

**REPORT ON MEASURES TO COMBAT DISCRIMINATION  
Directives 2000/43/EC and 2000/78/EC**

**COUNTRY REPORT  
Spain  
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State of affairs until 8 February 2007**

This report has been drafted for the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

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## INTRODUCTION

### 0.1 The national legal system

*Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.*

Public Administration as defined in the Spanish Constitution (SC) of 1978 is structured in three levels: Central Government, Autonomous Communities (regional governments) and Local Authorities. Central Government has a series of exclusive powers (SC, art. 149). These include criminal and procedural law, civil legislation, labour and Social Security law, the basic structure and coordination of healthcare, the basic structure of education and the basic legal system for Public Administration. The Autonomous Communities manage some of these fields (such as health and education) and also have the power to adopt legal regulations developing or complementing Central Government legislation in some fields.

Conflicts of powers between Central Government and the Autonomous Communities are resolved by the Constitutional Court (SC, art. 161)

In some of the fields mentioned in Directive 2000/43, such as social advantages and access to and supply of goods and services which are available to the public, including housing, all three tiers of government (Central, Regional and Local) have jurisdiction.

The International Treaties signed by Spain are included in the internal legal system (SC, art. 96). Spain has ratified practically all of the international instruments combating discrimination. Such is the case of the conventions of the United Nations, the International Labour Organisation (ILO) and the European Council. The *Universal Declaration of Human Rights* is mentioned in Article 10.2 of the SC as a source of interpretation of provisions relating to fundamental rights. The *International Convention on the Elimination of All Forms of Racial Discrimination* was ratified by Spain in 1969, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* in 1977 and the *Convention on the Elimination of All Forms of Discrimination against Women* in 1980. Also in relation to the social sphere, there is *ILO Convention 97 on Migration for Employment* (ratified in 1967) and *ILO Convention 111 on Discrimination (Employment and Occupation)* (ratified in 1967). Within the framework of the Council of Europe, Spain ratified the *Convention for the Protection of Human Rights and Fundamental Freedoms* in 1979, but has not yet ratified *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*. Spain has also signed up to the *European Social Charter* (ratified in 1980) and the *Convention on the Legal Status of Migrant Workers* (ratified in 1980).

Spain is a non-confessional State: the Constitution of 1978 clearly proclaims a separation between Church and State. In practice, religions are treated in different ways. Catholicism is the dominant religion: it is expressly mentioned in the Constitution and enjoys the closest official relationship with the Government as well as financial support. The relationship between the State and the Catholic Church is defined by four international treaties of 1979 between Spain and the Holy See, covering economic, religious-education, military and judicial matters. Jews, Muslims and Protestants have a recognised influence in Spanish Society, according to the Government, and therefore have acquired official status through

bilateral agreements (signed in 1992). Other religions are covered by the Constitution, but have no special agreements with the State.

Directives 2000/43 and 2000/78 were jointly transposed in Law 62/2003 of 30 December on fiscal, administrative and social measures (*Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social*) (arts. 27 to 43), published on 31 December 2003 in the Spanish Official Journal (BOE); in Chapter III ("*Medidas para la aplicación de la igualdad de trato*" – Measures for the application of equal treatment) of Title II ("*De lo social*" – Social measures). This law, and therefore the transposition of both directives, came into force on 1 January 2004.

They were transposed (under the former centre-right government) with no debate in society at large (as there was no formal dialogue with the two sides of industry or with NGOs, as suggested by the directives), and no political or parliamentary debate. Moreover, the transposition was effected in a law known in parliamentary terms as "*Ley de acompañamiento*" (Accompanying Law), in which over fifty existing laws are amended. This use of accompanying laws to amend many other laws has been repeatedly criticised, for example, by the Spanish Economic and Social Council (ESC), which has to report urgently on the bills for accompanying laws. In its report on last year's bill (adopted on 7 October 2003), the ESC points to "a deterioration of legal guarantees as a result of the use of a law regulating a profusion of disparate matters and that is not easily accessible to or comprehensible for the citizens affected by it," and remarks that the bill "is not confined to matters directly related to the implementation of the Finance Bill and is used on occasion to introduce legal amendments of a significance greater than that pertaining to a bill supplementing the Finance Bill."<sup>1</sup>

Chapter III of Law 62/2003, by which both directives are transposed, has three sections:

- ✓ The first section (arts. 27-28) contains a general transposition of the definitions of direct and indirect discrimination, harassment and instructions to discriminate given in the two directives.
- ✓ The second section (arts. 29-33) transposes various aspects of Directive 2000/43 on equal treatment irrespective of racial or ethnic origin. The scope of the provisions is defined in accordance with art. 3 of the Directive, except as regards employment and training. They include the possibility of adopting positive action measures for certain groups in order to compensate for disadvantages linked to racial or ethnic origin, the entitlement of legal entities to engage in proceedings concerning matters of racial or ethnic origin, and the inversion of the burden of proof. The section also establishes a "*Consejo para la promoción de la igualdad de trato y la no discriminación de las personas por el origen racial o étnico*" (Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin).
- ✓ The third section (arts. 34-43) includes measures on equal treatment and non-discrimination at work. It transposes fully what is provided in relation to employment and training in Directive 2000/43 and Directive 2000/78. It first specifies the possibility of adopting positive action measures for certain groups in order to compensate for disadvantages experienced at work for the various reasons specified in the two directives, and introduces the inversion of the burden of proof. Then, in arts. 37-41, it amends various labour laws so as to adapt them to the directives (*Estatuto de los Trabajadores* (Workers' Statute), *Ley de Integración Social de los Minusválidos* (Law on the Social Integration of the Disabled), *Ley de Procedimiento Laboral* (Law on Procedure in Industrial Disputes), *Ley sobre Infracciones y Sanciones en el Orden Social* (Law on

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<sup>1</sup> For a critique of the transposition of both directives in Spain see Cachón (2004b) and Arias y Hierro (2005).

Infringements and Penalties in the Social Sphere) and *Ley sobre el desplazamiento de trabajadores en el marco de una prestación de servicios transnacional* (Law on the relocation of workers in the framework of the provision of transnational services)). Finally, in arts. 42 and 43, it provides for the promotion of equality on various grounds in collective bargaining and the promotion of equality plans to address questions of disability in companies.

In the field of disability, Law 51/2003, of 2 December 2003, on Equal Opportunities, Non-discrimination, and Universal Access for Persons with Disability (*Ley 51/2003, 2 diciembre, de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*) also made progress in the direction pointed by Directive 2000/78. This Law is to be supplemented as regards sanctions by the “Bill on offences and sanctions in the field of equality for disabled people” (*Proyecto de Ley de Infracciones y sanciones en materia de igualdad de las personas con discapacidad*) which the government tabled in Parliament (13 January 2006). Also in Parliament is the Bill recognising sign language and speech aid systems (*Proyecto de Ley de que reconoce la lengua de signos y los sistemas de apoyo a la comunicación oral*), adopted by the Spanish government on the same date. Both bills are still in Parliament.

Law 13/2005 amending the Civil Code with regard to the right to contract matrimony (*Ley 13/2005, de 1 de Julio, por la que se modifica el Código Civil en material de derecho a contraer matrimonio*) allows homosexual couples to marry with the same rights as heterosexual couples.

## **0.2 State of implementation**

*List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.*

*Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?*

The most important points where national law is in breach of the Directives are the following:

- ✓ The terms “has been or would be treated” (Directive 2000/43 and Directive 2000/78, art. 2.2.a) are not included in the Spanish definitions of direct discrimination.
- ✓ There are two differences in relation to art. 2.2.b of the Directive. The first is that the Directive refers to a “provision, criterion or practice”, whereas the Spanish law refers to a “legal or administrative provision, a clause of a convention or contract, an individual agreement or a unilateral decision”. All these situations are referred to as “provision”, and the words “criterion or practice” are not included. The second is that the Directive says “persons” in the plural and the Spanish transposition says “person” in the singular.
- ✓ Law 62/2003 does not specify how indirect discrimination is to be justified.
- ✓ The words “hostile” and “degrading” are not included in the Spanish definitions of harassment.
- ✓ The seventh additional provision of the Law 62/2003, entitled “Non-applicability to immigration law”, states that the articles of transpositions of Directives shall not affect the

regulations provided “in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000”. The “justification” of this provision is based on article 3.2 of Directives 2000/43 and 2000/78. But it should not be forgotten that Law 4/2000 regulates issues that are liable to be affected by Directives as “work and establishment” and this exclusion is not in art. 3.2. of Directives.

- ✓ Although Section two of Chapter three of Title two of Law 62/2003 states that “the aim of this section is to establish measures to ensure that the principle of equal treatment and non-discrimination on the grounds of racial or ethnic origin is real and effective in education, health, social benefits and services, housing and, in general, the supply of and access to goods and services”, neither this section of Law 62/2003 nor any other part of it provides any such measures to make the principle of equal treatment “real and effective”.
- ✓ The principle of protection against victimisation is transposed but only in the labour field.
- ✓ Sanctions have only been established in the labour field (Directive 2000/78), but not in the other fields covered by the Directive 2000/43 on ground of racial or ethnic origin, except in the criminal field (The *Bill on offences and sanctions in the field of equality for disabled people*, which began its passage through Parliament in January 2006, establishes sanctions in all fields for discrimination on the ground of disability.)
- ✓ Law 62/2003 recognize the possibility that legal entities and associations may engage “on behalf” of the complainant, but only in employment field and not “or in support”, as stated in art. 10 of Directive 2000/43 (This omission has few practical consequences because there is a general recognition that entities and associations may become involved if they “have a legitimate interest”; see section 6.2.)
- ✓ In relation with the “Council for the promotion of equal treatment...” there are two difficulties: its independence is uncertain for at least two reasons: first, because the definition of its functions omits the word “independent”, which appears three times in Art. 13.2 of the Directive, once in each description of the body’s three functions; and second, because its make-up is of an essentially governmental nature; its effectiveness is questionable because the body will not have a budget of its own; instead it will receive “the necessary support for the performance of its functions” from the Ministry of Labour. (Currently – January 2007 – the government is preparing a Royal Decree to set up the Council and to meet the requirements of independent exercise of functions and efficacy).
- ✓ Law 51/2003 provides that “For the purposes of this Law, persons with a disability shall be deemed to be those with a recognized degree of impairment equal to or greater than 33 per cent”, and this state of affairs must be recognized by an official body. It could be argued that both points are in breach of Directive 2000/78, which makes no such provisions. The courts may in due course have to give a ruling on this matter.

The Spanish government decided not to use the additional period for the implementation of Directive 2000/78 (art. 18) in relation to age and disability, up to 2 December 2006, but transposed the Directive in Law 62/2003. In both cases Spanish law meets the requirements of Directive 2000/78.

### **0.3 Case-law**

*Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives.*

In Spain only judicial decisions by the highest courts, the Constitutional Court and the Supreme Court (with at least two rulings), provide “case law” (“sientan jurisprudencia”) or “legal doctrine” (doctrina legal”) (the notion of “precedent” does not formally exist in Spain). Decisions of the European Court of Justice also “provide case law” in Spain, as in the EU as a whole.

The first Supreme Court judgments referring to Directive 2000/78 were given in the Social Division on 9 March 2004<sup>2</sup>, annulling the clauses of collective agreements forcing workers to retire at age 65, because there is no national provision permitting such compulsory retirement. In its legal arguments the Supreme Court made extensive use of the considerations and articles of Directive 2000/78 and concluded that it is discriminatory on the grounds of age to force workers to retire at 65 if there is no provision justifying differences of treatment based on age “by legitimate employment policy, labour market and vocational training objectives”. On this issue the courts have made many pronouncements. For example, four subsequent Supreme Court judgments have reproduced this doctrine, expressly quoting Directive 2000/78 in their legal grounds<sup>3</sup>. These judgments have led to an amendment of the Law on the Workers’ Statute (see below in point 2.1.1 and point 4.7).

A Constitutional Court Judgment<sup>4</sup> has established an important doctrine against discrimination on the grounds of homosexuality. Alitalia had dismissed a worker (P.C.) ostensibly for “indiscipline” at work in July 2002. The worker brought an action under Article 55.5 of the Workers Statute for his dismissal to be declared void on the basis that he was the victim of discrimination on the grounds of his sexual orientation. Social Court no. 24 of Barcelona declared the dismissal void in November 2002. The company appealed against this ruling and the Social Division of the High Court of Catalonia found in the company’s favour in June 2003, deeming the dismissal to be valid. The Constitutional Court (CC) has overturned this ruling, and therefore invalidated the dismissal. The Constitutional Court allowed the worker’s appeal and quashed the ruling of the High Court of Catalonia on the grounds that the dismissal of the worker by Alitalia must be deemed void because it is a discriminatory act based on the worker’s homosexuality. In the legal grounds of its ruling the Constitutional Court cites, *inter alia*, Article 13 of the EC Treaty, Directive 2000/78 and certain articles of the Workers’ Statute which transposed the Directive (Arts. 4.1.c, 4.2.e and 17.1 in conjunction with Art. 55.5). (When the events took place the Workers’ Statute did not expressly include sexual orientation as a ground of discrimination. This was introduced into Spanish law with the transposition of Directive 2000/78 in December 2003. Prior to transposition the Statute did provide that any dismissal motivated by “any of the grounds of discrimination prohibited by the Constitution or the law” was void.). The legal grounds also refer to Article 14 of the Spanish Constitution, which provides for equality before the law and prohibits discrimination “on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance”. Though sexual orientation is not expressly cited in the Article, the Constitutional Court’s ruling states that sexual orientation is “undoubtedly a circumstance included in the expression ‘any other circumstance’”. This means that this protection against discrimination on the ground of sexual orientation existed prior to the transposition of Directive 2000/78 in December 2003, in the form of Article 14 of the Spanish Constitution. The case is also significant because it indicates that there are signs of psychological harassment of the worker because of his sexual orientation. However, the

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<sup>2</sup> See judgments of the Supreme Court (Social Division), both of 9 March 2004 and both concerning AENA (Aeropuertos Nacionales y Navegación Aérea) (nº 765/03 and nº 2319/03)

<sup>3</sup> Judgments of the Supreme Court (Social Division) 3427/03 of 6 April 2004; 6506/03 of 15 December 2004; 1744/04 of 1 June 2005; and 495/05 of 21 December 2005.

<sup>4</sup> Judgment of the Constitutional Court 41/2006, of 13 February 2006: P.C. vs. Alitalia Italian Airlines)

Constitutional Court does not enter into an analysis of this issue. It simply notes that Social Court no. 24 of Barcelona had declared the dismissal void because the worker had proven that there were “signs of psychological harassment because of his homosexuality”. The consequence of this Sentence of Constitutional Court is that the dismissal is void (as declared the Social Court nº 24 of Barcelona in November 2002) and that Alitalia must reinstate the worker and must pay all his salary in arrears from the date of the dismissal (July 2002) (Article 55.6 Workers Statute)

## 1. GENERAL LEGAL FRAMEWORK

### **Constitutional provisions on protection against discrimination and the promotion of equality**

*a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

*b) Are constitutional anti-discrimination provisions directly applicable?*

*c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

#### *Equality and non-discrimination*

Equality is one of the “higher values of the legal system” established by the Spanish Constitution of 1978<sup>5</sup> (art. 1.1), together with liberty, justice and political pluralism.

The Constitution proclaims the general principle of equality and non-discrimination in its article 14: “Spaniards are equal before the law and may not in any way be discriminated against on the grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.” As Puente (2003) points out, “this provision has a special place within the text of the Constitution (in Chapter II, but before its two Parts, namely those concerning “Fundamental Rights and Civil Liberties” and “Rights and Obligations of Citizens”). It is this which has made it possible to recognise a right fundamental both to equality and to non-discrimination. Article 14 thereby guarantees the two specific functions of the principle of equality: placing objective limits on the exercise of power, and providing for the rights of the individual.” Rubio-Marín (2004) notes that the constitutional equality principle in art. 14 is interpreted as requiring the legislator to show that difference in treatment is justified by objective and reasonable grounds. The inclusion of a list of prohibited grounds of discrimination means that when differentiations are made on these grounds, or on those included in the open list (such as, presumably, sexual orientation, age and disability), the degree of judicial scrutiny will be higher, as it will in principle be assumed that differentiation on those grounds is illegitimate.

Article 16 of Spanish Constitution proclaims that the “Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than that necessary to maintain public order according to the law.” And that “Nobody may be compelled to make statements regarding his religion, beliefs or ideology.”

Moreover, art. 10.2 of the Spanish Constitution recognises the interpretative applicability of the main international treaties on human rights. This article of the Spanish Constitution states

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<sup>5</sup> Constitución Española (Spanish Constitution) of 27 December 1978 (BOE, 29 December 1978).

that “provisions relating to fundamental rights and freedoms recognised by the Constitution shall be interpreted pursuant to the Universal Declaration on Human Rights and the chief international treaties and agreements ratified by Spain.” The most notable international instruments combating discrimination have been ratified during Spain’s democratic period (since 1976), and these instruments have informed the Constitution and the laws passed since then. Such is the case of the Universal Declaration on Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief or the European Convention on Human Rights.

Disability, age and sexual orientation are not expressly included in this article. But case-law tends to include them as “any other condition or personal or social circumstance”. The Constitutional Court, in judgment no. 269/1994 of October 1994<sup>6</sup>, ruled that disability is included in the generic phrase “any other personal or social circumstance”. Rubio-Marín (2004) notes that “although the provision does not refer to sexual orientation explicitly, because of its well-recognised open-ended nature, sexual orientation would probably be covered. There are some lower court rulings but no constitutional cases explicitly confirming this. However, in view of Framework Directive 2000/78 and other ECJ and ECtHR case-law (e.g. *Salgueiro da Silva Mouta v. Portugal*<sup>7</sup>) it would be almost unthinkable for the Constitutional Court to decide otherwise. This is so because art. 10.2 of the Constitution makes it mandatory for constitutional rights to be interpreted in the light of relevant international standards. Indeed, in its interpretation of the constitutional concept of *sex* discrimination, the Court has systematically invoked European Directives and case-law of both the ECJ and the ECtHR”.

The Spanish Constitutional Court has developed the principle of equality since its early judgments, adopting the doctrine of the European Court of Human Rights, which requires objective and reasonable justification for differential treatment. Judgment 200/2001<sup>8</sup> contains a reminder of doctrine on discrimination:

- ✓ That the principle of equality does not mean the prohibition of all unequal treatment, but that differentiation must be analysed as to whether it is reasonable or not.
- ✓ That on occasion, different treatments of different situations may be required, resulting in the achievement of real and effective equality.
- ✓ That temporary positive measures may be taken in order to achieve true equality for the disadvantaged group.
- ✓ In the case that disability accepts the constitutionality of the quotas, and in general the promotional measures for equal opportunities of the persons affected by diverse forms of disability.

The Constitution also states that “Aliens in Spain shall enjoy the civil liberties guaranteed by this Title, on the terms established by treaties and the law” (art. 13).

### *Promotion of equality*

While art. 14 of the Spanish Constitution contains a formal recognition of equality and non-discrimination, art. 9 provides the positive obligation for the public authorities to promote equality (promotional equality), since they must “promote conditions that ensure that the freedom and equality of individuals and of the groups that they form are real and effective; to

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<sup>6</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 3 October 1994, 269/1994.

<sup>7</sup> European Court of Human Rights, 21 December 1999, appl. no. 33290/96.

<sup>8</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 4 October 2001, 200/2001.



remove obstacles that impede or hamper the fulfilment of such freedom and equality; and to facilitate the participation of all citizens in political, economic, cultural and social life”. This article of the Constitution conceptualises positive action or promotional measures not as exceptions to the principle of equality but rather as constitutionally legitimate ways to implement equality.

Moreover, article 49 adds that “The public authorities shall implement a policy of welfare, treatment, rehabilitation and integration for those with physical, sensory or mental disabilities, to whom they shall give the necessary specialized attention and specific protection so that they may enjoy the rights that this Title provides for all citizens.”

The Spanish Constitutional Court<sup>9</sup> has ruled that the principle of equality is not breached by action on the part of the public authorities to counter the disadvantages experienced by certain social groups “even when they are given more favourable treatment, for the aim is to give different treatment to effectively different situations”.

### *Applicability of the constitutional principles of equality and non-discrimination*

Constitutional equality and anti-discrimination provisions are directly applicable. Article 53 of the Constitution introduces guarantees of fundamental rights and freedoms and also of the principle of equality and non-discrimination. The second paragraph of this article refers to the possibility for any citizen to file a claim to protection under article 14 “by means of preferential and summary proceedings in the ordinary courts and, where appropriate, by lodging an action for infringement of fundamental rights and freedoms with the Constitutional Court.”

The equality and non-discrimination clause can be enforced against both public and private players (see, for example, Law 62/2003, art. 27.2).

## **2. THE DEFINITION OF DISCRIMINATION**

### **2.1 Grounds of unlawful discrimination**

*Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.*

In the Spanish Constitution the grounds of unlawful discrimination expressly mentioned (art. 14) are:

- ✓ “birth,
- ✓ race,
- ✓ sex,
- ✓ religion,
- ✓ opinion or
- ✓ any other condition or personal or social circumstance”.

Law 62/2003 transposing Directives 2000/43 and 2000/78 expressly mentions the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation (art. 27).

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<sup>9</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 1 July 1987, 128/1987.

The Workers' Statute (arts. 4.2.c and 17.1, in the revised text given in art. 37 of Law 62/2003) expressly mentions: gender, marital status, age, origin, racial or ethnic origin, social condition, religion or beliefs, disability, political ideas, sexual orientation, affiliation or non-affiliation to a union, or language within the state of Spain, or family ties with other workers in a company.

The Criminal Code (Organic Law 10/1995), in its section on offences in relation to the exercise of fundamental rights and civil liberties guaranteed by the Constitution, punishes "those who incite discrimination...", and those who disseminate defamatory information against groups on racist, anti-Semitic or other grounds relating to ideology, religion, beliefs, family background, belonging to a race or ethnic group, national origin, gender, sexual orientation, illness, or disability (art. 510). The Criminal Code specifies as an aggravating circumstance of criminal responsibility the fact of "committing an offence on racist, anti-Semitic or other grounds relating to the ideology, religion or beliefs of the victim, the ethnic group, race, or nation to which he belongs, his gender or sexual orientation, or any illness or disability that he suffers from" (art. 22.4). Art. 314 punishes offences against workers' rights, referring to "Those responsible for serious discrimination in a public or private workplace against any person by reason of his ideology, religion or beliefs, ethnic group, race or nationality, gender, sexual orientation, family background, illness or disability, legal or trade-union representation of workers, family relationship with other employees, or use of any of the official languages within the State of Spain...".

Organic Law 7/1980 on Religious Freedom (art. 1.2) proclaims the principle of non-discrimination, providing that "religious beliefs shall not constitute a basis for inequality or discrimination before the law. Religious grounds may not be cited to prevent anyone from performing any work, activity, responsibility or public office."

In summary, the different grounds of unlawful discrimination expressly mentioned in Spanish law are the following:

gender,  
racial or ethnic origin,  
religion or beliefs,  
disability,  
age,  
sexual orientation,  
marital status,  
origin,  
social condition,  
political ideas, ideology  
affiliation to a union,  
language within the State of Spain  
family ties with other workers in the enterprise

### **2.1.1 Definition of the grounds of unlawful discrimination within the Directives**

*a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*

*Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood 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"?*

*b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion')?*

*c) Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

*d) Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.*

National law on discrimination does not define the terms racial or ethnic origin, religion or belief, age, or sexual orientation, and neither does the Workers' Statute or the Criminal Code.

### *Disability*

Disability is defined in general legislation on Social Security and disability. Social Security legislation gives two definitions of disability: a) As regards contributory benefits, the "situation of workers who, after undergoing prescribed treatment and receiving medical discharge, suffer severe anatomical or functional impairment that may be objectively determined and is likely to be permanent, and that diminishes or removes their ability to work"; and b) As regards non-contributory benefits, "impairments likely to be permanent, whether physical or mental, congenital or otherwise, that alter or render ineffective the physical, mental or sensory capacity of those suffering from them" (art. 136.1 and 2 of the General Social Security Law).

The definition of disability in the Law on the Social Integration of the Disabled (Law 14/1982) is much more extensive than that given by the Social Security Law in that it refers to the consequences of the impairment and the integration of disabled people not only in work but also in other fields such as education and society. In general terms it defines a person with disability as "any person whose capacity for integration in education, work, or society is found to be diminished as a consequence of a impairment, congenital or otherwise, that is likely to be permanent, in their physical, mental, or sensory capacities" (art. 7). And Law 51/2003 on equal opportunities provides that: "For the purposes of this Law, persons with a disability shall be deemed to be those with a recognized degree of impairment equal to or greater than 33 per cent. In any event, those with a recognized entitlement to Social Security pensions for permanent disability rated as total, absolute or severe shall be deemed to be affected by a impairment equal to or greater than 33 per cent, together with passive-class pensioners with a recognized entitlement to a retirement pension or a pension for retirement due to permanent incapacity" (art. 1.2). This situation must be recognized by the relevant official bodies, according to the procedure regulated in Royal Decree 1971/1999 of December 23 on the recognition, declaration, and rating of degrees of disability. The body's decision may be challenged before the courts.

Law 14/1982 gives a general definition of disability (with no reference to degrees of disability), and Law 51/2003 provides that, *for certain benefits* ("for the purposes of this Law"), "persons with a disability shall be deemed to be those with a recognized degree of impairment equal to or greater than 33 per cent", and this state of affairs must be recognized by an official body. Though it could be said that the establishment of a degree of impairment (of 33 per cent or greater) and the functions of the official body are in breach of Directive 2000/78, because the Directive neither specifies degrees nor provides for a body to recognize

them, there does not seem to be any contradiction between Spanish legislation and the Directive, as the Directive does not specify all aspects of how disability is to be dealt with, the arguments of Law 51/2003 seem reasonable and proportionate, and all this is subject to judicial protection. The ECJ ruling in the “Chacón Navas” case does not address this issue when it gives a definition of disability in relation to the question referred to it.

On the concept of disability in Directive 2000/78 (and also the interpretation of this concept in Spanish law), in 2005 there was an important Judgment of the Court of Justice of the European Communities in Case C-13/05, *Chacón vs Eurest*, on the question referred for a preliminary ruling by Social Court no. 33 of Madrid<sup>10</sup>. Mrs Chacón Navas was dismissed by the company Eurest while on sick leave on 28 May 2004. The company recognized that her dismissal was unlawful and offered her compensation. Mrs Chacón Navas filed a suit against Eurest asking for her dismissal to be declared void and for the company therefore to be obliged to take her back. Before making a ruling on the issue, the judge of Social Court no. 33 in Madrid referred a question for a preliminary ruling (OJ 19.3.2005) to the Court of Justice of the European Communities. The Court establish that the concept of “disability” “must (...) be given an autonomous and uniform interpretation” (paragraph 42) and, in the context of Directive 2000/78, “the concept of ‘disability’ must be understood 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” (paragraph 43). “However, by using the concept of ‘disability’ in Article 1 of that directive, the legislature deliberately chose a term which differs from ‘sickness’. The two concepts cannot therefore simply be treated as being the same” (paragraph 44). It also states that “in order for the limitation to fall within the concept of ‘disability’, it must therefore be probable that it will last for a long time” (paragraph 45). About the protection of disabled persons as regards dismissal, the Court establish that “a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78” and that “the prohibition, as regards dismissal (...) precludes dismissal on grounds of disability which (...) is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post” (paragraph 52). On those grounds, the Court rules:

- “1. A person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
2. The prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.
3. Sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination”.

All this doctrine is similar to that established in Spain by the legal provisions cited in the above paragraphs, which clearly distinguish between illness and disability.

Following this judgment, the Madrid Social Court declared that Chacón’s dismissal was “unfair” (and not “void”, as would have happened if the illness had been equivalent to “disability”).

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<sup>10</sup> This is the second case referred to the Court on Directive 2000/78, after the Mangold case (C-144/04), and the first on the concept of “disability” for the purpose of this Directive. The questions referred to the Court for a preliminary ruling have aroused great interest, as shown by the remarks sent in by six governments and by the EU Commission. Against the Commission’s judgment, the Court deemed that the questions referred were admissible.

## *Religion*

Religion is not defined in Spanish legislation. The principles of religious freedom, neutrality and non-discrimination prohibit the Spanish legislative from doing so. There is, however, a negative definition of religion in article 3.2 of the Organic Law on Religious Freedom. This article states in its second paragraph that “activities, intentions and entities relating to or engaging in the study of and experimentation on psychic or parapsychological phenomena or the dissemination of humanistic or spiritual values or other similar non-religious aims do not qualify for the protection provided in this Act”. The legislator specifies only what religion is not, not what it is.

In spite of this, for a long time the practice of the General Directorate for Religious Affairs (dependent on the Ministry of Justice) was to refuse the registration of religious denominations on the Register of Religious Entities on the grounds of these denominations’ lack of religious aims. However, the situation has changed since Constitutional Court Judgment 46/2001 of 15 February. In this case, the Unification Church (Iglesia de la Unificación) challenged the Resolution of the General Director for Religious Affairs of 22 December 1992 and the judgments of the Audiencia Nacional Court (30 September 1992) and the Supreme Court (14 June 1996) refusing the inclusion of this church on the Register.

The administrative resolution maintained that the Unification Church lacked a true religious nature, and was beyond the scope of protection under the Law on Religious Freedom (according to article 3.2). The resolution stated in its reasoning that in order to speak properly of a church or a religious denomination this had to have, among other defining features, a body of adherents other than the organization’s leading members. It also stated that, in order to determine the concept of religion, “it is a widely held opinion, reflected in the Spanish Academy Dictionary, that the elements making up the concept of religion are: a) an organic whole of dogma or beliefs related to transcendence, a higher Being or a Divinity; b) a body of moral rules regulating the individual and social behaviour of the adherents to a religious denomination, derived from that dogma; c) concrete and definite acts of worship, an external manifestation of the relationship between the adherents to a religious denomination and the higher Being or Divinity; and d) as a consequence of the existence of acts of worship, although this is not an essential element, ownership of places to which the adherents may go to perform such acts... In conclusion, in order for a group or organization to be properly described as religious, the following prerequisites must be met: 1) Belief in the existence of a higher Being, transcendent or otherwise, with whom communication is possible; 2) Belief in a body of doctrine (dogma) and rules of behaviour (moral rules), somehow derived from this higher being; 3) ritual practice, whether individual or collective (worship), constituting the adherents’ institutional means of communication with the higher Being.

The Constitutional Court, however, asserted that the administrative resolution violated the right to religious freedom, in its collective meaning, because the State, in the activity of registration, can only check that the entity is not excluded by article 3.2, and that its activities do not violate the entitlement of others to the free exercise of rights and freedoms, or are not detrimental to public safety, welfare or morality – the elements defining public order protected by the law in a democratic society, according to article 16.1 of the Constitution. It seems that, in administrative practice as well as in case-law, there was an implicit notion up to 2001 of religion coming from the Judeo-Christian tradition, and to a more limited extent, from the Islamic one. However, after this judgment, it seems clear that the government cannot

judge the religious components of entities wishing to join the Register, and must confine itself to verifying that, in view of their statutes, goals and aims, these entities are not excluded by article 3.2<sup>11</sup>.

### *Age*

Up to 2001 the tenth additional provision of the Spanish Workers' Statute authorized the establishment in collective agreements of clauses for the termination of employment contracts when workers reached retirement age (at 65), without prejudice to what is provided in the Social Security regulations. In 2001 this provision was repealed because, as was argued in the preamble of the law repealing it<sup>12</sup>, it "was based on demographic and labour-market realities different from those of today". But some collective agreements continued to include these clauses. Two Sentences of the Supreme Court of 9 March 2004 (both referring to the collective agreement of AENA) declared illegal these clauses (see Epigraph 0.3).

On 3 December 2004 the trade unions and employers' organizations signed an agreement with the Government to reintroduce that provision into the Workers' Statute and thereby enable the social partners to include clauses in collective agreements on the termination of contracts when employees reach the ordinary retirement age, provided that certain conditions are met.

On 29 June 2005 the Spanish Parliament passed a Law<sup>13</sup> inserting a "Tenth Additional Provision" into the Law on the Workers' Statute. This Provision states that "collective agreements may include clauses allowing the employment contract to be terminated when the employee reaches the ordinary retirement age as established in Social Security regulations", but adds two provisos: 1) the measure "is to be linked to objectives consistent with the employment policy expressed in the collective agreement, such as improvement of stability in employment, conversion of temporary contracts into indefinite ones, maintenance of employment, recruitment of new workers, or any other objectives aimed at enhancing quality of employment." And 2) in addition, a clause is introduced stating that "a worker whose employment contract is terminated must have covered the minimum contribution period, or a longer one if so provided in the collective agreement, and must meet the other prerequisites specified by Social Security legislation for entitlement to a contributory retirement pension."

This Law resolves the problems raised by the Supreme Court ruling of 9 March 2004 in that, on one hand, a law will be passed enabling such compulsory retirement clauses to be included in collective agreements, and on the other, they will not be discriminatory because they are to be "objectively and reasonably justified", as they will be linked to "legitimate employment policy, labour market and vocational training objectives", as stated in art. 6 of Directive 2000/78.

On this question, the Judge of Social Court no. 33 of Madrid has requested a Preliminary ruling from the Court of Justice of the European Communities (C-411/05) regarding the possibility of a compulsory retirement clause being discriminatory because it has no objective and reasonable justification, such as legitimate objectives of employment policy, as required by art. 6 of Directive 2000/78. The question refers to the case of *Palacios vs. the company Cortefiel* regarding the rescission of the plaintiff's employment contract under the textile

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<sup>11</sup> This legal argument was developed by Verónica Puente (2003 and 2004).

<sup>12</sup> In Royal Decree-Law 5/2001 of 2 March on urgent measures to reform the labour market in order to promote employment and to improve the quality thereof (BOE, 3 March 2001).

<sup>13</sup> Law 14/2005 on clauses in collective agreements concerning employees' reaching the ordinary retirement age (*Ley 14/2005, de 1 de Julio, sobre cláusulas de los convenios colectivos referidas al cumplimiento de la edad ordinaria de jubilación*, BOE, 2 July 2005).

industry collective agreement in the Madrid Region, which was already in force when Law 14/2005 was passed and which does not include clauses linking compulsory retirement to employment policy (Other similar actions are being brought in various social courts). The judge has asked the court whether the principle of equal treatment barring discrimination on the ground of age (art. 13 of the Treaty and art. 2.1 of Directive 2000/78) is in conflict with a national law (the Sole Transitory Provision of Law 14/2005) granting validity to compulsory retirement clauses established in collective agreements with the sole requirements that the worker must have reached the ordinary retirement age, and must meet the conditions provided in Spanish social security legislation for entitlement to a contributory retirement pension. If the answer to this question is affirmative, the judge asks if, therefore, this national legislative provision should not be applied in the case in hand.

### *Multiple discrimination*

There are no provisions addressing questions of multiple discrimination, or plans for legislation on this issue. However, the Bill for an Organic Law on effective equality of women and men (which will be passed in March 2007) contains a first reference to “multiple discrimination” in Spanish law. Art. 20 provides that “the public authorities shall, in the preparation of studies and statistics, devise and introduce the necessary mechanisms and indicators to show the incidence of other variables whose recurrence generates situations of multiple discrimination in the various spheres of action.”

#### **2.1.2 Assumed and associated discrimination**

*a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.*

*b) Does national law or case law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?*

There is no mention in Spanish legislation of discrimination based on assumed characteristics, nor of discrimination based on association with persons with particular characteristics. Both the Workers’ Statute and Law 62/2003, transposing Directives 2000/43 and 2000/78, and the Criminal Code speak only of personal characteristics and not of “assumed characteristics”. But discrimination on the grounds of “assumed characteristics” may be regarded as implicitly included in these laws.

The same goes for “association with persons with particular characteristics”. Although not explicitly covered by anti-discrimination legislation, it may be assumed to be implicitly covered. This assumption is backed up by the fact that the right of association (like that of assembly and the right to belong to a trade union) is regulated in art. 22 of the Constitution (within the section on fundamental rights and civil liberties).

#### **2.2 Direct discrimination (Article 2(2)(a))**

*a) How is direct discrimination defined in national law?*

*b) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

*c) In relation to age discrimination, if the definition is based on ‘less favourable treatment’ does the law specify how a comparison is to be made?*

*Law 62/2003 (art. 28.1.b) defines direct discrimination as “where a person is treated less favourably than another in a comparable situation on grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation”<sup>14</sup>.*

The expressions “has been or would be treated” (Directive 2000/43 and Directive 2000/78, art. 2.2.a) are not included in the Spanish definitions of direct discrimination.

The law does not permit justification of direct discrimination generally, or in relation to particular grounds.

In relation to age discrimination, the definition is based on ‘less favourable treatment’, but the law does not specify how a comparison is to be made.

Law 62/2003 (art. 38) provides the same definition of direct discrimination as in Law 13/1982, of 7 April, on Social Integration of Disabled People (*Ley de Integración Social de los Minusválidos*, LISMI). Art. 37.3 of this Law states that direct discrimination “shall be taken to occur where a person is treated less favourably than another in a comparable situation on the grounds of his or her disability”.

The seventh additional provision of Law 62/2003, entitled “Non-applicability to immigration law”, states that the articles transposing the Directives shall not affect the regulations provided “in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000”. This means that a different definition of direct (and indirect) discrimination remains in force in this Organic Law, which applies to aliens (chiefly non-Community citizens). Art. 23.1. of OL 4/2000 defines as discrimination “any act which, directly or indirectly, implies a distinction, exclusion, restriction or preference with regard to an alien on the basis of race, colour, descent, national or ethnic origin, or religious convictions and practices, and which has the aim or the effect of negating or restricting the recognition or exercise, in conditions of equality, of human rights and fundamental freedoms in the political, economic, social or cultural sphere”. Despite the fact that the Law says “directly or indirectly”, it may be noted that the content of the article corresponds to the concept of direct discrimination, although it does not use the expression “is treated less favourably” from art. 2.2.a of Directive 2000/43.

### **2.2.1 Situation Testing**

- a) *Does national law permit the use of ‘situational testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.*
- b) *Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*
- c) *Outline important case-law within the national legal system on this issue.*

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<sup>14</sup> *The Law on the rights and duties of aliens (OL 4/2000) (Ley Orgánica 4/2000, de 11 de enero, de derechos y libertades de los extranjeros en España y de su integración social) , has two articles devoted to “anti-discrimination measures”. It defines discrimination as “any act which, directly or indirectly, entails a distinction, exclusion, restriction or preference in relation to a foreigner on the grounds of race, colour, ascendance or national or ethnic origin, or religious beliefs and practices, and whose purpose or effect is to negate or limit the recognition or exercise, in equal conditions, of human rights and fundamental freedoms in the political, economic, social or cultural spheres.” In addition, it defines indirect discrimination as “any treatment stemming from criteria having an adverse effect on workers on account of their being foreigners or members of a particular race, religion, ethnic group or nationality.” OL 4/2000 makes no reference to provisions or practices; moreover, it refers only to “workers”, whereas the Directive refers to “persons” in general. This was the first reference in Spanish legislation to indirect discrimination, in a law whose scope is confined to aliens. The seventh additional provision of Law 62/2003 states that what is provided in Chapter III (i.e. transposition of Directives 2000/43 and 2000/78) does not affect the Law regulating the rights and freedoms of aliens in Spain (OL 4/2000).*



*d) Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

Situation testing is not expressly provided for in Spanish law, but nor is it forbidden. It might therefore be used as a form of evidence in discrimination cases. To date, no judgments have made use of situation testing.

The method was used in sociological research conducted by the ILO in 1995, in the framework of comparative research between European countries<sup>15</sup>. But it has not been used by NGOs to combat discrimination.

It cannot be said that there is reluctance to use situational testing as evidence in court: the question has simply not arisen. It is therefore possible (and probable) that developments in other countries will influence legal practice (both in the law and in the courts) in this field.

## **2.3 Indirect discrimination (Article 2(2)(b))**

- a) How is indirect discrimination defined in national law?*
- b) What test must be satisfied to justify indirect discrimination?*
- c) Is this compatible with the Directives?*
- d) In relation to age discrimination, does the law specify how a comparison is to be made?*

Law 62/2003 (art. 28.1.c) defines indirect discrimination as “where a legal or administrative provision, a clause of an agreement or contract, an individual agreement or a unilateral decision, though apparently neutral, would put a person of a certain racial or ethnic origin, religion or beliefs, disability, age or sexual orientation at a particular disadvantage in relation to others, provided that such provision is not objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”<sup>16</sup>.

Law 62/2003 does not specify how indirect discrimination is to be justified. Only the general provision in art. 2.2.b is included (“unless [the ID] is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”).

There are two differences in relation to art. 2.2.b of the Directive. The first is that the Directive refers to a “provision, criterion or practice”, whereas the Spanish law refers to a “legal or administrative provision, a clause of a convention or contract, an individual agreement or a unilateral decision”. All these situations are referred to as “provision”, and the words “criterion or practice” are not included. The second is that the Directive says “persons” in the plural and the Spanish transposition says “person” in the singular. This use of the singular generates a certain ambiguity in the law as to whether a group of persons as such is covered.

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<sup>15</sup> Colectivo IOE, *Labour market discrimination against migrant workers in Spain*, Geneva, ILO, 1996.

<sup>16</sup> Prior to the transposition of the Directives into Spanish law the concept of “indirect discrimination” was established only in the Immigration Law (see note 7). But the first ruling of the Constitutional Court on this matter is Judgment 145/1991, 1 July 1991, according to which, within the prohibition contained in art. 14, CE must also include “not only the notion of direct discrimination, meaning prejudiced differential treatment due to gender where gender is the object of direct consideration, but also the notion of indirect discrimination, which includes treatment not formally discriminatory from those which they are derived, due to the factual differences that take place among workers of both sexes, prejudiced unequal consequences due to the differentiated and unfavourable impact that formally equal or reasonably unequal treatment have on the workers of one or the other sex due to the difference of sex”. The Constitutional Court made similar rulings in its judgments 58/1994 of 28 February and 147/1995 of 16 October.

In the field of disability, Law 51/2003 defines indirect discrimination in similar terms as “where a legal or regulatory provision, a clause of an agreement or contract, an individual agreement or a unilateral decision, or a criterion or practice, or an environment, product or service, though apparently neutral, may put a person at a particular disadvantage in relation to others owing to a disability, provided that such provision is not objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” (art. 6). For its part, Law 13/1982, on the Social Integration of Disabled People, states that indirect discrimination “shall be taken to occur where an apparently neutral legal or administrative provision, a clause of a convention or contract, an individual agreement or a unilateral decision would put a person of a racial or ethnic origin, religion or beliefs, disability, age or sexual orientation at a particular disadvantage compared with other persons, provided that such a provision is not objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” (art. 37.3). And in relation to the obligation to make a reasonable accommodation (see section 2.6) it adds that “the employer is obliged to adopt appropriate measures, according to the needs of each specific situation in order to enable disabled people to have access to employment, to do a job, to advance in a profession and to undergo training, unless such measures would entail an excessive burden for the employer (art. 37bis.2).

Law 62/2003 does not specify how a comparison is to be made in relation to age discrimination.

The Law on the rights and duties of aliens (OL 4/2000), stipulates that “indirect discrimination is defined as any treatment stemming from criteria having an adverse effect on workers on account of their being aliens or belonging to a particular race, religion, ethnic group or nationality” (art. 23.2.e). It refers only to “workers”, whereas the Directive refers to “persons” in general, and it makes no reference to provisions or practices (as the Directives).

### **2.3.1 Statistical Evidence**

- a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.*
- b) Is the use of such evidence commonly used? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*
- c) Please illustrate the most important case law in this area.*
- d) Are there national rules which permit data collection? Please answer in respect of all 5 grounds.*

Though this is not expressly provided for in law, the complainants have a right to require or request that respondents provide data that may be necessary for them to determine whether there is a prima facie case of discrimination. But the Statistical evidence has not a common use. In the civil and administrative fields (the spheres of application of Directives 2000/43 and 2000/78) there are no agencies or authorities that can conduct formal investigations. In criminal cases, the public prosecution service can conduct all the investigations that are deemed necessary. Statistical evidence has not been used in any judgments. It cannot be said that there is reluctance to use statistical evidence as evidence in court: the question has simply not arisen. It is therefore possible (and probable) that developments in other countries will influence legal practice (both in the law and in the courts) in this field.

As regards national rules which permit data collection, age and disability are treated very differently from ethnic or racial origin, religion or belief or sexual orientation.

Organic Law 15/1999 of 13 December on the protection of personal data (*Ley Orgánica 15/1999 de Protección de Datos de Carácter Personal*) includes *ethnic or racial origin, religion or belief* and *sexual orientation* among “specially protected personal data”. Article 7 of that Law provides, pursuant to article 16 of the Spanish Constitution, that “no one may be forced to disclose details of his ideology, religion or beliefs. Only with the express written consent of the person concerned may personal data revealing ideology, trade-union affiliation, religion or beliefs be processed (...)” The Law further provides that “personal data referring to racial origin, health and sexual life may only be gathered, processed and transferred where, for reasons of general interest, a law so provides or the person concerned consents expressly thereto.”

As a result, employers may not gather data on the ethnic or racial origin, religion or beliefs or sexual orientation of their workers. But there are some exceptions to this general rule, such as those arising from art. 4.2 of Directive 2000/78.

The situation is different in the field of *disability*. Spanish laws not only allow but actually encourage the keeping of records inasmuch as employers (and other social fields as education, etc.) must gather such data about their workforce if they wish to benefit from the various measures for promoting job creation in which the disabled are specially protected.

Data relating to *age* may be collected with no legal impediments.

## **2.4 Harassment (Article 2(3))**

*a) How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

*b) Is harassment prohibited as a form of discrimination?*

*c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

At present only discriminatory harassment is given special treatment in Spanish law (Serrano, 2005 and Gimeno, 2005).

Law 62/2003 (art. 28.1.d) defines harassment as “all unwanted conduct related to racial or ethnic origin, religion or convictions, disability, age or sexual orientation that takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, humiliating or offensive environment”. The words “hostile” and “degrading” (Directive 2000/43 and Directive 2000/78, art. 2.3) are not included in the Spanish definitions of harassment.

Paragraph 2.2 of the same article adds: “Harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation is considered, in all events, as a discriminatory act”.

Law 62/2003 also amends the Workers’ Statute. Art. 4.2.e of the Law states that workers are entitled “to their privacy and to due respect of their dignity, including protection against verbal or physical offences of a sexual nature”. This provision has been invoked by the courts to protect workers mostly against sexual harassment, and only more recently against other forms of harassment<sup>17</sup>. Law 62/2003 (art. 37.2) adds the right to be protected “against

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<sup>17</sup> See *Sentencia del Juzgado de lo Social de Gerona* [Social Court of Gerona], 17 September 2002, and *Sentencia del Tribunal Supremo*, 23 July 2001 describing forms of moral harassment (See Gimeno, 2005).

harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

Besides, a new paragraph is added to article 54.3 (g) of the Workers’ Statute, considering as a disciplinary dismissal “harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, towards the employer or the people that work in the enterprise”.

Until the enactment of Law 62/2003, the only definition of harassment in the Spanish legislation was contained in the Penal Code, with the regulation of the crime (only) of sexual harassment (“whoever asks for sexual favours, for himself or a third party, in the field of a labour, teaching or service relation, continued or habitual, and with that behaviour provokes the victim an objective and serious intimidating, hostile or humiliating situation, will be punished as author of sexual harassment”) . Rubio-Marín (2004) notes that art. 184.1 of the Criminal Code refers to those who in the framework of an employment relationship (hence not necessarily the employer) solicit a sexual favour for themselves or for a third party and by that behaviour cause an objective and seriously intimidating, hostile or humiliating situation for the victim (no intent is thus required but the situation cannot be measured only by the victim’s sensitivity, given the requirement of objectivity). The punishment is increased when the person who harasses does so taking advantage of his or her hierarchical position in employment; when he or she either explicitly or implicitly threatens the worker with harming his or her legitimate career expectations (art. 184.2), or when the victim is especially vulnerable because of age, sickness or situation (art. 184.3). All these prohibitions are understood to refer both to persons of different genders and to persons of the same gender.

Law 62/2003 (art. 28.2), and Law 51/2003 on disability (art. 4) specify harassment as a form of discrimination.

## **2.5 Instructions to discriminate (Article 2(4))**

*Does national law prohibit instructions to discriminate?*

Law 62/2003 (Art. 28.2) provides that “any instruction to discriminate against persons on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, will be considered discrimination”.

Instructions to discriminate may also be considered to be covered by art. 314 of the Criminal Code, when it specifies “causing discrimination” as an infringement against workers’ rights, as well as art. 23.2.b of OL 4/2000 on the rights of aliens, when it states that all acts imposing stricter conditions on aliens than on Spaniards are discriminatory acts.

## **2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)**

*a) How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of ‘reasonable’. e.g. ➔ does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

*b) Does failure to meet the duty count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

*c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?*

*d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

National law has implemented the duty to provide reasonable accommodation for disabled people both in general terms (in Law 51/2003) and in employment (in Law 13/1982).

In art. 7 of Law 51/2003, reasonable accommodation is defined as “measures to adapt the physical, social, and attitudinal environment to the specific needs of persons with disability which effectively and practically, without involving a disproportionate burden, facilitate accessibility or participation for a person with disability on the same terms as for other citizens”. The material scope of this Law is telecommunications, built-up public spaces and buildings, transport, goods and services available to the public, and relations with public administration. In order to determine whether the burden arising from “reasonable accommodation” is proportionate or not, the Law provides that “account shall be taken of the cost of the measure, the discriminatory effects for disabled persons if it is not adopted, the structure and characteristics of the person, entity or organization that is to put it into practice, and the possibility of obtaining official funding or any other aid.”

Art. 37.2 bis of Law 13/1982 on the Social Integration of the Disabled (LISMI), introduced by Law 62/2003 transposing Directive 2000/78, provides that: “Employers are obliged to take appropriate measures to adapt the workplace and to make the company accessible, according to the needs of each specific situation, with the aim of enabling persons with disability to have access to employment, to do a job, to advance in a profession and to undergo training, except for measures that would impose an excessive burden on the employer”.

For the purpose of determining whether a burden is disproportionate, art. 7.c of Law 51/2003 states that “In order to determine whether a burden is proportionate, the following shall be taken into account: the cost of the measure, the discriminatory effects for disabled persons if it is not adopted, the structure and characteristics of the person, entity or organization that is to put it into practice, and the possibility of obtaining official funding or any other aid. To this end, the competent Public Authorities may establish a public aid plan to help cover the costs arising from the obligation to make reasonable accommodation.”

Art 37.3 bis of Law 13/1982 provides for its part that “To determine whether the burden is excessive, it is necessary to consider whether it is sufficiently offset by public measures, aid or subsidies for the disabled, along with the financial and other costs involved by the measures and the size and turnover of the organization or company.” There is no significant difference in the fact that the LISMI refers to “excessive burden”, whilst Law 51/2003 refers to “disproportionate burden”. The development that there has been in this field means that the term “disproportionate” is more precise, but both terms should be accepted by the courts

The failure on the part of the company to comply with its obligation to provide reasonable accommodation constitutes indirect discrimination, as established in art. 37.3 of LISMI, that may be justified only if such accommodation would constitute a disproportionate burden. When a disabled person is fit to work or to undergo training, the absence of such accommodation cannot be justified by a company decision involving unfavourable treatment of a disabled worker. Such a decision would be discriminatory, except for the said case of disproportionate burden.

The Cooperation Agreements with the various religious communities (Evangelical, Jewish and Islamic)<sup>18</sup> contain specific regulations to ensure reasonable accommodation for employees of particular religions. The three Agreements contain provisions on religious holidays and special diets. The weekly days of rest of the Seventh Day Adventists (Friday evening and all of Saturday) and Jewish communities (Friday evening and all of Saturday) can be granted instead of the day provided by article 37.1 of the Workers' Statute as the general rule (Saturday afternoon or Monday morning and all of Sunday), but only with the agreement of all the parties, which case-law has interpreted as being possible only if this is asked for by the employee before the signing of the contract<sup>19</sup>.

Moreover, members of the Islamic communities belonging to the Islamic Commission may request to stop work every Friday from 13.30 to 16.30 and one hour before sundown during Ramadan. This right is also subject to an agreement with the employer, and the hours not worked must be made up<sup>20</sup>.

In the case of the Islamic Commission and the Jewish community, there is a list of religious holidays that can replace those established in article 37 of the Workers' Statute, again with the agreement of both parties.

As for special diet (adaptation of food to Islamic religious precepts and mealtimes during the Ramadan fast), this possibility is provided only for Muslims interned in public centres or establishments and on military premises, as well as in public and subsidized private schools, where requested, and not as an obligation, since article 14.4 of the Agreement clearly states only that in this case "attempts shall be made". In the field of employment, therefore, there are no provisions on this issue.

There are not others accommodations on grounds of racial or ethnic origin, sexual orientation or age.

## **2.7 Sheltered or semi-sheltered accommodation/employment**

- a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?*
- b) Would such activities be considered to constitute employment under national law?*

There are two forms of support for disabled employment: semi-sheltered employment on the ordinary labour market and sheltered employment centres (Centros Especiales de Empleo, CEEs)).

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<sup>18</sup> Law 24/1992, of 10 November, adopting the cooperation agreement between the State and the Federation of Evangelical Religious Entities of Spain; Law 25/1992, of 10 November, adopting the cooperation agreement between the State and the Jewish Communities of Spain; and Law 26/1992, of 10 November, adopting the cooperation agreement between the State and the Islamic Commission of Spain.

<sup>19</sup> The Constitutional Court (19/1985, 13 February) provided, on the subject of the weekly day of rest for a Seventh Day Adventist employee (albeit before the signature of the Cooperation Agreement with the Federation of Evangelical Religious Entities of Spain), that one party to the contract cannot impose modifications in working conditions on the other party, and also that the consideration of Sunday as the general day of weekly rest (article 37.1 of the Workers' Statute) is based not on a religious rule but on a secular tradition.

<sup>20</sup> There is an interesting doctrine on this subject in the Judgment of the Madrid High Court of 27 October 1997. In this case, pursuant to a request for adaptation of working hours, the Court – not referring once to the Cooperation Agreement – states that although the courts of first instance should make employers adapt working hours, thus allowing their employees properly to meet their religious obligations, as well as not making them behave in a way incompatible with their beliefs, the worker must show loyalty and good faith, indicating his or her religious faith and the special working hours arising from it when applying for the job.

There are two types of measure for supporting employment for the disabled on the regular labour market:

- 1) (Public and private) companies with more than 50 employees are obliged to have 2% of disabled people in their workforce.
- 2) Semi-sheltered employment: the public authorities provide various forms of aid (subsidies, discounts in companies' Social Security contributions, subsidies to adapt workstations and aids of other kinds) for various types of employment contract governed by general labour regulations: indefinite contracts, temporary contracts and stand-in contracts for substitution of other disabled workers.

In sheltered employment centres (see section 5), disabled people's employment relationship is a "special employment relationship", with the form of any current employment contract but with certain peculiarities, which also appear in the working conditions.

CCEs can enter into contracts with "collaborating companies" (*empresas colaboradoras*) on the ordinary labour market to allow disabled workers at the CEE to provide their services in such companies. These are known as "employment enclaves" (*enclaves laborales*) and form bridges between the sheltered labour environment of CEEs and the ordinary labour market.

### **3. PERSONAL AND MATERIAL SCOPE**

#### **3.1 Personal scope**

##### **3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)**

*Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?*

The personal scope of protection against discrimination is general for all residents in Spain. The law does not make distinctions regarding equal treatment of Spaniards, nationals of other EU countries and non-EU nationals. There are no requirements of citizenship/nationality for protection under the relevant national laws transposing the Directives.

The seventh additional provision of the Law 62/2003, entitled "Non-applicability to immigration law", states that the articles of transpositions of Directives shall not affect the regulations provided "in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000". The "justification" of this provision is based on article 3.2 of Directives 2000/43 and 2000/78. But it should not be forgotten that Law 4/2000 regulates issues that are liable to be affected by Directives as "work and establishment" and this exclusion is not in art. 3.2. of Directives.

##### **3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)**

*Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?*

The prohibition of discrimination sanctioned in the Constitution and in the Workers' Statute, apply to both natural and legal persons. In the Criminal Code only natural persons are considered perpetrators of crimes under the Spanish legal order

The art. 27.2 of Law 62/2003 provides that the measures for the application of the principle of equal treatment under it apply to every person, both in the public and the private sector. As Rubio-Marín (2004) indicate, for the private sector, the prohibition on discrimination and violating workers' fundamental rights is mainly addressed to the employer but can also be made applicable to managers, and presumably to co-workers or the labour union.

### **3.1.3 Scope of liability**

*What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

The liability for discrimination is only of (natural or legal) person who produce discrimination, harassment and instruction to discriminate.

Employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) can not be held liable for the actions of employees or for actions of third parties (e.g. tenants, clients or customers). Likewise, trade unions or other professional associations can not be held liable for actions of their members.

## **3.2 Material Scope**

The material scope of the prohibition of discrimination is of a general nature.

All the fields mentioned by Art. 3 of Directive 2000/43 on racial or ethnic origin are covered by the general principle of equality laid down in art. 14 of the Spanish Constitution.

Although Directive 2000/78 only refers to the employment field, discrimination on the grounds on religion or belief, disability, age or sexual orientation is prohibited in all areas, public and private; and not only in the fields mentioned in Directive 2000/43 (social protection, social advantages, education, access to and supply of goods and services available to the public, including housing), but also in other possible fields, even if there is not an explicit anti-discrimination provision, because of the general and direct application of article 14 of the Constitution.

### **3.2.1 Employment, self-employment and occupation**

*Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?*

*In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.*

National legislation applies the principle of non discrimination to all sectors of public and private employment and occupation, including contract work, self-employment and holding statutory office.



The Constitution (art. 23.2) explicitly sanctions the fundamental right of access in equal conditions to public office and functions (which includes public employment) and makes reference to the leading principles of the civil service including those of merit and capacity (art. 103).

Art. 34 of Law 62/2003 defines the scope of application of the measures dealing with equal treatment and non discrimination in employment on all the grounds of Directives 2000/43 and 2000/78: “measures are aimed at the real and effective accomplishment of the principle of equal treatment and non discrimination in relation to access to employment, membership of or involvement in organisations of workers or employers, working conditions, professional promotion and vocational and continuous professional training, access to self-employment or to occupation and membership of and involvement in any organisation whose members carry on a particular profession”.

Art. 4.2.c. of Workers’ Statute (modified by Law 62/2003, art. 37) recognizes that workers are entitled in the working relation “not to be subjected to direct or indirect discrimination in employment nor, once occupied, on the grounds of sex, civil status, age within the limits set in the present law, racial or ethnic origin, social condition, religious or belief, political ideas, sexual orientation, membership or non-membership of a trade union, or for language reasons within Spain”.

The Criminal Code (art. 314) provides that an offence is committed against workers’ rights by “whosoever causes serious discrimination in public or private employment”, but it does not specify what constitutes “serious discrimination”.

### **3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)).**

*Is the public sector dealt with differently to the private sector?*

The second part of art. 3.1.a of the Directives specifies that conditions for access to employment, to self-employment or to occupation “includes selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion”. All this specification is missing in the Spanish transposition Law. But it may be considered unnecessary because the references to equal access to employment are clear and sufficient in the aforesaid legislation.

Moreover, Law 56/2003 of 16 December on Employment specifies as the foremost general objective of employment: “To guarantee real equality of opportunities and non-discrimination, taking into account what is provided in article 9.2 of the Spanish Constitution, in access to employment and in actions aimed at providing such access, along with a free choice of profession or trade without discrimination, on the terms provided in article 17 of the Workers’ Statute.”

And art. 16.2 of the Workers’ Statute (as modified by Law 62/2003, art. 37), regulating non-profit employment agencies, guarantees equal treatment and non-discrimination on all of the grounds mentioned in the Directives in access to employment through such agencies.

All labour regulations affect labour relations in both the private and public sectors. The employment of civil servants is regulated by the Civil Service Statute.

### **3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))**

- a) Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.*
- b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?*

The non discrimination in employment and working conditions, including pay and dismissals is expressly recognize in art. 17.1 of Workers' Statute (modified by Law 62/2003, art. 37) entitle "Non-discrimination in working relations": "Shall be regarded as void and without effect all legislative provisions, clauses of collective agreements, individual agreements and unilateral managerial decisions which provide for unfavourable direct or indirect discrimination on the grounds of age or disability, or which provide for favourable or adverse discrimination in employment, whether in relation to remuneration, working time, or other working conditions, on the grounds of sex, origin, include racial or ethnic origin, civil status, social condition, religious or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, or family ties to other workers in the enterprise, or by reference to the languages of the Spanish state". With the distinction between "unfavourable direct or indirect discrimination on the grounds of age or disability" and "favourable or adverse discrimination in employment" in other grounds, the provision facilitates positive action in the field of age or disability. The art. 8.12 of the Law on Violations and Sanctions of the Labour Laws (modified by Law 62/2003, art. 41) considers as very serious infringements "the unilateral decisions by the employer which involve unfavourable direct or indirect discrimination for reasons of age or disability or which contain positive or adverse discrimination relating to remuneration, working time, training, promotion, and other employment conditions, on the grounds of sex, origin, include racial or ethnic origin civil status, social condition, religious or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other workers in the enterprise, language within the Spanish State".

Article 37 of the Law of Social Integration of the Disabled (LISMI) (modified by Law 62/2003, art. 38), pursues the equality of treatment of persons with disability in the ordinary system of work.

As to occupational pensions, the General Social Security Law (Legislative Royal Decree 1/1994 of 20 June 1994) contains no antidiscrimination clause and establishes differences on grounds of age (and of other conditions, but not religion or beliefs, disability, sexual orientation or racial or ethnic origin). Art. 29.1 of Law 62/2003 establishes "measures to ensure that the principle of equal treatment and non-discrimination on the grounds of racial or ethnic origin is real and effective in (...) social benefits and (...) the supply of and access to goods and services". So discriminations in these fields are unlawful, but this Law 62/2003 provides no measures to make the principle of equal treatment "real and effective". But Law 62/2003 does not contain any specific provision for social benefits (like occupational pensions) on the grounds of Directive 2000/78 (religion or belief, age, disability and sexual orientation).

But the differences established by the Law for occupational pensions in the field of age are reasonable and proportionate and in accordance with Community legislation. Moreover, the general principle of equal treatment is also applicable to occupational pensions.

### **3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))**

*Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national Anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities ?*

The Workers’ Statute (art. 4) recognizes promotion and professional training as rights. And these are protected against discrimination on all of the grounds included in the directives.

The art. 34 of Law 62/2003 include this subject on all the grounds of Directives 2000/43 and 2000/78: “measures are aimed at the real and effective accomplishment of the principle of equal treatment and non discrimination in relation to access to (...) professional promotion and vocational and continuous professional training (...)”. Given the structure of the education and training system in Spain, this text includes all the aspects covered by art. 3.1.b of Directive 2000/43.

The Organic Law on Qualifications and Vocational Training (Law 5/2002 of 19 June) states that one of the principles of the national system of qualifications and vocational training is “access, on equal terms for all citizens, to the various forms of vocational training” (art. 2).

The Organic Law on Universities (6/2001 of 21 December) provides that students shall be entitled to “Freedom of opportunities and absence of discrimination on personal or social grounds, including disability, in access to universities and admission to university faculties, during university courses and in the exercise of their academic rights” (art. 46).

### **3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))**

*In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.*

The art. 34 of Law 62/2003 include this subject on all the grounds of Directives 2000/43 and 2000/78: “measures are aimed at the real and effective accomplishment of the principle of equal treatment and non discrimination in relation to (...) membership of or involvement in organisations of workers or employers (...) or to occupation and membership of and involvement in any organisation whose members carry on a particular profession”.

The art. 17.1 of Workers’ Statute and the art. 8.12 of the Law on Violations and Sanctions of the Labour Laws (both modified by Law 62/2003, art. 37 and 41) also include this field of equal treatment.

### **3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)**

*In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?*

Art. 29.1 of Law 62/2003 states that “the aim of this section (of Chapter III of the Law) is to establish measures to ensure that the principle of equal treatment and non-discrimination on the grounds of racial or ethnic origin is real and effective in education, health, social benefits and services, housing and, in general, the supply of and access to goods and services”. There is a general recognition of the principle of non-discrimination on the grounds of racial or ethnic origin in these areas in line with art. 3.1. of Directive 2000/43; so discrimination in these fields are unlawful, but neither this section of Law 62/2003 nor any other part of it provides any such measures to make the principle of equal treatment “real and effective”.

This same consideration applies to the four following sections.

Law 62/2003 does not contain any specific provision in relation on the exception in Article 3(3), Directive 2000/78 on the grounds of religion or belief, age, disability and sexual orientation.

Various Social Security and social protection provisions establish differences on grounds of age (and of other conditions, but not religion or beliefs, disability, sexual orientation or racial or ethnic origin).

### **3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)**

*This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.*

See art. 29.1 of Law 62/2003 in section 3.2.6. All the considerations in that paragraph are applicable to the field of social advantages.

Any clauses introducing differences of treatment in “social advantages” on the grounds of racial or ethnic origin, religion or beliefs, disability or sexual orientation would be discriminatory. But not on the grounds of age if the differences are “objectively and reasonably justified by a legitimate aim”. For example, it is common practice for there to be special discount rates for the young and elderly in public transport and some private transport.

Other social benefits (such as benefits for large families, childbirth benefits, etc., whether national, regional or local) must respect the principle of non-discrimination and be proportionate to the special circumstances for which they are designed.

### **3.2.8 Education (Article 3(1)(g) Directive 2000/43)**

*This covers all aspects of education, including all types of schools. Please also consider cases of segregation in schools, affecting notably the Roma community. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

See art. 29.1 of Law 62/2003 in section 3.2.6. All the considerations in that paragraph are applicable to the field of education.

Equal treatment and non-discrimination have been consolidated as basic principles of education in Spain. For example, the first three principles of quality listed in the *Organic Law on Education* (LOE)<sup>21</sup> refer to equal treatment and equal opportunities as follows: “a) Quality in education for all pupils, regardless of their social condition and circumstances; b) Fairness, guaranteeing equality of opportunities, educational inclusion and non-discrimination, and acting to offset personal, cultural, economic and social inequalities, especially those due to disability; c) Transmission and implementation of values fostering personal freedom, responsibility, democratic citizenship, solidarity, tolerance, equality, respect and justice, and that help overcome discrimination of any kind.” Another principle of LOE refers to equality between men and women: “Development of equality of rights and opportunities and promotion of real equality between men and women.”

The debate on school segregation has taken on a high profile in Spain with the large rise in the number of immigrants and foreigners of school age over the past six years. Foreign children, like Roma children, are mostly concentrated in state schools. The passage of LOE through Parliament in 2005 was marked by a fierce campaign against it by conservative organizations because, among other issues, LOE seeks to establish a more even distribution of pupils with special needs between state schools (*centros públicos*) and state-subsidized private schools (*centros privados concertados*). One of the key points of the political debate was the clash between the (so-called) right of parents to freely choose a school for their children, and the right to education and access thereto on equal terms. LOE strikes a balance between these principles, stating that “families may apply for admission at the schools to which they wish to send their children” (art. 86.3), but also providing the possibility of setting up “committees or other bodies to guarantee admission”. It also provides that “the various tiers of government shall ensure that pupils with special needs for educational support are distributed evenly between schools. To this end, they shall establish the proportion of pupils with these characteristics to be admitted into each state school and subsidized private school, and shall ensure that schools have the staffing and funding required for such support” (art. 38). It also provides that “in no event shall there be discrimination on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance” (art. 84.3).

The LOE bill also provides that the various tiers of government “shall develop compensatory actions in relation to persons, groups and regions in adverse situations and shall provide the necessary economic resources and support therefore.” “Groups” refers in particular to Roma people and immigrants.

A judgment of the Supreme Court (21 June 2006; expediente 3356/2000) has stated that it is not discriminatory to educate boys and girls separately. The trade union UGT (Unión General de Trabajadores) brought a legal action against three “Fomento” schools (in Asturias), linked to Opus Dei, as they are schools subsidized with public funds by virtue of agreements with the regional education authorities but that educate boys and girls in separate classrooms. The trade union argued that the sexes should not be separated in education and that any private schools doing so should not be able to take advantage of agreements allowing them to receive public funding. In setting the rules for the admission of pupils in public and private schools, the Organic Law on Education (LOE) provides that “In no event shall there be discrimination on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance” (art. 84). But LOE makes no express reference to agreements with

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<sup>21</sup> Organic Law on Education (*Ley Orgánica de Educación*), Law 2/2006, 3 May (BOE, 4 May 2006).

segregated schools. The Supreme Court ruling states that separate-sex education (in the private sphere) is lawful, and adds that “nor is there any express provision barring public support for schools offering such education.” The ruling recalls that the International Convention against Discrimination in Education<sup>22</sup> states that “separate education systems ... shall not be deemed to constitute discrimination”, and notes that “mixed education is one means, but not the only one, of promoting the elimination of sexual inequality,” and so its interpretation is that “international legislation leaves the issue open.” The court also mentions the arguments of the previous ruling of the National High Court (Audiencia Nacional), according to which “the mere fact that education is given solely to boys or to girls is not in itself discriminatory on the ground of sex, provided that the parents or guardians can choose, in a context of free education, between schools in a certain area.” The judgment adopts the position of the State Legal Service (Abogacía del Estado), contrary to UGT’s action, according to which “the fact that the compulsory education given in public schools is mixed does not mean that it must be mixed in all schools.” “This is an option that cannot be imposed. Especially when the Constitution enshrines parents’ right to choose the form of education that they wish for their children, guarantees freedom of establishment for schools and protects the right of private schools to define their own nature”. A representative of the trade union UGT has said that they are considering filing an appeal with the Constitutional Court (Tribunal Constitucional). The union argues that “agreements by which the State supports private schools came into existence to meet educational needs, and any school, when applying for such an agreement, should accept those requirements.” “We consider that schools opting for segregation, separating boys and girls, should not be state-supported. And this has to do not with the freedom to establish schools but with the free nature of education.”<sup>23</sup>

The Law for Social Integration of Disabled People attempts to integrate the disabled into “the ordinary system of general education, receiving, in this case, the support and resource programs that the Law recognizes”. A Special Education system is anticipated that will be provisional or definite, to those disabled for whom the ordinary educational system is impossible”, one of whose aim is professional training.

### **3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)**

*Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

See art. 29.1 of Law 62/2003 in section 3.2.6. All the considerations in that paragraph are applicable to the field of Access to and supply of goods and services which are available to the public.

The law has not made a distinction between goods and services available to the public and those only available privately.

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<sup>22</sup> [http://www.unhchr.ch/html/menu3/b/d\\_c\\_educ.htm](http://www.unhchr.ch/html/menu3/b/d_c_educ.htm)

<sup>23</sup> There are no data on the number of schools that separate pupils in their classrooms by sex. Of the 22,706 non-university schools and colleges in Spain (in the academic year 2005-2006), it is estimated that between 120 and 150 separate their pupils by sex (according to the Spanish Confederation of Schools and Colleges), and that 80% of these are state-subsidized private schools and the rest non-subsidized private schools. Most of them are linked to the Catholic Church (and especially to Opus Dei).

### **3.2.10 Housing (Article 3(1)(h) Directive 2000/43)**

*To which aspects of housing does the law apply? Are there any exceptions?*

See art. 29.1 of Law 62/2003 in epigraph 3.2.6. All the considerations in that paragraph are applicable to the field of housing.

The 2005-2008 National Housing Plan<sup>24</sup> is of universal scope, but is targeted in particular at the groups which have most difficulty in gaining access to decent housing, specifically including disabled people and their families. The Plan also expressly mentions immigrants and, implicitly, Roma people (within “groups in a situation, or at risk, of social exclusion”).

## **4. EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

*Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?*

Law 62/2003 (art. 34.2.2) reproduces the occupational requirement exception of art. 4.1 of the Directive which provides that “The differences based in a characteristic related to any the causes referred to in the previous paragraph (all the grounds of the Directives 2000/43 and 2000/78) do not assume discrimination when, owing to the nature of the specific professional activity that it deals with or the context in which it is carried out, such a characteristic constitutes an essential and determinant professional requirement, provided that the objective is legitimate and the requirement is proportionate”.

Prior to the transposition of the Directives into internal Spanish law, art. 17.2 of the Workers’ Statute stated that “exclusions, reservations and preferences in respect of unrestricted employment may be established by law”. Convention 111 of the International Labour Organization (ILO), which stipulates that there is no discrimination if distinctions, exclusions or preferences are based on qualifications required for employment, was also applicable. With regard to “legitimate and proportionate”, this expression was not defined in Spanish legislation but the Constitutional Court has used the concept of “objective and reasonable justification” in discrimination cases (STC 22/1981).

### **4.2 Employers with an ethos based on religion or belief**

*a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

*b) Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination?*

Law 62/2003 provides for non-discrimination in employment on the grounds of religion or beliefs and amends other laws (such as the Workers’ Statute) in this respect, but makes no reference to organizations with an ethos based on religion or beliefs. For organizations with a specific ethos, article 6 of the Organic Law on Religious Freedom states that “Registered

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<sup>24</sup> Adopted by Royal Decree 801/2005, of 1 July, adopting the 2005-2008 National Plan for the promotion of public access to housing (BOE, 13 July 2005).

Churches, Faiths and religious Communities shall be fully independent and may lay down their own organizational rules, internal and staff by-laws. Such rules, as well as those governing the institutions they create to accomplish their purposes, may include clauses on the safeguard of their religious identity and own personality, as well as the due respect for their beliefs, without prejudice to the rights and freedoms recognized by the Constitution and in particular those of freedom, equality and non-discrimination”. In my opinion, this provision is in keeping with art 4.2 of Directive 2000/78.

As Puente (2004) pointed out, the scope of these clauses is the regulation of the working relationship in such institutions. In these private organizations with a specific ethos, the exemptions operate in practice at three stages of the working relationship: the first being access to employment; the second being during the performance of an activity within the organization; and the third being dismissal as a consequence of that activity.

In the first moment, before the signature of the contract, the general rule is that religious reasons cannot be claimed for preventing anyone from exercising their right to work. Moreover, according to article 16.2 of the Constitution, nobody may be compelled to make statements regarding his/her religion, belief or ideology, which means that there is a prohibition of asking about the ideology or beliefs of the worker. However, in these organizations, questions on religion and belief, and the petition of workers to accommodate their private lives to the ethos of the enterprise seems legitimate if the activity to be done is linked with the ideological orientation pursued by the organization. This is connected to what has been said about the situation of teachers of Christianity in state schools. In recent years there have been problems in the recruitment of teachers of Christianity in state schools where the ecclesiastical authorities have learned that the teachers were living with partners without being married, and as a result refrained from recruiting such teachers, or dismissed them.

In the second stage, during the life of the working relation, the employees have to show respect for the ideology of the enterprise. This respect for the ideology also includes out-of-work activities, if they affect this ethos, risking it. In the third stage, although the general rule says that the discriminatory dismissal is void, in these organizations with a specific ethos it will not be discriminatory if there has been a working behaviour hostile to that ethos.

Conflicts may arise between the rights of organisations with an ethos based on religion or beliefs and other rights to non-discrimination, and these have been addressed both in the case-law of the Constitutional Court and in constitutional doctrine. According to general constitutional doctrine, since the principle of “good faith” that has to rule in work relations (art. 5.a of the Workers’ Statute), employees in ideological or ‘tendency’ organisations can be asked to conform to a minimal extent with the organisation’s ethos<sup>25</sup>. Rubio-Marín (2004) have pointed that both doctrine and courts have made it explicit that even within ideological institutions one has to distinguish between ‘ideological’ and ‘neutral positions’ within the organisation. Only the former are about transmitting the ideology of the institution and thus those in which ideological affinity can be expected<sup>26</sup>. For example, given the longstanding rejection of homosexuality by the Catholic faith this brings up interesting issues concerning religious institutions. In relation to those, especially to private religious schools, the Constitutional Court has considered that, once again, the most relevant factor to be taken into consideration is what the job itself consists of. If it is strictly linked to the spreading of the schools’ ethos, constraints will be more justifiable than if the job consists in developing some purely technical expertise or is restricted to the pure transmission of knowledge<sup>27</sup>. According

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<sup>25</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decisión), 27 March 1985, 47/1985.

<sup>26</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decisión), 12 June 1996, 106/1996.

<sup>27</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decisión), 13 February 1981, 5/1981.



to some scholarly doctrine this would allow employers in this kind of institutions to inquire about the worker's sexual orientation (Vicente 1998). On the other hand some scholars have pointed out that it is a worker's conduct and not his sexual preference per se that could be seen as violating the institution's ethos so that it is only when the conduct is notorious and has the capacity to discredit the institution's ethos that measures can be taken (Fernández 1985).

On 26 February 1999 the Spanish Ministers of Education and Justice and the chairman of the Catholic Bishops' Conference signed an agreement on economic/employment arrangements for teachers of religion. As a result, the bishop of each diocese decides upon the hiring, activities and dismissal of teachers and the State pays their wages and compensates them in the event of dismissal. This situation has given rise to many conflicts in recent years and various court rulings have been given against dismissals of teachers of Christian religion. These dismissals have generally resulted from arbitrary decisions of the diocese (and have therefore been declared unfair or void), deeming that teachers have become unsuitable for their work as a result of getting divorced, drinking in bars, belonging to a trade union, etc. The *Organic Law on Education* (LOE) is set to satisfactorily resolve this problem. Its Third Addition Provision, relating to teachers of religion, provides that:

“1. Teachers of religion must meet the qualification requirements stipulated for the various forms of education regulated by this Law, along with those stipulated in the agreements entered into between central government and the various religious denominations.  
2. Teachers not belonging to public education staff and that teach religion in state schools shall be employed, in accordance with the Workers' Statute, by the respective levels of government. Their employment status shall be regulated with the participation of teachers' representatives. They shall be awarded their posts according to objective criteria of equality, merit and ability. These teachers shall receive the emoluments for temporary teachers in the respective level of education. They shall in all events be proposed by religious bodies and automatically re-employed each year. The relevant tiers of government shall determine whether contracts are full time or part time, according to the needs of schools. Their dismissal, where appropriate, shall be pursuant to the law.”

This Provision of the LOE is in conformance with the art. 4(2) exception

#### **4.3 Armed forces and other specific occupations**

- a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*
- b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

No explicit reference is made in the transposition of Directive 2000/78 to the exception for the armed forces in relation to age or disability discrimination under Article 3.4.

But the law regulating access to the armed forces (Law 17/1999 of 18 May on Staff Regulations for the Armed Forces) provides that “Entry into military training centres shall be by public competition, (... guaranteeing) the constitutional principles of equality, merit and ability (...). Applicants must (among other conditions) (...) be eighteen or older, and not have passed the age limits provided in the regulations<sup>28</sup> (...). The tests to be passed in the

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<sup>28</sup> Royal Decree 1735/2000, of 20 October, adopting the General Regulations on Entry and Promotion in the Armed Forces (BOE, 21 October 2000), sets a minimum age of 23 for entry into the general forces, but the age limit is different for the various corps and scales in the army, and exceptions are provided for those joining the army from other armed corps such as

recruitment systems (...) shall serve to demonstrate the applicants' necessary psychophysical aptitudes (...)” (art. 63).

Similar rules are applicable to employment in the police, prison or emergency services.

#### **4.4 Nationality discrimination**

*Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).*

*a) How does national law treat nationality discrimination?*

*b) Are there exceptions in anti-discrimination law that seek to rely on Art 3(2)?*

The Law on the rights and duties of aliens (OL 4/2000) include direct and indirect discrimination by nationality but with definitions not similar with the directives 2000/43 and 2000/78. Moreover the indirect discrimination refers only to aliens “workers” not to “persons” as in Directive 2000/43. The definitions of harassment by nationality is not include.

As we said earlier, (see section 3.1.1), the seventh additional provision of the Law 62/2003, entitled “Non-applicability to immigration law”, states that the articles of transpositions of Directives shall not affect the regulations provided “in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000”. The “justification” of this provision is based on article 3.2 of Directives 2000/43 and 2000/78. But it should not be forgotten that Law 4/2000 regulates issues that are liable to be affected by Directives as “work and establishment” and this exclusion is not in art. 3.2. of Directives.

As the Law on the rights and duties of aliens (OL 4/2000) requires foreigners to be in a regular situation in order to enjoy full protection of their rights, equality for them is not guaranteed in the labour market, education and training, social protection, social advantages, and access to and supply of goods and services, until they have regularized their situation and procured a residence permit (and a work permit in the case of workers). This law does not affect Community citizens, who are covered by specific regulations and cannot be discriminated against in relation to Spaniards. Community citizens of the ten new Member States (except for Cyprus and Malta) are covered by temporary rules.<sup>29</sup>

Law 17/1999 on Staff Regulations for the Armed Forces was amended by Law 32/2002 of 5 July in order to allow foreigners to become professional soldiers. This Law provides that “Foreigners that are nationals of countries legally identified as having special and traditional historical, cultural and linguistic ties with Spain may become professional soldiers (...)”. No complaint has been lodged against this law differentiating between Latin Americans and other foreign nationals, because of the “special and traditional historical, cultural and linguistic ties” linking their countries and Spain according to the law. Royal Decree 2266/2004 of 3 December increased the maximum quota of foreign nationals in the professional army and navy to seven per cent of the total.

Royal Decree-Law 8/2004 of 5 November, on allowances for those taking part in international peace and security operations, introduced a differentiation on the grounds of nationality that may be discriminatory. This RDL (arts. 1 and 2) recognizes the right of “Spanish” soldiers taking part in such operations to receive allowances. Although an Instruction from the Under-

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the Civil Guard (art. 16).

<sup>29</sup> The corresponding annexes of the new Member States' accession treaties (except in the cases of Cyprus and Malta) provide the possibility of applying restrictions on the free circulation of workers from those countries in the European Union for a period of seven years. In Spain a transitional period of two years has been set, due to end on 1 May 2006.

Secretariat of the Ministry of Defence issued on 23 December 2004 recognizes the right of foreign soldiers in the Spanish army to receive allowances of the same amount as those established for Spaniards, the RDL may be considered to infringe the principle of equal treatment on the grounds of origin or nationality.

#### **4.5 Work-related family benefits**

*Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.*

- (a) Does national law permit an employer to provide benefits that are limited to those employees who are married?*
- (b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?*

Before commenting the current situation, it is interesting to point out that Law 13/2005 amending the Civil Code with regard to the right to contract matrimony (*Ley 13/2005, de 1 de Julio, por la que se modifica el Código Civil en material de derecho a contraer matrimonio*, BOE, 2 July 2005). In the preamble states that “the reality of Spanish society in our time has become much richer, more plural and more dynamic than that in which the Civil Code was enacted. Couples of the same sex cohabiting on a basis of affection have become increasingly recognised and accepted in society, overcoming deep-rooted prejudices and stigmas. Today it is widely acknowledged that cohabitation in such couples is a means for a large number of people to develop their personalities, and through which such people provide each other with emotional and economic support, albeit with no status other than that of a strictly private relationship, given the lack of formal recognition in law, up to now.” This provision is designed to end “a long history of discrimination on the ground of sexual orientation.” It establishes “a framework for personal realisation enabling those who freely adopt a sexual and emotional preference for persons of their own sex to develop their personalities in equal conditions”.

The Law 13/2005 has amended art. 44 of the Civil Code, which states that “Men and women are entitled to contract matrimony pursuant to the provisions of this Code,” and a new paragraph is added providing that that “Both parties’ being of the same sex shall neither prevent them from contracting matrimony nor diminish the effects thereof.” A further 16 articles are also amending, with the terms “men/women” (*hombre/mujer*) being replaced by “spouses” (*cónyuges*). (These articles refer to the rights and duties of spouses, the custody of children, donations and economic provisions, etc.) An additional provision states generally that “Legal provisions containing any references to ‘marriage’ shall be deemed applicable regardless of the sex of the spouses.” This amendment of the Civil Code, so simple in its form, means that homosexuals are henceforth entitled to get married with exactly the same rights (custody of children, adoption, inheritance, etc.) as currently enjoyed by heterosexual couples.

According to the Spanish Centre for Sociological Research (CIS), two out of three Spaniards are in favour of homosexual marriages. However, the Law has been strongly opposed by some conservative sectors of society close to the Catholic Church. Two weeks before the Law

was passed, a demonstration was held with the presence of 20 of Spain's 80 Catholic bishops. The result of the parliamentary vote on 30 June was 187 in favour and 147 against.

Both the General Social Security Law and the Workers' Statute recognize a number of rights of the "spouse" and the status of matrimony, in some cases explicitly and in others implicitly. The Social Security Law, for example, recognizes inter alia the spouse's rights to a survivor's pension (art. 174), to an allowance for burial costs (art. 173), and to compensation in the event of the other spouse's death due to an occupational accident (art. 177). The Workers' Statute provides for 15 days of marriage leave (art. 37.3.a), up to four days for serious illness or decease of the spouse (art. 37.3.b), and if one of the spouses moves to a new location and the other works in the same company, the latter is entitled to be transferred to the same locality (art. 40.3), and so on.

Two specific current questions are connected with the registered partnership and the unregistered de facto unions. As Rubio-Marín (2004) say, in Spain there is no general statute on civil unions with a generalised system of registry for partnership. The socialist government has promised to change this during its current mandate. In 1994 a municipality established the first municipal register without regard to the couple's sexual orientation and this example was then followed by hundreds of other municipalities and several autonomous communities. Registration is no substitute for marriage. The regional statutes on de facto unions attach to it some legal effects, mostly the option that partners stipulate their economic regime. Most collective agreements extending benefits to non-marital partnerships require that the partnership be registered. In spite of registration, the marital status of the partners is not changed, nor are there any consequences that ensue regarding the children of the partners. It is interesting to note that as far as public employment in the region is concerned, these regional statutes extend to registered partners the same regime of benefits, permits, health and social benefits as those enjoyed by married couples.

The situation is more complicated in the case of unregistered de facto unions. Many collective agreements are making up for the legislation's vacuum in the protection of non-married partners by explicitly stating that the privileges that the law grants to married partners should extend to stable or de facto unions. The explicit inclusion of same-sex partners, however, is exceptional. It is far more common to either refer to different-sex partners, or to de facto stable unions without any further specification. Given that employers tend to interpret the clauses in the most restrictive ways - excluding same-sex partners in the process - there is growing litigation in this regard. The results have thus far been erratic. The National Railway Company (*RENFE*), for instance, has been sued in different occasions and although it has lost in front of the lower courts it has systematically appealed with different degrees of success. It has finally changed its rules to extend benefits to same-sex partners<sup>30</sup>.

National law allows an employer to provide benefits that are limited to employees who are married, and this is a current practice in some companies. But it is illegal to limit these benefits to opposite-sex partners.

#### **4.6 Health and safety**

*Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

*Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?*

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<sup>30</sup> See Rojo (2005).

Law 31/1995 of 8 November on the Prevention of Occupational Hazards provides regulations for the protection of workers especially at risk from certain hazards, such as disabled workers. Art. 25 of the Law states that “Employers shall specially guarantee the protection of workers who, owing to their personal characteristics or known biological condition, including those with a recognised physical, mental or sensorial disability, are especially at risk from the hazards involved in their work. To this end, employers must take these aspects into account in hazard assessments and, pursuant thereto, shall take the necessary preventive and protective measures.” The Law further states that “Workers shall not be employed in posts in which, in view of their personal characteristics or known biological condition, or duly recognised physical, mental or sensorial disability, they may put themselves, other workers or other persons connected to the company in a dangerous situation, or, generally, where they are patently in a temporary condition unsuited to the psychophysical requirements of their respective posts of employment.”

There are not others exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery, etc.).

#### **4.7 Exceptions related to discrimination on the ground of age**

##### **4.7.1 Direct discrimination**

*a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*

*b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

*c) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?*

Spanish legislation does not permit a general direct discrimination on the ground of age but the legislation permit differences of treatment based on age for some activities within the material scope of Directive 2000/78. These exceptions are “objectively and reasonably justified by a legitimate aim”.

In the Social Security field there are issues that need studying from the perspective of possible discrimination on the ground of age, also related to employment. In some social benefits, age is consubstantial with the benefit itself. In others age is a factor limiting protection, as such benefits cannot be granted fully to all citizens. This second case may give rise to problems of discrimination. In any event sufficient justification is required. The justification cited by the law is normally the difficulty for older workers to re-enter the labour market. In other cases the justification is the different positions of Social Security contributors, even those performing no paid activity, and benefit receivers, in order to determine differences of treatment in Social Security (Blázquez, 2005).

National legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) of Directive 2000/78.

#### **4.7.2 Special conditions for young people, older workers and persons with caring responsibilities**

*Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.*

There are many employment policy programmes (detailed in the National Employment Plans and on occasion funded by the European Social Fund) with participant age limits, normally designed to favour young people (under 25) and older workers. For both groups there are training support and employment support measures in the form of partially subsidized contracts. In the case of young people the employment measures are work experience contracts, job-training contracts and subsidized indefinite contracts. In the case of older workers there are subsidized indefinite contracts for persons aged 45 to 55 in some cases, and for those aged over 52 in others. There is also a job-seeker's allowance programme for older workers at a particular disadvantage on the labour market (see Cachón 2004a).

The unemployment benefit system also makes age distinctions. For example, those aged over 52 who have used up their contributory unemployment benefit are entitled to an unemployment allowance until they reach retirement age, and those aged over 45 with family responsibilities that have used up their contributory unemployment benefit are entitled to a variable allowance depending on certain circumstances. "Active job-seeking income" is granted to those aged over 45 who satisfy certain conditions.

#### **4.7.3 Minimum and maximum age requirements**

*Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?*

The Workers' Statute (art. 6) sets the minimum age for access to employment at 16. This is also the minimum age for access to vocational training.

There is no general rule establishing a maximum working age, since the provision of the Workers' Statute in 1980 setting a maximum age of 69 was declared unconstitutional by the Constitutional Court in 1981<sup>31</sup>. Nor is there a maximum age for taking part in vocational training.

The Workers' Statute, which regulates dismissal proceedings, applies equally to all workers without distinction of age.

Public service is an exception, for retirement is mandatory at 65 (with exceptions such as judges, who can retire at 72, or publicly employed university professors, who can retire at 70).

#### **4.7.4 Retirement**

*In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).*

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<sup>31</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decisión), 2 July 1981, 22/1981.

- a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*
- b) Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*
- c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?*
- d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*
- e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?*
- For these above questions, please indicate whether the ages are different for women and men.'*

Workers may begin to receive a public pension at age 65, provided the other requirements provided in the law (General Social Security Law, art. 161) are met. But this does not mean that 65 is the age of obligatory retirement from work and the labour market. This age applies both for contributory pensions and for non-contributory pensions and may be lowered by the government for “those groups or professional activities whose work is of an exceptionally laborious, toxic, dangerous or unhealthy nature, and which have high levels of disease or mortality,” or in the case of “disabled people with a degree of disability equal to or greater than 65 per cent.” Early retirement may be taken from age 61 provided that certain requirements specified in the General Social Security Law (art. 161) are met.

There have been no recent changes in the regulations on retirement age, but the policies that used to promote early retirement are being progressively rolled back, so that the average retirement age is now 63.

The retirement age is of a voluntary nature. The rule requiring people to retire at no later than 69 was declared unconstitutional (See section 4.7.3). But retirement at 65 is compulsory in the civil service (Law 30/1984 on Civil Service Reform, art. 33), except for members of public corps with special regulations such as judges (compulsory retirement at 72) or university professors (compulsory retirement at 70), among others.

On 3 December 2004 the trade unions and employers’ organizations signed an agreement with the Government to reintroduce that provision into the Workers’ Statute and thereby enable the social partners to include clauses in collective agreements on the termination of contracts when employees reach the ordinary retirement age, provided that certain conditions are met. On 29 June 2005 the Spanish Parliament passed a Law inserting a “Tenth Additional Provision” into the Law on the Workers’ Statute. This Provision states that “collective agreements may include clauses allowing the employment contract to be terminated when the employee reaches the ordinary retirement age as established in Social Security regulations” and adds two provisos (See sections 0.3 and 2.1.1).

The conditions are the same for women and men.

#### **4.7.5 Redundancy**

- a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*
- b) If national law provides compensation for redundancy, is this affected by the age of the worker?*

Spanish law allows no distinctions on the grounds of age in the case of redundancy. But in practice many redundancies in companies affect the youngest employees (because they have been in the company for less time) or the eldest (because they have access to early retirement schemes).

Redundancy payments are provided for in the Workers' Statute (Title I, Chapter III, Section IV). Officially, such payments are not affected by the worker's age, but in practice they are, because their amount is linked how long the worker has worked for the company.

The current regulations on this matter are in line with Directive 2000/78. Actual practice in companies may also be said generally to conform to the Directive, but in some cases indirect discrimination on the ground of age does occur, and should, where appropriate, be dealt with by the courts.

#### **4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)**

*Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?*

Spanish legislation does not reproduce explicitly the exceptions mentioned in the Directive 2.5 regarding measures necessary for the maintenance of public order and the prevention of criminal offences, for the protection of health and the rights of freedoms of others.

#### **5. POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)**

- a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic.*
- b) Do measures of positive action exist in your country? Which are the most important? Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.*

The principle of "positive action" is rooted in the Spanish Constitution: article 14 formally recognizes equality before the law, without discrimination on any of the grounds listed in the Constitution, while article 9.2 requires the public authorities to promote "the conditions to ensure that the freedom and equality of individuals and of the groups that they form are real and effective". The positive action required by art. 9.2 should not be regarded only as a "legitimate exception" but as a guarantee that the principle of equality is to be made effective. In this connection, the Constitutional Court has repeatedly held that affirmative action measures are not to be seen as discriminatory. Rather, the Court has interpreted that actions of the public authorities to remedy the employment disadvantage of certain socially marginalized groups is actually required by a commitment to equality properly understood.



Positive action has been present in labour, educational and other provisions since the passing of the Spanish constitution in 1978 (Cachón 2004a).

In the field of employment, the Workers' Statute (art. 17.2) stipulates that the Parliament may regulate "exclusions, reservations and preference" measures in employment for certain groups at a disadvantage on the labour market. And (art. 17.3) that the Government "may regulate reservation. Duration or preference measures in employment".

In the educational field the Law on the Education System (*Ley Orgánica General del Sistema Educativo*) of 1990 stipulates that "In order to render effective the principle of equality in the exercise of the right to education, the authorities develop compensatory actions aimed at persons, groups and territorial regions with unfavourable situations, and provide the necessary economic resources" (art. 63).

In the Law 62/2003 (which transpose the Directives) there are three articles (30, 35 and 42) which develop positive action. Art. 35 in field of employment and occupation on all grounds of Directives provides that "with a view to ensuring full equality on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, the principle of equality shall not prevent maintaining or adopting specific measures in favour of certain groups in order to prevent or compensate for disadvantages that they may encounter". Art. 42 provides that "collective agreements may include measures directed to fight against every form of employment discrimination, to encourage equality of opportunities and to prevent harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation".

Art. 30 of the same Law, referring to the various spheres of employment included in Directive 2000/43 on the grounds of racial or ethnic origin, states that: "In order to guarantee full equality irrespective of racial or ethnic origin, the principle of equal treatment shall not prevent the maintenance or adoption of special measures benefiting certain groups, designed to prevent or to offset any disadvantages that they suffer as a result of their racial or ethnic origin."

The 3rd "National Action Plan for Social Integration in the Kingdom of Spain" (2005-2006) includes special measures to support those who are most vulnerable which may be regarded as positive action measures. The measures cover many spheres of action of the public authorities: education, housing, health, training, employment and social services. One of the groups given special attention is the Roma people. The Roma also have a special plan for "Roma Development" and a "National Roma Council" (see section 7).

### *Disability*

In the field of disability there has been a great range of positive action measures since the implementation of Law 13/1982 on the Integration of the Disabled (LISMI). Its aim (art. 38) is the complete personal fulfilment of the disabled and their total social integration so that the necessary assistance and protection to the seriously disabled, discrimination due to disability is prohibited, and a quota system and other acts in favour of job integration for the disabled are provided. The Constitutional Court (STC 269/1994, October 1994) has recognized the legality of the reservation of a quota for disabled persons in the selection of employees.

Law 51/2003 of 2 December, on equality of opportunities, non-discrimination and universal accessibility for the disabled, provides a series of positive action measures to combat the discrimination suffered by disabled people (art. 8):

“1. Positive action measures shall be those forms of specific support intended to prevent or to offset the disadvantages or special difficulties experienced by disabled people on entering and taking part in the various spheres of political, economic, cultural and social life, in keeping with the various types and degrees of disability.

2. The public authorities shall adopt additional positive action measures for disabled people that objectively experience a greater degree of discrimination, or lesser equality of opportunities, such as women with disabilities, disabled people with severe handicaps, disabled people that cannot represent themselves, or those who suffer greater social exclusion owing to their disabilities, along with disabled people that live in a rural environment.

3. Furthermore, within the framework of official policy for protecting the family, the public authorities shall adopt special positive action measures in respect of families with disabled members.”

Art. 9 of this Law specifies the contents of measures for positive action on the ground of disability; these measures may consist of

- ✓ Additional supports
  - Economic supports
  - Technical supports
  - Personal assistance
  - Specialized services
  - Special supports and services for communication
- ✓ Rules, criteria, or more favourable practices

These measures shall be minimum provisions, without prejudice to any other measures that may established by the Autonomous Communities in the spheres of their jurisdiction.

The Law (art. 12-16) anticipates promotional measures of equality, together with measures of positive action, that have as an aim a policy of comparison, and among those cited are:

- Measures of sensibility training
- Measures to ensure that administrative programs are of a quality that contemplates the situation of the disabled.
- Measures of innovation and technical development.
- The participation of the organization of persons with disability
- Plans and programs of accessibility and non-discrimination

The LISMI anticipates three systems of workplace integration for disabled persons: a) The integration in the ordinary work system, seeing that the system is preferential; b) the occupation in Special Work Centres, when the worker exceeds a certain grade of disability (disability above 33%); and c) occupational centres, when owing to the degree of disability, they can not access either one of the others.

In integration into the ordinary system of work, there is support for diverse measures, which we can describe as positive actions or assumptions of reverse discrimination:

- ✓ A quota system (the workforces of public and private companies with 50 or more employees must include at least 2 per cent of disabled workers)
- ✓ Incentives<sup>32</sup>

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<sup>32</sup> Initially established in Royal Decree 1441/1983, of 11 May, regulating measures for the promotion of employment for the disabled. Subsequent legislation has amended this Royal Decree's provisions.

1. Indefinite Contracts
  - a. Subsidy (aid of 3,900 euros to companies for each indefinite contract)
  - b. Bonuses in Social Security contributions (reduction of companies' Social Security contributions, offset by the public employment services)
  - c. Support for professional training
  - d. Bonuses for adaptation of work stations (subsidies for the adaptation of work stations)
  - e. Fiscal measures
2. Temporary contracts
  - a. Reduction, in force up to 1992, or bonuses in companies' Social Security contributions.

The *Special Employment Centres* are those that firstly, are for those of more than 70% disability, and secondly that have as objectives: a) productive work, participating regularly in market operations; b) to assure disabled workers paid work, such as rehabilitation services and social integration; and c) to integrate the largest number possible of disabled into the normal work routine. Workers that can be integrated through these centres are those that have a disability equal or superior to 33% that means that they have a limited work capacity in this same percentage.

The objective of the *Occupational Centres* is the social and personal integration of persons with disability whose capacity remains below the limits that permit integration using the formula of the Special Work Centres.

The LISMI anticipates the obligation of companies, public and private, or more than 50 workers of which 2% are disabled. However, its reiterated failure to comply, has resulted in the publication of the RD Royal Decree 27/2000, of January 14, of Alternative measures for the compliance with the quota in favour of disabled workers. This rule anticipates two types of substitute measures for the mentioned quotes: a) The possibility of contracts of supplies and services with Special Work Centres; b) donations in cash to foundations and public use associations that have as an objective, among others, the promotion of the work integration of disabled persons.

This quota of employment of disabled persons is equally applicable to Public Administrations, in Law 39/1984, of August 2 (modified Law 53/2003, of December 10, about public employment of the disabled), establishes that "In offers of public employment a quota will be applied of not less than five percent of vacancies to be covered by persons with disability whose degree of disability is equal to or superior to 33 percent, by which, two percent of the effective totals of the State Administration will be reached progressively, whenever they pass the selective tests and that, at that time, they will assign an indicated grade of disability and compatibility with the performance of tasks and corresponding functions, thus determining them in a regulatory way" (This Law was recently developed by Royal Decree 2271/2004 regulating access to public employment and the provision of posts for the disabled. This RD expressly mentions Directive 2000/78).

The law does not anticipate special subsidies for low performance of a disabled worker with a disability in the ordinary work system, but will anticipate a subsidy of 50% of the Minimum Wage in the case of the Special Work Centres.

Accessibility currently poses many problems: there are many non-adapted public and private buildings and many public and private services not adapted to the needs of certain groups of citizens, and information in Braille and sign language is not provided.

The “1st National Accessibility Plan 2004-2012”, adopted on 25 July 2003, is currently being implemented. This plan is a strategic framework of actions intended to ensure that new environments, products and services are made to be accessible to greatest possible number of citizens (Design for All) and that those already existing are suitably adapted. The following are the Plan’s five objectives:

1. To consolidate the Design for All model and its implementation in new products, environments and services. To disseminate information on and application of accessibility.
2. To introduce accessibility as a basic criteria of quality in public management.
3. To create a complete and efficient regulatory system for the promotion of accessibility eminently applicable on the ground.
4. To adapt environments, products and services to the Design for All criteria in a progressive and balanced manner.
5. To promote accessibility in new technologies.

To this end, 18 strategies have been adopted, implemented by 58 specific actions. Although the 1st Plan has a duration of 9 years, it is scheduled in three periods of three years each. The first period is now in progress (2004-2006).

In this context, on 12 July 2004 a Cooperation Agreement was signed between the Ministry of Labour and Social Affairs and the ONCE Foundation for cooperation in the social integration of disabled people with a view to developing a universal accessibility programme.

The Government approved on the 13 January 2006 the Bill recognising sign language and speech aid systems (*Proyecto de Ley por el que se reconoce la lengua de signos y los sistemas de apoyo a la comunicación oral*). The Bill recognises Spanish sign language as a language of those deaf people in Spain that freely decide to use it, along with the learning, knowledge and use thereof. It will also provide and guarantee support for communication by deaf, hearing-impaired and deaf-blind people. As to learning, the Bill states that the education authorities shall provide what is necessary to promote the learning of Spanish sign language by deaf, hearing-impaired or deaf-blind pupils that freely opt to learn this language. As to its use, the law will promote the use of sign-language interpreters for deaf, hearing-impaired and deaf-blind people and the provision of communication aids, where required, in various public and private spheres: 1) publicly provided goods and services (education; training and employment; health; culture; sport and leisure); 2) transport; 3) relations with public administration; 4) political participation; and 5) the media, telecommunications and the information society. The Bill, also provides for the creation of a “Centre for Linguistic Standardisation of Spanish Sign Language”. The purpose of this body will be to investigate, promote and disseminate this language and to supervise its use. This Bill, apparently the first of its kind in Europe, responds to a long-standing demand of Spanish associations representing deaf, hearing-impaired and deaf-blind people. Its aim is to facilitate deaf people’s access to information and communication, taking into account their heterogeneity and their specific needs.

### *Sexual Orientation/Gender Identity*

Though it cannot be strictly described as positive action, it is worth noting the Bill regulating the amendment of entries in official registers regarding people’s sex (*Proyecto de Ley reguladora de la rectificación registral de la mención relativa al sexo de las personas*) approved by the Government on the 2 June 2006. In Spain there are some 3,000 transsexuals. Transsexuals wishing to change their name and sex in the register of births, marriages and deaths in Spain currently need a court ruling and must undergo sex reassignment surgery. This process takes several years and is moreover costly and hazardous. The Bill solves this

problem by allowing people to change their names in the register of births, marriages and deaths by means of submitting “existential evidence” (“prueba de vida”). This gender identity bill was included in the governing Spanish Socialist Party’s electoral programme. The Bill’s purpose is to regulate the requirements for amending the entry relating to a person’s sex in the register of births, marriages and deaths (*Registro Civil*) when the existing entry does not match the person’s true gender identity. It also provides for name changes so that the person’s name may be in keeping with the relevant gender. In its preamble the Bill states that transsexuality is a social reality that needs to be addressed by the law so as to guarantee the free personal development and dignity of those whose current gender identity does not match the sex with which they were initially registered. The text of the Bill states that the reference to a person’s sex in official registers shall be amended once the applicant has proven that s/he has been diagnosed with “gender dysphoria” by means of a report from a registered doctor or psychologist. The applicant must also prove that s/he has been medically treated for at least two years in order to adjust his/her physical characteristics to the relevant sex. Proof that this requirement is met shall be supplied in a report from the registered doctor under whose supervision the treatment was given. Both requirements may have been met either before or after the Law’s entry into force. Anyone proving that they have satisfied both requirements may request a change in the reference to their sex in official registers as of the day after the Law is enacted. For a person’s sex to be amended in official registers, it will not be necessary for the medical treatment to have included sex reassignment surgery.

## **6. REMEDIES AND ENFORCEMENT**

### **6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)**

*a) What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

*b) Are these binding or non-binding?*

*c) Can a person bring a case after the employment relationship has ended?*

*In relation to each, please note whether there are different procedures for employment in the private and public sectors.*

*In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?*

The Constitution provides in Art. 53 that all fundamental rights (as is the case of equality) are protected by the ordinary courts of law. The Organic Law on the protection of fundamental rights establish that this protection will be made effective, in the first place, by a special procedure, preferential and summary, which is regulated in the main procedure laws in all jurisdictional orders: civil, criminal, labour or administrative. Moreover, appeals for protection in respect of such rights may be lodged at the Constitutional Court (CC) once ordinary proceedings have been exhausted. The Law on the rights and freedoms of aliens stipulates that foreigners are entitled to legal aid under the same conditions as Spaniards.

There are also conciliation procedures for civil and social matters. As well as having recourse to the ordinary courts and to the CC, victims of discrimination may appeal to the Ombudsmen (at both national and regional level) when the issue concerns acts by the public administration, as well as to the Employment Inspectorate (in matters of employment and Social Security) and to the Education Inspectorate, both private and public employment or education.

Conflicts regarding either private employment or the hired personnel of public entities (subject to labour law) are resolved by the social jurisdictional branch composed by the *juzgados de lo social de única instancia* (specialised social and labour first and only instance courts), *las salas de lo social de los Tribunales de primera y segunda instancia* (first instance and appeal chambers specialised in social and labour law), *Tribunales Superiores de Justicia* (regional high courts) and *la Audiencia Nacional* (national appeals court) and the *sala de lo social del Tribunal Supremo* (the social and labour law chamber of the Supreme Court).

When the conflicts are due to an action by the administration subject to administrative (and not labour) law, the jurisdictional branch which is competent is the *jurisdicción contencioso-administrativa* (administrative disputes jurisdiction) which requires the prior exhaustion of whatever administrative appeals there may be and which is formed by *juzgados y tribunales contenciosos administrativos, en primera y segunda instancia* (first instance and appellate administrative disputes courts), and by the *sala de lo contencioso-administrativo del Tribunal Supremo* (the administrative disputes chamber of the Supreme Court). The *Tribunal Supremo* (the highest instance within the ordinary judiciary) is in charge of solving appeals to unify contradictory doctrine of lower courts and its decisions are generally binding and thus constitute a source of law.

In the field of employment, articles 63-68 of the Law on Procedure in Industrial Disputes (RDL 2/1995) provides a compulsory conciliation procedure to be followed before any judicial appeal is lodged.

Art. 40 of Law 62/2003 (which transposes the Directives) modifies art. 181 of the Law on Procedure in Industrial Disputes: “Actions for the defence of other fundamental rights and civil liberties, including the prohibition of discriminatory treatment and harassment (...)” may be heard in Social Courts pursuant to a special urgent procedure. As Rodríguez (2004) says, the taking of this action is conditional, firstly, to the presentation of the period of prescription or predicted expiration for the acts and conducts with which the discrimination deals. Secondly, to express with clarity the constituent facts of the discrimination.

Equally, the worker considered the victim of labour discrimination, can make a claim in the criminal courts (art. 314 of the Criminal Code) but given the way the crime is described it has very few chances of being applied.

A person can bring a case after the employment relationship has ended.

The Law 51/2003 of equal opportunities for disabled people, anticipates the installation of the voluntary system of arbitration to solve conflicts that may arise in matters of equal opportunities and discrimination (art. 17). Art. 18 refers to the right of effective judicial care of persons with disability. It begins with a declaration: “The judicial care of the right to equal opportunities for persons with disability will include the adoption of all necessary measures to end the violation of the right and prevent ulterior violations, thus re-establishing to the victim the full exercise of this right”. And art. 19 recognizes the legitimacy of the judicial person legally equipped for the defense of the rights and interests of the individual disabled person and to obtain reparation for this individual person.

The litigants must have a lawyer and, if they win the action, the judge may require the respondent to pay that lawyer’s costs. If they cannot afford a lawyer, they may request a free duty lawyer.

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)**

*Please list the ways in which associations may engage in judicial or other procedures*

*a) in support of a complainant*

*b) on behalf of one or more complaints (please indicate if class actions are possible)*

Claims in respect of discrimination are normally supported by various organisations, such as NGOs working with Roma or immigrants, NGOs active in combating racism or the trade unions. These organisations are entitled to be party to legal proceedings. The Constitution entitles any physical or legal person invoking a legitimate interest to be party to proceedings relating to the violation of fundamental rights and freedoms.

Current Spanish legislation provides only for the intervention of “organisations or other legal persons that have a legitimate interest” in the administrative sphere. This is stated in general terms in Law 29/1998, of 13 July, regulating Contentious-Administrative Jurisdiction, which stipulates that: “The following are entitled to contentious-administrative jurisdiction: a) Physical or legal persons having a legitimate right or interest. b) Corporations, associations, trade unions and groups and bodies referred to in article 18 that are affected or which are legally entitled to defend legitimate collective rights and interests”. (Art. 19.1.) Moreover, OL 4/2000 on the Rights and Freedoms of Aliens stipulates that organisations for the defence of immigrants, which are legally constituted in Spain, may intervene in procedures in legal matters regarding aliens. (Arts. 20.3 and 4.). The OL 4/2000 on the Rights and Freedoms of Aliens stipulates that organisations for the defence of immigrants, which are legally constituted in Spain, may intervene in procedures in legal matters regarding aliens (Art. 20.3 y 4).

The Law on Labour Procedure in its regulation of capacity and procedural legitimization, mentions in article 16 workers, or their legitimate representatives if they are incompetent or if the plaintiff is a legal entity. Article 17 mentions the possibility for Trade Unions and Associations of Employers of being legitimized for the defence of their own economic and social interests, but no mention of other organizations is made in this article. Furthermore, article 20 contemplates that Trade Unions might appear in Court in the name and interest of the member workers that authorize them to do so, defending their individual rights. However, this possibility is only applicable to trade unions.

Law 62/2003 (art. 31) provides that “legal entities legally authorized to defend legitimate collective rights and interests, may engage on behalf of the complainant, with his or her approval, in any judicial procedure in order to make effective the principle of equal treatment based on racial or ethnic origin”. The words “on behalf” are included, but not “or in support”, as stated in art. 10 of Directive 2000/43. Moreover, this article refers to the principle of equal treatment on the grounds of racial or ethnic origin and only in fields other than employment. In this field, the aforementioned provisions of the Law on Procedure in Industrial Disputes remain in force.

## **6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)**

*Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).*

The Law 62/2003 (which transpose Directives) introduces the shift of the burden of proof in the Spanish legal system (although it was foreseen in labour procedure, for discrimination based on sex in art. 96 of Law of Social Procedure and for infringement of union liberty in the art. 179). For civil, administrative and labour procedures the law provides that if well-founded evidence of discrimination on the grounds of racial or ethnic origin (in all fields of Directive 2000/43) and religion or belief, disability, age or sexual orientation (in employment) are inferred from the allegations of the plaintiff, it shall be for the respondent to bring forward a reasonable and objective justification, sufficiently proved, of the adopted measures and their proportionality.

The art. 32 (for discrimination in fields different of employment on ground of racial or ethnic origin) and art. 36 (for discrimination in employment on all grounds of Directives) of Law 62/2003 provides that “in those civil and administrative procedures in which from the facts alleged by the plaintiff one may conclude the existence of well founded evidence of discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation with respect to matters falling within the scope of this section, it shall be for the respondent to give an objective and reasonable and sufficiently proved justification of the measures adopted and their proportionality” (the text of the art 32 is similar but on ground of racial or ethnic origin in others fields).

The Labour Procedure Law (art. 96) also contemplates the shift of the burden of proof, and after the reform introduced by Law 62/2003 (art. 40) it now mentions not only discrimination on the ground of sex but also on all the grounds of Directives. This art. 96 said: “in those processes in which allegations, on the part of the acting party, exist of indications which are founded in discrimination for reason of sex, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation, it shall rest with the respondent to provide sufficient proof of the objective and reasonable justification of the measures taken and of their proportional nature.”

The Constitutional Court has been establishing case-law on the burden of proof. In order to use this rule of distribution for the burden of proof, it is necessary, that the actor accredit “the existence of an indication that generates a reasonable suspicion, appearance or presumption in favor of similar affirmation; it is necessary on the part of the actor to contribute ‘realistic proof’” (STC 207/2001)<sup>33</sup>; and in another judgment it indicates the “requirement for a principle of proof revealing the existence of a general discriminatory panorama or of facts that the vehement suspicion appears of discrimination ...” (STC 308/2000)<sup>34</sup>.

In criminal domain the rule is presumption of innocence. The Spanish Constitution states that all persons have the right to the presumption of innocence (art. 24.2). The Constitutional Court point out that this presumption is “the cardinal principle of criminal procedure, which implies that any person accused of infringements is presumed innocent until the contrary is proved. This presumption of innocence shall only be removed if an independent court, which is impartial and established by law, declares the person’s guilt in a proceeding which observes all the guarantees” (STC 209/1999)<sup>35</sup>.

#### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

*What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that help the victim of discrimination to present a complaint)*

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<sup>33</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 22 October 2001, 207/2001.

<sup>34</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 18 December 2000, 308/2000.

<sup>35</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 21 November 1999, 209/1999.



The principle of protection against victimisation is transposed but only in the labour field.

Before the transposition, the Workers' Statute (art. 55.5) declared invalid those dismissals related to any of the grounds of discrimination covered by the Constitution or the legal system or which entail the violation of workers' fundamental rights and freedoms.

The Law 62/2003 (art. 37) introduces changes into the Workers' Statute and in the Law 5/2000 on infractions and remedies in social domain. The new redaction of art. 17.1 sanctions the nullity of those administrative regulatory provisions, conventional or contractual clauses, agreements or unilateral decisions of the employer which discriminate on all the grounds of Directives; and a new paragraph (art. 17.2) has been added. This paragraph states that "the decisions of the employer amounting to adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination shall likewise be void of effect".

Similarly, Law 62/2003 (art. 41) has introduced modifications of the Law 5/2000 on infractions and remedies in social domain. Art. 8 of the Law 5/2000 contains a list of what are to be considered very serious infractions in the area of labour relations. With the reform of Law 62/2003, art. 8.12 now adds to those decisions that amount to discrimination reference to those that "amount to an adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination".

There are no legal provisions concerning the victimisation of persons other than the complainant (as might be the case of witnesses), but judges should also apply victimisation protection to them.

## **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

*a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

*b) Is there any ceiling on the maximum amount of compensation that can be awarded?*

*c) Is there any information available concerning:*

*- the average amount of compensation available to victims*

*- the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?*

Sanctions have only been established in the labour field (Directive 2000/78), but not in the other fields covered by Directive 2000/43 on ground of racial or ethnic origin, except in the criminal field. A bill providing for sanctions for discrimination in the field of disability in various spheres of employment is currently going through Parliament (January 2007).

The Law on Infringements and Sanctions in the Social Order (approved by Royal Legislative Decree 5/2000, of 4 August 2000) provides economic sanctions for the legal, contractual, and conventional infractions of natural or legal persons and private and public employers when these affect employees in the service of the various tiers of public administration (civil servants are governed by special provisions). It ranges the sanctions from light, to serious, and very serious. The Law 62/2003 (art. 41) has modified Law 5/2000 to better comply with the Directive in ways that are relevant to discrimination on the grounds of Directives mostly to

make more evident that such discrimination, including harassment and victimisation, amounts to a very serious infraction.

Art 8.12 has been amended to include among very serious infringements in the context of employment “unilateral decisions of the employer meaning unfavourable direct or indirect discriminations on the ground of age or disability, or favourable or adverse relating to remuneration, working time, training, promotion, and other working conditions, on the grounds of sex, origin, comprised racial or ethnic origin, civil status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees, or language within the Spanish State, as well as decisions of the employer meaning unfavourable treatment of the workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination” are very serious infringements. The sanction for such infringements is a fine ranging from 3,005 euros to 90,152 euros depending on the seriousness of the infringement.

A new paragraph (13, in art. 8) has been added, specifying as a very serious infringements in the context of labour relations “harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation when it takes place within the realm of prerogatives of the management, whoever the agent may be, as long as, when known by the employer, the latter does not undertake the necessary measures to prevent such infractions”.

Art. 16.2 has been amended to include among very serious infringements in the context of employment “to establish employment conditions, be it through publicity, diffusion or in any other way that amounts to discrimination favourable or adverse to access to employment on the grounds of sex, origin, comprised racial or ethnic origin, civil status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees, or language within the Spanish State”.

Law 62/2003 also modified art. 54.2 of the Workers’ Statute, adding subparagraph g), including as gross contractual misconduct by the employee, punishable by disciplinary dismissal, “harassment of the employer or other employees in the undertaking on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

Moreover, the reform of art. 17 of the Workers’ Statute and of art. 181 of Employment Procedure by Law 62/2003 sanctions the ‘nullity’ of those administrative regulatory provisions, conventional or contractual clauses, agreements or unilateral decisions of the employer which amount to discrimination and that once the nullity of the employer’s action has been declared, the judicial decision will provide for the immediate halting of the damaging behaviour, the reposition to the situation prior to the violation of the worker’s rights, the reparation of the consequences derived from the action, and compensation for the resultant harm (see epigraph 3.2.3).

As for sanctions, the Law on Offences and Sanctions in the Social Sphere was amended by Law 62/2003. According to the new law, unilateral decisions of an employer involving unfavourable direct or indirect discrimination on the grounds of age or disability, or favourable or adverse treatment relating to remuneration, working time, training, promotion, and other working conditions, on the grounds of gender, racial or ethnic origin, civil status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees, or language within the Spanish State, as well as decisions of the employer

entailing unfavourable treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination are very serious offences. The sanction for such offences is a fine ranging from 3,005 euros to 90,152 euros depending on the seriousness of the offence. Additionally, these sanctions, once they are no longer subject to appeal, will be made public.

The sanctions for these infringements is a fine. In each of the three levels of seriousness (minor, serious and very serious), there are three degrees (minimum, medium and maximum). The degree of the fine is set with consideration of the following factors: negligence and intention of the subjected offender, fraud or collusion, failure of previous warning and requirements of the Inspection, figures of the business of the company, number of workers or beneficiaries affected in the case, harm caused and quantity defrauded, as circumstances that can aggravate or moderate the degree to apply to the infraction committed (Law 5/2000, art. 39). In the minimum degree the fine may range from €3,005 to €12,020; in the medium degree, from €12,050 to €48,081; and in the maximum degree, from €48,081 to €90,152. Additionally, these sanctions, once they are non-appealable, will be made public.

Art. 18.2 of Law 51/2003, on equality for disabled people, states that “Any payment or compensation to which the corresponding claim may give rise shall not be limited by a previously established ceiling. Compensation for moral damage shall be payable even where there are no damages of a pecuniary nature and shall be set according to the circumstances of the infringement and the seriousness of the injury.”

The failure to comply with the quotas or the alternative measures for the promotion of persons with disabilities is sanctioned with a fine of 301€ to 3005€ (art. 15 Law 5/2000).

The Law on Procedure in Industrial Disputes, amended by Law 62/2003, lays down a special procedure for violations of fundamental rights and civil liberties enshrined in the Constitution. With the amendment introduced by Law 62/2003, this procedure covers the acts of discrimination or harassment specified in the directives. If the court judgment rules in favour of the complainant in respect of acts of discrimination or discriminatory harassment, the court will declare that act void, require the previous state of affairs to be restored, and provide for “reparation of the consequences of the act, including any appropriate compensation.” That is, the Law requires compensation (reparation and money damages) for the victims of discriminatory acts, the amount of which is to be set by the court.

Moreover, art. 314 of the Criminal Code is applicable. This provides “imprisonment from 6 months to 2 years or a fine of 12 to 24 months” for those “that do not restore the situation of equality before the Law when required to do so or following an administrative penalty, making good any corresponding economic damages” when employers have been convicted of “serious discrimination in the workplace, public or private, against a person for reason of their ideology, religion, beliefs, ethnicity, race or nation, gender, sexual orientation, family situation, illness or disability, the retaining legal or workers’ union representation, relationship with other company workers, or for use of any official languages within the state of Spain...”.

But beyond the field of employment it is worth noting that the Criminal Code (art. 22) provides as a general aggravating circumstance the commission of any offence “motivated by racism, anti-Semitism or any other kind of discrimination relating to the victim’s ideology, religion or beliefs, the ethnic group, race or nation to which he belongs, his gender or sexual orientation, or any illness or disability from which he suffers.”

The Criminal Code expressly punishes offences against fundamental rights and civil liberties. Art. 510 provides prison sentences of one to three years and a daily fine of 6 to 12 months for “any person inciting discrimination, hatred or violence against groups or associations on racist, anti-Semitic or other grounds relating to ideology, religion or beliefs, family situation, its members’ forming part of an ethnic group or race, their national origin, gender or sexual orientation or any illness or disability from which they suffer”, and any person “disseminating defamatory information” about groups with these same characteristics. And art. 511 provides prison sentences of six months to two years, a daily fine of 12 to 24 months and disqualification from public office or employment for a period of three years for “any individual responsible for a public service who denies the provision of service to a person entitled thereto on the grounds of his ideology, religion or beliefs, national origin, gender, sexual orientation or family situation or any illness or disability from which he suffers”, or where these acts are committed on the same grounds against an association or the members thereof. If any of these acts are committed by a public servant, he will moreover be disqualified from public office or employment for a period of two to four years. Art. 512 provides disqualification from the exercise of a profession, trade, industry or business, for a period of one to four years, for “those who, in the exercise of their professional or business activity, deny the provision of a service to a person entitled thereto on the grounds of his ideology, religion or beliefs, his forming part of an ethnic group, race or nation, his gender, sexual orientation or family situation or any illness or disability from which he suffers.”

The Government approved on 13 January 2006 the Bill on offences and sanctions in the field of equality for disabled people (*Proyecto de Ley de infracciones y sanciones en materia de igualdad de las personas con discapacidad*) which is currently going through Parliament (January 2007). Law 51/2003, of 2 December, on Equal Opportunities, Non-Discrimination, and Universal Access for Persons with Disability, and Law 62/2003, of 30 December, of Fiscal, Administrative and Social Measures, which transposed Directive 2000/78 into Spanish law, did not establish an adequate system of sanctions in cases of discrimination on the ground of disability, as provided in article 17 of the Directive. The Bill is designed to fill this legal gap. The Bill defines as “administrative offences” any infringements of disabled people’s rights to equal opportunities, non-discrimination and universal access involving direct or indirect discrimination, harassment or non-compliance with requirements for accessibility and reasonable accommodation, along with non-compliance with legally established positive action measures, especially where there are economic benefits for the offender. These offences may be “minor”, “serious” or “very serious”, according to their seriousness. Offences will be punished with fines ranging from a minimum of 301 euros to a maximum of one million euros, depending on their seriousness. The criteria taken into account in the scaling of sanctions will be the offender’s intention, negligence, fraud, non-compliance with prior warnings, business volume and the number of people affected. This Bill complies with the provisions on disability in article 17 of Directive 2000/78 (Sanctions), and it was drawn up with dialogue with NGOs, as required by article 14 of the Directive: the Bill has been negotiated with the Spanish Committee of Representatives of the Disabled (CERMI) and was reported on favourably by the National Disability Council. The Autonomous Regions were also consulted as it was drawn up.

There is no information concerning the extent to which the available sanctions have been shown to be effective, proportionate and dissuasive, as is required by the Directives.

There is not information available concerning the average amount of compensation available to victims.

## 7. SPECIALISED BODIES

*Body for the promotion of equal treatment (Article 13 Directive 2000/43)*

*When answering this question if there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.*

- a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?*
- b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*
- c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*
- d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?*
- e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*
- f) Is the work undertaken independently?*

*Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin*

Law 62/2003 (art. 33) establishes a “Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin” (“*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*”). This Council has the following characteristics:

- ✓ It is attached to the Ministry of Labour and Social Affairs (although the Law specifies the Institute for Immigration and Social Services, the Institute’s functions in this field have been transferred to the Directorate-General for the Integration of Immigrants).
- ✓ Its functions include the three functions described in Art. 13.2 of the Directive, but the word “independent” does not appear in the definitions of these three functions in the Law.
- ✓ Its make-up is of a fundamentally governmental nature, as the Law states that the Council is to be formed by all the ministries with responsibilities in the areas referred to by Art. 3.1 of the Directive 2000/42, with the participation of the Autonomous Regions, the local authorities, the employers’ organisations and trade unions, and other organisations representing interests related to the racial or ethnic origin of persons.
- ✓ The Ombudsman may establish co-operation and collaboration mechanisms with the Council.
- ✓ Its make-up and functions will be regulated by a royal decree within three months of the passing of the Law (i.e. before 1 April 2004). But in January 2007 this royal decree is not approved yet.

The difficulty with the proposed body is that it may be hard to guarantee independence in the development of its functions and its effectiveness. Its independence is uncertain for at least two reasons: first, because the definition of its functions omits the word “independent”, which appears three times in Art. 13.2 of the Directive, once in each description of the body’s three functions; and second, because its make-up is of an essentially governmental nature, so it appears to be a typical internal consultative body within the Spanish government, albeit with a (minority) presence of the social partners and NGOs. Its effectiveness is questionable because the body will not have a budget of its own; instead it will receive “the necessary support for the performance of its functions” from the Ministry of Labour.

It is necessary to wait for the royal decree that will regulate the composition and functioning of the Specialised Body in order to make a more concrete appraisal of the same. The new incumbents of the Spanish Ministry of Labour are aware of certain limitations in the transposition made of Directive 2000/43 and are receptive to proposals concerning the anti-discrimination body. They recognise that there has been a lack of social dialogue in the transposition process and that an opportunity has been missed to publicise the fight against discrimination. The new incumbents of the relevant posts at the Ministry have already begun to hold talks with the most notable NGOs working with immigrants, the immigrants' organisations and the trade unions.

Although a budget (of 200,000€) was set for the Council for 2006, the Council has still not been set up. The Ministry of Labour and Social Affairs is currently (January 2007) working on a Draft of the Royal Decree by which the composition, competences and specific rules of the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin will be regulated. A budget of 200,000€ has been approved for 2007.

Major obstacles have been encountered in Spanish public administration in the implementation of the Council. One is the (poor) transposition made of Directive 2000/43 in Law 62/2003; others stem from the rigidity of public administration in Spain.

In any case, the Ombudsmen (national or regional, whenever they exist) are not deprived of their competences. The national Ombudsman acts as the High Commissioner of the Parliament for the defence of the rights contained in Title 1 of the Constitution –*inter alia* equality and non-discrimination on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance–, supervising the Administration's activity and reporting to the Parliament. The Ombudsman, according to Law 62/2003, may establish co-operation and collaboration mechanisms with the aforementioned Council.

#### *National Disability Council*

On the other hand, the Royal Decree 1865/2004, of 6 September, regulate the *National Disability Council* recreated in Law 51/2003 on equal opportunities, non-discrimination and universal accessibility for disabled people. This Council replaces the State Council for People with Disabilities and has wider functions in the field of equal opportunities and non-discrimination. This is a major step forward in the co-ordination of the various tiers of government, transversally of policy in the field of disability and participation in policymaking by organisations representing the various types of disability. The National Disability Council is an inter-ministerial collegiate advisory body that institutionalises the collaboration of associations of disabled people and their families with national government with a view to defining and co-ordinating a policy of integral care for the disabled. It is attached to the Ministry of Labour and Social Affairs (Department of Social Services, Families and Disability). In addition to the chairman (who will be the Minister of Labour) and two vice-chairmen, the Council has 15 members representing various bodies within national government, 15 members representing associations of disabled people of various kinds, and four expert advisors. The body will have a Special Permanent Bureau responsible for promoting equal opportunities, non-discrimination and universal accessibility for disabled people. Its functions include the issuing of reports, of a mandatory, non-binding nature, on draft regulations affecting equal opportunities, non-discrimination and universal accessibility. It is therefore a body with powers in the field of equal treatment in employment and occupation in line with Directive 2000/78, developing what is provided in articles 13 and 14 of the Directive.

Royal Decree 891/2005<sup>36</sup>, of 27 July, set up the National Roma Council (*Consejo Estatal del Pueblo Gitano*) “as a collegiate participatory and advisory body on general and specific public policy affecting the integral development of the Roma population in Spain” (art. 1). The Council is attached to the Ministry of Labour and Social Affairs through the Secretariat for Social Services, Families and Disability. Its overriding purpose is “to promote participation and cooperation of Roma associations in the development of general policy and the promotion of equal opportunities and treatment for the Roma population” (art. 2). Its functions therefore include “drawing up opinions and reports on regulatory projects and other initiatives related to the Council’s purposes (...) and that affect the Roma population, and, in particular, the development of regulations on equal opportunities and equal treatment” (art. 3). Of the 40 members forming the Council, half come from central government and the other half are representatives of Roma associations. The Council is already up and running. It has no specific budget, as it is an official advisory body. The measures it recommends are to be implemented by other bodies.

## **8. IMPLEMENTATION ISSUES**

### **8.1 Dissemination of information, dialogue with NGOs and between social partners**

*Describe briefly the action taken by the Member State*

- a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*
- b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and*
- c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

#### *Transposition*

The Directives were transposed in Spain with no formal social dialogue, neither with the social partners nor with the NGOs with a legitimate interest in the fields of the Directives (which are many, and well organized); nor was there any dissemination of the Directives either before, during or after the transposition.

Elsewhere we described the process as a “hidden transposition” (Cachón 2004b), because:

- ✓ there was no specific law transposing the Directives that might have made it possible to disseminate and publicise the work of the Spanish Parliament and the Community policy on equal treatment set out in the Directives;
- ✓ “equal treatment” does not appear in the Law’s title;
- ✓ the bill was not tabled as a government bill but left to the initiative of the Parliamentary Group supporting the government (which presented the text that the government had been working on) in the form of a large number of amendments to the Accompanying Law (*Ley de acompañamiento*) in Parliament, which made the overall proposition incomprehensible except to those familiar with the issue and with legislative processes;

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<sup>36</sup> Royal Decree 891/2005, of 27 July, set up the National Roma Council (*Consejo Estatal del pueblo gitano*) (BOE, 26 August 2005).

- ✓ the bill was not submitted to the consideration of the Council of State (the highest government advisory body) or the Economic and Social Council (an advisory body formed by the social partners);
- ✓ the bill was not submitted for consultation with the NGOs with a legitimate interest in the field;
- ✓ no member of the government made any statement about it at any time;
- ✓ there was no parliamentary debate because the Parliamentary Group that tabled the amendments refused to defend them, and thus the Spanish Parliament did not spend a single minute debating the contents of the directives (though there were a few brief critical references from opposition groups to the way in which the process was conducted).

### *Dissemination*

The new Administration (since April 2004) is aware of the fact that the directives have not been properly disseminated during the transposition process, and that this transposition has been made without the necessary dialogue with social partners and NGOs. The new people in charge see the fight against discrimination as one of the foundations of their political action. The new Government has passed the Regulations developing the Law on the rights and duties of aliens (OL 4/2000)<sup>37</sup> with a broad social and political consensus following a period of dialogue and negotiation.

In 2005 the “Support fund for the reception and integration of immigrants” (with funding of 120 million euros 2005; 186 million euros for 2006; and 200 million euros for 2007) established equality and non-discrimination as its governing principles and undertook actions in three fields:

- ✓ Support for programmes to combat racism and xenophobia;
- ✓ Training in equal treatment and non-discrimination for public employees and representatives of organizations; and
- ✓ Transfer of knowledge and best practice.

Moreover, the Directorate General for Integration of Immigrants has been running various programmes co-financed with European funds aimed at creating the necessary instruments to protect and support victims of racial or ethnic discrimination in the context of the Operational Programme to Combat Discrimination (*Programa Operativo de Lucha contra la Discriminación*). These programmes seek to facilitate access to employment for certain groups that have particular difficulties integrating themselves into the labour market on equal terms.

In February 2007 a *Strategic Plan for Citizenship and Integration 2007-2010* (*Plan Estratégico de Ciudadanía e Integración 2007-2010*), designed to establish strategic guidelines to promote the integration of immigrants in Spain, is to be adopted. One of the key points of the Plan is equal treatment and the combating of discrimination. This point involves the following five objectives:

1. Creating necessary and effective instruments for the protection and support of victims of discrimination on the grounds of racial or ethnic origin.
2. Including equal treatment in all public policy.
3. Combating discrimination on the grounds of racial or ethnic origin in the framework of the combat against all forms of discrimination.

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<sup>37</sup> Royal Decree 3393/2004, of 30 December. On the basis of this Royal Decree a "regularization" process was developed for immigrants in an irregular situation in Spain with a contract of employment (the result was the regularization of more than 570,000 immigrants in an irregular situation between February and May 2005).



4. Providing suitable instruments for the systematic collection of data on equal treatment and discrimination.
5. Involving the public in combating discrimination and promoting equal treatment.

To achieve these aims, the Plan is to implement a number of action programmes, in collaboration with the various levels of government and NGOs, such as the following:

- ✓ Implementation and strengthening of the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin and support for the setting up of anti-discrimination units in the various tiers of government.
- ✓ Promotion of the Spanish Observatory against Racism and Xenophobia (set up by Organic Law 14/2003<sup>38</sup> “to conduct studies and analyses, and with the ability to formulate proposals for action in the field of combating racism and xenophobia”;
- ✓ Integral programme of support to victims of discrimination;
- ✓ Training of specialist staff and public employees in combating racial or ethnic discrimination;
- ✓ Campaign of awareness-raising and information on equal treatment and non-discrimination;
- ✓ Establishment of a data collection system on equal treatment and racist and xenophobic acts;
- ✓ Creation of forums for dissemination of knowledge and exchange of best practice;
- ✓ Drawing up of codes of conduct on equal treatment in public services and promotion of codes of conduct on equal treatment in private companies and services;
- ✓ Signing of various international instruments on human rights and the protection of migrant workers’ rights.

The *Strategic Plan for Citizenship and Integration 2007-2010* is also to implement measures to encourage action by NGOs to combat discrimination.

### *Social dialogue*

Collective agreements are used to implement the principles of the directives. On 30 January 2003, the representatives of the Spanish Confederation of Employers’ Organisations (CEOE), the Spanish Confederation of Small and Medium-Sized Companies (CEPYME) and the trade unions *Comisiones Obreras* (CCOO) and *Unión General de Trabajadores* (UGT) signed the Multi-Industry Agreement for Collective Bargaining 2003 (ANC 2003). This agreement sets out the criteria and contents that should serve as guidelines at the various levels of collective bargaining in Spain in 2003 (and has been renewed for subsequent years).

Chapter V (entitled “Criteria relating to employment, internal flexibility, professional qualification and equal treatment in employment”) contains sections on “Equal treatment in employment”, as follows:

“The situation in employment and unemployment is uneven. Certain groups of workers have greater difficulty in finding work, either because of socio-cultural factors or prejudices or because of labour market conditions.  
Regarding the latter, collective bargaining should help to remedy any phenomena of inequality through the application of the principle of equal treatment expressly provided for in employment law, and through the promotion of specific actions aimed at eliminating direct or indirect discrimination. The general clauses on equal treatment

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<sup>38</sup> Organic Law 14/2003, of 20 November, revising Organic Law 4/2000, of 11 January, on the rights and freedoms of aliens in Spain and their social integration (BOE, 21 November 2003).

in the collective agreements are appropriate instruments for helping to combat possible discrimination.

Such measures may be taken in general terms in some groups; in the case of women, through access to employment, and vocational diversification and promotion; in the case of young people, through the promotion of stable employment for the young; in the case of immigrants, through the application of the same conditions that apply to other workers; and in the case of disabled workers, by promoting their integration into employment”.

This Agreement has been renewed for 2004, 2005 and 2006 (in the near weeks will sign a new ANC for 2007). Although to see how ANC is developed these years it will be necessary to follow the collective negotiations in the various sectors and companies, the inclusion of this anti-discrimination clause in line with what is laid down in art. 11.2 of the Directive must be described as highly positive.

### *Dialogue with NGOs*

The structures in place to encourage dialogue with non-governmental organisations are:

- ✓ The *Forum for the Social Integration of Immigrants*, created by Law 4/2000, is a collegiate consultative, informative and advisory body in the field of the integration of immigrants. It consists of 10 representatives of public administration, 10 of immigrants’ associations and 10 of social support organizations, including trade unions and employers’ organizations with an interest and involvement in the field of immigration<sup>39</sup>.
- ✓ The *Advisory Commission on Religious Freedom*, created by the Organic Law on Religious Freedom (OL 7/1980), is intended for reviewing, reporting on and setting forth proposals with respect to issues relating to the enforcement of the Law, being religious discrimination one of those issues. Representatives of the Churches, Denominations and Religious Communities or Federations, appointed by the Ministry of Justice, participate in this body.
- ✓ *National Disability Council* recreated in Law 51/2003 on equal opportunities, non-discrimination and universal accessibility for disabled people. This Council has 15 members representing associations of disabled people of various kinds and its functions include the issuing of reports on draft regulations affecting equal opportunities, non-discrimination and universal accessibility.

## **8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

*a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers’ associations or employers’ associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

*b) Are any laws, regulations or rules contrary to the principle of equality still in force?*

Art. 17.1 of Workers’ Statute declares null the regulation precepts, clauses of collectives agreements, individual pacts, and the unilateral decisions of discriminatory employers.

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<sup>39</sup> It is regulated by Royal Decree 3/2006, of 16 January, regulating the make-up, competences and procedural rules of the Forum for the Social Integration of Immigrants (BOE, 17 January 2006).

There are not laws, regulations or rules contrary to the principle of equality still in force on the grounds of Directives.

In the field of sexual orientation, the inequality caused by the fact that homosexual couples have no access to certain social benefits was resolved in 2005 when Parliament passed the Law amending the Civil Code that will allow homosexual couples to get married with the same rights as heterosexual couples (see section 4.5).

## **9. OVERVIEW**

*This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.*

*This could also be used to give an overview on the way (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.*

The transposition of Directives 2000/43 and 2000/78 has supplemented and notably improved the legal instruments in Spain for combating discrimination, especially in employment.

The challenge is now to apply the new regulations implementing the directives, and the first step is disseminate them among the various players in the judicial system (judges, public prosecutors and lawyers), civil servants (labour and education inspectors, among others), the social partners (trade unions and employers' organizations), employers and workers, NGOs with a legitimate interest in the field, and groups that may be affected by discriminatory processes such as roma, immigrants, minority religions, homosexuals, disabled people, etc.

One instrument of great importance in this area is the "Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin" (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*), which should have been up and running in April 2004 but whose founding decree has yet to be passed.

In this field the *Strategic Plan for Citizenship and Integration 2007-2010*, which establishes action plans to promote the integration of immigrants in Spain, will also be highly important. Two of its key points are equal treatment and combating discrimination.

In the field of disability, there are two notable bills currently in Parliament: one to provide sanctions in cases of discrimination on the ground of disability and another to recognize and facilitate the use of sign language.

## **10. CO-ORDINATION AT NATIONAL LEVEL**

*Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?*

Although the transposition of Community directives is the responsibility of the Ministry of Justice under the coordination of the Ministry of Foreign Affairs, the department that drew up the texts transposing Directives 2000/43 and 2000/78 was the Ministry of Labour and Social Affairs (Directorate-General for Labour). The Directorate-General responsible for developing the regulations applicable to the Council for the promotion of equal treatment of all persons

without discrimination on the grounds of racial or ethnic origin is the DG for the Integration of Immigrants. The department responsible for developing policies to support the disabled is the Secretariat for Social Services, Families and Disability.

Most of the anti-discrimination issues covered by this report are within this department's sphere of action. But we should note that there are other departments with responsibilities in matters of racial or ethnic origin, both in ministries and in other tiers of government such as the Autonomous Communities and Town Councils.

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## Annex

1. Table of key national anti-discrimination legislation
2. Table of international instruments

# ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

**Name of Country: SPAIN**

**Date: January 2007**

<i>Title of Legislation</i>	<i>In force from:</i>	<i>Grounds covered</i>	<i>Civil/Administrative/ Criminal Law</i>	<i>Material Scope</i>	<i>Principal content</i>
<i>Constitución Española de 27 Diciembre 1978</i> Spanish Constitution of 27 December 1978 <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.tribunalconstitucional.es/CONSTITUCION.htm">http://www.tribunalconstitucional.es/CONSTITUCION.htm</a>	12.1978	All. Explicitly: race, sex, religion, opinion and “another personal or social condition or circumstance”	Constitution	All	Principle of equality, non-discrimination and positive action
<i>Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social</i> Law 62/2003, of 30 December, of fiscal, administrative and social measures <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.boe.es/boe/dias/2003-12-31/pdfs/A46874-46992.pdf">http://www.boe.es/boe/dias/2003-12-31/pdfs/A46874-46992.pdf</a>	1.2004	All grounds of Directives	Administrative/ Labour	All	In the Title II, chapter III, art. 27 al 45 are transposed the Directives 2000/43 and 2000/78. Create Specialised body on racial or ethnic origin
<i>Real Decreto Legislativo 1/1995, 24 marzo, Estatuto de los Trabajadores</i> Royal Legal Decree 1/1995, 24 Mars, Workers’ Statute <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.mtas.es/publica/EstatutoTrab/contenido/EstatutoTrabajadores.pdf">http://www.mtas.es/publica/EstatutoTrab/contenido/EstatutoTrabajadores.pdf</a>	5.1995	All grounds of Directives	Administrative Labour	Employment and occupation	All the rights and duties of labour, employment and occupation
<i>Real Decreto Legislativo 2/1995, 7 abril, Ley de Procedimiento Laboral</i> Royal Legal Decree 2/1995, 7 April, Law on Employment Procedure <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.mtas.es/Guia2004/leyes/rdlg0295.html">http://www.mtas.es/Guia2004/leyes/rdlg0295.html</a>	5.1995	All grounds of Directives	Administrative Labour	Employment and occupation	Formal procedures on labour, employment and occupation
<i>Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social</i> Royal Legal Decree 5/2000, 4 August, Law on Infractions and Sanctions on the Social Order <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.mtas.es/Guia2004/leyes/RDLG500.html">http://www.mtas.es/Guia2004/leyes/RDLG500.html</a>	1.2001	All grounds of Directives	Administrative Labour	Employment and occupation	Infractions and Sanctions on the Social Order labour, employment and occupation

<i>Ley 13/1982, 7 abril, de Integración Social de los Minusválidos</i> Law 13/1982, 7 April, on the Social Integration of Disabled <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.mtas.es/Guia2004/leyes/L1382.html">http://www.mtas.es/Guia2004/leyes/L1382.html</a>	5.1982	Disability	Administrative Labour	Social integrations of disabled people	Prevention and assistance; rehabilitation; employment integration; social services
<i>Ley 51/2003, 2 diciembre, de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad.</i> Law 51/2003, 2 December, of Equal Opportunities, Non- discrimination, and Universal Access for Persons with Disability <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.boe.es/boe/dias/2003-12-03/pdfs/A43187-43195.pdf">http://www.boe.es/boe/dias/2003-12-03/pdfs/A43187-43195.pdf</a>	12.2003	Disability	Administrative Labour	Equal opportunities, non-discrimination, and universal access for persons with disability in all fields	Disabled equal opportunities; Improvement employment and living conditions
<i>Ley Orgánica 7/1980, 5 julio, de Libertad Religiosa.</i> Organic Law 7/1980, 5 July, on Religious Freedom <a href="http://www.administracion.es">www.administracion.es</a>	7.1980	Religion	Administrative Labour	Religious Freedom	Religious Freedom
<i>Ley Orgánica 4/2000, 11 enero, sobre derechos y libertades de los extranjeros en España y su integración social.</i> Organic Law 4/2000, 11 January, on Rights and liberties of aliens in Spain and his social integration <a href="http://extranjeros.mtas.es">http://extranjeros.mtas.es</a>	2.2000	Nationality All grounds of directives for aliens	Administrative Labour	Administrative situation of aliens	Direct and indirect discrimination; all administrative situation of aliens
<i>Ley Orgánica 10/1995, 23 noviembre, del Código Penal</i> Organic Law 10/1995, 23 November, Criminal Code <a href="http://www.administracion.es">www.administracion.es</a>	5.1996	All grounds of directives	Criminal Law	All criminal rules	Crimes against the rights of workers; all aspects of discrimination

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: SPAIN

Date: January 2007

<i>Instrument</i>	<i>Signed (yes/no)</i>	<i>Ratified (yes/no)</i>	<i>Derogations/ reservations relevant to equality and non-discrimination</i>	<i>Right of individual petition accepted?</i>	<i>Can this instrument be directly relied upon in domestic courts by individuals?</i>
European Convention on Human Rights (ECHR)	Yes	Yes 1979	reservation to art. 5 and 6 about the disciplinary regime of the armed forces	Yes	Yes
Protocol 12, ECHR	NO		--	--	--
Revised European Social Charter	Yes	NO	--	System Co.Complaints Non signed	--
International Covenant on Civil and Political Rights	Yes	Yes 1977	None	Yes	Yes
Framework Convention for the Protection of National Minorities	Yes	Yes 1995	None	Yes	Yes
International Convention on Economic, Social and Cultural Rights	Yes	Yes 1977	None	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes 1969	None	Yes	Yes
Convention on the Elimination of Discrimination Against Women	Yes	Yes 1984	None	Yes	Yes
ILO Convention No. 111 on Discrimination	Yes	Yes 1967	None	No	Yes
Convention on the Rights of the Child	Yes	Yes 1991	None	Yes	Yes