



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

**COUNTRY REPORT 2008**

**SPAIN**

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**State of affairs up to 31 December 2008**

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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.

International treaties signed by Spain are included in the domestic legal system (SC, Art. 96). Spain has ratified practically all of the international instruments combating discrimination. Such is the case for conventions of the United Nations, the International Labour Organization (ILO) and the European Council. The Universal Declaration of Human Rights is mentioned in Article 10.2 of the SC as a source for interpreting 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; the Convention on the Elimination of All Forms of Discrimination against Women in 1980; and the Convention on the Rights of Persons with Disabilities and its Optional Protocol in 2007. 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, and Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ratified in January 2008). 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 educational, military and judicial matters. Jews, Muslims and Protestants have been recognised by the Government to have an influence in Spanish society and therefore have acquired official status through bilateral agreements (signed in 1992). Other religions are under the protection of freedom of religion and the Constitution specifies (Art.16) that the public authorities will maintain co-operative relationships with them, although these religions do not have any 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*) 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 Matters) (Arts. 27 to 43 of the Law). This law, and therefore the transposition of both Directives, came into force on 1 January 2004.

The Directives were transposed under the former centre-right government with no debate in society at large (as there was no formal dialogue with 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 a *Ley de acompañamiento* (Accompanying Law), in which over 50 existing laws were 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 (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 by 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.

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

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 the provisions on 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* (Law on Workers' Statute), *Ley de Integración Social de los Minusválidos* (Law on the social integration of the disabled), *Ley de Procedimiento Laboral* (Law on the employment litigation procedure), *Ley sobre Infracciones y Sanciones en el Orden Social* (Law on offences and penalties in social matters) 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 13/1982 on the social integration of the disabled (*Ley 13/1982, de 7 de abril, de integración social de los minusválidos*) establishes social and economic benefits for persons with disabilities in the fields of social benefits, social security, education, work and housing. It is complemented by Law 51/2003 of 2 December 2003 on equal opportunities, non-discrimination, and universal accessibility for persons with disabilities (*Ley 51/2003, 2 diciembre, de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*) which strengthens protection in these fields in line with Directive 2000/78 and adds protection in access to goods and services available to the public. Law 51/2003 also enshrines the fight against discrimination and principle of “universal accessibility” in law. Law 51/2003 is supplemented as regards sanctions by Law 47/2007 on offences and sanctions in the field of equality for disabled people (*Ley 49/2007, de 26 de diciembre, por la que se establece el régimen de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*). Law 27/2007 also represents an advance in the rights of disabled people, as it recognises sign languages and regulates their use (*Ley 27/2007, de 23 de octubre, por la que se reconocen las lenguas de signos españolas y se regulan los medios de apoyo a la comunicación oral de las personas sordas, con discapacidad auditiva y sordociegas*).

Law 13/2005 of 1 July 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 Overview/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.*

*Please clearly and briefly indicate whether the Member State had taken advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability?*

*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.*

*Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.*

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

- The term “has been or would be treated” (Directive 2000/43 and Directive 2000/78, Art. 2.2.a) is not included in the Spanish definitions of direct discrimination.
- There are two differences in relation to Art. 2.2.b of the Directives. The first is that the Directives refer to a “provision, criterion or practice”, whereas the Spanish Law (62/2003) refers to a “legal or administrative provision, a clause of a collective agreement 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 Directives say “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 Law 62/2003, entitled “Non-applicability to immigration law”, states that the articles transposing the Directives do 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” for 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 the issues of “work and establishment” that are liable to be affected by the Directives and are not covered by the exclusion outlined in Art. 3.2. of the Directives.





- Although Section 2 of Chapter 3 of Title 2 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 field of labour.
- Sanctions have only been established in the field of labour (Directive 2000/78), but not in the other fields covered by Directive 2000/43 for discrimination on the grounds of racial or ethnic origin, except in criminal matters. (Law 47/2007 on offences and sanctions in the field of equality for disabled people establishes similar sanctions in all fields for discrimination on the ground of disability.)
- Law 62/2003 recognises the possibility that legal entities and associations may engage “on behalf” of the complainant, but only in the field of employment 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. of this report).

In relation to the Council for the promotion of equal treatment etc. there are two difficulties. To begin with, 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, its effectiveness is questionable because it is made up primarily of government representatives. Royal Decree 1262/2007 of 21 September regulates the composition, competencies and regulations of the Council (BOE, 3 October 2007). By the end of 2008 the Council had still not been set up.

- Law 51/2003 provides that “For the purposes of this Law, persons with a disability shall be deemed to be those with a recognised degree of impairment equal to or greater than 33 per cent”, and this state of affairs must be recognised 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 up to 2 December 2006 for the implementation of Directive 2000/78 (Art. 18) in relation to age and disability but transposed the Directive in Law 62/2003. In both cases Spanish law meets the requirements of Directive 2000/78.

The government that came into office in March 2004 (and whose term of office was renewed following the 2008 elections) has given strong impetus to policies against discrimination in all fields.



In its first term (2004-2008) it was especially active in fields such as gender equality (with a major law in the field), disability (with two new laws) and sexual orientation (with a law on same-sex marriage). In its second term (beginning in 2008) it has undertaken to table a bill in Parliament on equal treatment on all grounds and in all fields, and another on religious freedom. The former bill is likely to remedy some of the shortcomings of the transposition made in 2003 of Directives 2000/43 and 2000/78, especially as regards the configuration of the Council for Equal Treatment.

Another highly significant event in this field was the creation in 2008 of a Ministry of Equality, including a Secretariat General for Equality Policy and a Directorate General against Discrimination.

Though there are starting to be some court decisions applying the Community Directives, this is a field in which Spain has made little progress in recent years.

### 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. This should take the following format:*

**Name of the court**

**Date of decision**

**Name of the parties**

**Reference number** (or place where the case is reported).

**Address of the webpage** (if the decision is available electronically)

**Brief summary** of the key points of law and of the actual facts (no more than several sentences)

→ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

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*), also known as “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.

**Name of the court:** Supreme Court (Social Division)

**Date of decision:** 9 March 2004

**Name of the parties:** AENA (*Aeropuertos Nacionales y Navegación Aérea*)

**Reference number:** nº 765/03 and nº 2319/03

**Brief summary:** The first Supreme Court judgments referring to Directive 2000/78 were given in the Social Division on 9 March 2004, 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 or 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 reasoning<sup>2</sup>. These judgments have led to an amendment of the Law on the Workers’ Statute (see below in Section 2.1.1 and Section 4.7).

**Name of the court:** Constitutional Court

**Date of decision:** 13 February 2006

**Name of the parties:** P.C. vs. Alitalia Italian Airlines

**Reference number:** 41/2006

**Brief summary:** A Constitutional Court judgment has established 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) 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 for 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). (At the time 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. However, 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 Court’s legal reasoning also referred 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 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 were signs that the worker had been psychologically harassed because of his sexual orientation. However, the Constitutional Court did not enter into an analysis of this issue.

<sup>2</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.



It simply noted 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 Constitutional Court ruling is that the dismissal is void (as Social Court nº 24 of Barcelona declared in November 2002) and that Alitalia must reinstate the worker and pay all his salary in arrears from the date of the dismissal (July 2002) (Article 55.6 Workers’ Statute).

**Name of the court:** High Court of Justice of Galicia (TSJG)

**Date of decision:** 17 July 2008

**Name of the parties:** M.R. vs Radio Popular SA.

**Reference number:** 3041/2008

**Brief summary:** The High Court of Justice of Galicia (TSJG), confirmed the invalidity of the dismissal of an employee in the company Radio Popular (part of Cadena COPE, under the authority of the Spanish Bishops’ Conference and accordingly of Catholic ideology) because the company had infringed her right to equal treatment “without discrimination on grounds of gender ... opinion or any personal or social circumstance” (Art. 14 of the Spanish Constitution), *and* her right to “ideological freedom” (Art. 16 of the Spanish Constitution). The employee had applied for special leave (for public sector service) to work as a press officer for the political party Bloque Nacionalista Galego in the Provincial Council of A Coruña. In the course of this period of leave, she married another woman. These circumstances came to the company’s knowledge, and when the employee applied to rejoin Radio Popular, she was dismissed. A judge ruled in her favour and the High Court upheld the judgment. In the grounds for its decision, the High Court supports the reversal of the burden of proof where there are signs justifying a reasonable suspicion that fundamental rights may have been infringed, and it shows that the company had been unable to demonstrate that it had not infringed its employee’s right not to be discriminated against for reasons of sexual orientation (as she had married another woman) or that the dismissal was not for ideological reasons (as she had been working for a leftwing party that is often highly critical of some of the views taken by the Catholic Church). The Court declared the dismissal void because both fundamental rights (sexual orientation *and* ideological/political freedom) were infringed, but it did not use the term “multiple discrimination”.

A Madrid court has twice requested preliminary rulings from the ECJ on the application of Directive 2000/78: in the *Chacon Navas* and *Palacios de la Villa* cases (see Section 2.1.1 of this report).

There is no significant information about cases brought by Roma and Travellers.



## 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?*

#### *Equality and non-discrimination*

Equality is one of the “highest values of the legal system” established by the Spanish Constitution of 1978<sup>3</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”). This makes it possible to recognise the fundamental right to both equality and 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 principle of equality 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 an open-ended list of prohibited grounds of discrimination means that when differentiations are made either on the grounds specified or on those deemed to be included (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 the 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.” It also states that “Nobody may be compelled to make statements regarding his religion, beliefs or ideology.”

Moreover, Art. 10.2 of the Spanish Constitution recognises the role of the main international treaties on human rights in construing domestic provisions. This article of the Spanish Constitution states 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 international treaties and agreements ratified by Spain.”

<sup>3</sup> *Constitución Española* (Spanish Constitution) of 27 December 1978 (BOE, 29 December 1978).





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 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 and the European Convention on Human Rights.

Disability, age and sexual orientation are not expressly included in Article 14 of the Spanish Constitution. 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>4</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>5</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 the case-law of both the ECJ and the ECtHR.”

The Constitutional Court has implemented the principle of equality ever since its early judgments and adopted the doctrine of the European Court of Human Rights, which requires objective and reasonable justification for differential treatment. Judgment 200/2001<sup>6</sup> contains a reminder of doctrine on discrimination:

- 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;
- on occasion, different treatment of different situations may be required, resulting in the achievement of real and effective equality;
- temporary positive measures may be taken in order to achieve true equality for a disadvantaged group;
- quotas for disabled people, and in general measures to promote the equal opportunities of persons affected by diverse forms of disability, are constitutional.

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).

<sup>4</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 3 October 1994, 269/1994.

<sup>5</sup> European Court of Human Rights, 21 December 1999, appl. no. 33290/96.

<sup>6</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 4 October 2001, 200/2001.





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

*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 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 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 views positive action and measures promoting equality 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 specialised attention and specific protection so that they may enjoy the rights that this Title provides for all citizens.”

The Constitutional Court<sup>7</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”.

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

*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 for 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 actors (see, for example, Law 62/2003, Art. 27.2).

<sup>7</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 1 July 1987, 128/1987.



## 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).

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 of 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 a circumstance aggravating criminal liability 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,  
 use of languages of the State of Spain  
 family ties with other workers in an 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"?*

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 136.2 of the General Social Security Law).



The original definition of disability in the Law on the social integration of the disabled (Law 13/1982) (LISMI) was much more extensive than that given by the Social Security Law in that it referred to the consequences of the impairment and the integration of disabled people not only in work but also in other fields such as education, social benefits, social security and housing. In general terms it defined a person with a disability as “any person whose capacity for integration in education, work, or society is found to be diminished as a consequence of an impairment, congenital or otherwise, that is likely to be permanent, in their physical, mental, or sensory capacities” (Art. 7). It made no reference to degrees of disability.

However, Law 51/2003 on equal opportunities for the disabled updates the Law on the social integration of the disabled in the light of Directive 2000/78. It provides that: “For the purposes of this Law, persons with a disability shall be deemed to be those with a recognised degree of impairment equal to or greater than 33 per cent. In any event, those with a recognised entitlement to social security pensions for permanent disability rated as total, absolute or severe shall be deemed to be affected by an impairment equal to or greater than 33 per cent, together with passive-class pensioners with a recognised entitlement to a retirement pension or a pension for retirement due to permanent incapacity” (Art. 1.2). This norm affects the existing material scope of the Law on the social integration of the disabled (social benefits, social security, education, work and housing) and the areas introduced by Law 51/2003 (access to goods and services). It could be said that the establishment of a degree of impairment (of 33 per cent or greater) and the role of an official body are in breach of Directive 2000/78 as the Directive neither specifies degrees nor provides for a body to recognise them. However, 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 provisions of Law 51/2003 seem reasonable and proportionate, and all this is subject to judicial protection. The ECJ did not address this issue when it gave a definition of disability in its ruling on the *Chacón Navas* case (see below).

With regards to 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 from 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 Madrid Social Court no. 33<sup>8</sup>. Mrs Chacón Navas was dismissed by the company Eurest while on sick leave on 28 May 2004. The company recognised 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 Madrid Social Court no. 33 referred a question for a preliminary ruling (OJ 19.3.2005) to the Court of Justice of the European Communities.

<sup>8</sup> This was 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 the Directive. The questions referred to the Court for a preliminary ruling 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.



The Court established 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 established 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 these grounds, the Court ruled:

- “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”).

Spanish legislation establishes the obligation to provide reasonable accommodation for people with disabilities but does not transpose the remaining content of recital 17 of Directive 2000/78/EC.

- 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’; or a “disability”, sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*



## 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 (under the authority of the Ministry of Justice) was to refuse to register 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 National High Court (Audiencia Nacional) (30 September 1992) and the Supreme Court (14 June 1996) refusing to include 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 a church or religious denomination had to have, among other defining features, a body of adherents other than the organisation’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 organisation 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 collective religious freedom because the State, in the activity of registration, can only check that the entity is not excluded by Article 3.2 of the Organic Law on Religious Freedom (quoted above), and that its activities do not violate the entitlement of others to the free exercise of rights and freedoms nor are 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, up to 2001 “religion” was implicitly understood to come from the Judeo-Christian tradition, and to a more limited extent, from Islam.

However, after this judgment it seems clear that the government cannot judge the religious character 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>9</sup>.

Article 3.2 of the Religious Freedom Law allows “sects” to be excluded from the Register of Religious Associations. Registration in the register is voluntary for religious organisations but it gives them a “religious” legal personality, which gives their places of worship the right of inviolability and provides some tax benefits. Religious freedom is also protected regardless of whether a religious organisation is inscribed on the register. There is no special legislation or specific register for sects.

- 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)?*

### *Age*

Up to 2001 the 10th additional provision of the Spanish Workers’ Statute authorised clauses in collective agreements for the termination of employment contracts when workers reached retirement age (at 65), without prejudice to the provisions of the social security regulations. In 2001 this provision was repealed because, as was argued in the preamble of the law repealing it<sup>10</sup>, it “was based on demographic and labour-market realities different from those of today”. But some collective agreements continued to include such clauses. Two judgements by the Supreme Court of 9 March 2004 (both referring to the collective agreement of the AENA, *Aeropuertos Nacionales y Navegación Aérea*) declared these clauses illegal (see Section 0.3 of this report).

On 3 December 2004 the trade unions and employers’ organisations signed an agreement with the Government to reintroduce the 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.

<sup>9</sup> This legal argument was developed by Verónica Puente (2003 and 2004).

<sup>10</sup> 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).

On 29 June 2005 the Spanish Parliament passed a law<sup>11</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: first, 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 second, a clause was 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 of 25 June 2005 resolved the problems raised by the Supreme Court ruling of 9 March 2004 in that, on one hand, a law was passed enabling such compulsory retirement clauses to be included in collective agreements, and on the other, they are not discriminatory because they are to be "objectively and reasonably justified", as they have been declared to 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 Madrid Social Court no. 33 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 referred to the *Palacios de la Villa vs. Cortefiel* case regarding the termination of the plaintiff's employment contract under the textile 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 were being brought in various social courts). The judge 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 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 was affirmative, the judge asked if, therefore, this national legislative provision should not be applied in the case in hand.

<sup>11</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).



The ECJ's judgment of 16 October 2007 stated that: "The prohibition of any discrimination on grounds of age (...) must be interpreted as not precluding national legislation pursuant to which compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime, where the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose". The judgment therefore accepted that Spanish legislation in this field is in keeping with Directive 2000/78/EC.

- 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. This includes the way equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*
- *Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

There are no provisions addressing multiple discrimination.

However, Organic Law 3/2007 on effective equality of women and men (*Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*) contains the 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."

Multiple discrimination is likely to be addressed in the bill on equal treatment (on all grounds and in all fields) that the government has undertaken to table in Parliament in its current term.

- e) *How have multiple discrimination cases involving one of Art. 13 grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

No high court judgement in Spain has used the term "multiple discrimination".

The High Court of Justice of Galicia (TSJG), in its judgment 3041/2008 (see this judgment in Section 0.3 of this report) confirmed the invalidity of a dismissal of an employee because the company had infringed her right to equal treatment "without discrimination on grounds of gender, ... opinion or any personal or social circumstance" (Art. 14 of the Spanish Constitution), and her right to "ideological freedom" (Art. 16 of the Spanish Constitution). In its reasoning, the Court referred to the concept of multiple discrimination but without using this term.



### 2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

There is no mention in Spanish legislation of discrimination based on assumed characteristics, nor of discrimination based on association with persons with particular characteristics.

The Workers' Statute, 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.

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

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 (in 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?*

Law 62/2003 on the rights and duties of aliens (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>12</sup>.

The expression "has been or would be treated" (Directive 2000/43 and Directive 2000/78, Art. 2.2.a) is not included in the Spanish definitions of direct discrimination.

<sup>12</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, descent 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 the provisions of Chapter III (i.e. transposition of Directives 2000/43 and 2000/78) do not affect the Law regulating the rights and freedoms of aliens in Spain (OL 4/2000).



Law 62/2003 (Art. 38) provides the same definition of direct discrimination as Law 13/1982 of 7 April on the social integration of disabled people (*Ley de Integración Social de los Minusválidos*, Law on the social integration of the disabled). 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 articles transposing the Directives do 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.

b) *Are discriminatory statements or discriminatory job vacancies announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)*

Yes. Art. 16.2 of the Workers’ Statute provides that the (public and private) employment services should guarantee “the principle of equal treatment in access to employment, and may not make any discrimination on grounds of origin, including racial or ethnic origin, gender, age, (...) religion or beliefs, (...) sexual orientation, (...) or disability.” Accordingly, any job advertisement that does not respect this precept constitutes direct discrimination, even when an employer advertises a vacancy directly without using an employment service.

c) *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).*

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

d) *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?*

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.



### 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?. For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation?*

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.

- 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)?*

To date, no judgments have made use of situation testing.

- c) *Outline important case-law within the national legal system on this issue.*

There is no case-law.

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

The method was used in sociological research conducted by the ILO in 1995, in the framework of comparative research between European countries<sup>13</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 evolution (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?*

<sup>13</sup> Colectivo IOE, *Labour market discrimination against migrant workers in Spain*, Geneva, ILO, 1996.





Law 62/2003 (Art.28.1.c) defines indirect discrimination as “where a legal or administrative provision, a clause of a collective 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>14</sup>.

In the field of disability, Law 51/2003 defines indirect discrimination in similar terms as “where a legal or administrative provision, a clause of a collective 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 collective agreement 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 reasonable accommodation (see Section 2.6 of this report) 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. 37 bis 2).

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 (which the Directives do).

*b) What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

<sup>14</sup> Prior to the transposition of the Directives into Spanish law the concept of “indirect discrimination” was established only in the Immigration Law. But the first ruling of the Constitutional Court on this matter was Judgment 145/1991 of 1 July 1991, according to which the prohibition contained in Art. 14 CE must also cover “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 but that arises due to the factual differences that occur among workers of both sexes and prejudiced unequal consequences due to the differentiated and unfavourable impact that formally equal or reasonable unequal treatment has 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.



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 indirect discrimination] is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”).

c) *Is this compatible with the Directives?*

There are two differences in relation to Art. 2.2.b of the Directive 2000/43 (also included in Directive 2000/78). The first is that the Directive refers to a “provision, criterion or practice”, whereas the Spanish law transposing the Directives (62/2003) refers to a “legal or administrative provision, a clause of a collective agreement 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.

d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

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

e) *Have differences in treatment based on language been perceived as indirect discrimination on the grounds of racial or ethnic origin?*

Differences in treatment based on language must not be perceived as indirect discrimination on the grounds of racial or ethnic origin if such requirements are appropriate and necessary. The courts have never taken a view on this matter.

### 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.*

Though this is not expressly provided for in law, 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.

b) *Is the use of such evidence widespread? 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?*

Use of statistical evidence is not common. 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 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 evolution in other countries will influence developments (both in the law and in the courts) in this field.

c) *Please illustrate the most important case law in this area.*

There have not been any cases.

d) *Are there national rules which permit data collection? Please answer in respect to all 5 grounds. The aim of this question is whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

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 expressly consents 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.

Such data are compiled from government files (secondary data) or from surveys (primary data). Some of the data that provide statistical evidence of social inequality in various fields are used as evidence to justify positive action but they have not ever been used in the courts to make a case of possible indirect discrimination.

## 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.*



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 Spanish definitions of harassment.

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>15</sup>. Law 62/2003 (Art. 37.2) adds the right to be protected “against harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

Besides, a new paragraph has been added to Article 54.3 (g) of the Workers’ Statute, considering as an offence meriting 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”.

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

Paragraph 2.2 of Article 54 of the Workers’ Statute 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 (Art. 28.2) and Law 51/2003 on equal opportunities for the disabled (Art. 4) specify harassment as a form of discrimination.

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

Until the enactment of Law 62/2003, the only definition of harassment in the Spanish legislation was contained in the Criminal Code, with the regulation of the crime (only) of sexual harassment (“whoever asks for sexual favours, for himself or a third party, in the context of a continued or habitual labour, teaching or service relationship and with that behaviour creates for the victim an objective and serious intimidating, hostile or humiliating situation, will be punished as a perpetrator of sexual harassment”).

<sup>15</sup> See *Sentencia del Juzgado de lo Social de Gerona* [decision of the Social Court of Gerona] of 17 September 2002, and *Sentencia del Tribunal Supremo* [Supreme Court judgement] of 23 July 2001 describing forms of moral harassment (see Gimeno, 2005).



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 create 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 reaction, 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 to harm the worker's 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.

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

*Does national law (including case-law) prohibit instructions to discriminate?*

*If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

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”. But Law 62/2003 does not contain any specific provision regarding the liability of legal person for such actions.

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 people with disabilities? 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? Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

It is worth recalling that Spanish legislation speaks of disability in connection with certain benefits such as reasonable accommodation when “persons with a disability shall be deemed to be those with a recognised degree of impairment equal to or greater than 33 per cent”, recognised by an official body.





National law has implemented the duty to provide reasonable accommodation for disabled people both in general terms (in Law 51/2003 on equal opportunities for the disabled) and in employment (in Law 13/1982 on the social integration of the disabled). Art. 37.2 bis of Law 13/1982, 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 disabilities 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”.

Law 49/2007 (on offences and sanctions in the field of equality for disabled people) establishes sanctions in the event of a breach of the duty to provide reasonable accommodation. The definition of disability for the purposes of claiming reasonable accommodation is the same as for claiming protection from non-discrimination in general. Law 49/2007 defines a breach of accommodation duties as a serious offence and establishes sanctions up to a maximum of EUR 1 million. Such a breach does not equate to a form of discrimination.

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 organisation 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 on the social integration of the disabled 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 organisation or company.” There is no significant difference in the fact that the Law on the social integration of the disabled refers to “excessive burden”, whilst Law 51/2003 refers to “disproportionate burden”. Developments in this field mean that the term “disproportionate” is more precise, but both terms should be accepted by the courts.

*b) Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

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 disabilities which effectively and practically, without involving a disproportionate burden, facilitate accessibility or participation for a person with a disability on the same terms as for other citizens”. The material scope of this Law 51/2003 is telecommunications, built-up public spaces and buildings, transport, goods and services available to the public, and relations with public administration.



The definition of “disproportionate burden” is the same for employment and areas outside employment (see point a of this answer).

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

The failure on the part of a company to comply with its obligation to provide reasonable accommodation constitutes indirect discrimination, as established in Art. 37.3 of Law 13/1982 on the social integration of the disabled, 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 if there is a disproportionate burden.

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

Cooperation agreements with the various religious communities (Evangelical, Jewish and Islamic)<sup>16</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 day of rest of the Seventh Day Adventists 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 requested by the employee before the contract is signed<sup>17</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>18</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.

<sup>16</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>17</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>18</sup> There is 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 once referring to the Cooperation Agreement – states that although the courts of first instance should make employers adapt working hours, thus allowing their employees to meet their religious obligations properly, as well as not making them behave in a way incompatible with their beliefs, the worker must show honesty and good faith by indicating his or her religious faith and the special working hours arising from it when applying for the job.



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 (prisons and other centers) and on military premises, as well as in public and subsidised 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 no other accommodations on grounds of racial or ethnic origin, sexual orientation or age.

e) *Does the national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

No.

f) *Does national law require services available to the public, 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?*

Yes, Law 51/2003 requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

The purpose of Law 51/2003 on equal opportunities, non-discrimination and universal accessibility for persons with disabilities is “to establish measures to guarantee and make effective disabled people’s right to equal opportunities” (Art. 1). After this general statement, the Law defines its material scope in five fields: telecommunications, built-up public spaces and buildings, transport, goods and services available to the public, and relations with public administration.

The Law defines “accessibility requirements” and “reasonable accommodation”. “Accessibility requirements” are deemed to be “the requirements to be met by environments, products and services, and non-discrimination arrangements in provisions, criteria and practices, in accordance with the principles of universal accessibility and design for all.” It then defines “reasonable accommodation” as “measures to adjust the physical, social and attitudinal environment to the specific needs of disabled people and which, effectively and practically and without imposing a disproportionate burden, facilitate accessibility or participation for a person with a disability on the same conditions as for other citizens” (Art. 7.b and c).

Art. 10.2 provides that “the basic requirements for accessibility and non-discrimination shall, for each sphere or area, establish specific measures for preventing or eliminating discrimination, and for offsetting disadvantages or difficulties” in each of these fields. Art. 10.3 provides that all this must be done taking into account the various types and degrees of disability, which should inform both the initial design and reasonable accommodation of environments, products and services in each of the Law’s spheres of application.



Law 49/2007 defines a breach of accommodation duties as a serious offence and establishes sanctions of up to a maximum of EUR 1 million. Such a breach does not equate to a form of discrimination.

- g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

The expression “disabilities by anticipation” do not appear in Spanish legislation. Neither Law 13/1982 nor Law 51/2003 includes the idea of protection for disabilities by anticipation.

- h) *Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

Law 13/1982 on the social integration of the disabled was the first law in this field in Spain. This law establishes social and economic benefits for persons with disabilities in the fields of social benefits, social security, education, work and housing but does it from a perspective of protection of persons with disabilities. The Law was amended when Directive 2000/78 was transposed into Spanish law through Law 62/2003.

Law 51/2003 on equal opportunities, non-discrimination and universal accessibility for people with disabilities adopts a perspective of fighting against discrimination and facilitating “universal accessibility” generally (which also affects the fields covered in Law 13/1982 and other laws on sectors such as education, housing, etc.). It also extends the Law's material scope as it establishes measures in the field of access to and supply of goods and services which are available to the public.

Law 47/2007 on offences and sanctions in the field of equality for disabled people has established, as required by Directive 2000/78, sanctions in case of failure to comply with obligations under Laws 13/1982 and 51/2003. National law does not provide for special rights for people with disabilities. But, for example, Law 27/2007 represents an important advance in the rights of disabled people beyond the prohibition of discrimination, as it recognises sign languages and regulates their use.

## **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 workers with disabilities?*

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



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

- 1) (Public and private) companies with more than 50 employees are obliged to give 2% of jobs to disabled people.
- 2) Semi-sheltered employment: the public authorities provide various forms of aid (subsidies, discounts to 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 the substitution of other disabled workers.

*b) Would such activities be considered to constitute employment under national law?*

In sheltered employment centres (see Section 5 of this report), 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.

Sheltered employment centres can enter into contracts with "collaborating companies" (*empresas colaboradoras*) in the ordinary labour market to allow disabled workers at the centre to provide their services in such companies. These are known as "employment enclaves" (*enclaves laborales*) and form bridges between the sheltered labour environment of the centres 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 Law 62/2003, entitled “Non-applicability to immigration law”, states that the articles transposing the Directives do 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” for 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 the issues of “work and establishment” that are liable to be affected by the Directives and are not covered by the exclusion outlined in Art. 3.2. of the 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 in the Constitution and in the Workers’ Statute applies to both natural and legal persons. In the Criminal Code only natural persons are considered perpetrators of crimes under the Spanish legal order.

Art. 27.2 of Law 62/2003 provides that 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) indicates, for the private sector, the prohibition on discrimination and violation of 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?*



Liability for discrimination only applies to (natural or legal) persons who cause discrimination, harassment and instruction to discriminate.

Employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, and 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

### 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?*

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 field of employment, discrimination on the grounds on religion or belief, disability, age or sexual orientation is prohibited in all areas, public and private. This applies not only to 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 to other possible fields, even if there is not an explicit anti-discrimination provision, because of the general and direct applicability of Article 14 of the Constitution.

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 grants the fundamental right of access in equal conditions to public office and functions (which includes public employment) and makes reference to the guiding principles of the civil service including those of merit and ability (Art. 103).

Art. 34 of Law 62/2003 defines the scope of application of 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 realisation 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 the Workers' Statute (modified by Law 62/2003, Art. 37) recognises that workers are entitled in the working relationship "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".

*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.*

**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". This is completely missing from the Spanish law (62/2003) transposing them. However, it may be considered unnecessary because its references to equal access to employment are clear and sufficient.

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 the provisions of 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."

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 that establishes special standards in the public sector but all employees are equally subject to the principle of equal treatment.



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

*In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.*

*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.*

Non-discrimination in employment and working conditions, including pay and dismissals, is expressly recognised in Art. 17.1 of the Workers' Statute (modified by Law 62/2003, Art. 37) entitled "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. Art. 8.12 of the Law on violations and sanctions of labour laws (modified by Law 62/2003, Art. 41) considers as very serious infringements "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, or language within the Spanish State".

Article 37 of the Law on the 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 anti-discrimination 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 discrimination in these fields is unlawful, but Law 62/2003 provides no measures to make the principle of equal treatment "real and effective".



Moreover, Law 62/2003 does not contain any specific provision for social benefits (such as occupational pensions) on the grounds of Directive 2000/78 (religion or belief, age, disability and sexual orientation). However, 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, or such as adult life long learning course?*

The Workers’ Statute (Art. 4) recognises promotion and professional training as rights. These are protected against discrimination on all of the grounds included in the Directives.

Art. 34 of Law 62/2003 includes this subject on all the grounds of Directives 2000/43 and 2000/78: “measures are aimed at the real and effective realisation 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 are 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))**

Art. 34 of Law 62/2003 includes 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”.



Art. 17.1 of the Workers' Statute and Art. 8.12 of the Law on offences and penalties in social matters (both modified by Law 62/2003, Art. 37 and 41) also include this field of equal treatment.

*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.*

### **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 is 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 of this report.

Law 62/2003 does not contain any specific provisions in relation to the exception in Article 3(3) of 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 the discussion of Art. 29.1 of Law 62/2003 in Section 3.2.6 of this report. All the considerations outlined 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.

Beyond the measures established by Laws 13/1982 and 51/2003, there are some social advantages for persons with disabilities, such as special discounts in transport or in access to some services at local level. 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

Law 51/2003 establishes that services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

### 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 and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

*Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated “special” education is favoured and supported.*

See the discussion of 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>19</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 the Organic Law on Education 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 become 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, such as Roma children, are mostly concentrated in state schools.

<sup>19</sup> Organic Law on Education (*Ley Orgánica de Educación*), Law 2/2006, 3 May (BOE, 4 May 2006).



The passage of the Organic Law on Education through Parliament in 2005 was marked by a fierce campaign against it by conservative organisations because, among other issues, the Law seeks to establish a more even distribution of pupils with special needs<sup>20</sup> between state schools (*centros públicos*) and state-subsidised 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. The Law 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 subsidised private school, and shall ensure that schools have the staffing and funding required for such support” (Art. 87). 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 Law 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; reference no. 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 subsidised with public funds by virtue of agreements with the regional education authorities but which 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 to public and private schools, the Organic Law on Education 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). The Law makes no express reference to agreements with 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>21</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.”

<sup>20</sup> LOE Art. 71.2 defines pupils with “special needs” as those who “require educational support different to what is given ordinarily, because of their special educational needs, specific learning difficulties or high intellectual capacity or because they have joined the education system late, or because of their personal conditions or school history.”

<sup>21</sup> [http://www.unhchr.ch/html/menu3/b/d\\_c\\_educ.htm](http://www.unhchr.ch/html/menu3/b/d_c_educ.htm)





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*) opposing the UGT’s action, according to which “the fact that compulsory education given in public schools is mixed does not mean that it must be mixed in all schools” and “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 argued 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” and “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>22</sup>

The Law on the 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 programmes that the Law recognises”. A special education system is provided that can be either temporary or permanent for those disabled people for whom attendance within the ordinary educational system is impossible, one of the aims of which is professional training.

The Organic Law on Education (LOE) provides (in Art. 74) that schooling for pupils with special educational needs (including those resulting from disability) “shall be governed by the principles of standardisation and integration and shall guarantee non-discrimination and effective equality in access to and continuance in the [mainstream] education system”, but it adds that “measures may be introduced to make the various stages of education more flexible, when considered necessary. Schooling for such pupils in special educational units or centres, which may continue up to the age of 21, shall be provided only when their needs cannot be met in the framework of measures catering for diversity in ordinary centres.”

The Organic Law on Education also provides a measure for positive action (Art. 75), stating that “The educational authorities shall establish a reserve quota of places in vocational training for pupils with disabilities.”

In conclusion, the general criterion is that people with disabilities should be integrated (and they are) in the mainstream educational system, if necessary with special support; special systems are provided only when their educational needs cannot be met in the mainstream system.

<sup>22</sup> There are no data on the number of schools that separate pupils into different 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 pupils by sex (according to the Spanish Confederation of Schools and Colleges), and that 80% of these are state-subsidised private schools and the rest non-subsidised private schools. Most of them are linked to the Catholic Church (and especially to Opus Dei).



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

- a) *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 the discussion of Art. 29.1 of Law 62/2003 in Section 3.2.6 of this report. All the considerations in that paragraph are applicable to 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.

The airline Air Nostrum, a subsidiary of Iberia Líneas Aéreas de España, refused to allow three deaf people on board on the grounds that they were unaccompanied. It claimed that according to its flight operation manual the safety of these people could be at risk in an emergency. A court of first instance ruled in Iberia's favour, but the Madrid Provincial Court, in judgement 211/2009 of 6 May 2009 ruled in favour of the three deaf people, represented by the National Confederation of the Deaf and the Spanish Committee of Disabled People's Representatives. The Madrid Provincial Court deemed this a case of "indirect discrimination" and noted that Law 51/2003 of 2 December on equal opportunities, non-discrimination, and universal accessibility for persons with disabilities prevails over Iberia's flight operation manual, and that not allowing these three deaf people on board may be regarded as "indirect discrimination" pursuant to Art. 6.2 of that Law (which transposes Art. 2.2.b of Directive 2000/78/EC; although the Directive only addresses employment discrimination, Law 51/2003 also covers discrimination with regard to access to goods and services). It ordered Iberia to take steps to ensure that "the infringement of disabled people's rights ceases and that deaf people are not discriminated against in its flights". This is the first court ruling to apply the concept of "indirect discrimination" in access to goods and services in Spain.

- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

No.

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

*To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.*

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



The practical application of this legal statement could be improved. Immigrants of certain national origins and the Roma tend to congregate in certain districts. This leads to a significant segregation of the population. This circumstance becomes a problem when it is compounded by poor living conditions or even illegal construction or slum districts.

In the case of the Roma, many Spanish local governments have carried out successful relocation programmes in towns. However, in some cases these relocation programmes encounter opposition from other town residents.

The 2005-2008 National Housing Plan<sup>23</sup> and the 2009-2012 National Housing and Restoration Plan<sup>24</sup> are of universal scope, but are targeted in particular at the groups which have most difficulty in gaining access to decent housing, specifically including disabled people and their families and older people (more than 65 years). These plans also expressly mentions immigrants and, implicitly, Roma people (within the term “groups in a situation, or at risk, of social exclusion”).

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<sup>23</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).

<sup>24</sup> Adopted by Royal Decree 2066/2008, of 12 December, adopting the 2009-2012 National Housing and Restoration Plan (BOE, 24 December 2009).



## 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 “Differences based on a characteristic related to any of the causes referred to in the previous paragraph [all the grounds of the Directives 2000/43 and 2000/78] do not amount to discrimination when, owing to the nature of the specific professional activity concerned 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 domestic 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 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 (Art. 4(2) Directive 2000/78)

*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?*

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 organisations with an ethos based on religion or beliefs. For organisations with a specific ethos, Article 6 of the Organic Law on Religious Freedom states that “Registered churches, faiths and religious communities shall be fully independent and may lay down their own organisational rules, internal and staff by-laws. Such rules, as well as those governing the institutions they create to accomplish their purposes, may include clauses safeguarding their religious identity and own personality as well as due respect for their beliefs, without prejudice to the rights and freedoms recognised by the Constitution and in particular those of freedom, equality and non-discrimination”. In the opinion of the author, this provision is in keeping with Art. 4.2 of Directive 2000/78.

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



In the first stage, 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 on asking about the ideology or beliefs of the worker. However, in these organisations, questions on religion and belief, and the requirement that workers accommodate their private lives to the ethos of the enterprise, seem legitimate if the activity to be performed is linked to the ideological orientation pursued by the organisation. This is connected with the situation of religious education teachers in state schools. In recent years there have been problems recruiting religious education teachers 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 hiring such teachers, or dismissed them.

In the second stage, during the employment relationship, 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 or risk this ethos. In the third stage, although the general rule says that a discriminatory dismissal is void, in these organisations with a specific ethos it will not be discriminatory if there has been behaviour hostile to that ethos.

- 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? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

Conflicts may arise between the rights of organisations with an ethos based on religion or belief 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” should govern employment relationships (Art. 5.a of the Workers’ Statute), employees in ideological or ethos-based organisations can be asked to conform to a minimal extent with the organisation’s ethos<sup>25</sup>. Rubio-Marín (2004) has pointed that both doctrine and the courts have made it explicit that even within ideological institutions one has to distinguish between ‘ideological’ and ‘neutral’ employment positions. 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, this brings up interesting issues given Catholicism’s longstanding rejection of homosexuality. In this respect, especially in relation 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 spreading the school’s ethos, constraints will be more justifiable than if the job consists in developing purely technical expertise or is restricted to the pure transmission of knowledge<sup>27</sup>. According to some academic doctrine, this would allow employers in this kind of institution to inquire about the worker’s sexual orientation (Vicente 1998).

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

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

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

On the other hand, some scholars have pointed out that it is a worker's conduct and not his sexual preferences *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 Conference of Catholic Bishops signed an agreement on the financial and employment arrangements for teachers of religion. As a result, the bishop of each diocese decides on the hiring, activities and dismissal of teachers and the State pays their wages and compensates them in the event of dismissal, if appropriate. This situation has given rise to many conflicts in recent years and various court rulings have been given against dismissals of religious education teachers. 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 who 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.

On 15 February 2007 the Constitutional Court adopted a judgment on the constitutionality of the agreement between Spain and the Vatican regarding teachers of religion. By virtue of the 1979 Agreement on Education and Cultural Affairs between the Kingdom of Spain and the Vatican (and its development in the second additional provision of Organic Law 1/1990 of 3 December on the Education System), teachers of religion in Spanish state schools are hired by means of employment contracts made by the public authorities (regional governments), but in order to be so employed they require an “ecclesiastical declaration of suitability”, granted by the diocesan bishop according to the Canonical Code, and must be proposed by the bishop to the competent public authority. In October 2000, a teacher of religion in the Canary Islands (María del Carmen Galayo) was notified that she would not be given a new contract because she was carrying on a romantic relationship with a man other than her spouse, from whom she had separated. This teacher had been working with an employment contract at various state schools since the academic year 1990/1991, on the bishop's proposal. She filed an action for protection of fundamental rights to Social Court No 4 of Las Palmas de Gran Canaria.



The judgment dismissing the action (127/2001) states that “[...] if the bishop [withdraws] his proposal of the plaintiff for the post, deeming that she is living in sin and is unsuitable to teach the Catholic religion, he is acting within the scope of his spiritual ministry and pursuant to the rules of the Agreement with the Vatican, with the value conferred thereon by Art. 96 of the Constitution, exercising the discretionary power bestowed on him by Art. 3 and other related provisions of that Agreement, and cannot be subjected to judicial review except negatively [...], and unless fundamental rights are infringed, but with the special conditions, distinctions and peculiarities of the sphere of education in the Catholic religion [...]” The teacher lodged an appeal with the High Court of the Canary Islands. Before making its decision, the Court submitted a request to the Constitutional Court for a ruling on the constitutionality of certain articles of the agreement between Spain and the Vatican.

The Constitutional Court’s decision, which does not touch on the specific case of the teacher’s dismissal, rules that the agreement between Spain and the Vatican is not unconstitutional. It provides general doctrine on two issues:

1. Regarding bishops’ power to assess the conduct of teachers of religion and their “testimony of Christian life” (as stated in Art. 804 of the Canonical Code) before granting an “ecclesiastical declaration of suitability”, and, therefore, proposing the hiring or firing of such teachers, the Constitutional Court stated that “the religious creed being taught must, therefore, be that defined by each church, community or denomination (...). It follows that the power to judge the suitability of the persons who are to teach their respective creeds rests with these denominations. According to the Constitution it is permissible for this judgment not to be confined to a strict consideration of the teaching staff’s knowledge of dogma or teaching ability, but also to cover aspects of personal behaviour in so far as personal testimony is a defining component of the religious community’s creed, to the point of being vital to an aptitude or qualification for teaching, regarded ultimately and above all as a channel and instrument for the transmission of certain values, a transmission in which example and personal testimony are instruments that churches may legitimately regard as essential.”

2. Regarding the right of teachers of religion to effective judicial protection, the Constitutional Court first recalled that in an earlier judgment (STC 1/1981) it had laid down the exclusive jurisdiction of judges and courts in the civil sphere, and that, in cases such as that of teachers of religion, this judicial protection entails, in the first place, that “the courts should review whether the administrative decision was taken in accordance with the provisions of the law”; but, further to this review, the competent courts should also consider if the refusal of the diocesan bishop to propose the person is due to religious or moral criteria determining his/her unsuitability to teach religious education, which criteria are to be defined by the religious authorities according to the right of religious freedom and the principle of religious neutrality of the State, or, on the other hand, if the decision is based on grounds other than the fundamental right of religious freedom and therefore not covered by this right. Moreover, once the strictly “religious” grounds of the decision have been established, “the court should weigh up the conflicting fundamental rights so as to determine what impact the right of religious freedom exercised in the teaching of religion in schools may have on the fundamental rights of workers in their employment relationship.”



This judgment, drawn up by the Constitutional Court President, makes no reference to EU Directive 2000/78, as might have been expected<sup>28</sup>.

#### 4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

- 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)?*

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.

- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

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 18 or older, and not have passed the age limits provided in the regulations<sup>29</sup> (...). The tests to be passed in the 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.

- c) *Are there cases where religious institutions can select people (on the basis of their religion) to hire or to dismiss from a job - when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

<sup>28</sup> This was a highly complex judgment that addressed aspects of the right of religious freedom, the principle of the religious neutrality of the State, and effective judicial protection. It was a much-anticipated judgment (as there were 15 other constitutionality issues before the Constitutional Court in very similar cases), and was highly controversial. It was politically controversial, in that there were favourable pronouncements from the (socialist) government and the (conservative) Popular Party, and highly critical ones from the United Left party; controversial in society (the bishops and Catholic authorities expressed themselves in favour and the trade unions strongly against); and legally controversial (with some highly critical pronouncements to the effect that a sphere of religious precedence incompatible with the constitutional State was being permitted, and that teachers of religion could find themselves in a situation of discrimination). The judgment will have notable consequences, as the ordinary courts will now have to decide upon many cases where teachers of religion have been dismissed. The grounds for such dismissals are normally that the teachers are separated or divorced and are living with another partner or have remarried (as in the case of the plaintiff whose case gave rise to this judgment), or are not believers, but also because they have taken part in strikes or are affiliated to a trade union or a left-wing party. In the former cases the courts are likely to judge, in keeping with this Constitutional Court doctrine, that the dismissals are fair. But in the latter cases the dismissals should be declared void.

(<http://www.tribunalconstitucional.es/jurisprudencia/Stc2002/STC2002-4831.html>).

<sup>29</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 the Civil Guard (Art. 16).



For a discussion of the possibility of religious institutions to select people (on the basis of their religion) to hire or to dismiss from a job, when that job is in a state entity, or in an entity financed by the State, see Section 4.2.

#### 4.4 Nationality discrimination (Art. 3(2))

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

- a) *How does national law treat nationality discrimination? Does this include stateless status?*  
*What is the relationship between ‘nationality’ and ‘race or ethnic origin’, in particular in the context of indirect discrimination?*  
*Is there overlap in case law between discrimination on grounds of nationality and ethnicity (ie where nationality discrimination may constitute ethnic discrimination as well?)*

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

Art. 34 of OL 4/2000 allows the Ministry of the Interior to recognise as stateless foreigners with no nationality who meet the requirements of the 1954 Convention relating to the Status of Stateless Persons, and to issue the identity papers provided for in Article 27 of the Convention. This provision is implemented in the regulations recognising statelessness adopted in Royal Decree 865/2001 of 20 July, which provides that: “Stateless people recognised as such shall be entitled to live in Spain and to engage in work, professional and business activities in accordance with the provisions of immigration regulations” (Art. 13).

Art. 23.2 of OL 4/2000 defines “indirect discrimination” in the sphere of immigration and treats “nationality” and “race or ethnic origin” as equivalent when prohibiting discriminatory acts “against a foreign citizen merely because of his condition as such or because he belongs to a particular race, religion, ethnic group or nationality.”

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

As we said earlier, (see Section 3.1.1), the seventh additional provision of Law 62/2003, entitled “Non-applicability to immigration law”, states that the articles transposing the Directives do 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” for 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 the issues of “work and establishment” that are liable to be affected by the Directives and are not covered by the exclusion outlined in Art. 3.2. of the 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 regularised their situation and procured a residence permit (and a work permit in the case of workers). However, several Constitutional Court judgments in late 2007 overturned the distinction made by OL 4/2000 between residents with legal status and illegal immigrants in access to fundamental rights. The Court made eight rulings<sup>30</sup> in which it declared the distinction to be unconstitutional for freedom of assembly, freedom of association, the right to non-obligatory education, the right to organise, the right to strike and the right to free legal assistance.

Law 4/2000 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) were covered by temporary rules until 1 May 2006.<sup>31</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 complaints have been lodged against this differentiation between Latin Americans and other foreign nationals. 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) recognises the right of “Spanish” soldiers taking part in such operations to receive allowances. Although an instruction from the Under-Secretariat of the Ministry of Defence issued on 23 December 2004 recognises 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 (Recital 22 Directive 2000/78)

*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 (e.g. Case C-267/06 Maruko) 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.*

<sup>30</sup> Constitutional Court Judgments 236/2007 of 7 November (a real leading case), 259/2007 of 19 December, and 260, 261, 262, 263, 264 and 265/2007, all of 20 December.

<sup>31</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 was set, ending on 1 May 2006.



- a) *Does national law permit an employer to provide benefits that are limited to those employees who are married?*

Before commenting on the current situation, it is interesting to point out that the preamble to 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) 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”.

Law 13/2005 thus 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 was 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 were also amended, 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, gifts and financial arrangements, 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 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 was 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 2005 was 187 in favour and 147 against.

Both the General Social Security Law and the Workers’ Statute recognise 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, recognises *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 the serious illness or death of a spouse (Art. 37.3.b), and if both spouses are working for the same company and one is moved to a new location, the other latter is entitled to a transfer to the same place (Art. 40.3), and so on.





Two specific current questions are connected with registered partnerships and unregistered *de facto* unions. As Rubio-Marín (2004) says, in Spain there is no general statute on civil unions introducing a unified system for registering partnerships. The socialist government has promised to change this during its current mandate. In 1994 a municipality established the first municipal register for couples irrespective of their sexual orientation, and this example was then followed by hundreds of other municipalities and several autonomous communities. Registration is no substitute for marriage. Regional statutes on *de facto* unions attach some legal effects to it, mostly the option for the partners to stipulate their matrimonial property 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 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 that enjoyed by married couples.

The situation is more complicated in the case of unregistered *de facto* unions. Many collective agreements make up for the legislative vacuum regarding the protection of non-married partners by explicitly stating that the privileges granted by the law to married partners should extend to stable or *de facto* unions. Explicit inclusions of same-sex partners are, however, exceptional. It is far more common to refer either 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 way - excluding same-sex partners - there is growing litigation in this regard. The results have thus far been erratic. The National Railway Company (RENFE), for instance, was sued on various occasions, and although it lost before the lower courts, it systematically appealed with varying degrees of success. It finally changed its rules to extend benefits to same-sex partners<sup>32</sup>.

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

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 (Art. 7(2) Directive 2000/78)**

*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>32</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 no other exceptions in 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 (Art. 6 Directive 2000/78)**

##### **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 ?*

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

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

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



- 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) ?*

National legislation (Art. 161.2 of the General Social Security Law: RDL 1/1994 of 20 June) allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it, thus 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 measures to support training and employment in the form of partially subsidised contracts. In the case of young people the employment measures are work experience contracts, job-training contracts and subsidised contracts of indefinite duration. In the case of older workers there are subsidised contracts of indefinite duration 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 (caring responsibilities) who 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>33</sup>. Nor is there a maximum age for taking part in vocational training.

<sup>33</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decisión), 2 July 1981, 22/1981.



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

Public service is an exception. 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).*

*For these questions, please indicate whether the ages are different for women and men.*

- 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?*

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 (apart from the public sector or civil service, with some exceptions: see section c below). This age applies both to contributory and non-contributory pensions and may be lowered by the government for "those groups or professional activities whose work is of an exceptionally strenuous, 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.

The conditions are the same for women and men.

- 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?*

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 conditions are the same for women and men.

- 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?*



The retirement age is voluntary. The rule requiring people to retire at no later than 69 was declared unconstitutional (See Section 4.7.3 of this report).

However, retirement at 65 is compulsory in the civil service (Law 30/1984 on Civil Service Reform, Art. 33), except for members of public professions with special regulations such as judges (compulsory retirement at 72) or university professors (compulsory retirement at 70), among others.

The conditions are the same for women and men.

- 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?*

On 3 December 2004 the trade unions and employers' organisations signed an agreement with the government to reintroduce a provision into the Workers' Statute enabling 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 of this report).

The conditions are the same for women and men.

- 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)?*

The laws protecting employment rights apply to all workers irrespective of age.

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?*

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).

National law permits the taking into account of seniority in selecting workers for redundancy.



- b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

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 level is linked to the length of time for which 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 Article 2.5 of the Framework Directive 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.

#### **4.9 Any other exceptions**

*Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.*

There are no other exceptions in national law.



## 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*

The principle of “positive action” is rooted in the Spanish Constitution: Article 14 formally recognises 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 is 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 marginalised 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 specify “exclusions, reservations and preference” in employment for certain groups at a disadvantage in the labour market. Art. 17.3 states that the government “may specify measures of reservation, duration or preference in employment”.

In the educational field, the Organic 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 shall develop compensatory actions aimed at persons, groups and territorial regions with unfavourable situations, and provide the necessary economic resources” (Art. 63).

In Law 62/2003 (which transposes the Directives) there are three articles (30, 35 and 42) which regulate positive action. Art. 35 dealing with discrimination in employment and occupation 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 aiming 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 third 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. The measures cover many spheres of action of the public authorities: education, housing, health, training, employment and social services.

*b) Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. 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 people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.*

## Roma

One of the groups given special attention in the National Action Plan is the Roma, but there are no positive measures aimed specifically at them. However, many measures aimed generally at pupils with special needs affect them more significantly than other groups. The Roma school population is especially affected by the following measures:

- Compensatory education
- Measures for children with special educational needs
- “Living together” programmes (Discipline programmes)
- Education in values
- Absenteeism control plan
- Reinforcement, Guidance and Support Plan.

The Roma also have a special Roma development plan and a National Roma Council (see Section 7).

## Disability

In the field of disability there has been a wide range of positive measures since the implementation of Law 13/1982 on the social integration of the disabled (LISMI). Its aim (Art. 38) is to grant the necessary assistance and protection to the seriously disabled, provide a quota system and other actions in favour of promoting the integration of the disabled into employment and prohibit discrimination in order to allow the complete personal fulfilment of the disabled and their total social integration. The Constitutional Court (STC 269/1994, October 1994) has recognised the legality of establishing a quota for disabled people when selecting employees.



Law 51/2003 of 2 December on equality of opportunities, non-discrimination and universal accessibility for the disabled provides a series of positive 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 content of measures for positive action on the ground of disability; these measures may consist of:

- Additional support
  - Economic support
  - Technical support
  - Personal assistance
  - Specialised services
  - Special support and services for communication
- Rules, criteria, or more favourable practices.

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

The Law (Art. 12-16) institutes measures promoting equality, together with measures of positive action, that have as an aim a policy of compensating for disability. Among those cited are:

- Awareness training;
- Measures to ensure that administrative programmes are of a quality that takes into account the situation of the disabled;
- Measures relating to innovation and technical development;
- Participation by organisations representing people with disabilities;
- Plans and programmes relating to accessibility and non-discrimination.

The Law on the social integration of the disabled lays out three systems of workplace integration for disabled persons: a) integration into the ordinary work system, specifying that this is preferential; b) 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 of the other options.



In integration into the ordinary system of work, there is support for various measures, which can be described as positive actions or measures of reverse discrimination:

- a quota system (at least 2% of the workforces of public and private companies with 50 or more employees must be disabled)
- Incentives<sup>34</sup>
  1. Indefinite contracts
    - a. Subsidy (aid of EUR 3 900 to companies for each indefinite contract)
    - b. Bonuses in social security contributions (reduction of companies' social security contributions, reimbursed by the public employment services)
    - c. Support for professional training
    - d. Bonuses for the 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.

Special employment centres are for people with a disability rating of more than 70%, and have as objectives: a) productive work, producing goods to be sold on the market ; b) assuring disabled workers paid work, while providing rehabilitation services and improving their social integration; and c) to integrate the largest number possible of disabled into a normal work routine. Workers who can be integrated through these centres are those that have a disability equal or superior to 33% (which means that their capacity to work is also limited to the same degree).

The objective of occupational centres is to improve the social and personal integration of persons with disability whose capacity remains below the limits that permit integration through the special work centres.

The Law on the social integration of the disabled places an obligation on publicly owned and private companies with more than 50 workers to meet a 2% disability quota. However, repeated failure to comply with this provision resulted in the publication of Royal Decree 27/2000 of January 14 on alternative measures for compliance with the quota in favour of disabled workers. This rule specifies two measures substituting for quotas: a) entering into contracts for goods and services with special work centres; b) donations in cash to foundations and public associations that have as an objective, among others, promoting the employment integration of disabled persons.

<sup>34</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.



This employment quota for disabled persons is equally applicable to public administration. Law 39/1984 of August 2 (modified by Law 53/2003 of December 10 on the public employment of the disabled) establishes that “In offers of public employment a quota will be applied of not less than five per cent of vacancies to be filled by persons with a disability whose degree of disability is equal to or superior to 33 per cent, by which two per cent of the staff employed by the state administration will be reached progressively, provided that they pass selection”. (This Law was recently amended by Royal Decree 2271/2004 regulating access to public employment and the provision of posts for the disabled. This Royal Decree expressly mentions Directive 2000/78.)

The law does not provide special subsidies for the lower performance of a disabled worker in the ordinary work system, but grants a subsidy of 50% of the minimum wage in the case of special work centres.

Accessibility currently poses 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 First 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 plan has the following 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 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 first plan covers nine years, it is divided into three periods of three years each. 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.

Law 27/2007 recognising sign languages and speech aid systems (*Ley 27/2007, e3 23 de octubre, por la que se reconocen las lenguas de signos españolas y se regulan los medios de apoyo a la comunicación oral de las personas sordas, con discapacidad auditiva y sordociegas*) recognises Spanish sign language as the language of those deaf people in Spain that freely decide to use it, along with the learning, knowledge and use thereof. It also provides and guarantees support for communication by deaf, hearing-impaired and deaf-blind people.



The Law states that the education authorities must provide resources to promote the learning of Spanish sign language by deaf, hearing-impaired or deaf-blind pupils that freely opt to learn this language. The Law covers 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 Law also establishes a Centre for the Linguistic Standardisation of Spanish Sign Language. The purpose of this body is to investigate, promote and disseminate this language and to supervise its use.

This Law, apparently the first of its kind in Europe, responds to a long-standing demand from 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 Law 3/2007 regulating the amendment of entries in official registers (*Registro civil*) regarding people's sex (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*). 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 order and must undergo sex reassignment surgery. This process takes several years and is moreover costly and hazardous. The Law solves this problem by allowing people to change their names in the register of births, marriages and deaths by submitting "existential evidence" ("*prueba de vida*") 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.

This gender identity bill was included in the governing Spanish Socialist Party's electoral programme. In its preamble the Law 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 Law states that the reference to a person's sex in official registers can 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 should 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 is not 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)

*In relation to each, of the following questions 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)?*

*Are there available statistics on the number of cases related to discrimination brought to justice ? If so, please provide recent data.*

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

The Constitution provides in Art. 53 that all fundamental rights (of which equality is one) are protected by the ordinary courts of law. The Organic Law on the protection of fundamental rights establishes that this protection will be made effective, in the first place, by a special preferential and summary procedure which is regulated by the main procedural laws for all types of jurisdiction: 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 on 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, with regards to both private and public employment/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 of 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 High Court) ) and the *sala de lo social del Tribunal Supremo* (the social and labour 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 jurisdiction) which requires the prior exhaustion of whatever administrative procedures there may be and which is formed by *juzgados y tribunales contenciosos administrativos, en primera y segunda instancia* (first instance and appellate administrative courts), and by the *sala de lo contencioso-administrativo del Tribunal Supremo* (the administrative chamber of the Supreme Court).

The *Tribunal Supremo* (the Supreme Court, the highest instance within the ordinary judiciary) is responsible for judging appeals in order to unify contradictory decisions by lower courts. Its decisions are generally binding and thus constitute a source of law.

In the field of employment, Articles 63-68 of the Law on the employment litigation procedure (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 the employment litigation procedure: “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, use of this type of procedure is conditional, firstly, on the period of prescription or predicted expiration of acts and conduct to which the discrimination relates, and secondly, on a clear presentation of the constituent facts of the discrimination.

Equally, a worker considered the victim of labour discrimination can make a claim in the criminal courts under Art. 314 of the Criminal Code, but given the way this article describes the crime, it has very little chance of being applied.

Law 51/2003 on equal opportunities for people with disabilities establishes a 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 to effective judicial care of persons with disability. It begins with a declaration: “The judicial protection of the right to equal opportunities for persons with disabilities shall include the adoption of all necessary measures to end the violation of the right and prevent future violations, thus re-establishing to the victim the full exercise of this right”. Art. 19 recognises the legitimate standing of legal persons who may legally defend the rights and interests of an individual disabled person and obtain reparation for this individual person.

There are no costs or other barriers that may act as deterrents to litigants seeking redress. 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.

As the former European Monitoring Centre on Racism and Xenophobia (EUMC) pointed out (2005), Spain is one of the countries where there are no available statistics on the number of cases related to discrimination brought to court.



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

All the cited judicial procedures are binding, but the conciliation procedures are not binding.

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

A person can bring a case after the employment relationship has ended. The worker has 20 days in the case of dismissal and a year for other labour claims to bring an action.

## 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 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 administrative matters. This is stated in general terms in Law 29/1998 of 13 July regulating the administrative jurisdiction, which stipulates that: “The following are entitled to the 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 20.4).

Article 16 of the Law on the employment litigation procedure in its regulation of capacity and procedural legitimisation mentions workers or their legitimate representatives if they lack capacity or if the plaintiff is a legal entity. Article 17 mentions the possibility of trade unions and employers’ organisations being authorised to defend their own financial and social interests, but does not mention any other organisations. Furthermore, Article 20 stipulates that trade unions may appear in court in the name and interest of member workers that authorise them to do so, to defend their individual rights. However, this possibility is only applicable to trade unions.

Law 62/2003 (Art. 31) provides that “legal entities legally authorised 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 the employment litigation procedure 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).*

Law 62/2003 (which transposes the Directives) introduces a shift of the burden of proof into the Spanish legal system (although it was already present in the employment litigation procedure: for discrimination based on sex in Art. 96 and for infringement of the freedom to join a union in Art. 179). For civil, administrative and labour litigation 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 must be for the respondent to bring forward a reasonable and objective justification, sufficiently proven, of the measures adopted and their proportionality.

Art. 32 (dealing with discrimination in fields other than employment on grounds of racial or ethnic origin) and Art. 36 (dealing with discrimination in employment on all grounds of the Directives) of Law 62/2003 provides that “in those civil and administrative proceedings 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 proven justification of the measures adopted and their proportionality” (the text of Art. 32 is similar but on grounds of racial or ethnic origin in other fields).

The Law on the employment litigation procedure (Art. 96) also established a 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. Art. 96 states “in those proceedings in which allegations, on the part of the claimant, 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 established case-law on the burden of proof. In order for a shift in the burden of proof to occur, it is necessary, that the claimant prove “the existence of an indication that generates a reasonable suspicion, appearance or presumption in favour of such an affirmation; it is necessary on the part of the claimant to produce ‘realistic proof’” (STC 207/2001)<sup>35</sup>; and in another judgment the Court indicates the “requirement for a principle of burden of proof revealing the existence of a general discriminatory situation or of facts that lead to a strong suspicion of discrimination ...” (STC 308/2000)<sup>36</sup>.

In the grounds for a judgment given in 2008 (3041/2008 of 17 July) the High Court of Justice of Galicia supports the reversal of the burden of proof as there were signs justifying a “reasonable suspicion” that fundamental rights had been infringed, such as the employee’s right not to be discriminated against for reasons of sexual orientation (as she had married another woman) and ideological freedom (as the employee had worked for a leftwing party that is often highly critical of some of the views taken by the Catholic Church). (See Section 2.1.1.e above).

In criminal matters, the rule is the presumption of innocence. The Spanish Constitution states that all persons have the right to the presumption of innocence (Art. 24.2). The Constitutional Court has pointed 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>37</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)*

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

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.

Law 62/2003 (Art. 37) introduced changes into the Workers’ Statute and into Law 5/2000 on offences and penalties in social matters. The new version of Art. 17.1 of the Workers’ Statute stipulates the nullity of administrative regulatory provisions, clauses in collective agreements or contracts, agreements or unilateral decisions of an employer which discriminate on all the grounds of the Directives; and a new paragraph (Art. 17.2) has been added.

<sup>35</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 22 October 2001, 207/2001.

<sup>36</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 18 December 2000, 308/2000.

<sup>37</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 21 November 1999, 209/1999.



This paragraph states that “the decisions of an employer that amount 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) introduced modifications to Law 5/2000 on offences and penalties in social matters. Art. 8 of Law 5/2000 contains a list of very serious infractions in the area of employment. With the revision introduced by Law 62/2003, Art. 8.12 now covers (in addition to discriminatory decisions) decisions that “amount 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”.

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. There is a reversal of the burden of proof when victimisation is directed towards a trade union representative if the worker claims “anti-union conduct” of the enterprise (STC 002/2009)<sup>38</sup>.

## 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.*

Sanctions have only been established in the field of employment for all the grounds (Directive 2000/78) and for the ground of disability in all fields (Law 49/2007), but not in the other fields covered by Directive 2000/43 on ground of racial or ethnic origin, except in criminal law.

The Law on offences and penalties in social matters (approved by Royal Legislative Decree 5/2000 of 4 August 2000) provides financial sanctions for legal, contractual, or collective agreements infractions in the field of employment by natural or legal persons; private employers; and public employers when these affect employees in the service of the various tiers of public administration (civil servants are governed by special provisions). The Law outlines three categories of infractions: minor, serious, and very serious. Law 62/2003 (Art. 41) modified Law 5/2000 to better comply with the Directives, mostly by making more evident that discrimination on the grounds specified by the Directives, including harassment and victimisation, amounts to a very serious infraction.

<sup>38</sup> See *Sentencia del Tribunal Constitucional* (Constitutional Court decision), 12 January 2009, 002/2009. There is not a reversal of the burden of proof in all types of victimisation cases.





Art 8.12 was amended to include among very serious infringements in the context of employment “unilateral decisions of the employer leading to unfavourable direct or indirect discrimination on the ground of age or disability, or favourable or adverse treatment relating to remuneration, working time, training, promotion, and other working conditions, on the grounds of sex, origin, including racial or ethnic origin, marital 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 of the Spanish State, as well as decisions of the employer leading to unfavourable treatment of the workers as a reaction to a complaint within the undertaking or to any legal proceeding 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 EUR 3 005 to EUR 90 152 depending on the seriousness of the infringement.

A new paragraph (13, in Art. 8) was added, specifying as a very serious infringement in the context of employment relations “harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation when it takes place within the scope of management authority, whoever the agent may be, provided that, when the employer is aware of it, the latter does not undertake the necessary measures to prevent such infractions”.

Art. 16.2 was amended to include among very serious infringements in the context of employment “to establish employment conditions, be it through advertisements, diffusion or in any other way, that amount to favourable or adverse discrimination in access to employment on the grounds of sex, origin, comprised racial or ethnic origin, marital 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 of 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 the Law on the employment litigation procedure by Law 62/2003 stipulates the ‘nullity’ of those administrative regulatory provisions, clauses in collective agreements or contracts, agreements with or unilateral decisions of the employer which amount to discrimination and that once nullity of an employer’s action has been declared, a judicial decision must provide for the immediate cessation of the damaging behaviour, a return to the situation prior to the violation of the worker’s rights, reparation of the consequences ensuing from the action, and compensation for the resultant harm (see Section 3.2.3).

As for sanctions, the Law on offences and penalties in social matters was also 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, marital 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 of 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 EUR 3 005 euros to EUR 90 152 depending on the seriousness of the offence. Additionally, these sanctions, once they are no longer subject to appeal, are made public.

For each degree of seriousness of the offence (minor, serious and very serious), there is a corresponding range of fines: a minimum range (EUR 3 005 to EUR 12 020); a medium range (EUR 12 050 to EUR 48 081); and a maximum range (EUR 48 081 to EUR 90 152). The level of the fine is set in consideration of the following factors: negligence and intention of the offender, fraud or collusion, failure of previous warnings and requests by the Inspectorate business turnover, number of workers or beneficiaries affected, harm caused and quantity defrauded (Law 5/2000, Art. 39). Additionally, these sanctions, once they are no longer subject to appeal, are 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.”

Failure to comply with quotas or alternative measures for the promotion of the employment of persons with disabilities is sanctioned with a fine of EUR 301 to EUR 3 005 (Art. 15 Law 5/2000).

The Law on the employment litigation procedure, 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 monetary 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 a situation of equality in accordance with the law when required to do so or following an administrative penalty, making good any corresponding financial loss” when employers have been convicted of “serious discrimination in a public or private workplace, against a person for reason of their ideology, religion, beliefs, ethnicity, race or nationality, gender, sexual orientation, family situation, illness or disability, maintenance of legal or workers’ union representation, relationship with other company workers, or for use of any official languages of 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. 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 a 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 stipulates 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.”

Law 49/2007 on offences and sanctions in the field of equality for disabled people (*Ley 49/2007, de 26 de diciembre, por la que se establece el régimen de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*) establishes a system of sanctions in the field of discrimination on the ground of disability. Law 51/2003 of 2 December on equal opportunities, non-discrimination, and universal accessibility for persons with disabilities, and Law 62/2003 of 30 December on 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.



Law 49/2007 fills this legal gap. The Law 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 are punished with fines ranging from a minimum of EUR 301 to a maximum of EUR 1 million, depending on their seriousness. The criteria taken into account when setting the level of fine are the offender’s intention, negligence, fraud, non-compliance with prior warnings, business turnover and the number of people affected. This Law complies with the provisions on disability in Article 17 of Directive 2000/78 (Sanctions), and it was drawn up in consultation with NGOs, as required by Article 14 of the Directive: the Law was 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.

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

Legislation establishes a maximum amount for the fines (EUR 90 152 in the field of employment and EUR 1 million in the field of disability), but does not establish any ceiling for compensation. (See point a).

*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?*

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 no 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) for the promotion of equal treatment, 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?(Body/bodies that corresponds to the requirements of article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so)*

### **The 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*). Royal Decree 1262/2007 of 21 September regulates the composition, competencies and regulations for the Council (BOE, 3 October 2007). This is the only body that corresponds to the requirements of Art. 13 of Directive 2000/43.

This Council was not operational by December 2008, though a Ministerial Order<sup>39</sup> had announced which bodies had been selected to provide the Council’s members on behalf of organisations and associations who work to promote equal treatment and non-discrimination against people on grounds of racial or ethnic origin. There is no news on when the Council will start to work.

On the other hand, Royal Decree 1865/2004 of 6 September regulates 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, and for the 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 integrated 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 is 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.

<sup>39</sup> Order IGD/18/2009 of 8 January (BOE, 19 January 2009)



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.

- 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.*

The Council for the promotion of equal treatment of all persons etc. has the following characteristics:

- It is attached to the Ministry of Equality (Directorate-General against Discrimination).
  - It is a collegiate Spanish governmental body.
  - Its make-up is of a fundamentally governmental nature, as the Law states that the Council is to be formed by all ministries with responsibilities in the areas referred to by Art. 3.1 of the Directive 2000/43, with the participation of autonomous regions, local authorities, employers' organisations and trade unions, and other organisations representing interests related to the racial or ethnic origin of persons. Royal Decree 1262/2007 specifies its composition: the Chairman will be appointed by the Minister of Labour "from among figures of widely recognised prestige in the field of equal treatment and the fight against discrimination"; eight members are representatives of central government (Ministries of Labour, Education and Science, Justice, Health and Consumer Affairs, the Interior and Housing); four members from Spain's Regional Governments; three members from local government; two members from employers' organisations; two members from trade union organisations; and 10 members from organisations and associations active in the field of non-discrimination against people because of their racial or ethnic origin. The Ministry of Labour outlined a process for selecting these last members in Ministerial Order TAS/113/2008 of 23 January (BOE 30 January 2008).
  - The Ombudsman may establish mechanisms for co-operating and collaborating with the Council.
- 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.*

Its functions include the three functions described in Art. 13.2 of the Directive. The word "independent" does not appear in the definitions of these three functions in the Law, but is used in Royal Decree 1262/2007.

- d) *Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*

No (see point c).



- e) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

No.

- f) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions)*

No.

- g) *Is the work undertaken independently?*

The difficulty with this body is that it may be hard to guarantee its effectiveness and independence in the performance of its functions. Its independence is uncertain: even though the Decree twice includes the word “independent” to describe its assistance to victims and the elaboration of reports (which Law 62/2003 did not), the body is clearly of an advisory nature because half of its thirty members are representatives of the public administration and the other half of social organisations; it does not have a permanent structure to which citizens can turn that is separate from the public administration (because the Council secretariat is a part of the public administration itself, being a department of the Ministry of Equality). To evaluate its effectiveness, we will have to wait to see how the Council works.

In any case, the Ombudsmen (national or regional, whenever they exist) have not been deprived of their competences. The national Ombudsman acts as the Parliamentary High Commissioner 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, monitoring the administration’s activity and reporting to Parliament. The Ombudsman, according to Law 62/2003, may establish mechanisms for co-operating and collaborating with the aforementioned Council.

- h) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

Once it is operational, the Council may conduct formal investigations into discrimination against the Roma. Among the members of the Council there are two Spanish Roma organisations: the Fundación Secretariado Gitano and the Unión Romaní, which are very active associations in this field.





### *National Roma Council*

Royal Decree 891/2005<sup>40</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 draft legislation 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. This Council has reported various Government projects, such as the Plan of “Roma Development” which has been approved every year since 1989.

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<sup>40</sup> Royal Decree 891/2005 of 27 July setting up the National Roma Council (*Consejo Estatal del pueblo gitano*) (BOE, 26 August 2005).



## 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)*

#### *Transposition*

The Directives were transposed in Spain with no formal social dialogue, either with the social partners or with the NGOs with a legitimate interest in the fields of the Directives (which are many, and well organised); nor was there any dissemination of information about 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 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 an Accompanying Law (*Ley de acompañamiento*) in Parliament, which made the overall proposition incomprehensible except to those familiar with the issue and with legislative processes;
- 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 content of the Directives (though there were a few brief critical references from opposition groups as to the way in which the process was conducted).

#### *Dissemination*

The government that came into force in April 2004 and whose term of office was renewed in 2008 is aware of the fact that information on the Directives was not properly disseminated during the transposition process, and that this transposition was made without the necessary dialogue with social partners and NGOs. The people currently in charge see the fight against discrimination as one of the foundations of their political action.



The present government passed regulations in 2004 implementing the Law on the rights and duties of aliens (OL 4/2000)<sup>41</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 EUR 120 million for 2005; EUR 186 million for 2006; and EUR 200 million for 2007) established equality and non-discrimination as its governing principles and undertook action in three fields:

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

Moreover, the Directorate-General for the 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 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 combating discrimination. This 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 fight against all forms of discrimination;
- 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 programmes of action, in collaboration with the various levels of government and NGOs, in areas 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.

<sup>41</sup> Royal Decree 3393/2004, of 30 December. On the basis of this Royal Decree a "regularisation" process was initiated for immigrants in an irregular situation in Spain with a contract of employment (the result was the regularisation of more than 570 000 immigrants in an irregular situation between February and May 2005).



- Promotion of the Spanish Observatory against Racism and Xenophobia (set up by Organic Law 14/2003<sup>42</sup> “to conduct studies and analyses, and with the ability to formulate proposals for action in the field of combating racism and xenophobia”);
- Integrated programme of support to victims of discrimination;
- Training of specialist staff and public employees in combating racial and 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 the dissemination of knowledge and exchange of best practice;
- Drawing up codes of conduct on equal treatment in public services and promotion of codes of conduct on equal treatment in private companies and services;
- Signature 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.

*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*

#### *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 immigrant integration. It consists of 10 representatives of the public administration, 10 of immigrants’ associations and 10 of social support organisations, including trade unions and employers’ organisations with an interest and involvement in the field of immigration<sup>43</sup>.
- The Advisory Commission on Religious Freedom, created by the Organic Law on Religious Freedom (OL 7/1980), aims to review, report on and present proposals with respect to issues relating to the enforcement of the Law, religious discrimination being one of these issues. Representatives of churches, denominations and religious communities or federations, appointed by the Ministry of Justice, participate in this body.

<sup>42</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).

<sup>43</sup> It is regulated by Royal Decree 3/2006 of 16 January on the make-up, competences and procedural rules of the Forum for the Social Integration of Immigrants (BOE, 17 January 2006).



- The 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 issuing reports on draft legislation affecting equal opportunities, non-discrimination and universal accessibility.
- 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)*

### *Social dialogue*

Collective agreements are used to implement the principles of the Directives. On 30 January 2003, 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 to 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.

Collective bargaining should help to remedy any 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. General clauses on equal treatment in collective agreements are appropriate instruments for helping to combat possible discrimination.

General measures may be taken for some groups: in the case of women, through access to employment, 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 was renewed for 2004, 2005 and 2006 (in coming weeks a new ANC for 2007 will be signed). Although it will be necessary to follow collective negotiations in various sectors and companies to see how the ANC is implemented, the inclusion of this anti-discrimination clause in line with Art. 11.2 of Directive 2000/43 must be described as highly positive.



d) *to specifically address Roma and Travellers*

## Roma

No formal or informal process of dissemination and dialogue with NGOs and social partners took place in 2003 when the transposition of Directive 2000/43 was approved in Spain. Anyway, this changed considerably in the legislation 2004-2008.

The National Roma Council has started work (see Section 7 of this report).

The Roma Development Plan adopted each year from 1989 is a programme of action for social development and improvement of the quality of life of Spanish Roma. Its objectives are the following: 1) improve the quality of life of the Roma population and implement the principle of equal opportunities in their access to systems of social protection; 2) encourage their participation in public and community life; (3) promote better coexistence among different social and cultural groups; (4) strengthen Roma associations; (5) combat discrimination and racism towards the Roma.

## 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).*

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

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

There are no laws, regulations or rules still in force that are contrary to the principle of equality on the grounds specified in the Directives.

In the field of sexual orientation, inequality caused by the fact that homosexual couples had no access to certain social benefits was resolved in 2005 when Parliament passed a law amending the Civil Code that allows homosexual couples to marry with the same rights as heterosexual couples (see Section 4.5 of this report).





## 9. 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).

With the creation of the Ministry of Equality in April 2008, the general duty for monitoring the implementation of the two Directives moved to this ministry (to its Directorate-General against Discrimination), independently of the duties of other ministerial departments in their respective fields. The Directorate-General is also responsible for developing regulations applicable to the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin.

The department responsible for implementing policies to support the disabled is the General Secretariat for Social Policy (since April 2008 part of the Ministry of Health and Social Policy). Most of the anti-discrimination issues covered by this report fall within this department's remit. But we should note that there are other departments with responsibilities in matters of racial or ethnic discrimination, 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 31 December 2008

<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
<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 “other personal or social condition or circumstance”	Constitution	All	Principle of equality and 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 on fiscal, administrative and social measures <a href="http://www.boe.es/boe/dias/2003-12-31/pdfs/A46874-46992.pdf">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 the Directives	Administrative/ Employment	All	Directives 2000/43 and 2000/78 are transposed in Title II, Chapter III, Art. 27, al 45. Creates a specialised body dealing with racial or ethnic discrimination.



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
<i>Real Decreto Legislativo 1/1995, 24 marzo, Estatuto de los Trabajadores</i> Royal Legal Decree 1/1995, 24 March, Workers' Statute <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.mtin.es/es/sec_leyes/trabajo/estatuto06/index.htm">http://www.mtin.es/es/sec_leyes/trabajo/estatuto06/index.htm</a>	5.1995	All grounds of the Directives	Administrative/ Employment	Employment and occupation	All rights and duties relating to 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 the employment litigation procedure <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.mtin.es/es/sec_leyes/trabajo/estatuto06/index.htm">http://www.mtin.es/es/sec_leyes/trabajo/estatuto06/index.htm</a>	5.1995	All grounds of the Directives	Administrative/ Employment	Employment and occupation	Formal procedures relating to 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 offences and penalties in social matters <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.mtin.es/es/Guia/leyes/RDLG500.html">http://www.mtin.es/es/Guia/leyes/RDLG500.html</a>	1.2001	All grounds of the Directives	Administrative/ Employment	Employment and occupation	Infractions and Sanctions on the Social Order Labour, employment and occupation

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
<i>Ley 13/1982, 7 abril, de Integración Social de los Minusválidos</i> Law 13/1982, 7 April, on the social integration of disabled people <a href="http://www.administracion.es">www.administracion.es</a> <a href="http://www.mtin.es/es/Guia/leyes/RDLG500.html">http://www.mtin.es/es/Guia/leyes/RDLG500.html</a>	5.1982	Disability	Administrative/ Employment	Social integration of disabled people in social benefits, social security, education, work and housing	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, on equal opportunities, non-discrimination, and universal accessibility for persons with disabilities <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/ Employment	Equal opportunities, non-discrimination, and universal access for persons with disability in all fields. Specifically in access to and supply of goods and services which are available to the public	Disabled equal opportunities; Improvement of working and living conditions
<i>Ley 49/2007, de 26 de diciembre, por la que se establece el régimen de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad</i>	3.2008	Disability	Administrative/ Employment	Equal opportunities, non-discrimination, and universal access for persons with disability in all fields	Infractions and sanctions in the field of equal opportunities for the disabled





Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
<i>universal de las personas con discapacidad</i> Law 49/2007 on offences and sanctions in the field of equality for disabled people <a href="http://www.administracion.es">www.administracion.es</a>					
<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/ Employment	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 the rights and liberties of aliens in Spain and their social integration <a href="http://www.mtin.es/es/Guia/leyes/LO400.htm">http://www.mtin.es/es/Guia/leyes/LO400.htm</a>	2.2000	Nationality All grounds of the Directives for aliens	Administrative/ Employment	Administrative situation of aliens	Direct and indirect discrimination; the entire 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 the Directives	Criminal	All criminal matters	Crimes against the rights of workers; all aspects of discrimination

**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

Name of country: Spain

Date: 31 December 2008

<b>Instrument</b>	<b>Signed (yes/no)</b>	<b>Ratified (yes/no)</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	Yes	Yes 1979	Reservation with regards to Arts. 5 and 6 relating to the disciplinary regime of the armed forces	Yes	Yes
Protocol 12, ECHR	Yes	Yes 2008	None	--	--
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
Convention on the Rights of Persons with Disabilities	Yes	Yes 2007	None	Yes	Yes