

Developing Anti-Discrimination Law in Europe

The 27 EU Member States compared

November | 2010



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Developing Anti-Discrimination Law in Europe

**The 27 EU Member States, Croatia, the Former
Yugoslav Republic of Macedonia and Turkey compared**

**Prepared by Isabelle Chopin and Thien Uyen Do
for the European Network of Legal Experts in the non-discrimination field**

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The **Comparative Analysis** was drafted in 2010 by Isabelle Chopin and Thien Uyen Do. It follows the previous publication 'Developing Anti-Discrimination Law in Europe, The 27 Member States compared', by Isabelle Chopin and Eirini-Maria Gounari, in November 2009.

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Preface

In a great many European countries anti-discrimination legislation has been adopted and reviewed over recent years. This major and unprecedented operation was originally set in motion with the adoption of two pieces of European legislation in 2000: the Racial Equality Directive (2000/43) and the Employment Equality Directive (2000/78). The transposition of these Directives into the national legal systems of the 27 Member States is described in a series of annually updated country reports produced by the European Network of Legal Experts in the non-discrimination field. This Network was established and is managed by Human European Consultancy and the Migration Policy Group on behalf of the European Commission.

The reports were written by independent national experts in each Member State. The information was provided in response to questions set out in a template format which closely followed the provisions of the two Directives. The Network's ground coordinators (experts on the Directives' five discrimination grounds) and content manager read and commented on various drafts of the reports. The 30 reports cover national law, the establishment of enforcement mechanisms and the adoption of other measures. They contain information current as of 31 December 2009.¹ As such, they are a valuable source of information on national anti-discrimination law and can be found on the network's website at: <http://www.non-discrimination.net>.

This Comparative Analysis, drafted by Isabelle Chopin and Thien Uyen Do (Migration Policy Group), compares the information set out in the **2009** country reports in a format mirroring that of the country reports themselves and draws some conclusions from the information contained in them.

In addition to the EU Member States, the candidate countries Croatia, the Former Yugoslav Republic of Macedonia and Turkey have been part of the Network since December 2009 and reports have been issued for these countries as well. Consequently, the authors have decided to include more detailed information about them in this comparative analysis.

The 2010 country reports will be published in the course of 2011.

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¹ As an exception, where major changes in legislation have been adopted at national level after the cut-off date for this document, they have been included and signalled accordingly.

Executive Summary

1. Anti-discrimination law in most states goes beyond the requirements of European law in some way, whether with regard to the grounds of discrimination which are prohibited by law, the scope of protection or the competencies of the national equality body. However, there are still some gaps in a small number of Member States. Candidate countries are steadily bringing their legislation into line with EU requirements, with the notable exception of Turkey where major shortcomings remain.
2. Whereas prior to transposition of the Racial Equality Directive (2000/43/EC) and Employment Equality Directive (2000/78/EC) many EU Member States provided protection against discrimination through a patchwork of – largely declaratory – equality clauses in a series of legislative instruments, all now have adopted more visible specific anti-discrimination legislation. Candidate countries clearly appear to have opted for a single piece of legislation dealing with anti-discrimination. Most Member States have transposed the Directives through civil and labour law; a minority also through criminal law.
3. Most states have incorporated all the grounds of discrimination included in the two Directives in their national anti-discrimination legislation. Most have chosen not to define the grounds of discrimination in their implementing legislation. A considerable number of states have chosen not to restrict new anti-discrimination laws to the grounds found within the Directives. In addition to expanding the list of prohibited grounds of discrimination, various countries have made the list non-exhaustive by adding a phrase such as ‘or any other circumstance’.
4. The great majority of states have introduced legislation that expressly prohibits direct and indirect discrimination, harassment and instruction to discriminate. Moreover, in most cases, the definitions provided in national legislation are very similar to the definitions found in the Directives. Many states have essentially reproduced the text of the Directives on these core concepts.
5. Implementation of the Employment Equality Directive’s provision on reasonable accommodation for persons with disabilities is patchy. Where national provisions exist, these vary considerably between those which provide a basic duty with little elaboration on how this should be implemented and those which provide more extensive guidance on its practical application.
6. In general, protection against discrimination on any of the Directives’ grounds in the states is not conditional on nationality, citizenship or residence status. In the majority of states, both natural and legal persons are protected against discrimination. There is more variation in national rules on who is to be held liable for discrimination, particularly when it occurs in the workplace.
7. While a majority of states seem to meet the material scope of the Directives, there remain some noteworthy gaps. In some countries there is a lack of protection for all employees and the self-employed, especially in the public sector. Two Member

States (Latvia² and Poland) still have to transpose the Racial Equality Directive in all fields outside employment. On the whole, protection against discrimination in provision of goods and services is mostly restricted to those goods and services available to the public. A variety of ways of distinguishing publicly available goods from privately available goods have emerged. A number of countries provide the same scope of protection for all grounds, thereby going beyond the Directives.

8. The exceptions to the principle of equal treatment permitted under the Directives have largely been taken up in national law. In some cases the exceptions may be wider than the Directives allow. Most states provide for positive action measures to prevent or compensate for disadvantages linked to one or more of the discrimination grounds.
9. The vast majority of states combine judicial proceedings – including civil, criminal, labour and/or administrative proceedings - with non-judicial proceedings. Some non-judicial proceedings are of general applicability but provide an effective forum for discrimination cases, whereas others have been established specifically for discrimination cases as an alternative dispute resolution procedure to the normal courts. Whereas all states (except Turkey) now provide for a shift in the burden of proof in discrimination cases, there are suspected inconsistencies with the Directives' provisions in a number of states. The same can be said for the prohibition of victimisation. Whether sanctions applied in states meet the 'effective, proportionate and dissuasive' test must be considered on a case-by-case basis. However, few country experts currently predict that sanctions and remedies in their country will comply with this standard.
10. Almost all states now have equality bodies or have incorporated their functions into the mandates of existing bodies such as national human rights institutes. A high proportion of bodies are competent not only for racial and ethnic origin discrimination but also other grounds. The functions of specialised bodies go beyond those listed in the Racial Equality Directive in many countries. It remains to be seen whether all these bodies will be able to carry out the independent functions required by the Directive.
11. Few states are considered to have adequately transposed the Directives' requirements to disseminate information on discrimination laws, to promote social dialogue and to encourage dialogue with non-governmental organisations. Often these tasks fall to the specialised equality body. There appear to be more instances of structured dialogue for disability than for the other grounds of discrimination.
12. Few countries have systematically ensured that all existing legal texts are in line with the principle of equal treatment. In most countries discriminatory laws will be repealed following a finding of discrimination by the courts, or possibly a recommendation by an equality body. Legislation on the annulment of discriminatory clauses in contracts, collective agreements, internal rules

² In Latvia, the Prohibition of Discrimination against Natural Persons who are Economic Operators Act applies only to discrimination on the basis of race/ethnic origin and gender, and only in relation to supply of and access to goods and services. The Act did not cover self-employment at the end of 2009 but draft amendments addressing self-employment were adopted on 10 December 2009 at first reading by Parliament. New legislation was adopted in 2010, and will be dealt with in the next issue of this Comparative Analysis.

of undertakings or rules governing independent occupations, professions or workers' or employers' organisations is more common.

13. The most pressing issue is the proper application of national anti-discrimination laws and the active enforcement of rights. Candidate countries must transpose EU rules and procedures through adequate legal, administrative and judicial structures. As a prerequisite to their accession to the EU, correct implementation and effective enforcement depend on the efforts these countries make during the application process.



Chapter 1

Introduction

The objective of this report is to compare and contrast anti-discrimination laws in the 27 EU Member States and 3 EU Candidate Countries (namely Croatia, FYR of Macedonia and Turkey), as comprehensively described in the annually updated country reports written by the European Network of Legal Experts in the non-discrimination field and summarised in this publication. Trends and commonalities between various countries in the implementation of the Racial Equality Directive (2000/43/EC) and Employment Equality Directive (2000/78/EC) are identified. The grounds of discrimination listed in the Directives – racial and ethnic origin, religion and belief, disability, age and sexual orientation – will be considered individually and collectively. It should be recalled throughout that the purpose of this report is to provide an overview of national laws: for detailed and nuanced information about the law in a particular country, readers are referred the comprehensive country reports. These country reports contain information current as of 31 December 2009.³

It goes beyond the scope of this report to assess the extent to which Member States have fully complied with the Directives or to assess the legislative impact of the European Directives on the laws of all countries examined, though it could potentially be used as one of the instruments for making such an assessment. In the transposition process ambiguities in the Directives became apparent which this report will not seek to clarify, although, where appropriate, the report makes some suggestions to that effect.

The Racial Equality Directive had to be transposed into national law by 19 July 2003 in the EU 15 Member States and by 1 May 2004 in the EU 10, the date of their accession to the EU. The latest accession countries, Bulgaria and Romania, had to transpose the EU *acquis* by 1 January 2007. The Employment Equality Directive had to be transposed by 2 December 2003 in the ‘old’ Member States and by either 1 May 2004 or 1 January 2007 in the ‘new’. If and when they accede, Croatia, FYR of Macedonia and Turkey will have to align their national legislation with EU law by the date they enter the EU. Clear pictures have emerged of the implementation of the Directives.

All the countries covered (except Turkey) have transposed the two Directives into their national law to various extents, but important discrepancies exist: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden and the United Kingdom Croatia⁴ and FYR of Macedonia.⁵ Poland has partially transposed the Directives but significant legislation is still notably missing, primarily in relation to the scope of the Racial Equality Directive beyond employment (Article

³ <http://www.non-discrimination.net>. The 2010 country reports will be published in the course of 2011.

⁴ Croatia has adopted an Anti-Discrimination Act, in force since January 2009. However, there are certain issues which are not in compliance with the Directives.

⁵ The Anti-Discrimination Act will enter in force on 1 January 2011. For the purpose of this comparative analysis, the authors decided to include the new legislation in this report. Presently, anti-discrimination provisions in FYR of Macedonia stem from various pieces of legislation such as the Labour or Penal Code.

3(1)(e)-(h)) and the creation of a specialised equality body.⁶ Turkey, like the two other candidate countries analysed in this report, is not a member of the EU but more harmonisation efforts should undeniably be made to bring the major existing discrepancies into line with EU standards as a prerequisite to possible future accession.⁷

As a first observation, a number of different transposition methods can be identified among the states:

- adoption of anti-discrimination acts which more or less reproduce the Directives,
- adoption of anti-discrimination acts covering more grounds than the Directives,
- adoption of combinations of multi-ground anti-discrimination acts and single-ground acts,
- adoption of several pieces of single-ground anti-discrimination legislation,
- adoption of combinations of specific legislation and an employment act,
- adoption of combinations of specific amendments to legislation, labour and penal codes and some administrative law,
- transposition of the Directives in a much wider general act, and
- transposition of the Directives so far only in the field of employment.

A second observation about methods of implementation may be made in particular with regard to age discrimination. The transposition of Directive 2000/78 with respect to age discrimination presented particular challenges because the great majority of Member States did not have existing general legislation against age discrimination. Two contrasting patterns or models can be identified in how countries chose to confront these challenges, though it should be stressed that these are only broad patterns, within which significant variations occur. Turkey has not yet incorporated age discrimination into its national legislation.

One pattern consists of direct or nearly direct enactment in national legislation of the age discrimination provisions of the Directive, without elaborate adaptation to existing practice or detailed amendment of existing legislation. We have seen in the table above that Cyprus, Greece and Italy have passed anti-discrimination laws which more or less reproduce the Directives; with regard to age discrimination in particular we could add Austria, Denmark, Slovakia and Slovenia to this list. Underlying this response we can

⁶ Several attempts to adopt an Equal Treatment Act have been made since 2006. In October 2010, the Equal Treatment Act was passed by the Sejm (Lower House of the Parliament). It is currently being discussed within the Senate (Higher House of the Parliament). If the Act is eventually approved by the Parliament it will still need a Presidential signature to come into force. The Act aims to fill the gaps in the transposition of relevant directives and does not go any further. Originally called 'Draft Equal Treatment Act' the name of the Act was changed into the 'Act on the Implementation of Certain Provisions of European Union in the Field of Equal Treatment' (*Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*). The Act provides that the role of the equality body would be played by the office of the existing Ombudsperson (Commissioner for Civil Rights Protection, *Rzecznik Praw Obywatelskich*). However it does not provide any information on how this new role should be played, nor does it provide any additional funds for the Ombud office. There are currently two referrals to the European Union Court of Justice and one reasoned opinion pending against Poland (state of affairs November 2010).

⁷ However, a preliminary draft for a Combating Discrimination and Establishment of an Equality Council Act was tabled in March 2010 in order to address most of the shortcomings.

perhaps discern a preference for partly deferring the process of detailed adaptation of existing law and practice so that it can be resolved by judicial adjudication and subsequent interaction between the Member State and the European Union institutions.

A contrasting response consisted of engaging in a more elaborate legislative debate within the Member State as to how the age discrimination requirements of the Directive might be fully and immediately integrated within existing law and practice of the Member State. The resulting legislative debate tended to be difficult and complex, which is why Belgium, Germany, the Netherlands, Sweden and the United Kingdom took up the option of extra time to implement age discrimination requirements in particular.

On the whole, most countries have transposed the Directives through civil or labour law, with a minority having also maintained, introduced or amended criminal law provisions, e.g. Belgium, Denmark, Estonia, France and Luxembourg. While in some countries anti-discrimination provisions still exist in various pieces of legislation, e.g. Bulgaria and Latvia, this method has largely been replaced by more general anti-discrimination provisions and legislation, and more recently a move towards multiple-ground equal treatment bodies is also discernable.

Ensuring that the Directives are transposed across all of a Member State's territory and by all tiers of government with relevant competences was a reason for delays in several Member States. The United Kingdom was delayed in its transposition in Gibraltar. Finland was found by the European Court of Justice to have failed to fulfil its Community obligations by omitting the Åland islands from its transposition of Directive 2000/43/EC. The European Court of Justice has condemned Austria, Finland, Germany and Luxembourg for failure to transpose Directive 2000/43/EC.⁸ The European Commission agreed to end infringement proceedings against Malta, Slovakia and Spain after these countries modified their national legislation in order to fully implement the Race Equality Directive (2000/43/EC).⁹ Regarding Directive 2000/78/EC, in 2005 and 2006 respectively, Germany and Luxembourg were found by the European Court of Justice to be in breach of their EC Treaty obligations for their failure to transpose the Employment Equality Directive. Infringement proceedings initiated against Austria and Finland were closed in October 2009 following correct and complete implementation. Similarly, the European Commission also decided to cease infringement proceedings against Slovakia and Malta as their national legislation had been brought into line with EU requirements. Meanwhile, the European Commission continued to pursue some other infringement procedures. For example, on 20 November 2009 it sent a reasoned opinion to the United Kingdom for incorrectly implementing Directive 2000/78/EC, stating that there is no clear ban on 'instruction to discriminate' in national law and no clear appeals procedure in the case of disabled people, and the exceptions to the principle of non-discrimination on the basis of sexual orientation for religious employers are broader than those permitted by the Directive. In 2009, the Dutch General Equal Treatment Act was also under scrutiny, in particular with regard to the exception provided for ethos

⁸ Case C-327/04 *Commission v Finland*, 24 February 2005, Case C-329/04, *Commission v. Germany*, Case C-335/04, *Commission v. Austria*, Case C-320/04 *Commission v Luxembourg*.

⁹ At the end of 2009, 12 infringement cases remained open whereas 11 cases were closed during the course of the year.

organisations in Article 4(2).¹⁰ In 2010, it was decided to continue infringement procedures initiated against Poland for failure to transpose correctly and completely both Directives.

This report will look in turn at the main substantive issues in both Directives: the grounds of discrimination, the definition of discrimination, the duty of reasonable accommodation, the personal and material scope of the law, exceptions to the principle of equal treatment and positive action, remedies and enforcement, equal treatment bodies, and implementation and compliance issues.

¹⁰ At the end of 2009, 14 infringement cases remained open whereas 7 cases were closed during the course of the year. Reasoned opinions were also sent to Germany and Italy in 2009.



Chapter 2

The grounds of discrimination

The Racial Equality Directive and the Employment Equality Directive require Member States to prohibit discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation. The Directives do not contain any definition of these grounds. This section examines how the Member States and candidate countries have incorporated the different grounds of discrimination into national law. This poses issues such as whether to provide a definition of each ground and how to address discrimination based on assumed characteristics. In addition, the section will highlight the main issues arising with respect to each ground during the implementation process.

Most countries have chosen not to define the grounds of discrimination in their legislation implementing the Directives (including, for instance, France, Greece, Hungary, Poland, Romania, Slovenia, Croatia and FYR of Macedonia). A small group of countries have included statutory definitions or have at least provided definitions in accompanying documentation, such as an explanatory memorandum. This group includes Austria, Estonia, Ireland, the Netherlands, Sweden and the United Kingdom. In many countries, definitions or guidelines for definition have subsequently been provided by national court rulings.

A. Which grounds are included?

All countries have included the general principle of equal treatment or specific grounds of discrimination in the Constitution (except the UK which lacks a written constitution) and in national anti-discrimination legislation. However, constitutional provisions are generally either not directly applicable or they have vertical effect only in litigation involving the State as the respondent. In Bulgaria, Cyprus, Estonia, Luxembourg, the Netherlands, Slovenia and Spain, constitutional provisions are deemed to be applicable to horizontal relations as well. In a minority of countries, horizontal direct effect remains theoretical or largely debatable (for instance, Belgium, Ireland, Italy, Poland, Portugal, Croatia, and FYR of Macedonia). In addition, it should be noted that a number of

Member States such as Belgium,¹¹ Bulgaria,¹² Cyprus,¹³ Hungary,¹⁴ Poland,¹⁵ Romania,¹⁶ Spain,¹⁷ and Sweden¹⁸ chose not to restrict new anti-discrimination laws to the grounds found within the two Directives and have opted for a broader list of prohibited grounds. Age and sexual orientation are not explicitly mentioned in the legislation in Turkey and whereas the new Anti-Discrimination Act in FYR of Macedonia covers extra grounds not provided for in the Directives, it does not include sexual orientation.

B. Racial or ethnic origin

There appear to be two main issues in relation to the definition of 'racial or ethnic origin'. First, there are debates around the use of 'race' within anti-discrimination legislation. Secondly, there are overlaps with other personal characteristics, such as nationality, language or religion.

¹¹ The following grounds are covered: age, sexual orientation, civil status, birth, wealth/income, religious or philosophical belief, actual or future state of health, disability, physical characteristic, nationality, genetic characteristic, social origin and, since 30 December 2009, trade union opinion.

¹² The Protection Against Discrimination Act and the special integrated Anti-Discrimination Act ban discrimination on grounds of sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or public status, disability, age, sexual orientation, family status, property status, or any other ground provided for by law or by international treaty Bulgaria has ratified.

¹³ The following grounds are covered: community; race; religion; language; sex; disability, political or other conviction; national or social descent; birth; colour; wealth; social class, or any ground whatsoever, unless the Constitution itself otherwise provides.

¹⁴ Hungarian legislation covers the following grounds: sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, the part-time nature or definite term of the employment relationship or other relationship related to employment, belonging to an interest representation, and other situation, attribute or condition of a person or group. The list is non-exhaustive.

¹⁵ The following grounds are protected: gender, age, disability, race, religion, nationality, political opinion, membership of a trade union, ethnic origin, belief, sexual orientation, employment for a definite or indefinite period of time, and part-time or full-time employment. This list remains open, however.

¹⁶ Article 2 of the Anti-Discrimination Act protects the following grounds: race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, and HIV positive status.

¹⁷ The grounds expressly protected in Spanish law are gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation, marital status, origin, social condition, political ideas and ideology, affiliation to a union, use of languages of the State of Spain, and family ties with other workers in an enterprise.

¹⁸ In Sweden the new comprehensive Anti-Discrimination Act which entered in force on 1 January 2009 includes a new discrimination ground, 'gender-transgressing identity or expressions'. See Discrimination law (diskrimineringslag) 2008:567. Government bill 2007/08:95. Committee report. 2007/08:AU7. Voted on in the Parliament on 4 June 2008. rskr. 2007/08:219.

Recital 6 of the Racial Equality Directive declares:

‘The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply the acceptance of such theories.’

Some countries have taken the view that including the terms ‘race’ or ‘racial origin’ in anti-discrimination legislation reinforces the perception that humans can be distinguished according to ‘race’, whereas there is no scientific foundation for such categorisation. For example, the Finnish Non-Discrimination Act refers to ‘ethnic or national origin’ (section 6(1)), whilst the Swedish 1999 Ethnic Discrimination Act refers to ‘ethnic affiliation’ (section 3) and defines it thus: ‘Ethnic affiliation means that someone belongs to a group of people who have the same race, colour, national or ethnic background or religious belief’. In other countries, ‘race’ has been included in the legislation, but it is qualified. Austria also rejects the idea of separate races and therefore the notion of ‘race’ has been removed from legal texts to be replaced with ‘ethnic affiliation’. Similarly, Hungary refers to ‘racial affiliation’ and ‘belonging to an ethnic minority’. In Germany, vivid criticisms and opposition have arisen for the same reasons. In France, various legal provisions refer to ‘real or assumed’ (*vraie ou supposée*) race.

One of the areas of ambiguity in the Racial Equality Directive is the extent to which characteristics such as colour, national origin, membership of a national minority, language or social origin fall within the scope of ‘racial or ethnic origin’. Many national laws include, as a minimum, colour and national origin within legislation implementing the Racial Equality Directive. Some states, such as Hungary,¹⁹ Poland and Slovenia, have specific and detailed laws on the protection of national minorities. It is often unclear whether the concepts of ethnic/national minority found within these laws will be relied upon when national courts interpret anti-discrimination legislation.

The boundary between ethnic origin and religion is also problematic. Within the Directives, it is evident that this is an important distinction because the material scope of the Racial Equality Directive is much more extensive than that of the Employment Equality Directive. Nevertheless, the concepts of ethnicity and religion are closely linked. The European Court of Human Rights recently held that:

‘Ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.’²⁰

¹⁹ “Race” (*faj*) and “colour” (*szín*) are mentioned by the Constitution, whereas the Equal Treatment Act uses “colour of skin” (*bőrszín*), “racial affiliation” (*faji hovatartozás*), “belonging to a national or ethnic minority” (*nemzeti vagy etnikai kisebbséghez való tartozás*) and “nationality” (*nemzetiség*).

²⁰ Para 55, *Timishev v Russia*, Applications 55762/00 and 55974/00, 13 December 2005.

In the Netherlands, case-law has recognised the possibility for discrimination against Jews,²¹ and in certain circumstances Muslims,²² to be challenged as race discrimination. In the United Kingdom, discrimination against Sikhs²³ or Jews²⁴ has been accepted as discrimination on racial grounds (specifically, ethnic origin). Similarly, due to the historical background of Nazi ideology in Germany, anti-Semitism is regarded as discrimination on the grounds of race and not of religion.

A number of common problems have arisen in the process of implementing the Racial Equality Directive. First, the Directive is distinguished by its broad material scope, extending beyond employment to include areas such as education and housing. Yet several states have not adopted adequate legislation on discrimination outside employment, notably Latvia, Lithuania and Poland. Secondly, the Racial Equality Directive requires Member States to establish a body or bodies for the promotion of equal treatment. All states, except Poland and Turkey, have set up such a body. The Czech Republic and Spain have both put their equality bodies in place during the course of 2009. In FYR of Macedonia, the new Anti-Discrimination Law envisages the establishment of a Commission for Protection from Discrimination in 2011.

In terms of transposition in practice, Roma segregation in education shows a good example of the serious challenges faced by several states in terms of implementation and effective enforcement,²⁵ including Bulgaria, the Czech Republic, Cyprus,²⁶ Finland, Greece, Hungary, Poland, Slovakia and Croatia (see Chapter 5 section B below). Another common issue that arises is the lack of data in many states on the socio-economic situation of persons vulnerable to racial discrimination. This makes it difficult to identify the extent of disadvantage and whether any progress is being made in reducing inequalities.

C. Religion or belief

No state has attempted to provide a comprehensive definition of 'religion or belief' within anti-discrimination legislation (e.g. an exhaustive inventory of protected religions). Further guidance on the meaning of 'religion or belief' is in some states provided by explanatory documentation accompanying legislation or by court rulings, such as in Belgium, France and Germany. In Austria, the explanatory notes for the Federal Equal Treatment Act state that the 'Framework Directive' states that the terms religion and belief must be interpreted broadly. 'Religion' in particular is not restricted to churches and officially recognised religious communities. Nevertheless, it should be noted that for a religion there are minimum requirements of a statement of belief, some rules on way of

²¹ Opinion 1998/48, Equal Treatment Commission.

²² Opinion 1998/57, Equal Treatment Commission.

²³ *Mandla v Dowell Lee* [1983] 2 AC 548.

²⁴ *Seide v Gillette Industries Ltd.* [1980] IRLR 427.

²⁵ A thematic report written in 2007 by Lilla Farkas, Roma Expert for the European Network of Legal Experts in the non-discrimination field, entitled *Segregation of Roma Children in Education, Addressing structural discrimination through the Race Equality Directive* provides a more detailed analysis of this issue.

²⁶ It should be noted that the total Roma population in Cyprus is relatively marginal compared to other countries such as Romania and Croatia.

life and worship. Religion is defined as any religious, confessional belief, or the membership of a church or religious community.²⁷ The term 'belief' has also been the subject of debate surrounding its meaning. In the Netherlands, the term *levensovertuiging* (philosophy of life) has been adopted because this had already been interpreted through case law. It includes broad philosophies, such as humanism, but it does not extend to every view regarding society. In addition to *levensovertuiging*, the Dutch General Equal Treatment Act (GETA) also covers *godsdiens* (religion).²⁸ Both *religion* and *belief* are defined and applied in a broad sense.

Most of the controversies around implementation of the provisions of the Employment Equality Directive on religion or belief centre on the extent of any exceptions provided for organised religions (e.g. churches) and organisations with an ethos based on religion or belief (e.g. religious schools). The Directive provides a rather complex exception in Article 4(2), which permits such organisations to make requirements relating to employees' religion or belief in narrow circumstances. Some states have provided exceptions that go beyond the strict terms of the Directive (e.g. Hungary and Croatia) or which remain ambiguous (e.g. Greece, Ireland, Italy, Romania and the UK). As a reaction to a letter sent by the Commission to the Netherlands regarding a potential breach of the Directive, the Government announced that the exception will be reformulated in such a way as to closely reflect the wording of the Directive. The Government has announced that it will submit a draft law to Parliament with such an amendment in the autumn of 2010.²⁹ UK proposals to change the approach to 'ethos organisations' failed and the newly implemented Equality Act 2010 suffers from the same defects as the previous legislation in this regard. France, Portugal and Sweden did not adopt any exception clause for employers with an ethos based on religion or belief.

Finally, there has been a gradual increase in case law arising since the adoption of the Directives stemming from controversy over requirements on dress codes and religious symbols, thus indicating that manifestation of religious belief through dress or symbols is one of the key issues in the practical implementation of the Directives. For instance, such cases have been recorded in Belgium, Denmark, France, Germany, Greece, Italy, the Netherlands, Sweden and the United Kingdom.

D. Disability

In 2006, the European Court of Justice (ECJ) provided its first decision on the meaning of 'disability'. The Court distinguished disability from sickness:

'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 ...

²⁷ No. 307 der Beilagen XXII. GP - Regierungsvorlage – Materialien.

²⁸ In the English translation of the GETA on its website, the Equal Treatment Commission translates *levensovertuiging* as belief.

²⁹ See Letter of the Ministry of Interior and Kingdom Affairs dd 29-09-2009, Tweede Kamer 2009-2010, 28 481, nr. 7.

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.³⁰

The majority of national legislation contains many examples of definitions of disability (e.g. Austria, Belgium, Cyprus, the Czech Republic, Estonia, Germany, Luxembourg, Portugal, Slovakia, Spain Sweden, and FYR of Macedonia) but stem from the context of social security legislation rather than anti-discrimination law. At present and unless future case law otherwise provides, national definitions appear *a priori* in line with the *Chacon Navas* ruling of the Court, except for Cyprus, Greece, Poland, Slovakia, Slovenia and the United Kingdom where significant discrepancies exist. The new Anti-Discrimination Act in FYR of Macedonia introduces disability as a protected ground into national legislation and the definition provided in the Labour Code also seems at first glance compatible with *Chacon Navas*, as does the definition provided by the Persons with Disability Act in Turkey. But since the concept of disability is new to Turkish judges, it is not yet known how it will be interpreted in the future. Notably, Bulgaria sets out a wider interpretation of disability as it does not require the limitation to result in ‘hinder[ing] the participation of the person concerned in professional life’³¹ – the existence of an impairment or limitation is sufficient, regardless of the implications this may have for the individual’s professional life. In addition, this national definition is broader in material scope because it applies to any field including, but not limited to, professional life. However, the concept of permanent disability is narrower than in ECJ case law as it requires three additional elements: a permanence of what is effectively the equivalent of a hindrance to participation, a threshold of 50 per cent of incapacity and official medical certification acknowledging the incapacity. Similarly, Lithuania does not limit material scope to professional life as reference is made to public life.³² However, mental and psychological impairments are not addressed by Lithuanian legislation. Countries including Estonia, Hungary and Malta go beyond the employment field by referring to everyday activities or all aspects of social life³³ and, likewise, Sweden does not seem to restrict the scope of relevant impairment to professional activities only. Danish law does not contain a definition of ‘disability’ and the term used in the Prohibition of Discrimination in the Labour Market Act is ‘handicap’ which seems to be narrower than that established in *Chacón Navas*. Similarly, the Romanian Anti-Discrimination Act does not define ‘disability’ or the connected protected grounds of chronic non-infectious disease or HIV infection even though it provides protection against discrimination on these grounds. Romanian disability-related legislation still uses the concept of ‘handicap’, ‘handicapped’ persons being defined as ‘those persons lacking abilities to normally carry out daily activities due to a physical, mental or sensorial impairment and who require protective measures for rehabilitation, integration and social inclusion.’³⁴

³⁰ Paras 43-45, Case C-13/05 *Chacón Navas v Eures Colectividades SA*, judgment of 11 July 2006, [2006] ECR I-6467. See commentary by Lisa Waddington (2007) 44 *Common Market Law Review* 487.

³¹ Integration of Persons with Disabilities Act, sections 1.1 and 1.2 Additional Provision.

³² Social Integration of Disabled Persons Act, 1991, No. 36-969.

³³ For Estonia, see Article 5 Equal Treatment Act. For Hungary, see Article 4 of the Rights of Persons with Disabilities Act.

³⁴ Article 2 and Article 3(16) of Romania / Act 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap.

The ECJ's requirement for it to be probable that the impairment will last is echoed in various definitions of disability in national law. For example, in both Austria³⁵ and Germany,³⁶ impairments must be likely to last for more than six months in order to amount to disabilities, while in the United Kingdom³⁷ the impairment should last for at least 12 months. In contrast, other states require the impairment to be indefinite in duration (Cyprus³⁸ and Sweden³⁹).

It is not yet clear whether the Court regards the formula provided in *Chacon Navas* as an exhaustive definition of disability. In particular, this definition leaves no space for the protection of those assumed to be disabled or likely to have a future disability. These scenarios are anticipated in some national legislation. Irish legislation covers discrimination on grounds that exist at the present moment, grounds that previously existed, and grounds that may exist in the future.⁴⁰ Dutch law covers 'an actual or assumed disability or chronic disease',⁴¹ thereby protecting (for example) a person who previously had cancer but no longer experiences any symptoms. The Slovak Anti-Discrimination Act states that 'discrimination on the ground of previous disability, or discrimination against a person in a case in which it could be, based on external symptoms, possible to presume that she or he is a person with a disability, shall be deemed to be discrimination on the ground of disability'.⁴² UK law also protects individuals with respect to past disabilities.

One of the most significant innovations within the Employment Equality Directive is the duty placed on employers to provide reasonable accommodation to enable access to work for persons with disabilities. As discussed later in this report, this provision has been implemented in a very uneven fashion across the states. Some states have omitted the concept from national law (e.g. Italy, Poland and Turkey). In many other states, the concept remains ambiguous and the legal consequences are not clear if an employer does not provide a reasonable accommodation (e.g. Greece, Hungary, Lithuania and Romania).

E. Sexual Orientation

Very few states have defined sexual orientation within anti-discrimination legislation. In Bulgaria, sexual orientation is defined under the Protection against Discrimination Act, section 1.9 Additional Provision, as 'heterosexual, homosexual or bisexual

³⁵ Section 3, Disability Equality Act 2005.

³⁶ Section 2, Social Code IX and Section 3 Disabled Equality Act.

³⁷ Section 1(1), Disability Discrimination Act 1995.

³⁸ Law 127(I)/2000.

³⁹ Chapter 1 Section 5 paragraph 4 new Discrimination Act (2008:567).

⁴⁰ Section 6(1)(a), Employment Equality Act 1998-2004.

⁴¹ Article 1(b), Act of 3 April 2003 concerning the establishment of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease, *Staatsblad* 2003, 206.

⁴² Section 2a paragraph 11 (d) of the Act No 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on Amending and Supplementing Certain Laws, as amended.

orientation'. Germany, Ireland and Sweden provide a similar definition. British legislation refers to 'a sexual orientation towards (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of the same sex and of the opposite sex'.⁴³ The 2006 German General Law on Equal Treatment adopts the term 'sexual identity' while the Federal German Constitutional Court refers to both sexual identity and sexual orientation. This is understood to reach beyond sexual orientation and also encompasses protection against discrimination for transsexual people.⁴⁴ In France and the Netherlands, the concept of sexual orientation has not been interpreted in a way that covers transsexuality and transvestism, in contrast with Denmark. Discrimination on these grounds is regarded as sex discrimination. Anti-discrimination provisions in FYR of Macedonia and Turkey do not cover sexual orientation as a protected ground.

Many of the difficulties encountered in implementing the sexual orientation provisions of the Directive relate to the breadth of any exceptions applying to employers with a religious ethos (see the section above on religion or belief). These exceptions are sensitive because some employers may be hostile to homosexuality because of religious beliefs. Another key issue relates to partners' benefits and the extent to which national law permits employers to limit work-related benefits to those employees who are married (e.g. a pension entitlement for a surviving spouse). It should also be noted that, in the majority of states, there are few or no examples of cases of discrimination on the grounds of sexual orientation being brought before the courts. Issues around confidentiality may deter some individuals. Moreover, in some states the wider political climate remains unfriendly (e.g. Poland) or openly hostile to equality for lesbian, gay and bisexual people (e.g. Lithuania or FYR of Macedonia).

F. Age

Age is generally assumed to be an objective characteristic with a natural meaning and hence it is not defined. The Swedish Discrimination Act defines age as the "length of life to date" and includes all ages, ensuring that the young and the old are evenly protected. Likewise, most states have not restricted the scope of the legislation, but the Irish Employment Equality Act 1998-2007 limits its application to 'persons above the maximum age at which a person is statutorily obliged to attend school'.⁴⁵ Similarly, in Denmark legislation was adopted in 2006 which removes protection from persons under 18 if differential treatment is stipulated in a collective agreement.⁴⁶ Moreover, the prohibition against differential treatment due to age does not apply with regard to the employment and conditions of pay and dismissal of young people under the age of 15, since their employment is not regulated by a collective agreement. In the UK, the provisions of the 2010 Equality Act which prohibit age discrimination in the provision of goods and services and the performance of public functions will apply, if and when they are implemented, only to discrimination suffered by adults over the age of 18: children under this age will not be protected by this extension of age discrimination legislation.

⁴³ Regulation 2(1), Employment Equality (Sexual Orientation) Regulations 2003, S.I. 1661.

⁴⁴ See Federal Constitutional Court (Bundesverfassungsgericht) of 6 December 2005; 1 BvL 3/03, paragraph 48 et seq.

⁴⁵ Section 6(f)(3).

⁴⁶ Act No. 31/2006.

Implementation of the age provisions of the Employment Equality Directive remains a work in progress. Article 6 of the Directive permits justification of both direct and indirect age discrimination. Most states have decided to exercise this option. As a consequence, there remains very substantial uncertainty across the states as to which forms of age discrimination will be treated as justified by national courts. In *Mangold v Helm*,⁴⁷ the Court of Justice provided an early indication that directly discriminatory practices need to be carefully scrutinised by national courts. That ruling, in conjunction with the *Kücükdeveci* case⁴⁸, will potentially greatly affect national implementation, particularly as the ECJ ruled that prohibition of discrimination on the grounds of age must be considered as a general principle of EU law to which the Directive merely gives expression. A key issue is the justification for compulsory retirement ages. National practice varies greatly in this area, ranging from states with no national compulsory retirement age (e.g. the Czech Republic) to states which permit compulsory retirement by public and private employers at a specific age (e.g. Italy). These issues are examined further in section 6(g) of this report.

G. Assumed and associated discrimination

Discrimination can sometimes occur because of an assumption about another person which may or may not be factually correct, e.g. that the person has a disability. Alternatively, a person may face discrimination because they associate with persons of a particular characteristic, e.g. a non-Roma man may be denied admission to a bar because he is with friends from the Roma community. In many countries, the application of discrimination law to such scenarios is neither stipulated nor expressly prohibited, and only future judicial interpretation will clarify this issue. This is the case for instance in Finland, Greece, Italy, Latvia, Malta, Poland, Romania, Slovenia, Spain, the UK⁴⁹ and Turkey.

Ireland provides a rare example where legislation explicitly forbids discrimination where a ground is 'imputed' to exist and discrimination due to association.⁵⁰ Croatia prohibits discrimination based on misconception⁵¹ and there is no case law on discrimination based on perception or assumption of a person's characteristic, whereas in the Czech Republic discrimination on the ground of assumed characteristics is forbidden. The Bulgarian Protection against Discrimination Act also explicitly prohibits discrimination on perceived or assumed grounds and discrimination by association.⁵² As mentioned earlier, in several states the legislation refers to 'real or assumed' race (e.g. France) or to a disability that existed in the past or which may exist in the future (e.g. the Netherlands). The Federal Disability Equality Act adopted in Austria in 2005 extends protection to relatives caring for

⁴⁷ Case C-144/04, *Mangold v. Helm*; [2005] ECR I-9981.

⁴⁸ Case C-555/07, judgment of 19 January 2010 (not yet published).

⁴⁹ However, in the United Kingdom the explanatory notes to the 2010 Equality Act make it clear that associative discrimination and discrimination on the basis of perception are intended to be covered by the Act.

⁵⁰ Section 6(1)(b), Employment Equality Act 1998-2004.

⁵¹ Article 1(3) of the Anti-Discrimination Act.

⁵² Additional Provisions, section 1.8. See also the European Court of Justice's judgment of 17 July 2008 in Case C-303/06 *Coleman v Attridge Law*, *Steve Law* [2006] OJ C237/6.

disabled persons and the same is stated in the Employment of People with Disabilities Act, which protects close relatives with caring responsibilities.

In addition, the explanatory notes to the Austrian Equal Treatment Act explicitly state that 'the principle of equal treatment is applicable irrespective of whether the grounds for the discrimination are actually present or are only assumed to exist', and this is also reflected in case law. Regarding discrimination by association, no federal Austrian law expressly deals with this question for discriminatory grounds other than disability, so it is for the courts to provide a clear interpretation. In the Flemish Framework Decree of 10 July 2008 in Belgium, the definition of direct discrimination expressly states that it is applicable in cases of discrimination based on an assumed characteristic.



Chapter 3

The definition of discrimination

The Racial Equality and Employment Equality Directives identify four forms of prohibited discrimination: direct, indirect, harassment and instructions to discriminate. An overview of Member State and candidate country anti-discrimination legislation reveals considerable progress in this area. The great majority of states have introduced legislation that expressly forbids each of these four types of discrimination. Moreover, in most cases, the definitions provided in national legislation are very similar to the definitions found in the Directives. Many states have chosen essentially to reproduce the text of the Directives on these core concepts. This section will examine the regulation of each type of discrimination across the national legal systems.

At the outset, it should be noted that although states may be described as following the definitions found in the Directives, there are often slight differences between the actual text of national legislation and that of the Directives. Given the frequent absence of case law interpreting the legislation, it is difficult to assess whether small differences in language are matters that will be resolved through purposive judicial interpretation or whether there are substantive gaps in national implementation.

A. Direct discrimination

All the countries, except Turkey,⁵³ have adopted legislation that reflects closely the definition of direct discrimination found within the Directives. There are several common elements:

- the need to demonstrate less favourable treatment;
- a requirement for a comparison with another person in a similar situation but with different characteristics (e.g. ethnic origin, religion, sexual orientation);
- the possibility to use a comparator from the past (e.g. a previous employee) or a hypothetical comparator; and
- a statement that direct discrimination cannot be justified.

These elements can be generally found in legislation in Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, France (although hypothetical comparison is not foreseen, which is in breach of the Directives), Finland, Germany, Greece, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, Poland (although the erroneous definition of the comparator limits the scope of protection), Portugal, Slovakia, Slovenia, Sweden, the United Kingdom, Croatia and FYR of Macedonia). It should be noted that this legislation does not necessarily apply to the full material scope required by the Directives and it may coexist with other legislation containing different definitions of direct discrimination. Moreover, most states have taken advantage of the opportunity provided for in Article 6 of the Employment Equality Directive to permit justification of direct discrimination on the ground of age.

In the Czech Republic, anti-discrimination provisions can be found in various ordinary laws governing employment and labour relations. Although different from the definitions proposed by Directive 2000/43/EC and Directive 2000/78/EC, the 2000 Romanian Anti-Discrimination Act provides a detailed definition, attempting to cover the whole range of actions and omissions leading

⁵³ In fact, there is no definition of direct discrimination in Turkish law.

to discrimination. The Romanian law allows justifications of direct discrimination in the fields of housing and access to services and access to goods (in breach of Directive 2000/43), if such a 'restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary'.⁵⁴ Similarly, in Bulgaria the Protection against Discrimination Act does not permit general justification for direct discrimination with respect to any grounds, while in the Netherlands direct discrimination is forbidden but not further defined in legislation. In Slovakia, the prohibition of general justification of direct discrimination is not explicit and can only be derived from interpretation.

B. Indirect discrimination

A high proportion of states have introduced a definition of indirect discrimination that generally reflects the definition adopted in the Directives. This includes Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom, Croatia and FYR of Macedonia. In Turkey, indirect discrimination is explicitly prohibited on the grounds of gender and maternity only, thus not meeting the requirements laid down in the Directives.

In the Netherlands, legislation defines indirect discrimination but this definition is very different to the definition given in the Directives. There is, however, a significant body of Dutch case law interpreting the concept of indirect discrimination in a manner similar to that required by the Directive.⁵⁵ In the Czech Republic, there are anti-discrimination provisions across a range of laws containing various definitions of indirect discrimination, which conform to the definitions given by the Directives.

The Directives anticipate a comparison between the effect of a measure on persons of a particular ethnic origin etc. and its impact on other persons. National law varies in the comparison required for establishing indirect discrimination. For example, Polish law requires the measure to be detrimental for all or a significant number of employees belonging to the particular group of persons.⁵⁶ In the United Kingdom, the definition of indirect discrimination requires evidence that the measure placed the individual complainant, as well as the group to which he or she belongs, at a disadvantage.⁵⁷

⁵⁴ Article 10, Romania / Act 324/2006 for the Amendment of Government Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination, (20 July 2006).

⁵⁵ An infringement procedure against the Netherlands was initiated in 2008, notably because Dutch legislation refers to 'distinction' rather than 'discrimination' with regard to the definitions of direct and indirect discrimination. In October 2009, the Government has announced that a draft law on 'integrated equal treatment' addressing the issues highlighted in the reasoned opinion of the Commission is expected for autumn 2010.

⁵⁶ Article 18, Labour Code.

⁵⁷ Section 19 Equality Act 2010.

C. Harassment

Harassment is defined in the Directives as unwanted conduct related to racial or ethnic origin, religion or belief, disability, age, or sexual orientation with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.⁵⁸ The majority of states have adopted definitions of harassment that appear similar to that contained in the Directives. This includes Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, the United Kingdom, Croatia and FYR of Macedonia. In Romania, harassment is defined in the 2000 Anti-Discrimination Law, in the Law on Equal Opportunities between Men and Women and in the new Criminal Code, but none of the definitions provided are in complete compliance with the definition of harassment spelled out in the Directives. In Turkey, only harassment that constitutes defamation is punishable under Criminal Law.

The Directives do not provide specific rules on how to determine whether conduct is such as to violate a person's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment. Several states have sought to clarify this in national legislation. For instance, under Slovakia's Anti-Discrimination Act harassment means conduct which results in or may result in creating an intimidating, unfriendly, shameful, humiliating, degrading or offensive environment and which has or may have the purpose or effect to violate a freedom or human dignity. In the Equal Treatment of Persons Order in Malta, harassment refers to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material that any person can be subjected to. Finland provides a wider definition as it covers the violation of physical integrity in addition to the violation of dignity and includes not only individuals but also groups.

Another area left open by the Directives is the responsibility of the employer for acts of harassment by other workers or by third parties such as customers. In many states, employers can be held liable for the actions of their workers to varying degrees. Some Member States have chosen to place a specific duty on employers to take action to prevent and redress harassment in the workplace. For example, the 2006 German General Act on Equal Treatment places employers under a legal duty to prevent discrimination occurring in the workplace. This includes a duty to protect employees from discrimination by third parties.⁵⁹ Similarly, Croatia obliges employers to protect employees' dignity against the conduct of superiors, co-workers and third persons in connection with the work performed, if this conduct is unwanted and contrary to special regulations.⁶⁰ Ireland also prohibits harassment by an employer, a colleague, a client, customer or other business contact of the employer.⁶¹ Sweden is not so explicit regarding co-workers and third parties.

⁵⁸ Article 2 (3).

⁵⁹ Section 12.4 AGG.

⁶⁰ Article 5(5) Labour Act.

⁶¹ Section 14A(1)(a) Employment Equality Act 1998-2007.

D. Instructions to discriminate

The Directives contain a provision stating that ‘an instruction to discriminate (...) shall be deemed to be discrimination.’⁶² A similar provision has been included in the national legislation of the great majority of countries, with a small number of exceptions (e.g. Turkey). Under Bulgarian and Croatian law, only intentional instruction to discriminate is regarded as discrimination. In France such a provision was introduced by Act 2008-496; however, general legal principles on complicity and liability previously could produce similar effects. For instance, unlawful discrimination was found where an estate agent refused to rent accommodation to people with surnames of ‘foreign origin’ following instructions from the owner.⁶³ UK law does not expressly regulate instructions to discriminate, though less favourable treatment “because of” a protected ground is regarded as including instruction to discriminate on protected grounds.⁶⁴

⁶² Article 2(4), Directives 2000/43 and 2000/78.

⁶³ Court of Cassation, Criminal Chamber, 7 June 2005, no. 04-87354.

⁶⁴ *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425.



Chapter 4

The reasonable accommodation duty

The Employment Equality Directive places employers under a duty to 'take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.'⁶⁵ The following states have legal provisions that approximate to the reasonable accommodation duty found within the Directive: Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Spain, Sweden, the United Kingdom, Croatia and FYR of Macedonia.⁶⁶ These vary considerably from states which provide a basic duty with little elaboration on how this should be implemented (e.g. Lithuania) or how the disproportionate burden must be assessed (e.g. Latvia, Sweden, Croatia and FYR of Macedonia), to states with more extensive guidance on its practical application (e.g. the United Kingdom). In Cyprus, the duty to adopt 'reasonable measures' is not restricted to the workplace but also covers basic rights (rights to independent living; diagnosis and prevention of disability; personal support with assistive equipment, services etc.; access to housing, buildings, streets, the environment, public means of transport, etc.; education; information and communication through special means; services enabling social and economic integration; vocational training; employment in the open market etc.; and supply of goods and services, including transport and telecommunications). However, outside the field of employment, this duty is not absolute.

The concept of reasonable accommodation duty has not been included in national legislation in Italy, Poland,⁶⁷ and Turkey⁶⁸. In Hungary, the duty of reasonable accommodation has not entirely been implemented. In France, the scope of the duty of reasonable accommodation remains incomplete as the obligation is limited to those who are already officially recognised as disabled workers, while in Bulgaria the Protection against Discrimination Act, Articles 16 and 32, makes provision for reasonable accommodation for persons with disabilities in employment and education respectively. In Romania, the 2000 Anti-Discrimination Act does not stipulate reasonable accommodation for persons with disabilities, but Act 448/2006 on the Promotion and Protection of the Rights of Persons with Disabilities, which has the same personal scope as the Anti-Discrimination Law, establishes the duty to ensure reasonable accommodation in accessing various public and private services and facilities and in labour relations.

Whilst the definition of the duty varies, it is commonly subject to the limitation that it should not create a 'disproportionate' or 'unreasonable' burden for the employer (in Austria, Belgium, Bulgaria, Cyprus, France, Germany, Ireland, Latvia, Lithuania, the

⁶⁵ Article 5, Directive 2000/78.

⁶⁶ Clear provisions regarding reasonable accommodation are introduced with the entry into force of the new Anti-Discrimination Act.

⁶⁷ The version of the new law passed by the *Sejm* in October 2010 ('Act on the Implementation of Certain Provisions of European Union in the Field of Equal Treatment', that has not yet reached the final stage of Presidential signature) does not intend to remove the gap.

⁶⁸ However, the Persons with Disabilities Act require both public and private employers to take necessary measures to eliminate or alleviate the barriers and hardship faced by disabled employees or job applicants in employment processes and to make physical adjustments. In addition, the United Nations Convention on the Rights of Persons with Disabilities, to which Turkey is a signatory, prohibits denial of reasonable accommodation as a form of discrimination. Yet, there is no indication on the concept of reasonableness or guidance on how the test should be conducted.

Netherlands, Portugal, Slovakia, Spain and Croatia). The preamble of the Directive provides an indication of the criteria to be taken into account in determining the reasonableness of a particular accommodation. Recital 21 identifies three issues to consider and these are often included in national legislation or case-law:

- the financial and other costs entailed: Bulgaria, Cyprus, Finland, France, Germany, Ireland, Malta, Spain and the United Kingdom;
- the scale and financial resources of the organisation or undertaking: Austria, Finland, Ireland, Malta, Slovakia and the United Kingdom; and
- the possibility of obtaining public funding or any other assistance: Austria, Cyprus, Finland, France, Germany, Ireland, Malta, the Netherlands, Portugal, Spain, Slovakia and the United Kingdom.

National legislation is often ambiguous about whether failure to provide reasonable accommodation is to be treated as a form of unlawful discrimination (e.g. Hungary and Latvia). In some countries there is still no case law that could lead to the conclusion that such an approach is being taken (e.g. Lithuania and Luxembourg). In Cyprus, no case has ever been tried in courts on reasonable accommodation but decisions of the equality body on this issue consider failure to provide reasonable accommodation to be discrimination. Irish case law holds that a failure to provide reasonable accommodation amounts to discrimination.⁶⁹ The courts did not however state whether it is a form of direct or indirect discrimination. In Bulgaria there is no provision relating failure to provide reasonable accommodation to bans on direct or indirect discrimination, but in several cases the courts have found that this constituted direct (rather than indirect) discrimination

In France, a failure to meet the duty constitutes unlawful discrimination, but it is not specified whether this is classified as direct or indirect discrimination. In Sweden, failure to provide reasonable accommodation is treated as direct discrimination in the fields of employment and education. In contrast, failure to provide reasonable accommodation is treated as indirect discrimination in Austria and Denmark. In Slovakia, failure to provide reasonable accommodation is regarded as a violation of the principle of equal treatment (which is broader than the prohibition of discrimination and its individual forms and encompasses also the duty to adopt measures to prevent discrimination) and it does not equate to direct or indirect discrimination. However this does not mean that, in specific situations, actions or omissions of an employer cannot at the same time also fall under definitions of the specific forms of discrimination as defined by the Slovak Anti-Discrimination Act – mainly direct or indirect discrimination or harassment. Meanwhile, in the United Kingdom failure to provide reasonable accommodation is defined as a specific form of discrimination.

⁶⁹ *A Complainant v. Bus Éireann* DEC E2003-04.



Chapter 5

The personal and material scope of national provisions

A. Personal scope

The Racial Equality Directive and Employment Equality Directive are applicable to all persons. This means that national anti-discrimination laws should apply to all persons on a Member State's territory irrespective of whether they are EU or third-country nationals. On the whole, protection against discrimination in the Member States on any of the Directives' grounds is not conditional on nationality, citizenship or residence status.⁷⁰

Recital 16 of the Racial Equality Directive states that it is important to protect all natural persons against discrimination and that Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on the grounds of the racial or ethnic origin of their members. The Employment Equality Directive does not have an equivalent recital, but there is no reason why both natural and legal persons should not be understood under the term 'persons' in this Directive as well. In most countries both natural and legal persons are protected against discrimination. Where the law does not expressly distinguish between the two, this is assumed, as for instance in Bulgaria, Greece and Latvia. Legal persons remain categorically unprotected in Swedish law,⁷¹ and in Austria the wording of the legislation implies that protection against discrimination is provided for natural persons only, while in Estonia the Equal Treatment Act refers to the rights of persons and the local legal tradition implies that only natural persons can be victims of discrimination (unless this is challenged in the national courts). In the Czech Republic, while liability applies to both legal and natural persons, only natural persons have a right to equal treatment and protection against discrimination pursuant to the Anti-Discrimination Act.

Neither Directive indicates whether it should be understood as making both natural and legal persons liable for discriminatory acts. Nor do they state who exactly should be held liable for discriminatory behaviour. This issue is discussed above in relation to harassment. The question of liability is particularly relevant in cases of discrimination in employment, as often the employer bears responsibility for the actions of his or her employees, for example for discrimination against a client or for harassment by one employee against another. For instance, in Ireland,⁷² the Netherlands⁷³ and Sweden, anti-discrimination legislation is directed

⁷⁰ In France the principle of equality is applicable to non-nationals unless the legislator can justify a difference in treatment on the basis of conditions of public interest, cf. Constitutional Council, 22 January 1990, 296 DC, R.F.D.C. no. 2 1990, obs Favoreu.

⁷¹ In Sweden the Discrimination Inquiry Commission has proposed protection for legal persons in a number of areas (but not all) covered by non-discrimination legislation (SOU 2006:22, page 332 *et al*). However, this proposal has not been finally accepted.

⁷² Section 8(1) of the Employment Equality Act 1998-2007 prohibits discrimination by employers and employment agencies. Most of the prohibitions within the legislation are aimed at the employer and no clear provision is made to enable actions against the person(s) who actually discriminated. The exceptions are section 14 of the Act, which refers to liability being imposed on a person responsible for procuring or attempting to procure discrimination, and section 10 which refers to liability being imposed on a person who displays discriminatory advertising.

⁷³ Dutch legislation in the field of employment is directed towards employers, employers' organisations, organisations of workers, employment offices, public job agencies, professional bodies, training institutions, schools, universities, etc.

at employers, and usually the person who actually acted in a discriminatory way cannot be held personally liable. In Bulgaria, the courts have interpreted the Protection against Discrimination Act as providing a basis to hold legal entities liable for discrimination by their employees even where no damages but other remedies have been sought. In contrast, in Spain liability for discrimination is personal and only the person (natural or legal) who has acted in a discriminatory way is liable under the law, rather than the employer or service provider.

It is less common to make employers liable for the actions of third parties such as tenants, clients or customers who discriminate against their employees. In Portugal, for instance, employers and providers of services can only be held liable for actions of third parties where a special duty of care is imposed by law or where a special relationship can be established, for example sub-contractors.⁷⁴ Similarly, in the Netherlands records of parliamentary debates are thought to make clear that the Dutch legislature did not intend that anti-discrimination legislation should be enforceable against a colleague or a third party, on the basis that there is no contract or relationship of authority between the parties.⁷⁵ Pursuant to Croatian anti-discrimination law, employers and service providers cannot be held liable for actions of third parties but employers are obliged to secure the dignity of their employees against the conduct of persons whom they regularly meet in connection with their work.⁷⁶ In FYR of Macedonia, liability for third party conduct would depend upon the character of the relationship and future court practice regarding this matter. Turkish criminal law does not allow for employers to be held liable for employees or third persons whereas civil law only covers liability for employees. In Romania, liability is individual; according to the case law of the national equality body, employers can be held liable for actions of their employees if there is joint responsibility, but not for actions of third parties. The national equality body has used personal liability in determining the degree of responsibility of each party.

Trade unions and other trade or professional organisations are not usually liable for the discriminatory actions of their members, except in Denmark where trade unions are liable if an employee of the trade union discriminates against a member of the trade union. However, that liability is restricted to the actions of employees only.

B. Material scope

Article 3(1) of both Directives lists the areas in which the principle of equal treatment must be upheld. Four sections are common to both Directives and therefore cover all five grounds of discrimination:

- conditions of access to employment, self-employment or an occupation, including selection criteria and recruitment;
- access to all types of vocational training and guidance, including practical work experience;
- employment and working conditions, including dismissals and pay; and
- membership of or involvement in workers' organisations, employers' organisations and professional organisations.

⁷⁴ Article 617(2) of Labour Code.

⁷⁵ Explanatory Memorandum to the Act on Equal Treatment on the ground of Age in Employment, Occupation and Vocational Training (Act on Equal Treatment on the ground of Age in Employment), Second Chamber of Parliament, 2001-2002, 28 170, nr., 3, p.19.

⁷⁶ Article 5(5) of Labour Act.

The Racial Equality Directive extends the scope of protection against discrimination on the grounds of racial or ethnic origin to social protection, including social security and healthcare; social advantages; education; and access to and the supply of goods and services that are available to the public, including housing.

The relationship with constitutional provisions is complex. In the majority of countries constitutional equality guarantees apply generally, thus theoretically covering the material scope of the Directives, at least in the public sector. However it is highly unlikely that constitutional provisions alone sufficiently transpose the Directives. Where Protocol 12 to the European Convention on Human Rights (which contains a general prohibition of discrimination by the State against an open number of groups) is applicable in national law, such as in Cyprus, Finland, the Netherlands, Spain and Croatia, the scope of national law is broad, at least in relation to the public sector (in Cyprus, Protocol 12 has general application beyond public law). In terms of concrete legislative provisions, however, most countries are far more restrictive and exhaustively list the areas to which the discrimination legislation applies.

The scope of the Directives is met in Austria, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, the United Kingdom and Croatia. In Belgium, the division of competences between the different levels of government still causes discrepancies regarding the implementation of the material scope of the Directives. In the Czech Republic the newly adopted Anti-Discrimination Act of 17 June 2009 has a quite broad scope, extending beyond the requirements of the Directives, as it covers for all grounds to the same extent work and employment relations; access to employment, self-employment and occupation; health care; education; social security and social protection; social advantages; and services including housing. In Slovakia, the prohibition of discrimination applies also to all these fields for all prohibited grounds which go beyond the list contained in the Directives (although the prohibition of discrimination in the field of housing only applies to legal persons and entrepreneurs). In anticipation of the Council Directive proposed by the European Commission,⁷⁷ the Swedish Government plans to introduce a prohibition of age discrimination in the following areas: supply of goods and services including housing, health, medical care and social services; social insurance; and public employment.

To fulfil the Directives' requirements, national anti-discrimination law must apply to the public and private sectors, including public bodies. Not all states currently meet this requirement. In FYR of Macedonia, there is no equivalent and consistent approach for the public sector. Article 5 of the Turkish Labour Act prohibiting discrimination applies to employees under a labour contract irrespective of whether they work in the public or the private sector. Some categories of workers are however excluded from the scope of the Labour Act, such as workers performing sea and air transport activities or domestic services, and civil servants who are subject to the Civil Servants Act.

⁷⁷ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final.

In the same way, in Hungary not all private actors are covered by the Equal Treatment Act of 2003. The Hungarian legislature took a unique approach among the EU Member States, in that it does not enumerate the fields falling under its scope, but instead lists the public and private entities which must respect the requirement of equal treatment in all actions falling under the scope of the Equal Treatment Act. These are mostly public bodies and include state, local and minority self-governments and public authorities (Article 4). Four groups of private actors are listed (Article 5): (i) those who offer a public contract or make a public offer; (ii) those who provide public services or sell goods; (iii) entrepreneurs, companies and other private legal entities using state support; and (iv) employers and contractors.

Equality must be guaranteed in all sectors of public and private employment and occupation, including contract work, self-employment, military service and statutory office. A number of countries fall short of this protection. Military service is not included in the scope of legislation transposing the Directives in, for instance, Latvia, Greece and Ireland, while in the Netherlands the Age Discrimination Act has applied to military service since 1 January 2008.

In Greece, Latvia,⁷⁸ Lithuania,⁷⁹ Poland, Portugal and the United Kingdom, self-employment and/or occupation are not fully covered. Maltese law does not apply to military personnel or to persons who work or perform services in a professional capacity or as contractors for others where the work or service is not regulated by a specific contract of service. With respect to persons who hold statutory office, the Maltese Employment and Industrial Relations Act 2002 only applies if the person concerned has a contract of employment. In the Netherlands the term 'liberal profession' has been used instead of self-employment but has at all times been interpreted broadly, in particular by the Equal Treatment Commission, in order to guarantee that not only doctors, architects etc. are covered, but also freelancers, sole traders, entrepreneurs, etc.

In Lithuania, a provision prohibiting discrimination with regard to membership of or involvement in employers' and employees' organisations was introduced into the Equal Treatment Act only by the latest amendments of June 2008. Likewise, the Romanian Anti-Discrimination Act does not spell out expressly the prohibition of discrimination on grounds of membership of a trade union or professional organisation; however, the national equality body and the courts have interpreted that membership of trade unions or professional organisations falls under the protected ground of 'social category' or under 'any other category' and is therefore protected by anti-discrimination legislation. A similar reasoning applies in FYR of Macedonia.

As already noted, Latvia, Lithuania and Poland have yet to fully transpose the Racial Equality Directive beyond the employment sphere. In Latvia however, the Social Security Act of 1 December 2005 prohibits differential treatment on the grounds of race (as well as the other grounds under the Directives, possibly including sexual orientation under 'other circumstances') in the field of

⁷⁸ Provisions dealing with access to economic activity and self-employment were adopted in first reading on 10 December 2009 in the Parliament.

⁷⁹ Self-employment is not explicitly mentioned in the Equal Treatment Act and legislation regulating particular professions such as attorney, notary, etc., does not provide for anti-discrimination provisions. Further interpretation of the Equal Treatment Act by courts or the Equal Opportunities Ombudsman would be required.

social protection within the public sphere. The law similarly prohibits discrimination on grounds of race as far as social security and social services provided by the state are concerned. After the entry into force of amendments to the Consumer Protection Act on 23 July 2008, discrimination in access to and supply of goods and services based on a person's gender, race or ethnic origin is prohibited. As the law does not distinguish between goods and services available to the public and those available privately, it should apply to both these categories. Lithuanian law does not explicitly cover social protection, social security, social advantages and healthcare. The general duty to implement equal opportunities enshrined in the Equal Treatment Act could be interpreted to mean that social security and healthcare should also be covered when the principle of non-discrimination is applied. This particular issue has not been addressed in court yet. In Poland the provisions which exist outside the employment field do not include important elements of the Directives such as definitions of direct and indirect discrimination, and the scope of the provisions on goods and services and social advantages are uncertain.

Article 3(3) of the Employment Equality Directive provides that the Directive's scope does not extend to 'payments of any kind made by state schemes or similar, including state social security or social protection schemes'. This exception is not found in the Racial Equality Directive, which in contrast lists 'social protection' in its scope (Article 3(1)(e)). Some Member States have reproduced Article 3(3) of the Employment Equality Directive in their anti-discrimination legislation, e.g. Cyprus, Finland and Greece. However, in all of these countries it is likely that other laws would protect against discrimination in social security and healthcare. Relying on Article 3(3), the Italian decree transposing Directive 2000/78 provides that its content shall be without prejudice to the provisions already in force relating to social security and social protection, but the Immigration Act 1998 also protects against discrimination on the grounds of religion and nationality in this area.

The term 'social advantages' is mostly left undefined in national legislation. In the Netherlands it is observed by the Government in the Explanatory Memorandum to the General Equal Treatment Act that this notion must be interpreted in the light of ECJ case law rendered in the context of Regulation 1612/68 on the free movement of workers.⁸⁰ In the Dutch Government's view, the notion of social advantages refers to advantages of an economic and cultural kind which may be granted by both private and public entities. These may include student grants, public transport reductions and reductions for cultural or other events. Advantages offered by private entities include, for example, reductions for entry to the cinema and theatre.

In the majority of states, issues arise in relation to discrimination in the education of children from racial and ethnic minorities. Of particular concern is the segregation of Roma children, which constitutes one of the most widespread manifestations of discrimination against Roma. There are Roma in all European Union countries with the apparent exception of Luxembourg and Malta. In Bulgaria, the Czech Republic, Hungary, Latvia, Poland, Romania, Slovakia and Croatia, a disproportionate number of Roma

⁸⁰ See for example ECJ Case C-261/83 *Castelli* of 12 July 1984 and Case C-249/83 *Hoecx* of 27 March 1985, as referred to in the Dutch Explanatory Memorandum to the EC Implementation Act, Second Chamber of Parliament 2002-2003, 28 770, nr. 3, p. 15.

children attend remedial 'special' schools for children with intellectual disabilities and are thereby segregated from the mainstream school system and receive an inferior level of education which affects their life chances.

Segregation of Roma also occurs in some mainstream schools by virtue of the existence of segregated classes. This is the case in Bulgaria, the Czech Republic, Finland, Greece, Hungary, Latvia, Poland, Romania, Slovakia, Slovenia and Croatia. In Poland there were a number of segregated 'Romani classes' or 'remedial classes' which followed a special curriculum. In 2008, the Minister of Education decided to stop the creation of new Romani classes and to abolish the existing Romani classes within a period of two years (2009-2010).⁸¹ As a point of fact, no new class has been created and existing Romani classes are supposed to be abolished. Romani children beginning their education are placed into integrated classes. In Romania, a 2008 study conducted by the NGO Romani CRISS monitoring the implementation of measures against segregation of Roma pupils in Romanian schools found cases of segregation of Roma pupils in 67 per cent of the schools monitored (90 schools), either at school or at classroom level.⁸² In 2008, there were 68 Roma-only classes in Croatia. In Slovakia 'zero-grade' classes have been established for children who are not expected to be able to absorb the standard curriculum as a result of the social and linguistic environment they come from. Although formulated neutrally, these measures have in practice been aimed more specifically at Roma children and Roma children are also their almost exclusive beneficiaries. In Finland, Roma are streamed into special education classes more often than other pupils. France, Slovakia and the United Kingdom have legislation expressly prohibiting segregation in schools between persons of different racial or ethnic groups but concerns have been expressed by various stakeholders about *de facto* segregation arising from residence patterns.

There are only a few instances where segregated classes have been challenged under national legal systems, for instance in Bulgaria, Denmark, Finland and Greece. In Finland there has been one case where *de facto* segregation of immigrant children at school was successfully challenged.⁸³ In Greece intervention of the Ombudsman was necessary to ensure that the public authorities in the Peloponnese provided temporary classrooms for Roma children who had been excluded from a school on the basis that the building facilities were insufficient. In 2003, 57 Croatian citizens of Roma origin lodged a complaint arguing they had been segregated at primary school on the grounds of their racial or ethnic origin.⁸⁴ In Denmark, the municipality of Elsinore set up segregated classes for Roma children from 2002. The official explanation given was to ensure that pupils would show up at school

⁸¹ See minutes from the 4th meeting of the 'Team on Roma issues' at: http://www.mswia.gov.pl/portal/pl/473/Zespol_do_Spraw_Romskich_Komisji_Wspolnej_Rzadu_i_Mniejszosci_Narodowych_i_Etnic.html.

⁸² Laura Surdu, Romani CRISS, with the support of UNICEF, *Monitorizarea aplicarii masurilor impotriva segregarii scolare in Romania* [Monitoring the implementation of measures against school segregation in Romania]. The report used a sample of 134 schools from 9 counties (Alba, Botosani, Brasov, Dolj, Galati, Hunedoara, Iasi, Neamt and Salaj), as well as from Bucharest.

⁸³ In Finland, segregation did not aim at Roma children in particular.

⁸⁴ ECtHR, *Oršuš and Others v. Croatia* (n° 15766/03), Chamber Judgment of 16 March 2010. The Grand Chamber held that there had been a difference in treatment based on ethnic origin and that, such separations, resulting from a lack of command of the Croatian language, had not been objectively justified, appropriate and necessary.

in the morning. This was not considered to be an objective justification by the Council of Europe Commissioner for Human Rights⁸⁵ and the Danish Institute for Human Rights' Complaints Committee for Ethnic Equal Treatment,⁸⁶ which consequently stated that the segregation of Roma children was not in accordance with the law. In 2006 the municipality thus decided to cease the Roma classes and allow the children back into ordinary classes in state schools in Elsinore.

In many states including Belgium, Cyprus, Finland, Lithuania, Poland, Portugal and Croatia, school absenteeism and disproportionately high drop-out rates are serious issues among the Roma, Sinti and Traveller communities. In Lithuania, a 2008 report on Roma education stressed that most Roma children (69 per cent) did not attend either pre-school establishments or pre-school groups; and participation in after-school activities is uncommon among Roma. According to the existing data in the school year 2002/2003 approximately one third of Roma children have never been involved in any form of education.⁸⁷ In FYR of Macedonia, the Roma population has the lowest level of educational achievement with 39 per cent of Roma not attending primary school and only 17.4 per cent enrolled in secondary education.⁸⁸

In a large number of Member States, residence patterns also lead to a high concentration of Roma children (e.g. Cyprus, Hungary, Romania, and Slovakia), or children of particular ethnic minorities (e.g. France, the Netherlands, and the United Kingdom⁸⁹) in certain schools, resulting in so-called 'ghetto schools'. These schools follow the same curriculum but the quality of education and the physical conditions of the buildings is often inferior. Some states are considering making attempts to try to remedy this form of *de facto* segregation. In the Netherlands, equal treatment legislation has been used to respond to the desire of many school boards or local governments to institute plans to ensure a spread of children from different cultural backgrounds across all schools through the use of housing and education policies to prevent the emergence of 'black or ghetto schools'.

There have been several attempts by governments to address the segregation of Roma pupils.⁹⁰ In Hungary positive action initiatives are underway in education to integrate Roma through the integration of socially disadvantaged pupils and students. In Romania, the Ministry of Education adopted Order no. 1540/2007 on Banning School Segregation of Roma Children and Approving the Methodology for Preventing and Eliminating School Segregation of Roma Children. The Order is intended to prevent, ban and eliminate segregation and includes sanctions for those who do not observe its provisions. The FYR of Macedonia strategy for the Roma population sets out education as one of the Government's priorities.

⁸⁵ Final report by Mr. Alvaro Gil/Robles, 15 February 2005, Council of Europe.

⁸⁶ Decisions of 5 December 2005, 730.7.

⁸⁷ National Programme for Roma. <http://www.vlada.hr/nacionalniprogramromi/content/view/21/36/lang.english/>.

⁸⁸ http://www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf.

⁸⁹ Concerns persist as to the concentration of ethnic minority students in particular schools, which reflect wider issues of divided communities and social segregation. State schools in particular parts of England, in particular the East End of London and some northern cities such as Bradford, often contain high numbers of black and Asian pupils, with some schools also being overwhelmingly Muslim in student composition.

⁹⁰ For a discussion of some of these measures, see the section on positive action measures.

The Racial Equality Directive prohibits discrimination concerning access to and supply of goods and services, including housing, that are available to the public. The boundaries of this prohibition generated debate in many countries, and most states do indeed restrict protection to publicly available goods and services. Exceptions include Bulgaria, Cyprus, France, Italy, Lithuania,⁹¹ Luxembourg,⁹² Malta, Romania, Slovenia, Spain and Croatia, where legislation does not distinguish between goods and services available to the public and available privately and it is thus presumed to apply to both. Under current legislation, there are no specific provisions forbidding discrimination concerning the supply of goods and services available to the public in FYR of Macedonia.⁹³ A few legislatures have provided definitions to delineate the circumstances in which discrimination is prohibited. Swedish law prohibits discrimination in goods and services, including housing, which are professionally provided, and thus the law does not apply to private transactions. There is some concern over the exception from the material scope of the provision of goods and services under German law for all transactions concerning a special relation of trust and proximity between the parties or their families, including the letting of flats.

The Finnish Non-Discrimination Act covers the 'supply of or access to housing and movable and immovable property and services on offer or available to the general public other than with respect to relationships between private individuals.' Thus for example banking and insurance services, transportation services, repair services, and the selling and hiring of premises for business are covered. Significantly, the *travaux préparatoires* provide that the powers of the European Community and the basis of the Directives have to be taken into account when interpreting this provision. Legislation for aspects falling under the jurisdiction of the Åland Islands prohibits discrimination in the 'professional' (not strictly private) provision of goods and services, including housing. Portuguese law provides that private associations have the right to reserve goods and services only for their members.

As with education, discrimination against Roma in the field of housing is a serious issue most states are facing. Roma and travellers usually live in areas at the outskirts of cities, in settlements without minimum standards of living or on parking spots considered illicit by the authorities in countries such as Belgium, Bulgaria, Cyprus, the Czech Republic, France, Poland, Portugal, Romania, Slovakia, Croatia and FYR of Macedonia. In Greece, several complaints were brought to the attention of the Ombudsman and the Council of Europe European Committee of Social Rights. Unfortunately, little data is available at the national level regarding the Roma housing situation.

⁹¹ Note that religious communities or associations, as well as associations founded by these religious communities or their members, are not obliged to follow the Equal Treatment Act while providing goods and services, when the purpose of this provision is of religious character.

⁹² Although in general no difference is being made between goods and services available to the public and those offered by private associations, there is a special clause applicable to associations. Article 6 of the General Discrimination Act of 28 November 2006 deems any provision to be void, that is included in a contract, a convention or internal regulation of a company or of rules of private associations, of bodies representing independent professions and organisations of workers and employers, and that is contrary to the principle of equal treatment.

⁹³ The new Anti-Discrimination Act (due to enter in force in 2010 and to be implemented in 2011) provides for the prohibition of discrimination concerning the supply of goods and services available to the public but this is only enumerated without any further explanation.

Many states have maintained the diverging scope of the two Directives, only expressly outlawing discrimination in social protection, social advantages, education and goods and services available to the public in relation to racial and ethnic discrimination. However, a number of states provide the same protection also for other grounds of discrimination, if not all grounds, and thus go beyond the requirements of the Directives. The following illustrates areas in which countries exceed EC law provisions:

- Whereas in Austrian federal legislation the distinction between the scopes of the two Directives is maintained, in some provincial legislation it is levelled up.
- In Bulgaria the Protection against Discrimination Act explicitly applies universally to the exercise of all rights and freedoms deriving from law, implicitly including in full any particular field such as any sector of employment and occupation, and all the other fields mentioned under the Racial Equality Directive.⁹⁴ In respect of its universal material scope, a number of decisions both by the courts and by the equality body expressly recognise that the Act provides comprehensive, total protection.
- Denmark extends the prohibition of discrimination outside employment to religion or belief and sexual orientation.
- The Finnish Non-Discrimination Act prohibits discrimination in access to training/education on a wide variety of grounds, including age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation and 'other personal characteristics'.⁹⁵
- In France the general principle of equality in public services guarantees equal treatment in social protection and education for all grounds. Also, all grounds are protected in the provision of goods and services, including housing.
- Hungarian law has practically unlimited material scope, treating all grounds of discrimination equally.
- The Irish Employment Equality Act 1998-2007 and Equal Status Act 2000-2004 both prohibit discrimination on nine grounds: marital status, family status, sexual orientation, religious belief, age, disability, gender, race (including nationality and ethnic origin) and membership of the Traveller community (Equality Act 2004).
- The scope of the Italian Anti-Discrimination Decrees partially corresponds with other pre-existing legislation still in force, primarily the Immigration Act of 1998. This Act offers protection that mostly overlaps with that of the Decrees, which cover all the fields specified in the two Directives.
- In Latvia, differential treatment on the grounds of race, colour, gender, age, disability, health condition, religious, political or other conviction, national or social origin, property or family status or other circumstances (sexual orientation as a prohibited ground is not expressly listed) is covered in the field of social protection within the public sphere, and social security and social services provided by the state.
- In Slovakian law, the right to health care is guaranteed equally to every person irrespective of sex, religion or belief, race, affiliation with nationality or ethnic group, disability, age, sexual orientation, marital status and family status, colour of

⁹⁴ Protection against Discrimination Act, Article 6.

⁹⁵ The Act has a limiting clause, however: section 3 provides that the Act does not apply to the aims or content of education or the education system. According to the *travaux préparatoires*, this takes into account Article 149(1) of the EC Treaty (presently Article 165(1) of the TFEU), which states, *inter alia*, that the Community shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems.

skin, language, political or other opinion, national or social origin, property, lineage/gender,⁹⁶ trade union activities or other status.⁹⁷ The Anti-Discrimination Act prohibits discrimination in housing on the same grounds except for trade union activities. Discrimination in the field of public procurement is also unlawful.

- In Slovenia, protection is enjoyed with regard to all of the Directives' grounds and other grounds against discrimination in the fields of social protection, social advantages, education and goods and services.
- Spanish law additionally prohibits discrimination in social advantages on the grounds of religion or belief, disability and sexual orientation.
- In Sweden, discrimination is prohibited in social security and healthcare, including social services, state grants for education, social insurance and related benefit systems on the grounds of ethnic origin, religion or belief, disability and sexual orientation. The prohibition on discrimination in goods, services and housing applies to all the above-mentioned grounds as well, while age is again exempted from the prohibition.
- Romanian anti-discrimination legislation applies to a large number of criteria going beyond those provided by the Directives, and the scope of the Anti-Discrimination Law is applicable to areas beyond those spelled out in the Directives.
- In the United Kingdom, discrimination on the grounds of race, national or ethnic origin, nationality and colour, disability, sexual orientation and religion or belief (with some exceptions) are prohibited in all forms and levels of education, in the provision of goods and services, and in the performance of public functions by public authorities (believed to cover social protection, including healthcare and social security). Northern Ireland, but not Great Britain, has broad prohibitions against discrimination on grounds of political opinion.
- In Croatia, the Anti-Discrimination Act applies to housing in general without any exceptions and covers racial or ethnic origin, religion or belief, age, disability and sexual orientation.

⁹⁶ The Slovak word "*rod*" can be translated as either lineage or gender.

⁹⁷ Section 2 paragraph 1 of the Anti-Discrimination Act.



Chapter 6

Exceptions to the principle of equal treatment and positive action

The Directives are based on a dichotomy between direct discrimination, which cannot be justified, and indirect discrimination, which is open to objective justification. Age discrimination is the only exception to this rule: here, direct discrimination can be justified. Most countries have complied with this approach, although there are some states where it may be argued that national law continues to permit the justification of direct discrimination (e.g. Poland or Romania). This does not appear to be compatible with the requirements of the Directives.

Whilst the Directives are based on the principle that direct discrimination cannot be justified, this is balanced by the inclusion of some specific exceptions. Some of these apply to all grounds of discrimination (e.g. genuine occupational requirements), whereas some are ground-specific (e.g. employers with a religious ethos). This section will examine the implementation of each of these exceptions.

The Directives also permit positive action to be taken in certain circumstances. This is not an exception to the principle of equal treatment. On the contrary, these are measures which are necessary to ensure 'full equality in practice'. Both the exceptions and positive action are optional elements for national law and practice. States are not required to include any or all of the possible exceptions, nor are they obliged to permit positive action.

A. Genuine and determining occupational requirements

Article 4 of the Racial Equality Directive and Article 4(1) of the Employment Equality Directive allow Member States to 'provide that a difference of treatment which is based on a characteristic related to [racial or ethnic origin, etc.] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. The majority of states – Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom, Croatia and FYR of Macedonia – have chosen to include such an exception within their national legislation and this applies to many or all discrimination grounds. In some cases, the precise wording of national legislation varies from that found within the Directives (e.g. Italy and Romania). This creates the risk that the exception is wider than what is permitted, but this will depend on subsequent interpretation by national courts.

The Netherlands specifies that only *outer racial appearances* may constitute a genuine occupational requirement.⁹⁸ This means that 'race' *per se* is not regarded as a permissible ground for a given distinction; only physical differences (skin colour, hair type, etc.) may form a basis for a distinction, to the exclusion of sociological differences.

⁹⁸ Article 2(4)(b) General Equal Treatment Act, as inserted by the 2004 EC Implementation Act.

B. Employers with an ethos based on religion or belief

Under Article 4(2) of the Employment Equality Directive, Member States can maintain national legislation or practices which allow churches and other public or private organisations whose ethos is based on religion or belief to treat persons differently on the basis of their religion or belief. Such different treatment does not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This exception only allows for different treatment on the grounds of religion or belief, and cannot be used to justify discrimination on another ground, for example sexual orientation.

At the outset, it is important to distinguish between national legislation that does not apply to employment within religious organisations and national legislation which does apply, but provides certain exceptions.

When implementing the Directive, not all Member States chose to include the Article 4(2) exception: such was the case of France, Portugal, Romania, and Sweden. Turkey does not provide an exception for employers with an ethos based on religion or belief. The Anti-Discrimination Law in Romania does not include specific provisions on an exemption for employers with an ethos based on religion or belief to comply with the Directive either, but the provisions of Article 9 on determining occupational requirements which are recognised as exemptions under a clear legitimacy and adequacy test can be interpreted to allow ethos or religion-based exceptions. In contrast, the following states have adopted provisions in national law which seek to rely on Article 4(2): Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovakia, Slovenia, the United Kingdom, Croatia and FYR of Macedonia.

There are concerns in several states that the exceptions based on Article 4(2) are too wide (e.g. Greece, Ireland, Italy and Croatia). On the contrary, in Bulgaria there is an inconsistency in the wording between the Directive and the Protection against Discrimination Act, as rather than define the occupational requirement as 'genuine, legitimate and justified', the Act terms it 'genuine and determining', making it arguably stricter than under the Directive. In Ireland, the Employment Equality Act does not refer to the term 'legitimate' or 'proportionate', as required by the Directive.

C. Armed forces and other specific occupations

Article 3(4) of the Employment Equality Directive permits Member States to exclude the armed forces from the scope of anti-discrimination legislation in respect of the grounds of disability and age. A few Member States have included an express exemption for the armed forces in relation to both age and disability: France, Greece, Ireland, Italy, Slovakia and the United Kingdom. Others have simply maintained age and capability requirements in their regulations on the armed forces without expressly declaring an exemption from the equal treatment principle, e.g. Bulgaria, Portugal, Romania and Spain. Military service requires candidates not to be older than a certain fixed age in, for instance, Slovenia and FYR of Macedonia. Professional soldiers must retire by the

age of 60 in Poland. The exception regarding armed forces has not been adopted in Finland, Hungary, Lithuania and Luxembourg. In several states, the exceptions seem to be wider than provided for in Article 3(4). For example, Greek and Irish law provides exemptions on the basis of age in respect of the police, the prison service or any emergency service.⁹⁹

D. Nationality discrimination

Article 3(2) of both Directives provides that ‘the Directive does not cover difference of treatment based on nationality ...’ Nevertheless, in several Member States nationality is a prohibited ground of discrimination, including Belgium, Bulgaria, Estonia, the Netherlands, Portugal, Romania and Spain. A number of Member States have express exclusions from the scope of their implementing legislation which apply to discrimination based on nationality: Greece, Italy, Luxembourg and Malta.

E. Family benefits

Implementation of the Directives comes at a time when an increasing number of states are allowing same-sex couples to marry or to register partnerships and to benefit from the same benefits as married couples. Under the Employment Equality Directive, it would at first sight appear that any work-related benefits that are made available to opposite-sex couples should always be available to same-sex couples, as otherwise it would constitute discrimination on the ground of sexual orientation. However, Recital 22 of the Employment Equality Directive states that ‘this Directive is without prejudice to national laws on marital status and the benefits dependent thereon.’

It is necessary to distinguish between a number of different situations that can arise here. First, there are situations where employment-related benefits are limited to those who are married. In the Netherlands, Belgium and Spain, same-sex couples can get married, so here limiting benefits to married couples does not result in discrimination on the grounds of sexual orientation. In other states, such as the United Kingdom, national legislation on the recognition of same-sex partnerships has had the impact of requiring marital benefits to be extended to registered partners. This is not, though, an automatic consequence of same-sex partnership legislation. In 2006, the German Constitutional Court ruled that it was lawful to restrict supplementary payments to married civil servants and to exclude those in (same-sex) registered partnerships.¹⁰⁰ The compatibility of such practices with the Directive was tested in a preliminary reference case judged on 1 April 2008 by the European Court of Justice in *Maruko*.¹⁰¹ Consequently, the German Constitutional Court has clarified that both same sex couples living in a life partnership and married spouses have to be treated equally with regard to social benefits, thereby overruling the previous case law.¹⁰²

⁹⁹ Section 37, Employment Equality Act 1998-2004.

¹⁰⁰ BVerwG, 2 C 43.04, 26 January 2006.

¹⁰¹ Case C-267/06, *Maruko*, [2008] ECR I-1757.

¹⁰² Federal German Constitutional Court (*Bundesverfassungsgericht*), 7 July 2009, 1 BvR 1164/07.

There remain many states where restricting work-related benefits to married employees is likely to be regarded as lawful. In some states (Ireland, Italy and Austria), this is made clear in legislation or in guidance accompanying legislation. In other states, the issue has not been expressly addressed in national legislation, but it is the view of the national reporter that courts would interpret the law as permitting benefits to be officially restricted to married employees (e.g. Greece, Latvia, Lithuania, Poland and FYR of Macedonia).

F. Health and safety

With regard to disabled persons, Article 7(2) of Directive 2000/78 allows Member States to maintain or adopt provisions on the protection of health and safety at work. Some national legislators have interpreted this provision as permitting health and safety exceptions to non-discrimination on the ground of disability, e.g. Cyprus, Greece, Ireland, Luxembourg, the Netherlands and Croatia. In Ireland, for instance, if a person has a disability that under the given circumstances could cause harm to that person or to others, treating that person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination.¹⁰³ In FYR of Macedonia, the new Anti-Discrimination Act sets out three exceptions regarding pregnant women or mothers, the educational needs of people with disabilities and more generally special protection of people with disabilities. In Bulgaria, there are no exceptions for health and safety related to any of the protected grounds, including disability, under the Protection against Discrimination Act; however, under the Healthy and Safe Work Conditions Act, employers have a duty to only assign to their employees tasks that are compatible with their capabilities¹⁰⁴ in view of the specific dangers for employees with a reduced work capability,¹⁰⁵ and a number of other laws and secondary legislation governing specific fields, such as transportation (including aviation) and other risk-intensive occupations, provide health requirements for access to employment in those fields. Similarly, the Romanian Anti-Discrimination Act does not provide specific exceptions in relation to disability in the context of health and safety provisions of the Directive; however, the general exception of objective and justified limitation, allowed by Article 9 of the Anti-Discrimination Act, could be applicable.

G. Exceptions related to discrimination on the ground of age¹⁰⁶

The Employment Equality Directive permits national law to include a range of exceptions in relation to both direct and indirect age discrimination. Article 6(1) states: 'Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that

¹⁰³ Section 4(4) Equal Status Act 2000-2004.

¹⁰⁴ Article 16 (1.2a).

¹⁰⁵ Article 16 (1.3).

¹⁰⁶ See further: C O'Cinneide, *Age Discrimination and European Law*, available at: http://www.non-Discrimination.net/content/media/Age%20discrimination%20and%20European%20Law_en.pdf. Some of the findings of this study are reproduced in this section.

aim are appropriate and necessary.' It then lists examples of differences which could be allowed, including the fixing of minimum conditions of age, professional experience or seniority for access to employment.

Several Member States have simply inserted the text of Article 6 into national law, including Austria, Cyprus, Greece, Malta, Portugal and Slovakia. Meanwhile, Finland, France, Germany, Ireland, Italy, Luxembourg, Romania, Slovenia and the United Kingdom have provisions that resemble all or part of Article 6. Age does not explicitly appear as a protected ground in Turkey.

Article 6(1)(b) of the Employment Equality Directive expressly allows laws which seek to promote the vocational integration or protection of young people, older workers and persons with caring responsibilities. Such laws are very common. Almost every state has some legislation which aims to protect young employees. Minimum and maximum age requirements, in particular in access to employment, seem to be widely permitted. These can be described as direct age requirements, whereas a required number of years of experience constitutes an indirect age requirement. The Czech Republic has examples of both direct age requirements (minimum age requirements for employment and self-employed activity and maximum age limits set for certain professions) and indirect age requirements (conditions of pay dependent on years of experience, requirement of a certain education and a minimum period of training for entrance to professions).

A key issue relating to the age provisions of the Employment Equality Directive is retirement. In principle, compelling employees to leave work because they have reached a certain age is direct age discrimination which will require objective justification. Meanwhile, recital 14 indicates that retirement ages may be regarded as justified age discrimination. It states that 'this Directive shall be without prejudice to national provisions laying down retirement ages'. National law and practice varies greatly in this area.

At the outset, it is important to distinguish between the age at which people become entitled to receive pensions (pensionable age) and the age at which they are required to cease employment (retirement age). Sometimes these are linked in national law. In Malta protection against unfair dismissal is lost at retirement age and in Hungary such protection is reduced. In Latvia, the Constitutional Court has held that it was not disproportionate to require civil servants to retire at pensionable age.¹⁰⁷

The approach in national law to retirement age can be loosely grouped into three categories. First, there are Member States where national law does not impose any compulsory retirement age, nor does it remove protection from dismissal for workers after a certain age. In general, this includes the Czech Republic, Poland and Slovakia. Retirement ages are not specified in national legislation in Denmark or Germany, but these are commonly found in collective agreements.

In a second group of states, retirement ages are specified for public sector employees. The precise age varies: Belgium (65), Cyprus (63 – being phased in), Hungary (70), Portugal (70), and Spain (65). In France, the retirement age specified for employees of the

¹⁰⁷ Case 2003-12-01, decision of 18 December 2003.

public sector (65) can be subject to derogation. In Bulgaria, in some sectors, such as the professional army¹⁰⁸ and the police,¹⁰⁹ the law imposes age limits after which people, both women and men, can no longer remain in service, although they are not prohibited from finding employment in other sectors and still collecting their pensions.

Finally, there are states where national law permits the compulsory retirement of employees, whether in the public or private sector, because they have reached a certain age: Finland (68), Italy (65), Luxembourg (68), Romania (65), Sweden (67), the United Kingdom (65), Croatia (65) and FYR of Macedonia (64).¹¹⁰ In Ireland, an employee may be dismissed after he or she has reached the 'normal retiring age' for that position. The general legislative rule in Bulgaria is that workers may be dismissed on the ground of age once they reach the applicable pensionable ages, which vary based on the particular number of years in service; however, this does not affect any other rights to labour protection, including protection against unfair dismissal, which workers retain as long as they are employed. In Romania, the state-imposed retirement age is not mandatory as persons of pensionable age who want to carry on their activities can do so if their employers agree.

In transposing the Directives there seems to have been little discussion in some Member States as to the legality of certain existing provisions and practices. An exception is the Netherlands, where every government department was obliged to make a report giving an inventory of age criteria in its legislation in order to review the legitimacy of such distinctions. The compatibility of retirement ages with Directive 2000/78 has been partially clarified by the Court of Justice, most notably in its decisions in Cases C-87/06 *Pascual García* [2006] OJ C121/2, C-411/05 *Palacios de la Villa* [2007] ECR I-8531 and C-488/05 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569.

H. Public security, public order, criminal offences, protection of health, and protection of the rights and freedoms of others

Article 2(5) of the Employment Equality Directive states that 'This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.' Article 2(5) is reproduced in legislation in Cyprus, Greece and Malta, and in Italy it is largely incorporated.

United Kingdom anti-discrimination legislation typically includes an exception for acts done for the purpose of safeguarding national security or protecting public safety or public order which are justified by that purpose. In Portugal, even though the

¹⁰⁸ Defence and Armed Forces of the Republic of Bulgaria Act, Article 127 (1). For soldiers, the limit is 49 years; that limit is raised for each higher rank, with 60 years as the limit for the highest ranking officers (ibid.).

¹⁰⁹ Ministry of Interior Act, Article 245 (1). The limit is 60 years.

¹¹⁰ The retirement age is 65 for men and 62 for women.

laws implementing the Directives do not include any specific exceptions concerning public security, these exceptions may be considered implicit.

I. Other exceptions

In some states, national legislation includes exceptions which are not expressly specified in the Directives. Some of these may be incompatible with the Directives, but it is difficult to be certain in advance of case law testing their scope. For example, in Lithuania, the Equal Treatment Act provides exceptions that relate to knowledge of the state language, participation in political activities and enjoyment of different rights on the basis of citizenship. The Anti-Discrimination Act in Croatia contains quite a controversial exception regarding regulation of 'the rights and obligations arising from family relations when it is stipulated by the law, particularly with the aim to protect the rights and interests of children, which must be justified by a legitimate aim, protection of public morality and favouring marriage in line with the Family Act provision.' In FYR of Macedonia, the new Anti-Discrimination Act provides three exceptions regarding measures aiming at stimulating employment, protecting the distinguishing characteristics of identity of ethnic, religious and linguistic minorities, and favouring persons and groups in a disadvantaged position. The Irish Equal Status Act also contains a number of exceptions and exemptions to the non-discrimination rule that could be problematic with regard to the Directives.

J. Positive action

Article 5 of Directive 2000/43 and Article 7(1) of Directive 2000/78 permit Member States to maintain or adopt specific measures to prevent or compensate for disadvantages linked to any of the grounds covered, with a view to ensuring full equality in practice. The following states have introduced positive action measures: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom, Croatia and FYR of Macedonia.

The scope for positive action is often a matter clarified through case law. A significant case in Sweden concerned Uppsala University's practice of reserving 10 per cent of places on their law programme for applicants whose parents were both born outside Sweden. This was designed to promote pluralism within the law school. Two students who were denied places but had better entry qualifications than some of the students admitted to the reserved places successfully challenged this practice. The Supreme Court held that this was not permissible under Swedish legislation, without it being necessary to consider the possible application of the Directives. In Croatia, the Constitutional Law on Rights of Ethnic Minorities¹¹¹ provides for positive action for proportionate representation of members of ethnic minorities in state administration, judiciary and bodies and administrations

¹¹¹ *Ustavni zakon o pravima nacionalnih manjina*, Official Gazette 155/02.

of local authorities and the Judiciary Act¹¹² provides for positive measures with respect to ethnic origin, for instance regarding the nomination of judges. Those provisions were challenged before the Constitutional Court as discriminatory. The Constitutional Court¹¹³ held that such an advantage constitutes special positive measures intending to favour a certain group with the aim to eliminate factual inequality and differentiation of those persons based on their characteristics without being automatic and unconditional. It concluded that such measures were not discriminatory as long as they were justified, permitted and proportionate.

A number of states have introduced legal duties to promote equality. In some cases, there are broad obligations to advance equality in national constitutions (e.g. Greece (Article 116(2)) or Spain (Article 14)). Other states have included more detailed obligations in national legislation. In Bulgaria, the Protection against Discrimination Act places a duty on all authorities to take measures whenever necessary to equalise opportunities for disadvantaged groups and to guarantee participation by ethnic minorities in education to accomplish the objectives of the Act.¹¹⁴ The Act requires authorities to take such measures as a priority for the benefit of victims of multiple discrimination.¹¹⁵

In Finland, the Non-Discrimination Act compels all public authorities to foster equality, including by drawing up plans on ethnic equality. In the United Kingdom, national legislation includes detailed obligations for public authorities to pay 'due regard' to the need to promote equality on the grounds of race, disability and gender. Swedish law obliges employers to take measures designed to ensure full equality with regard to ethnic background.

Disability is the ground for which there are probably most positive action measures already in place. These can be found in the great majority of countries. There is a quota system for the employment of disabled persons in Austria, Belgium (mostly public sector only), Bulgaria, Cyprus (only in the public sector), the Czech Republic, France, Germany, Greece, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, Spain, Croatia and Turkey. However, alternatives to employing disabled persons such as paying a fee or tax are almost always offered.

There are also many examples of positive action for ethnic minorities, in particular the Roma. Bulgaria, the Czech Republic, Hungary, Romania and Slovakia are amongst a group of nine states involved in the Roma Decade of Social Inclusion, which requires their governments to draw up and implement action plans over the ten-year period, until 2015.¹¹⁶

¹¹² Article 78(7) and (8), *Zakon o sudovima*, Official Gazette 150/2005, 16/2007 and 113/08.

¹¹³ Constitutional Court decisions number U-I-2767/2007, 31 March 2009 and number U-I-402/2003 and U-I-2812/2007, 30 April 2008.

¹¹⁴ Article 11(1).

¹¹⁵ Article 11(2).

¹¹⁶ <http://www.romadecade.org>.



Chapter 7

Remedies and enforcement

A. Judicial and administrative procedures

Article 7(1) of Directive 2000/43 and Article 9(1) of Directive 2000/78 provide that 'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under [these Directives] are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.' In no state are discrimination disputes resolved purely in the courts. The vast majority of states combine judicial proceedings – which could be civil, criminal, labour and/or administrative – with non-judicial proceedings. Mediation or conciliation proceedings may be available as a mandatory part of the court proceedings, as in France, Portugal and Spain, or separately, as for example in, Hungary, Slovakia, Croatia and FYR of Macedonia.¹¹⁷ The Romanian Mediation Act, as amended in 2009, provides that judges are obliged to inform the parties to all civil cases of the possibility of using mediation and its advantages.¹¹⁸ However, mediation remains optional in Romania. Some national proceedings are exclusively for private or public sector complaints, while others hear both.

Some non-judicial proceedings are general but provide an effective forum for discrimination cases, whereas others have been established especially for discrimination cases as an alternative, complementary dispute resolution procedure to the normal courts. Among the general non-judicial procedures are inspectorates, ombudsmen and human rights institutions. In Turkey, besides proceedings before judicial or administrative courts, victims of discrimination can file their complaints to the Human Rights Boards that have been established in every province and district and to the Human Rights Inquiry Commission of the Turkish Grand National Assembly. Their decisions are however not enforceable or legally binding.

Labour inspectorates are charged with enforcing employment law, including equal treatment provisions, in Finland, Hungary, Latvia, Lithuania, France, Greece, Poland, Portugal, Romania, Slovakia and Spain. In addition, in Lithuania Employment Dispute Commissions, regulated by the Employment Code, are the primary bodies mandated for employment dispute resolution. The responsibility for the establishment of an Employment Dispute Commission in a company, agency or organisation rests with the employer. They are made up of an equal number of representatives of employers and employees. The Employment Dispute Commission can award compensation to an individual in cases of discrimination that has breached the Labour Code. In Spain victims can also submit complaints to the Education Inspectorate, and in Hungary and Slovakia they can complain to the Consumer Protection Inspectorate.

In Latvia, the Ombudsman's Office examines and reviews complaints concerning human rights violations and attempts to resolve conflicts through conciliation, which if unsuccessful is followed by non-binding recommendations. In Bulgaria the Protection against Discrimination Commission can make a finding of discrimination and order preventative or remedial action; it can also

¹¹⁷ Although there is no record that mediation has been used in case on discrimination.

¹¹⁸ Romania / Act 370/2009 amending Act 192/2006 on Mediation (26 November 2009).

impose financial sanctions, but it cannot award compensation to a victim. The procedure is universally applicable to both the public and private sectors. In FYR of Macedonia, the new Anti-Discrimination Act provides for an administrative procedure in front of the Commission for Protection against Discrimination which can issue opinions and recommendations. If an opinion is not implemented, the Commission can initiate a procedure before the competent authority.¹¹⁹ In Cyprus two separate authorities have been set up within the Ombudsman institution, acting as the national specialised body: the 'Equality Authority' and the 'Anti-Discrimination Authority'. These two authorities can issue binding decisions and impose small fines for non-compliance with their decisions. However, in practice the decisions issued are recommendations which although non-binding tend to be conformed to, at least by individuals. The Ombudsman does not have the power to issue binding decisions, even though their decisions are generally authoritative and to a large extent also complied with. In Spain victims of discrimination may appeal to the general Ombudsmen (at both national and regional level) when the issue concerns acts of the public administration.

The Estonian Chancellor of Justice provides an impartial conciliation procedure upon application by the victim. In the context of discrimination by natural or legal persons in private contexts, the decision of the Chancellor of Justice is legally binding, while the Chancellor of Justice (in case of discrimination by public institutions) and Commissioner for Gender Equality and Equal Treatment (public and private domain) are empowered to conduct ombudsman-like procedures with non-legally binding results. Participation in the conciliation procedure at the Chancellor of Justice institution is not compulsory.

The Portuguese High Commissioner for Immigration and Intercultural Dialogue (*Alto Comissariado para a Imigração e Diálogo Intercultural* - ACIDIC) can act as a mediator to try to avoid formal legal procedures. The High Commissioner can also initiate administrative procedures and decide whether fines should be imposed. Respondents have the right to appeal to the courts against the fines imposed. Neither the victim nor associations have the right to appeal or to intervene in the appeal procedure.

In Hungary, the Equal Treatment Authority can take action against any discriminatory act and can impose severe sanctions on persons and entities violating the prohibition of discrimination. The Ombudsman for Civil Rights and the Ombudsman for the Rights of National and Ethnic Minorities can also investigate cases of discrimination by any public body.

In Finland, non-employment related complaints of discrimination on the grounds of ethnic origin can be submitted to the Ombudsman for Minorities and/or the Discrimination Tribunal. The Discrimination Tribunal may confirm a settlement between the parties or prohibit the continuation of conduct that is contrary to the prohibition of discrimination or victimisation. The Tribunal may also order a party to fulfil its obligations by imposing a conditional fine. It may also issue a statement on how non-discrimination law is to be interpreted at the request of the Ombudsman for Minorities, a court of law, a public authority or an NGO. Proceedings before the Discrimination Tribunal are free of charge and do not require the use of a legal counsel. The Ombudsman

¹¹⁹ The Law does not specify which authority though.

may issue statements on any discrimination case submitted to him/her, where necessary forward the complaint to the pertinent authorities, and if agreed to by the complainant, provide legal assistance and lead conciliation proceedings.

In Malta, the National Commission for Persons with Disability can investigate complaints alleging failure to comply with the 2000 Equal Opportunities (Persons with Disability) Act and, where appropriate, provide conciliation in relation to such complaints. By virtue of the provisions of the 2007 Equal Treatment of Persons Order, the remit of the National Commission for the Promotion of Equality for Men and Women has been extended to cover the promotion of equal treatment irrespective of racial or ethnic origin within the meaning of the provisions of the Order, which continue to be exercised with the assistance of the National Commission for the Promotion of Equality (NCPE).

Austria and the Netherlands both have Equal Treatment Commissions which can issue non-binding opinions. These do not preclude applicants from seeking binding court judgments on the same case, in which case the courts are obliged to take the Commission's opinion into consideration and give clear reasons for any dissenting decisions.

There are special court procedures in a number of countries. Spain has an urgent procedure in the social courts for actions for the defence of fundamental rights and civil liberties. The United Kingdom's employment tribunals adjudicate the full range of employment disputes, including those on discrimination; each tribunal has a legally qualified chairman and two lay members. In Italy the 1998 Immigration Act established a special procedure for discrimination cases and this is now applicable to all grounds of discrimination. Representation by a lawyer is not required and victims can apply directly to the judge at the ordinary civil court with territorial jurisdiction for their place of residence (an exception to the general principle of suing in the court in the territorial jurisdiction of the defendant) in order to obtain an injunction against the discriminatory activity as well as damages. The hearing takes place 'avoiding all unnecessary formality', with a free choice by the judge of the most suitable method for gathering evidence. In cases of particular urgency, the judge can issue an interim order, the violation of which (as of the order issued in the final decision) constitutes a criminal offence. The decrees transposing the Directives add to this procedure the possibility of pre-trial mediation and the possibility for the judge to order - together with the judgment - that a plan be drawn up for the elimination of discrimination, as well as for the publication of the judgment in a major newspaper.

In Ireland, a specialised Equality Tribunal has an investigative role in hearing complaints. The procedure is informal. Complainants may represent themselves and costs may not be awarded against either party. Hearings are held in private. In 2004 the jurisdiction for dismissal cases was transferred to the Equality Tribunal, which now has the power to award remedies, including a specific power to order reinstatement. The option of mediation is provided for in section 78 of the Employment Equality Act 1998-2007. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court.¹²⁰ The

¹²⁰ Section 91(2), Employment Equality Act 1998-2007.

Equality Authority may provide assistance in the enforcement procedures.¹²¹ In Poland a ‘compensation complaint’ procedure has been operating under the Labour Code since 1 January 2004:¹²² victims of discrimination are entitled to initiate judicial proceedings and seek compensation. The Labour Court determines the compensation to be awarded, taking into consideration the type and gravity of the discrimination. This specific remedy was intended to avoid the need to use more general legal remedies such as Article 415 Civil Code (general compensation clause), though use of general remedies is not excluded.

In Romania, a victim of discrimination or any NGO interested can choose between filing a complaint with the National Council for Combating Discrimination and/or filing a civil complaint for civil damages with a court of law unless the act is criminal, in which case Criminal Code provisions apply. The two venues (national equality body and civil courts) are not mutually exclusive and the plaintiff can choose to use them simultaneously, which in practice creates difficulties for the parties, the equality body and the judiciary. Moreover, an action before the equality body does not suspend the period of prescription (time limit) for filing a civil case.

Complaints with regard to the public sector are commonly dealt with separately from the private sector. In Italy cases concerning public employees are heard in the civil courts. In Croatia, civil procedures are the same for employment in the private and public sectors with the exception of the obligation for a plaintiff wishing to file a claim against the State to send a request to the State Attorney’s office for friendly settlement. In Lithuania, complaints about administrative acts and acts or omissions of civil servants and municipal employees in the field of public administration, including social protection, social advantages, education, and access to and supply of goods and services which are available to the public, can be filed with an administrative disputes commission or the administrative courts. Cases of alleged discrimination by public institutions in Latvia can be filed with the same public institution that has treated the person differently, with a higher institution, with an administrative court, or with the public prosecutor’s office. In France the administrative courts hear complaints from civil servants and contractual employees in the public sector and from citizens bringing actions against the State. In the Netherlands if the discrimination occurs in public employment, ordinary administrative law procedures apply.

Although the number of complaints submitted to courts or equality bodies has been gradually rising, the still relatively low volume of case law on discrimination in most countries may well point towards barriers to justice, real and perceived. Transposition of the Directives will go some way towards improving this situation due to the Directives’ enforcement provisions (see below) and the increased likelihood of civil procedures being used over criminal law procedures, which traditionally have been used but which pose difficulties in terms of proof and the prerogative of the state prosecutor. Notwithstanding transposition, however, a number of deterrents and potential barriers to litigation can be identified. Firstly, some experts are concerned that the complexity of discrimination law may be deterring victims of discrimination in, for instance, Austria and the United Kingdom from bringing cases. Skilled, experienced assistance to victims can help counter this, but this type of aid remains limited in availability (in contrast to the

¹²¹ Section 67(1)(b)(iii) Employment Equality Act 1998-2007.

¹²² Article 18^{3d}.

professional advice and representation usually available to respondents). In Croatia, similarly to many countries, the plaintiff is not obliged to instruct a lawyer, but due to the complexity of the legislation and procedures, the help of a lawyer is *de facto* necessary. Procedures to access free legal aid are too complicated and the lawyers' fee paid by the State is symbolic. Insufficient financial means to pursue a case is a second barrier cited in a number of states and is closely related to lack of adequate representation. In the Czech Republic and Lithuania, for example, legal aid is provided in very limited circumstances and therefore is of very limited effect. In Slovakia the threshold for entitlement to free legal aid is quite low and hence a relatively large number of people cannot afford legal services.

Another potential barrier is short time limits for bringing a case. The Directives leave it to the national legislature to set any time limits it deems appropriate (Article 7(3) Racial Equality Directive, Article 9(3) Employment Equality Directive). In all countries individuals can bring cases after the employment relationship has ended provided the time limits for submitting a claim are respected. In the Netherlands an applicant who wishes to contest the lawfulness of the termination of an employment contract (discriminatory dismissal / victimisation dismissal) under civil law must do so within two months of termination of the employment contract. Under Germany's General Equal Treatment Act there is a time limit of two months for claims, beginning either with the receipt of the job application by the employer or knowledge of the disadvantageous behaviour. In Ireland, the Equal Status Act 2000-2004 requires a complainant to notify the respondent in writing within two months of the date of the incident (or the date of the last incident) of the nature of the complaint and the intention to pursue the matter with the Equality Tribunal if there is no satisfactory response. Even with the possibility of an extension if there is reasonable cause that prevented the complainant from sending the notification within the normal time period, there is concern that such short time limits can be problematic for victims, especially people with literacy difficulties, people with inadequate command of the state's official language and disabled persons. In Croatia, employees must file their complaints with their employer within 15 days. The employer has 15 days to decide on the complaint and if the employee is not satisfied with this decision, a claim can be filed with the court within 15 days. In Hungary for certain types of legal dispute (such as disputes concerning the termination of an employment relationship under Article 202 of the Labour Code), claims have to be initiated within 30 days of the injurious measure; in Sweden if the claim aims to have a dismissal declared void, the time limit for filing is a matter of weeks from the act of dismissal or - in certain cases - one month after the expiry of the employment. Furthermore, the length and the complexity of procedures may act as deterrents to those seeking redress, as is said to be the case in Portugal and Slovakia, and there is concern in Slovenia that some judicial proceedings take over three years to complete.

Basic adjustments to proceedings and court buildings to accommodate the needs of disabled complainants are often lacking and can deter disabled complainants. In the Netherlands there are no specific rules requiring courts or the equality body to be accessible. Physical access to courts and other public buildings is not guaranteed in Slovakia or Slovenia. Access to public buildings is not always guaranteed in practice in Hungary, Portugal and Slovakia despite legal requirements. While the provision of information in Braille or sign language is required in Lithuania and Portugal, it is not mandatory in the Czech Republic, Malta, Slovakia or Slovenia. In Ireland, sign language interpretation in the court system is required in the context of criminal actions, but

there is no corresponding provision for civil actions. In Estonia and Hungary sign language is available in the courts, but Braille is rare. A further barrier in Estonia is that in practice courts usually reject complaints in Russian, in spite of the claimants' right to interpretation in court.¹²³ In Cyprus legal documents are not made available in Braille in the courts. No countries mention specific procedural rules for individuals with learning disabilities. The French Law on Disability creates a structure which centralises all administrative procedures to enforce the rights of disabled people. For instance, a claim referee will forward a disabled person's claim to the competent authority or jurisdiction.

Finally, the infrequency of litigation may itself be a deterrent to victims of discrimination as the impression may prevail that success is improbable. The more that cases are reported in the media, the more knowledgeable victims will become about their rights and options for upholding those rights. There is a tendency for the media to report on high-profile cases involving racial or ethnic and religion discrimination rather than age or disability cases.

B. Legal standing and associations

Article 7(2) of Directive 2000/43 and Article 9(2) of Directive 2000/78 provide that 'Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of [these Directives] are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under [these Directives]'. Member States have some discretion as to how this clause is implemented in terms of the type of assistance that can be provided by associations to victims. Being able to 'support' a victim is more common than the power to engage in proceedings 'on behalf' of a victim.

No special regulations on the engagement of associations in discrimination procedures are found in Denmark, Finland and the United Kingdom. Individual lawyers (working for organisations) may represent - and thereby 'engage in support of' - a victim in court upon his or her authorisation, and trade unions and employers' organisations can represent their members. In FYR of Macedonia, the Labour Act envisages the possibility to engage in judicial or other procedures only for trade unions but the new Anti-Discrimination Act extends this to all organisations and institutions dealing with equality issues. In the United Kingdom, associations with sufficient interest (*locus standi*) in a matter may bring judicial review actions under administrative law against public authorities, even if they have not themselves been the victims of a wrongful act. This requirement of sufficient interest has been given a generous interpretation in recent years by the UK courts, and trade unions, NGOs and the equality commissions have brought important actions against public authorities through judicial review proceedings. In addition, courts and tribunals may at their discretion permit associations with relevant expertise to make a 'third-party intervention' in any case, whereby

¹²³ In Estonia as of 1 January 2009 the administrative court may provide translations of complaints and other materials for people deprived of their liberty (Article 10(9) of the Code of Administrative Court Procedure).

associations may present legal arguments on a point of law that is at issue in the proceedings. Such ‘third party interventions’ are often permitted in complex discrimination law cases. In practice, complainants are supported by the equality bodies, trade unions, race equality councils, other voluntary sector advice agencies and complainant aid organisations under the normal rules of civil procedure. Employment Tribunal and Employment Appeal Tribunal procedures allow complainants to represent themselves or to be represented by any person. In Croatia, the right to intervene is given to bodies, organisations, institutions, associations or other persons engaged with the protection of the right to equal treatment related to the group whose rights are being deliberated in the proceedings. Under Swedish procedural law anyone can engage in proceedings or support a complaint. Trade unions have legal standing where one of their members is involved. NGOs have the right to bring actions in their own name as a party provided that their statutes envisage the possibility to look after their members, taking into account their interest, their own activities and the circumstances of the case and on condition that consent is given. In Bulgaria, public interest NGOs and trade unions may join proceedings brought by a victim in their support, and do not formally need the complainant’s consent for this, or else they may represent complainants, for which consent is necessary.¹²⁴ Furthermore, they can initiate proceedings themselves without an individual complainant where the rights of many parties are affected.¹²⁵ Trade unions and public interest NGOs can also join such *actio popularis* proceedings brought by other associations in an *amicus curiae* capacity. NGOs and trade unions can intervene in support of class actions.

Greek procedural law permits NGOs and trade unions with a legitimate interest in ensuring the principle of equal treatment to represent persons before any court or administrative authority, as long as they have that person’s written consent (Article 13(3), Act 3304/2005). The organisation must act before the court through an authorised lawyer. In Ireland, an individual or body may be authorised by an individual complainant to represent them before the Equality Tribunal or Labour Court (Article 77(11), Employment Equality Act 1998-2007). In Estonia, associations of workers and other entities with a legitimate interest may represent or advise victims of discrimination in penal, civil and administrative procedures if they meet certain criteria. Associations and other entities have a right to involvement in discrimination disputes in private employment as well as in the framework of the conciliation procedure before the Chancellor of Justice, where a person who has a legitimate interest in ensuring compliance with the equal treatment guarantee may also act as a representative (Article 23(2) of the Law on the Chancellor of Justice). Representation of victims by legal entities (such as NGOs) is also allowed under the Slovakian Anti-Discrimination Act. The legal entity has to be given the authority to do so under a separate law (e.g. as is the case for the National Centre for Human Rights) or has to deal with discrimination. Additionally, a 15 October 2008 amendment to the Code of Civil Procedure offers the opportunity to ‘a legal entity whose activity is the protection of rights under a special law’, to join a pending court proceeding. The Slovak Anti-Discrimination Act is one such ‘special law’. This means that the national equality body (the Slovak National Centre for Human Rights) or an NGO that seeks to protect the victims of discrimination can intervene as a third party to a court’s proceedings.

¹²⁴ Ibid. In practice, however, if the complainant and NGO are not in communication, it would be difficult for the NGO to learn about the case in order to file a motion to join it.

¹²⁵ Article 72(3).

In Germany under the General Law on Equal Treatment, anti-discrimination associations are entitled to support claimants in court proceedings, provided that they fulfil certain criteria (such as having at least 75 members and operating permanently rather than on an *ad hoc* basis to support one claim). In Luxembourg, under the General Discrimination Act of 28 November 2006, for associations to assist a victim of discrimination before the courts they must have legally existed for five years and be recognised by the Ministry of Justice as being nationally representative in the field of anti-discrimination.

Few states allow associations to engage in proceedings 'on behalf of' victims of discrimination. Spanish Act 62/2003 transposing the Directives (Article 31) provides that in cases outside employment, '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'. There is no corresponding provision for employment-related cases, in which only trade unions and employers' organisations can engage. With complainants' consent, trade unions can appear in court in the name and interest of their members. Furthermore, the Constitution entitles any natural or legal person invoking a legitimate interest to be party to proceedings relating to the violation of fundamental rights and freedoms, and entitles legal entities with a legitimate interest to engage in administrative procedures. In Latvia, the 2006 amendments to the Organisations and Foundations Act extended the power to bring a case on behalf of a victim (with their consent) at state institutions and courts to organisations and foundations whose aims are the protection of human rights and individual rights. Prior to this, only the National Human Rights Office (the predecessor of the Ombudsman's Office), trade unions (on behalf of their members) and voluntary organisations within the scope of their aims and tasks had this right. In Lithuania, according to the latest amendments to the Equal Treatment Act in June 2008, associations whose field of activity encompasses representation of victims of discrimination on a particular ground of discrimination in the courts have the right to engage on behalf or in support of complainants, with their approval, in judicial and administrative procedures.

In Romania, NGOs with a legitimate interest in combating discrimination can appear in court as parties and may engage, either on behalf of or in support of the plaintiff, in any judicial and/or administrative discrimination procedure based on a request or proxy given by the victim. When the discrimination concerns a community or a group of people, the Romanian Anti-Discrimination Act provides legal standing for NGOs even without the approval of the alleged victims of discrimination. In Poland general rules under the Civil Procedure Code allow non-profit social organisations to bring a claim on behalf of individuals or join such proceedings in labour law and administrative proceedings. They can also act as *amicus curiae* and present their opinion to the court.¹²⁶ Organisations whose statutory objectives include equality protection and protection against discrimination by unfounded, direct or indirect violation of the rights and duties of citizens may, in the case of claims in this field and with the consent of the citizens, institute actions on behalf of the citizens. With the consent of the plaintiff, they may join proceedings at any stage of the proceedings. The Irish Equality Authority has been granted the right to intervene in a case before the High Court as *amicus curiae* in order to give evidence in relation to the Racial Equality Directive. Following a legal challenge, this right was subsequently upheld by the Irish

¹²⁶ Article 63, Code of Civil Procedure.

Supreme Court.¹²⁷ The Hungarian Equal Treatment Act allows ‘social and interest representation organisations’ as well as the Equal Treatment Authority to engage on behalf of the victim in proceedings initiated due to alleged infringement of the principle of equal treatment and to engage in administrative procedures. Furthermore, social and interest representation organisations, the Equal Treatment Authority and the Public Prosecutor can bring *actio popularis* claims, provided that the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, and that the violation affects a larger group of persons that cannot be determined accurately. Class actions by associations engaging in legal proceedings on behalf a group of persons are not permitted in most states with the exception of:

- Bulgaria, Cyprus, Denmark and Lithuania where in certain cases prescribed by law it is possible to bring a class action, although this option has never yet been put in practice by NGOs;
- Slovakia where, according to a 15 October 2008 amendment to the Civil Procedure Code, the national equality body, as well as NGOs dealing with discrimination, can bring a class action; and
- Austria where the Austrian National Council of Disabled Persons (an NGO) has a limited ability to file a class action on behalf of an unidentifiable group of affected persons.

In France, a draft law was tabled in 2006 but it has not progressed further. In Poland, the Parliament passed a new law in 2009 on class action which was due to enter into force in July 2010¹²⁸ and in Italy, the Government included in the budgetary law a provision¹²⁹ introducing class actions to obtain financial compensation for wrongs perpetrated against groups of consumers.¹³⁰

States also have considerable discretion in the criteria they set for determining which legal entities can provide such assistance and which cannot. The French Act of 16 November 2001 permits representative trade unions and NGOs which have been established legally for at least five years and whose statutes mention the fight against discrimination or slavery to intervene in an action brought by any apprentice, trainee, job applicant or employee who alleges to have been a victim of discrimination. Any person with a legitimate interest in the dismissal or granting of a civil action has legal standing before the civil courts, and NGOs working to combat discrimination on the grounds of ethnic origin, race or religion may be civil parties in some criminal actions. Although there is no specific provision in the Code of Administrative Justice, NGO interventions are common practice before administrative courts provided that the associative purpose corresponds to the subject matter of the case. However, the scope of the new law is narrow and does not include employment cases for instance.

¹²⁷ Supreme Court [2006] IESC 57.

¹²⁸ Act of 17 December 2009 on Pursuing Claims in Collective Actions, in force from 19 July 2010 (*Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym*, Dz.U. Nr 7, poz. 44 z 18 stycznia 2010).

¹²⁹ Legge 24 Dicembre 2007, n. 244, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2008), in Gazzetta Ufficiale n. 300, del 28 dicembre 2007, Article 2, commi 445-449.

¹³⁰ After having been frozen for a while since its adoption in 2007, this piece of legislation will enter into force, in a slightly modified form on 1 January 2010.

The Hungarian 'social and interest representation organisations' referred to above include any social organisation or foundation whose objectives, as set out in its articles of association or statutes, include the promotion of equal social opportunities for disadvantaged groups or the protection of human rights. This includes the minority self-governments of particular national and ethnic minorities and trade unions for matters related to employees' material, social and cultural circumstances and living and working conditions (Article 3(f) Equal Treatment Act). In Belgium, the Centre for Equal Opportunities and Opposition to Racism, officially recognised associations, associations which have had a legal personality for at least three years and state as their objective the defence of human rights or the fight against discrimination, and workers' and employers' organisations may engage in discrimination proceedings. However, where the victim of the alleged discrimination is an identifiable (natural or legal) person, an action brought by such bodies will only be admissible if they prove that the victim has consented to the action.

In Italy in cases of discrimination on the grounds of race and ethnicity, associations and bodies active in the fight against discrimination can engage in proceedings in support or on behalf of complainants if they are included in a list approved by a joint decree of the Ministries of Labour and of Welfare and Equal Opportunities.¹³¹ Such organisations are listed on the basis of criteria set out in the joint decree which include establishment for one year and having promotion of equal treatment and combating discrimination as their only or primary aim. With regard to all the grounds of discrimination dealt with in Directive 2000/78, standing to litigate - previously limited by Decree 216/2003 to trade unions - is now extended to other organisations and associations representing the rights or interests affected. Portuguese associations may engage in judicial or other procedures in support of a complainant as they have the right to legal standing in civil and criminal cases concerning race discrimination and in some administrative proceedings. In particular, Act 18/2004 provides that 'associations whose objective is the defence of non-discrimination based on racial or ethnic origin have the right to engage in judicial procedures on behalf or in support of the interested persons, with their approval' (Article 5).

A different model is found in Austria. Whereas anyone can represent alleged victims of discrimination in informal proceedings before the Equal Treatment Commission, for court proceedings only one statutory organisation, the Litigation Association of NGOs against Discrimination, has been given third party intervention rights in the courts on behalf of the complainant, with his or her consent (section 62 Equal Treatment Act). All specialised NGOs can join this Association, but non-members are not granted any special procedural rights. If they want to intervene they have to prove their legal interest in the case. The rights are relatively weak, as they generally do not allow the Association to bear the costs and risks of a case; these remain with the complainant. The NGO the Austrian National Council of Disabled Persons has been given a similar right of intervention in disability cases, in addition to the Litigation Association's own right to act.

¹³¹ Joint Decree of the Ministries of Labour, Social Affairs and of Equal Opportunities of 16 December 2005, no.215 (Establishment of the list of associations having standing to litigate in support or on behalf of victims of discrimination based on racial or ethnic grounds). Published in *Gazzetta Ufficiale* serie generale n. 9, on 12 January 2006.

C. Burden of proof

As a result of the difficulties inherent in proving discrimination, Article 8 of the Racial Equality Directive and Article 10 of the Employment Equality Directive lay down that persons who consider that they have been discriminated against must only establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination. The burden of proof will then shift to the respondent who must prove that there has been no breach of the principle of equal treatment. This does not affect criminal cases (Article 8(3)/10(3)), and Member States can decide not to apply it to cases in which courts have an investigative role (Article 8(5)/10(5)). Thus, for example, in France the burden of proof is not shifted in administrative procedures which are inquisitorial in nature. Nevertheless, the Council of State in 2009 held that while in discrimination cases it is the responsibility of the petitioner to submit the facts in order to presume a violation of the principle of non-discrimination, the judge must actively ensure that the respondent provides evidence that all elements that could justify the decision are based on objectivity and devoid of discriminatory objectives. Portuguese law states that the principle does not apply to criminal procedures nor to actions in which, in terms of the law, it is up to the court to carry out the investigation. In the Netherlands, the burden of proof is shifted in court proceedings while this is not necessary in procedures before the Equal Treatment Commission, although the Commission nevertheless does apply the shift in the burden of proof on a voluntary basis. This rule applies for all forms of discrimination, including harassment. On the contrary in Bulgaria, the shift of the burden of proof is applicable to both judicial proceedings and proceedings before the equality body; it is also uniformly applicable to all forms of discrimination, including harassment and victimisation.

A minority of states have failed to transpose the burden of proof provision in line with the Directives. The provision on the burden of proof in the Austrian federal Equal Treatment Act lowers the burden for the plaintiff but in a way that is not considered to satisfactorily comply with the Directives. However, the Supreme Court has provided an interpretation in line with the Directive by ruling that 'if the establishment of discriminatory infringements is successful, it is for the respondent to prove that he or she did not discriminate.' In Poland the burden of proof only shifts in employment cases. In Latvia the shift of the burden of proof applies to employment, natural persons who are economic operators and access to goods and services (Consumer Protection Act, Article 3(1)(5)). In FYR of Macedonia, the shift of the burden of proof was recently and partially introduced in the Labour Act, the Social Protection Act and the Child Protection Act but for the latter only in administrative procedures and litigation. Turkish law provides for a shift in a limited number of cases.

In Lithuania, the shift of the burden of proof with respect to the grounds covered by the Racial Equality Directive was formally introduced into the Equal Treatment Act only in June 2008. In practice, the Equal Opportunities Ombudsperson applied the shift of the burden of proof while investigating complaints from 2005 as the Ombudsperson is not bound by the Civil Procedure

Code. Nonetheless, the Civil Procedure Code provides as a general rule that the burden of proof falls upon the applicant.¹³² The Government is aware that amendments should be adopted in order to bring more legal certainty, and initiated an amendment to introduce the shift of the burden of proof in discrimination cases. This, however, was dismissed by the Parliament.¹³³ In Romania, it may be argued that the provisions on the burden of proof are not in full compliance with the Directives as the 2006 amendments to the 2000 Act introduced the concept of ‘sharing the burden of proof’ meaning that ‘the person interested has the obligation to prove the existence of facts which allow presumption of direct or indirect discrimination and the person against whom the complaint was filed has the duty to prove that the facts do not amount to discrimination.’¹³⁴ While the interpretation by the national equality body of this provision tends to result in compliance with the Directives, judicial interpretation has varied and some courts have interpreted it in such a manner as to place an unreasonable burden on the victim, thus conflicting with the provisions of the Directives in relation to burden of proof.

National case law is starting to reveal a varied approach to what may be taken to constitute ‘facts from which it may be presumed that there has been direct or indirect discrimination.’ The meaning of this phrase is one of several questions on the burden of proof put before the European Court of Justice in the Case of C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn* decided by the Court on 1 July 2008.

D. Victimisation

Member States must ensure that individuals are protected from any adverse treatment or adverse consequences in reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment (Article 9 Racial Equality Directive; Article 11 Employment Equality Directive). There is still a major inconsistency with this principle in a number of states where protection is restricted to the employment field and thereby fails to protect against victimisation in the areas outside employment protected by the Racial Equality Directive (Latvia, Luxembourg, Poland and Spain). According to Danish law, ‘the protection applies to a person who files a complaint regarding differential treatment of her/himself and to a person who files a complaint of differential treatment of another person’ and it is a prior condition that a causal link can be established between the victimisation

¹³² Lithuania/Lietuvos Respublikos Civilinio proceso kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. Civilinio proceso Kodeksas. Official publication *Valstybės Žinios*, 2002, Nr. 36-13640. Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=332205.

¹³³ Lithuania/ Civilinio proceso kodekso 178 straipsnio pakeitimo ir papildymo bei priedo papildymo įstatymo projektas, Nr. XP-2349, 2007-06-19. Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=299949&p_query=&p_tr2=.

¹³⁴ Article 20(6) of the Governmental Ordinance 137/2000.

and the employee's request for equal treatment. In Italy a recent Act¹³⁵ introduced amendments to the Anti-Discrimination Decrees extending protection against victimisation to 'any other person' beyond the complainant. In both Croatia and FYR of Macedonia, anti-discrimination acts prohibit placing in a less favourable position a person who has reported discrimination or filed a complaint or who has witnessed discrimination.

In Belgium, the General Anti-Discrimination Federal Act and the Racial Equality Federal Act extend protection against reprisals for victims filing a complaint to any witness in the procedure. Similar protection from victimisation is provided in fields other than employment by Article 16 of the General Anti-Discrimination Federal Act; in this context too, protection extends to witnesses. In Bulgaria, protection is accorded for victimisation by presumption and by association as well. Action for protection against discrimination may include, but is not limited to, bringing proceedings before the equality body or a court, in either the capacity of victim or as a third party, or testifying in proceedings. In the United Kingdom it is not required that the perpetrator of the victimisation should have been involved in the initial complaint. For example an employer who refuses to employ a person because he or she had complained of discrimination or assisted a victim of discrimination in a previous job would still be liable for victimisation. The United Kingdom provision on victimisation is, however, problematic in that the definition of victimisation requires the complainant to show less favourable treatment than a real or hypothetical comparator, while the Directives do not require a comparator. Case law has demonstrated how difficult it is to find an appropriate comparator.¹³⁶ Furthermore, protection against victimisation in the United Kingdom is retrospective only: the law does not require preventative measures as are implicitly required by the EC Directives. In contrast, Slovenian protection against victimisation is proactive: upon finding discrimination in the original case, the Advocate of the Principle of Equality should order in writing the legal person in which discrimination allegedly occurred to apply appropriate measures to protect the discriminated person or persons assisting the victim of discrimination from victimisation or adverse consequences of the complaint. In the event that an alleged offender does not act in accordance with the order of the Advocate, the inspector has the duty to prescribe appropriate measures that protect the person from victimisation. In Lithuania, the provision in the Equal Treatment Act repeats the wording of the Directives, stating that an employer is obliged to take necessary measures to ensure that employees are protected against dismissal or other adverse treatment which could occur as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. Before the latest amendments of June 2008, it had limited protection to those employees who directly filed a complaint against discrimination. In Romania, protection against victimisation is not limited to the complainant but extends to witnesses. As the law does not distinguish, victimisation is prohibited not only in relation to complaints filed with the national

¹³⁵ Legislative decree of 8 April 2008, n. 59 (later converted into an ordinary law by Act of 6 June 2008, n. 101, converting into law, with modifications, legislative decree of 8 April 2008, containing urgent provisions for the implementation of EU obligations and the execution of judgments of the Court of Justice of the European communities, published in Official Journal n. 132 of June 7, 2008 (*Legge 6 giugno 2008, n. 101, "Conversione in legge, con modificazioni, del decreto-legge 8 aprile 2008, n. 59, recante disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzione di sentenze della Corte di giustizia delle Comunità europee."* pubblicata nella Gazzetta Ufficiale n. 132 del 7 giugno 2008).

¹³⁶ See, for example, *Aziz –v- Trinity Taxis* [1989] QB 463 and *Chief Constable of the West Yorkshire Police –v- Khan* [2001] IRLR 830. However, this is no longer an issue with the adoption of the Equality Act.

equality body but also in relation to complaints submitted to any other public or private institution (labour inspectorate, consumer protection office etc.).

French Act No. 2008-496 has introduced specific protection against victimisation applicable to the entire scope of civil remedies for direct or indirect discrimination covered by the Directives. In particular, it provides that no one having testified in good faith about discriminatory behaviour or having reported it can be treated in an unfavourable manner and that 'Unfavourable measures cannot be taken against a person because he or she was a victim of discrimination or because of his or her refusal to submit to discrimination prohibited by Article 2.' This law clarifies that protection extends to victims and non-victims but does not provide any indication as to the burden of proof applicable to claims of victimisation.

In Poland, a recent amendment to the Labour Code¹³⁷ extended the prohibition of victimisation. Previously the Labour Code had only prohibited the termination of a labour contract as the result of an employee having used their rights to defend themselves against unequal treatment. This provision was amended and currently any other adverse treatment and negative consequences are also prohibited. This broadened protection covers complainants but is also extended to employees who in any way support a victim of discrimination.

E. Sanctions and remedies¹³⁸

Infringements of anti-discrimination laws must be met with effective, proportionate and dissuasive sanctions, which may include compensation being paid to the victim (Article 15 Racial Equality Directive, Article 17 Employment Equality Directive). The concept of effective, proportionate and dissuasive remedies was first developed in the European Court of Justice's case law on sex discrimination. Due to the parallels of EC sex discrimination law with the Racial Equality and Employment Equality Directives, this case law is of relevance to the latter Directives. The meaning of the concept must be determined in each concrete case in the light of individual circumstances.

In practice, a wide range of possible remedies exist depending, for example, on the type of law (e.g. civil, criminal, or administrative remedies), the punitive or non-punitive character of the remedies, their orientation as backward-looking or forward-looking (the latter meaning remedies seeking to adjust future behaviour) and the level at which they are intended to operate (individual/micro or group/macro level). Remedies may be available through various, possibly complementary, enforcement processes (administrative,

¹³⁷ Act of 21 November 2008 on an amendment of the Act on the Labour Code (Dz.U. Nr 223, poz. 1460, 18 December 2008), in force since 18 January 2009.

¹³⁸ A thematic report on this topic produced by the European Network of Legal Experts in the non-discrimination Field provides a more detailed analysis, cf. the thematic study by Christa Tobler, *Remedies and Sanctions in EC Non-discrimination Law, Effective, Proportionate and Dissuasive Sanctions and Remedies, with particular reference to Upper Limits on Compensation to Victims of Discrimination*. Some of the findings of this study are reproduced in this section.

industrial relations and judicial processes). Depending upon such features, the remedies offered by a particular legal order will reflect different theories of remedies (e.g. remedial, compensatory, punitive and preventive justice) and also different concepts of equality (e.g. an individual justice model, a group justice model or a model based on equality as participation). It follows that a comprehensive enforcement approach is very broad indeed. This approach addresses not only procedural aspects and the substance of remedies (relief and redress for the victims of discrimination) but also broader issues such as victimisation, compliance, mainstreaming and positive action, as well as other innovative measures such as corrective taxation. Financial compensation to the victim may include compensation for past and future loss (most common), compensation for injury to feelings, damages for personal injury such as psychiatric damage, or exemplary damages to punish the discriminator (much less common).

As a whole, no single national enforcement system appears to be truly all-encompassing. Essentially, they are all mostly based on an individualistic and remedial – rather than a preventative – approach. Irish law provides a broad range of remedies including compensation awards, reinstatement and re-engagement, as well as orders requiring employers to take specific courses of action. In particular, there is case law relating to compliance with these orders: the creation of an equal opportunities policy; reviewing recruitment procedures; reviewing sexual harassment procedures; formal training of interview boards; review of customer service practices; and equality training for staff. In Spain sanctions have been established in the employment field 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 grounds of racial or ethnic origin, except in criminal law.

In some Member States the specialised body is empowered to issue sanctions in cases where they have found discrimination. The Bulgarian Protection against Discrimination Commission has power to impose financial sanctions between the equivalent of €125 and €1,250, amounts that would be dissuasive to the majority.¹³⁹ These sanctions are administrative fines and are not awarded to the victim as compensation but go to the state budget. As the national specialised body, the Cyprus Commissioner for Administration (also referred to as the Ombudsman), can impose limited fines including fines for non-compliance with its recommendations within a specified time period (subject to appeal to the Supreme Court of Cyprus). Furthermore, it can issue orders, published in the Official Gazette, to end the situation which directly produced the discrimination within a specified time limit and in a specified manner. The Commissioner's reports can be used for obtaining damages in a regional court or an employment tribunal. The two equality authorities set up under the Ombudsman are further empowered to impose small fines which cannot exceed CYP350 (€598) for discriminatory behaviour, treatment or practice; CYP250 (€427) for racial discrimination concerning the enjoyment of a right or freedom; CYP350 (€598) for non-compliance with the recommendation within the specified time limit; and CYP50 (€85.44) daily for continuing non-compliance after the deadline set by the equality body.¹⁴⁰ Generally speaking, the fines are very low and offer little deterrence to potential perpetrators, and they are hardly ever imposed by the equality body. In addition, no

¹³⁹ Article 78-80 of the Protection against Discrimination Act.

¹⁴⁰ The Combatting of Racial and Some Other Forms of Discrimination (Commissioner) Act No. 42(1)/ 2004 (19 March 2004), Sections 18, 26(1).

finances have ever been imposed so far. The British Commission for Equality and Human Rights¹⁴¹ and the Equality Commission for Northern Ireland are able to use their powers of formal investigation to investigate organisations they believe to be discriminating and, where they are satisfied that unlawful acts have been committed, they can serve a binding 'compliance notice' requiring the organisation to stop discriminating and to take action by specified dates to prevent discrimination from recurring. They also have the power to enter into (and to enforce via legal action if necessary) binding agreements with other bodies who undertake to avoid discriminatory acts and to seek an injunction to prevent someone committing an unlawful discriminatory act.

Interesting administrative remedies are found in Portugal. Besides administrative fines, the following remedies are available in all cases of discrimination:

- publication of the decision;
- censure of the perpetrators of discriminatory practices; confiscation of property;
- prohibition of the exercise of a profession or activity which involves a public prerogative or depends on authorisation or official approval by the public authorities;
- removal of the right to participate in trade fairs;
- removal of the right to participate in public markets;
- prohibition of access to their premises for the perpetrators;
- suspension of licences and other authorisations; and
- removal of the right to the benefits granted by public bodies or services.

In Hungary, specific sanctions and remedies exist for various fields. For instance, if there has been discriminatory behaviour in education, the court may:

- oblige the perpetrator to have the infringement discontinued and refrain from further infringement;
- oblige the perpetrator to make restitution in a statement or by some other suitable means and to make, at the perpetrator's own expense, an appropriate public disclosure for restitution;
- oblige the perpetrator to restore the state preceding the infringement, and to eliminate or deprive of its infringing nature any object produced as the result of the infringement, at the perpetrator's own expense;
- oblige the perpetrator to pay any annual saving achieved as a result of the infringement into the Public Education Development Fund;
- oblige the maintainer to define the catchment area of the school in a way that meets the legal requirements aimed at reducing segregation (see Section 3.2.8.); or

¹⁴¹ The Equality Act 2006 established a new single equalities and human rights body for Great Britain, the Commission for Equality and Human Rights (CEHR), which came into formal existence in October 2007 and now calls itself the Equality and Human Rights Commission (EHRC). The EHRC has taken over the powers and functions of the three previous GB equality commissions – the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission – and has new functions in relation to sexual orientation, religion or belief and age, as well as in relation to human rights in general.

- forbid for a definite period of time or until certain conditions are met the admission of new pupils or students, provided that their education can be provided in another educational institution within the perimeters of the same settlement.¹⁴²

For certain cases, the European Court of Justice's case law contains specific indications regarding the European Union legal requirements in relation to remedies. Thus, in the case of discriminatory dismissal, the remedy (or remedies) granted must in all cases include either reinstatement or compensation. Further, where compensation is chosen as a remedy it must fully make good the damage. Upper limits are not acceptable, except for situations where the damage was not caused through discrimination alone.

Upper limits for pecuniary damages seem to apply in Ireland where financial awards for dismissal cases are limited to a maximum of two years' salary and the Equality Status Act 2000-2004 provides for a limit of approximately €6,348. In Finland, the law specifies an upper limit of €15,560;¹⁴³ but this is only theoretical as it can be exceeded for special reasons, such as if the breach of equal treatment laws took place over an extended period of time; if the respondent is indifferent to requirements posed by law; if the breach was particularly severe; or if the complainant felt particularly offended by the breach. Statutory upper limits on compensation for non-pecuniary damages seem to apply in Malta for disability cases (€465).¹⁴⁴

There appear to be no limits either in relation to pecuniary or non-pecuniary damages in the national laws of Bulgaria, the Czech Republic, Denmark, France, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, the United Kingdom, Croatia and FYR of Macedonia. In Estonia, the Public Service Act (Article 135) was amended in December 2008 to the effect that the upper limit of compensation provided for illegal termination of employment or service does not apply if there has been discriminatory termination as specified in the Equal Treatment Act or the Gender Equality Act.

In Latvia there is no maximum amount for damages under civil law, but the Reparation of Damages caused by State Administrative Institutions Act sets maximum amounts of non-pecuniary damages for personal harm at 5,000 Lats (around €8,000), or 7,000 Lats (around €10,000) in cases of grave personal harm, and 20,000 Lats (around €24,000) if harm has been caused to life or grave harm has been caused to health. The maximum amount of damages for moral (i.e. non-pecuniary) harm is set at 3,000 Lats (around €4,800) or 5,000 Lats (around €8,000) in cases of grave moral harm and 20,000 Lats (around €24,000) if harm has been caused to life or grave harm has been caused to health. It is unclear as yet whether in cases of discrimination the courts would award damages for both personal harm and moral harm. The definitions of personal harm and moral harm permit cases of discrimination to be brought under both, and the law permits applications for several kinds of damages at the same time. Austrian law specifies an upper limit of €500 in cases of non-recruitment or non-promotion if the employer proves that the victim would not have been recruited or promoted anyway. Of the countries where limits do exist, Ireland is particularly interesting because there are

¹⁴² Article 84 Paragraph (14) of the Public Education Act.

¹⁴³ TyA 60/2007, section 1.

¹⁴⁴ Article 24 of the Equal Opportunities (Persons with Disability) Act.

no comparable statutory limits on compensation for discrimination on grounds of sex. In Poland there is a minimum level of compensation which is linked to the minimum wage.

In the United Kingdom in 2004, according to the Equal Opportunities Review (EOR) annual survey of compensation awards, the average award in disability discrimination cases was £ 28,889 (approx. €34,000); for racial discrimination, £13,720 (approximately €16,183); and for sex discrimination £11,898 (approximately €14,030). Average compensation across all three grounds increased by 44 per cent from 2003; trends since then have remained reasonably static. In France legal practice is still very conservative in calculating pecuniary loss and amounts awarded remain rather low. This is also the case for compensation awards in Ireland where Equality Authority officers have stated that they feel constrained by the maximum level of compensation they can award under the Employment Equality Act. In Ireland the average award before the Equality Tribunal in 2007 was €14,431 compared to €10,113 in 2006. The highest award was €125,000. The average award in equal status cases was €2,751, an increase compared to 2006 (€1,187). In Sweden, damages for violations of non-discrimination legislation range between €3,700 and €10,000, depending on the circumstances and if there are no mitigating circumstances. In Slovakia an inconsistent and varying approach is taken to financial compensation. Dutch courts are generally reluctant to grant damages for non-pecuniary loss. In a number of early cases concerning discrimination in access to services in Hungary, the amount of compensation was consistently around €400. This is double the monthly minimum wage, so not very dissuasive. Recently, however, average amounts have risen with discrimination based on racial or ethnic origin being sanctioned with non-pecuniary damages of around €2,000 in recent cases. Punitive damages do not exist, but a so-called 'fine to be used for public purposes' may be imposed by the court if the amount of damages that can be imposed is insufficient to mitigate the gravity of the actionable conduct. This fine is, however, payable to the state and not the victim.

On initial examination, with the possible exception of the United Kingdom, these figures seem relatively low. This, coupled with the length of time it can take to get a decision - for instance in Ireland it takes three years for cases to be heard by the Equality Tribunal - throws doubt on the effectiveness of the remedy and even whether it in actual fact makes good the loss. Its dissuasiveness is also questionable, in particular with regard to the issue of whether such sums will deter larger employers. Spanish legislation provides for criteria based on company turnover to determine the level of sanction in some cases. This approach appears to be an interesting option.

Chapter 8

Equal treatment bodies

By now most countries have designated a specialised body for the promotion of equal treatment irrespective of racial or ethnic origin, as required by Article 13 of the Racial Equality Directive. However, in Spain, the Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin, just began functioning in 2009. In FYR of Macedonia a specialised body for promotion of equal treatment is envisaged for 2011. In Poland and Turkey¹⁴⁵ there are no single specialised bodies which would be able to fulfil all three functions under Article 13(2) of the Racial Equality Directive. No body or institution has been officially designated in the transposition process to comply with the Directive. However, there are several institutions in Poland which have mandates to promote the equal treatment of all persons without discrimination based on racial or ethnic origin; these are the Ombudsperson, the Ministry of Interior, and the Government Plenipotentiary for Equal Treatment within the Ministry of Labour and Social Policy. The Member States which have set up completely new bodies are France,¹⁴⁶ Germany,¹⁴⁷ Greece,¹⁴⁸ Hungary,¹⁴⁹ Italy,¹⁵⁰ Romania¹⁵¹ and Slovenia.¹⁵² Bodies that already existed but which have been given the functions designated by Article 13 include the Cypriot Ombudsman, the Estonian Chancellor of Justice, the Lithuanian Equal Opportunities Ombudsperson, the Maltese Equality Commission, the Slovak National Centre for Human Rights and the Croatian Ombudsman. In Latvia the National Human Rights Office was re-organised in 2007 as the Ombudsman's Office with increased competences after the Parliament appointed the Ombudsman on 1 March 2007. In some states the Article 13 functions are fulfilled by, or shared between, a few organisations (e.g. Greece).

The minimum requirement on Member States is to have one or more bodies for the promotion of racial and ethnic origin equality which a) provide independent assistance to victims of discrimination in pursuing their complaints about discrimination, b) conduct independent surveys concerning discrimination, and c) publish independent reports and recommendations on any issue relating to such discrimination. A high number of states go further than this, firstly in terms of the grounds of discrimination they cover, and secondly in terms of the powers they have to combat discrimination. The Austrian Equal Treatment Commission and Office for Equal Treatment, the Bulgarian Protection against Discrimination Commission, the Cypriot Ombudsman, the Estonian Chancellor of Justice, the French High Authority against Discrimination and for Equality, the German Federal Anti-Discrimination Agency, the Irish Equality Authority, the Dutch Equal Treatment Commission, the Belgian Centre for Equal Opportunities and Opposition to

¹⁴⁵ The draft law tabled in March 2010 foresees the creation of an equality body.

¹⁴⁶ High Authority against Discrimination and for Equality (HALDE). However, a bill is under discussion to incorporate the HALDE into a new structure, the Defender of Rights.

¹⁴⁷ The Federal Anti-Discrimination Agency.

¹⁴⁸ Equal Treatment Committee and Equal Treatment Service, which share the task of promoting the principle of equal treatment with the Ombudsman, the Work Inspectorate and the Economic and Social Committee. However, a recent report of the National Commission of Human Rights recommends the merger of all existing equality bodies into the Ombudsman.

¹⁴⁹ Equal Treatment Authority.

¹⁵⁰ National Office against Racial Discrimination.

¹⁵¹ National Council on Combating Discrimination (NCCD).

¹⁵² Advocate of the Principle of Equality and Council of the Government for the Implementation of the Principle of Equal Treatment.

Racism, the Croatian Office of the Ombudsman, the Hungarian Equal Treatment Authority, the Lithuanian Equal Opportunities Ombudsperson, the Greek Ombudsman, Equal Treatment Committee and Work Inspectorate, the Romanian National Council on Combating Discrimination, the Slovenian Advocate of the Principle of Equality and Council for the Implementation of the Principle of Equal Treatment, and the Swedish Equality Ombudsman¹⁵³ all deal with many grounds of discrimination. The Equality Commission for Northern Ireland works on discrimination on the grounds of race, religious belief or political opinion, sex, sexual orientation, marital status, disability and age. In Great Britain, the Commission for Equality and Human Rights, which came into formal existence in October 2007 and now calls itself the Equality and Human Rights Commission (EHRC), replaced the three previous British equality commissions – the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission – and has new functions in relation to sexual orientation, religion or belief and age, as well as in relation to human rights in general. Those with the mandate only to deal with racial and ethnic origin discrimination are the Danish Board of Equal Treatment¹⁵⁴ (established as part of the Danish Institute for Human Rights), the Finnish Ombudsman for Minorities, the Italian National Office against Racial Discrimination, the Portuguese High Commissioner for Immigration and Intercultural Dialogue, and the Spanish Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin.

In terms of the powers of specialised bodies, it is notable that the respective bodies provide assistance to victims of discrimination in a variety of ways. Some specialised bodies provide assistance in the form of support in taking legal action – the Belgian, Finnish, Hungarian, Irish, Italian, Slovak, Swedish, British, Northern Irish and Croatian bodies can do this. Others give their – usually non-binding – opinion on complaints submitted to them, e.g. the Austrian and Dutch Equal Treatment Commissions, the Danish Board of Equal Treatment, the Hungarian Equal Treatment Authority, the Latvian Ombudsman's Office, the Greek Ombudsman and Equal Treatment Committee, and the Slovenian Advocate of the Principle of Equality. Such proceedings do not preclude the victim from subsequently taking legal action before the courts with a view to obtaining a binding remedy.

A number of specialised bodies – e.g. those in Austria, Bulgaria, Cyprus, France, Hungary, Ireland, Lithuania, Romania and Sweden – can investigate complaints of discrimination and usually can force compliance with their investigations by all persons involved. In France, the High Authority concludes an investigation by adopting a deliberation which may propose recommendations, mediation or presenting observations before the courts. The Protection against Discrimination Commission in Bulgaria has the power to impose sanctions, including fines, and 'soft' penalties, such as public apology or publication of its decision. The Hungarian Equal Treatment Authority can apply sanctions on the basis of an investigation. In Ireland, the Equality Authority may serve a 'non-discrimination notice' following an investigation. This notice may set out the conduct that gave rise to the notice and what

¹⁵³ Established by the 2008 Discrimination Act (2008:567) according to which the previous Equal Opportunities Ombudsman (JämO - sex equality), Ombudsman Against Ethnic Discrimination (DO – also covered discrimination on the grounds of religion and other belief) the Disability Ombudsman (HO) and the Ombudsman Against Discrimination due to Sexual Orientation have now been merged into one Equality Ombudsman responsible for supervising all grounds.

¹⁵⁴ The Danish Complaints Committee for Ethnic Equal Treatment was closed as of 1 January 2009, as a result of the establishment of the new Board of Equal Treatment. The Board of Equal Treatment consists of 1 president, 2 vice-presidents and 9 additional members.

steps should be taken to prevent further discrimination. Non-compliance with this notice may result in an order from either the High Court or the Circuit Court requiring compliance.

Most bodies can arrange for conciliation between the parties and most can review and comment on legislative proposals and the reform of existing laws.

Interesting and useful powers which are not listed in Article 13(2) include the following:

- The Belgian Centre for Equal Opportunities and Opposition to Racism has the power to take legal action in the public interest. Where the alleged violation has an identifiable victim (who can be a natural or legal person),¹⁵⁵ the Centre's power to act is conditional upon the consent of the victim (Article 31, *in fine*, of the General Anti-Discrimination Federal Act).
- The French High Authority has the role of legal adviser ('*auxiliaire de justice*'), whereby criminal, civil and administrative courts may seek its observations in cases under adjudication. In addition, its powers have been extended to include the right to seek permission to submit its observations on civil, administrative and criminal matters.
- In the case of an investigation of a complaint which results in a finding of direct intentional discrimination (a criminal offence), the French High Authority can propose a *transaction pénale* - a kind of negotiated criminal sanction - to a perpetrator which can either be accepted or rejected. This could be a fine or publication (for instance a press release). If the proposed negotiated criminal sanction is rejected, or having been accepted there is a subsequent failure to comply with it, the Authority can initiate a criminal prosecution, in place of the public prosecutor, before a criminal court.
- The Dutch Equal Treatment Commission has the power to advise organisations (including governmental bodies) whether their employment practices contravene non-discrimination law.
- The Hungarian Equal Treatment Authority may initiate an *actio popularis* with a view to protecting the rights of persons and groups whose rights have been violated.
- The Irish Equality Authority enjoys legal standing to bring complaints to the Equality Tribunal relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. The Equality Authority may also carry out equality reviews, i.e. an audit of the level of equality that exists in a particular business or industry. Based on the results of this audit, an equality plan will be developed. The plan will consist of a programme of actions to be undertaken in employment or business to further the promotion of equality of opportunity. Where there are more than 50 employees, the Authority may instigate the review itself and produce an action plan. If there is a failure to implement the action plan, the Equality Authority may issue a notice detailing what steps are required for its implementation. Non-compliance with this notice may result in an order from either the High Court or Circuit Court requiring compliance.

¹⁵⁵ In some cases there is no victim, but the Act is nevertheless violated: this would be the case, for instance, if an employer publicly boasts that thanks to his 'selective' procedures in the recruitment process, no homosexual will ever be hired - this should be considered an offence as defined under Article 6(1) of the Act, and the associations or organisations listed in Article 31 will be considered to have an interest in filing a claim to request that a prosecution is launched.

In Slovakia, if a breach of the principle of equal treatment violates rights, interests protected by the law or freedoms of a higher or non-specified number of persons; or if public interest is seriously endangered by such violation, the right to invoke the protection of the right to equal treatment is also vested in the Slovak National Centre for Human Rights or in NGOs active in the field of anti-discrimination. These entities can request that the entity breaching the principle of equal treatment refrains from such conduct and, where possible, rectify the illegal situation (the list of these two options is exhaustive).¹⁵⁶

Finally, some concerns in relation to particular countries may be highlighted. There is concern that some specialised bodies are too close to government, thereby risking the independence of their work. For instance, the Italian National Office against Racial Discrimination has been created within the Department for Rights and Equal Opportunities of the Presidency of the Council of Ministers; the Slovenian Advocate of the Principle of Equal Treatment does not have its own budget, but is actually funded through the Government Office for Equal Opportunities, and irregularities in the appointment mechanism found in 2009 cast doubts on the Advocate's independence; and the Spanish Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin is attached to the Equality Ministry through its Anti-Discrimination Directorate General, although it is not part of the Ministry's hierarchal structure, and its make-up is fundamentally of a governmental nature. Moreover, the word 'independent' is not enshrined into the Act defining the Council's functions; although it does appear in a Royal Decree redefining those functions. That text is however purely rhetorical as the Council cannot *de jure* and *de facto* exercise its functions fully independently. Independence is also affected by the recent budgetary cuts many equality bodies are facing due to the economic crisis (e.g. Ireland, Latvia and Romania).

¹⁵⁶ Although this provision is a very progressive one, no entity entitled to file the *actio popularis* has done so as of yet.



Chapter 9

Implementation and compliance

A. Dissemination of information and social and civil dialogue

Of all of the Directives' articles, it is those on the dissemination of information and social and civil dialogue that have seen the least formal implementation by Member States and candidate countries and probably the most varied response. To some extent, this is due to the vagueness of these articles and the interpretation by some governments that they are not bound to transpose these provisions into law but simply to take some steps towards achieving their objectives. The impression prevails that the provisions have been insufficiently implemented in at least Bulgaria, Cyprus, Estonia, Greece, Latvia, Luxembourg, Poland, Slovenia, Spain, FYR of Macedonia and Turkey, and, with particular regard to Directive 2000/78/EC, Portugal and Italy. More generally, it seems that the duty to disseminate information and establish dialogue mechanisms is not a high priority at the national level.

Positive information dissemination activities include ministerial publications providing basic information on the principle of equal treatment, information campaigns through the media and organisation of seminars as in, for instance, Austria, Bulgaria, Malta and Portugal. In Hungary a National Network for Equal Opportunities has an office in each county and Budapest. It organises research and conferences, produces and disseminates information materials, maintains contacts with civil society and establishes networks of civil organisations. In Romania the National Council on Combating Discrimination has carried out national awareness raising campaigns, cultural events, summer schools, courses and training, round tables discussing public policies, and affirmative measures targeting children, students, teachers, civil servants, police officers, gendarmes, judges, lawyers, NGO representatives, doctors and healthcare workers. In Croatia, noteworthy initiatives included research on citizens' attitudes to discrimination and their knowledge of the newly adopted Anti-Discrimination Act, which was conducted by the Ombudsman's office in cooperation with the Centre for Peace Studies (NGO).

Information should be disseminated in a way that is accessible to all people with disabilities and in languages understood by minorities in that country. In Finland, for instance, a leaflet on the Non-Discrimination Act has been produced by the Ministry of Labour and the SEIS-project,¹⁵⁷ and made available in Braille and both in print and on the internet in Finnish, Swedish, English, Sami, Russian, Arabic and Spanish. French television campaigns and websites are adapted for the visually and hearing impaired. In contrast, information provision does not seem to cater for disabled persons' needs in some countries including Bulgaria, the Czech Republic, Hungary, Latvia, Portugal, Slovakia and, to some extent, Poland¹⁵⁸.

The mandates of specialised bodies in most countries include awareness-raising activities, for instance Denmark, Estonia, France, Ireland, Romania, Sweden and the United Kingdom. Where the body only has competences relating to race and ethnic origin, however, other arrangements must be made for the grounds of religion and belief, age, disability and sexual orientation. This is a

¹⁵⁷ "STOP – Finland Forward without Discrimination", funded by the Community Action Programme to Combat Discrimination.

¹⁵⁸ The website of the Ministry of Interior and Administration was designed in a way that made it accessible to people with visual impairments using screen reading software. The Ministry uses the Intelligent Web Reader software.

shortcoming for example in Italy, where dissemination of information has started with the activities of the National Office against Racial Discrimination, but no particular measures are planned for the other grounds.

A small number of Member States, including Malta, Poland and Portugal, have included in their legislation an obligation on employers to inform employees about discrimination laws. Malta extends this duty to 'any person or organisation to whom these regulations apply'; who should bring the laws to the attention of the organisation's members or to any other persons who may be affected by the organisation's actions.¹⁵⁹ Implementation of the obligation on employers in Poland is monitored by the National Labour Inspectorate.

Finally, European Union campaigns and project funding must be acknowledged for their role in many countries in raising awareness. Although some activities had been carried out previously, the designation of 2007 as the European Year of Equal Opportunities for All resulted in various activities being organised at national level in each Member State aimed at raising awareness and promoting debate on the benefits of diversity for European societies. The National Commission for the Promotion of Equality for Men and Women, in collaboration with the European Commission delegation in Malta, organised a media campaign entitled *A National Campaign Promoting Equal Opportunities for All* as a follow up to the *European Year of Equal Opportunities for All 2007*. This campaign sought to highlight the six grounds of discrimination recognised by the EU. In Croatia, the Government's Office for Human Rights was proactive in attracting EU and other funds in order to speed up implementation of the law and develop a network of stakeholders.

Some countries consulted NGOs and social partners for support with transposition of the Directives:

- In Hungary, the legislative concept paper and draft were sent to NGOs and posted on the Ministry of Justice website with a call for comments.
- In Ireland the Department of Justice, Equality and Law Reform produced a discussion document on the employment issues that arose from the Directives and invited submissions from other government departments, the social partners, the Equality Tribunal and the Equality Authority.
- In Croatia, the Ombudsman's office invited the social partners, civil society organisations dealing with human rights, organisations protecting the rights of various marginalised and minority groups, churches and religious organisations to give their input regarding implementation of the Anti-Discrimination Act in February 2010.
- In the United Kingdom well over 10,000 copies of a first consultation document were sent to a diverse range of organisations, including employers' organisations, public and private sector employers, trade unions, NGOs with a particular interest in any of the areas of discrimination within the Directives, lawyers' organisations, academics and others.

¹⁵⁹ Regulation 12 of Legal Notice 461 of 2004.

A positive example of cooperation between the Government and NGOs in Slovakia is shown in the process of amending the Anti-Discrimination Act. A representative of the NGOs was invited to become a member of the inter-governmental body to prepare the amendment that resulted into the Act being finally adopted in spring 2008. The process was transparent and democratic, and led to a relatively satisfactory result. This contrasts starkly with Spain, where transposition has been severely criticised for being 'hidden', with a lack of consultation and parliamentary debate, the absence of government public statements and the bypassing of the Council of State and Economic and Social Council. A different problem emerged in Denmark and Finland: the lack of public debate was attributable to the fact that the actors who would normally generate public discussion were participants in the Committees charged with considering implementation of the Directives and felt they could not discuss the issues until that (lengthy) process was over.

Few countries have put in place permanent structures specifically for dialogue with civil society and the social partners on equality issues. In Bulgaria, the Protection against Discrimination Commission has signed a partnership agreement with one of the two principal trade unions. At local level in France the Commission for the Promotion of Equality (COPEC) brings together all local actors under the authority of the representative of the state in the administrative area (*département*) to generate co-operation and dialogue. The Disability Act of 2005 created a *Département*-level Commission for the Rights and Autonomy of the Disabled which will be competent for all decisions relating to the support of disabled people. Its members are representatives of public authorities, NGOs, trade unions and social partners and at least 30 per cent are representatives of the disabled. Its structure will be set out by decree (still to be adopted). The same law creates an obligation on the social partners to hold annual negotiations on measures necessary for the professional integration of persons with disabilities. Slovenian law requires the Government and competent ministries to co-operate with NGOs that are active in the field of equal treatment and with the social partners (Article 8 of the Act Implementing the Principle of Equal Treatment). In Belgium, a specific taskforce has been set up within the Federal Public Service (Ministry) of Employment since July 2001 (*cellule entreprise multiculturelle*), with the active cooperation of the Centre for Equal Opportunities and Opposition to Racism in order to establish more systematic links with the social partners.

In Finland there is a good record of government co-operation with NGOs and social partners through advisory bodies on youth issues, disability, rehabilitation and Roma affairs. An Advisory Body on Minority Issues has been set up which will develop a means of co-operation between the Government and NGOs in matters relating to the supervision and monitoring of the implementation of equal treatment. Key ministries, the association of municipalities, social partners and five NGOs are represented on the board of the advisory body. In the Netherlands, the Ministry of Social Affairs and Labour has established a network of professionals on equal treatment issues, consisting of representatives from the most important ministries and national employees' and employers' organisations. The network convenes twice a year to exchange information on equal treatment. In addition, the Ministry of Social Affairs operates an 'Article 13 Project' which delivers training to small and medium-sized businesses, provides information in professional journals, and conducts interviews with large companies on equal treatment. In Romania the national equality body works closely with NGOs representing various vulnerable groups and consults with the main NGOs when developing its programmes in relevant areas. In Spain a Strategic Plan for Citizenship and Integration designed to promote the integration of immigrants was adopted in February 2007. One of the key points of

the Plan is equal treatment and combating all forms of discrimination. The Plan is implemented through a number of action programmes in collaboration between various levels of government and NGOs.

There appear to be more instances of structured dialogue for disability than the other grounds of discrimination. The Latvian National Council for the Affairs of Disabled Persons unites representatives of NGOs and state institutions to promote the full integration of disabled persons in political, economic and social life based on the principle of equality. In Spain, structures for dialogue include the Advisory Commission on Religious Freedom and the National Disability Council, which represents associations of disabled persons of various kinds. Its functions include issuing reports on draft regulations affecting equal opportunities, non-discrimination and universal accessibility. In France there is a National Consultative Commission for the Disabled.

As with information dissemination, it is often the role of the specialised equality bodies to generate dialogue with the social partners and civil society. This is the case for the Belgian Centre for Equal Opportunities and Opposition to Racism, the Estonian Chancellor of Justice, the Irish Equality Authority, and the Italian National Office against Racial Discrimination (for racial and ethnic origin only).

General structures for social dialogue may be used for dialogue on equality issues in the Czech Republic, Denmark, Lithuania, Malta, Poland, Portugal, Slovakia, Sweden and the United Kingdom. However, their effective use in practice differs greatly. There is a good record of governmental agencies and ministerial departments co-operating with non-governmental organisations in the United Kingdom.

B. Ensuring compliance

Article 14 of the Racial Equality Directive and Article 16 of the Employment Equality Directive require Member States to ensure that legal texts comply with the Directives, demanding that on the one hand that ‘any laws, regulations and administrative provisions that are contrary to the principle of equal treatment are abolished’, and on the other that ‘any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers’ and employers’ organisations are, or may be, declared void or are amended’. The wording of these provisions would appear to prescribe the systematic repeal of all discriminatory laws, whereas more leeway is left for annulling contractual provisions and bringing them into line with the Directives.

Few countries have systematically ensured that all existing legal texts are in line with the principle of equal treatment. In transposing the two Directives, only the relevant ministries in Finland seem to have reviewed legislation in their respective administrative fields. They did not find any discriminatory laws, regulations or rules, and it was therefore deemed unnecessary to abolish any laws. In the United Kingdom, government departments reviewed the legislation for which they were responsible to ensure that any legislation which was contrary to the Directive’s principles of equal treatment in relation to disability, religion or belief and sexual orientation,

and most recently age, was repealed or amended. Non-governmental experts in other countries have, however, identified laws that were discriminatory, for example Article 175 of Portugal's Criminal Code, which punished homosexual acts with persons aged 14 to 16 or the instigation of such acts, while the same type of acts were not punished if the 14 to 16 year old was of the opposite sex. In the new Criminal Code (Law 59/2007 of 4 September 2007) Article 175 has been replaced by Article 173 (sexual acts with adolescents). This article does not violate the above mentioned principle.

In most countries therefore, discriminatory laws are likely to be repealed following a complaint before the courts. In most countries, the constitutional equality guarantee already acts as a filter for discriminatory laws, with the constitutional court having the power to declare void or set aside any unconstitutional provisions. However, proceedings before constitutional courts for this purpose can be lengthy, requiring the exhaustion first of all other remedies. On this basis it is questionable whether this is sufficient to fulfil this provision of the Directives. Aside from constitutional clauses, there are often clauses in primary legislation which allow lower courts to declare laws that are in breach of the principle of equal treatment void. For instance in France, the Constitution, Civil Code and Labour Code all ensure that provisions and clauses which breach the 'superior rule' of equality are void. In Lithuania the Labour Code provides that courts can declare invalid acts adopted by state institutions, municipalities or individual officers if they are contrary to the law. In Romania, as the principle of equality is clearly guaranteed in the Constitution, any contrary provisions would be unconstitutional and illegal under the Anti-Discrimination Law as *lex specialis*. Following the decisions of the Romanian Constitutional Court which limited both the mandate of the NCCD¹⁶⁰ and of the civil courts in relation to discrimination generated by legislative norms,¹⁶¹ only the Constitutional Court may tackle norms containing provisions contrary to the principle of equality. As legal standing before the Constitutional Court is limited by the Constitution to specifically mentioned categories (courts of law or the Ombudsman), the Romanian legal framework currently has a *de facto* gap in protection against discrimination induced by legislative provisions.

Article 26 of the Greek Anti-Discrimination Act provides 'Once in force, this Act repeals any legislation or rule and abrogates any clause included in personal or collective agreements, general terms of transactions, internal enterprise regulations, charters of profit or non-profit organisations, independent professional associations and employee or employer associations opposed to the equal treatment principle defined in this Act.'

In Cyprus, the Equal Treatment Act stipulates the repeal of any contrary provisions, even though under the doctrine of implied repeal these would not normally prevail over later legislation in the event of a conflict. It seems that a recommendation by the equality body, following an investigation and a finding that a law or practice is discriminatory, can trigger the repeal of discriminatory laws, but this is not necessarily always the case. In Ireland, there is concern that the Equal Status Act 2000-2004 remains subordinate to other legislative enactments, because section 14(a)(i) provides that nothing in that Act will prohibit any action taken under any enactment.

¹⁶⁰ Romania / Curtea Constituțională / Decision 997 of 7 October 2008 finding that Article 20(3) of the Anti-Discrimination Act, defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions, is unconstitutional.

¹⁶¹ Romania / Curtea Constituțională / Decision 818 (3 July 2008) published in the Official Gazette 537 of 16 July 2008.

In some jurisdictions, an entire agreement is invalidated if it includes a discriminatory clause. Legislation which can annul discriminatory rules in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations is more common among the Member States. This is the case in the Netherlands where the main equal treatment acts stipulate that 'agreements' which are in contravention of the equal treatment legislation are void. General labour law is relied on to this end in many countries, including Hungary, where Articles 8 and 13 of the Labour Code provide that an agreement (individual or collective) that violates labour law regulations is void. If annulled or successfully contested the agreement is invalid (Article 9), and if invalidity results in loss compensation must be paid (Article 10). Similar general labour law provisions are found in Latvia (Article 6 Labour Act), Poland (Article 9.2 Labour Code), and Estonia (Articles 16 and 125(1) Employment Contracts Act and under Article 4(2) Collective Agreements Act which provides that the terms and conditions of a collective agreement which are 'less favourable to employees than those prescribed in a law or other legislation' are invalid, unless exceptions are explicitly permitted).

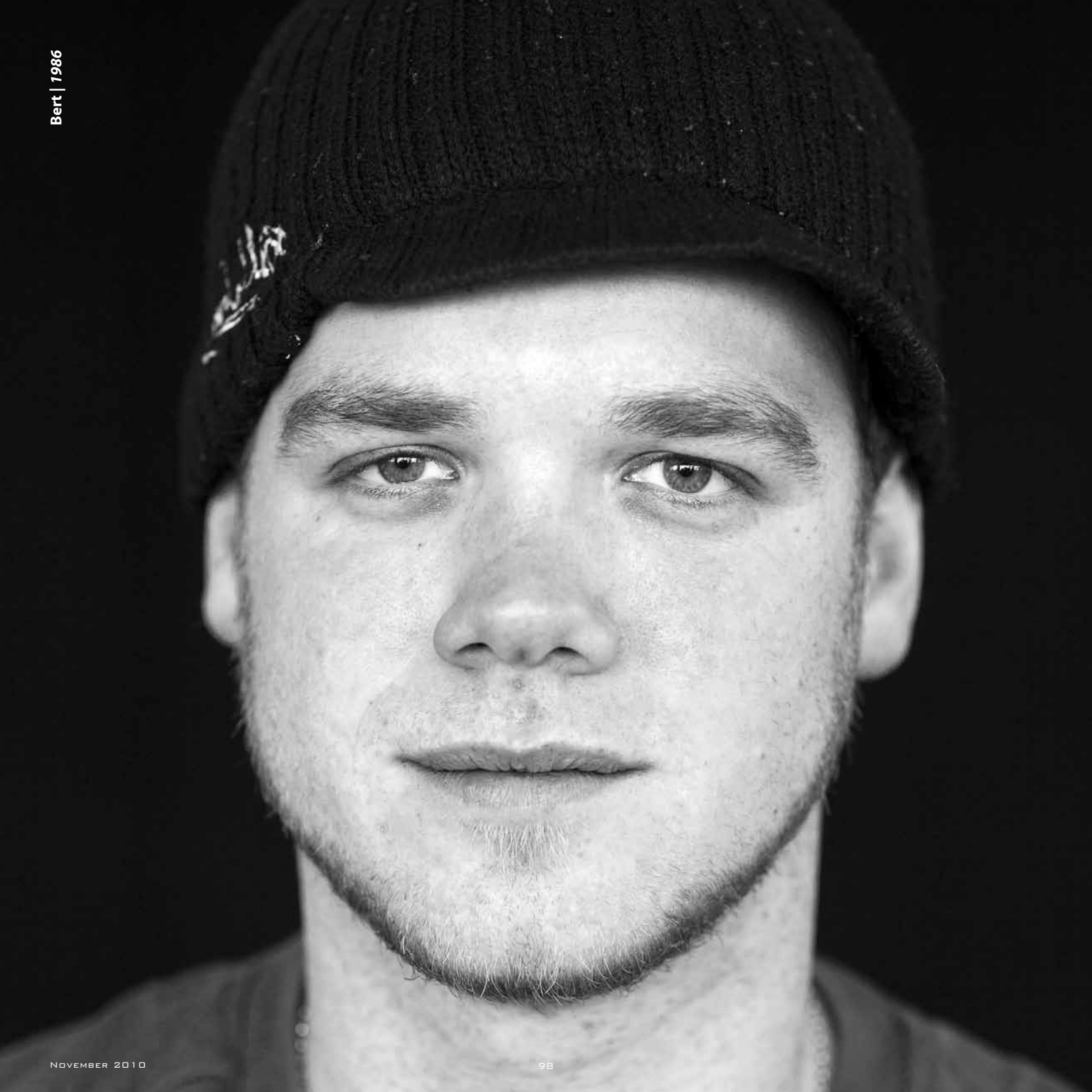
There are provisions in some Member States which specifically render discriminatory provisions in contracts or collective agreements, etc., void. In Spain, Article 17(1) of the Workers' Statute declares void any discriminatory clauses in collective agreements, individual agreements, and unilateral decisions of discriminatory employers. The Finnish Non-Discrimination Act provides that a court may, in a case before it, change or ignore terms in contracts or collective agreements that are contrary to the prohibition provided in section 6 (on discrimination) or section 8 (on victimisation) of the Act (section 10). The Employment Contracts Act also has a special provision concerning employment contracts: a provision of a contract which is plainly discriminatory is to be considered void (section 9(2)).

Significantly, the Irish Employment Equality Act 1998-2004 provides that all employment contracts are deemed to have an equality clause that transforms any provisions of the contracts that would otherwise give rise to unlawful discrimination (section 30). All discriminatory provisions in collective agreements are deemed void, and it is not possible to contract out of the terms of the equality legislation (section 9). While it is the case that discriminatory clauses are not valid, the reality is that this fact may only be established through litigation. Where the Equality Tribunal hold that the clause in question is contrary to the legislation, that part of the collective agreement or contract cannot be enforced and must be modified.

In Malta, Regulation 12 of Legal Notice 461 of 2004 provides that any provisions in individual or collective contracts or agreements, internal rules of undertakings, or rules governing registered organisations that are contrary to the principle of equal treatment, will, on entry into force of these regulations, be considered void. In the United Kingdom there are specific provisions for this purpose in the anti-discrimination legislation for each of the relevant grounds.¹⁶²

¹⁶² The Equality Act 2010 makes similar provision for each of the relevant grounds.

Under the Slovakian Anti-Discrimination Act, employers and relevant trade unions had until 1 January 2005 to bring the provisions of collective agreements into compliance with the principle of equal treatment. Employers have the same obligation with regard to provisions in their internal rules. This means that after January 2005 all collective agreements and internal rules of employment contrary to the Anti-Discrimination Act could not be legally applied. Furthermore, regulations registered by a state agency (by-laws of associations, by-laws of independent professions and workers' and employers' organisations, by-laws of profit-making organisations, etc.) must not be contrary to the principle of equality. If the by-laws submitted for registration are in breach of this principle, the registration body must reject them. Also, some specialised bodies (such as the Irish Equality Authority) likewise have the power to order changes to discriminatory rules of organisations and independent professions and associations.



Chapter 10

Conclusion

The transposition of the Racial Equality and Employment Equality Directives has immensely enhanced legal protection against discrimination on the grounds of racial and ethnic origin, religion and belief, age, disability and sexual orientation across Europe. As part of the negotiations preceding EU membership, candidate countries must screen EU law, and in particular the two landmark Directives, in preparation for full compliance with the EU *acquis*. It is encouraging how much additional protection national law provides compared to EU law in certain instances and that levelling up of protection across grounds has continued in a few countries. However, this fifth comparative overview¹⁶³ has revealed that, although significant progress has been made in recent years and a few gaps have been plugged, a small number of apparent shortcomings still remain in the legislation of some Member States and candidate countries and it is now imperative that they be resolved, ten years after the adoption of the Directives. Ultimately it is up to the courts to decide whether national law is inconsistent with European law and to ensure effective implementation. Case law at national level is now becoming more frequent, although the number of cases in some countries remains very low or focuses on some grounds in particular to the detriment of the others. There has been a large increase in the number of preliminary references lodged at the European Court of Justice especially on the grounds of age, but it remains to be seen how these rulings will be applied at national level. Given the ambiguities in some of the Directives' texts, and therefore also in many national provisions, judicial interpretation is vital to clarify important boundaries.

A challenge identified in many countries is the application of anti-discrimination laws in practice. Most countries have outlawed discrimination on at least some grounds for some time, yet the number of cases brought by victims seeking to assert their equality rights remains rather low. The hope was expressed in the last four editions of this publication that the detail that has been added to the law in many countries, and in particular specific procedural rights in the remedies and enforcement rules, would change this situation. Although much of this machinery had been put in place by many states, initial observations indicate a possible correlation between countries with low levels of case law and countries which transposed the Directives by simply 'lifting' wording from the Directives for their national laws. Certain procedural difficulties that affect access to justice and effective enforcement also stem from the short limitation periods foreseen in legislation, lengthy procedures, high costs or failures in provision of legal aid. The law remains complex and remedies often inadequate. The credibility and admissibility of methods of proof, such as statistical evidence (and therefore the issue of data collection) and to a lesser extent situation testing, still need to be pushed for. Finally, due to the economic downturn, budgetary cuts have greatly affected the intervention and work of many equality bodies and NGOs in many Member States.

Some countries have made some small progress regarding positive action and dissemination of information on anti-discrimination laws but much more remains to be done to increase dialogue among governments, civil society and the social partners across all grounds and to raise awareness among the public.

¹⁶³ Four previous issues of this publication compared the situation in the 27 Member States. They were completed in September 2005, November 2006, July 2007 and November 2009.



Chapter 11

Tables

Explanatory Note to Tables

The information in these tables is based on that which appears in the updated executive summaries and country reports for the European Network of Legal Experts in the Non-discrimination Field, gathering information regarding 2009. The information is a non-exhaustive list which contains only the main pieces of anti-discrimination legislation that apply regarding non-discrimination in each Member State and does not include references to other specific legislation. Inclusion of the legislation in the tables does not imply that national legislation is in compliance with Directives 2000/43 and 2000/78.

	Constitutional provisions	Main Anti-Discrimination Legislation	Grounds covered
AUSTRIA	Article 7 Federal Constitutional Act (B-VG), Article 2 Basic Law	Federal Equal Treatment Act, Federal Law Gazette I 100/1993 as amended by Federal Law Gazette I 65/2004 and 97/2008	Gender, ethnic affiliation, religion, belief, age, and sexual orientation
		Equal Treatment Act, Federal Law Gazette I 66/2004 as amended by Federal Law Gazette I 98/2008	Gender, ethnic affiliation, religion, belief, age, and sexual orientation
		Equal Treatment Commission and Office for Equal Treatment Act, Federal Law Gazette I 66/2004 as amended by Federal Law Gazette I 98/2008	Gender, ethnic affiliation, religion, belief, age, and sexual orientation
		Disability Equality Act, Federal Law Gazette I 82/2005 as amended by Federal Law Gazette. I 67/2008	Disability
		Styrian Equal Treatment Act, Styrian Provincial Law Gazette 24/2004	Gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation
		Viennese Service Order, as amended by Viennese Provincial Law Gazette 36/2004	Gender, race, ethnic origin, religion, belief, disability, age, sexual orientation
		Viennese Anti-Discrimination Act, Viennese Provincial Law Gazette 35/2004	Race, ethnic origin, religion, belief, age, sexual orientation
		Lower Austrian Equal Treatment Act, Lower Austrian Provincial Law Gazette 69/1997 as amended by 65/2004	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Carinthian Anti-Discrimination Act, Carinthian Provincial Law Gazette 63/2004	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Voralbergian Anti-Discrimination Act	Gender, ethnic affiliation, religion, belief, disability age, and sexual orientation
		Upper Austrian Anti-Discrimination Act	Gender, ethnic affiliation, religion, belief, disability age, and sexual orientation
		Burgenland's Anti-Discrimination Act	All grounds of the two directives
		Salzburg Equal Treatment Act 31/2006	All grounds of the two directives

BELGIUM	Articles 10 and 11 of the Constitution	Racial Equality Federal Act Criminalising Certain Acts Inspired by Racism or Xenophobia of 30 July 1981, as amended by Acts of 12 April 1994, 7 May 1999, 20 January 2003 and 10 May 2007	Race, colour, descent, ethnic and national origin
		General Anti-Discrimination Act Pertaining to the Struggle against Certain Forms of Discrimination of 10 May 2007 as amended by the Federal Act Establishing the Centre for Equal Opportunities and the Struggle against Racism of 30 December 2009	All grounds in the two directives and additional grounds
		Flemish Region / Community: Decree establishing a Framework Decree for a Flemish Equal Opportunities and Equal Treatment Policy of 10 July 2008	All grounds of the two directives and additional grounds
		French-speaking Community: Decree on the Struggle against Certain Forms of Discrimination of 12 December 2008	All grounds of the two directives and additional grounds
		Walloon Region: Decree on the Struggle against Certain Forms of Discrimination, including between Women and Men, in the Economy, Employment and Vocational Training of 6 November 2008	All grounds of the two directives and additional grounds
		German-speaking Community: Decree on the Guarantee of Equal Treatment in the Labour Market of 17 May 2004	All grounds of the two directives and additional grounds
		Region of Brussels-Capital: Ordinance on the Struggle against Discrimination and Equal Treatment in Employment of 4 September 2008	All grounds of the two directives and additional grounds
		Region of Brussels-Capital: Ordinance on Promotion of Diversity and the Fight against Discrimination in the Civil Service of the Region of 4 September 2008	All grounds of the two directives and additional grounds
		Commission communautaire française (Cocof): Decree on Equal Treatment between Persons in Vocational Training of 22 March 2007	All grounds of the two directives (open list of suspect criteria)
		Protection against Discrimination Act of 13 September 2003	All grounds of the two Directives and additional grounds
BULGARIA	Article 6 (2) of the Constitution	Combating Racial and Some Other Forms of Discrimination (Commissioner) Act, Law 42(1)/2004 of 19 March 2004	Race, community, language, colour, religion, political or other beliefs, national or ethnic origin, special needs, age and sexual orientation (appointing the Ombudsman as the Equality Body)
CYPRUS	Article 28 of the Constitution	Equal Treatment Irrespective of Race or Ethnic Origin Act, Law 59(I)/2004 of 31 March 2004	Racial and ethnic origin (transposing the Racial Equality Directive)
		Equal Treatment in Employment and Occupation Act, Law 58 (1)/2004 of 31 March 2004	Racial and ethnic origin religion or belief, age, sexual orientation (transposing the employment Directive)
		Persons with Disabilities Act, Law 127(I)/2000 as amended by Law 57(I)/2004 of 31 March 2004	Disability

	Constitutional provisions	Main Anti-Discrimination Legislation	Grounds covered
CZECH REPUBLIC	Article 3.1 of the Charter of Fundamental Rights and Freedoms, (part of the Constitutional order)	Labour Code	No explicit grounds
		Anti-Discrimination Act, Law 198/2009 of 17 June 2009	All grounds in the two Directives and sex
		Employment Act, Law 435/2004 Coll. of 13 May 2004	All grounds in the two directives and additional grounds
		Pre-school, Basic, Secondary, Tertiary Professional and Other Education Act (the Education Act), as amended of 24 September 2004, Law 561/2004 Coll.,	Race, Ethnic origin, religion or belief and additional grounds
DENMARK	None	Penal Code, Law 1260 of 23 October 2007, section 266 b	Race, skin colour, national or ethnic origin, religion/belief and sexual orientation
		Prohibition of Unequal Treatment due to Race and Ethnicity Act, Law 626 of 29 September 1987	Race, skin colour, national or ethnic origin, religion/belief and sexual orientation
		Prohibition of Differential Treatment in the Labour Market Act, Law 31 of 12 January 2005, Consolidated Law 1349 of 16 December 2008	Race, skin colour, national, social or ethnic origin, religion, belief, age, disability, sexual orientation and political opinion
		Ethnic Equal Treatment Act, Law 374 of 28 May 2003	Race and ethnic origin
		Institute for International Studies and Human Rights Act, Law 411 of 6 June 2002	Race and ethnic origin
		Prohibition of Direct and Indirect Discrimination on the Grounds of Age and Disability Act, Law 1417 of 22 December 2004	Age and disability
		Board of Equal Treatment Act, Law 387 of 27 May 2008	All grounds in the two Directives and Additional grounds
ESTONIA	Article 12(1) Constitution	Legal Chancellor of Justice Act of 25 February 1999 as amended on 11 February 2003	All grounds in the two directives and additional grounds
		Equal Treatment Act of 22 April 2004 as amended on 11 December 2008	All grounds in the two Directives
		Penal Code	Ethnic origin, race, colour, sex, language, origin, religion, political opinion, financial or social status, genetic risks
FINLAND	Section 6(1) and (2) Constitution	Non-Discrimination Act, 21/2004 as amended on 14 November 2008 and 20 February 2009	All grounds in the two directives and additional grounds
		Penal Code	All grounds in the two directives and additional grounds
		Province of Åland: Provincial Prevention of Discrimination Act 66/2005, Discrimination Ombudsman Act, Provincial Decree on the Discrimination Board	All grounds in the two directives

FRANCE	Preamble to the Constitution, Article 1 of the Constitution	Act Combating Discrimination, Law 2001-1006 of 16 November 2001	All grounds in the two directives and additional grounds
		All grounds in the two directives and additional grounds	All grounds in the two directives and additional grounds
		Social Modernisation Act, Law 2002-73 of 17 January 2002	All grounds in the two directives and additional grounds
		Creation of Specialised Body (HALDE) Act, Law 2004-1486 of 30 December 2004	All grounds in the two directives and additional grounds
		Social Cohesion Act, Law 2004-1370 of 20 December 2004	Race and religion
		Enabling the Government to Adopt Emergency Measures for Employment by Governmental Decree Act, Law 2005-846 of 26 July 2005	Age
		Adaptation of National Law to Community Law in Matters of Discrimination Act, Law 2008-496 of 27 May 2008	All grounds in the two Directives
GERMANY	Article 3, German Basic Law	Disability Act, Law 2005-102 of 11 February 2005	Disability
		Promotion of Equality of the Disabled Act of 27 April 2002	Disability
GREECE	Article 5.2 of the Constitution	Act implementing European Directives Putting into Effect the Principle of Equal Treatment including the General Law on Equal Treatment of 14 August 2006. Last amended on 5 February 2009	All grounds in the two directives and additional grounds (belief not in civil law)
		Anti-Racist Act against Discrimination on the Grounds of Racial or Ethnic Origin or Religion, as amended, Law 927/1979	Racial or ethnic origin and religion
		Implementation of the Principle of Equal Treatment regardless of Racial or Ethnic Origin, Religion or other Beliefs, Disability, Age or Sexual Orientation (General Framework), Law 3304/2005 of 27 January 2005	All grounds in the two directives
HUNGARY	Article 70/A of the Constitution	Equal Treatment and Promotion of Equality of Opportunities Act, Law CXXV of 28 December 2003, last amended in November 2009 (Equal Treatment Act)	All grounds in the two directives and additional grounds
		Government Decree on the Equal Treatment Authority and Detailed Provisions of its Proceedings, Decree 362/2004 of 26 December 2004	All grounds in the two directives and additional grounds
		Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities Act, Law XXVI of 16 March 1998	Disability
IRELAND	Article 40.1 of the Constitution	Employment Equality Act 1998-2007 of 18 October 1999	All grounds in the two directives and additional grounds
		Equal Status Act 2000-2004 of 25 October 2000	All grounds in the two Directives and additional grounds
		Equality Act 2004 of 19 July 2004	All grounds in the two directives and additional grounds
		Protection of Employment Act 2007 of 8 May 2007	Age

	Constitutional provisions	Main Anti-Discrimination Legislation	Grounds covered
ITALY	Article 3 of the Constitution	Legislative Decree transposing Directive 2000/43, Decree 215 of 9 July 2003 as amended by Act 101 of 6 June 2008	Racial and ethnic origin
		Decree on Internal Structures and Competences of Specialised Body of 11 December 2003	Racial and ethnic origin
		Joint Decree of the Ministries of Labour / Welfare and Equal Opportunities Establishing a Register of Associations and Bodies with Standing to Litigate Discrimination Claims of 16 December 2005	Racial and ethnic origin
		Legislative Decree transposing Directive 2000/78, Decree 216 of 9 July 2003, as amended by Act 101 of 6 June 2008	Religion or belief, age, disability and sexual orientation,
LATVIA	Article 91 of the Constitution	Labour Act of 20 June 2001, last amended in 2006 (includes civil service and sexual orientation but still excludes self-employment)	All grounds in the two directives and "any other circumstances"
		Consumer Protection Act of 18 March 1999, as further amended	Race, ethnic origin and gender
		Ombudsman Act of 6 April 2006	Grounds not specified
		Prohibition of Discrimination against Natural Persons who are Economic Operators Act of 21 May 2009	Race, ethnic origin and gender
LITHUANIA	Article 29 of the Constitution	Equal Treatment Act of 18 November 2003, as amended in June 2008	All grounds in the two directives and additional grounds
LUXEMBOURG	Article 10bis of the Constitution (for nationals only)	Penal Code	All grounds in the two Directives
		General Anti-Discrimination Act of 28 November 2006	
		All grounds in the two Directives	
		Public Sector Act of 29 November 2006	All grounds in the two Directives
MALTA	Article 45 of the Constitution	Disabled Persons Act of 12 September 2003	Disability
		Employment and Industrial Relations Act of 2 December 2002	Marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association
		Equal Treatment in Employment Regulations, 2004, Legal Notice 461 of 2004 issued under the Employment and Industrial Relations Act of 5 November 2004, as further amended	All grounds in the two directives and additional grounds
		Equal Opportunities (Persons with Disabilities) Act 2000	Disability
NETHERLANDS	Article 1 of the Constitution	Equal Treatment of Persons Order, Legal Notice 85 of 7 December 2007	Race and ethnic origin
		General Equal Treatment Act of 1994, last amended in 2005	All grounds in the two directives and additional grounds
		Equal Treatment in Employment on the Ground of Age Act of 1 May 2004	Age
		Equal Treatment on the Grounds of Disability and Chronic Disease Act of 3 April 2003 as further amended	Disability and chronic disease
		Criminal Code	Race, religion or belief, heterosexual or homosexual orientation and disability

POLAND	Article 32 of the Constitution	Labour Code (last amended 18 January 2009)	All grounds in the two directives and additional grounds
PORTUGAL	Article 13 of the Constitution	Promotion of Employment and the Institutions of the Labour Market Act of 20 April 2004	All grounds in the two directives and additional grounds
		Racial and Ethnic Origin Discrimination Act, Law 18/2004 of 11 May 2004, as amended by Decree Law 86/2005	Race, and ethnic origin
		Labour Code Act, Law 35/2004	All grounds in the two directives and additional grounds
ROMANIA	Arts. 4 and 16 of the Constitution	Decree-law creating the Office of the High Commissioner for Immigration and Ethnic Minorities, Decree-law 251/2002 of 22 November 2002 amended by Decree-law 27/2005 of 04 February 2005 and revoked by Decree-law 167/2007 of 3 May 2007	Race, ethnic origin and nationality
SLOVAKIA	Article 12 of the Constitution	Amendment of Government Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination Act, (Anti-Discrimination Act), Law 324/2006 of 20 July 2006	All grounds in the two Directives and additional grounds
		Equal Treatment in Certain Areas and Protection against Discrimination Act, amending and supplementing certain other laws, Law 365/2004 Coll. of 20 May 2004	All grounds in the two Directives
		Slovak National Centre for Human Rights (Establishment) Act, Law 308/1993 Coll. as further amended on 15 December 1993	All grounds in the two Directives
SLOVENIA	Article 14 of the Constitution	Labour Code	Non exhaustive list
SPAIN	Arts. 14 and 16 of the Constitution	Principle of Equal Treatment (Implementation) Act of 22 April 2004, as amended on 22 June 2007	All grounds in the two directives and additional grounds
		Employment Relations Act of 24 April 2002, as amended on 29 October 2007	All grounds in the two directives and additional grounds
		Fiscal, Administrative and Social Measures Act, Law 62/2003, of 30 December 2003	All grounds in the two Directives
SWEDEN	Chapter 1, Sec 2 and Chapter 2, Sec. 15 of the Constitution	Criminal Code	All grounds
		Discrimination Act (2008:567) of 5 June 2008	All grounds in the two Directives and sex and transgender identity or expression
		Penal Code	Ethnicity, religion and other belief, sexual orientation
UNITED KINGDOM	No written constitution	Great Britain: Race Relations Act 1976 last amended by Race Relations Regulations in 2003	Racial and ethnic origin, colour, nationality and national origin
		Northern Ireland: Race Relations (NI) Order 1997, last amended by Race Relations Order Regulations 2003	Racial and ethnic origin, colour, nationality and national origin
		Great Britain: Disability Discrimination Act 2005 amending the Disability Discrimination Act 1995	Disability
		Great Britain: Special Educational Needs and Disability Act 2001	Disability
		Northern Ireland: Disability Discrimination Act 1995 (Amendment) Regulations (NI) 2004	Disability

	Constitutional provisions	Main Anti-Discrimination Legislation	Grounds covered
		Great Britain: Employment Equality (Sexual Orientation) Regulations 2003 as amended by the Civil Partnership Act 2004 (Consequential Amendments to Subordinate Legislation) (Wales) Order 2005 and by the Civil Partnership Act 2004 (Consequential Amendments) (Scotland)) Order 2005	Sexual orientation
		Northern Ireland: Employment Equality (Sexual Orientation) Regulations (NI) 2003: The Civil Partnership Act 2004 (Amendments to Subordinate Legislation) (No2) Order 2005	Sexual Orientation
		Great Britain: Employment Equality (Religion and Belief) Regulations 2003	Religion and Belief
		Northern Ireland: Fair Employment and Treatment (NI) Order 1998, last amended by Fair Employment Regulations in 2003.	Religious belief and political opinion
		Great Britain: The Equality Act 2006	All grounds including sex
		GB: Employment Equality (Age) Regulations 2006	Age
		NI: Employment Equality (Age) Regulations 2006	Age
		Anti-Discrimination Act	Race and ethnic origin
		Labour Code	No grounds mentioned
		Prevention and Protection against Discrimination Act of 8 April 2010	Gender, language, citizenship, social origin, personal or social status, property status, health condition, sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status
CROATIA	Article 14 of the Constitution		
FYR of MACEDONIA	Article 9 of the Constitution (for nationals only)		
TURKEY	Article10 of the Constitution	There is no anti-discrimination legislation in Turkey. It is possible to find meagre provisions relating to anti-discrimination mainly in the Labour Code, the Penal Code, the Persons with Disabilities Act and the National Education Act	

	Direct Discrimination	Indirect Discrimination	Harassment	Instruction to discriminate
AUSTRIA	Equal Treatment Act, Employment of People with Disabilities Act and Disability Equality Act (All Federal and Provincial laws)	Equal Treatment Act, Act on the Employment of People with Disabilities, Disability Equality Act and similar wording in most of the provincial acts	Equal Treatment Act, Act on the Employment of People with Disabilities, Disability Equality Act and all provincial acts	Equal Treatment Act, Act on the Employment of People with Disabilities, Disability Equality Act (Federal and Provincial laws)
BELGIUM	Racial Equality Federal Act, General Anti-Discrimination Federal Act, Flemish Decree, Decrees adopted by the German-speaking Community, the French-speaking Community and the Walloon Region	Racial Equality Federal Act and the General Anti-Discrimination Federal Act, Flemish Decree, Decrees adopted by the German-speaking Community, the French-speaking Community and the Walloon Region	Racial Equality Federal Act and the General Anti-Discrimination Federal Act, Flemish Decree, Protection against Violence and Moral or Sexual Harassment at Work Act of 11 June 2002, Penal Code	Racial Equality Federal Act and the General Anti-Discrimination Federal Act, Flemish Decree, Decrees adopted by the German-speaking Community, the French-speaking Community and the Walloon Region, Penal Code
BULGARIA	Protection against Discrimination Act	Protection against Discrimination Act	Protection against Discrimination Act	Protection against Discrimination Act
CYPRUS	Equal Treatment Irrespective of Race or Ethnic Origin Act, Equal Treatment in Employment and Occupation Act and Persons with Disabilities Act	Equal Treatment irrespective of Race or Ethnic Origin Act, Equal Treatment in Employment and Occupation Act and Persons with Disabilities Act	Equal Treatment irrespective of Race or Ethnic Origin Act, Equal Treatment in Employment and Occupation Act and Persons with Disabilities Act	Equal Treatment irrespective of Race or Ethnic Origin Act, Equal Treatment in Employment and Occupation Act and Persons with Disabilities Act
CZECH REPUBLIC	Anti-Discrimination Act, Employment Act, Service by Members of the Security Services Act	Anti-Discrimination Act, Employment Act, Service by Members of the Security Services Act	Anti-Discrimination Act, Employment Act, Service by Members of the Security Services Act	Anti-Discrimination Act
DENMARK	Prohibition of Differential Treatment in the Labour Market Act, Ethnic Equal Treatment Act	Prohibition of Differential Treatment in the Labour Market Act, Ethnic Equal Treatment Act	Prohibition of Differential Treatment in the Labour Market Act, Ethnic Equal Treatment Act	Prohibition of Differential Treatment in the Labour Market Act, Ethnic Equal Treatment Act
ESTONIA	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act
FINLAND	Non-Discrimination Act, Provincial Act on Prevention of Discrimination in the Province of Åland Islands	Non-Discrimination Act, Provincial Act on Prevention of Discrimination in the Province of Åland Islands	Non-Discrimination Act, Provincial Act on Prevention of Discrimination in the Province of Åland Islands	Non-Discrimination Act, Provincial Act on Prevention of Discrimination in the Province of Åland Islands
FRANCE	Adaptation of National Law to Community Law in matters of Discrimination Act	Adaptation of National Law to Community Law in matters of Discrimination Act	Adaptation of National Law to Community Law in matters of Discrimination Act	Adaptation of National Law to Community Law in matters of Discrimination Act
GERMANY	General Equal Treatment Act	General Equal Treatment Act	General Equal Treatment Act	General Equal Treatment Act
GREECE	Implementation of the Principle of Equal Treatment Act	Implementation of the Principle of Equal Treatment Act	Implementation of the Principle of Equal Treatment Act	Implementation of the Principle of Equal Treatment Act
HUNGARY	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act
IRELAND	Employment Equality Act, Equal Status Act	Employment Equality Act, Equal Status Act	Employment Equality Act, Equal Status Act,	Employment Equality Act, Equal Status Act

	Direct Discrimination	Indirect Discrimination	Harassment	Instruction to discriminate
ITALY	Decree transposing Directive 2000/43 and Decree transposing Directive 2000/78 Labour Act Equal Treatment Act General Anti-Discrimination Act	Decree transposing Directive 2000/43 and Decree transposing Directive 2000/78 Labour Act Equal Treatment Act General Anti-Discrimination Act	Decree transposing Directive 2000/43 and Decree transposing Directive 2000/78 Labour Act Equal Treatment Act General Anti-Discrimination Act	Decree transposing Directive 2000/43 and Decree transposing Directive 2000/78 Labour Act Equal Treatment Act General Anti-Discrimination Act
LATVIA	Labour Act	Labour Act	Labour Act	Labour Act
LITHUANIA	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act
LUXEMBOURG	General Anti-Discrimination Act	General Anti-Discrimination Act	General Anti-Discrimination Act	General Anti-Discrimination Act
MALTA	Equal Treatment in Employment Regulations and Equal Treatment of Persons Order	Equal Treatment in Employment Regulations and Equal Treatment of Persons Order	Equal Treatment in Employment Regulations and Equal Treatment of Persons Order	Equal Treatment in Employment Regulations and Equal Treatment of Persons Order
NETHERLANDS	General Equal Treatment Act, Age Discrimination Act, Disability Discrimination Act	General Equal Treatment Act, Age Discrimination Act, Disability Discrimination Act	General Equal Treatment Act, Disability Discrimination Act and Age Discrimination Act	General Equal Treatment Act, Disability Discrimination Act and Age Discrimination Act
POLAND	Labour Code	Labour Code	Labour Code	Labour Code
PORTUGAL	Racial and Ethnic Origin Discrimination Act, Labour Code, Disability Act	Racial and Ethnic Origin Discrimination Act, Labour Code, Disability Act	Labour Code	Racial and Ethnic Origin Discrimination Act, Labour Code, Disability Act
ROMANIA	Anti-Discrimination Act	Anti-Discrimination Act	Anti-Discrimination Act	Anti-Discrimination Act
SLOVAKIA	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act
SLOVENIA	Equal Treatment Act, Employment Relations Act, Vocational Rehabilitation and Employment of Disabled People Act	Equal Treatment Act, Employment Relations Act, Vocational Rehabilitation and Employment of Disabled People Act	Equal Treatment Act, Employment Relations Act	Equal Treatment Act, Employment Relations Act
SPAIN	Fiscal, Administrative and Social Measures Act	Fiscal, Administrative and Social Measures Act	Fiscal, Administrative and Social Measures Act	Fiscal, Administrative and Social Measures Act
SWEDEN	Discrimination Act	Discrimination Act	Discrimination Act	Discrimination Act
UNITED KINGDOM	GB: Disability Discrimination Act, Race Relations Act, Employment Equality (Sexual Orientation) Regulations, Employment Equality (Religion or Belief) Regulations, Equality Act 2006, NI: Race Relations Order, Fair Employment and Treatment Order, Employment Equality (Sexual Orientation) Regulations 2006	Judicial interpretation needed as there is no definition of indirect discrimination. GB: Race Relations Act, Employment Equality (Sexual Orientation) Regulations, Equality (Sexual Orientation) Regulations, Employment Equality (Religion or Belief) Act 2006, NI: Race Relations Order, Fair Employment and Treatment Order, Employment Equality (Sexual Orientation) Regulations 2006	Judicial interpretation might be needed. GB: Race Relations Act, Employment Equality (Sexual Orientation) Regulations, Disability Discrimination Act, Fair Employment and Treatment Order, Reg. 5 of the 2006 age regulations also prohibit instructions to discriminate in both GB and NI	Judicial interpretation might be needed. GB: Race Relations Act, Disability Discrimination Act, NI: Race Relations Order, Fair Employment and Treatment Order, Reg. 5 of the 2006 age regulations also prohibit instructions to discriminate in both GB and NI

CROATIA	Anti-Discrimination Act	Anti-Discrimination Act	Anti-Discrimination Act	Anti-Discrimination Act
FYR of MACEDONIA	Prevention of and Protection against Discrimination Act, Social Protection Act, Labour Code	Prevention of and Protection against Discrimination Act, Social Protection Act, Labour Code	Prevention of and Protection against Discrimination Act, Labour Code	Prevention of and Protection against Discrimination Act
TURKEY	Not defined	Not defined	Not defined	Not defined

	Employment	Social Protection	Social advantages	Education	Goods and services (including housing)
AUSTRIA	Equal Treatment Act, Employment of People with Disabilities Act, Disability Equality Act, Federal Disability Act, Provincial Equal Treatment Acts and/or Provincial Anti-Discrimination Acts	Equal Treatment Act (only on the ground of ethnic affiliation), for all grounds in most of the Provincial Acts (except Lower Austria)	Equal Treatment Act (only on the ground of ethnic affiliation) for all grounds in most of the Provincial Acts (except Lower Austria)	Equal Treatment Act, for all grounds in most of the Provincial Acts (except Lower Austria)	Equal Treatment Act (ethnic affiliation), Disability Equality Act (disability), for all grounds in most of the Provincial Acts (except Lower Austria)
BELGIUM	Racial Equality Federal Act and the General Anti-Discrimination Federal Act, Flemish Decree, Decrees adopted by the German-speaking Community, the French-speaking Community and the Walloon Region, not fully implemented in the Region of Brussels-Capital Ordinance of 22 March 2007	Racial Equality Federal Act and the General Anti-Discrimination Federal Act	General Anti-Discrimination Federal Act, the Flemish Community / Region, the French-speaking Community and the Walloon Region Decrees	Flemish Community / Region, French-speaking Community Decrees.	Racial Equality Federal Act and the General Anti-Discrimination Federal Act, Flemish Community / Region, French-speaking Community and the Walloon Region Decrees. Social housing is a regional competence and is covered by the Framework Anti-Discrimination Decree of the Flemish Community / Region, the Anti-Discrimination Decree of the Walloon Region and a specific Ordinance of the Region of Brussels-Capital
BULGARIA	Protection against Discrimination Act	Protection against Discrimination Act	Protection against Discrimination Act	Protection against Discrimination Act	Protection against Discrimination Act
CYPRUS	Equal Treatment Irrespective of Race or Ethnic Origin Act, Equal Treatment in Employment and Occupation Act, Persons with Disabilities Act	Equal Treatment Irrespective of Race or Ethnic Origin Act, Persons with Disabilities Act	Equal Treatment Irrespective of Race or Ethnic Origin Act, Persons with Disabilities Act	Equal Treatment Irrespective of Race or Ethnic Origin Act, Persons with Disabilities Act	Equal Treatment Irrespective of Race or Ethnic Origin Act, Persons with Disabilities Act
CZECH REPUBLIC	Anti-Discrimination Act, Employment Act	Anti-Discrimination Act	Anti-Discrimination Act	Anti-Discrimination Act	Anti-Discrimination Act
DENMARK	Prohibition of Differential Treatment in the Labour Market Act	Ethnic Equal Treatment Act	Ethnic Equal Treatment Act	Ethnic Equal Treatment Act	Ethnic Equal Treatment Act
ESTONIA	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act

FINLAND	Non-Discrimination Act, Åland Islands: Provincial Prevention of Discrimination Act ¹⁶⁴	Non-Discrimination Act (racial and ethnic origin), Åland Islands: Provincial Prevention of Discrimination Act	Non-Discrimination Act (racial and ethnic origin), Åland Islands: Provincial Prevention of Discrimination Act	Non-Discrimination Act (racial and ethnic origin), Åland Islands: Provincial Prevention of Discrimination Act	Non-Discrimination Act (racial and ethnic origin), Åland Islands: Provincial Prevention of Discrimination Act
FRANCE	Adaptation of National Law to Community Law in Matters of Discrimination Act	Adaptation of National Law to Community Law in Matters of Discrimination Act	Adaptation of National Law to Community Law in Matters of Discrimination Act	Adaptation of National Law to Community Law in Matters of Discrimination Act	Adaptation of National Law to Community Law in Matters of Discrimination Act
GERMANY	General Equal Treatment Act	General Equal Treatment Act	General Equal Treatment Act	General Equal Treatment Act	General Equal Treatment Act
GREECE	Principle of Equal Treatment (Implementation) Act	Principle of Equal Treatment (Implementation) Act	Principle of Equal Treatment (Implementation) Act	Principle of Equal Treatment (Implementation) Act	Principle of Equal Treatment (Implementation) Act
HUNGARY	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act, Consumer Protection Act, Housing: Equal Treatment Act
IRELAND	Employment Equality Act, Equal Status Act 2000-2004	Equal Status Act	Not mentioned in Equal Status Act	Equal Status Act, Education Act 1998	Equal Status Act
ITALY	Decree transposing Directive 2000/43 and Decree transposing Directive 2000/78	Decree transposing Directive 2000/43	Decree transposing Directive 2000/43	Decree transposing Directive 2000/43	Decree transposing Directive 2000/43
LATVIA	Labour Act	Social Security Act, Consumer Protection Act	Social Services Act, Consumer Protection Act	Education Act (except grounds of age, disability, sexual orientation)	Social Security Act
LITHUANIA	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act
LUXEMBOURG	General Anti-Discrimination Act	General Anti-Discrimination Act	General Anti-Discrimination Act	General Anti-Discrimination Act	General Anti-Discrimination Act

¹⁶⁴ The Non-Discrimination Act is also applicable with respect to privately employed persons and civil servants working in the Åland Islands. The Provincial Act is applicable with respect to those employed as civil servants by the Åland Islands or one of the municipalities in Åland Islands and those that are self-employed.

	Employment	Social Protection	Social advantages	Education	Goods and services (including housing)
MALTA	Employment and Industrial Relations Act, Employment and Training Services Act and Equal Treatment in Employment Regulations Act	Equal Treatment of Persons Order	Found in various pieces of legislation	Equal Treatment of Persons Order, Equal Opportunities (Persons with Disability) Act 2000	Equal Treatment of Persons Order
NETHERLANDS	General Equal Treatment Act, Age Discrimination Act, Disability Discrimination Act	General Equal Treatment Act (only regarding race)	General Equal Treatment Act (only regarding race)	General Equal Treatment Act	General Equal Treatment Act
POLAND	Labour Code	Judicial interpretation needed of the Social Security Act, the Social Assistance Act and the Medical Treatment Act	Judicial interpretation needed (grounds not listed) of the Family Benefits Act, and the Retirement and Disability Pensions from the Social Insurance Fund Act	Education Systems Act	Judicial interpretation needed of the Minor Offences Code. (no explicit anti-discrimination clause in the relevant laws regarding housing)
PORTUGAL	Labour Code, Disability Act	Racial and Ethnic Origin Discrimination Act, Basic Social Security Act	Racial and Ethnic Origin Discrimination Act, Basic Social Security Act	Basic Education Act, Racial and Ethnic Origin Discrimination Act, Law 134/1999, Law 46/2006, Labour Code	Racial and Ethnic Origin Discrimination Act, Law 46/2006, Law 134/99
ROMANIA	Anti-Discrimination Act	Anti-Discrimination Act	Anti-Discrimination Act	Anti-Discrimination Act	Courts need to assess the conditions of the exceptions included in the Anti-Discrimination Act
SLOVAKIA	Labour Code, Equal Treatment Act	Equal Treatment Act,	Equal Treatment Act	School Act, Equal Treatment Act, Higher Education, Primary and Secondary Schools Act	Equal Treatment Act, Consumer Protection Act, Housing: Equal Treatment Act in a limited way
SLOVENIA	Employment Relations Act, Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act	Equal Treatment Act
SPAIN	Fiscal, Administrative and Social Measures Act	Fiscal, Administrative and Social Measures Act	Fiscal, Administrative and Social Measures Act	Fiscal, Administrative and Social Measures Act	Fiscal, Administrative and Social Measures Act
SWEDEN	Discrimination Act	Discrimination Act (age is not covered)	Social advantages is not a category under the Discrimination Act	Discrimination Act	Discrimination Act (age is not covered)

UNITED KINGDOM	GB: Race Relations Act, Employment Equality (Sexual Orientation) Regulations, Employment Equality (Religion or Belief) Regulations, Disability Discrimination Act, Employment Equality (Age) Regulations 2006 NI: Race Relations Order, Employment Equality (Sexual Orientation) Regulations, Fair Employment and Treatment Order, Disability Discrimination Act	In UK Law , partially covered inGB:Race Relations Act, Disability Discrimination Act, Equality Act; NI: Race Relations Order, Fair Employment and Treatment Order, Disability Discrimination Act	GB: Race Relations Act, Disability Discrimination Act, Equality Act; NI: Race Relations Order	GB: Race Relations Act, Equality Act, Employment Equality (Sexual Orientation) Regulations, Employment Equality (Religion or Belief) Regulations, Special Educational Needs and Disability Act 2001; NI: Fair Employment and Treatment Order, Race Relations Order, Special Educational Needs and Disability (NI)	GB: Race Relations Act, Disability Discrimination Act, Equality Act; NI: Race Relations Order, Fair Employment and Treatment Order, Disability Discrimination Order
CROATIA	Anti-Discrimination Act, Labour Code	Anti-Discrimination Act	Anti-Discrimination Act	Anti-Discrimination Act	Anti-Discrimination Act
FYR of MACEDONIA	Labour Act, Prevention of and Protection against Discrimination Act, Employment of People with Disabilities Act	Prevention and Protection against Discrimination Act, Social Protection Act	Prevention and Protection against Discrimination Act, Social Protection Act	Prevention and Protection against Discrimination Act, Education Acts	Prevention and Protection against Discrimination Act, Housing Act
TURKEY	Only regarding access to employment, employment and working conditions in the Penal Code	No	No	Education Act	No

	REASONABLE ACCOMODATION FOR DISABLED PEOPLE	GENUINE AND DETERMINING OCCUPATIONAL REQUIREMENT
AUSTRIA	Employment of People with Disabilities Act and Disability Equality Act	All Federal and Provincial Acts
BELGIUM	General Anti-Discrimination Federal Act	Racial Equality Federal Act, General Anti-Discrimination Federal Act
BULGARIA	Protection against Discrimination Act, Integration of Persons with Disabilities Act, Labour Code and Healthy and Safe Working Conditions Act	Protection against Discrimination Act
CYPRUS	Persons with Disabilities Act	Persons with Disabilities Act, Equal Treatment in Employment and Occupation Act
CZECH REPUBLIC	Anti-Discrimination Act	Labour Code, Anti-Discrimination Act, Employment Act
DENMARK	Prohibition of Differential Treatment in the Labour Market Act	Prohibition of Differential Treatment in the Labour Market Act
ESTONIA	Equal Treatment Act	Equal Treatment Act
FINLAND	Non-Discrimination Act;	Non-Discrimination Act, Provincial Act on Prevention of Discrimination in the Province of Åland Islands
FRANCE	Disability Act, Labour Code	Adaptation of National Law to Community Law in Matters of Discrimination Act, Labour Code
GERMANY	Social Code, Disability Equality Act	General Equal Treatment Act
GREECE	Principle of Equal Treatment (Implementation) Act	Principle of Equal Treatment (Implementation) Act
HUNGARY	Partially in the Rights of Persons with Disabilities and Guaranteeing their Equal Opportunities Act	Equal Treatment Act
IRELAND	Employment Equality Act	Employment Equality Act
ITALY	No general duty on employers.	Decree transposing Directive 2000/43 and Decree transposing Directive 2000/78
LATVIA	Labour Act	Labour Act
LITHUANIA	Judicial interpretation needed of the Equal Treatment Act	Equal Treatment Act
LUXEMBOURG	General Anti-Discrimination Act	General Anti-Discrimination Act
MALTA	Equal Opportunities (Persons with Disability) Act and Equal Treatment in Employment Regulations	Equal Treatment in Employment Regulations Act, Employment and Industrial Relations Act and Equal Treatment of Persons Order
NETHERLANDS	Disability Discrimination Act	General Equal Treatment Act
POLAND	Vocational and Social Rehabilitation and Employment of Disabled Persons Act amended in 2003, partially in the Labour Code	Labour Code
PORTUGAL	Labour Code	Racial and Ethnic Origin Discrimination Act and Labour Code
ROMANIA	No provisions	Anti-Discrimination Act
SLOVAKIA	Equal Treatment Act,	Equal Treatment Act
SLOVENIA	Vocational Rehabilitation and Employment of Disabled Persons Act, Convention on the Rights of People with Disabilities (directly applicable)	Employment Relations Act, Equal Treatment Act

SPAIN	Equal Opportunities, Non-Discrimination and Universal Access for Persons with Disabilities Act	Fiscal, Administrative and Social Measures Act
SWEDEN	No legal basis is necessary, the prohibition of discrimination is asymmetric regarding disability	Discrimination Act
UNITED KINGDOM	Disability Discrimination Act	GB: Race Relations Act, Employment Equality (Sexual Orientation) Regulations, Employment Equality (Religion or Belief) Regulations; NI: Race Relations Order, Employment Equality (Sexual Orientation) Regulations, Fair Employment and Treatment Order
CROATIA	Anti-Discrimination Act	Anti-Discrimination Act
FYR of MACEDONIA	Prevention of and Protection against Discrimination Act, Labour Law	Prevention of and Protection against Discrimination Act
TURKEY	Persons with Disabilities Act	No

	Article 13 of the Racial Equality Directive designated specialised body	Instrument of designation	Body for other grounds	Provide independent assistance to victims ¹⁶⁵	Independent surveys	Issue recommendations
AUSTRIA	National Equality Body (NEB) and Equal Treatment Commission (ETC) (Each province will have an equality body, although not all have been set up yet)	Equal Treatment Commission and National Equality Body Act	All grounds in Article 13 EC Treaty	NEB: yes ETC: yes	NEB: yes ETC: no	NEB: yes ETC: no
BELGIUM	Centre for Equal Opportunities and the Fight against Racism at the Federal level, Protocols of collaboration or collaboration agreements have to be concluded between the Federal Government and the Government of each Region and Community	General Anti-Discrimination Act of 10 May 2007 pertaining to the fight against certain forms of discrimination and amending the Act of 15 February 1993 (as amended on 25 February 2003) setting up the Centre for Equal Opportunities and the Fight against Racism	All grounds under Article 13 EC Treaty except gender and additional grounds	yes	yes	yes
BULGARIA	Protection against Discrimination Commission	Protection against Discrimination Act, 13 September 2003	All grounds covered by the two Directives and additional grounds	yes	yes	yes
CYPRUS	Commissioner for Administration (also referred to as the Ombudsman) , two separate authorities are set up within the Ombudsman's office: the Equality Authority (employment issues) and the Anti-Discrimination Authority (race and ethnic origin)	Combating of Racial and Some Other Forms of Discrimination (Commissioner) Act	All grounds covered by the two Directives and additional grounds	yes	yes	yes
CZECH REPUBLIC	The Public Defender of Rights (Ombudsperson)	Anti-Discrimination Act	All grounds in the two Directives and sex	yes	yes	yes
DENMARK	Danish Institute for Human Rights	Ethnic Equal Treatment Act	No (although covers general human rights infringements)	yes	yes	yes

¹⁶⁵ The results in this column are based on a broad view of the variety of ways in which assistance can be provided to victims. It does not represent an assessment of Directive 2000/43's requirement that an equality body or bodies provide 'independent assistance'. For this reason a positive answer was produced for bodies which provide independent assistance or advice to victims and also to those bodies which investigate and hear discrimination complaints (quasi-judicial bodies). For more information on this issue see the Thematic Report of Professor Rikki Holtmaat 'Catalysts for Change? Equality Bodies according to Directive 2000/43' for the European Network of Legal Experts in the Non-discrimination Field (March 2006).

ESTONIA	Legal Chancellor (or Chancellor of Justice),	Chancellor of Justice Act	All grounds in the two Directives and additional grounds	yes	yes	yes
	The Commissioner for Gender Equality and Equal Treatment	Equal Treatment Law	All grounds in the two Directives and sex (additional grounds for labour relations)	yes	yes	yes
FINLAND	Ombudsman for Minorities and Discrimination Ombudsman for the Åland Islands	Non-Discrimination Act, Ombudsman for Minorities and the Discrimination Board Act (660/2001), as amended. Provincial Act on the Discrimination Ombudsman (67/2005) and Provincial Act on Prevention of Discrimination in the Province of Åland (66/2005)	No	yes	yes	yes
FRANCE	High Authority against Discrimination and for Equality (HALDE)	Law no 2004-1486 of 30 December 2004, Equal Opportunities Act of 30 March 2006	All grounds in the two Directives and additional grounds	yes	yes	yes
GERMANY	Federal Anti-Discrimination Agency	General Equal Treatment Act	All grounds in the two Directives and sex	yes	yes	yes
GREECE	Ombudsman for the public services	Principle of Equal Treatment (Implementation) Act	All grounds in the two Directives and additional grounds	no	yes	yes
	Labour Inspection in the Field of Employment and Occupation	Principle of Equal Treatment (Implementation) Act	All grounds in the two Directives	no	no	yes
	Equal Treatment Committee in private sector in any field but employment	Principle of Equal Treatment (Implementation) Act	All grounds in the two Directives	no	no	yes
HUNGARY	Equal Treatment Authority	Equal Treatment Act	All grounds in the two Directives and additional grounds.	yes	yes	yes
IRELAND	The Equality Authority (EA) The Equality Tribunal (ET)	Employment Equality Act 1998 as amended by Equality Act 2004, Equal Status Act 2000 as amended by Equality Act 2004	All grounds in the two Directives and additional grounds.	ea: yes et: no	ea: yes et: no	ea: yes et: no
ITALY	National Office against Racial Discrimination (UNAR)	Legislative Decree transposing Directive 2000/43	No	yes	yes	no
LATVIA	The Ombudsman	Ombudsman Act of 6 April 2006	Grounds not specified	yes	yes	yes
LITHUANIA	Equal Opportunities Ombudsman	Equal Treatment Act	All grounds in the two Directives and sex	no	yes	yes

	Article 13 of the Racial Equality Directive designated specialised body	Instrument of designation	Body for other grounds	Provide independent assistance to victims ¹⁶⁵	Independent surveys	Issue recommendations
LUXEMBOURG	Centre for Equality of Treatment	General Anti-Discrimination Act	Race, ethnic origin, religion or belief, disability, age and sex	yes	yes	yes
MALTA	Equality Commission (previously the National Commission for the Promotion of Equality for Men and Women)	Equal Treatment of Persons Order 2007	Gender, race and ethnic origin	yes	yes	yes
NETHERLANDS	Equal Treatment Commission (ETC)	No official designation by law. However, Explanatory Memorandum to the Bill (page 20 Appendix) that led to the Act of 21 February 2004 (Equal Treatment Act), states that the implementation of Article 13 of the Racial Equality Directive is already accomplished as the Netherlands has the ETC	All grounds under in the two Directives and additional grounds	yes	yes	yes
POLAND	No specialised body has been designated to meet the requirements of Article 13.2 of Directive 2000/43	Not designated	Not designated	-	-	-
PORTUGAL	ACIDI (High Commission for Immigration and Intercultural Dialogue)	Decree Act 167/2007	Race, ethnic origin and nationality	yes	yes	yes
ROMANIA	National Council on Combating Discrimination	Governmental Decision 1194 of 27 November 2001	All grounds under in the two Directives and additional grounds	yes	yes	yes
SLOVAKIA	Slovak National Centre for Human Rights	Equal Treatment Act amending Act No. 308/1993 Coll. Establishing the Slovak National Centre for Human Rights	All grounds in the two Directives and additional grounds	yes	yes	yes
SLOVENIA	Advocate of the Principle of Equality/Council of the Government for the Implementation of the Principle of Equal Treatment	Equal Treatment Act	All grounds in the two Directives and additional grounds	yes	no	yes

SPAIN	Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin.	Law 62/2003, Royal Decree 1262/2007	no	no	no	no
SWEDEN	Equality Ombudsman	Discrimination Act	All grounds in the two Directives and sex, transgender identity or expression,	yes	yes	yes
UNITED KINGDOM	Great Britain: Commission for Equality and Human Rights Northern Ireland: Commission for Racial Equality for Northern Ireland (ECNI)	GB: Equality Act 2006, NI: Northern Ireland Act 1998	GB: All grounds in the two Directives, NI: All grounds in the two Directives and political belief	CRE: yes ECNI: yes	CRE: yes ECNI: yes	CRE: yes ECNI: yes
CROATIA	Ombudsman	People's Ombudsman Act	All grounds covered by the two Directives and additional grounds	yes	yes	Yes
FYR of MACEDONIA	Commission on Protection against Discrimination to be created in 2011	Prevention of and Protection against Discrimination Act	Race and ethnicity, religion or belief, age, disability and additional grounds	-	-	-
TURKEY	None	-	-	-	-	-

European Commission

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