounds of discrimination covered by the two aforementioned EU directives: racial or ethnic origin, religion and belief, disability, age and sexual orientation. Some of the country-specific information contained in this report has been obtained by means of a survey that was sent to the members of the European Network of Independent Legal Experts in the non-discrimination field.

## Mapping the Information Needs

A survey conducted by the European Commission in 2004 found that 93% of the respondents, who were mostly experts in the area of non-discrimination, were of the view that data collection was 'important' or 'very important' to the development of effective policies to promote equality and tackle discrimination. This close to unanimous recognition of the need for data collection reflects the many and absolutely vital roles that statistical data can play in this context:

- Statistical evidence can play a decisive part in legal proceedings. Individual claimants often find themselves in need of statistical evidence to back up their claim, particularly where indirect discrimination is at issue. The two Directives recognize this, and provide that 'rules of national law or practice. ...may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.'
- Statistical data can have a key role in recognizing the need for, and planning of, positive action measures. The two Directives permit positive action by allowing the maintenance or adoption of specific measures to prevent or compensate for disadvantages linked to any of the grounds mentioned in the Directives.
- Government agencies, businesses and other organisations can collect statistical data for the purposes of monitoring compliance with equal treatment laws.
- Statistics are needed to assess the effectiveness of present anti-discrimination laws and policies, and to guide future policy and legal development.
- Statistical and other scientific knowledge and evidence can give a major boost to awareness raising and sensitising efforts, and provide a compelling, factual baseline for national discussion on discrimination.
- Key international human rights conventions, to which all EU Member States are parties, directly and indirectly necessitate the collection of data on discrimination. Several conventions require the contracting states to submit periodic country reports on the human rights situation to the international treaty bodies, and full compliance with these requirements necessitate the compilation of statistical data.

It should also be noted that the EU Member States are, under Article 13 of the Racial Equality Directive, required to designate a body or bodies for the promotion of equal treatment, the competence of which must include 'conducting of independent surveys concerning discrimination', and 'publishing of independent reports and making recommendations on any issue relating to such discrimination'. Successful compliance with these requirements benefits from, if not depends on, the collection of statistical data.

## The Role of Data in Ensuring Compliance with Equal Treatment law

The report examines more closely three contexts in which statistical data can be used to ensure compliance with equal treatment law: legal proceedings, in which statistical evidence can be used as evidence for the purposes of proving the existence or absence of discrimination in individual cases; internal workplace monitoring, in which statistics showing the composition of the workforce can be used to reveal possible under-representation that may be due to discrimination; and finally, analysis of the causes, extent and effects of discrimination in the society in general.

It has become common wisdom that modern forms of discrimination are often subtle and covert, which means that they are also less easy to prove. Direct evidence of discrimination is rare, and where such direct evidence exists, corroboration is even rarer. A further problem is that in discrimination cases the factual evidence, or important parts thereof, is usually in the possession of the respondent, not the complainant. The sharing of the burden of proof, as provided for in the two directives, to a certain extent alleviates these challenges. Statistics can constitute a powerful, even decisive piece of evidence in discrimination claims, and are regularly admissible in the European legal systems. Analysis shows that statistical data can be relevant in respect of both direct and indirect discrimination.

Yet, the survey conducted for this report by the *European Network of Independent Legal Experts in the non-discrimination field* shows that only in a few EU Member States there is a solid tradition in using statistical evidence in the context of legal proceedings in relation to discrimination on the basis of the grounds covered in this report. These countries are the United Kingdom, Ireland and the Netherlands, whereas there is little or no experience in this regard in the rest of the EU countries. The use of statistical evidence involves some rather complex issues, such as the construction of comparator groups and the calculation of relative disadvantage that is at the core of indirect discrimination claims. Lack of use of statistical evidence does however not appear to be attributable to these challenges, but seems rather to be a direct result of the lack of data in this area. Few countries have taken a systematic approach to the collection of data through the compilation of official statistics (such as census or national survey data broken down by the equality grounds), workplace monitoring, and research (such as victim surveys and discrimination testing). Sometimes it may in theory be possible to gather the data needed in an individual case by means of ad hoc testing or observation, but in practice this is often not a viable option because of the burdens that the deployment of these methods pose to individual complainants in terms of the need for financial resources and special expertise. Some countries have tried to tackle this problem by designating specific bodies that have been entrusted with the power to conduct investigations and to help complainants to gather evidence.

Statistical data can be used also in the context of quantitative workplace monitoring. Monitoring is quite likely the most effective measure that a government agency, company or any other organisation can take to ensure that it is in compliance with equal treatment laws. Quantitative monitoring refers to a process where an organisation collects data on the make-up of its workforce e.g. in terms of age and ethnic origin in order to track down possible imbalances in the composition of the workforce. Such monitoring has many benefits, and experiences from those countries that have imposed monitoring duties have been predominantly positive. Yet, only a few EU countries have introduced monitoring duties, and even in these countries the duties are of rather limited scope in terms of the organisations and discrimination grounds covered.



Besides having a potentially pivotal role in legal proceedings and in monitoring of workplace practices, data is indispensable also for examining the causes, extent and consequences of discrimination at a more general level. Data that is useful in this context can be compiled on the basis of various sources, such as official statistics, complaints data (such as justice system data) and research. This kind of data provides important information, on the societal level, with regard to the extent to which equal treatment laws are complied with in practice and what kind of an impact they are having on the situation of groups vulnerable to discrimination. Many if not most Member States produce some information in this respect. Typically, they collect and publish data on the number of discrimination complaints filed with the police or some other competent body, and occasionally conduct victim surveys and/or opinion surveys. Collection of data for these purposes tends however to be non-comprehensive, particularly in terms of the grounds covered and the data collection methods used.

The overall conclusion is warranted that the collection of data is, in all three contexts examined, a seriously under-utilised tool to secure and promote the realisation of equal treatment.

## Data Protection and the Right to Privacy

Collection of data in relation to the equality grounds is often opposed by claiming that the collection of such personal and mostly also sensitive data is prohibited by laws relating to the protection of data and the right to privacy. To examine the merit of this claim the report analyses the pertinent international and European, and to some extent also national, legal standards.

Right to protection of privacy is guaranteed in a number of international human rights conventions. The most important of these in the European context are the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political rights (ICCPR).

Article 8(1) of the ECHR provides that '[e]veryone has a right to respect for his private and family life', which encompasses the right to respect for information relating to private life. Collection, storage, usage and disclosure of personal data fall within the ambit of Article 8. Processing of personal data without consent or knowledge of the data subject is likely to constitute an interference with the rights provided for in Article 8, especially if the data are of such nature that they could cast the data subject in a negative light or could result in a restriction of the data subject's freedom of choice. Right to respect for private life is not an absolute one: interference thereof may be justified under Article 8(2). If it is not to contravene Article 8, an interference must (i) have been in accordance with the law, (ii) pursue a legitimate aim, and (iii) be necessary in a democratic society in order to achieve that aim. In practice, given that all EU Member States have adopted data protection laws and that the fight against discrimination constitutes a 'legitimate aim', compliance of data collection activities with Article 8 depends on whether these activities can be considered to be necessary in a democratic society in order to achieve the said aim. The report concludes that the collection of data in relation to the equality grounds does not, as a rule, infringe Article 8 insofar as the principle of proportionality is satisfied. This requires, for instance, that least intrusive means of obtaining the data should be used as a matter of principle.

Article 17 of the International Covenant on Civil and Political Rights provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, and that everyone has the right to the protection of the law against such interference. To comply with Article 17, an interference with privacy must therefore be based on a law - which must itself be in compliance with the provisions, aims and objectives of the Covenant - and must be reasonable in the particular circumstances. All EU Member States have adopted legislation in the area of data protection, and have set up authorities supervising compliance with that legislation thereby providing - at least

on a *prima facie* level - for the safeguards required by Article 17. In addition, the collection of data for the purposes of combating discrimination presumptively satisfies the requirement of reasonableness and is in accordance with the aims and objectives of the ICCPR. In consequence the report concludes that Article 17 of the ICCPR does not pose any major obstacles for the collection of data, provided that the principle of proportionality is respected in all operations involving processing of personal data.

Whereas the conventions that provide for the right to privacy deal with the collection of personal data on a rather general level, the documents that deal with data protection provide more detailed guidance in this regard. A core instrument in this area is the EU Data Protection Directive. The Directive, with its 34 operative paragraphs and 72 recitals, is a remarkably complex piece of law. The report highlights and analyses two core areas of the Directive: First, the conditions under which the collection and other processing of sensitive data is allowed, and second, the qualitative principles that have to be respected in the processing of personal data.

Article 8 of the Directive sets out the criteria that render the processing of sensitive data legitimate. The notion of 'sensitive data' (called 'special categories of data' in the language of the Directive) refers to personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and health or sex life. Article 7 lays down the somewhat less stringent criteria that apply with respect to processing of personal data that is not considered sensitive (such as a person's age). Article 8(1) contains a *prima facie* prohibition of processing of sensitive data, but exceptions thereto are laid down in Article 8(2). The latter sets out several conditions, one or more of which must be satisfied in order to legitimise the processing of sensitive personal data. Most importantly, Article 8(2) provides that sensitive data may be processed on the basis of the data subject's consent, unless the laws of the Member State otherwise provide. Sensitive data may also be processed when the data is necessary for the establishment, exercise or defence of legal claims. Further exemptions to the in-principle prohibition to process sensitive data may be laid down by national law or by decision of the national supervisory authority, provided that 'suitable safeguards' are provided for.

Article 6 sets out five qualitative principles that must be respected when personal data is processed. These principles require that personal data must be (i) processed fairly and lawfully; (ii) collected for specified, explicit and legitimate purposes; (iii) adequate, relevant and not excessive; (iv) accurate, and where necessary, kept up to date; and (v) kept in a form which permits identification of data subjects for no longer than is necessary. The report concludes that by virtue of these principles, those conducting data collection operations should as a matter of principle opt for secondary rather than primary data collection, anonymous rather than non-anonymous surveys, sampling rather than full-scale surveys, and for voluntary rather than compulsory surveys, unless doing so would prejudice the objectives of the operation.

All EU countries have transposed the EU Data Protection Directive into their national laws, which means that their data protection laws have a lot in common in terms of structure and content. A degree of variation has however resulted because many of the provisions in the Directive leave room for interpretation. Importantly, a country-by-country examination of the generally applicable data protection laws reveals that most EU Member States have not ruled out processing of sensitive data on the basis of the data subject's consent, an option provided for in the EU Data Protection Directive. Some countries have however limited the applicability of that rule, for instance by requiring that additional criteria be met.

The report also refers to past and present situations where population data systems have been used, or attempted or planned to be used, to target individuals or population groups for illegitimate or abusive purposes, and examines whether these examples should discourage the collection of data in relation to the equality grounds. In this respect the report concludes that whereas there is a need to minimize the possibility of abuse, in particular by closely observing the data protection laws, the collection of data in relation to the equality grounds does not, when the necessary precautions are taken, seem to present a credible additional threat.

## Definitions and Categorization

Collection of data, whether by means of workplace monitoring, censuses, surveys or observation, requires prior decision-making as to the relevant categories that are used. The construction of categories and the principles in accordance with which individuals can be categorized into different groups have proven to be among the most difficult issues involved in collecting data in relation to the equality grounds, ethnicity in particular. One consequence of these difficulties is that in many countries census questions on ethnicity have changed from one census to the next.

The two Directives do not define ‘racial origin’, ‘ethnic origin’, ‘disability’, ‘religion’, ‘belief’, ‘age’ or ‘sexual orientation’. The report notes that this does not mean that States are at a liberty to define these concepts and to construct the categories they use for the purposes of data collection in any way they see fit. They must construct the categories on the basis of criteria built on objective factors, and have to be consistent in applying these criteria. This is particularly so where data collection is linked to the distribution of rights, obligations, resources or burdens as is often the case e.g. with the census.

The human rights approach to the collection of data emphasises the right of an individual to be in control of sensitive data relating to her. Under international human rights law, no-one can be compelled to reveal her ethnic origin or religion, and this principle may apply to other kinds of sensitive data as well. With regard to ethnic origin, the international human rights law supports the principle of self-identification, i.e. the principle that it is for the individual concerned to decide which ethnic group she is to be identified with.

## Conclusions

The report concludes that there is considerable and compelling demand for collection of data in relation to the equality grounds. This demand is currently not satisfied, and it appears that it has not been fully understood in the legal and political cultures of the Member States. The oft-stated perception that international and European laws on right to privacy and protection of data prohibit the collection of personal data relating to the equality grounds was found to be false. The pertinent laws only set out the legal framework and the qualitative criteria that must be met when data is collected or otherwise processed. Accordingly, the report recognizes the need to engage in data collection in order to work towards the realisation of equal treatment in practice.

Steven | 1977

## Part I

# Introduction to data collection

## 1. Introduction

Anti-discrimination law has widened its focus from an emphasis on individual prejudice to one which addresses institutional and societal patterns and practices. Group outcomes are emphasised, both in order to diagnose discrimination, and to discover whether remedial measures have been effective. This in turn makes it important to have access to collective data and to be in a position to utilise such data in a way which is relevant for these purposes. The aim of this study is to examine the role of data for the purposes of proving discrimination; developing positive action strategies; monitoring workplace practices; and assessing the effectiveness of the EU race and employment directives in combating discrimination. It will consider the difficulties associated with data collection and interpretation in this context, and point towards possible solutions to these difficulties, drawing on the practice of EU Member States and other relevant jurisdictions where available.

### 1.1. Benefits and Risks of Data Collection in the Context of Anti-discrimination Law

A recent survey conducted by the European Commission found that 93% of respondents were of the view that data collection was 'important' or 'very important' to the development of effective policies to promote equality and tackle discrimination.<sup>1</sup> This close to unanimous recognition of the need for data collection reflects the many and absolutely vital roles that statistical data can play in this context.

Data on discrimination can serve a wide range of purposes:

1. To prove discrimination: Individual claimants often find themselves in need of statistical evidence to back up the claim, particularly where indirect discrimination is at issue.
2. To guide policy and legal development: Decision makers at both the European and national level need comprehensive and reliable information when facing questions concerning appropriate policies, legislation and effective remedies for addressing the problem of discrimination. This is true too for national equality bodies, ombudsmen and NGOs to plan and carry out their work efficiently.
3. To develop positive action strategies.
4. To monitor the national situation, workplace practices and other institutional patterns.
5. To assess the effectiveness of the EU race and employment directives in combating discrimination.
6. For awareness-raising and sensitising activities and for researchers seeking to improve our understanding of discrimination as a phenomenon, a task that is a prerequisite for developing more effective policies combating discrimination.

To sum up, it is fair to conclude that statistical data can bring the fight against discrimination to a whole new level (see Fig. 1).

<sup>1</sup> Response statistics for Green paper on anti-discrimination and equal treatment. Available at the website of the European Commission, at: [http://ec.europa.eu/comm/employment\\_social/fundamental\\_rights/pdf/green/stats.pdf](http://ec.europa.eu/comm/employment_social/fundamental_rights/pdf/green/stats.pdf)

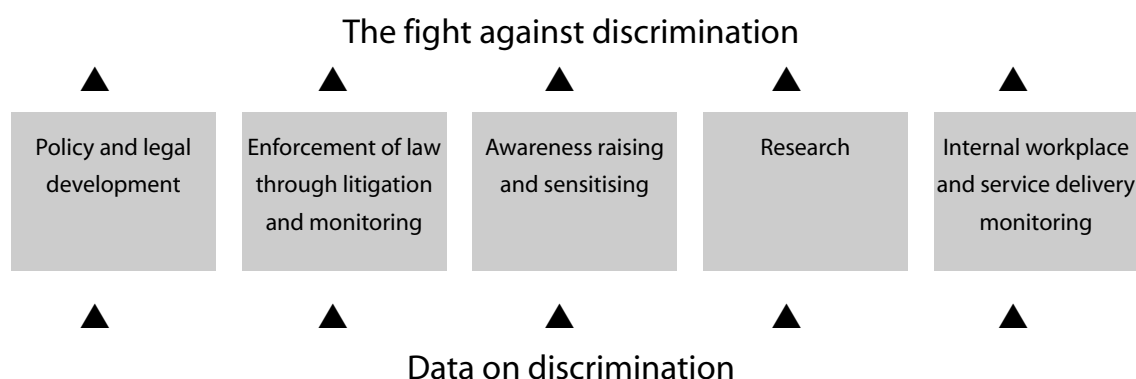


Figure 1. The uses of statistical data in the fight against discrimination.

At the same time, the very idea of collecting sensitive data raises many concerns and fears. This is because the data are, by themselves, capable of being used for both legitimate and illegitimate purposes, and because sensitive data has in the past been misused on several occasions. Because of this some people are of the view that no data should be collected in relation to racial or ethnic origin, religion or belief, disability, or sexual orientation, not even for the purposes of anti-discrimination law and policy. It is also widely believed that the collection of sensitive data is prohibited by international, EU and/or national law relating to the protection of data. It is for this reason that important safeguards have been put in place to enable the benefits of data collection to be achieved without the risks.

While these issues have been increasingly addressed in the recent years, there are so far few if any comprehensive legal analyses of (i) the uses of statistical data in this context, and (ii) the restraints posed by law, in particular data protection law, for collection of data. While a fully comprehensive and in-depth analysis of the legal questions involved is not possible within the confines of a single report, it is hoped that this report, for its part, serves to bring the discussions to a new level.

## 1.2. Data Collection: Methods and Concepts

To begin with the key concepts involved should be defined. There is no universal consensus on the definition of most of these concepts, so the following definitions are given only for the purposes of this report.

Data refers to any piece of information, whether in numerical or in some other form. The function of data is that it reveals something about some aspect of reality and can therefore be used for analysis, reasoning or decision-making. Where the data relates to an identifiable person, it is called personal data. The individual to whom the data relates to is called the data subject. Where personal data relates to matters such as racial or ethnic origin, religion or belief, disability, or sexual orientation, it is considered sensitive data, although it should be noted that the EC Data Protection Directive<sup>2</sup> does not speak of sensitive data but of 'special categories of data'. Any operation performed upon personal data, including collection, recording, disclosure and destruction of data, is referred to in this report as processing. Data that originally related to an identified person is called anonymous data if it has been processed in such a manner that it no longer relates to an identified or identifiable person.

<sup>2</sup> European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281 of 23.11.1995 (henceforth 'Data Protection Directive').



There is a wide range of sources of data that are useful in the context of anti-discrimination law and policy. These include the following:

- Official statistical sources, such as the data gathered through population censuses and other major national surveys like the Labour Force Survey (LFS) and the Survey on Income and Living Conditions (SILC);
- Administrative registers, such as central and local population registers;
- Complaints data, such as statistics emanating from the police, prosecutor and court case files and registers; data emanating from respective registers kept by Ombudsmen, specialized bodies, and NGOs;
- Academic and ad hoc research, such as sample surveys that chart the experiences of groups exposed to discrimination; opinion surveys that chart the prevalence of prejudices; discrimination testing; and qualitative research including in-depth interviews;
- Data gathered by means of workplace monitoring and service delivery monitoring.

A distinction must be made between primary and secondary data collection. Primary data collection refers to 'original' collection of data, while secondary data collection refers to collection of data that is already in the possession of some entity, i.e. data that has been collected at an earlier point in time. In primary data collection, the data is collected directly from the persons concerned ('direct primary collection'), or from people who are close to or associated with them who reply in their place ('indirect primary collection'), or by means of 'direct observation'.<sup>3</sup> Data is usually collected by means of questionnaires, interviews or through observation.

Broadly speaking, data can be collected for two purposes that should not be confused:

- For the purposes of being able to draw conclusions and/or make decisions on an individual level; for instance, an employer may record the disability of a worker for the purposes of being able to provide appropriate forms of reasonable accommodation to that person; or, a hospital may record that a patient refuses to allow blood transfusion being administered on her on the grounds of her religion;
- For the purposes of being able to draw conclusions and/or make decisions on a group level; for instance, data may reveal patterns of under-representation in particular occupations or educational institutions, and these may subsequently be available to back up an indirect discrimination claim or to plan a positive action strategy.<sup>4</sup>

The latter purpose highlights what statistics are about. The purpose of statistics is to bring to light, in an aggregate form, information about a certain population (e.g. the average employment rate of young immigrants) or a certain phenomenon (e.g. the number of discrimination complaints filed within a year). The purpose is to produce consolidated and anonymous information; but while the information is made – or at any rate: should be made – available in such a manner that a particular person and a particular (set of) data cannot be related to each other, this does not preclude the need to observe data protection laws in the course of production of the statistics, as the aggregate data is always based on micro-data, typically personal data.

<sup>3</sup> Council of Europe, The Processing of personal data collected and processed for statistical purposes. Recommendation No. R (97) 18 and explanatory memorandum, p.31.

<sup>4</sup> The making of this distinction is crucial, as data that is gathered solely for statistical purposes usually may not, under the European data protection laws, be used for making decisions with respect to specific individuals. Therefore it is usually not allowed e.g. to use census returns as evidence in litigation.

### 1.3. Content of This Report

The point of this study is to examine the following questions:

- Is data collection necessary or useful in order to fulfil legal duties arising from European or international anti-discrimination law? These questions will be dealt with in chapter 2.
- What are the ways in which data can be used in ensuring compliance with anti-discrimination law? In particular, what is the role of data a) in legal proceedings, b) in workplace and service delivery monitoring and c) in tracking down the extent, forms and consequences of discrimination in the society in general? These questions will be dealt with in chapters 3, 4, and 5.
- What are the risks, constraints and challenges involved in data collection? In what way has personal data been used for abusive purposes in the past? What are the limits and conditions posed by international and European human rights law and data protection law upon data collection? These questions are dealt with in chapters 6, 7 and 8.

Finally, the report lays out a number of conclusions on the basis of these analyses.

The report's main concern is with the relevance of data collection for Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (henceforth Employment Equality Directive) and Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (henceforth Racial Equality Directive). The former Directive prohibits discrimination on the grounds of religion and belief, age, disability, and sexual orientation in the areas of employment and occupation, while the latter prohibits discrimination on the grounds of racial or ethnic origin in the areas of employment, occupation, education, social protection, social advantages and access to and supply of goods and services which are available to the public, including housing.<sup>5</sup>

Data collection is relevant in respect of several key aspects of the directives:

- The concepts of discrimination, particularly indirect discrimination;
- The positive action provisions, which permit the maintenance or adoption of specific measures to prevent or compensate for disadvantages linked to any of the grounds mentioned in the Directives;<sup>6</sup>
- The requirements 'to promote social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices ...';<sup>7</sup> and
- The requirement, under Article 13 of the Racial Equality Directive, to designate a body or bodies for the promotion of equal treatment, the competence of which must include 'conducting of independent surveys concerning discrimination', and 'publishing of independent reports and making recommendations on any issue relating to such discrimination.'

The information in this report is partly based on the responses to a survey sent to the members of the European Network of Independent Legal Experts in the non-discrimination field, which was set up and is funded in the framework of the EC Action Programme to Combat Discrimination (2001-2006) and is coordinated by human european consultancy and the Migration Policy Group (MPG).

<sup>5</sup> See the respective Directives for the precise descriptions of the material areas covered by them.

<sup>6</sup> Article 5 of the Racial Equality Directive; Article 7 of the Employment Equality Directive.

<sup>7</sup> Article 11 of the Racial Equality Directive and Article 13 of the Employment Equality Directive.

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## Part II

# Equal treatment law and the need for data

## 2. The legal framework

### 2.1 EU Directives on Equal Treatment

The substantive operative architecture of the two Directives rests upon two cornerstones. The first one might be termed 'complaint-led enforcement of anti-discrimination law'. A significant property of the two Directives is that they are geared towards ensuring that individuals who consider themselves discriminated against enjoy an effective access to justice. Thus the Directives seek to remove many of the obstacles formerly associated with bringing legal action in cases of discrimination. These key aspects of the Directives include: An effective and relatively broad operative definition of discrimination; the prohibition of victimization; lowering of the burden of proof; the requirement of the availability of judicial and/or administrative procedures for the enforcement of anti-discrimination law; the requirement that associations and other entities may engage in any judicial or administrative procedure as provided for in the Directives and national laws; the requirement that there must exist nationally a body for the promotion of equal treatment with a competence to provide independent assistance to victims of racial and ethnic discrimination; and the requirement of effective and proportionate sanctions.

Statistics can play a key role as an important piece of evidence in relation to individual claims. This is particularly true for indirect discrimination, which focuses the attention on group outcomes, i.e. the effects of various measures and practices upon particular groups. As will be discussed in more detail in Chapter 2, there may be cases where it is practically impossible to identify and establish discrimination in the absence of relevant data. Thus the identically-worded preamble of each Directive provides at recital (15) that 'rules of national law or practice. ...may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.'

The individual complaint-oriented aspects of the two Directives go a long way in ensuring equal treatment, but they do not go all the way. Litigation is slow, expensive and stressful for the complainant. Victims of discrimination may not always even be aware of the fact that they have been discriminated against, or may not feel certain enough about that. A significant portion of discrimination will therefore go unnoticed and will not be remedied. Even where an individual takes a matter to a court or other competent body, the remedies are primarily aimed at making good the harm suffered by the individual complainant, and do not necessarily serve to displace the discriminatory patterns or structures which gave rise to the discrimination.

This is why the complaint-led model of anti-discrimination law needs to be complemented. As one recent study concluded, the fact that discrimination still continues - albeit at lower levels than before - despite anti-discrimination legislation having been nationally in place for more than 30 years in some countries, means that discrimination is not just going to 'wither away' without a more proactive approach.<sup>8</sup>

The second approach, the 'promotion of equality' model aims to remedy some of the defects of the complaints-led model. The operative idea behind this model is its proactive nature. Instead of reacting to individual cases of discrimination, this model is geared towards identifying and addressing institutional and societal patterns and practices, and looks at the status and position of groups of people, i.e. has a more collective orientation.<sup>9</sup> Consequently statistics play a more important and multidimensional role under this approach.

<sup>8</sup> Dex, Shirley and Kingsley Purdam, *Equal Opportunities and Recruitment. How Census data can help employers to assess their practices*, (York: York Publishing Services, 2005).

<sup>9</sup> For a general discussion of this, see Fredman, Sandra 'Equality: A New Generation' *Industrial Law Journal* 2001 30(2).

Key aspects of the second approach are also present in the Directives, forming their second cornerstone. As embodied in the two Directives, all the provisions promoting equality necessitate or benefit from the collection of data. Thus:

- The Directives allow the Member States to take positive action, i.e. to maintain or adopt specific measures to prevent or compensate for disadvantages linked to any ground of discrimination covered by the Directives ‘with a view to ensuring full equality in practice’;<sup>10</sup>
- Employers are required under Article 5 of the Employment Equality Directive to provide reasonable accommodation for persons with disabilities, meaning that they have to take appropriate measures to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures constitute a disproportionate burden on the employer;
- Member States are required under Article 13 of the Racial Equality Directive to designate a body or bodies for the promotion of equal treatment, the competence of which must include ‘conducting of independent surveys concerning discrimination’, and ‘publishing of independent reports and making recommendations on any issue relating to such discrimination’;
- Member States are required by the Directives to take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, ‘including through the monitoring of workplace practices, collective agreements, codes of conduct, and through research or exchange of experiences and good practices’;<sup>11</sup>
- Member States are required by the Directives to encourage dialogue, within the framework of national practice, with ‘appropriate non-governmental organisations’ that have a legitimate interest in contributing to the fight against discrimination;<sup>12</sup>
- The European Commission needs data by which it can assess the effectiveness of the current EU anti-discrimination regime, as it is charged with coming up, if necessary, with proposals to revise and update the two Directives on equal treatment.<sup>13</sup>

Each of these necessitates or benefits from the collection of data. This is particularly true for the positive action provisions. According to the Directives, Member States may adopt specific measures to ‘prevent or compensate for disadvantages’ linked to the equality grounds covered by the Directives. Where the relevant empirical evidence shows no disadvantage, or the existence of sufficiently widespread discrimination or other phenomenon likely to produce disadvantages in the future, positive action is not allowed. Whether there are disadvantages that justify the taking of positive action is in essence an empirical question, which can be detected through relevant data, such as socio-economic statistics broken down by racial or ethnic origin, age, religion or belief, disability and/or sexual orientation, where available. Notably, it is primarily a matter of showing that there is an inequality in the outcomes for different groups.<sup>14</sup> The Directives do not require that the disadvantages are attributable to discrimination; the existence of disadvantages is enough in and of itself. Alternatively, there may be evidence of widespread discrimination, even in the absence of statistics on group outcome. Existence of widespread discrimination certainly counts as a ‘disadvantage’ in itself, and therefore other pieces of evidence, demonstrating the prevalence of discrimination, may be useful.<sup>15</sup> Note too

<sup>10</sup> Article 5 of Racial Equality Directive, Article 7 of Employment Equality Directive.

<sup>11</sup> Article 13(1) of Employment Equality Directive, Article 11 of the Racial Equality Directive.

<sup>12</sup> Article 14 of Employment Equality Directive, Article 12 of Racial Equality Directive.

<sup>13</sup> See Articles 17(2) of Racial Equality Directive and 19(2) of Employment Equality Directive.

<sup>14</sup> That we are dealing here with group-wide disadvantages is clear from the pertinent preambles to the Directives, which expressly speak of preventing or compensating for ‘disadvantages suffered by a group of persons’ of a particular ethnic origin, religion etc. See recitals (26) of the Employment Equality Directive and (17) of Racial Equality Directive.

<sup>15</sup> Again, there needs to be evidence of a group-wide disadvantage, in this case in relation to discrimination. See previous footnote. Not everyone belonging to a particular group has to have experienced discrimination however, but it is equally clear that few isolated incidences do not suffice either.

that the Directives also entitle states to take action to prevent disadvantage, so that special measures may be taken even where the disadvantages have not yet materialized. Under the last mentioned scenario, there should however be evidence of sufficiently widespread discrimination, or some other macro-level factor likely to produce disadvantages in the future. This is because positive action is only allowed with a view to ensuring full equality in practice. As well as assisting in detecting the necessary disadvantage to trigger specific measures, statistical data play an important part in designing and carrying out special measures, such as the setting of numerical targets that organisations should aspire to reach in order to attain a balanced workforce.

Secondly, also the provision of reasonable accommodation may require collection of data. It may require the recording of the number of disabled employees, the particular types of disabilities involved and particular forms of accommodation measures needed.

The third major area in which data collection is relevant to compliance with the Directives concerns the role of equality bodies, which, according to Article 13 of the Racial Equality Directive, must have the powers to conduct 'independent surveys concerning discrimination.' This is complemented by recital 24 of the Directive, which states that these bodies should be equipped 'with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.' This strongly suggests that the power to conduct surveys should include the power to collect data: otherwise, the body would not have the requisite competence to analyse the problems involved and study possible solutions.

The fourth major area in which data collection is relevant arises under the social dialogue provisions, according to which 'Member States should take adequate measures to promote social dialogue with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.' Whilst it is clear that monitoring is thus only one option among others, it is equally clear that states must bring the social partners together to have a serious discussion on the ways in which equal treatment in the working life can be realized. Given that workplace monitoring is an indispensable means by which an employer can ascertain that its policies or modes of operation do not in fact produce unequal outcomes for particular groups within its workforce, it can be said that there is in effect indirect pressure to engage in monitoring.

Finally, the European Commission needs data by which it can assess the effectiveness of the current EU anti-discrimination regime, as it is charged with coming up, if necessary, with proposals to revise and update the two Directives.<sup>16</sup> The European Commission has shown an interest in the subject area, as it formed a Working Group on Data Collection in 2003 and has subsequently commissioned and supported several studies in the area.<sup>17</sup> The Commission also took the matter of data collection up in its Green paper on Equality and non-discrimination in an enlarged European Union:

The lack of mechanisms to collect data and to monitor trends and progress in Member States currently makes it difficult to assess the real extent of the challenges that exist and to measure the effectiveness of legislation and policies to tackle discrimination.

<sup>16</sup> See Articles 17(2) of Racial Equality Directive and 19(2) of Employment Equality Directive.

<sup>17</sup> See the following studies: Simon, Patrick, Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands. Medis Project. Available at [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf/pubst/compstud04\\_en.pdf](http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/compstud04_en.pdf) (visited 1.1.2006); Reuter, Niklas - Timo Makkonen - Olli Oosi, Study on Data Collection to measure the extent and impact of discrimination in Europe. Final Report 7.12.2004. Available at [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf/pubst/compstud04fin.pdf](http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/compstud04fin.pdf) (visited 1.1.2006); Olli, Eero - Birgitte Kofod Olsen, Towards common measures for discrimination, 27.11.2005. Available at: [http://www.smed.no/commonmeasures/TowardsCommonMeasures\\_2005.pdf](http://www.smed.no/commonmeasures/TowardsCommonMeasures_2005.pdf) (visited 1.1.2006).



This situation partly reflects an understandable concern to respect personal privacy and data collection rules. Nevertheless, greater availability of quantitative and qualitative data could help to support the development of anti-discrimination policies by establishing baseline positions, identifying where results of inequalities lie and analysing their dimensions. It would also be useful to obtain data in order to track the impact of policy and funding.<sup>18</sup>

While the above-enumerated aspects of the two Directives perhaps do not amount to a fully fledged embodiment of the 'promotion of equality' model, e.g. in that positive action is only allowed but not required, it has to be kept in mind that the Directives lay down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions.<sup>19</sup> Indeed, Britain and Finland have imposed specific duties upon the public authorities to actively promote equality. In Britain, this duty centrally involves the monitoring of workplace practices.

## 2.2. International Human Rights Law

The EU Member States are parties to the major human rights conventions concluded under the auspices of the United Nations and the Council of Europe. The principle of non-discrimination runs like a red thread throughout all human rights instruments. Non-discrimination is both a right of its own and a constitutive element of all human rights in that the enjoyment of the rights must be guaranteed on a non-discriminatory basis.<sup>20</sup>

There are three contexts in which data on discrimination should be collected under international human rights law: First, some of the most recent human rights instruments expressly call on the states to collect the necessary data. Second, the protection and respect of some rights provided for in the human rights instruments may in practice require collection of data. Third, full compliance with the obligation incumbent upon states parties to produce periodic country reports, as provided for in a number of conventions, in practice requires states to report, and thus collect, data on discrimination. These three contexts will be briefly discussed below.

To start with an example of a human rights instrument calling for the collection of data in relation to discrimination, we may refer to the UN Convention on the Rights of Persons with Disabilities, which was in the final stages of adoption process at the time of the writing of this report. Article 31 of the Convention, entitled 'Statistics and Data Collection', reads as follows:

States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.

The said Article further specifies that the data shall be used to help to assess the implementation of States Parties' obligations under the Convention and to identify barriers faced by persons with disabilities in exercising their rights. States Parties have the responsibility for disseminating the data and they are to ensure that the data is accessible 'to persons with disabilities and others'. The Article also makes the point that all data processing is to comply with legally established safeguards, including legislation on data protection.

<sup>18</sup> Commission of the European Communities, Equality and non-discrimination in an enlarged European Union. Green paper. Brussels, 28.05.2004. COM(2004)379 final.

<sup>19</sup> Article 6(1) of Racial Equality Directive, Article 8(1) of Employment Equality Directive.

<sup>20</sup> Scheinin, Martin – Catarina Krause 'The Right not to be Discriminated Against: The Case of Social Security' in Orlin, Ted – Martin Scheinin, The Jurisprudence of Human Rights Law: A Comparative Approach (Jyväskylä: Gummerus, 2000). For a discussion of the prohibition of discrimination under the European human rights law, see e.g. De Schutter, Olivier, The Prohibition of Discrimination under European Human Rights Law, European Network of Legal Experts in the non-discrimination field. Human european consultancy & Migration Policy Group (Luxemburg: European Communities, 2005).

Along similar lines but in relation to racial discrimination the Durban Declaration and Plan of Action, adopted by the UN World Conference against Racism in 2001, urges states to

collect, compile, analyse, disseminate and publish reliable statistical data at the national and local levels and undertake all other related measures which are necessary to assess regularly the situation of individuals and groups of individuals who are victims of ... racial discrimination.<sup>21</sup>

The Declaration also invites states to 'improve concepts and methods of data collection and analysis' and to 'develop indicators of progress and participation of individuals and groups of individuals in society', and endorses quantitative and qualitative research.<sup>22</sup> There are also other instruments calling for the collection of data in relation to discrimination.<sup>23</sup>

Secondly, particular treaty provisions in practice entail the need to collect data. For instance the International Convention on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) place an obligation on States Parties not just to refrain from discrimination, but also to take positive steps to give effect to the right not to be discriminated against. States are required to take effective measures to ensure compliance with the principle of non-discrimination inter alia in the areas of employment, education and provision of services. Under the well-established jurisprudence of the UN CERD Committee, states parties are obliged to investigate allegations of racial discrimination thoroughly, effectively and with due diligence and expedition.<sup>24</sup> The effective investigation of discrimination may, depending on the circumstances of the case, require the collection of appropriate data. In addition, the UN Human Rights Committee has, in its General Comment No. 18 on non-discrimination, opined that 'the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination.'<sup>25</sup> Both the identification of detrimental conditions, and monitoring of progress made in their elimination, call for the collection of empirical data.

States parties may also need to produce statistical evidence to be effectively able to defend themselves before the international human rights bodies in cases of individual complaints brought against them. A case in point is *ERRC v Greece*, decided by the European Committee on Social Rights. The case concerned the right to adequate housing and the factual housing conditions of Roma in Greece.<sup>26</sup> A key aspect of the proceedings before the Committee was the assessment of the evidence relating to the factual situation of the Roma with respect to housing. The complainant organisation was in many places able to present evidence, including statistical evidence, to substantiate its claim, whereas the respondent state had difficulties in providing the necessary information and in many places failed to either comment or contradict the information provided by the complainant. The respondent government pleaded that it was barred by its legislation, in particular the Constitution, from collecting data on the Roma. The Committee however held that such restrictions did not constitute an acceptable defence, as states have a responsibility to investigate suspected discrimination, and as alternative means of assessing the situation could have been used:

The Committee considers that when the collection and storage of personal data is prevented for such reasons, but it is also generally acknowledged that a particular group is or could be discriminated against, the

<sup>21</sup> Paragraph 92.

<sup>22</sup> Paragraphs 93 and 94.

<sup>23</sup> Such as the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by General Assembly resolution 48/96 of 20 December 1993. See rule 13 in particular.

<sup>24</sup> See *L.K. v. The Netherlands*, Communication No. 4/1991; *Ms. M.B v Denmark*, Communication No. 20/2000 (15/03/2002); and *Ziad Ben Ahmed Habassi v. Denmark*, Communication No. 10/1997.

<sup>25</sup> Human Rights Committee, General Comment No. 18. Non-discrimination. 10/11/89, HRI/GEN/1/Rev.7 (12 May 2004), paragraph 10.

<sup>26</sup> European Committee on Social Rights, *ERRC v Greece*, Complaint No 15/2003, decision on merits on 8 December 2004.

authorities have the responsibility for finding alternative means of assessing the extent of the problem and progress towards resolving it that are not subject to such constitutional restrictions.<sup>27</sup>

Given that many treaty bodies have embraced the concept of indirect discrimination, and that others appear to be in the process of doing the same, it is likely that statistical evidence is going to play an increasingly important role in future proceedings in relation to discrimination.<sup>28</sup>

Thirdly, States parties need to collect data for the purposes of drafting periodic country reports that they are required to submit to the treaty bodies. The bodies monitoring compliance with the human rights conventions have repeatedly requested States parties to provide necessary data. Some of the general requests for information include the following:

- The UN Human Rights Committee, in its guidelines for state reports, reminds States parties that their reports should include 'sufficient data and statistics' in order to enable the Committee to assess progress in the implementation of human rights by states parties.<sup>29</sup>
- The UN Committee on the Economic, Social and Cultural Rights, in its respective General comment on reporting by States parties, refers to monitoring and gathering of information, and underlines that 'the essential first step towards promoting the realization of economic, social and cultural rights is diagnosis and knowledge of the existing situation.'<sup>30</sup>
- The UN Committee on the Elimination of All forms of Racial Discrimination, in its General recommendation concerning reporting by states parties, 'invites States parties to endeavour to include in their reports ... relevant information on the demographic composition of the population' protected by the Convention.<sup>31</sup> In its General recommendation on Roma, the Committee asks States parties to 'include in their periodic reports, in an appropriate form, data about the Roma communities within their jurisdiction, including statistical data about Roma participation in political life and about their economic, social and cultural situation, including from a gender perspective.'<sup>32</sup> The Committee has also called for 'periodic surveys' in relation to 'descent-based discrimination.'<sup>33</sup>
- The Advisory Committee on the Framework Convention for the Protection of National Minorities, in its outline for country reports, calls for the collection of necessary data. According to the outline, states should provide 'factual information...such as statistics and the results of surveys.' The document also points out that 'where complete statistics are not available, governments may supply data or estimates based on ad hoc studies, specialized or sample surveys, or other scientifically valid methods, whenever they consider the information so collected to be useful.'<sup>34</sup>

<sup>27</sup> Ibid, paragraph 27.

<sup>28</sup> For the Human Rights Committee, see Cecilia Derksen on her own behalf and on behalf of her daughter Kaya Marcelle Bakker v. The Netherlands, Communication No. 976/2001. For the CERD Committee, see B.M.S. v. Australia, Communication No. 8/1996, and L.R. et al v. Slovakia, Communication No. 31/2003. For the European Committee on Social Rights, see International Association Autism-Europe (IAAE) v. France, collective complaint No. 13/2002. For the ECtHR, see Building Societies v. The United Kingdom, Judgement of 23 October 1997 and Jordan v. United Kingdom, Judgement of 4 April 2001.

<sup>29</sup> Human Rights Committee, Consolidated guidelines for state reports, CCPR/C/66/GUI/Rev.2 (26 February 2001), paragraph C.6.

<sup>30</sup> Committee on the Economic, Social and Cultural Rights, General Comment No 1, HRI/GEN/1/Rev.7 (12 May 2004).

<sup>31</sup> UN CERD Committee, General Recommendation IV, HRI/GEN/1/Rev.7 (12 May 2004). In its further general guidelines on reporting the Committee underlines that '[s]tates which do not collect information on these characteristics in their censuses, are therefore requested to provide information on mother tongues as indicative of ethnic differences, together with any information about race, colour, descent, national and ethnic origins derived from social surveys. In the absence of such information, a qualitative description of the ethnic characteristics of the population should be supplied...' CERD/C/70/Rev.5 (5 December 2000).

<sup>32</sup> CERD Committee, General recommendation XXVII on discrimination against Roma, HRI/GEN/1/Rev.7 (12 May 2004).

<sup>33</sup> CERD Committee, General recommendation XXIX, on Article 1, paragraph 1 of the Convention, HRI/GEN/1/Rev.7 (12 May 2004).

<sup>34</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Outline for reports to be submitted pursuant to Article 25 paragraph 1 of the Framework Convention for the protection of national minorities. Adopted by the Committee of Ministers on 30 September 1998 at the 642nd meeting of the Ministers' Deputies.

## 2.3. The Role of Data Collection in Other Relevant Contexts

European countries have recognized the importance of international co-operation in the field of monitoring discrimination, in particular as regards ethnic discrimination, and have for instance set up two major monitoring bodies, the ECRI and the EUMC.

The Member States of the Council of Europe established the European Commission against Racism and Intolerance (ECRI) in 1993. Its action covers all necessary measures to combat violence, discrimination and prejudice faced by persons or groups of persons, notably on grounds of race, colour, language, religion, nationality and national or ethnic origin.

ECRI's General policy recommendation No. 4 is specifically devoted to the need for national surveys on the experience and perception of discrimination and racism. In it the ECRI recommended

the governments of member States to take steps to ensure that national surveys on the experience and perception of racism and discrimination from the point of view of potential victims are organised.

Furthermore, ECRI has opined that 'statistical data on racist and discriminatory acts and on the situation of minority groups in all fields of life are vital for the identification of problems and the formulation of policies', and stated that it was 'convinced that such statistical data should be supplemented by data on attitudes, opinions and perceptions'.<sup>35</sup>

The European Monitoring Centre on Racism and Xenophobia (EUMC) was established in 1997. The primary task of the EUMC is to provide the EU and its Member States with objective, reliable and comparable information and data on racism, xenophobia, islamophobia and anti-Semitism at the European level.<sup>36</sup> To accomplish its tasks, the EUMC mainly engages in secondary collection of data through its Information Network on Racism and Xenophobia (RAXEN), which is formed by 25 National Focal Points. Preparations to convert the EUMC into a Fundamental Rights Agency are underway at the time of the writing.

The work of the EUMC has been hampered to a considerable extent by the absence of adequate nationally produced data. Its Annual Report 2005 points out that there is 'great reluctance' on part of the EU Member States to collect statistics along the lines of ethnic and national origin.<sup>37</sup> On a positive note, the report shows that states have been willing to collect direct evidence of discrimination in the form of reported incidents, formal complaints and court cases. All Member States were in addition found to have surveys and research studies on ethnic discrimination. The ultimate conclusion of the report is however that '[a]s things stand, discrimination in the fields of employment, education and housing' – the areas specifically focused upon in the report – 'is difficult to quantify within a country, and compare between countries, because of the absence of statistical evidence on national and ethnic origin'.<sup>38</sup>

<sup>35</sup> ECRI, General policy recommendation No. 4, CRI(98)30 (06/03/1998).

<sup>36</sup> The EUMC has published a number of studies that have dealt with e.g. majorities attitudes towards migrants and minorities, and discrimination in the various fields of life, including employment and education. See <http://eumc.eu.int>

<sup>37</sup> EUMC, Racism and Xenophobia in the EU Member States: Trends, developments and good practice, Annual Report 2005 Part 2, p. 99 ff.

<sup>38</sup> Idem.

It should also be noted that many NGO's and advocacy groups have been very straightforward in demanding the collection of data,<sup>39</sup> although opinions among the NGOs are mixed.<sup>40</sup>

## 2.4. Conclusions

As identified in this report, there is a wide range of contexts in which data collection is relevant and often necessary to prove and remedy discrimination. Equality bodies, set up by the EU Member States, must have the competence to carry out surveys on the extent and nature of discrimination. States parties to international human rights conventions, and these include all the EU Member States, are obliged to report and thus to collect data on discrimination in order to be in full compliance with their duties under international law. Where it is suspected that discrimination exists, for instance in that a particular group is not treated equally with respect to access to employment, education, housing or other services, states concerned are under an obligation to effectively investigate the issue, which may in practice require data collection. Socio-economic data, broken down by the equality grounds, is needed to document the disadvantages that the Member States are, under certain conditions, required to remedy by means of special measures. Individual complainants are in need of statistical data in order to successfully pursue their cases before courts and other competent bodies, especially in cases of indirect discrimination. In addition, key international human rights documents, key international stakeholders such as the EUMC and ECRI, and many NGOs and advocacy organisations have called for the collection of data. It should however be noted that this does not necessarily mean that states would necessarily have to engage in collection of personal data; data collected by means of alternative methods, such as anonymous surveys, may meet many of the data needs identified above.

<sup>39</sup> One of the most vocal organisations campaigning for the collection of ethnic data has been the European Roma Rights Centre (ERRC), an international public interest law organisation engaging in a range of activities aimed at combating anti-Romani racism and human rights abuse of Roma. See <http://www.errc.org>

<sup>40</sup> According to Goldston, the most commonly voiced objections in relation to collecting data on racial or ethnic origin are: 1) the inherent inaccuracy of racial classifications and the data upon which they are based; 2) the history of abuse of race statistics in the past; 3) the purported infringements of the rights to privacy and self-determination; and 4) the barriers to the collection and maintenance of race statistics posed by international law and/or domestic legislation. Goldston, James 'Race and Ethnic Data: A Missing Resource in the Fight Against Discrimination' in Andrea Krizsan – Iván Székely (eds), *Ethnic Monitoring and Data Protection: The European Context*, (Budapest: Central European University Press, 2001), p. 24. Indeed, one of the most important goals of civil rights organisations in the US before the mid-1960s was to remove racial designations from public forms and the data compiled from them. Petersen, William 'The Protection of Privacy and the United States Census' in Martin Bulmer (ed), *Censuses, Surveys and Privacy* (London: The Macmillan Press, 1979), p. 178

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## Part III

# The role of data in ensuring compliance with equal treatment law



Part III examines the role of data in ensuring compliance with equal treatment law in three contexts:

- Evidence in legal proceedings (chapter 3);
- Workplace monitoring and service delivery monitoring (chapter 4); and
- Measuring the causes, extent and consequences of discrimination at a general level (chapter 5).

Under the above themes this part discusses what data is needed, what are the instruments by which the data can be collected, and how the data can be used in the three contexts.

### 3. The role of statistics in the proof of discrimination

#### 3.1. Sources of Evidence, Burden of Proof and Use of Statistics in Individual Litigation

One of the primary means by which discrimination is combated across the EU Member States is through individual litigation. Whether individual claimants are however able in practice to enforce their rights depends on a number of factors, including the availability of necessary evidence. It has become common wisdom that modern forms of discrimination are increasingly subtle and covert, which means that they are also less easy to prove.<sup>41</sup> Direct evidence of discrimination is rare, and where such direct evidence exists, corroboration is even rarer.<sup>42</sup>

In criminal proceedings the burden of an individual litigant to produce evidence is not a major problem, as it is typically for the police, prosecutor or the court to investigate the facts. Most EU Member States have however transposed the two equal treatment directives mainly through civil or labour law,<sup>43</sup> which are generally enforced in adversarial proceedings where the onus of proving a fact is upon the party wishing to rely upon it.<sup>44</sup> A particular problem emerges in that context: in discrimination cases the factual evidence, or important parts thereof, is usually in the possession of the respondent, not the complainant<sup>45</sup> - provided of course that the necessary information exists in the first place. The overwhelming majority of the EU countries address this problem through rules concerning discovery of documents, whereby a court may, on its own initiative or upon a request of one of the parties, order the other party to submit

<sup>41</sup> See e.g. Deitch, Elizabeth et al 'Subtle yet significant: The existence and impact of everyday racial discrimination in the workplace' *Human Relations*, Vol 56(11) 2003.

<sup>42</sup> Alemu, Fitsum 'Testing to prove racial discrimination: methodology and application in Hungary'. An internet article available at: <http://www.errc.org/cikk.php?cikk=1016> (visited 1.1.2006)

<sup>43</sup> Cormack, Janet – Mark Bell, *Developing Anti-Discrimination Law in Europe*. European Network of Independent Legal Experts in the non-discrimination field (human european consultancy & Migration Policy Group 2005), p. 14, available at the following website: [http://ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/05compan\\_en.pdf](http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/05compan_en.pdf)

<sup>44</sup> It is sometimes suggested that this difference between criminal and civil proceedings with regard to the need to produce proof has led to a situation where victims of discrimination prefer to initiate criminal proceedings instead of civil proceedings. See e.g. Latraverse, Sophie 'Report on Measures to Combat Discrimination: Country Report – France' (European Network of Legal Experts in the non-discrimination field, December 2004). Available at [http://ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/frrep05\\_en.pdf](http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/frrep05_en.pdf) (visited 1 September 2006).

<sup>45</sup> For simplicity's sake, the term chiefly used in this chapter is 'complainant', but this is without prejudice to the nature of the proceedings in question and should be understood in sensu largo.

information that is in her possession and of relevance to the case.<sup>46</sup> In some countries the scope of this obligation is in some specific circumstances limited by the domestic data protection laws. Where the respondent refuses to furnish the court with the requested information, without providing a satisfactory justification thereto, the court is usually entitled to freely appreciate what inferences it draws from that. The existence of this kind of arrangement is crucial, as otherwise an imbalance results in that the respondent can in practice decide to use the information in the proceedings only where it is to her own benefit.

However, the above-described arrangement provides only for a partial answer to the problem. This is because in most cases the potential complainant would need the necessary data already *before* commencing legal action, in order to assess whether a *prima facie* case of discrimination can be made out. Some jurisdictions have adopted specific solutions to deal with this aspect. In Sweden, a person who applies for a job, promotion or training opportunity but is not selected has a right to request and receive written information from the employer regarding the education, work experience and other qualifications of the person who was selected, in order to be able to compare qualifications. A different type of arrangement exists in the UK, where an alleged discriminator can be asked for information, including statistical data, through the 'questionnaire procedure' before or after proceedings have been commenced. Under this procedure, if the respondent does not fill in the questionnaire, or gives unreasonable answers, the court may find sufficient grounds to draw inferences and shift the burden of proof to the respondent. Though they do not have official standing, many discrimination cases have been won in the UK because of inadequately answered questionnaires, and specialized equality bodies routinely use them.<sup>47</sup> Discrimination lawyers in other European countries have adopted similar, though less formulaic, questionnaires.<sup>48</sup>

The two Directives recognize the difficulties inherent in proving discrimination and share the burden of proof in other than criminal proceedings.<sup>49</sup> The proper application of the burden of proof rule may on occasion make it unnecessary for the complainant to rely on information that is in the possession of the respondent, although this depends on the extent to which other evidence is available. The Directives provide that when a complainant establishes 'facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'<sup>50</sup> This means that the complainant must come forward with enough evidence, 'facts', to make a *prima facie* case of discrimination.<sup>51</sup> After this the burden of proof shifts to the respondent. In practice, domestic judicial bodies enjoy a margin of freedom in appreciating the exact point at which they are satisfied that the evidence marshalled by the complainant constitutes a *prima facie* case.

The Directives further state that the rules of national law or practice 'may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.'<sup>52</sup> As this wording indicates, states are only allowed, not required, to accept statistical data as admissible evidence. Some domestic laws expressly allow the use of statistics: in Belgium, the applicable federal law cites 'statistical data' and 'situation tests' as two

<sup>46</sup> The respondent, e.g. an employer, is usually not required to provide material where it is not readily available, or where an employer would be required to begin a process of data collection that would add unnecessarily to the length and cost of a hearing. This is the case e.g. in Britain, see *Carrington v Helix Lighting Ltd* [1990] ICR 125. Furthermore, in the case of criminal proceedings the principle against self-incrimination provides that a person charged with a criminal offence cannot be compelled to provide self-incriminating evidence.

<sup>47</sup> ERRC – Interights – MPG, *Strategic Litigation in Europe: From Principles to Practice* (Nottingham: Russell Press, 2004), p. 72. For critical comments see Fredman, Sandra, *Discrimination Law* (Oxford: Oxford University Press, 2002), p. 165.

<sup>48</sup> *Idem* (ERRC).

<sup>49</sup> Member States need not apply the sharing of the burden of proof to proceedings where it is for the court or other competent body to investigate the facts of the case. Article 10(5) of Employment Equality Directive, Article 8(5) of Racial Equality Directive.

<sup>50</sup> Article 8 Racial Equality Directive, Article 10 of Employment Equality Directive.

<sup>51</sup> See recital 31 of Employment Equality Directive and 21 of Racial Equality Directive.

<sup>52</sup> See the identical recitals (15) of Employment Equality Directive and Racial Equality Directive.

examples of the kind of evidence that leads to the shifting of the burden of proof to the respondent.<sup>53</sup> The relevant Italian legislation also expressly provides for the use of statistical data. Statistical evidence is regularly held admissible also in other jurisdictions, even if the relevant laws do not expressly provide for this. Statistical evidence may however not be accepted or be considered to constitute convincing or sufficient evidence in particular circumstances, as appears from the following case from the Czech Republic:

Eight months of detailed research was conducted by the ERRC and its partner organisations to provide a comprehensive statistical basis to the complaint in which 18 Romani children from the Czech city of Ostrava challenged the system of racial segregation in Czech schools under which Romani children predominantly ended up at special schools intended for pupils with learning difficulties. The syllabus taught in special schools is far inferior to that taught in 'normal' schools. The data collected by the petitioners showed that in Ostrava, Romani children were 27 times more likely to be in special schools than were non-Romani children. An administrative action and subsequent application to the Czech Constitutional Court were unsuccessful as the court ruled that it had no jurisdiction to consider statistical evidence.<sup>54</sup>

The use of statistical data in the context of legal proceedings relating to discrimination on the basis of the grounds covered by the two Directives has been infrequent. The survey conducted by the European Network of Independent Legal Experts in the non-discrimination field for this report indicates that only the UK has anything like a well-established and a reasonably systematic approach in this area. Ireland and the Netherlands have considerable experience of the use of statistics in this context, although in the case of Ireland the main body of case law predates the Directives, and in the case of the Netherlands it appears that the experience is limited to the use of statistics by the Equal Treatment Commission, whereas the use of statistics by the regular courts has been infrequent.<sup>55</sup> Four more countries, Czech Republic, Finland, France and Hungary, have had one or two cases where statistics have played a major role.<sup>56</sup> In the rest of the EU countries, effectively forming an overwhelming majority, no case law could be found where statistics would have played any major role.

The cases that were found concerned most often discrimination on the basis of age or racial or ethnic origin, and occasionally also with religion, while it was much harder to find examples of cases dealing with sexual orientation, disability or belief. There were examples of the use of statistics in relation to both direct and indirect discrimination. The statistics were based on various sources. These included official macro-level datasets such as censuses and labour force surveys; research published by official bodies, academic researchers and equality bodies; internal monitoring data produced by the organisations concerned; and *ad hoc* evidence gathered by researchers or complainants by way of interviews and observation as in the above example from Ostrava.<sup>57</sup>

Some jurisdictions allow the use of situation testing to prove the breach of the principle of equal treatment, which in the case of large-scale testing also produces statistical data. Discrimination testing is a rather simple concept,<sup>58</sup> and can

<sup>53</sup> Cormack, Janet – Mark Bell, *Developing Anti-Discrimination Law in Europe*. European Network of Independent Legal Experts in the non-discrimination field (human european consultancy & Migration Policy Group, 2005), p. 70.

<sup>54</sup> See ERRC – Interights – MPG, *Strategic Litigation in Europe: From Principles to Practice* (Nottingham: Russell Press, 2004), p. 82.

<sup>55</sup> On the general situation of the Netherlands see Guiraudon, Virginie - Karen Phalet - Jessika Ter Wal, *Final Report on the Netherlands*. Medis Project, June 2004, p. 67.

<sup>56</sup> The case from France might be a 'borderline' one though (see the next footnote).

<sup>57</sup> Another case of live observation might be mentioned here: In a French case evidence introduced before the Court was based on the results of a visual investigation by a Labour Inspector. This evidence showed that the table and bar staff were 97% European whereas 'colored' workers were numerous in the kitchens, and on a taped telephone conversation in which the manager stated that 'colored' staff were not hired for table and bar service. The Paris Criminal Court found that illegal discrimination leading to a racist management of the workforce had been established. CA Paris 17/10/2003 / appel de TGI Paris 22/11/2002, DO juillet 2003 p.284, *Affaire « Moulin Rouge » SOS Racisme et Marga c/ Beuzit et Association du Moulin*.

be used to study the existence of discrimination either outside or within the context of a judicial process (research-oriented testing v. litigation-oriented testing).<sup>59</sup> The results of testing are regarded as admissible evidence in several EU countries.<sup>60</sup>

This chapter looks at the way in which statistical data can be used, and has been used, in legal proceedings dealing with direct or indirect discrimination.

## 3.2. Direct Discrimination

The two Directives frame the concept of direct discrimination in the same way. The definitions, if combined, would read like this:<sup>61</sup>

Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

A large majority of the EU Member States have adopted legislation that reflects closely this definition.<sup>62</sup> This definition is based on a purely comparative rationale in that the motives or intentions that led to the less favourable treatment play no role in it.<sup>63</sup> The definition is based on the concept of equality as consistency, and is as such primarily a relative one.<sup>64</sup> As long as there is consistency, the outcome is irrelevant.<sup>65</sup> It is not the treatment per se that is at issue, but the fact that one person is treated less favourably than another one on any of the grounds mentioned.<sup>66</sup>

The use of statistical evidence is usually not required for the purposes of making a *prima facie* case of direct discrimination, as it is enough to show that only *one* individual has been treated unfairly in comparison to another. Statistics deal with the aggregate level of analysis, and do not as such conclusively prove that a particular individual

<sup>58</sup> Testing starts with matching up a pair of testers who are as close to equal as possible in all relevant characteristics except one: the characteristic for which the test will seek to determine whether discrimination is occurring on the basis of that characteristic. For example, if a test is conducted for discrimination in rental housing, two testers would have similar credit reports, similar employment histories, drive similar cars, be dressed in a similar manner, be the similar age and of the similar educational background, but be of different racial or ethnic background. The testers would then be sent, close together in time, to the same apartment complex. If the ethnic majority tester is offered an apartment, but the ethnic minority tester is told that no apartments are available, that is some evidence of housing discrimination. If this test is repeated several times, and the same result is obtained, that is stronger evidence of discrimination. Kathryn Lodato et al: *Investigatory Testing as a Tool for Enforcing Civil Rights Statutes. Current Status and Issues for the Future*. Public Law Research Institute. PLRI Reports (1998). For an example of what testing may entail in the context of access to employment, see Fitsum Alemu, *Testing to prove racial discrimination: methodology and application in Hungary*. An internet article available at: <http://www.errc.org/cikk.php?cikk=1016> (visited 1.1.2006).

<sup>59</sup> See *ibid* (Alemu). For research-oriented testing, see Chapter 4.

<sup>60</sup> One of these countries is France, where the Cour de Cassation ruled in an important decision of 11 June 2002 that evidence gathered by means of testing was admissible. Depending on the applicable domestic rules on standing, the testers may be able to bring a case to a court themselves and/or stand in the court as witnesses.

<sup>61</sup> For the definitions proper, see Article 2(2) of the respective Directives.

<sup>62</sup> Cormack, Janet – Mark Bell, *Developing Anti-Discrimination Law in Europe*, European Network on Independent Legal Experts in the non-discrimination field (human european consultancy & Migration Policy Group, 2005), pp. 26-27.

<sup>63</sup> This notwithstanding, a showing of a prejudice or discriminatory intent on part of the respondent may be useful evidence in establishing a *prima facie* case of discrimination.

<sup>64</sup> Fredman, Sandra, *Discrimination Law* (Oxford: Oxford University Press, 2002), p. 92 ff.

<sup>65</sup> *Idem*.

<sup>66</sup> *Idem*.

has, or has not, been discriminated against. In particular, statistics produced by the respondent, showing e.g. a balanced workforce, should not suffice – at least not alone – to rebut a case made by the complainant. The fact that an employer does not discriminate as a matter of regular practice does not prove that it did not do so in a particular instance.

A very important exception to the above-stated main rule however exists. Judicial bodies know that it may be difficult for a complainant to bring even *prima facie* evidence of discrimination, and may allow the use of statistical evidence to infer direct discrimination. In particular, statistical evidence may be used to establish a regular pattern of treatment of a particular group: regular failures by a group to obtain promotion or appointment, or clear evidence of under-representation in particular grades, may give rise to an inference of discrimination. In the British case *Marshall v F Woolworth & Co. Ltd.*, the complainant considered that she had not been offered a job as she was black, i.e. that direct race discrimination was involved. An employment tribunal inferred the existence of *direct* discrimination from the fact that there was no black person working at the store in question, even though there is a sizeable black community living in the local area and half of the job applicants were black.<sup>67</sup> Where available, a court may use the monitoring records of an employer, showing an imbalance in e.g. the ethnic profile of the workforce, to draw an inference of discrimination. Consider the case of *West Midland Passenger Transport Executive v Singh*, also from the UK, where Balcombe LJ in the Court of Appeal stated:

statistics obtained through monitoring are not conclusive in themselves, but if they show racial or ethnic imbalance or disparities, then they may indicate areas of racial discrimination.... In the absence of a satisfactory explanation in a particular case, it is reasonable to infer that the complainant as a member of the group has been treated less favourably on grounds of race. Indeed, evidence of discriminatory conduct against the group in relation to promotion may be more persuasive of discrimination in the particular case than previous treatment of the applicant which may be indicative of personal factors peculiar to the applicant and not necessarily racially motivated.<sup>68</sup>

Consider also the following example, this time from the US, involving statistics compiled through large-scale testing:

In 1989 the Washington Lawyer's Committee working with the local community and Howard University experts adapted testing to prove discrimination in the provision of taxicab services in the District of Colombia. This work involved substantial research using paired teams to test for discrimination in the refusal of service because of a passenger's race. Over the course of two and a half months, the team trained and carefully matched teams of black and white testers, who ultimately conducted 292 tests. The test results showed that taxis failed to stop for black testers in 20% of the tests, while cabs passed white testers during only 3% of the tests. As a result of the testing, litigation was undertaken against three cab companies whose practices reflected particularly high levels of discrimination. On the eve of the trial, the suits were settled. The settlement included a payment of nearly \$50,000 in damages and significant injunctive relief.<sup>69</sup>

So while it is true that in most cases of direct discrimination statistics do not play any major role, the issue is not that simple. As also the above examples show, sometimes statistics help the individual(s) concerned to establish a *prima facie* case. This is the case when there is a pattern of direct discrimination affecting a number of people belonging to a particular group. In such situations, statistical evidence may in practice be a *conditio qua sine non* for successful

<sup>67</sup> COIT 1404/80, ET.

<sup>68</sup> *West Midland Passenger Transport Executive v Singh* [1988] ICR 614 at 619.

<sup>69</sup> See Alemu, Fitsum, *Testing to prove racial discrimination: methodology and application in Hungary*. An Internet article available at: <http://www.errc.org/cikk.php?cikk=1016> (visited 1.1.2006), and the references cited therein.

pursuance of a case, especially if no other evidence is available or if it is too weak.<sup>70</sup> Statistics may also play an important role in showing that the justification proffered by the respondent is merely a pretext.<sup>71</sup> The respondent can in turn introduce statistical evidence that challenges the relevancy, accurateness or completeness of the statistics relied on by the complainant.

### 3.3. Indirect Discrimination

As with direct discrimination, the notion of indirect discrimination is conceptualised in the two Directives in an almost identical way, and may be combined into a single definition as follows:<sup>72</sup>

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin, or those having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation, at a particular disadvantage compared with other persons, unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving this aim are appropriate and necessary, or
- (ii) as regards persons with a particular disability, the employer or any person or organisation is obliged to take appropriate measures to provide reasonable accommodation in order to eliminate disadvantages entailed by such provision, criterion or practice.

The concept of indirect discrimination, which originated in the US, has been part of UK law since 1975. It has gradually been incorporated into EU law through ECJ case-law on gender and equal pay. It is, however, a relatively new concept in many EU Member States. Most of the Member States have now adopted a definition that generally reflects the above definition,<sup>73</sup> but still have relatively little experience in applying it. Thus much of the discussion below refers to UK experience and that of the ECJ in respect of gender discrimination.

It should be noted as a start that there are two ways in which the definition included in the two Directives modifies previous definitions of indirect discrimination, such as that previously found in UK legislation. Firstly, instead of requiring proof of a rigid rule or condition, the EU definition uses the more flexible notion of a neutral practice. Secondly, the older approach, used in the UK, required proof that substantially more members of a designated group were unable to comply with the condition than others. This necessitated the use of statistical comparisons. The EU definition refers instead to a neutral provision, criterion or practice which puts persons from a designated group at a *particular disadvantage compared with other persons*. This means that it is possible to establish indirect discrimination without the use of statistics. In practice, however, statistics will generally be central to an indirect discrimination case.

The definition of indirect discrimination is based on a comparative and relative logic. Where it differs from the concept of direct discrimination is in that the comparison takes now place predominantly on a group level instead of an individual level. This quite readily calls for identification and measurement of possible gaps in achievement that may

<sup>70</sup> The situation prevailing under the EU law can be contrasted with the situation prevailing under the US federal law. In the US, statistics are often admissible in individual disparate treatment cases but they are rarely determinative without additional anecdotal evidence, because of the need to show intent to discriminate. See Waks, Jay W. et al 'The Use of Statistics in Employment Discrimination Cases' *The Trial Lawyer*, Vol. 24 (2001), p. 261.

<sup>71</sup> *Idem*.

<sup>72</sup> For the definitions proper, see Article 2(2) of the respective Directives.

<sup>73</sup> Cormack, Janet – Mark Bell, *Developing Anti-Discrimination Law in Europe*, European Network of Independent Legal Experts in the non-discrimination field (human european consultancy & Migration Policy Group, 2005), pp. 28-29.

exist between two groups of people. Indirect discrimination is concerned more with substantive outcomes than with formal consistency of treatment.<sup>74</sup> Indeed, it recognizes that sometimes formally consistent application of facially neutral criteria may in fact have discriminatory effects.

While the comparative rationale of the definition invites the use of statistical evidence, this is in practice not required in all, or perhaps even most cases. In some circumstances the competent bodies may take 'common sense' into account, and make assumptions about ordinary behaviour without requiring statistical evidence. For example in the British case of *Panesar v Nestlé Co Ltd* it was accepted that those with Pakistani ethnic origins were more likely than others to have beards, and therefore a claim for indirect discrimination could be made out against a rule that prohibited employees from having beards.<sup>75</sup> In *Mandla v Lee*<sup>76</sup> and *Singh v British Rail Engineering*,<sup>77</sup> bans on the wearing of turbans were treated as making out a claim for indirect race discrimination against Sikhs. The Dutch Equal Treatment Commission has even gone as far as to state that where there is an imbalance in the composition of a workforce, in that the employees are predominantly of the majority ethnicity, it can be suspected that indirect discrimination has taken place if a minority person brings forward facts that look like exclusionary practices, because it is 'common knowledge' that minority people tend to get excluded in workplaces where the majority is of different ethnic background.<sup>78</sup> Importantly, the European Court of Justice has confirmed in its case law in the field of gender discrimination that there are circumstances where it is not necessary to analyse the specific consequences of the application of a criteria or practice in order to find indirect discrimination.<sup>79</sup>

In some other cases, statistical data – in some form or the other – can play an important role. In the employment context this may take place e.g. in the following ways: a) where the existence of discriminatory practices in recruitment and/or selection is suspected, the profile of the applicants or all employees, or some subsection thereof, is compared with the profile of the general population or some subsection of it (e.g. those with sufficient qualifications and/or those living in a certain area), in order to discover possible under-representation; this method requires the existence of both 'internal' data for an organisation, broken down by the relevant equality ground, and the existence of 'external' macro-level data, likewise broken down by the relevant equality ground (and possibly also place of residence and qualifications); b) where discrimination in wages, promotion or firing is suspected, the internal data alone is used to compare the respective situations of the different groups of employees; this requires that an employer has the necessary data relating to its workforce broken down by the relevant equality ground; c) where the effects of a particular provision or criterion needs to be investigated, this can be done by examining and comparing the proportions of the different groups within the general population, or some subsections thereof, that can comply with the provision or criterion concerned. The above-described three main methods, i.e. using either internal or external data alone or in conjunction with each other, apply *mutatis mutandis* also to the areas of education and provision of services.

<sup>74</sup> For a general discussion of this, see Fredman, Sandra, *Discrimination Law* (Oxford: Oxford University Press, 2002), p 106 ff.

<sup>75</sup> [1980] IRLR 482.

<sup>76</sup> [1983] IRLR 209.

<sup>77</sup> [1986] ICR 22.

<sup>78</sup> ETC, Oordeel 99-72.

<sup>79</sup> See e.g. the case of *Schnorbus*, where the selection procedure regarding access to practical legal training discriminated against women because of the preference accorded to applicants who had completed compulsory military or civilian service, which could be done only by men. The court said: '...it is not necessary in this case to analyse the specific consequences of the application of the [selection criteria]. It is sufficient to note that, by giving priority to applicants who have completed compulsory military or civilian service, the provisions at issue themselves are evidence of indirect discrimination since, under the relevant national legislation, women are not required to do military or civilian service and therefore cannot benefit from the priority accorded by the abovementioned provisions of the JAO to applications in circumstances regarded as cases of hardship.' ECJ case C-79/99 *Schnorbus* [2000] ECR-I-10997, paragraph 38.



Where the applicable internal data does not readily exist, e.g. where an employer does not keep an up-to-date employee register that includes information in relation to the relevant equality ground, such data may need to be 'handpicked' by way of observation or by way of an investigation. Where the applicable external data does not exist, the only way to establish the relevant data may be through sample surveys or some other type of research.

Consider the following four cases, the first one of which comes from Finland, the next two from Britain, and the last one from Ireland:

The city of Vantaa had to cut down the number of its employees because of financial problems. It had issued specific selection criteria in accordance to which some of its employees were to be dismissed. The criteria included factors such as the person's interest for early retirement, being above a certain age limit, and the importance of the employee for the employer. According to the instructions, the assessments were to be done on an individual basis. The statistics showed that the likelihood of having been dismissed was more than two times higher in the age group 50-59 than in the other age groups. As the city could not provide an objective justification for the imbalance, the Supreme Administrative Court of Finland found this to constitute discrimination on the basis of age.<sup>80</sup>

In *Hussein v Saints Complete House Furnitures*,<sup>81</sup> a Liverpool furniture store refused to consider applicants for jobs from a particular postal area in Liverpool which had a high rate of unemployment. The store justified this on the basis that unemployed friends of employees from that area might hang around the store and discourage customers. Labour Force Surveys indicated that 50% of the population of this postal area were black, as compared to 2% for the Liverpool region as a whole. An employment tribunal held that this statistical evidence was sufficient to demonstrate that the employer was indirectly discriminating on the grounds of race by applying a 'no hiring' rule to that postal area, and the rule was held not to be justified.

In *Aina v Employment Service*, a Black African employee applied for the post of equal opportunities manager in his organisation. He was assessed as having the skills and ability for the job. However, his application was rejected because, unknown to him, the post was open only to permanent staff at higher grades than his. Monitoring data showed that the organisation had no permanent Black African employees at the grades in question. The employment tribunal held that there was no justification for the requirement, and that it amounted to indirect discrimination on racial grounds.<sup>82</sup>

In *Martin v. Concern* the claimant, as a man over 40, alleged indirect discrimination on the basis of age. The respondent had received 148 applications for a job. Thirteen applicants were interviewed all of whom were under 40. Of the applicants, 70 were aged between 20-29, 65 were between 30-39, 10 between 40-49 and 3 over 50. The Equality Officer held that it was a fact that 13 (9%) of the applicants were over 40 years of age and 133 (91%) were under that age. It was also a fact that the 20 candidates shortlisted for interview were under 40 years of age. When the data was examined it emerged that 29 applicants who fulfilled all of the essential criteria were not called for interview – 6 of whom were over 40 years old – which represented 4% of the total number of applicants and 21% of the applicants who fulfilled the essential criteria and were not called for

<sup>80</sup> 08.08.2001/1766 KHO:2001:38. The case was tried before the coming into force of new legislation transposing the Employment Equality Directive, and therefore – as the old domestic law provided for this – also direct discrimination could in theory have been justified, which is not the case under the Directive.

<sup>81</sup> [1979] IRLR 337.

<sup>82</sup> *Aina v Employment Service* [2002] DCLD 103D. Cited in Commission for Racial Equality, *Statutory Code of Practice on Racial Equality in Employment* (Belmont Press, 2005), p. 19.

interview. From this the Equality officer found that the complainant had failed to establish a *prima facie* case of discrimination and that his case must fail.<sup>83</sup>

*Comparison Groups.* The Directives do not provide many leads as to the way in which the relevant comparisons should be made. Several questions emerge: When are persons to be considered to have a particular characteristic, e.g. a *particular* disability? Are we restricted to comparing broad categories, such as ‘the disabled’ with ‘the not-disabled’? And how exactly is the relevant pool of comparison selected?

The word ‘particular’ in its ordinary meaning stands for something that is not universal or general, but unique or specific to a person, group or category. This would suggest that we are not stuck with comparing broad categories of groups representing the different grounds.<sup>84</sup> Moreover, the definition of discrimination in the two Directives avoids referring to ‘groups’ as such, referring to ‘persons’ instead. It is submitted that these two facts imply that there is no generally applicable rule of thumb as to how much ‘difference’ there must be between two groups of persons or how much their respective situations must differ. It all depends on the facts of the case: who were those impacted by a provision, criterion or practice, do they somehow stand out from the rest in terms of racial or ethnic origin, disability, religion or belief, sexual orientation or age? Insofar as there is a correlation between a disadvantage and any characteristic that falls under any of the broad categories of grounds, there is a presumption of discrimination. For an example, a driving licence requirement does not prejudice all disabled persons, only specific subgroups within that general category - such as blind persons - while it still constitutes indirect discrimination on the grounds of disability in the absence of an objective justification.

There is not much case law across the Europe that has addressed these questions, but the little there is supports the above flexible and pragmatic approach. For instance with regard to age discrimination, the categorization has always followed the specifics of the case. In the above-mentioned case from the Supreme Administrative Court of Finland, the decisive comparison took place between those aged 50-59 and all the others. In *Perry v. Garda Commissioner*,<sup>85</sup> the situation of a 59 year old was compared to the situation of a 60 year old. In *Martin v. Concern*<sup>86</sup> the decisive comparison took place between those who were over 40 (the age of the applicant) and those who were under 40. The case law on ethnic origin has suggested a flexible approach as well: Sometimes the relevant comparison group has been the broad group of ‘blacks’, sometimes a more limited group such as ‘the Roma’ or ‘those of Pakistani origin’. While a flexible approach in this regard thus appears to be widely accepted, this does not mean that the delimitation of the relevant group of persons is an easy task. For instance the Dutch Equal Treatment Commission has not adopted an uniform approach to the issues of delimitation, on top of which the courts and the academic commentators have often criticized its approaches.

Selecting the relevant pool of comparison is obviously a very important part of an indirect discrimination claim. It however appears that most of the EU countries do not have anything like a well-established approach to this question. While for instance the Dutch Equal Treatment Commission has extensive experience of the use of statistics in relation to indirect discrimination cases, it appears that it has not adopted a coherent practice in this regard, but has employed several different approaches. Difficulty in defining the comparison groups has been found to be one of the main challenges the courts in the US have faced in this context.<sup>87</sup>

<sup>83</sup> *Martin v. Concern*, DEC-E2005/029.

<sup>84</sup> See also Whittle, Richard ‘The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective’ 27 *European Law Review* June 2002, p. 309.

<sup>85</sup> DEC-E2001-029.

<sup>86</sup> DEC-E2005/029.

<sup>87</sup> National Research Council, *Measuring Racial Discrimination*. Panel on Methods for Assessing Discrimination (Washington DC: National Academies press, 2004), p.120.

Only in the UK does the situation appear to be somewhat clearer. The Court of Appeal in *Allonby v Accrington and Rossendale College* considered that 'once the impugned requirement or condition has been defined, there is likely to be only one pool [of comparators] which serves best to test its effect'.<sup>88</sup> It is well-established that selecting this pool is a job for the court or tribunal, and will involve the consideration of the factual circumstances in question. In the sex discrimination case of *Price v Civil Service Commission*, the Employment Appeals Tribunal ruled that in selecting the two comparator groups, the appropriate 'pool for comparison' would consist of people who would qualify for the benefit sought, or be eligible for it, if the challenged provision did not apply.<sup>89</sup> The approach established by the ECJ in the sex discrimination case of *Seymour Smith* is generally applied by the UK courts across all the equality grounds: i.e. the comparison will in usual circumstances be between those members of a disadvantaged group who satisfy the requirement in question, and the general proportion of members of that disadvantaged group in the workforce, not just to those directly affected by the measure in question.<sup>90</sup> Who comes within this group will vary according to the circumstances. If a challenge is made to a single job requirement (e.g. that all successful applicants had to have an undergraduate university degree), then applying the logic of the Price decision, it seems that the comparator groups should usually be those in the general national population that qualify for that post and belong to a disadvantaged group, and those in the national population that do not qualify and belong to such a disadvantaged group. If the challenge is made to two or more job requirements or recruitment criteria, then the comparator groups should be those who qualify, and those who would be qualified but for the existence of these requirements, or those who might wish to apply but for the existence of the criteria being attacked. The comparator groups might also be limited to a local geographical area, or to the national population, depending upon the nature of the post in question. The groups may be restricted to those who had a particular set of qualifications, or to a wider group.

*Measuring disadvantage.* How big a difference is required for there to be a *particular* disadvantage? Again, the qualifier 'particular' signifies simply a condition that is specific, i.e. not generally shared. If everyone is similarly disadvantaged, there is no particular disadvantage. Whether this is what is implied, or whether e.g. a certain degree of severity is referred to, is up to the ECJ to decide in the final instance. Again, there is very little case law in the EU countries that would address this question.

The Dutch Equal Treatment Commission (ETC) has strongly stressed the point that the disadvantage should be calculated on the basis of relative proportions and not absolute figures.<sup>91</sup> In a number of cases the ETC has given the standard rule that people in the alleged indirectly discriminated group should be disadvantaged by the apparently neutral rule or practice at least 1.5 times as often as people from the comparator group. However, since 2004 the ETC seems to have started to use other methods of calculation, especially in cases where the absolute numbers are very small.<sup>92</sup> These methods have been developed by the University of Utrecht and include complicated ways of calculating the chance that a particular group will be more negatively affected than another group. Concerns have been voiced that this change in the policy of the ETC will make things extremely and unnecessarily complicated, leading to a decrease in transparency and general acceptability of the decisions.

<sup>88</sup> [1998] IRLR 364, 368.

<sup>89</sup> [1977] IRLR 291.

<sup>90</sup> In *Seymour Smith* the Court stated: 'In order to establish whether a measure adopted by a Member State has disparate effect as between men and women to such a degree as to amount to indirect discrimination for the purposes of Article 119 of the Treaty, the national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure. If that is the case, there is indirect sex discrimination, unless that measure is justified by objective factors unrelated to any discrimination based on sex.' Case C-167/97, paragraph 4 of the judgement.

<sup>91</sup> The ETC illustrates this by giving the example of a company where 10 women and 1000 men are employed. When 9 women and 9 men work part time in this company this is 'equal' in terms of absolute figures but unequal in terms of the percentage of females and males working part-time.

<sup>92</sup> See e.g. Oordeel 2003-91 and 2003-92.

In the UK, the courts have rejected any automatically applicable rules on these questions, which has led to somewhat complex case law. How big a statistical difference is required to make out the existence of disparate impact will depend upon what comparator group is selected, and is a question of fact to be decided in the relevant circumstances. In the field of sex discrimination, the House of Lords has considered that a difference of 5% across the national population was sufficient to make out a claim of indirect discrimination,<sup>93</sup> and it is likely that a similar approach will be taken with respect to the other grounds as well.

*Comparative experiences.* The use of statistical data is not without its problems even where it is commonly being used. The experience from the USA in relation to racial discrimination shows that the parties to the case and the statistical experts they use, the courts, and academic commentators often disagree in a profound way about how the correct statistics should be compiled, e.g. how the comparator groups should be constructed. This is despite the fact that analyses used in court cases typically involve simple comparisons between the racial composition of an applicant pool or a potential promotion pool and a set of selection outcomes (such as hiring or promotion). Few cases involve rigorous assessment of the use of multiple regression and other multivariate analyses.<sup>94</sup> Several methods of measuring adverse impact are used in the USA. According to the EEOC's Uniform Guidelines on Employee Selection Criteria, an adverse impact exists if members of a protected class are selected at a rate less than four-fifths (80%) of that of another group. According to the 'standard deviations method', which is relied on by most of the courts, an adverse impact exists if the difference between the number of protected class selected and the number that would be anticipated under random selection is more than two or three standard deviations.<sup>95</sup> There are also other methods for measuring adverse impact, such as multiple regression analysis.<sup>96</sup>

Although courts expect to see statistical evidence presented by plaintiffs in employment discrimination cases, they are often sceptical of such statistics. Nelson and Bennett analysed altogether 178 federal court cases for the period 2000-2002 and found a certain lack of credence given by courts to statistical evidence, resulting in a detriment to the plaintiffs. The main reasons cited for not relying on statistical data in judicial opinions were (1) relatively small sample sizes, (2) difficulty in defining the comparison groups, (3) the use of aggregated data across multiple job levels in a class action suit.<sup>97</sup>

### 3.4 Agency Investigations

Some of the problems associated with the individual enforcement-oriented adversarial processes can be addressed by powers given to a specific body to conduct investigations into cases of suspected discrimination.<sup>98</sup> This is particularly so where the process may be initiated without a formal complaint, and the body has strong information gathering powers, including the ability to demand written or oral evidence and the production of documents, thereby addressing difficulties arising from the absence of necessary statistical evidence or lack of co-operation on part of the respondent. In addition, agency investigations are capable of addressing discriminatory patterns and structures instead of retrospective remedying of the harm experienced by a particular individual.

<sup>93</sup> *Seymour-Smith* [2000] 1 WLR 435.

<sup>94</sup> National Research Council, *Measuring Racial Discrimination*. Panel on Methods for Assessing Discrimination. (Washington DC: National Academies press, 2004), p.120.

<sup>95</sup> The 'standard deviation method' involves a somewhat complex statistical calculation of the probability with which differences in outcomes between similarly situated groups occurred by chance.

<sup>96</sup> On these methods, see Waks, Jay W. et al 'The Use of Statistics in Employment Discrimination Cases' *The Trial Lawyer*, Vol. 24 (2001).

<sup>97</sup> National Research Council, *Measuring Racial Discrimination*. Panel on Methods for Assessing Discrimination. (Washington DC: National Academies press, 2004), p.120.

<sup>98</sup> See generally Fredman, Sandra, *Discrimination Law* (Oxford: Oxford University Press, 2002), p. 175.

Ombudsmen or broadly speaking equivalent institutions have been set up in many EU countries.<sup>99</sup> Generally these bodies are empowered to conduct investigations on the basis of specific complaints and/or on their own initiative. Some of these bodies are entitled to impose a fine in case their request for appropriate information is not met. A finding of discrimination typically leads to the issuing of recommendations or advice and is without prejudice to the victim's right to initiate legal proceedings, for instance with a view to obtaining compensation.

Labour inspectorates or equivalent bodies have been entrusted with the task of supervising compliance with the equality legislation in the field of employment in a number of countries.<sup>100</sup> These authorities usually have broad powers to conduct on-site investigations and demand documentation that is in the possession of the employer. Usually labour inspectorates carry out their general supervisory tasks on an on-going basis, conducting more specific investigations where they surmise that such might be needed or where they have been prompted to do so, usually by way of a non-formal complaint.

Many of the complaint bodies established by the EU Member States have investigative powers as well.<sup>101</sup> Usually proceedings before these bodies are initiated by a formal complaint, but this may not preclude the complainant's right to subsequently engage in another type of legal proceeding in the same matter e.g. for the purposes of obtaining compensation.

Yet other types of bodies and procedures exist. For instance in the UK, the Commission for Racial Equality (CRE) has the power to conduct two types of formal investigations, 'named person investigations' and 'general investigations'.<sup>102</sup> If the CRE suspects that a particular company or organisation is discriminating on racial grounds, it can embark on a formal investigation. In carrying out this investigation, the CRE can order respondents to produce documents and give evidence, including statistical evidence. If satisfied that unlawful acts of discrimination have occurred, the CRE can issue a non-discrimination notice to the respondents, requiring them to take specified action to prevent any further discrimination.<sup>103</sup> The CRE also has powers to look at a defined area of activity: such 'general investigations' do not focus on any particular company or organisation. Under this power, the CRE can again order respondents to produce documents and give evidence, after first obtaining authorisation from the Secretary of State to exercise this power. It can also make recommendations to all bodies and publish a report.

While the investigations conducted by the bodies such as those described above can provide a significant means of fact-finding, the experience especially from the UK has shown that an effective carrying out of investigations requires not just the existence of formal powers, but especially the availability of considerable amounts of financial resources, in the absence of which the coverage of the work can never be adequately comprehensive.<sup>104</sup>

<sup>99</sup> These countries include e.g. Cyprus, Estonia, Finland, Greece, Lithuania, Slovenia and Sweden. For an analysis of the existence, independence and effectiveness of these bodies see Holtmaat, Rikki 'Catalysts for Change? – Equality Bodies according to Directive 2000/43/EC' (Luxembourg: European Commission, 2007).

<sup>100</sup> These countries include e.g. Belgium, Finland, Hungary, Malta, Poland and Portugal.

<sup>101</sup> Complaint bodies exist e.g. in Austria, Denmark, Finland, Hungary and the Netherlands.

<sup>102</sup> A reader interested in these matters is advised to become acquainted with the practices and powers of also other bodies, such as the UK Disability Rights Commission (DRC), the proposed new UK Commission for Equality and Human Rights, the Equality Commission for Northern Ireland (ECNI) and the Equality Authority of Ireland.

<sup>103</sup> The CRE can also make recommendations to improve behaviour and publish a report of the investigation, even if no specific findings of discrimination are established.

<sup>104</sup> It should also be noted that the UK commissions have been hampered by the fact that a 'named person investigation' cannot take place without the Commission suspecting that unlawful discrimination is occurring.

### 3.5. Conclusions

This chapter has examined the role of statistical data in the context of legal proceedings on discrimination. Statistics can be used to establish or rebut a *prima facie* case of discrimination. In a direct discrimination case, statistics can reveal the existence of a discriminatory pattern and thereby form indirect evidence of direct discrimination in relation to an individual complaint. In the case of indirect discrimination, a complainant may use statistics to demonstrate the disadvantageous effects that the application of a provision or a criterion has on a specific group, and to show discriminatory effects of even loose practices by revealing the resulting imbalances in the make-up of e.g. a workforce or a clientele. The respondent on her turn can introduce alternative statistical data to question the adequacy, accuracy or reliability of the statistics relied on by the complainant.

Despite the potential usefulness of statistical evidence, the overwhelming majority of the EU countries so far have none, or only very limited experience of the use of such evidence in this context. This situation can be contrasted with the widespread use of statistics in the field of sex discrimination cases in Europe,<sup>105</sup> and with the equally widespread use of statistics in the field of racial discrimination cases in the USA. This is, however, likely to change as the notion of indirect discrimination becomes more deeply embedded in the legal culture of Member States. But, as this chapter has shown, Member States will need to make other adjustments to ensure that the transition occurs smoothly and in compliance with EU law. There are several issues which need to be addressed for this to happen. Firstly, it is necessary for complainants and judicial bodies to have access to relevant information, particularly statistical information, in the possession of the defendant. Here the existence of a duty to disclose the relevant information is of importance, particularly before the initiation of legal proceedings. Only a few Member States have introduced mechanisms to accommodate the latter need. Also of key importance is the need to give equality bodies or similar institutions the power to initiate proceedings to uncover patterns of discrimination, including having power to obtain relevant documents from employers or service providers. Secondly, more attention needs to be paid to providing relevant guidance to the parties to the case and even the courts in identifying the correct pools of comparison, especially in the absence of a well-established line of interpretation in this regard. Thirdly, it is necessary to make provision for the admissibility of statistical evidence in judicial proceedings.

Finally, and most importantly, strenuous efforts are needed to ensure that data is available to compile relevant statistics in this context. Such data sources should include macro-level datasets, such as census data and data from Labour Force Surveys, which should allow the breaking down of the data by the equality grounds, place of residence and qualifications; and/or administrative register data (such as population registers), with data that can be broken down by each equality ground. Also useful would be collection of internal monitoring data by employers, schools, and service providers, including data on their workforce and service delivery, broken down by the grounds of discrimination; and information produced in the course of various types of research into discrimination. In some instances it may in theory be possible to gather the necessary data by means of *ad hoc* testing or observation, but in practice this is often not a viable option because of the burdens that the deployment of these methods pose in terms of financial resources and the need for special expertise.

A couple of our findings indicate that it is precisely the lack of the necessary data that has led to the infrequent use of statistics in discrimination cases, not for instance legal or technical barriers. First, the use of statistical evidence has been most frequent in those countries (the United Kingdom and the Netherlands) that have in general been most active in collecting data in relation to the equality grounds e.g. by means of workplace monitoring. Second, the use of statistical evidence has been most frequent with respect to those grounds of discrimination for which statistical information most often exists (at least in the above countries): age and ethnic origin – and outside the scope of this study: sex –

<sup>105</sup> ERRC – Interights – MPG, *Strategic Litigation in Europe: From Principles to Practice* (Nottingham: Russell Press, 2004), p. 82.

while little statistical information of sufficient precision is usually compiled in relation to sexual orientation, disability and religion and belief. These findings make it likely that a good deal of discrimination goes presently unnoticed and unchallenged because of the paucity of data collection.

## 4. The role of data in workplace and service delivery monitoring

### 4.1. Diversity Monitoring

While the two Directives do not provide for a direct legal duty for employers to monitor the diversity of their workforce, the uniformly worded Article 11(1) of the Racial Equality Directive and Article 13(1) of the Employment Equality Directive state that Member States should take 'adequate measures to promote social dialogue... with a view to fostering equal treatment, including through the monitoring of workplace practices'. The Guide on Ethnic Monitoring, produced by the UK Commission for Racial Equality, emphasises the essential role of monitoring for any commitment to equality:

Without ethnic monitoring, an organisation will never know whether its race equality scheme or policy is working. There is a risk that people will just see the policy as paying lip service to race equality. To have an equality policy without ethnic monitoring is like aiming for good financial management without keeping financial records.<sup>106</sup>

Quantitative workforce monitoring and service delivery monitoring basically refers to a process where the administration of an organisation keeps track of the composition of its workforce and/or the recipients of its services by means of collecting the necessary data. Workforce monitoring often covers recruitment as well, meaning that the necessary data is collected also of all job applicants. Monitoring can bring important benefits. It helps employers and service providers to avoid discrimination suits by making it possible to track down discriminatory practices in the organisation at an early stage. Monitoring is practically a *conditio sine qua non* where an organisation has adopted an equality plan and has set targets with a view to ensuring equal representation of all groups in the workforce and/or within the recipients of services. Workplace monitoring and the ensuing diversity of the workforce arguably also makes business sense, as it ensures that employers are tapping to the widest possible pool of talent. A description and analysis of the ways in which workplace and service delivery monitoring can be carried out in practice is provided in Annex I.

Only a few EU Member States have in place explicit legal provisions requiring workplace or service delivery monitoring, as appears from the exploration of national practices in Annex 2. Even in those countries where such duties exist, they tend to apply to a limited range of entities. The absence of explicit legal duties does however not mean that monitoring could not be taken up in the other Member States or with respect to those entities for which requirements do not apply. Where the national equality or other applicable laws do not regulate the issues involved, the legality of engaging in monitoring falls to be dealt with under general or employment-specific data protection laws. As long as such legislation is complied with, it is possible for all public and private organisations to engage in monitoring. Anonymous forms of monitoring provide also an alternative.<sup>107</sup>

<sup>106</sup> Commission For Racial Equality, *Ethnic Monitoring. A guide for public authorities* (London: CRE, 2002), p. 3.

<sup>107</sup> It should be noted in this context that the famous Bébér report in France recommended that French companies should conduct, on a yearly basis, anonymous workplace monitoring. See Claude Bébér, *Des entreprises aux couleurs de la France - Minorités visibles : relever le défi de l'accès à l'emploi et de l'intégration dans l'entreprise*. Available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/044000573/0000.pdf> (visited 1.5.2006).

Experiences from those countries that have imposed monitoring duties have shown that it indeed is an effective means of bringing about equality, in particular where there is wide public support for it. These experiences are explored in Annex 1.<sup>108</sup>

## 4.2. Conclusions

Despite the many benefits that it has to offer, and despite the predominantly good experiences, only a few EU Member States have hitherto introduced monitoring requirements. This probably has to do with the fact that the very idea of collecting data, especially in the contexts of employment and service delivery, has not yet garnered general support and is still widely considered a sensitive issue. However, evidence from many countries shows that while there are some practical challenges in establishing monitoring in the workplace and in service delivery, these challenges can be overcome. It should be recognized that the sensitivities involved may be different with respect to the different equality grounds, and that it may take some time before general acceptance of monitoring starts to grow. In many cases anonymous monitoring may prove to be a viable way to introduce monitoring, although in terms of the objectives of monitoring, non-anonymous forms provide some important benefits over the former.

At the end of the day, the social partners in each country should engage in a dialogue about these issues, as required by the two Directives, and should seriously consider requiring the respective governments to introduce monitoring duties, or consider adopting voluntary codes of conduct by themselves.

## 5. The role of data in measuring discrimination at a general level

Besides having a potentially pivotal role in legal proceedings and in monitoring of workplace practices, data is indispensable also for examining the causes, extent and consequences of discrimination at a more general level. This data can help to answer the following questions:

- First of all, what is the size of the groups we are talking about? What is their situation in socio-economic terms and how do they compare with the other groups? These questions can best be answered by means of demographic and socio-economic statistics based on census data, survey data and administrative data, in so far as these take the relevant variables (e.g. ethnic origin) into account.
- What is the number of complaints on discrimination submitted to the competent bodies e.g. on a yearly basis? What are the respective profiles of the complainants and the perpetrators? These questions can be answered by means of so-called complaints data.
- How much, and what kind, of discrimination do the members of groups particularly exposed to discrimination experience? What do the victims do about the discrimination they have experienced? These questions can be answered on the basis of victim survey data.
- How prevalent are prejudices among a particular group or the society at large? Are people aware of the existence of equal treatment laws? These questions can be answered by means of attitude surveys and opinion polls.
- Do employers and service providers engage in discrimination in practice? Are the equality laws complied with, or is there a need to introduce more robust laws? These questions can be answered by means of discrimination testing research.

<sup>108</sup> See also Commission For Racial Equality, *Ethnic Monitoring. A guide for public authorities* (London: CRE, 2002), p. 3; Dex, Shirley and Kingsley Purdam, *Equal Opportunities and Recruitment: How Census data can help employers to assess their practices* (York: York Publishing Services, 2005), p. 10; Collins, Evelyn 'The Role of Equality Bodies in Advancing the Case for Data' in Simo Mannila (ed), *Data to Promote Equality* (Helsinki: Edita, 2005).



This chapter takes a look at the different instruments that can be used to compile the afore-mentioned statistics.<sup>109</sup>

## 5.1. Official Social, Economic and Demographic Statistics

All EU Member States produce population-wide statistics on employment, level of education, income, health and wealth. Such statistics provide important information of the socio-economic status of the population, and if broken down by age, disability, racial or ethnic origin, and/or religion or belief, they provide an all-important point of entry for the analysis of the situation of groups vulnerable to discrimination.<sup>110</sup>

The use of such statistics has two major advantages. First, the necessary data is often produced by the state on a regular basis, which allows for the steady development of longitudinal data, enabling trend analysis. Second, socio-economic data provides an important insight into the effects of direct, indirect and structural discrimination as well as all other causes of disadvantage. This is important, as it is patently difficult to measure in particular indirect and structural discrimination.

While this source of information has its benefits, it has its limitations as well. First, not all discrimination leads to observable differences in outcomes, which means that some forms of discrimination are not visible in socio-economic statistics.<sup>111</sup> Second, it is challenging to establish clearly the portion to which the disadvantaged position of a group, as shown by outcome statistics, is the result of discrimination. While it may safely be assumed that discriminated against groups are worse off than they would be if they would not be discriminated against, it is an extremely difficult task to establish the extent to which their socio-economic disadvantage results specifically from discrimination. Some researchers have used multivariate analyses<sup>112</sup> in an attempt to control the other relevant variables, such as average level of education, in order to be able to estimate the extent to which disparities in e.g. income and employment level result from discrimination. The ability to effectively carry out regression analysis poses further demands on data collection, as it requires the availability of wide range of data across equality grounds on e.g. educational achievements. Such data is currently not often available. In addition, the method itself has also been subject to some criticism.<sup>113</sup>

At any rate, however, it is already in itself highly important from the point of view of other policy goals to establish if there are observable differences in socio-economic statuses of various groups, even if the extent to which the disparities result from discrimination cannot always be positively established.<sup>114</sup> The existence of disparities calls for closer investigation of

<sup>109</sup> For an examination of the different sources of data and their usefulness, see e.g. Wrench, John 'The Measurement of Discrimination: Problems of Comparability and the Role of Research' in Simo Mannila (ed.): *Data to Promote Equality: Proceedings of the European Conference* (Helsinki: Edita, 2005). See also Wrench, John – Tariq Modood, *The Effectiveness of Employment Equality Policies in Relation to Immigrants and Ethnic Minorities in the UK*, International Migration Papers 38 (Geneva: ILO, 2000).

<sup>110</sup> Sexual orientation is not mentioned here because it does not appear likely that the EU Member States will take this variable into account in their official statistics production in the near future.

<sup>111</sup> This would categorically be the case with some types of discrimination, such as denial of access to a restaurant on the basis of ethnic origin, which is unlikely to lead to differences in socio-economic status. A person may also be repeatedly discriminated against in access to employment, except for once, and thus be able to obtain a position that matches her qualifications. Therefore even repeated events of discrimination may not always lead to observable differences in outcomes.

<sup>112</sup> Under a multivariate analysis, discrimination is found through the unexplainable residual gap that remains between two groups even after all the variables that can be reasonably assumed to have factored in have been taken into account and controlled for.

<sup>113</sup> See Riach, P.A. – J. Rich 'Field Experiments of Discrimination in the Market Place' *The Economic Journal* 112, November 2002, p.F481. From a theoretical perspective, one limitation of the method is that it does not take into account the extent to which the variables that are controlled for reflect discrimination.

<sup>114</sup> Under the 'equality of results' model of equality, which is however not embraced as such by the two Directives, a difference in socio-economic status in itself proves the existence of an inequality.

the matter and possibly the adoption of appropriate corrective measures. This is especially the case where the statistics disclose disparities in outcomes across multiple areas of life, such as employment, housing and health.<sup>115</sup>

The extent to which the above-described data exists varies from country to country. There are three possible primary sources of social, economic and demographic data: population censuses, household surveys and administrative records. Apart from providing the basic data for socio-economic statistics, they have two other major functions from the point of view of anti-discrimination work. They provide the external benchmark data that is needed by employers and service providers to assess their internal data, as discussed in relation to monitoring (chapter 4). In addition, censuses and administrative records can be used to provide the sampling frame for the purposes of various types of surveys mapping experiences or attitudes in relation to discrimination.

*Population censuses.* Census is a major source of social and demographic statistics. Censuses are conducted in almost all countries of the world on a regular basis, typically every five or ten years.<sup>116</sup> A census ordinarily provides information on size, composition and spatial distribution of the population in addition to socio-economic and demographic characteristics. An authoritative UN guide on censuses lists a number of topics that countries should include in their respective census questionnaires as a matter of priority (these are called basic topics), and a list of other topics that they should consider including.<sup>117</sup> For instance occupation, school attendance, and educational attainment are listed as basic topics, together with place of birth, citizenship, sex and age. Language, religion, national and/or ethnic group, and disability fall into the latter category. In practice, as described in Annex 3 in more detail, all EU Member States collect data in relation to age (date of birth), and a majority collect data in relation to disability, religion and national or ethnic origin. No Member State currently collects data directly on sexual orientation.

*Household surveys.* Household surveys provide for a flexible method of data collection, and has become a key source of data on social phenomena in the last 60-70 years. In sample surveys part of the population is selected from which data are collected and then inferences are made to the whole population. Sample surveys allow the covering of particular subject matters in greater detail than censuses. Household surveys typically cover subjects such as labour force activities and disability. The surveys may be ad hoc or periodic.<sup>118</sup>

*Administrative records.* Many types of social statistics are compiled from various administrative processes. Examples of such records include central and local population registers, vital statistics compiled from the civil registration system,<sup>119</sup> and education statistics from enrolment reports of the ministries of education. Administrative records have the benefit of providing accurate and up-to-date information, as they are based on continuous processes. The combination of different administrative records can be a very rich source of information. The most important administrative source of data is the population register, where they exist. A population register maintains life databases for every person and household in the country. The register is updated on a continuous basis when there are changes in the characteristics of an individual and/or a household. Countries that have developed such systems include Denmark, Finland, Germany, the Netherlands, Norway and Sweden. For most of these countries censuses are based on the registration system.<sup>120</sup>

<sup>115</sup> Here it needs to be reiterated that the EU Directives link the adoption of positive action measures to the existence of disadvantage, not discrimination.

<sup>116</sup> During the 2000 census round, altogether 184 countries and areas conducted censuses. United Nations, *Principles and Recommendations for Population and Housing Censuses*, Revision 1. Statistical Papers Series M No. 67/rev.1 (New York, 1997), p. 3 Also available at: [http://unstats.un.org/unsd/publication/SeriesM/SeriesM\\_67rev1E.pdf](http://unstats.un.org/unsd/publication/SeriesM/SeriesM_67rev1E.pdf).

<sup>117</sup> Idem.

<sup>118</sup> Ibid, p. 3.

<sup>119</sup> Almost all countries of the world have a vital registration system, recording vital events such as live births, deaths (including foetal deaths), marriages and divorces.

<sup>120</sup> United Nations, *Designing Household Survey Samples: Practical Guidelines* (New York, 2005), p. 5. Also available at <http://unstats.un.org/unsd/demographic/sources/surveys/Handbook23June05.pdf>

## 5.2 Complaints Data

Baseline data on the extent and nature of discrimination is provided for by what may, *sensu largo*, be called 'complaints data'. Complaints data may come from various sources, such as police crime report files, prosecution files, court case files, and files of various bodies handling complaints, such as equality commissions and ombudsmen. Complaint data typically includes information on the numbers and types of complaints filed with a particular institution. Also other data may be available, such as aggregate profiles of perpetrators and complainants, broken down by variables such as age, gender, nationality and so on. The interlinking of source data from police, prosecutor and court registers can produce significant additional information, as this allows the tracking down of how many crime reports on discrimination are filed with the police annually (in those countries where discrimination is a criminal offence), how many of these cases are brought to the courts by the prosecutors, and how many of these cases end up with a finding of discrimination.

Complaints data has a serious limitation though, in that it can – even at its best – tell only about *reported* cases of discrimination, while discrimination is an example *par excellence* of an activity that often remains hidden. There are two main reasons for the latter state of affairs: First, there is evidence pointing to the fact that people may not even know it when they are being discriminated against, and cannot therefore be expected to file a complaint in the first place. Many researchers have argued that as a result of increased legislative and other measures in this area, discrimination is increasingly taking subtle and less easily recognizable forms.<sup>121</sup> Second, even where a person is aware of the fact that she has been discriminated against, she may have various reasons for not pressing charges or otherwise coming forward with a complaint.

Data on complaints (*sensu largo*) may be available also through the work of other than public authorities. Many organisations operating in an EU country have established telephone hotlines or other means by which they provide advice and assistance to victims of discrimination. These organisations usually keep records of the cases that have been reported to them and of the course of action taken. The advantage of such organisations is that they are often locally based and are easily accessible i.e. there is a low threshold for contacting them.<sup>122</sup>

## 5.3. Surveys

Surveys refer to studies that by means of mail surveys, telephone interviews or face-to-face interviews gather information on the experiences, habits, opinions, attitudes and/or social and economic situation of a group of people. Recent additions to the technological-methodological repertoire include web-based (online) surveys and e-mail surveys.<sup>123</sup> Survey methods are widely used and the related methods well refined. Victim surveys and self-report surveys constitute perhaps the most important survey types from the point of view of collecting data in relation to discrimination.

*Victim surveys.* Victim surveys are an excellent means of exposing hidden criminality, as the data is collected directly from the persons who are at a particular danger of being discriminated against. Victim surveys provide a good overview of the extent and nature of experienced discrimination. Surveys can provide detailed information, such as information relating to the experienced obstacles in access to justice, and the effects, psychological and other, of discrimination. It should be underlined that victim surveys can only reveal the experiences of the respondents: the

<sup>121</sup> See e.g. National Research Council, *Measuring Racial Discrimination: Panel on Methods for Assessing Discrimination* (Washington DC: National Academies press, 2004), p. 71.

<sup>122</sup> Triesscheijn, Cyril, *Multi agency monitoring of discrimination; factors and actors in the local setting*. A paper for the Stockholm International Forum Combating Intolerance, 29-30 January, 2001.

<sup>123</sup> See Duffy, Bobby et al 'Comparing data from online and face-to-face surveys' *International Journal of Market Research* Vol. 47, Issue 6, p. 616 and the references cited therein.

actual prevalence of discrimination may be higher than indicated by the responses, as the respondents may not always be aware of the fact they have been discriminated against; on the other hand, the prevalence of discrimination may be lower than indicated by the responses, as individuals may sometimes erroneously attribute a negative event to discrimination even if discrimination played no part in it. In any case, results from victim surveys have proved to be very instrumental for putting the issue of discrimination on the political agenda, and are among the most common forms of research carried out in relation to discrimination.

*Self-report surveys.* Self-report surveys in the context of anti-discrimination work are used to chart the prevalence and type of (i) prejudices and stereotypes or (ii) questionable behaviour within a specific population. These surveys can be targeted at the general population at a local, regional, national or e.g. European level, or be targeted at a specific group. Targeted self-report surveys usually study key professional groups (so-called gatekeeper groups) in order to measure the prevalence of stereotypes, prejudices and/or engagement in questionable practices. A benefit of attitude surveys is that they can be used to measure attitudes towards all groups vulnerable to discrimination. Attitude surveys, when conducted at regular intervals, give information on changes in attitudes, and can thus function as an early warning system. While there is no one-to-one correspondence between negative attitudes and discriminatory behaviour, the two are positively correlated, and it is fair to say that increased social acceptability of prejudices signals a danger of increasing levels of discrimination.

## 5.4. Situation Testing

Situation testing<sup>124</sup> is a form of social experiment in a real life situation. In situation testing, two or more individuals are matched for all relevant characteristics other than the one that is expected to lead to discrimination, e.g. disability or ethnic origin.<sup>125</sup> The testers apply for a job, an apartment or some other good and the outcomes and the treatment they receive are closely monitored.<sup>126</sup> This kind of paired testing allows for good control over different causal variables, diminishing the possibility that differences in treatment are caused by variables that the researcher cannot observe.<sup>127</sup> the direct and unequivocal measurement leaves no room for other explanations.<sup>128</sup> Situation testing has been used to study discrimination in employment, renter- and owner-occupied housing, homeowner's insurance, mortgage lending, car sales, access to hotels, access to banks, access to service establishments, access to taxicab service, access to health club membership, access to bars and access to discos.<sup>129</sup> Of the EU countries, the method has been applied at least in Britain, France, Germany, Italy, Spain and the Netherlands. The International Labour Organisation (ILO) has endorsed its use. The method was originally developed as a tool for checking compliance with the law, and may be used as a means of evaluating the effectiveness of anti-discrimination legislation.<sup>130</sup> The method is already very well developed and has been used for more than 35 years.<sup>131</sup>

<sup>124</sup> Also referred to as 'audit testing', 'discrimination testing', 'in-situ verification testing' and 'paired testing'.

<sup>125</sup> Fix, Michael and Margery Turner 'Testing for Discrimination: The Case for a National Report Card' *Civil Rights Journal*, Fall 1999.

<sup>126</sup> Idem.

<sup>127</sup> Idem.

<sup>128</sup> Bovenkerk, Frank 'The Research Methodology' in de Beijl, Roger Zegers (ed) *Documenting discrimination against migrant workers in the labour market; A comparative study of four European countries* (Geneva: International Labour Office, 2000), p. 17.

<sup>129</sup> Foster, Angela Williams et al, *Measuring Housing Discrimination in a National Study: Report of a Workshop* (Washington DC: National Academy Press, 2002), 9; Riach, P.A. – J. Rich 'Field Experiments of Discrimination in the Market Place' *The Economic Journal* 112, November 2002, p. F515; Fix, Michael and Margery Turner 'Testing for Discrimination: The Case for a National Report Card' *Civil Rights Journal*, Fall 1999; Bovenkerk (ibid), p. 13.

<sup>130</sup> Colectivo IOE, *Labour market discrimination against migrant workers in Spain*, International Migration Papers 9 (Geneva: International Labour Office, 1995).

<sup>131</sup> Riach, P.A. – J. Rich 'Field Experiments of Discrimination in the Market Place' *The Economic Journal* 112, November 2002, p. F515.

Situation testing methodology has numerous advantages. While it has mainly been applied in order to study and prove discrimination on the basis of ethnicity or gender, the method is likely applicable for the studying of discrimination on the basis of disability, sexual orientation, age and religion as well.<sup>132</sup> This is important, as it is very difficult to measure discrimination on these other grounds by any other means. Situation testing is a particularly valuable tool also because it can be used to expose well-concealed forms of discrimination. Results of testing experiments are also often very generalizable, i.e. one can draw conclusions on the basis of such experiments about the actual levels of discrimination in a society.<sup>133</sup>

There are few drawbacks involved in using situation testing. One of the limitations of the method is that it is applicable primarily with respect to studying recruitment policies or access to services. It is difficult to see how the method could be used to reveal wage gaps or unequal treatment with respect to promotion, as the examination of these issues would require the conclusion of an employment contract, and is therefore beyond the limits of an experiment. There has been some debate over the ethical acceptability of the method, but the conclusion appears warranted that there are no major problems in that respect, especially insofar as minimal inconvenience is caused to those involved in the study.<sup>134</sup> The use of situation testing has been widely endorsed and has been found useful. Riach and Rich conclude that discrimination testing has produced 'compelling evidence of enduring and pervasive discrimination in employment' in the USA, where net discrimination rate against Blacks, Asians and Arabs has never been found to be under 25%.<sup>135</sup> According to Bovenkerk, situation testing has 'exerted a strong influence on the development and subsequent refinement of public policies aimed at counteracting illegal, unethical discrimination'.<sup>136</sup>

## 5.5. Conclusions

Statistical data emanating from official data sources and from research provide important information, on the societal level, with regard to the extent to which equal treatment laws are complied with in practice and what kind of impact they are having on the situation of groups vulnerable to discrimination. This is the kind of information that international treaty bodies and monitoring organisations have been for years urging states to collect. Indeed, many if not most Member States appear to produce some information in this respect: Typically, they collect and publish data on the number of discrimination complaints filed with the police or some other competent body, and occasionally conduct victim surveys and/or opinion surveys.<sup>137</sup> It however appears to be the case that such data is collated and published most often with respect to ethnic discrimination, and to a lesser extent with respect to age discrimination and discrimination on the basis of disability. Discrimination on the basis of religion and sexual orientation appear to be the least frequently studied areas. There is also a clear lack of even baseline data on the size and socio-economic position of the different groups. In effect, it must be concluded that also in this context the collection of data is a seriously underutilised opportunity to secure and promote the realisation of equal treatment in practice.

<sup>132</sup> Ibid, pp. 484, 485, 505 ff, 515.

<sup>133</sup> National Research Council, *Measuring Racial Discrimination*. Panel on Methods for Assessing Discrimination (Washington DC: National Academies press, 2004), p.72.

<sup>134</sup> Riach, P.A. & J. Rich 'Deceptive Field Experiments of Discrimination: Are they Ethical?' *Kyklos*, Vol. 57, 2004, pp. 457-470.

<sup>135</sup> Riach, P.A. – J. Rich 'Field Experiments of Discrimination in the Market Place' *The Economic Journal* 112, November 2002, p. F499.

<sup>136</sup> Bovenkerk, Frank 'The Research Methodology' in de Beijl, Roger Zegers (ed), *Documenting discrimination against migrant workers in the labour market - A comparative study of four European countries* (Geneva: International Labour Office, 2000), p. 39.

<sup>137</sup> See the reports, country-specific and general, issued by the international treaty bodies and bodies such as the EUMC and ECRI, and also the periodic country reports submitted to the treaty bodies by the states parties. These sources of information often sum up the latest information that is available with respect to the different countries.

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## Part IV

# The risks, constraints and challenges involved in data collection

It is often said that information is power. The preceding chapters have explored the many ways in which data can empower those that aspire to make equal treatment a reality. But theoretically speaking, just as data can be used for purposes that are beneficial and legitimate, so can it be used for purposes that are not. Examples of past misuse of sensitive data have shown that there are real and significant dangers involved in collection of sensitive data. On that basis many feel that sensitive data should not be collected. Many also claim that data collection runs against privacy laws and data protection laws.

It should however be underlined that it is not the content of the data that poses a risk; it is the context and purpose of its use that matters. Thus there is a need to reconcile the legitimate need for data with the equally legitimate need to protect that data from being used for wrongful purposes. This is exactly what international and national laws relating to the right to privacy and the protection of data do; they attempt to find an appropriate balance between the different needs.

Accordingly, this part refers to the past and current experiences from misuse of data (chapter 6), and analyses the limits and conditions that privacy and data protection laws impose upon data collection operations (chapter 7). While the data protection law in particular has a major impact on data collection, it is not the only piece of law to do so. One of the most hotly debated issues in relation to data collection is the question how people can be classified into particular groups. Obviously, the reliability and objectives of any data collection are seriously compromised if people assign themselves - or are assigned by others - into groups on an un-standardised basis. Some guidelines are needed in this respect, and thus the report examines, as a last issue, what kind of a bearing the international human rights law has on this issue (chapter 8).

## 6. Past and present misuse of data

That the concept of collecting sensitive data raises many concerns and fears is understandable in light of the many historical and some contemporary examples related to misuse of data in the context of human rights abuses. There have been several well-known situations where population data systems have been used, or attempted or planned to be used, to target vulnerable groups within the population. Selzer and Anderson have identified 17 cases where population data systems have either been used to target individuals or population subgroups, or where such efforts were initiated, or where such targeting has been seriously contemplated.<sup>138</sup> Examples include the extermination and forced migration of Jews, Roma and other groups during the Second World War in altogether six European countries, internment and forced migration of Japanese Americans during 1941-1945, apartheid in South Africa, the Cultural Revolution in China and the 1994 Rwandan genocide.<sup>139</sup>

The research shows that the misuse or attempted misuse of population data have occurred in both totalitarian and democratic countries, although in democratic societies such misuses tend to occur primarily in times of national stress.<sup>140</sup> The targeted groups have included racial and ethnic minorities, linguistic minorities, indigenous populations, subjected populations such as the African, 'Indian' and 'Coloured' populations in South Africa, and those from a 'wrong' social class. In terms of geographical scope, all regions of the world are represented, except Latin America and Western Asia, though the latter factor is possibly attributable to the lack of research concerning these areas. While almost all of the examples of misuse or suspected misuse of population data systems are

<sup>138</sup> Selzer, William 'On the use of Population Data Systems to Target Vulnerable Population Subgroups for Human Rights Abuses' *Coyuntura Social* No. 30, 2005.

<sup>139</sup> Idem. See also Selzer, William – Margo Anderson 'After Pearl Harbor: The Proper Role of Population Data Systems in Time of War. 2000'. A research paper available at: <http://www.uwm.edu/~margo/govstat/newpaa.pdf>

<sup>140</sup> Idem.



historical, the use or contemplated use of surveys and administrative data to investigate and prosecute suspected terrorists after 9/11 in the United States is also included in the list of the 17 cases.<sup>141</sup>

Another contemporary example of a controversial practice comes from Cyprus, even if it is clearly of different nature than some of the historical cases referred to above. In November 2004 the Cyprus Ministry of Education issued, upon the request of immigration authorities, a circular requesting all headmasters of primary and secondary schools to notify the immigration authorities about the foreign children enrolled and the contact details of their parents, in order to investigate whether the latter reside lawfully in the country. The Cyprus Ombudsman investigated the matter. The Ombudsman's report of April 12, 2005 refers to international and national laws guaranteeing the right to education and prohibiting discrimination in education and in the enjoyment of rights. The Ombudsman stated that although the circular did not expressly deny access to education by foreign children, in practice it prevents a section of immigrants from enrolling their children in school for fear of prosecution by the immigration authorities. The Ombudsman consequently recommended the circular to be withdrawn.

The above examples advise caution in relation to some forms of data collection, particularly those that lead to the maintenance of extensive datasets that contain data on nationality, ethnicity, religion and their possible proxies such as language and place of birth. The existence of such datasets may pose a threat in a situation where things go seriously wrong and some group that wishes to target some other groups for abusive purposes has been able to wield power, and where the ordinary legislative and organisational safeguards for the protection of human rights are no longer capable of precluding or stopping the abuse.

But a number of other viewpoints also merit consideration: First, the abusive targeting of specific individuals or groups does not depend on the existence of registers containing sensitive information to take place: the perpetrators can use other, though usually more laborious, means for that purpose. This means that the absence of sensitive data in the population data systems does not guarantee the absence of human rights violations. Second, many forms of data collection on discrimination do not entail the collection of personal or sensitive data, and many of those that do, do not lead to the maintenance of the kind of massive databases that could be used for the kind of abusive purposes that were described above. Third, almost all countries of the world, including all EU countries, already have extensive datasets containing personal data, including such 'proxy indicators' for ethnicity as nationality, mother tongue and place of birth, and it is not likely that they are going to dispose of the existing data and cease collecting the data, as they are essential for several major policy purposes. It should also be noted that many countries in the world, including USA, Canada, UK and many Central and Eastern European countries, already gather data directly on racial, ethnic or national origin through their censuses. Instead of focussing on the 'added risk' of introducing new sensitive data to national databases, priority should therefore be given to the securing of confidentiality of the existing and future data. Fourth, the very practices discussed above, in particular those that took place during the Second World War, led to the establishment of the modern human rights regime with its legal and organisational safeguards against abuse. In addition, modern data protection technology provides important means by which any data set can be protected from unauthorized access and by which the data can be rendered useless (by way of obscuring or masking individual data) even if accessed by unauthorized third parties.<sup>142</sup> In effect, though some concerns still exist and though no system can be entirely watertight, it should be recognised that there is a qualitative difference between the present and the past situations in this regard.

At the end of the day, given that (i) there is a need to facilitate and engage in data collection to better be able to combat discrimination, and (ii) that there is a need to minimise the threat of abuse of the data, even if the risk

<sup>141</sup> Idem.

<sup>142</sup> It must however equally be kept in mind that also the techniques used to gain unauthorised access to such data and to link anonymised data to specific identifiable individuals (re-identification of data) are constantly developing as well.

cannot be expected to emerge but in exceptional circumstances, there is a need to find a working balance between these two legitimate interests. International, European and national laws on the protection of privacy and on the protection of personal data aim to strike that balance, and will therefore be explored in the following.

## 7. Protection of the right to privacy and the right to protection of data

### 7.1. Background

At the core of the right to privacy are the liberal notion of freedom and the idea of an autonomous individual who is absolutely sovereign over herself and of all her actions that do not interfere with others.<sup>143</sup> There has been a certain evolution in the development of the right to privacy, as this right was first framed as encompassing the protection of the home, the family, and secrecy of correspondence, while eventually the protection has come to cover secrecy of telecommunications and the general protection of personal data. The core international human rights instruments that protect the right to privacy and apply with respect to the EU countries consist first of all of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the UN Covenant on Civil and Political Rights (ICCPR).

Concerns about the potential effect of automatic data processing upon the right to privacy began to grow, both in national and international circles, in the late 1960s and early 1970s.<sup>144</sup> The new data processing power of computer technology clearly raised problems that could not be adequately dealt with by a general right to privacy.<sup>145</sup> Beginning from the 70's some European countries, particularly Germany and France, were developing their own distinctive approaches to data protection matters. The first general law on data protection was adopted in 1973 by Sweden. In 1983, the German constitutional court gave a landmark decision in which it held that all processing of personal data (in that case: census data) is an intrusion of the right on informational self-determination (*informationelle selbstbestimmung*), and therefore needs specific justification.<sup>146</sup> On the international level, the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was adopted in 1981. The EC Data Protection Directive was adopted in 1995.<sup>147</sup>

The international instruments and the national data protection laws regulate the manner in which information can be collected, registered, used and disseminated. Only personal information, that is information relating to identified or identifiable individual natural persons, is usually covered by data protection laws.<sup>148</sup>

A particular challenge for any attempt to analyse the concrete implications of the international and national instruments relating to data protection and the right to privacy arises from the fact that they often take the form of framework instruments. Instead of setting down in casuistic fashion detailed provisions on the processing of personal information, they tend to set down rather diffusely formulated, general rules.<sup>149</sup> This, coupled with the almost complete absence of legal analyses or case law relating to these considerations in the context of collecting data on discrimination, has necessitated a thorough and detailed examination of these issues in this report.

<sup>143</sup> See Nowak, Manfred 'U.N. Covenant on Civil and Political Rights: CCPR Commentary' (Kehl: Engel, 1993), p. 287.

<sup>144</sup> Michael, James, *Privacy and Human Rights* (Hampshire: Dartmouth, 1994), p. 32.

<sup>145</sup> Bainbridge, David, *EC Data Protection Directive* (London: Butterworths, 1996), p. 14.

<sup>146</sup> Albers, Marion, *Informationelle Selbstbestimmung*. Nomos-Verlag, 1. Auflage (Baden-Baden, 2005).

<sup>147</sup> European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281 of 23.11.1995.

<sup>148</sup> Bainbridge, David, *EC Data Protection Directive* (London: Butterworths, 1996), p. 2.

<sup>149</sup> See *ibid*, p. 3.

## 7.2. Identification of Possible Problem Areas

The collection and other processing of data in relation to discrimination is carried out for the purpose of being able to draw conclusions at a general, collective level, not at an individual level.<sup>150</sup> Statistics aim at providing aggregate results with regard to a given population or a given phenomenon. But the fact that statistics, as they are released, regularly do not disclose information with regard to any particular individual,<sup>151</sup> does not mean that the carrying out of statistical operations would not engage the rules that relate to the protection of personal data. This is because statistics are based on microdata, typically personal data.<sup>152</sup>

As the data protection laws apply only where processing of personal data is involved, an elementary distinction has been made between those operations that involve processing of personal data and those that do not. Typically, the latter group includes most forms of discrimination testing, anonymous surveys and anonymous workplace monitoring, although the design of each particular activity has to be carefully assessed to examine whether personal data will be processed at any stage of the operation. Generally, these operations do not engage data protection laws, except in those rare instances where the published (anonymised) results of these activities make it possible to identify data relating to particular individuals by some indirect means. As the avoidance of the latter situation is simply a matter of sound planning and carrying out of the activities involved, this exception will not be further examined here.

Many other forms of data collection however require the processing of personal data and therefore also engage data protection laws. These include the collection of data through censuses or non-anonymous workplace or service delivery monitoring, and the collection of data for the purposes of various kinds of administrative records maintained by central or local authorities or e.g. schools. While sample survey data are generally rendered anonymous at an early stage, the conducting of surveys usually requires processing of personal data for the purposes of constructing the sample frame and/or at the input stage, and therefore some parts of the process may also engage data protection laws. But once the data are rendered anonymous, e.g. when they are released in an aggregate form, they do not, as a rule, constitute personal data anymore and are therefore not concerned with by the data protection laws.

It should be noted that data collection activity, irrespective of whether it involves collection of personal data and whether it thus comes under data protection laws, has to respect the ordinary law of the country concerned. For an example, the mode of data collection in itself may in extreme cases run against the law. Overly persistent or repeated attempts to get an interview, foot-in-the-door techniques etc – basically any refusal to take ‘no’ for an answer – may constitute an infringement of the right to respect for home. This concern however arises only in relation to highly irregular data collection techniques. Most data collection, especially in the area of measuring discrimination, is carried out either by a statistical agency, a specialized body, a research institute, or a research team led by a university department, which makes the deployment of such techniques highly unlikely. In addition, most countries have criminal sanctions against intrusion of privacy and home, and thereby provide protection from such activities.

<sup>150</sup> An exception to this is of course the processing of data for the purposes of providing reasonable accommodation. Also the implementation of positive action schemes often requires the using of data at the level of making decisions that concern specific individuals.

<sup>151</sup> A key element of data protection laws and laws regulating statistical activities are rules and principles that prohibit and prevent the connecting of a particular – in itself ‘anonymous’ – data to any particular individual through direct or indirect means (‘re-identification’).

<sup>152</sup> See e.g. Explanatory memorandum to the Council of Europe Recommendation No. R(97) 18 on the protection of personal data collected and processed for statistical purposes (30 September 1997).

## 7.3. Data Protection

### 7.3.1. EU Data Protection Directive

The EC Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (henceforth Data Protection Directive) was adopted on October 24, 1995. Member States of the EU were given until October 24, 1998 to bring their respective legal systems into conformity with the provisions of the Directive.<sup>153</sup> By that time, only four countries had done so. As of January 2006, all Member States, including all new Member States, had by and large transposed the Directive. The Directive has in fact been very influential, as almost all Member States adopted new data protection laws to transpose the Directive.

The Directive is a remarkably complex piece of law. It has 34 operative paragraphs and altogether 72 recitals, and a structure where a rule is almost always followed by a number of exceptions, limitations and possibilities for derogation, making a comprehensive analysis challenging. These challenges are compounded by the fact that while the Directive aims at 'equivalent protection resulting from the approximation of national laws', it also recognizes that Member States are left with a 'margin for manoeuvre', and anticipates that 'disparities could arise in the implementation of the Directive'.<sup>154</sup> These anticipations have also materialised in practice, as there are marked substantive differences in the ways in which the Member States have interpreted some of the provisions of the Directive, in addition to which not all of them have legislation that is fully in line with all of the provisions of the Directive.<sup>155</sup>

Article 2(a) of the Directive defines 'personal data':

'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

The definition of data as 'any information' is wide and extends to images and other non-textual information.<sup>156</sup> There are two conditions for information to be regarded as personal: the data must relate to or concern a natural person, and this person must be identifiable either directly or through some indirect means. According to recital 26, 'to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person'.<sup>157</sup> The Directive does not apply to data that has been rendered anonymous in such a way that the data subjects are no longer identifiable.

<sup>153</sup> Article 32(1).

<sup>154</sup> Recital 9 of the Directive.

<sup>155</sup> Commission of the European Communities, *First Report on the Implementation of the Data Protection Directive* (95/46/EC). COM (2003) 265 final. See also Korff, Douwe, *EC Study on Implementation of Data Protection Directive: Comparative Summary of National Laws*. September 2002, available at: [http://ec.europa.eu/justice\\_home/fsj/privacy/docs/lawreport/consultation/univessex-comparativestudy\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/lawreport/consultation/univessex-comparativestudy_en.pdf) (visited 1 may 2006).

<sup>156</sup> Recital 14 of the Directive.

<sup>157</sup> The recital calls for an assessment of the probability with which either the controller of the data or any third person could use the available range of techniques, such as the combination of various sources, to identify the data subjects. While this probably does not relate to a situation where a computer hacker is able to combine multiple sources of data in an completely unexpected way, the threshold for determining that a particular set of data is to be regarded as personal and thus within the purview of the Directive is not particularly low either. If the results of e.g. anonymous monitoring, survey or official statistics make possible the identification of individuals even though the results have been rendered anonymous, it comes within the purview of the Directive.

Article 2(b) defines what is meant by processing of personal data:

'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.

The definition of processing is wide, which is compounded by the fact that the list of examples is not exhaustive. The Directive applies to both public and private sectors. It does not apply to the processing of personal data in the course of processing operations concerning public security, defence and the activities of the state in area of criminal law.<sup>158</sup> Keeping of manual files, whether of employees or customers, comes within the ambit of the Directive.<sup>159</sup>

The following discussion concerns the provisions of the Directive that lay down the rules on the lawfulness of the processing of sensitive personal data. Many of these provisions give Member States a significant amount of leeway in terms of deciding how the rules are to be implemented in national legislation. With a view to this, it should be noted that Article 5 of the Directive expressly provides that Member States shall 'determine more precisely the conditions under which the processing of personal data is lawful'.

The Data Protection Directive sets out a number of requirements that must be met when data is being processed, requirements which are considerably stricter in the case of 'sensitive' data, which includes personal data revealing the racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and health or sex life. In summary, any processing (including collection) of any sort of personal data has to comply with the conditions of Article 6. One of them is that the data are processed 'lawfully'. The conditions for lawfulness are specified in Article 7 (applicable to any sort of data other than sensitive data) and Article 8 (for sensitive data), which is stricter. Thus the collection of sensitive data has to satisfy both Article 6 and Article 8. These requirements are set out in detail below.

Article 6 of the Directive provides:

Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

First of all, all data processing operations must be 'lawful'. The conditions for legitimacy of all data processing are set out in Article 7, and for sensitive data in Article 8 (see below). Secondly, all personal data must be processed 'fairly'. Fairness is somewhat less obvious in meaning but is potentially a broader notion. At a very general level, the notion of fairness means that, in striving to achieve their data-processing goals, data controllers must take account of the interests and reasonable expectations of data subjects.<sup>160</sup> The notion of fairness brings with it requirements of balance and proportionality: the collection and further processing of data must be carried out in a manner that does not in the circumstances intrude unreasonably upon the data subject's privacy nor interfere unreasonably with their autonomy and integrity.<sup>161</sup> The requirement of fairness is also seen to imply that a person must not be unduly pressured into supplying data on herself to a data controller or to accept that the data are used by the

<sup>158</sup> Article 3(2).

<sup>159</sup> See Article 3(1).

<sup>160</sup> Bygrave, Lee A., *Data Protection Law: Approaching its Rationale, Logic and Limits* (The Hague: Kluwer, 2002), p. 58.

<sup>161</sup> *Idem*.

latter for particular purposes.<sup>162</sup> The requirement of fairness has also been seen to favour, as a point of departure, an approach where personal data is collected directly from data subjects.<sup>163</sup> Fairness also implies that where data subjects have a right to be informed of a particular data processing activity, that they are informed in such a language and in such a manner that is intelligible for them, a condition which is important especially for foreigners and people with certain disabilities.

- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

This requirement, often called the ‘purpose-specification principle’, is really a cluster of four principles: 1) the purposes for which data are collected shall be specified; 2) these purposes must be explicit, i.e. fully and clearly expressed; 3) the purposes must be legitimate; and 4) the purposes for which data are further processed shall not be incompatible with the purposes for which the data were first collected. Importantly, the subsection expressly recognizes that the further processing of data for statistical or scientific purposes is not considered incompatible, on the condition that ‘appropriate safeguards’ are in place. Such safeguards may consist for instance of the following measures: the legal requirement that the data must not be used to take decisions on data subjects; the obligation to notify the national data protection authority or an ethics committee of the planned operations; obligation to obtain prior authorisation from the national data protection authority; the requirement that a particular balance test be met; the requirement that the data should be pseudonymised or anonymised whenever possible.<sup>164</sup> It should be pointed out that some Member States have been found to provide too weak safeguards or none at all in this respect.<sup>165</sup> It should also be noted that, in pursuance of Article 8 of the Directive, further processing of *sensitive* data for statistical or scientific purposes must *in addition* either (i) take place on the basis of consent of the data subjects, or (ii) be considered to serve a ‘substantial public interest’.

- (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

Sub-paragraph (c) lays down the principle of proportionality, which specifies that only those personal data may be collected that are necessary to achieve the purposes of the data collection operation. In so far as doing so does not put the objectives of a particular operation in jeopardy, the controller should opt for secondary rather than primary data collection,<sup>166</sup> anonymous rather than nominal surveys, sampling rather than full-scale surveys, and for

<sup>162</sup> Bygrave, Lee A., *Data Protection Law: Approaching its Rationale, Logic and Limits* (The Hague: Kluwer, 2002), p. 58.

<sup>163</sup> Ibid, p. 59. This principle is also supported by Article 9.2. of the Council of Europe *Recommendation No. R(97) 18 on the protection of personal data collected and processed for statistical purposes*. The Recommendation, as interpreted in its explanatory memorandum, actually goes as far as to require that sensitive data may not be collected by any other means than by collecting it directly from the data subjects. See p. 58 of the explanatory memorandum.

<sup>164</sup> The list of measures is only exemplary, and is without prejudice to an assessment as to whether any one of the individual measures would by itself, or in combination with any other measure, suffice to meet the requirements posed by the Directive. The list describes some of the measures adopted by the EU Member States in this regard as they are summed up e.g. in Korff, Douwe, *EC Study on Implementation of Data Protection Directive: Comparative Summary of National Laws*. September 2002, available at: [http://ec.europa.eu/justice\\_home/fsj/privacy/docs/lawreport/consultation/univessex-comparativestudy\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/lawreport/consultation/univessex-comparativestudy_en.pdf) (visited 1 May 2006).

<sup>165</sup> Ibid, p. 66 ff.

<sup>166</sup> Primary data collection refers to ‘original’ collection of data, while secondary data collection refers to the usage of some dataset consisting of data that has already been collected (see section 1.2. of this report). It should especially be noted that ‘secondary data collection’ is not the same as ‘indirect primary data collection’ as the latter term refers to the collection of data from other persons than the data subject herself.

voluntary rather than compulsory surveys.<sup>167</sup> The requirement of adequacy may be seen to favour, as a point of departure, data collection methods that proceed from the basis of self-classification; however, if the utilisation of the self-classification method leads in a particular instance to a situation where a high number of people choose not to classify themselves (e.g. in terms of ethnic origin), or categorize themselves along lines that clearly do not match the 'objective reality', methods employing third-party identification may be applicable as they may in fact better meet the requirement of adequacy of data.<sup>168</sup>

- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

All reasonable steps should be taken to ensure that the data is not factually misleading. In general it can be assumed that data that has been obtained directly from the data subject is accurate.<sup>169</sup> Where data is processed for other than just statistical purposes, in particular where it is processed for the purposes of making decisions at an individual level (e.g. when an employer offers training to particular persons, linked to an equality ground, in the course of a positive action programme), every reasonable step must be taken to ensure accuracy of the data.

- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

Subparagraph (e) is a logical corollary to subparagraph (c). Both are directed at ensuring minimality of personal data processing, the latter covering the stage of data collection and the former the subsequent stages. Personal data are to be erased or made anonymous once they are no longer required for the purposes for which they have been kept.<sup>170</sup> Where the design of a scientific or statistical project so requires, the necessary identification data may be retained, provided that specific, 'appropriate' domestic safeguards are in place. Where-ever possible, controllers of data should use Privacy-Enhancing Technologies.<sup>171</sup>

These requirements provide essential guidance on the kinds of data that may be collected and on the way in which the data may be collected. Under Article 6(2) of the Directive, it is for the controller to ensure that the quality principles are complied with.

Articles 7 and 8 lay down the criteria that make data processing legitimate, with the latter applying where processing of sensitive data is at stake, and the former where processing of all other types of personal data is at stake. Article 7 provides:

Member States shall provide that personal data may be processed only if:

- (a) the data subject has unambiguously given his consent; or

<sup>167</sup> See Council of Europe Recommendation No. R(97) 18 on the protection of personal data collected and processed for statistical purposes and the explanatory memorandum, p. 62.

<sup>168</sup> Commission for Racial Equality, *Ethnic Monitoring: A guide for public authorities* (London: CRE 2002), p. 69.

<sup>169</sup> *Idem*.

<sup>170</sup> Bygrave, Lee A., *Data Protection Law: Approaching its Rationale, Logic and Limits* (The Hague: Kluwer, 2002), p. 60.

<sup>171</sup> On the concept of Privacy-Enhancing Technologies, see e.g. Borking, John 'Privacy-Enhancing Technologies (PET) - Darf es ein Bitchen weniger sein?' *Datenschutz und Datensicherheit*, Volume 25, Number 10, October 2001.

- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
- (d) processing is necessary in order to protect the vital interests of the data subject; or
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

It is enough that the planned data processing activity involving the processing of personal data meets one of the criteria listed above. It is likely that most operations that are related to collecting data on discrimination are justified either under (a), (c), (e), or (f). If the operation however involves also the processing of sensitive data, as is often the case, the more stringent conditions laid down in Article 8 must be met instead.

Article 8(1) contains a *prima facie* prohibition of processing of sensitive data (called ‘special categories of data’ in the language of the Directive):

Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.

The categories listed as ‘special categories of data’ differ somewhat from the categories covered by the two equal treatment Directives, apart from that both instruments cover racial or ethnic origin in the same terms. It appears that the notions used in Article 8(1) are to be interpreted broadly rather than narrowly.<sup>172</sup> Data concerning sexual orientation is quite clearly covered by the term ‘data concerning sex life’, and ‘data concerning health’ is likely to be interpreted to cover data concerning disability. ‘Philosophical beliefs’, together with ‘political opinions’, probably comes quite close to what is meant by ‘belief’ in the sense in which the term is used in the Employment Equality Directive. It should be noted that the use of the verb ‘reveal’ in the Directive indicates that data are to be considered sensitive even if they only indirectly indicate racial or ethnic origin or religion or belief. For instance, an individual’s name and place of birth, or for instance her photograph, may reveal ethnic origin. Age is not classified as sensitive data.

Article 8(2) lays down the exceptions to Article 8(1). It sets out five conditions, one or more of which must be satisfied in order to legitimise the processing of sensitive personal data. Article 8(2) provides:

Paragraph 1 shall not apply where:

- (a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject’s giving his consent; or

<sup>172</sup> The Article 8-related recital 33 of the Directive does not speak of ‘sensitive data’ or ‘special categories of data’, but more broadly of ‘data which are capable by their nature of infringing fundamental freedoms or privacy’, forming therefore one test which can be applied in determining the scope of the notions mentioned in Article 8(1). For instance, as it is known that people with disabilities are frequently treated unequally, there are grounds for arguing that the notion of ‘health’, as it is used in the Data Protection Directive, encompasses disability.



Article 2(h) of the Directive defines ‘the data subject’s consent’ as ‘any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.’ The requirement that the giving of consent must be specific and explicit means that such an indication can never be simply assumed, but the consent must have been fully and clearly expressed.<sup>173</sup> The requirement that the consent has to be ‘freely given’ means that persons involved must be given a real choice and no penalty may be imposed in case one decides not to co-operate: individuals from whom information is requested must not be subject to any kind of duress, influence or pressure, whether direct or indirect.<sup>174</sup> The condition that the consent given must be ‘informed’ means that it must be clear to the person whose consent is being sought what exactly she is consenting to. The party requesting the sensitive data must make it clear that disclosure of sensitive information is not obligatory, and must inform the data subject of the purposes for which the information is being requested, and for what kind of use the information will be put and if it will be disclosed to third parties.

The paragraph leaves it to each Member State to decide whether it considers that the giving of consent constitutes a sufficient condition for justifying the processing of sensitive data. This is an important restriction, as opinions in the EU countries are mixed in this respect,<sup>175</sup> and as Article 8(2)(a) is in practice the most important paragraph justifying the collection of data in relation to discrimination in most of the EU countries.

(b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards; or

Employers have several obligations in relation to equal treatment law that may call for the processing of sensitive data.<sup>176</sup> Processing is however justified only where it is *necessary* for the purposes of carrying out these obligations; it is not enough that the processing of sensitive data is merely *useful* for such purpose. The processing of data in relation to disabled workers clearly meets the necessity test: employers have a legal duty to provide reasonable accommodation, and the carrying out of this obligation in practice often requires collection of pertinent data. Processing of data may also be required where the national law sets positive action duties, such as a quota or a target figure e.g. for employing people with disabilities. Collection of sensitive data may also be necessary in some other circumstances, such as where an employer has to look into a claim that a worker is subjecting another to harassment.

More general diversity monitoring by employers may however not meet the necessity test, as there are also other means by which an employer can strive to ensure that its practices or the criteria and provisions that it has set are not discriminatory. These include anonymous monitoring and beforehand screening of recruitment practices and selection criteria.<sup>177</sup> While non-anonymous monitoring can be seen to facilitate compliance with non-

<sup>173</sup> There is however no requirement that explicit consent be in writing, but explicit oral consent will presumably suffice.

<sup>174</sup> See also Council of Europe *Recommendation No. R(97) 18 on the protection of personal data collected and processed for statistical purposes and the explanatory memorandum*, p. 69.

<sup>175</sup> See Korff, Douwe, *EC Study on Implementation of Data Protection Directive: Comparative Summary of National Laws*. September 2002, available at: [http://ec.europa.eu/justice\\_home/fsj/privacy/docs/lawreport/consultation/univessex-comparativestudy\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/lawreport/consultation/univessex-comparativestudy_en.pdf) (visited 1 May 2006). See also the section on national data protection laws in this report.

<sup>176</sup> It should however be noted that the applicability of this provision is not limited to obligations and rights of employers, but is of wider applicability in the context of employment law. For instance labour inspectorates, in those countries where they exist, may need to process sensitive data to carry out their supervisory functions.

<sup>177</sup> It should be noted that the condition that processing must be ‘necessary’ means that the least intrusive applicable means must be used, i.e. that information cannot reasonably be obtained by any less intrusive means.

discrimination law, it may not, in ordinary circumstances, be deemed strictly necessary for this purpose and is thus not justified under this paragraph.<sup>178</sup>

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or

A key point here is the interpretation of what is meant by ‘vital interests’, as it may have two meanings. ‘Vital’, if understood literally, means something that is necessary for the continuance of life; if understood figuratively, it denotes something that is simply essential or very important.<sup>179</sup> Taking into account the additional requirement that the data subject must be physically or legally incapable of giving her consent, it is submitted that this paragraph is most likely to be applicable only when there is a medical emergency and the worker or another person is at risk of serious harm to her health. Processing of sensitive data in the framework of equal treatment law can seldom if ever be justified under this condition. This is without prejudice to the fact that health professionals may need to collect and store sensitive personal data for purely medical purposes, for instance to register that a patient’s faith prohibits the use of blood transfusions or some other type of treatment.

(d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or

This is an important exception in itself, but does not as such have a bearing on the issues that this study deals with.

(e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.

While it may *prima facie* look like it is of no particular relevance in the context of anti-discrimination law, the first limb of (e) does raise some questions. Many ethnic and religious groups seek to distinguish themselves from others by way of wearing a particular type of clothing: the Roma in some countries wear distinctive clothing, Muslim women typically wear a veil and Sikh men wear turbans. It might be asked whether the wearing of such clothing constitutes an example of ‘manifestly making public’ a person’s ethnic origin or religion.

It should be reiterated that Article 6 of the Directive requires the data to be adequate, accurate and relevant, and the processing itself to be ‘fair’. It is doubtful whether the drawing of inferences on the basis of indirect indicators fully meets these criteria. It may also be argued that the requirement that the data be ‘manifestly made public’ requires a deliberate act on part of the data subject to make the data public, which can only take place where a person can exercise a choice, which arguably is not the case with many religious or ethnic groups, let alone with people who have visible disabilities. On the basis of these considerations it is submitted that the first limb of (e) can only be of very limited applicability in the context of collection of data in relation to discrimination. Most importantly, it is submitted, the first limb of (e) would be unlikely to legitimate such practices as the recording of the number of Roma children in a school on the basis of visible markers of ethnic identification; nor the monitoring by a service provider of the proportion of recipients of services that belong to visible minorities.

<sup>178</sup> Jay, Rosemary – Angus Hamilton, *Data Protection Law and Practice*, Second edition (London: Sweet & Maxwell, 2003), p. 192.

<sup>179</sup> *Ibid*, p. 183.

The second limb of (e) may however be of wider applicability. It allows employers and other data controllers to process sensitive data where it is necessary for the purpose of, or in connection with, legal claims. The Directive does not set any restrictions with regard to the type of legal proceedings that come under (e), meaning that it is reasonable to assume that all types of proceedings, including administrative and settlement proceedings, qualify. Where a court or other competent body has powers to require a data controller to disclose documents or other information for the purposes of finding out whether equal treatment laws have been breached, the necessary collection and processing of data is justified under this subparagraph. A data controller is also allowed to carry out the necessary data collection activities in order to defend its legal rights. It is however less clear whether data controllers are allowed to keep records for monitoring purposes even before a claim has been filed, as a sort of precautionary measure. In this connection it should be noted that the reference to 'establishment' of legal claims is somewhat ambiguous, as it could mean proving the existence of legal claims already applicable or the creation of new legal claims.<sup>180</sup> As the processing must be *necessary* for the defence or establishment of legal *claims*, and given that the exceptions that are made to what are essentially embodiments of human rights must be interpreted narrowly, it is not likely that general workforce diversity monitoring could be justified under this provision in the absence of a formal legal claim, as it is possible to collect the necessary data after a claim has been filed. As concerns monitoring in the context of *recruitment* the contrary conclusion appears warranted, as an employer cannot without adequate data properly defend herself from a potential discrimination claim, and as the *ex post facto* collection of necessary data is hard if not impossible, and as a complete ban on the collection of data would therefore render employers unable to properly defend themselves in the courts.

The above list of situations in which it is permissible to process sensitive data is not exhaustive. Article 8(3) permits health professionals to process sensitive information as part of their everyday business, subject to certain conditions. In addition, Article 8(4) of the Directive provides that

Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority.

Article 8(4) is very important from the point of view of the topic at hand. Processing of sensitive data is allowed under this subparagraph provided that three conditions are met. First, there has to be a 'substantial public interest'. It goes without further argument that the guaranteeing and promotion of equal treatment qualifies as a substantial public interest. Second, the processing of the data must be provided for in national law, or be authorized by the national supervisory organ where it has been granted the necessary powers. Third, suitable safeguards must be in place to protect the rights and freedoms of individuals. This requires the taking of appropriate technical and organisational measures, particularly in order to maintain security of data and thereby to prevent any unauthorized transmission or access to data.<sup>181</sup>

One of the objectives of Article 8(4) is to facilitate scientific research and government statistics, making it legitimate to process and store sensitive data in central population registers, tax registers, census registers and the like. Ethnic monitoring in the UK has been justified under this Article.<sup>182</sup>

It should be reiterated that any data collection, no matter on what grounds it is justified, must respect the qualitative requirements set out in Article 6, including the principle of proportionality.

<sup>180</sup> Ibid, p. 198.

<sup>181</sup> See recitals 34 and 46 of the Directive.

<sup>182</sup> Jay, Rosemary – Angus Hamilton, *Data Protection Law and Practice*, Second edition (London: Sweet & Maxwell, 2003), p. 190 ff.

The Data Protection Directive lays down a number of other important rules, e.g. in relation to data subject's right of access to data (Article 12) and on information to be given to the data subject by the controller of data (Articles 10 and 11). Article 28 requires each Member State to provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted pursuant to the Directive. In effect, there are data protection commissioners or other authorities in all 25 Member States of the European Union.<sup>183</sup>

*Conclusions.* While the Directive contains a *prima facie* prohibition of processing of sensitive data, it also provides for significant and wide exceptions to this main rule. Processing is, first of all, allowed on the basis of the consent of the data subject, unless applicable domestic law otherwise ordains. For those countries that do allow the processing of sensitive data on the basis of consent, this justification is in practice quite likely the most important ground on which data collection in relation to discrimination takes place. Collection of data is also legitimate, even without the consent of the data subjects, in two circumstances: (i) where such data collection is necessary for the establishment, exercise or defence of legal claims, and (ii) where it is otherwise provided for in national law or by the decision of the national supervisory authority.

In effect, it is from the legal point of view possible to collect and process sensitive data obtained through censuses, administrative processes, surveys, workplace monitoring or by other methods in a manner that does not breach the Directive.

The qualitative principles set out in the Data Protection Directive have a major impact for the designing of data collection operations. In so far as doing so does not prejudice the objectives of an operation, the controller should opt for secondary rather than primary data collection, anonymous rather than nominal surveys, sampling rather than full-scale surveys, and for voluntary rather than compulsory surveys. Data the keeping of which is no longer necessary must be disposed of.

### 7.3.2. ETS Convention No. 108

The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS Convention No. 108) is the only international treaty dealing specifically with data protection. Its adoption was a significant achievement, and the Convention is still considered the blueprint for a minimum standard of protection in national law. The Convention entered into force on October 1, 1985. All the EU Member States are parties to this Convention.<sup>184</sup>

Article 3(1) specifies the scope of application of the Convention. The Convention applies to automated personal data files and automatic processing of personal data in the public and private sectors. Three limitations are apparent: First, the Convention concerns only the processing of 'personal data'. Personal data, under Article 2(a) of the Convention, means any information relating to an identified or identifiable individual ('data subject'). The explanatory report to the Convention states that an identifiable person pursuant to Article 2(a) of the Convention is one who can be easily identified.<sup>185</sup> Data that has been rendered anonymous does not fall within the ambit of

<sup>183</sup> For a list of these authorities, see [http://europa.eu.int/comm/justice\\_home/fsj/privacy/nationalcomm/index\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/privacy/nationalcomm/index_en.htm)

<sup>184</sup> Some Member States have issued declarations in relation to the Convention. While the Convention has been criticized for not being adequately clear about which laws apply to transborder flows of data, and for not requiring the setting up of national supervisory authorities (see e.g. Bainbridge 1996, 18ff.), these original weaknesses have now by and large been remedied by the adoption of an Additional Protocol addressing these very issues. Eight of the EU Member States have ratified the Protocol, while the rest of them, with a few exceptions, have signed it (situation as of 1.1. 2006).

<sup>185</sup> Paragraph 28. What is meant by 'easy' is presumably a function not just of technical possibility but also of time and financial resources that identification would be likely to require.

the Convention. Second, the Convention deals primarily with processing and storage of personal data, not data collection practices as such. The only exception to this is Article 5(a) which requires that personal data shall be ‘obtained and processed fairly and lawfully’.<sup>186</sup> Third, the Convention makes a distinction between manual and automated data processing practices to the almost total exclusion of manual (non-automatic) processing.<sup>187</sup>

Article 6, on ‘special categories of data’, is a key provision from the point of view of this study:

Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.

The list of ‘special categories of data’ is not exhaustive, but represents a minimum list. It can be concluded that personal information relating to any of the grounds covered by the two Article 13 Directives are included, with the exception of age.

Data relating to these grounds may only be processed if ‘appropriate safeguards are provided for by the domestic law’. The Convention or the explanatory report on it, do not elaborate upon what is meant by ‘appropriate safeguards’. As the Convention does not deal with the collection of data as such, the main thrust of the provision may thus be characterized as requiring the taking of precautionary measures to prevent and sanction any harmful *usage* of the data and the intentional or unintentional *disclosure* of the data to unauthorized third parties. The requirements arising from Article 6 are not particularly difficult to meet in practice. There are several reasons for this: First, the expression ‘domestic law’ is to be taken in a wide sense, i.e. as not only referring to legislation but also to appropriate or specific regulations or administrative directives, as long as the necessary level of protection is secured.<sup>188</sup> Second, as the qualifier ‘appropriate’ makes clear, States parties are given a margin of freedom in deciding what measures to take, although one must keep in mind that as a requirement arising from a human rights convention, the safeguards provided must be effective. Third, the Convention itself provides for a range of derogations; derogation is possible for instance where it is provided for by the domestic law and constitutes a necessary measure in a democratic society in the interests of, inter alia, suppression of criminal offences or protection of the data subject or the rights and freedoms of others. Suppression of criminal offences may go beyond detection to include at least some elements of prevention.<sup>189</sup>

Under Article 8 of the Convention ‘any person’ shall be enabled to establish the existence of an automated personal data file, to obtain confirmation of whether personal data relating to her are stored in such a file, and to obtain the data and to have it rectified or erased if they have been processed in a way that conflicts with the obligations arising from Articles 5 and 6 of the Convention. These rights of the data subject may be restricted where data processing operations pose no real risks for the data subject concerned, for instance if the data is used for statistical or research purposes, as in these situations the data are presented in aggregate form and stripped of their identifiers.<sup>190</sup>

The core obligations and principles identified above give considerable scope for variation to suit different constitutional and legal systems in their domestic implementation.<sup>191</sup> While some commentators observe that the general obligations are broadly speaking met by states in practice, there is no international supervisory

<sup>186</sup> Emphasis added.

<sup>187</sup> Article 3(2)c of the Convention.

<sup>188</sup> Explanatory report, paragraph 46.

<sup>189</sup> Michael, James, *Privacy and Human Rights*, (Hampshire: Dartmouth, 1994), p.137.

<sup>190</sup> Explanatory report, paragraph 59.

<sup>191</sup> Michael, James, *Privacy and Human Rights* (Hampshire: Dartmouth, 1994), p. 35.

mechanism to ensure that this is always the case.<sup>192</sup> Consequently, significant differences in the levels of protection have remained.<sup>193</sup> The elimination of these differences was one of the key motives for the drafting and adoption of the EU Data Protection Directive.<sup>194</sup>

*Implications for collecting data in relation to discrimination.* The ETS Convention No. 108 requires that appropriate safeguards are in place to render the processing of sensitive data legitimate. On a general level, given that all EU Member States have adopted both legal and organisational safeguards, by means of adopting laws on data protection and by means of setting up national data protection authorities, the general conclusion is warranted that the Convention should not pose obstacles for the processing of sensitive data for the purposes of anti-discrimination law and policy. At the end of the day however the permissibility of processing depends on the quality ('appropriateness') of the national safeguards provided by the country in question. What such safeguards may in practice consist of is discussed in the following subsection.

### 7.3.3. National Data Protection Laws in the EU Member States

All EU countries have ratified the Council of Europe Convention No. 108 and have transposed the EU Data Protection Directive into their national laws, which means that their data protection laws have a lot in common in terms of structure and content. All of them for instance make a distinction between 'regular' personal data and 'special categories' of personal data, and subject the latter to a more stringent regime of protection. They allow the processing of sensitive data for instance where the 'vital interests' of the data subject are at stake and where processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law. A degree of variation has however resulted because many of the provisions in the above-mentioned instruments leave room for interpretation and little authoritative guidance has so far been available. In addition, from the point of view of this study it is particularly important to investigate whether the Member States have used the opportunity granted to them in Article 8(2)(a) of the Directive to provide that the prohibition to process sensitive data may not be lifted by the data subject's consent.

Upon an examination of the general data protection laws adopted by the EU Member States it does not appear that they have made any large-scale use of this opportunity to rule out the collection of sensitive data on the grounds of the data subject's consent.<sup>195</sup> The generally-applicable data protection laws of all EU Member States allow, as a main rule, the processing of sensitive data on the basis of consent. There are however some limitations to this rule:

- (i) In some countries, such as Austria, Denmark, Estonia, Greece, Italy and Portugal, the free giving of consent is not enough in itself, as an authorisation of the national data protection body is required as well;<sup>196</sup>
- (ii) In a number of countries the applicability of the main rule is, or can be, limited by means of sectoral laws. This is the case in Belgium, Cyprus, Czech Republic, France, Greece, Luxembourg, Slovakia, and United Kingdom. These limitations can have significant implications in particular contexts. For instance in Belgium an Executive Decree issued by the government provides that consent cannot constitute a

<sup>192</sup> Bainbridge, David, *EC Data Protection Directive* (London: Butterworths, 1996), p. 17.

<sup>193</sup> *Ibid*, p. 23.

<sup>194</sup> *Idem*.

<sup>195</sup> This finding is based on a country-by-country examination of the national data protection laws. For a list of these laws, please visit [http://ec.europa.eu/justice\\_home/fsj/privacy/law/implementation\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/law/implementation_en.htm) (visited 1.5.2006)

<sup>196</sup> This requirement does not necessarily apply in all cases, such as where the processing is based on a specific law or where the controller is a public body.

justification for the processing of sensitive data where the consent cannot be considered to have been given 'freely'.<sup>197</sup> This is taken to be the case in the context of the employment relationship, as it is considered that a power imbalance exists between the employer and the employee.<sup>198</sup> The Belgian government took this position despite two prior contrary opinions issued by the Belgian Commission for the protection of private life.<sup>199</sup>

(iii) In Hungary, Italy, Latvia and Slovakia the consent needs to be given in writing.

Many countries expressly authorize the processing of sensitive data also in other circumstances than where the data subject has expressly given her consent. In the Netherlands, processing of data relating to racial or ethnic origin is allowed even without the consent of the data subject, provided that such processing is necessary for the purpose of remedying existing inequalities, and that identification of the persons concerned takes place upon objective criteria such as parent's place of birth, and that the data subjects have not indicated any objection to such processing in writing.<sup>200</sup> Several of the data protection laws of the Member States contain generally-applicable provisions authorising the processing of sensitive data in accordance with (some other) statutory law or a subsidiary rule. This is the case in Austria, Cyprus, Netherlands, Poland, Slovenia, Spain, and Sweden. Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland and Sweden expressly allow the processing of sensitive data for statistical and scientific purposes. It should be noted that in some countries processing for these purposes requires prior authorization from the national data protection body. In some countries, such as Denmark, Greece, Malta and Sweden, the national data protection authority has been given powers to authorize the processing of sensitive data also in other contexts than those expressly mentioned in law.

The UK appears to be the only country where the data protection laws expressly set out workplace monitoring as a legitimate form of processing of sensitive data. According to the UK law, the data must be collected with the consent of the individual and must be stored in a manner that does not identify the individual.

It should be reiterated that the EU law requires in many places that 'adequate' or 'suitable' safeguards must be provided by each Member State to render the collection of sensitive data legitimate. It is therefore not enough that the collection of data is legitimate under national law, as a particular Member State may be lacking in view of the EU law. This is a real possibility, as a 2002 study found that the safeguards provided by many of the Member States were inadequate or even non-existing in this respect.<sup>201</sup> The fact that a national law takes a liberal approach to the processing of sensitive data may therefore not be an indication that there are no legal obstacles for collecting sensitive data, quite vice versa.

<sup>197</sup> Article 27 of the Executive Decree of 13 February 2001 implementing the Federal Law of 8 December 1992 on the protection of the right to private life with respect to the processing of personal data.

<sup>198</sup> Idem. There is however an important exception to this rule: the rule does not apply where the processing of data is justified by the need to grant an advantage to the workers concerned. This exception encompasses the legitimacy of the collection of data where it is necessary for the purpose of e.g. reasonable accommodation.

<sup>199</sup> Commission for the protection of private life (*Commission de la protection de la vie privée*): Opinion n°8/99 of 8 March 1999; Opinion n°25/99 of 23 July 1999.

<sup>200</sup> Article 18 of the Data Protection Act of 6 July 2000, as amended.

<sup>201</sup> See Korff, Douwe, *EC Study on Implementation of Data Protection Directive: Comparative Summary of National Laws*. September 2002, available at: [http://ec.europa.eu/justice\\_home/fsj/privacy/docs/lawreport/consultation/univessex-comparativestudy\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/lawreport/consultation/univessex-comparativestudy_en.pdf) (visited 1 May 2006).

## 7.4. Right to Privacy

### 7.4.1. Article 8 of the European Convention on Human Rights

The European Convention on Human Rights (ECHR) has been ratified by 45 states, including all the 25 Member States of the European Union.<sup>202</sup> Article 8 of the Convention deals with the right to respect for private and family life:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The most far-reaching of the four protected interests (private life, family life, home and correspondence) is private life.<sup>203</sup> This encompasses the right to respect for information relating to private life. That the collection of information on an identified individual may engage Article 8 was evident already from a 1982 decision by the European Commission on Human Rights. In *X v UK* the Commission expressed its view that

a compulsory public census, including questions relating to the sex, marital status, place of birth and other personal details of the inhabitants of a particular household may constitute a *prima facie* interference with the right guaranteed by Article 8, paragraph 1 of the Convention to respect for private and family life, which falls to be justified under the terms of Article 8, paragraph 2.<sup>204</sup>

Case law from the European Court of Human Rights (ECtHR) has shown that ‘information relating to private life’ is to be construed broadly to include almost any information relating to an identified or identifiable individual. Such information may concern e.g. former political activity or even business transactions, as is evident from the following case:

In *Amann v Switzerland* the applicant complained that the creation of a card on him, following the interception of a telephone call he had received from a person working at a foreign embassy, and the storing of the card in a card index had resulted in a violation of Article 8 of the Convention. The card was apparently created for reasons that had to do with domestic security, while the phone call had in fact been related to a legitimate business transaction. The Court found that the creation and storage of a card on which it was stated that the applicant had been in contact with the embassy and had done business with a person working in that embassy amounted to data relating to the applicant’s private life, and pointed out that “the storing by a public authority of information relating to an individual’s private life amounts to an interference within the meaning of Article 8”. It was not material whether the data was sensitive in nature, or whether the applicant had been inconvenienced in any way, or whether the data had been disclosed to a third party.<sup>205</sup>

<sup>202</sup> Number of ratifications as of 22.11.2005.

<sup>203</sup> Gordon, Richard QC – Tim Ward – Tim Eicke, *The Strasbourg Case Law* (London: Sweet & Maxwell, 2001), p. 781.

<sup>204</sup> *X v UK* 30 DR 239 1982.

<sup>205</sup> See paragraphs 69 and 70 of the decision.



In *MS v. Sweden* the court reiterated again ‘that the protection of personal data, particularly medical data, is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention’. In light of these examples it is clear that the processing of personal data falls within the ambit of Article 8.

The Convention does not provide that everyone has a right to privacy, but that everyone has the right to *respect* for private life. Under a well-established line of interpretation, confirmed by the ECtHR, this means that states not only have an obligation to abstain from interfering with private life, but they also have positive obligations to protect individuals against interferences with their rights by private individuals or entities, if necessary by means of criminal law.<sup>206</sup> This means that inasmuch as the processing of data engages Article 8, adequate safeguards must be in place to regulate the activities of not just state and municipal authorities, but university and private research institutions as well. In order to determine the scope of such obligations, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, keeping also in mind that the contracting state in any event has a margin of appreciation.<sup>207</sup>

Article 8 does not just cover the collection of data, but also the storage, usage and disclosure of data. For instance in *MS v Sweden*, the ECtHR held that ‘[t]he domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention’. It is possible that also a failure to allow an opportunity to refute incorrect information may constitute an infringement. In *Rotaru v. Romania*, the Court pointed out that “both the storing by a public authority of information relating to an individual’s private life and the use of it and the refusal to allow an opportunity for it to be refuted amount to interference with the right to respect for private life secured in Article 8 § 1 of the Convention.”<sup>208</sup> Article 8, or any other provision of the Convention for that matter, do not however provide for a general, across-the-board right to gain access to, and challenge, personal information stored in files held by others.<sup>209</sup>

A distinction must be made between situations in which the data subject has given her consent to the collection of data, and situations in which the consent is missing. In all cases where interference has been found, the data subject had not been aware of, or had not consented to, the collection of data. Subsequent use or disclosure of voluntarily given personal data may also engage Article 8 if the data is used for purposes other than those that the data subject was informed of, or if the information is disclosed to third parties or kept in a way that fails to guarantee the security of the data.

Generally speaking, interference is likely to be found when the data in question reveal details about the data subject’s personality or traits, are processed without the latter’s knowledge or consent, and the processing potentially casts the data subject in a negative light or could result in a restriction of the data subject’s freedom of choice.<sup>210</sup> These principles would seem to apply regardless of whether the information is processed automatically or manually. By way of drawing a negative inference, it appears that the collection and other processing of

<sup>206</sup> Gordon, Richard QC – Tim Ward – Tim Eicke, *The Strasbourg Case Law* (London: Sweet & Maxwell, 2001), p. 781; ECtHR *Botta v. Italy* (1998) 26 E.H.R.R. 241, paragraph 33; Ovey, Clare – Robin Whyte, *The European Convention on Human Rights*. Third Edition (Oxford: Oxford University Press, 2002), p. 219.

<sup>207</sup> ECtHR, *Botta v. Italy* (1998) 26 E.H.R.R. 241, paragraph 33.

<sup>208</sup> ECtHR, *Rotaru v Romania* (4 May 2000), paragraph 46.

<sup>209</sup> Bygrave, Lee A. ‘Data Protection Pursuant to the Right to Privacy in Human Rights Treaties’ *International Journal of Law and Information Technology*, 1998, p. 23 ff.

<sup>210</sup> *Ibid*, p. 17.

personal data that takes place on the basis of a freely given consent of the data subject does not, on a *prima facie* level, constitute an infringement of Article 8. This renders legitimate for instance the collection of data through such sample surveys the participation to which is voluntary. However, those forms of collection of personal data that do not proceed from the basis of voluntary co-operation, for example censuses, readily constitute interference in terms of Article 8(1).

Right to respect for private life is not an absolute one: interference thereof may be justified under Article 8(2). If it is not to contravene Article 8, an interference must (i) have been in accordance with the law, (ii) pursue a legitimate aim (relating to national security, public safety or the economic well-being of the country, prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others), and (iii) be necessary in a democratic society in order to achieve that aim. Since paragraph 8(2) provides for an exception to a right guaranteed by the Convention, these requirements are to be interpreted narrowly.<sup>211</sup>

The expression 'in accordance with the law' not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects, in addition to which the law must indicate with sufficient clarity the scope and conditions of exercise of the authorities' discretionary power in the area under consideration.<sup>212</sup> In the EU countries, particular data collection activities complying with national data protection laws should not, on a *prima facie* level, have problems with this requirement as long as the national law complies with the EU Data Protection Directive as it should. No particular problems should be encountered with respect to the requirement of legitimate aim either: collection of data for the purposes of combating discrimination arguably satisfies several of the headings listed in Article 8(2). The question whether a particular data collection operation that is considered to interfere with Article 8(1) is justified under Article 8(2) comes thus in practice down to the question whether the activity can be considered 'necessary in a democratic society' in order to fight discrimination. Under the case-law of the Court, for the answer to be in the affirmative, there should be a pressing social need justifying the interference, in addition to which the interference must be proportionate to the aim pursued.<sup>213</sup> It is for the national authorities to make the initial assessment of this, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for the ECtHR.<sup>214</sup>

In the above-mentioned case *X v. UK* the Commission found that the requirement for the compulsory provision of information for the purposes of national census, backed up by criminal sanctions, was a justifiable interference with Article 8 rights. The census was considered to pursue a legitimate aim, namely the economic well-being of the country. The carrying out of the census was also considered to be necessary in a democratic society in order to achieve the said aim. The Commission was particularly influenced by the fact that census returns were treated in complete confidence. The Commission concluded: "where the information gathered by the census is treated with care and confidentiality, the interference thereby occasioned with the applicant's right to respect for his private and family life is necessary in a democratic society."<sup>215</sup>

*Implications for collecting data in relation to discrimination.* Article 8 of the European Convention is framed in general terms and is broad in scope, making its detailed analysis challenging given the wide range of data collection activities, differences in the methods involved, and in particular the lack of case-law touching these issues. Some tentative conclusions can however be drawn. First, there are forms of data collection, such as

<sup>211</sup> ECtHR, *Rotaru v Romania* (4 May 2000), paragraph 47.

<sup>212</sup> See e.g. ECtHR, *Rotaru v. Romania* (4 May 2000), paragraphs 52-62; *Malone v. the United Kingdom* (2 August 1984), paragraph 66.

<sup>213</sup> ECtHR, *Smith and Grady v. United Kingdom* (2000), 29 E.H.R.R. 493; *Chassagnou v. France* (2000), 29 E.H.R.R. 615.

<sup>214</sup> *Idem*.

<sup>215</sup> European Commission on Human Rights, *X v UK* 30 DR 239 1982.

anonymous surveys, that can be carried out without this interfering with Article 8 rights.<sup>216</sup> The same conclusion applies with respect to sample surveys, the participation to which is voluntary, even if they involve processing of personal data. However, workplace monitoring, even when they are based on facially voluntary co-operation of the data subjects, may not be truly voluntary, as it may be argued that an employer or a service provider is in a *de facto* dominant position. Thus such practices may need to be justified under Article 8(2) of the Convention to be legitimate. As regards censuses, it must be noted that as a main rule the answering of census questions is obligatory, often at a pain of criminal sanctions, which means that census questions have to be justified under Article 8(2) to be considered legitimate.<sup>217</sup> The question whether a justification exists under Article 8(2) depends on the particular objectives and procedures of the particular data collection activity. In practice, the assessment of this matter usually boils down to whether the principle of proportionality is satisfied, i.e. the means used are proportionate in view of the aims. The latter condition implies, for instance, that least intrusive means of obtaining the necessary data should be employed as a matter of principle.

## 7.4.2. Article 17 of the International Covenant on Civil and Political Rights

Whereas Article 8 of the ECHR approaches the issue of privacy in terms of a *right* to respect for private life, Article 17 of the International Covenant on Civil and Political Rights, modelled after Article 12 of the Universal Declaration of Human Rights, is framed in terms of a *prohibition* of arbitrary or unlawful interference with privacy:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Like its counterpart Article 8 of the ECHR, Article 17 of the ICCPR covers infringements of privacy both by public and private actors.<sup>218</sup> As the Committee points out in its General Comment No. 16 on the right to privacy, this means in practice that 'States parties are under a duty themselves not to engage in interferences inconsistent with Article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons'.<sup>219</sup>

A key task here is the examination of what is meant by 'arbitrary or unlawful interference' with privacy. To begin with, all interferences with privacy must be 'lawful' to comply with Article 17. This means that no interference can take place except as permitted by a law. There is also a qualitative requirement: Such a law, as well as the interference itself, must be in compliance with the provisions, aims and objectives of the Covenant, in order for the interference not to be arbitrary or unlawful.<sup>220</sup> In addition, an interference so provided for by law must in any event be reasonable in the particular circumstances, in order for it to satisfy the requirement of not being arbitrary in nature.<sup>221</sup>

<sup>216</sup> Here the auxiliary verb 'can' is used to emphasise the obvious point that no wholesale beforehand legitimisation of any particular form of data collection is possible, as all data collection operations have to comply with all relevant legislation, not just with those dealing with the right to protection of privacy.

<sup>217</sup> It should however be noted that in many countries the census questionnaires point out that the answering of certain questions, e.g. those on religion or ethnicity, is optional.

<sup>218</sup> Human Rights Committee, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, 08/04/88, paragraph 1.

<sup>219</sup> *Ibid*, paragraphs 1 and 9.

<sup>220</sup> *Ibid*, paragraph 3.

<sup>221</sup> *Ibid*, paragraph 4. Nowak asserts that 'regardless of its lawfulness, arbitrary interference contains elements of injustice, unpredictability and unreasonableness'. Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: Engel, 1993), p. 292.

The assessment of ‘reasonability’ necessarily includes a measure of discretion, and it is here that the guidance provided by the Human Rights Committee is particularly useful. In General Comment No. 16 the Committee balances between the need for data and the protection of privacy, and notes that

[a]s all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant.<sup>222</sup>

While the Committee speaks here only of the ‘public authorities’, there is no reason why the same argument would not be applicable with respect to private actors. The principle espoused here by the Committee should pose no hurdles for collecting data on discrimination, as there hardly can be better examples of information that is ‘essential in the interests of society as understood under the Covenant’, given that the Committee itself has on many occasions urged the States parties to collect such data.

Paragraph 10 of the General Comment goes to the heart of data collection, laying down the requirements under which such practices can take place, and will therefore be cited in its entirety:

The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

The General Comment makes no distinctions between data collection methods or conditions, e.g. whether disclosure of data is voluntary or not. The focus of Article 17 and the General Comment is on the requirements that have to be met in order to make the processing of data lawful, not so much on the content of the data. This, and the rather broad language of Article 17, supports the view that the Article is applicable also with respect to voluntarily submitted data. The principles mentioned concern only ‘personal information’, that is information concerning an identified or identifiable individual, and therefore Article 17 is not engaged by data that has been rendered anonymous. The Committee uses the terms ‘personal information’ and ‘information concerning a person's private life’ interchangeably, and it is clear that information on a person's sex, age, ethnic or racial origin, disability, religion and belief and sexual orientation are protected under Article 17.

The emphasis of Article 17 and the General Comment is on the legal and institutional safeguards that must be in place to protect personal information: Processing of personal information must be regulated by law and effective measures must be taken to ensure that the data is not used for wrongful purposes and that the data is kept in a secure way. The General Comment goes as far as to suggest that an individual has a right to know of all the registers and files where data on her person is kept, and even a right to request rectification or elimination of any incorrect data – a right that does not exist as such under the ECHR.

*Implications for collecting data in relation to discrimination.* Article 17 of the ICCPR poses no major problems for collecting data in relation to discrimination. While all forms of collection of personal data engages Article 17,

<sup>222</sup> Ibid, paragraph 7.

collection of data in relation to discrimination in the EU Member States can hardly be held 'unlawful' or 'arbitrary'. This is because all 25 countries have adopted legislation in the area of data protection, and have set up authorities supervising compliance with that legislation,<sup>223</sup> thereby providing – at least on a *prima facie* level – for the safeguards required by Article 17, and as the collection of data for the purposes of combating discrimination satisfies the requirement of reasonableness and is in accordance with the aims and objectives of the ICCPR.<sup>224</sup> However, the principle of proportionality must be respected in all operations involving processing of personal data, and the national law should specifically require measures protecting the confidentiality and security of data.

### 7.4.3. Articles 7 and 8 of the Charter of Fundamental Rights of the European Union

The Charter, concluded in December 2000, is not a legally binding instrument, but 'a solemn proclamation'.<sup>225</sup> It is nevertheless an important policy document in the context of the EU, and serves also as an example of a relatively recent instrument in this area. Developments in this area of law are visible in the Charter, which has separate provisions with regard to respect for private and family life (Article 7) and protection of personal data (Article 8). This is the first time that an international document recognises that protection of personal data is a fundamental right in and of itself.

Article 7, entitled 'Respect for private and family life', provides that

Everyone has the right to respect for his or her private and family life, home and communications.

The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word 'correspondence' has been replaced by 'communications'.<sup>226</sup> In accordance with Article 52(3) of the Charter, the meaning and scope of the rights guaranteed in Article 7 are otherwise the same as those of Article 8 of the ECHR, and are to be interpreted in the same way.

Article 8, entitled 'Protection of personal data', provides that

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 8 is based on Article 286 of the Treaty establishing the European Community, the EU Data Protection Directive, Article 8 of the ECHR, and the Council of Europe Convention on Personal Data. As such, the rights arising from Article 8 shall be exercised under the conditions and within the limits defined by the relevant community instruments, and the meaning and scope of the Article is to be interpreted in a way that takes account of the above-mentioned Council of Europe instruments and their interpretation.<sup>227</sup> Under Article 52(1) of the Charter, any limitation on the exercise of the rights must be provided for law and respect the essence of those rights.

<sup>223</sup> For a list of these authorities, see [http://europa.eu.int/comm/justice\\_home/fsj/privacy/nationalcomm/index\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/privacy/nationalcomm/index_en.htm)

<sup>224</sup> A caveat is however in place here, as this conclusion applies only at a general level, since it is possible that the data protection laws of a particular country do not in their substance fully satisfy all of the requirements of the Covenant.

<sup>225</sup> For the text of the Charter (2000/C 368/01), see [http://www.europarl.eu.int/charter/pdf/text\\_en.pdf](http://www.europarl.eu.int/charter/pdf/text_en.pdf).

<sup>226</sup> Page 10 of the explanatory report.

<sup>227</sup> See Articles 52, paragraphs 2 and 3, of the Charter.

Given the close relationship of Articles 8 and 9 to the above-enumerated instruments, the key ones of which are discussed in this report, it is not considered necessary to analyse the implications of the said Articles at this point. It should however be noted that the Charter emphasises the role of consent by requiring that any collection of personal data must take place on 'the basis of the consent of the person concerned or some other legitimate basis laid down by law.'

## 7.5. Conclusions

Contrary to a widespread belief, the international, European and national rules on protection of privacy and data do not categorically prohibit the collection of data in relation to discrimination.<sup>228</sup> They merely form the legal framework within which the collection and other processing of sensitive data may take place. This conclusion applies with respect to all types of data collection studied: collection of data through censuses, administrative processes, surveys and workplace monitoring.

Processing of sensitive data is permitted, first of all, on the basis of the consent of the data subject, except where this option is ruled out by national law in particular circumstances or where the authorisation of the national data protection authority is needed but not obtained.

Processing of sensitive data is allowed even in the absence of the consent of the data subject where it is necessary in the context of legal proceedings, or where the processing is carried out by a public authority in the general interest and as provided for by law, which as a rule renders collection of data through censuses and administrative records legitimate. The Member States are also allowed to introduce specific legislation permitting the processing of sensitive data insofar as this takes place for reasons of substantial public interest and if suitable safeguards are provided for. On top of that, it should be noted that there are forms of data collection that regularly do not engage data protection laws, including anonymous workplace monitoring and anonymous surveys. The same applies with respect to most types of discrimination testing. The carrying out of opinion surveys,<sup>229</sup> while as a rule not requiring the processing of sensitive data, may (at the early stages of the process) require the processing of personal data, but it should be fairly easy to plan and carry out such surveys in such a way that is in full compliance with the data protection law.

It should be pointed out that the above conclusions are general in nature and that the lawfulness of a particular data collection operation depends specifically on (i) whether the applicable laws adopted by the Member State in question provide for the safeguards required by the relevant international and European instruments, and (ii) whether the data controller has respected the qualitative requirements posed by national, European and international law, including the principle of proportionality.

## 8. Definitions and categorization

Collection of data, whether by means of workplace monitoring, censuses, surveys or observation, requires prior decision-making as to the relevant categories that are used. This is not just a matter of technicality, but raises complex legal, political and philosophical questions at three levels:

<sup>228</sup> This conclusion applies also with respect to soft law instruments, which could not be dealt with here because of lack of space. See e.g. Council of Europe, *The protection of personal data collected for statistical purposes*. Recommendation No R(97) 18 and explanatory memorandum (Council of Europe Publishing, 1998).

<sup>229</sup> Directed at the general public or some subsection thereof.

- Definitions (the generic level). What is meant by the terms 'racial origin', 'ethnic origin', 'religion', 'belief', 'disability', 'age' and 'sexual orientation'?
- Classification (the group level). Once it is known how e.g. the term 'ethnic origin' is to be defined, by what principle are particular groups recognized?
- Identification (individual level). By what criteria can a person be assigned into a group? Should this be done on the basis of self-identification by the person concerned, on the basis of some objective criteria, or on the basis of mutual recognition among the members of the group?

These are complex issues and will be discussed here only in order to (i) throw some light on the question why these issues are so contentious and to (ii) pinpoint what are the legal principles that have a bearing on these matters. There are of course many practical viewpoints that have a bearing on these issues but that cannot be discussed here. For instance, to facilitate cross-referencing and comparative analyses, the same principles and categories should be used for all types of data collection if only possible. Second, the categories used should not be broad and few but many and specific. This is because there are always sub-groups within a wider category that face particular challenges and whose situation goes undetected if too broad categories are used.

To begin with it should be pointed out that the two Directives do not define 'racial origin', 'ethnic origin', 'disability', 'religion', 'belief', 'age' or 'sexual orientation'.<sup>230</sup> The Directives do not deal with the question who are to be regarded as members of a certain group and on what grounds. Recital 31 of the Employment Equality Directive only points out, in reference to legal proceedings, that 'it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.'

## 8.1. Racial Origin

The concept of 'racial origin' aptly demonstrates the conceptual problems and sensitivities at hand. The ambiguity surrounding the concept of race is apparent also in the instrument that has become known as the 'Racial Equality Directive'. Preamble 6 of the Directive declares that '[t]he European Union rejects theories which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories.' But if there are no separate races, and everyone is of the same race, how can people differ in terms of their 'racial origin' and be subjected to discrimination on that basis?

This ambiguity is understandable from the point of view of the origins of the concept of race. Racial thinking, relating to assumed hereditary superiority and inferiority of different groups, was quite likely originally born of the need to justify exclusion, subjugation and domination.<sup>231</sup> Racial theories were developed by early physical anthropologists, giving racial thinking some scientific credence, and these theories soon became part of the popular imagery. While data that challenged the notion of races as fixed, permanent and natural groupings has been available for well over one hundred years,<sup>232</sup> these later scientific findings – including those showing that

<sup>230</sup> The proper definition of these terms in international, European and national law has been subject to a lot of debate, with little or no universal agreement over the meaning of these terms. For ethnic origin see Timo Makkonen: *Identity, Difference and Otherness. The Concepts of 'People', 'Indigenous People' and 'Minority' in International Law*. Helsinki University Press, Helsinki (2000); for religion see Jeremy Gunn: *The Complexity of Religion and the Definition of "Religion" in International Law*. *Harvard Human Rights Journal*, Vol 16 (2003), 189-215; for disability, see Deborah Mabbett: *Definitions of Disability in Europe: A Comparative Analysis*. Final Report. Brunel University, UK (2000). See also, generally, chapter 2 of the above quoted Cormack, Janet – Bell, Mark (2005). *Developing Anti-Discrimination Law in Europe* and its update drafted in 2006, forthcoming.

<sup>231</sup> Racial categorization has in many societies become such a taken-for-granted issue that the origins of racial classifications are seldom realized even by researchers who develop and use these classifications. See Stansfield, John H. II 'Epistemological considerations' in Stanfield, John H. II – Ruthledge M. Dennis (eds.), *Race and Ethnicity in Research Methods* (California: Sage Publications, 1993).

<sup>232</sup> Mukhopadhyay, Carol C. – Yolanda T. Moses 'Re-establishing "Race" in Anthropological Discourse' *American Anthropologist* 99(3) 1997, p. 518.

there is no significant genetic variation between the assumed 'races'.<sup>233</sup> - have not managed to eliminate the quasi-scientific beliefs that remained within the general population. This is probably because of the fact that there are certain visible inter-group differences, such as skin colour, and it is assumed that these visible differences signal some more fundamental differences. While these visible differences do not have any major biological significance, they have gained *social* significance, so much so that many individuals and groups nowadays identify themselves and others in racial terms. It is also a fact of life that people regularly treat each other on the basis of the assumed race of the other person. So 'race', while a social construct, has very concrete effects in the real life. It is therefore possible for there to be 'racial discrimination' but no separate races in the biological sense of the notion.

How the concept of 'racial origin' should be constructed for the purposes of data collection, given that as a social construct it does not have a scientifically valid basis and that different people can understand it in different ways? It is submitted that there is no 'objective' way to do that. Any distinctions that are used are quite inevitably going to be those that have become widespread in popular culture and/or developed in administrative practices in the society concerned.<sup>234</sup> At this point it should be noted that there are marked cultural differences in this. In the UK and USA the use of 'racial' language is commonplace and widely accepted at the level of both legislation and every-day speech, even to the extent that they have been described as 'race-centred societies'.<sup>235</sup> The situation is very different in some other countries, such as Austria, Finland, Germany and Sweden, where it is widely considered inappropriate to use 'racial' language in everyday speech, let alone in legislation.

Besides using categorizations that derive from historically and culturally specific folk beliefs it is possible to collect data in relation to 'racial origin' by linking that concept to other, somewhat more 'objective' notions. For instance the International Convention on the Elimination of All Forms of Racial Discrimination encompasses in the concept of 'race' also the related notions of colour, descent and national or ethnic origin.<sup>236</sup>

Of the EU countries, only the UK collects data on race in censuses, although even there the classification used is a peculiar mixture of ethnic and racial categories. In the 2001 census questionnaire the respondents were asked to describe their 'ethnic group', and were given the following choices:

- A. White (British/Irish/Any other White Background),
- B. Mixed (White and Black Caribbean/White and Black African/White and Asian/Any other Mixed background),
- C. Asian or Asian British (Indian/Pakistani/Bangladeshi/Any other Asian background),
- D. Black or Black British (Caribbean/African/Any other Black background), and
- E. Chinese or other ethnic group (Chinese/Any other).<sup>237</sup>

<sup>233</sup> See Malik, Kenan, *The Meaning of Race: Race, History and Culture in Western Society* (Basingstoke: Macmillan, 1996), p. 4.

<sup>234</sup> For instance the US Office of Management and Budget (OMB) which provides for many official classification standards used in the USA, including those used in the census, emphasises with respect to the racial classification standard that '[t]he categories in this classification are social-political constructs and should not be interpreted as being scientific or anthropological in nature.' Office of Information and Regulatory Affairs, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 1997, p.58. Available at <http://www.whitehouse.gov/omb/fedreg/1997standards.html> (visited 1.1.2006).

<sup>235</sup> Stanfield, John H. II 'Methodological Reflections: An Introduction' in Stanfield, John H. II – Ruthledge M. Dennis (eds.) *Race and Ethnicity in Research Methods* (California: Sage Publications, 1993). According to Stanfield, in race-centered societies 'races are created as social and cultural constructions and used as political weapons. Generations of societal residents are socialized into the belief that it is "natural" to assume that real or imagined phenotypic features predict values, personality, intellectual attributes, behavior, moral fiber, and leadership abilities. In this sense, race is not only a category but an organising principle of everyday life, because it facilitates decision making in such matters as self-concept, concept of others, residential choice, hiring and firing in labor markets, and selection of mates and friends.' Ibid, p. 15.

<sup>236</sup> Article 1 of the Convention. For an example from Brazil, on the relationship of the concepts of 'race' and 'colour', see Noqueira, Oracy, *Tanto preto quanto branco: estudos de relações raciais* (São Paulo: T. A. Queiroz, 1979).

<sup>237</sup> There is some variation in the formulation of census questions used in the respective questionnaires used in England, Northern Ireland, Scotland and Wales. The example provided in the text is from the questionnaire used in England.



Data on 'race' is collected in the United States' census more directly. In the year 2000 census a person could declare herself to be of e.g. 'White', 'Black, African American, or Negro', 'American Indian' or e.g. 'Asian Indian' or 'some other' race. A significant debate was held before the 2000 census round regarding the inclusion of a question on whether a person was Hispanic, and whether being Hispanic was a matter of being a member of an ethnic group or a racial group.<sup>238</sup> These considerations aptly demonstrate how racial and ethnic categories overlap in the absence of clear scientific principles for making such distinctions.

## 8.2. Ethnic Origin

Ethnicity as a concept has enjoyed growing popularity, particularly in the social sciences, in pace with the decreasing popularity of racial theories.<sup>239</sup> Ethnicity is usually understood in terms of common descent and culture, although lately the importance of the latter has been emphasised at the expense of the former.<sup>240</sup>

Yet, just like the concept of 'race', 'ethnicity' is a social construct. Often people who understand themselves to belong, or are generally understood to belong to the same ethnic group, have different ideas about what constitutes the group and who exactly qualify as its members.<sup>241</sup> Bulmer and Solomos sum up the position of many contemporary researchers in the field of ethnic studies as follows:

Race and ethnicity are not 'natural' categories, even though both categories are often represented as if they were. Their boundaries are not fixed, nor are their membership uncontested. Race and ethnic groups, like nations, are imagined communities. People are socially defined as belonging to a particular ethnic or racial group, either in terms of definitions employed by others, or definitions which members of particular ethnic groups develop for themselves. They are ideological entities, made and changed in struggle. They are discursive formations, signalling a language through which differences may be named and explained.<sup>242</sup>

The social constructedness of these concepts does not mean that there are no ethnic groups to begin with – we are not talking of imaginary communities, but of communities that people imagine in different ways. There is no single model or principle of social organisation that forces itself upon people.<sup>243</sup> In effect, as Ahmad has argued, while ethnicity is an important facet of self and group identity, it is also difficult to operationalise into a concise, valid and reliable question.<sup>244</sup>

<sup>238</sup> See Simon, Patrick, *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands*. Medis Project. Available at [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf/pubst/compstud04\\_en.pdf](http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/compstud04_en.pdf) (visited 1.1.2006), p. 55 ff.

<sup>239</sup> See e.g. Malik, Kenan, *The Meaning of Race: Race, History and Culture in Western Society* (Basingstoke: Macmillan, 1996), p. 1, and Makkonen, Timo, *Identity, Difference and Otherness: The Concepts of 'People', 'Indigenous People' and 'Minority' in International Law* (Helsinki: Helsinki University Press, 2000), p. 22 ff and the references cited therein.

<sup>240</sup> See idem (Makkonen). See also Rallu, Jean-Luis -Victor Piché - Patrick Simon 'Démographie et ethnicité: une relation ambiguë' Dans Graziella Caselli, Jacques Vallin et Guillaume Wunsch, (éd.) *Démographie : analyse et synthèse. VI : Population et société* (Paris: Éditions de l'Institut national d'études démographiques, 2004).

<sup>241</sup> Vermeulen, Hans – Cora Govers 'Introduction' in Vermeulen, Hans – Cora Govers (eds), *The Anthropology of Ethnicity* (Amsterdam: Spinhuis, 1996), p. 5. Liebkind, Karmela 'Maahanmuuttajat ja kulttuurien kohtaaminen' in Liebkind (ed) *Maahanmuuttajat ja kulttuurien kohtaaminen Suomessa* (Helsinki: Gaudeamus, 1994), p. 23.

<sup>242</sup> Bulmer, Martin – John Solomos 'Introduction: Re-thinking Ethnic and Racial Studies' *Ethnic and Racial Studies*, Vol 21, No. 5, 1998, p. 822.

<sup>243</sup> Makkonen, Timo, *Identity, Difference and Otherness: The Concepts of 'People', 'Indigenous People' and 'Minority' in International Law* (Helsinki: Helsinki University Press, 2000).

<sup>244</sup> Ahmad, Waqar 'Ethnic Statistics: Better Than Nothing or Worse Than Nothing?' in Daniel Dorling – Stephen Simpson (eds), *Statistics in Society: The Arithmetics of Politics* (London: Arnold, 1999), p. 124.

The Racial Equality Directive prohibits discrimination on the basis of 'ethnic origin', not 'ethnicity'. This shifts the focus from the present status of a person to her past. But how far back in time should one go? If one goes 250 years back in time, which makes approximately ten generations, every person has up to 1024 ancestors. How many of them should have been from Africa for a modern day person to be of 'African origin'?

It is submitted that these are questions for which it is patently difficult, if not impossible, to give a scientifically motivated, 'objective' answer. Scientific analyses and everyday experiences alike suggest that there is no single, universally applicable 'natural' principle in accordance with which all people could be objectively categorized into separate ethnic groups.<sup>245</sup> Yet, there are legal principles which provide some guidance.

First, it is a well-established principle of international human rights law that the existence of ethnic minorities is a question of fact, not of law. The Permanent Court of International Justice outlined this principle already in a 1935 decision.<sup>246</sup> The same principle has been reiterated by the UN Human Rights Committee, which has asserted that '[t]he existence of an ethnic, religious or linguistic minority in a given state party does not depend upon a decision by that State party but requires to be established by *objective criteria*.'<sup>247</sup> While widely agreed to, this principle is not universally accepted, and particularly France has been persistently of the view that there are no minorities in its territory.<sup>248</sup>

Second, states have to be consistent in applying the criteria and must avoid making arbitrary distinctions. If recognition is in practice tied to allocation of rights, resources or obligations, a withholding of recognition may amount to discrimination. This has been emphasised for instance by the UN CERD Committee, which in its General Recommendation XXIV noted that

It appears... that a number of States parties recognize the presence on their territory of some national or ethnic groups or indigenous peoples, while disregarding others. Certain criteria should be uniformly applied to all groups, in particular the number of persons concerned, and their being of a race, colour, descent or national or ethnic origin different from the majority or from other groups within their population.

...the Committee draws to the attention of States parties that the application of different criteria in order to determine ethnic groups or indigenous peoples, leading to the recognition of some and refusal to recognize others, may give rise to differing treatment for various groups within a country's population.<sup>249</sup>

The Advisory Committee on the Framework Convention for the Protection of National Minorities has emphasised the same point of view.<sup>250</sup> States should thus be careful in constructing nomenclatures for instance for the purposes of censuses, as the results of data collection are regularly used to allocate rights, resources or obligations. International human rights law supports the principle of self-identification, i.e. the principle that it is for the

<sup>245</sup> It is submitted that there are clear cases, such as an isolated tribe living on an island of its own. Such clear-cut examples are however increasingly hard to find in a modern world characterized by mass-scale migration and a situation where a multitude of different groups live side by side in the same society.

<sup>246</sup> *Minority Schools in Albania* (1935), Permanent Court of International Justice, Ser. A/B, No. 64, 17.

<sup>247</sup> Human Rights Committee, *General Comment* 23, HRI/GEN/1/Rev.7 (12 May 2004) paragraph 5.2., emphasis added.

<sup>248</sup> On the situation in France, see Blum, Alain 'Resistance to identity categorization in France' in Daniel Dorling – Stephen Simpson (eds), *Statistics in Society: The Arithmetics of Politics* (London: Arnold, 1999).

<sup>249</sup> CERD Committee, *General recommendation XXIV concerning Article 1 of the Convention*, Fifty-fifth session (1999), paragraphs 2 & 3.

<sup>250</sup> See e.g. Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Poland*. Strasbourg, 27 November 2003, ACFC/INF/OP/I/(2004)005, para 17.

individual concerned to decide which ethnic group she is to be identified with. The principle underlies the UN CERD Committee's General recommendation VIII, which in its entirety reads as follows:<sup>251</sup>

*The Committee on the Elimination of Racial Discrimination,*  
*Having considered reports from States parties concerning information about the ways in which individuals are identified as being members of a particular racial or ethnic group or groups,*  
*Is of the opinion that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.*

The Committee is thus of the view that self-identification carries a rebuttable presumption of validity. Unfortunately it did not elaborate upon the justifications that may overrule that presumption, or the situations where it is allowed to identify a person as a member of a particular group by way of third-party observation or other equivalent technique. It should be noted that there are situations where the simple application of the self-identification rule leads to problematic results. In Hungary, the application of the self-identification rule in determining who are eligible to participate in minority self-government elections as voters and as candidates has arguably led to an abuse of the system by non-minority people. Also the contrary phenomenon is common: people who do have ties with a minority group report in censuses and surveys to be members of the national majority, which leads to an under-estimation of the size of minority groups.<sup>252</sup>

It should be noted that the principle of self-identification has also been endorsed by ECRI<sup>253</sup> and the Durban Declaration and Plan of Action,<sup>254</sup> and has been embraced by some national jurisdictions.<sup>255</sup>

The Framework Convention for the Protection of National Minorities expands on these questions, and recognizes in Article 3(1) that '[e]very person belonging to a national minority shall have the right to choose to be treated or not to be treated as such'.<sup>256</sup> This provision leaves it to every such person to decide whether or not she wishes to come under the protection flowing from the principles of the Framework Convention. This has been interpreted as implying that each person shall be entitled to request not to be treated as belonging to a minority,<sup>257</sup> and that no-one may be obliged to disclose her possible affiliation with a minority.<sup>258</sup> The Advisory Committee on the Framework Convention has taken the view that consequently the answering of census questions on ethnicity cannot be made compulsory.<sup>259</sup>

<sup>251</sup> It should also be noted that the principle of self-identification is also in line with the core value of human rights, namely human dignity, an essential part of which is individual liberty and self-determination.

<sup>252</sup> This is a familiar situation in many countries. For Canada, see Potvin, Maryse – Sophie Latraverse, *Final Report on Canada*. Medis Project (May 2004), p. 36-38.

<sup>253</sup> Gachet, Isil 'The Issue of Ethnic Data Collection From the Perspective of Some Council of Europe Activities' in Andrea Krizsan (ed) *Ethnic Monitoring and Data Protection: The European Context* (Budapest: Central European University Press, 2001), p. 54.

<sup>254</sup> Article 92(a) of the Durban Declaration and Plan of Action. A/CONF.189/12.

<sup>255</sup> Article 7 of the Hungarian Minority Act provides: 'identification with and expression of belonging to a national, ethnic minority is the exclusive and inalienable right of the individual. No one can be forced to declare his or her national or ethnic identity. The right to national or ethnic identity and recognition and expression of belonging to such a minority group does not exclude the possibility of double or multiple identity.' Cited in Krizsán, Andrea 'Ethnic Monitoring and Data Protection: The Case of Hungary' in Andrea Krizsán (ed.), *Ethnic Monitoring and Data Protection. The European Context* (Budapest: Central European University Press, 2001), p. 159.

<sup>256</sup> The OSCE Copenhagen document of 1990 provides for a related right in Article 32: 'To belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice.'

<sup>257</sup> See Opinion of the Advisory Committee on the Framework Convention on Cyprus, 6 April 2001, ACFC/OP/I/(2002)004, para. 18.

<sup>258</sup> See Opinion on Azerbaijan, 22 May 2003, ACFC/OP/I/(2004)001, para. 21 and Opinion on Ukraine, 1 March 2002, ACFC/OP/I/(2002)010, para. 22.

<sup>259</sup> See e.g. the opinion of the Advisory Committee on Poland, where it noted that '[w]hile recognising the need for quality data in this area, the Advisory Committee considers that the right not to be treated as a person belonging to a minority also extends to a census and that a compulsory answer to a question on ethnic origin or a question on language used is not compatible with that principle.' Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Poland*. Strasbourg, 27 November 2003, ACFC/INF/OP/I/(2004)005, para. 24.

However, the right embodied by Article 3(1) does not imply a right for an individual to choose arbitrarily to belong to any minority or ethnic group. As pointed out by the explanatory report to the Convention, the individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity.<sup>260</sup> The application of these principles in practice is often anything but a straightforward issue, and can give rise to complex legal and political disagreements.<sup>261</sup>

The above-mentioned principles limit states' margin of freedom to construct ethnic categories for the purposes of censuses and the like. When data is collected, and especially insofar as it has a bearing on the distribution of rights or resources, states should establish equitable criteria by which groups are included (in questions made, e.g. in national census) as options from which individuals can choose. Individuals are also to be given the option to refuse all identifications without any disadvantage resulting from such choice.

Despite these principles the states are left with a lot of room for manoeuvre. The practices of the different Member States vary a great deal, and any single country can use multiple methods by which to keep track of the ethnic composition of its population.

Also other types of classifications exist for different types of purposes. Those Member States that have ratified the Council of Europe Convention for the Protection of National Minorities often include in the relevant legislation a definition of national or ethnic minority and/or an enumeration of the groups that are recognized as such. This is despite the fact that the Convention itself does not contain a definition of its beneficiaries, i.e. national minorities or persons belonging to them.<sup>262</sup> These domestic classifications often influence the classifications used for data collection purposes.

The experiences from the Member States and third countries show that countries use categorizations that are specific to their history, current demographic structure and prevailing legal system. Where ethnic questions have been included in the censuses, they have proved contentious and have been changed frequently.<sup>263</sup>

### 8.3. Religion and Belief

The concept of 'religion' gives rise to some difficult questions as well, although perhaps not to the same extent as the concept of ethnic origin. As Southworth has noted, the notion of 'religion' is not a fully coherent entity, as even the officially recognized religions are very diverse in their nature and are divided into different factions and sects, making it difficult to determine on what level a community can be said to exist.<sup>264</sup> There is also overlap between the concepts of religion and ethnicity. The main difficulty involved in the case of religion however is the question

<sup>260</sup> Explanatory report, paragraphs 33-34.

<sup>261</sup> A case in point is the situation of the Northern Ireland and especially its monitoring arrangements under the equality legislation. See McCrudden, Christopher 'Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate' in Morrison, J. – G. Anthony (eds), *Judges, Transition and Human Rights Cultures* (Oxford: OUP, 2006).

<sup>262</sup> According to the explanatory report to the Convention, '[i]t was decided to adopt a pragmatic approach, based on the recognition that at this stage, it was impossible to arrive at a definition capable of mustering general support of all Council of Europe member States.' Explanatory Report, paragraph 12.

<sup>263</sup> See e.g. Simon, Partcik, *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands*, Medis Project. Available at [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf/pubst/compstud04\\_en.pdf](http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/compstud04_en.pdf) (visited 1.1.2006). See also Nobles, Melissa 'Racial categorization and censuses' in Kertzer, David I – Dominique Arel, *Census and Identity: The Politics of Race, Ethnicity, and Language in National Censuses* (Cambridge: Cambridge UP, 2002).

<sup>264</sup> Southworth, Joanna 'The Religious Question: Representing Reality or Compounding Confusion?' in Dorling, Daniel – Stephen Simpson (eds), *Statistics in Society: The Arithmetics of Politics* (London: Arnold, 1999), p. 136 ff.

to what extent new and sometimes contentious religious movements are accepted as religions proper. It is submitted that the inclusion of the term 'belief' on side with 'religion' should probably be taken as a prima facie recognition that adherence to a wide range of beliefs, including non-theistic and atheistic beliefs, come under the protection of European anti-discrimination law.

Insofar as collection of data in relation to religion has a bearing on the rights, privileges or benefits enjoyed by particular religious communities, e.g. in terms of a right to teach religion in schools or the right to conclude marriages, also the relevant principles relating to non-discrimination and freedom of religion and belief have to be kept in mind. The use of a particular classification system must not give rise to any discrimination or unjustified disadvantage. In this regard it should be kept in mind what the UN Human Rights Committee has opined in relation to Article 18 of the ICCPR, relating to freedom of religion and belief:

The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

It is a well-established principle of international human rights law that no-one can be compelled to reveal her thoughts or adherence to a religion or belief. The UN Human Rights Committee has confirmed this.<sup>265</sup> This means that the answering of questions on religion should be optional, also in censuses, if no justification exists to the contrary.

Despite the afore-mentioned challenges, classifications on the basis of religion have not in practice given rise to the same kind of problems as classifications on the basis of racial or ethnic origin. This probably has to do with the level of institutionalisation and organisation involved, as most – though not all – major religious communities are well-established and have clear and stable criteria for membership. The relatively unproblematic nature of religion in the context of data collection can be seen in that e.g. in Canada the question on religion has been asked in censuses since 1871 and has changed little, whereas questions on ethnic or 'racial' origin, asked in censuses since 1871 as well, have changed significantly from one census to the next.<sup>266</sup>

## 8.4. Disability

Disability differs from the other grounds in that while Member States seldom provide explicit definitions of 'racial or ethnic origin', 'religion' or 'sexual orientation', definitions of 'disability' abound in the legal systems of the Member States. Some states, such as Hungary and Malta, have adopted a specific definition for the purposes of anti-discrimination law, while other countries have definitions that have been adopted for the purposes of other types of laws. There is wide variation in the definitions of disability found across the Member States. In most cases, a medical model of disability is enshrined in law, focusing on the person's functional capacity as the cause of impairment. In contrast, a social model views disability as arising from the interaction of an individual with her disability and the surrounding environment.<sup>267</sup>

<sup>265</sup> Human Rights Committee, *General Comment 22*, Paragraph 3.

<sup>266</sup> Potvin, Maryse – Sophie Latraverse, *Final Report on Canada*. Medis Project (May 2004), p. 34.

<sup>267</sup> Cormack, Janet – Mark Bell, *Developing Anti-Discrimination Law in Europe*. European Network of Independent Legal Experts in the non-discrimination field (human european consultancy & Migration Policy Group, 2005), p. 21. It is also noteworthy that in its judgment of 11 July 2006, in case C-13/05 Chacón Navas, paragraph 43, the European Court of Justice defined disability, in the context of Directive 2000/78, 'as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.

Many countries have in their censuses for the past decades followed the taxonomy developed by the World Health Organization (WHO) in 1980. This classification, called the International Classification of Impairments, Disabilities and Handicaps (ICIDH) has been criticized by some for being too medical and too centred on the individual, and was revised by the WHO in 2001. The new classification system, called International Classification of Functioning, Disability and Health (ICF), represents an attempt to achieve a synthesis of the two models of disability.<sup>268</sup> It remains to be seen what impact the new classification system will have on future data collection activities.

## 8.5. Age

The ground of age is probably the least problematic of all the grounds of discrimination covered by the two Directives. It is the easiest to measure, and the only problems that are likely to emerge relate to the question how different age groups should be constructed for the purposes of making comparisons. It is submitted that no general guidelines should be given in that regard, as the most workable or appropriate categories can only be established on a case-by-case basis. The EU Member States have chosen not to define 'age' in their anti-discrimination laws.<sup>269</sup> All Member States that carry out censuses ask about date of birth.

## 8.6. Sexual Orientation

The concept of sexual orientation may appear *prima facie* to be a rather uncomplicated one. Most Member States have chosen not to define sexual orientation within their respective anti-discrimination laws.<sup>270</sup> As an exception, the Irish equality legislation defines sexual orientation as 'homosexual, heterosexual or bisexual orientation' and a basically similar definition is found in the UK legislation.<sup>271</sup>

In practice, the issue of classification may not be straightforward. Many commentators have pointed out that the three-part classification model hides significant variations and that sexual orientation may be a matter of degree.<sup>272</sup> Furthermore, there are different conceptions of what constitutes sexual orientation - including attraction, identity, lifestyle, partnership and community.<sup>273</sup> In practice, a balance needs to be struck between recognizing the diversity of sexual orientations and the construction of categories for the purposes of data collection and research.

## 8.7. Conclusions

The construction of categories for the purposes of data collection gives rise to considerable challenges. This is because the reality that hides behind facially simple concepts such as 'racial or ethnic origin', 'religion or belief', 'disability' or 'sexual orientation' is characterized by deeper and wider diversity than the essentialist use of these

<sup>268</sup> World Health Organisation, *Towards a Common Language for Functioning, Disability and Health*. ICF. WHO/EIP/GPE/CAS/01.3

<sup>269</sup> Cormack, Janet – Mark Bell, *Developing Anti-Discrimination Law in Europe*. European Network of Independent Legal Experts in the non-discrimination field (human european consultancy & Migration Policy Group, 2005), p. 23.

<sup>270</sup> Ibid, p. 22.

<sup>271</sup> Ibid, p. 23.

<sup>272</sup> Haslam, Nick 'Evidence that male sexual orientation is a matter of degree' *Journal of Personality and Social Psychology*, 1997 Oct Vol 73(4), 862-870. McManus, Sally, *Sexual Orientation Research Phase 1: A Review of Methodological Approaches*. National Centre for Social Research. Scottish Executive Social Research (Edinburgh, 2003).

<sup>273</sup> McManus, Sally, *Sexual Orientation Research Phase 1: A Review of Methodological Approaches*. National Centre for Social Research. Scottish Executive Social Research (Edinburgh, 2003).

terms in legal texts or everyday speech would lead one to expect. Thus there are no tight fits between concepts and categories on the one hand and the empirical reality on the other. Human diversity and social organisation do not follow any simple principles, and the cognitive tools (such as concepts) that people use to make sense of this diversity vary from group to group and individual to individual. This means that the exact contents of the notions involved are always open to debate and that group boundaries can always be conceived in different ways. But in order to be operational, data collection systems must take a pragmatic approach to these issues, meaning that certain compromises may need to be made.<sup>274</sup>

States are not at a liberty to construct the categories they use for the purposes of data collection in any way they see fit. They must construct the categories on the basis of criteria built on objective factors, and have to be consistent in applying these criteria. This is particularly so where data collection is linked to the distribution of rights, obligations, resources or burdens – as is often the case e.g. with the census.<sup>275</sup>

The human rights approach to the collection of data emphasises the right of an individual to be in control of sensitive data relating to her. Data collection in relation to racial or ethnic origin should, as a main rule, take place with the consent of the person concerned, and should take into account the principle of self-identification. An individual however does not have a subjective right to declare to belong to any group whatsoever where this is in manifest conflict with the objective facts. In practice the extent of self-identification may sometimes be narrow also because e.g. census questionnaires can provide only few and broad categories as options where to choose from.<sup>276</sup> Likewise, data collection in relation to religion should only take place on the consent of the data subject. It is submitted that these examples may imply the existence of a broader human rights principle according to which no-one may be obliged or coerced to disclose sensitive information in relation to her person.

According to the practical experiences from several countries, the development of a classification system takes time, and should take place in close co-operation with the target groups.<sup>277</sup> The classification system should be developed with the purposes of equal treatment law in mind, meaning that as a general rule it is advisable to follow definitions applicable in that field of law. As women and men belonging to a same group often face distinct types of prejudices and discrimination, it is essential that all data collection takes into account the gender dimension.<sup>278</sup> Moreover, where possible, it is strongly recommended that the data collection system used should allow the analysis of also other types of intersectional discrimination.<sup>279</sup>

<sup>274</sup> Cf. Olli, Eero – Birgitte Kofod Olsen, *Towards common measures for discrimination*, 27.11.2005. Also available at: [http://www.smed.no/commonmeasures/TowardsCommonMeasures\\_2005.pdf](http://www.smed.no/commonmeasures/TowardsCommonMeasures_2005.pdf) (visited 1.1.2006), p. 9.

<sup>275</sup> That this principle has been breached many times has been underlined by Haug, according to whom 'the history of statistics on minority groups is full of examples of politically motivated re-definitions and re-groupings to eliminate, inflate, recreate or subdivide language, religious or ethnic groups.' [Haug, Werner 'Ethnic, Religious and Language Groups: Towards a Set of Rules for Data Collection and Statistical Analysis'. An online journal article available at <http://www.eumap.org/journal/features/2003/april/ethrellangroups> (visited 1.1.2006)]. Along similar lines, Mabbett concludes with respect to disability that the 'assignment of people to categories may become susceptible to manipulation for financial or political reasons, undermining the moral relevancy of the category.' [Mabbett, Deborah, *Definitions of Disability in Europe: A Comparative Analysis. Final Report* (Brunel University, 2002)].

<sup>276</sup> This has been pointed out e.g. in Tronstad, Kristian Rose – Lars Østby 'Measuring discrimination in Norway' in Olli, Eero – Birgitte Kofod Olsen (eds) *Towards common measures for discrimination*. (27.11.2005), p. 22.

<sup>277</sup> Potvin, Maryse – Sophie Latraverse, *Final Report on Canada. Medis Project* (May 2004), p. 36.

<sup>278</sup> See e.g. CERD Committee, *General recommendation XXV on gender-related dimensions of racial discrimination*, and Commission of the European Communities, *Equality and non-discrimination in an enlarged European Union*. Green paper. Brussels, 28.05.2004. COM(2004)379 final.

<sup>279</sup> On intersectional discrimination in general and particularly from a human rights perspective, see Makkonen, Timo, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore* (Turku: Åbo Akademi Institute for Human Rights, 2002). Available at: [http://www.abo.fi/institut/imr/degree\\_programmes/norfa/timo.pdf](http://www.abo.fi/institut/imr/degree_programmes/norfa/timo.pdf)

Stefan | 1981



# Part V

## Overall conclusions

This report has explored the ways in which anti-discrimination law and policy necessitates and benefits from collection of data, and has sought to clarify the conditions under which the data can be collected. It has also taken a look at whether the EU Member States are currently engaging in data collection.

It was found that international, European and national equal treatment laws put considerable pressure on EU Member States to collect data in relation to discrimination. This pressure emanates from multiple sources. First, the Racial Equality Directive provides that equality bodies must have the power to conduct surveys on discrimination. Second, the international human rights conventions require States parties to investigate cases of suspected discrimination, which in some circumstances necessitates data collection. Third, the reporting obligations placed upon Member States require them to produce statistical data on the situation of groups vulnerable to discrimination. Fourth, the effective implementation of equal treatment laws often requires the use, and therefore collection, of data. The main data collection needs arising from compliance with equality laws include the following:

- (i) *Complainants and respondents* often need data in order to be able to establish or rebut a case of discrimination. Several types of data may be useful in this respect, including: data gathered by means of workplace or service delivery monitoring; data gathered through an investigation carried out e.g. by an enforcement agency; data gathered by means of discrimination testing; and census or survey data.
- (ii) *Employers and service providers* can utilize data to ensure that they are in compliance with equal treatment laws, and to implement possible equality plans. This requires the existence of internal data produced by way of quantitative monitoring, and often also the existence of external benchmark data based on e.g. census or survey data.
- (iii) *Public authorities* need data in order to ensure that equal treatment laws are complied with and are effective, to study the existence of discrimination in the society at large, and to assess the situation of groups vulnerable to discrimination with a view to considering the adoption of positive action measures. A wide range of data sources may prove useful in this context, such as: census and survey data; administrative files; victim surveys; opinion surveys; and data emanating from discrimination testing.

Data is also needed for a wide range of other purposes. For instance, decision makers both at the European and national level need comprehensive and reliable data when facing questions concerning appropriate policies, legislation and effective remedies for addressing the problem of discrimination. National equality bodies, ombudsmen and NGOs also need data on discrimination for the purposes of monitoring the national situation as well as for planning and directing their work in an appropriate way. Data are also needed for the purposes of awareness raising and sensitising activities. Scientific evidence on the extent and nature of discrimination can serve as a compelling, factual baseline for national discussion on discrimination.

Despite the heavy demand and the many useful purposes that data can serve, data collection remains a severely under-utilised tool in the fight against discrimination. It appears to be the case that the afore-mentioned demands have not been fully grasped in the legal and political cultures of the Member States. This is evident for instance in that in the vast majority of the Member States there has not yet been a single court case where statistical evidence would have played any major role in proving discrimination on the basis of racial or ethnic origin, religion or belief, disability, age or sexual orientation. This situation is clearly linked to the paucity of data collection, making it highly likely that in the absence of the necessary data a significant portion of discrimination goes unnoticed and/or unchallenged.

The absence of data is however not complete. In most if not all EU countries some information is available in relation to analysing the extent, nature and effects of discrimination. This information tends to be incomplete in that it is limited in terms of the grounds it covers (typically ethnic origin), the material areas it covers (typically employment) and the methods employed (typically police statistics and data from victim surveys). The collection

of personal data in relation to the equality grounds through censuses is however relatively common. All EU Member States that conduct censuses inquire about age, and a narrow majority inquire about disability, religion and ethnic or national origin. No Member State poses questions with regard to sexual orientation. It appears to be the case that the information that is gathered by means of censuses is seldom made full use of for the purposes of anti-discrimination policies.

It is widely believed that international, European and national laws on data protection and the right to privacy categorically prohibit the collection of sensitive data. This was found not to be the case. The pertinent laws only set out the legal framework and the qualitative conditions that must be respected when the data is being collected or otherwise processed. Processing of sensitive data is in the overwhelming majority of EU Member States allowed on the condition that the data subject has given her consent thereto. Processing is allowed even without consent where it is necessary in the context of legal proceedings or in the course of the activities that public authorities take to ensure the realization of the principle of equal treatment in practice. Many Member States also expressly and separately authorize the collection and processing of sensitive data for statistical and scientific purposes, rendering most forms of data collection lawful also on that ground. States are also at a liberty to introduce legislation that further expands the possibility to engage in data collection without this infringing their obligations, provided that the necessary safeguards are in place. In addition, there are forms of collecting data on discrimination that do not involve, at any stage, not even at the stage of data collection, the processing of personal or sensitive data on individuals identified or identifiable directly or indirectly, and which thus do not engage the data protection laws in the first place.

The qualitative principles laid down in the European data protection instruments provide essential guidance on how to reconcile data collection with the protection of privacy and the prevention of misuse of data. These principles should always be taken into account when designing and implementing data collection operations. To sum up, these principles provide that in so far as doing so does not prejudice the objectives of the operation, the controller should opt for secondary rather than primary data collection, anonymous rather than non-anonymous surveys, sampling rather than full-scale surveys, and for voluntary rather than compulsory surveys. Data the keeping of which is no longer necessary must be disposed of. Privacy-Enhancing Technologies (PETs) should be used where such are available.

It is likely that in practice most forms of data collection will proceed on the basis of voluntary submission of data. Such an approach is also in line with the relevant principles of international human rights law, which provide that, as a matter of principle, no-one may be obliged to disclose her religion or ethnic origin. This has two consequences. First, the effectiveness of the data collection operations depends on the extent to which the persons and groups concerned are willing to co-operate in the action. This in turn depends on, inter alia, whether they are convinced that effective safeguards are in place to prevent any misuse of data. Second, it is likely that there will always be individuals who decide not to co-operate, and this has certain consequences for the reliability of the data.

By way of conclusion it can be said that whether EU Member States engage in data collection depends more on their anti-discrimination policies than on the European or international data protection laws. In a modern Europe, where the notion of 'information society' was coined already in the 1940's and where it is taken for granted that banks, insurance companies, schools, hospitals, tax authorities, stores and other public and private entities process personal data, it is surprising that the concept of collecting data in relation to a core human right faces such widespread reluctance and suspicion as it does. There are many practical, theoretical and legal challenges, relating for instance to the definition of the equality grounds and the need to foster general acceptance of data collection, that still need to be addressed, but it does not appear to be the case that many countries are prepared to address these challenges. They should do so, because at the end of the day, data form a reality test for checking whether the society is keeping its promise of equal treatment.

Leonie | 1995

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Jimmy | 1992

# Annex I

## Diversity Monitoring

Diversity monitoring is the process by which a public or private entity collects, stores and analyses data about the composition of its workforce or clientele across the relevant equality grounds. Monitoring is one of the most efficient measures an employer can take to ensure it is in compliance with the equality laws. Many if not most employers readily collect and store data about the employees, in particular information relating to their sex, address, union membership, length of service and other data as may be required to pay the salaries and manage the workforce in general. Diversity monitoring basically implies extending the scope of information that is being collected to include information relating to the equality grounds. Where monitoring practices exist, data is most commonly collected in relation to ethnic origin and disability,<sup>280</sup> although there is at least some experience of monitoring across all of the equality grounds covered by the two EU Equal Treatment Directives. While it therefore appears to be theoretically and technically possible to conduct monitoring across all the grounds, challenges remain with respect to the general acceptability, and therefore also practical feasibility, of conducting monitoring especially in relation to religion and sexual orientation, at least in the majority of the EU Member States.

*Monitoring recruitment and selection.* Employers interested in ensuring that their recruitment and selection practices are not biased need to address the following questions:

- Do qualified members of all groups apply for advertised posts in proportion to their presence in the population?
- Given the population of qualified applicants who do apply, does each group have the same chance of getting on the shortlist?
- Given the applicants on the shortlist, does each group have the same chances of getting offered the job?<sup>281</sup>

Data external to the organisation is required to answer the first question. Proportions of applicants from different protected groups need to be compared with their proportions of the qualified population in general. For that purpose, employers need to know the likely pools of suitably qualified applicants in the relevant spatial labour market.<sup>282</sup> Where the distributions of applicants, offers or hiring outcomes by particular groups deviate, in a statistically significant sense, from their distribution in the relevant qualified populations, then discrimination may be present and this possibility needs further investigation.<sup>283</sup>

Even where it is not possible in a satisfactory manner to investigate whether the pool of applicants is representative of the qualified general population, the monitoring of the applicants can trace irregularities in the process by which applicants are short-listed, invited to interview and offered a job. Diversity monitoring does thus not become redundant in the face of possible lack of suitable external comparative data.

It is crucial that the employer ties monitoring to concrete remedial action. The type of corrective action should directly address the source of the problem as identified by the analysis of monitoring data.

*Workforce monitoring.* Once individuals are working within an organisation, it is not difficult to keep records of all employees. If the relevant data has already been collected at the recruitment stage, employer needs only to transfer the data concerning appointed individuals into the employee database, while the data on other applicants may for instance be rendered anonymous and kept for a fixed period of time in order for the employer to be able to respond effectively to any claims of discrimination in relation to the recruitment process.

<sup>280</sup> See Dex, Shirley and Kingsley Purdam, *Equal Opportunities and Recruitment. How Census data can help employers to assess their practices* (York: York Publishing Services, 2005).

<sup>281</sup> See *ibid*, pp. 7-8.

<sup>282</sup> *Ibid*, p. 1.

<sup>283</sup> *Ibid*, p. 8.

Workforce diversity monitoring should ideally cover all aspects relating to employment, including promotion, pay and other conditions of work, and termination of employment relationships. It is of high importance to monitor how individuals progress to the top levels of jobs.<sup>284</sup> Where employers are monitoring progression, the appropriate match would be, for instance, the success rates of each ethnic group.<sup>285</sup> It may also be necessary to collect data in relation to disability and the need for reasonable accommodation. No external comparative data is necessarily needed to assess equality of treatment at this stage.

*Technical and practical considerations.* In principle, the within-organisation elements of diversity monitoring are not inherently problematic or technically challenging. Basically, applicants for vacancies are for instance asked to fill in an equal opportunity form, usually as a voluntary exercise. To alleviate any fears of misuse of the data in the selection process, the processing of this information can be separated from the processing of the applications proper and trusted to a person who is not involved in the selection process. Once information about short-listing, appointments, salary and promotion become available, these can be entered into the database. The overall statistics on applicants and the workforce, broken down by different equality grounds, can then be compared with the relevant benchmark data.

In practice, however, things are not this simple. Many employers feel uncomfortable about asking questions about sensitive issues, and many prospective employees feel uncomfortable about answering those questions. Practice has shown that where collected on a voluntary basis, the information on ethnicity, disability and sexual orientation is often incomplete.<sup>286</sup> Missing data has a direct and detrimental effect on the quality of the monitoring exercise, which is why employers need to consider ways in which they can encourage employees to submit the data.

A major technical challenge relates to the existence and availability of suitable external data, which can be beneficial at some stages of monitoring for comparative purposes. An employer or a service provider needs a benchmark, a standard, in order to be able to assess its internal data. Where such a benchmark based on official data exists, it provides clear benefits for the monitoring exercise. An ideal benchmark would show the proportion of qualified applicants belonging to a certain protected category living in the spatial area of recruitment.<sup>287</sup> This requires the existence of extensive and reliable macro-level data sets that include personal data in relation to the protected equality ground(s), qualifications (in particular highest education) and place of residence. Such data could even in theory be only available through censuses, central population registers or possibly national Labour Force Surveys. In situations where official data is not available, data from similar organisations may provide for a useful point of comparison.

Comparative analysis can reliably be carried out only where the categories used for collecting data through monitoring correspond to those used in the official datasets (or in the other benchmark used). For instance, it is clear that if the monitoring form used by an employer defines 'disability' only in terms of physical impairment, while the relevant official data is based on a more inclusive definition, the two do not provide for a common basis of comparison.

<sup>284</sup> Ibid, p. 21.

<sup>285</sup> Idem.

<sup>286</sup> See e.g. *ibid*, p. 13.

<sup>287</sup> As regards the spatial area of recruitment, it has to be noted that employers use different recruitment strategies for different types of vacancies. Local outlets are typically used for low-grade or starter entry jobs and national outlets are used for higher-grade entry jobs. Some of the jobs advertised are so specialized that it is practically impossible to ever hope to gain information from nationally representative surveys or even census data about the pool of qualified applicants; *ibid*, pp. 20-21.

*Alternative method: Anonymous monitoring.* Under-declaration, especially of ethnic, religious and sexual identity, causes many difficulties for the analysis of the data. One way in which this problem can be addressed is the use of anonymous monitoring instead of non-anonymous monitoring. Collection of data through anonymous surveys, whereby no data on identified or identifiable persons is gathered, has been found to significantly increase response rates especially among the LGB people.<sup>288</sup> If repeated at regular intervals, and provided that the survey sample is representative, anonymous surveys can yield also trend data.

Whether anonymous monitoring has any benefits over non-anonymous monitoring in terms of response rates and anonymity depends on the size of the organisation and the level of information that is being sought. In a small or even medium-size organisation, a detailed questionnaire may lead to a situation where particular responses can nevertheless be traced back to particular individuals, a fact which compromises the very idea of anonymous monitoring and may again lead to a decrease in the willingness to co-operate. The usefulness of this method has thus to be assessed on a case-by-case basis.

The disadvantage of relying on regular anonymous surveys instead of employee registers is that the information cannot be kept up-to-date, in addition to which it is a bit more burdensome method both for the employees and the employer. Unlike anonymous monitoring, non-anonymous monitoring may be useful for the exploration of reasonable accommodation duties and for the implementation of equality (positive action) plans.<sup>289</sup> Anonymous monitoring also faces the same challenges associated with the need for suitable comparative statistics as non-anonymous monitoring.

Overall, it may be concluded that non-anonymous monitoring has some advantages over anonymous monitoring, and that the benefits of anonymity may not materialize where detailed information is needed or where the size of the company or other entity is small. Anonymous monitoring may however be the only available option where national data protection laws do not allow the use of non-anonymous monitoring or where there are serious problems with response rates.<sup>290</sup>

*Diversity monitoring in service delivery.* The prohibition of discrimination under the Racial Equality Directive applies not just in relation to employment, but also in relation to, *inter alia*, education, social security, healthcare, social advantages and access to and supply of goods and services, including housing. Entities working in these areas may thus want to monitor not just their personnel but also their service delivery. Monitoring can provide useful information particularly in the domains of housing, education and health care. Monitoring can be used to tell which groups are using or receiving the services and whether certain groups are facing particular challenges. An agency providing housing services may for instance want to draw up profiles of service use to verify that all groups have an equal access to housing of equal quality and on equal terms. Schools can assess the impact of their policies on pupils, staff, and parents from different ethnic groups. They can also monitor the way their policies and operating modes work, with special emphasis on pupils' attainment levels. Further and higher education institutions can monitor, by ethnic group, student admissions and progress, and staff recruitment and career development.<sup>291</sup>

<sup>288</sup> This is understandable, given that most LGB people are thought not to be out about their sexual orientation to everyone they work with. See Stavo-Debaugue, Joan – Sue Scott, *Final Report on England*. Medis Project (May 2004), p. 31.

<sup>289</sup> It should be noted that different data protection rules may apply where the data is used not just for monitoring purposes but also for the purposes of making decisions with respect to specific individuals.

<sup>290</sup> Another way to deal with low response rates may be to use other-identification in addition to self-identification as the basis on which assignment to different categories takes place.

<sup>291</sup> Commission for Racial Equality, *Ethnic Monitoring. A guide for public authorities* (London: CRE, 2002), p. 5. For more on service delivery monitoring, see p. 47.



## Annex II

### Examples of Monitoring Practices in the EU Member States

To find out whether the EU Member States are engaging in monitoring the *European Network of Independent Legal Experts in the non-discrimination field* asked country experts to report on whether the Member States have enacted legislation requiring or allowing the collection of data in this area.<sup>292</sup> It emerged that few Member States have adopted specific laws or statutory provisions that deal specifically with this issue. For most of the countries, there are no specific requirements in this regard under equal treatment laws or employment laws, and the question of whether monitoring is allowed falls under the general regime of data protection law.

This part reviews such legal duties under the national laws of the EU countries that are a) directly related to securing equal treatment, either in law or in fact, including through positive action and reasonable accommodation, and which b) require the collection of sensitive personal data.

*Belgium.* While there is no general requirement on the public or private sectors to engage in workforce or service delivery monitoring, the public services of the Flemish-speaking Community constitute an exception. They are required to file annual reports and action plans on the progress they are making towards proportionate representation of all target groups in the workforce, and thus, they are to keep records of the representation of these different groups. These 'target groups' include persons of non-EU origin and background ('allochtonen'), persons with a disability, workers above 45 years of age, persons who have not completed their secondary education, and persons belonging to the under-represented sex in a specific profession.

*Hungary.* Under the Hungarian Labour Law an employer may – in agreement with trade unions represented at the workplace or, if there is no such trade union, with the works council – adopt an 'equal opportunities plan' for a definite period of time. The aim of the plan is to improve the situation of disadvantaged groups at the workplace. The non-exhaustive list of these groups, as enumerated in the Labour Code, includes women, employees older than 40, Roma employees, disabled people, employees with two or more children under 10, and single employees with a child under 10. The plan shall contain the analysis of the work-related situation of disadvantaged groups, with special regard to their wages, promotion, training and child-related benefits. Furthermore, the plan shall state the employer's objectives related to equality of opportunities, and the means for the achievement of these objectives, with special regard to training and work-safety programs. Employers are allowed to collect the data necessary for the preparation of the plan, as long as the processing of the data takes place in accordance with the Data Protection Act, is based on the consent of the employee concerned, and the information is kept only until the last day of the validity period of the plan.

*Lithuania.* The Lithuanian Labour Code provides advantages for specified employee groups. According to Article 92 of the Code the following persons shall be provided additional guarantees in the labour market: Persons with a disability, persons in the 16-25 age group who take their first employment, persons who have not more than five years until their entitlement to old age pension, and graduates who are starting their working career. Compliance with this requirement necessitates the collection of relevant information.

*Portugal.* Companies are obliged to present to the workers' representatives a yearly 'social balance' containing data on human resources, social investments and improvements in working conditions. This obligation concerns companies with more than ten employees. The social balance may give some information about the situation of, in particular, elderly workers and workers with a disability. For these and other purposes, employers are allowed to keep records of their workforce after obtaining the authorisation of the National Data Protection Authority.

*The Netherlands.* In the Netherlands the collection of data with regard to disability is allowed, and to a certain extent encouraged, as employers may be asked to submit, on a voluntary basis, information on the numbers of

<sup>292</sup> In this context 'monitoring' is to be understood in a bit broader sense than in which the concept was used in Annex 1.

disabled employees for the purposes of a specific country-wide report drawn up by a governmental research institute. Collection of data with regard to religion or belief, sexual orientation or ethnic origin is not allowed. There is one exception to this rule: ethnic monitoring is allowed, albeit not required, for the purposes of positive action. Collection of data on people of non-Dutch origin is therefore permissible provided that the group concerned is shown to suffer from actual inequalities and that the monitoring can be considered to constitute a necessary means to fight these inequalities.

The current situation, placing strict limits on monitoring, can be contrasted with the situation that prevailed in 1994-2004. The Act on the Promotion of Proportional Labour Market Participation of Allochtones, or 'Wet BEAA', came into effect in 1994.<sup>293</sup> The crux of the Act was that employers had to register the number of members of minority groups in their service and formulate policies to hire more of them and to keep them in their service. When the law was evaluated in 1996, it was found that less than 60 % of the employers had introduced the compulsory registration of the ethnic origin of the employees, and only 14% were complying fully with the law, which inter alia required employers to deposit a report at the Chamber of Commerce. The Act was criticized on two sides: many companies complained about the complexity and volume of procedures and requirements involved, while some other stakeholders complained about the poor monitoring and enforcement of the law. In effect, a new law, the Act for Stimulation of Labour Market Participation, or the 'SAMEN Act', was introduced in January 1998.

The SAMEN Act obliged employers with a staff of more than 35 people to register ethnicity and to produce a yearly report to be submitted to the Works Council. According to the SAMEN Act, a proportional representation of ethnic minorities was achieved when an enterprise had as many employees from a target group as were represented in the regional working population. Qualifications and skills were also taken into account. The government listed target percentages for each region. Experiences with the SAMEN Act were more positive than with its predecessor, with many employers reportedly having been reluctant to co-operate at first, but then improving on this matter thanks to lobbying and control mechanisms. However, only one third of all employers deposited an annual report as required. The Act was prolonged once, in 2001, but in 2003 a decision was made to end its implementation as of January 1, 2004, in spite of the fact that it had proven useful particularly to the Equal Treatment Commission and the NGOs.

*United Kingdom.* There is a general statutory duty upon most British public authorities to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different ethnic groups. This duty was introduced by the Race Relations (Amendment) Act 2000 and has been supplemented by additional specific statutory duties in the Race Relations Act 1976 (Statutory Duties) Order 2001. The Commission for Racial Equality has published several statutory Codes of Practice that elaborate upon these duties with respect to racial and ethnic equality. While these Codes do not impose any legal obligations as such or provide for authoritative statements of the law, they are of relevance in any proceedings brought under the RRA.<sup>294</sup> The courts must take these codes into account, and therefore an employer can benefit from adherence to the relevant code if it has to defend itself before an industrial tribunal in a discrimination case.<sup>295</sup>

<sup>293</sup> Most of the information in this and the following paragraph is based on Guiraudon, Virginie - Karen Phalet - Jessika Ter Wal, *Final Report on the Netherlands*. Medis Project, June 2004.

<sup>294</sup> See e.g. s. 1.6 of CRE, *Statutory Code of Practice on Racial Equality in Employment*. November 2005.

<sup>295</sup> As the Code of Practice points out, 'employers should be able to defend themselves better in any case of alleged racial discrimination brought against the organisation, if they can show they have taken the steps recommended in this code.' CRE, *Statutory Code of Practice on Racial Equality in Employment*. November 2005. s. 1.7.

The race equality duty requires a wide range of public authorities to monitor their functions and policies for any adverse impact on race equality.<sup>296</sup> These bodies are required to assess the likely impact of any proposed policies on the promotion of race equality. Moreover, they are required to prepare and publish a Race Equality Scheme, setting out how they intend to fulfil the requirements of the duty.

Most public authorities bound by the general duty also have a specific duty to promote race equality as employers. This means that they have to monitor, by ethnic groups, all employees, and all applicants for jobs, promotion and training. Authorities employing more than 150 people have to monitor the number of employees from each ethnic group who: receive training; benefit (or suffer disadvantage) as a result of performance assessments; are involved in grievances; have disciplinary action taken against them; and end employment with the authority. Public authorities bound by the specific duties are required to monitor all their functions and policies that are relevant to the general duty. The CRE's statutory code of practice defines functions as the full range of a public authority's duties and powers, which means that they have to extend monitoring also to the main areas of their service delivery.

A duty is imposed also on educational bodies to monitor the ethnic composition and performance of their staff and pupils. Schools must prepare and publish a race equality policy, as well as to monitor and assess how their policies affect ethnic minority pupils, staff and parents. Further and higher education institutions (such as universities) must assess the impact of all their policies on students and staff. They must also monitor, by racial group, student admissions and progress, and staff recruitment and career development. The CRE has published a code of practice that guides how public authorities should give effect to these statutory requirements, and has also published guidance upon how to monitor effectively when carrying out these duties.

Monitoring is not a legal obligation for private entities. The Employment Code of Practice therefore only recommends its use, although it can be said that this recommendation has more force than a simple piece of advice.<sup>297</sup> It should also be mentioned that the CRE has also introduced guidelines on public procurement.

The Disability Discrimination Act 2005 imposed a general duty upon all British public authorities to avoid unlawful disability discrimination and to promote equality of opportunity for disabled persons. The Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 impose a specific duty upon public authorities to prepare a Disability Equality Scheme, which is to set out an authority's arrangements for implementing the general duty. This scheme must also set out an authority's arrangements for monitoring the impact of its policies or practices upon disabled persons, including their employment policies. Once a year, each public authority is to report on the results of its monitoring arrangements, and every three years, the authority is to report on its progress in enhancing equality for disabled persons.

It should be emphasised that under UK law no individual is obliged to disclose her ethnic origin, gender, sexual orientation, disability, religion or age: co-operation is thus voluntary.

Monitoring duties exist in Northern Ireland in respect of religious and political belief. The Fair Employment Act 1989 imposes a positive duty on employers with a workforce of ten employees or more to take measures to ensure a fair proportion of both of the two major religious communities in Northern Ireland, Catholics and Protestants, in their workforce. Employers with ten or more employees are required to monitor annually the composition and pay scales of their workforce, and every three years to review their recruitment, promotion and

<sup>296</sup> The authorities concerned include central government departments, local authorities, criminal justice authorities, educational authorities and regulatory bodies.

<sup>297</sup> Stavo-Debaugue, Joan – Sue Scott, *Final Report on England*. Medis Project (May 2004), p. 60.

training practices. Employees and applicants for employment are to be classified as 'Catholic', 'Protestant' or 'other'.<sup>298</sup>

The 'employment equity' monitoring requirements imposed upon employers in Northern Ireland are enforced by the requirement that employers file their monitoring returns and equality plans with the Equality Commission for Northern Ireland (ECNI) for approval. The ECNI can seek court orders to force employers who fail to do this to submit their arrangements to the Commission. The Commission can also launch investigations into an employers' monitoring arrangements and this 'Article 55 review' is a key mechanism to promote equality in this area.<sup>299</sup> Non-compliance with the monitoring provisions of the duty can be penalised primarily by the denial of government grants and exclusion from state tendering processes.<sup>300</sup>

If patterns of discriminatory treatment are identified in the monitoring process, employers, after consultation with the Equality Commission, are required to take appropriate positive action measures. These can include the setting of goals and timetables; implementing equal opportunities policies; reviewing employment policies, practices and procedures; and taking steps to attract applicants from the under-represented community.

Section 75 of the Northern Ireland Act 1998 provides for an extensive positive duty on public authorities. This imposes a duty on specified public authorities to have due regard to the need to promote equality of opportunity across all equality grounds, including disability, age, sexual orientation and political belief, in carrying out their public functions. A duty to promote good relations is imposed in respect of race, religion and political belief. A wide range of Northern Irish authorities are subject to the legislation. Schedule 9 of the Act sets out the measures required to comply with the duty, and in particular requires that all authorities to which the duty applies prepare an 'Equality Scheme'. This Scheme is required to set out the arrangements to introduce impact assessment, monitoring, consultation, training and access to information that the authority intends to take to implement the duty. The Northern Ireland Equality Commission has set out detailed guidelines for drafting Equality Schemes, and in particular how public authorities should monitor the impact of their policies and practices, which should include monitoring of the effect of their employment policies and practices upon different groups and the composition of their workforce. The results of any monitoring carried out under the scheme are required to be taken into account in formulating policy.

The Northern Irish s. 75 duty requires all public authority equality schemes and monitoring arrangements to be submitted to the Equality Commission for Northern Ireland for approval. The ECNI, if dissatisfied with a public authority's equality scheme or its monitoring arrangements, can refer the authority in question to the Secretary of State for Northern Ireland, who can impose an alternative scheme if necessary. The Commission can also investigate the extent of compliance with the duty or with a specific scheme, as well as investigate complaints about non-compliance from individuals. If the authority fails to respond to action recommended by the Commission following such an investigation, the Commission can refer the matter to the Secretary of State. Enforcement via judicial review and auditing mechanisms is also possible.

The UK experiences of monitoring are somewhat mixed. A major survey by the CRE in 2003 found that only just over one-third of organisations were responding well to both the spirit and the letter of new duties under the

<sup>298</sup> Employers can classify individuals according not only to their actual religious belief, but also according to their 'supposed' religious belief. This provision was introduced as a result of fears that individuals might be reluctant to self-classify due to the possibility of external threats, and the belief that employers in such cases should still be obliged to classify their employees to prevent patterns of exclusion being maintained.

<sup>299</sup> Equality Commission for Northern Ireland, *Annual Report 2000-2001*, p. 25.

<sup>300</sup> See Sloane, P.J. and D. Mackay 'Employment Equity and Minority Legislation in the UK After Two Decades: A Review' 23 *International Journal of Manpower* (1997), p. 18.

2001 legislation. This is despite the fact that the vast majority of public organisations had produced a race equality scheme or policy.<sup>301</sup> In the private sector, which is not subject to the 2001 legislation, 38 per cent of directors of companies stated that their organisation collected information on the number of employees by ethnic group, while only 22 per cent stated that their organisations collected information on job title or grade and ethnic group.<sup>302</sup> Relatively few private sector employers comply with the recommendations of the equality commissions, or have introduced intensive monitoring.

There is wide agreement that the Northern Irish employment equity duties have proved in the main largely successful. The House of Commons Northern Ireland Affairs Committee reported in 1999 that 'the extent to which employers have complied with the regulatory requirements of the legislation appears to be impressive'.<sup>303</sup> There is also reason for satisfaction in light of the outcomes: The analyses of the monitoring returns for the year 2004 show that earlier imbalances have now disappeared, as the composition of the workforce is now 57.7% Protestant and 42.7% Catholic, while their proportions of those available for work are 57.3% and 42.7% respectively. This achievement has been heralded as 'a telling example of the potential of a public policy intervention'.<sup>304</sup>

*EU25 experiences in the context of disability.* Data collection takes often place in the context of disability. Firstly, many if not most EU countries have adopted specific schemes to promote employment of people with disabilities, and compliance with these schemes, or eligibility for certain benefits in this context, usually requires appropriate documentation. Secondly, the taking of reasonable accommodation measures, as required by the EU Employment Equality Directive, may in practice require the collection and storage of data in relation to disabled workers.

Specific allowances or subsidies may be available either to disabled workers or companies that employ them. This is the case for instance in Italy, the Netherlands, Slovakia and Spain. Many countries have set a specific quota for disabled workers. Thus, for instance in Hungary, employers are obliged to pay a so called 'rehabilitation contribution' to the central Labour Market Fund if the number of their employees exceeds 20 and the proportion of disabled persons within the workforce is below 5 percent. On the other hand, if the proportion of disabled workers exceeds 5 per cent, employers are entitled to receive funding. In Germany employers who have more than 20 employees are required to ensure that at least 5% of them are persons with disabilities. In Malta the quota is 2%. In Austria companies with 25 or more workers are obliged to employ at least one person with a disability.

In many countries, for instance Belgium, Finland and Lithuania, there is legislation on so-called social companies that are entitled to financial support from the state.<sup>305</sup> Social companies are companies in which a substantial amount of the workforce consists of people with disabilities or other people that experience disadvantages in the labour market. For instance in Finland a company is entitled to the status of a social company and the ensuing benefits if its workforce consists in at least 30% of people with disabilities or people with a history of long-term

<sup>301</sup> Joan Stavo-Debauge – Sue Scott: *Final Report on England*. Medis Project (May 2004), p. 48.

<sup>302</sup> See Dex, Shirley and Kingsley Purdam, *Equal Opportunities and Recruitment. How Census data can help employers to assess their practices* (York: York Publishing Services, 2005), p. 7 and references cited therein.

<sup>303</sup> House of Commons Northern Ireland Affairs Committee Fourth Report (1999), para. 48.

<sup>304</sup> Foreword by Chief Commissioner Bob Collins to the 2004 Monitoring Report No 15 by the NI Equality Commission, page 2.  
<http://www.equalityni.org/uploads/pdf/MonRepNo15P1.pdf>

<sup>305</sup> The UK has introduced new legislation on so-called Community Interest Companies (CICs). These companies differ to an extent from 'social companies' in the sense in which the term is used here. A CIC is a new type of company, designed for social enterprises that want to use their profits and assets for the public good. For more information, see <http://www.dti.gov.uk/cics/>

unemployment. According to the European Commission's Green Paper on Entrepreneurship, social enterprises provide 3.5 million jobs in the European Union.<sup>306</sup>

In this connection it might also be pointed out that some Member States provide for, or at any rate allow, reasonable accommodation with respect to religion. Accommodation of religion may mean for instance the provision of special menus and the making of arrangements for the observation of religious holidays; such accommodation measures may require the collection of data on religion.

Many entities, in their capacity as a provider of services and/or as an employer, need to collect personal data in the course of their duties that are not directly related to equal treatment.

In many Member States, such as Denmark and Hungary, schools are required or allowed to collect personal data in relation to pupils' mother tongue for the purposes of arranging the teaching of, and/or teaching in, the mother tongue.<sup>307</sup> In Cyprus the Ministry of Education maintains records of children registered at all levels of schools in Cyprus. The children are classified as 'Greek-Cypriots', 'Greeks' (from Greece) and 'non-Greek speakers'. 'Non-Greek speakers' are further classified into 'Turkish Cypriots' and 'Others'. Upon registration of children in secondary education public schools, religion must be declared, in order to provide, if desired, exemptions from religious instruction classes in the cases of children who are not of Greek Orthodox religion. In Portugal, some education providers keep records on 'children of gypsy origin' (*crianças de origem cigana*), with a view to guaranteeing their ability to change schools in accordance with their mobile lifestyle. In Slovakia, universities are required, and grammar schools and high schools are allowed, to keep ethnic records.

Across the Member States, health care authorities and those providing for health care services typically enjoy exemptions from data protection rules, and are allowed to process data that may be needed in order to provide medical treatment. Such data may include information on e.g. disabilities.

In addition to education and health care services, there are many other examples of the collection of sensitive data in a context other than securing equal treatment. For instance in Germany and some other countries employers are required to collect data on religious affiliation for the purposes of church tax collection.

While entities in both public and private sectors may thus acquire sensitive information with regard to their employees or people using their services, it is not necessarily the case that they use, or are even allowed to use, this information for the purposes of equality monitoring.

<sup>306</sup> Commission of the European Communities, COM(2003) 27 final, p. 23.

<sup>307</sup> In some countries the same applies with respect to kindergartens.

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## Annex III

# Collection of Data Through Censuses in the EU Member States

The following table indicates which EU Member States collect data in relation to the equality grounds through population censuses:<sup>308</sup>

<b>Discrimination Ground</b>	<b>Ethnic or National Origin</b>	<b>Religion</b>	<b>Age</b>	<b>Disability</b>	<b>Sexual Orientation</b>
Austria	No	Yes	Yes	No	No
Belgium	No	No	Yes	Yes	No
Cyprus	Yes	Yes	Yes	Some	No
Czech Rep.	Yes	Yes	Yes	No	No
Estonia	Yes	Yes	Yes	Yes	No
France	No	No	Yes	No	No
Germany	No	Yes	Yes	Yes	No
Greece	Some <sup>309</sup>	No	Yes	No	No
Hungary	Yes	Yes	Yes	Yes	No
Ireland	Yes	Yes	Yes	Yes	No
Italy	No	No	Yes	Some	No
Latvia	Yes	No	Yes	No	No
Lithuania	Yes	Yes	Yes	Yes	No
Luxembourg	No	No	Yes	No	No
Malta	No	No	Yes	Yes	No
Poland	Yes	No	Yes	Yes	No
Portugal	No	Yes	Yes	Yes	No
Slovakia	Yes	Yes	Yes	No	No
Slovenia	Yes	Yes	Yes	No	No
Spain	No	No	Yes	No	No
UK	Yes	Yes	Yes	Some	No

Two clarifications need to be made at this point. First, the table includes information that is gathered through censuses. Countries may gather the information also by some other means, e.g. registers, mini-censuses, and/or surveys. There is thus more data available than what this table indicates. Denmark, Finland, Sweden and the Netherlands are not included in this table, as they no longer conduct censuses.<sup>310</sup>

Second, the questions, variables and categories used vary from country to country. This is especially the case with ethnic/national origin.<sup>311</sup> Only Cyprus, Ireland and the UK ask directly about ethnic origin.<sup>312</sup> In Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia the census questionnaire does not ask about 'ethnic origin' but about 'nationality', which is however to be understood in ethnic terms and to be distinguished from the formal notion of citizenship, and is therefore included in this table as indicating ethnic or national origin.

<sup>308</sup> The table has been compiled on the basis of country-by-country analysis of census questionnaires (the last census taken in the country before June 2006). The author would like to thank Mr. Perttu Salmenhaara for his help in collecting and analysing the data.

<sup>309</sup> Some limited information is gathered, namely whether one is of Greek origin and what was his/her mother's place of residence at the time of birth.

<sup>310</sup> These countries do, however, compile census-like information on the basis of official registers.

<sup>311</sup> There is considerable variation also with respect to census questions on disability: some of these questions are rather specific whereas some are very general.

<sup>312</sup> The way the questions have been formulated differ somewhat. Notably, the UK census question on ethnic origin has strong racial overtones, while the Irish question asks about 'ethnic or cultural background'.

The Greek census questionnaire inquires about the place of residence of the data subject's mother at the time of birth and whether the person concerned is of Greek origin. Many if not all countries ask about data subject's citizenship and place of birth, but the inclusion of these variables was not considered to be sufficient for a country to be considered as collecting data on ethnic or national origin.

The table shows that all EU Member States that conduct censuses collect data in relation to age (date of birth) and that a clear majority of states collect data in relation to religion. A narrow or close majority gather data in relation to national or ethnic origin and disability. No Member State currently collects data in relation to sexual orientation, although the introduction of a question on sexual orientation has been considered in some countries.

It should be kept in mind that the collection of data in relation to the equality groups does not necessarily mean that the data is made use of for the purposes of anti-discrimination law and policy.



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