

Developing Anti-Discrimination Law in Europe

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

November | 2011



Justice

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

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* Information for Turkey is current to 31 December 2009 and consequently is not included in the tables contrasting the other countries covered, for which information is current to 1 January 2011. As regards the major significant changes in a few Member States, such as the bill in Spain for a new comprehensive anti-discrimination law, information may be based on data after 1 January 2011.

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Preface

Ten years ago a major and unprecedented evolution occurred in the European Union with the adoption in 2000 of two pieces of EU legislation in the field of anti-discrimination: the Racial Equality Directive (2000/43) and the Employment Equality Directive (2000/78). The implementation of these legal provisions in 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. In addition, the Network also includes candidate countries (Croatia, the Former Yugoslav Republic of Macedonia and Turkey) and annually reports on their national legislation compared with the anti-discrimination standards set by the EU. This Network was established and is managed by the Human European Consultancy and the Migration Policy Group.

The reports are written by independent national experts in each Member State. The information is provided in response to questions set out in a template format which closely followed the provisions of the two Directives. The 30 reports cover national law, the establishment of enforcement mechanisms and the adoption of other measures. They contain information current as of 1 January 2011.² 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 2010 country reports in a format mirroring that of the country reports themselves and draws some conclusions from the information contained in them.

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² As an exception, where major changes in legislation have been adopted at national level after the cut-off date, 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 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 instructions 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. In a few countries, the reasonable accommodation duty has been enlarged to religion only.
6. In general, protection against discrimination on any of the grounds of the Directives 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 appear to meet the material scope of the Directives, certain gaps seem to remain. In some countries there is a lack of protection for all employees and the self-employed, especially in the public sector. 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 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 now provide for a shift in the burden of proof in discrimination cases, there are suspected inconsistencies with the provisions of the Directives 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.
10. 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. However, it remains questionable whether or not these bodies carry out in practice the independent functions as required by the Directive in a number of countries.
11. Many Member States could do more to implement the requirements of the Directives as regards the dissemination of information on discrimination laws, promotion of social dialogue and encouragement of 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. However, 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 of undertakings or rules governing independent occupations, professions or workers’ or employers’ organisations is also 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. Subsequent correct implementation and effective enforcement depend on the efforts made by these countries during the application process. All countries must now ensure adequate access to justice to victims of discrimination, as they still face major procedural difficulties.



Chapter 1

Introduction

The objective of this report is to compare and contrast anti-discrimination law in the 27 EU Member States and three EU candidate countries (namely Croatia, the 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. In addition, the ten-year anniversary of the adoption of the Directives provides a good opportunity to explore the main trends and commonalities between all countries covered by this study. 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 of a particular country, readers are referred to the comprehensive country reports. These country reports contain information current as of 1 January 2010.³

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, although the report 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, the FYR of Macedonia and Turkey will have to align their national legislation with EU law by the date that they enter the EU.

³ Information for Turkey is current to 31 December 2009 and consequently is not included in the tables contrasting the other countries covered, for which information is current to 1 January 2011. All country reports are available on <http://www.non-discrimination.net>.



Chapter 2

State of play prior to the adoption of the Anti-discrimination Directives

In the earlier Treaties, ex-Article 141 of the Treaty establishing the European Community (TEC) was the only provision which addressed discrimination. From 1975, it allowed sex discrimination to be successfully tackled across the European Union (EU). Building on this experience, a broad consensus emerged, as European integration progressed, that the Community should go beyond the economic context of its early days and grant greater protection against various forms of discrimination to individuals living in EU territory. Civil society organisations and the European Parliament played a key role in driving discrimination issues forward at the EU level in the absence of specific anti-discrimination provisions in the Treaties.⁴ It was owing to their efforts that a general provision was inserted into the Treaties, significantly raising the level of protection throughout the EU, where most Member States had originally developed a patchy and ineffective non-discrimination legal framework.

Although before the enactment of ex-Article 13 TEC (now Article 19 of the Treaty on the Functioning of the European Union (TFEU)) the competence of the EU in the field of non-discrimination was debatable,⁵ it did not prevent the European institutions from developing several noteworthy initiatives to combat racism and xenophobia, such as the European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe in 1984, the first common joint declaration condemning all forms of intolerance in 1986⁶ and the European Council Resolution on the fight against racism and xenophobia⁷ in 1990. These activities took place in a climate of resurgence of racial violence and the rise of the extreme right-wing. In parallel, the Heads of State and Government of the member states of the Council of Europe adopted in 1993 a declaration and plan of action on combating racism, xenophobia, anti-Semitism and intolerance and created the European Commission against Racism and Intolerance (ECRI). Despite the absence of any specific provision on anti-discrimination at the EU level, all Member States and candidate countries had to comply with Article 14 of the European Convention on Human Rights⁸ and to incorporate the UN International Convention on the Elimination of All Forms of Racial Discrimination and the main UN human rights conventions guaranteeing the principle of equal treatment into their national legal systems. Only a few countries had autonomously developed specific anti-discrimination legislation (e.g. the 1994 Equal Treatment Act in the Netherlands, the 1998 Employment Equality Act in Ireland, and the Race Relations Act 1976 in the United Kingdom).

⁴ See I. Chopin, The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment, *European Journal of Migration and Law* 1: 111-129, 1999.

⁵ See M. Bell, *Anti-Discrimination Law and the EU*, Oxford University Press, 2002.

⁶ Declaration against racism and xenophobia, OJ C 158, 25.6.1986, pp. 1-3.

⁷ Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 29 May 1990 on the fight against racism and xenophobia, OJ C 157, 27 June 1990, pp. 1-3.

⁸ By 2000, only Cyprus had ratified Protocol 12 to the European Convention on Human Rights which expands the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right (including rights under national law).

Article 14 European Convention on Human Rights

‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

This chapter provides a brief overview of the state of play prior to the adoption of the two Anti-discrimination Directives, in particular on the grounds of discrimination, the definitions and scope of discrimination, and whether or not specialised bodies were responsible for discrimination at the national level.

A. Racial and ethnic origin

Prior to the transposition of the Racial Equality Directive into national legislation (or prior to full compliance with the EU *acquis* upon entrance into the EU for accession countries), national legal frameworks for combating discrimination on the grounds of racial or ethnic origin varied greatly, and included provisions of international law, constitutional law, criminal law, civil law and administrative law.

Protection of equality in the constitution provided the first layer of protection against discrimination, in particular in the absence of specific anti-discrimination legislation. All Member States and candidate countries constitutionally guaranteed equal treatment and prohibited discrimination on grounds of racial and ethnic origin, except the UK, which lacks a written constitution. All countries explicitly mentioned racial and ethnic origin, except Latvia and Poland, whose legislation contained a general anti-discrimination clause with no reference to any specific ground.

Discrimination clauses in the Danish Constitution?

The Danish Constitution of 1849⁹ contains no general provision on equality before the law. Neither does the Constitution contain a general prohibition and definition of racial discrimination. Some of the provisions of the Danish Constitution, however, contain prohibitions against discrimination. Section 70, for example, states that no one may be deprived of any civil or political rights on grounds of faith or descent, and Section 71, paragraph 1, provides that no Danish citizen may be deprived of personal liberty on grounds of political opinion, faith or descent.¹⁰ This section may be interpreted to imply a principle of equality by which it is prohibited to discriminate on grounds of religion

⁹ With subsequent amendments.

¹⁰ The reference to ‘descent’ was inserted into Articles 70 and 71 in 1953.

or race in both civil and political rights as well as social, economic and cultural rights. The reference to descent has been interpreted as to cover racial origin.

Constitutional provisions are generally either not directly applicable or they have a vertical effect only in litigation against the State. Individuals are entitled to invoke constitutional provisions in proceedings against other private parties, such as employers, in for instance Bulgaria, Lithuania, Poland and Slovakia. In the absence of a horizontal direct effect of constitutional provisions, the principles set out in constitutions need to be given concrete expression in provisions of criminal, civil and administrative law. All Member States and candidate countries adopted such provisions in the field of anti-discrimination, but they were highly disparate and scattered, with many inconsistencies in the material scope of protection and the legal remedies available to victims. In Belgium, Denmark and Sweden, criminal law prohibited racial discrimination and provided for sanctions against perpetrators of such conduct. Racist and xenophobic attitudes were considered as aggravating circumstances in Austria,¹¹ Czech Republic¹² and Spain.¹³ The dissemination of racial prejudice was prohibited in Denmark,¹⁴ Italy¹⁵ and Spain.¹⁶ The crime of genocide was severely punished in countries such as Bulgaria,¹⁷ Estonia,¹⁸ Hungary,¹⁹ Portugal,²⁰ Slovenia²¹ and Spain.²² Incitement to hatred was condemned in

¹¹ Section 33Z5 of the Criminal Code.

¹² Act No 140/1961, the Criminal Code, as subsequently amended.

¹³ Article 239 of the Criminal Code.

¹⁴ Section 266 (b) of the Criminal Code.

¹⁵ Article 1 of Act No 205 of 1993.

¹⁶ Article 510.2 of the Criminal Code.

¹⁷ Criminal Code, Section III, Liquidation of Groups of the Population (Genocide) and Apartheid, Article 416, (1) (Amended – SG, No 153/1998).

¹⁸ Section 1 of Article 61 of the Criminal Code.

¹⁹ Article 155 (Genocide) of Act IV of 1978 on the Criminal Code.

²⁰ Article 239 of the Criminal Code.

²¹ Official Gazette no. 63/94 and 23/99, Article 373.

²² Article 607.2 of the Criminal Code.

Austria,²³ Belgium,²⁴ Bulgaria,²⁵ Ireland,²⁶ Italy,²⁷ Hungary,²⁸ Estonia,²⁹ the Netherlands,³⁰ Romania,³¹ Spain,³² Slovenia³³ and the UK³⁴ whereas the Portuguese³⁵ and Spanish³⁶ Criminal Codes prohibited the establishment of, or participation in, organisations with the objective of inciting violence, hatred and discrimination. Minority rights were protected in the Czech Republic, Hungary, Latvia and Lithuania under criminal law. Civil law covered racial discrimination in the Czech Republic,³⁷ Hungary,³⁸ Greece,³⁹ the Netherlands,⁴⁰ Slovakia⁴¹ and Spain,⁴² whereas labour law prohibited racial discrimination in the workplace in Austria,⁴³ Bulgaria,⁴⁴

²³ Paragraph 283 of the Criminal Code.

²⁴ Article 1(1) of the Act of 30 July 1981 on the Prevention of certain acts inspired by racism or xenophobia.

²⁵ Article 162 of the Criminal Code.

²⁶ Prohibition of Incitement to Hatred Act 1989.

²⁷ Article 1 of Act no. 205 of 1993.

²⁸ Article 269 of the Criminal Code.

²⁹ Article 72(1) of the Criminal Code.

³⁰ Article 137c and 137d of the Criminal Code.

³¹ Article 317 of the Criminal Code.

³² Article 510.1 of the Criminal Code.

³³ Article 63 of the Constitution.

³⁴ Part III of the Public Order Act 1986.

³⁵ Article 240 of the Criminal Code.

³⁶ Article 510.1 of the Criminal Code.

³⁷ Act No 40/1964, the Civil Code, as subsequently amended; Article 2 of the Civil Code Act No 99/1963, the Civil Procedure Code, as subsequently amended; no express mention of racial or ethnic discrimination, but general protection.

³⁸ Articles 76 and 84 of the Civil Code.

³⁹ Article 57 in conjunction with Article 4 of the Civil Code.

⁴⁰ Article 162, Book 6 of the Civil Code.

⁴¹ Section 2 of Act no. 40/1964, Civil Code as subsequently amended.

⁴² Article 27 of the Civil Code.

⁴³ § 33 ABGB, JGS No 946/1811.

⁴⁴ Promulgated 1986, last amended 31 March 2001. Labour Code (*Kodeks na truda*), DV 26/1.04.1986 and 27/4.04.1986, amended DV 25/16.03.2001, entered into force 31.03.2001; Articles 8 and 243.

the Czech Republic,⁴⁵ Denmark,⁴⁶ Finland,⁴⁷ France,⁴⁸ Germany,⁴⁹ Hungary,⁵⁰ Ireland,⁵¹ Italy,⁵² Latvia,⁵³ Poland,⁵⁴ Slovakia⁵⁵ and Sweden.⁵⁶ Administrative law guaranteed equal treatment in Austria,⁵⁷ Belgium,⁵⁸ Bulgaria,⁵⁹ the Czech Republic⁶⁰ and Hungary.⁶¹

The Racial Equality Directive provides for a wide scope of application, as employment, education, social protection including social security and healthcare, social advantages, and access to goods and services including housing are covered. Prior to 2003, there was a patchwork of compliance as there was specific non-discrimination legislation applicable to employment whereas education was covered by criminal law or by the general principle laid down in the national constitution only. In France, Ireland, Romania and the UK, all fields seemed to be ultimately covered through a combination of legislative and legal principles.

Although foundations for protection against discrimination on the ground of racial or ethnic origin existed prior to the adoption of the Racial Equality Directive, the nature of the legislation and the many inconsistencies caused difficulties in adequately addressing discrimination throughout the EU. National legislation containing anti-discrimination clauses was mostly structured around sectors, creating a system of scattered anti-discrimination provisions rather than autonomous comprehensive legislation applicable to all fields. This model was particularly evident in Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, Poland and Slovakia. The wide spectrum of legal instruments (criminal, civil, administrative) made comparison between EU Member States and candidate countries an extremely complex task to carry out.

⁴⁵ Article 1 of Act No167/1999, Employment Act; Article 1 of Act No 65/1965, the Labour Code, as subsequently amended. The relevant amendment was published as Act No 155/2000; Resolution No 461/2000.

⁴⁶ Act on the Prohibition of Differential Treatment in the Labour Market (1996).

⁴⁷ Employment Contracts Act, Chapter 2, Section 2.

⁴⁸ Articles L122-45 and L122-35 of the Labour Code.

⁴⁹ Works Constitution Act.

⁵⁰ Article 5 of Act XXII of 1992 on the Labour Code.

⁵¹ Employment Equality Act 1998.

⁵² Act No 286 of 1998 on Immigration and the Legal Status of Foreigners; 1970 Workers' Act.

⁵³ Article 7 of the Labour Act, replaced by Article 1 of the Labour Code from 1 June 2002.

⁵⁴ Article 11 of the Labour Code.

⁵⁵ Article 3 Labour Code, Section 112 Employment Act, Article 1 of the new Labour Code in force from 1 April 2002.

⁵⁶ Act on Measures against Ethnic Discrimination in Working Life, 1999 (*Lagen (1999:130) om åtgärder mot etnisk diskriminering i arbetslivet*).

⁵⁷ Article IX (1) EGVG, BGBl. Nr. 50/1991.

⁵⁸ Article 16 of the Royal Decree of 2 October 1937 introducing the Public Servants Statute, amended by Article 5(A) of the Royal Decree of 26 September 1994.

⁵⁹ The Civil Servant Act, promulgated in 1999.

⁶⁰ Article 4, Act No 71/1967, the Code of Administrative Procedure, as subsequently amended.

⁶¹ Article 3 of Act LXXV of 1996 on the Supervision of Labour Affairs.

B. Religion or belief

Similarly to racial and ethnic origin, constitutional provisions encompassed religion or belief in the majority of countries. In all candidate countries explicit reference to religion or belief could be found, except in Latvia and Poland,⁶² which had a general anti-discrimination clause. Religious discrimination was prohibited though civil code provisions in countries such as the Czech Republic,⁶³ Hungary⁶⁴ and Slovakia.⁶⁵ Insulting language on grounds of religion or acts of worship was prohibited in the Portuguese Criminal Code.⁶⁶ Personal data protection legislation prohibited the collection and processing of data referring to religion without the consent of the individual in the Czech Republic, Denmark, Greece, Italy, Latvia, Poland, Portugal, Slovakia and Sweden. Again, a variety of clauses covered religion or belief, not yet in a consistent manner and not always addressing the specific issue of discrimination. Fields of application varied greatly among EU Member States and candidate countries. Protection against discrimination in areas such as housing, healthcare and education was patchy.

C. Age

Although a few Member States had provisions covering age discrimination in their ordinary laws, only Finland had an explicit reference to age in its Constitution. Judges in Spain argued that Article 14 of the Constitution was comprehensive, hence also implicitly covering age. General anti-discrimination provisions in the constitutions of several Member States could also have been held to cover age discrimination. By the end of 1999, only Belgium, Finland, Spain and Ireland had incorporated specific provisions with regard to age discrimination into their labour laws or collective agreements.⁶⁷ In Austria, the Works Constitution Act protected older workers by discouraging dismissal of older employees. In addition, the Employment Contract Law Adjustment Act envisaged judicial proceedings in cases of socially unjustified dismissals. The Irish Employment Equality Act of 1998 had characteristics that prefigured the Employment Equality Directive. The Act prohibited direct and indirect discrimination in access to employment, training or work experience, conditions of employment and promotion, and the classification of posts, and it contained specific provisions with regard to age. Employers were permitted to fix different ages for retirement and to treat employers differently if there was clear actuarial or other evidence that significantly increased costs would result if discriminatory treatment were not allowed. Maximum recruitment ages were possible under certain conditions.

⁶² In Poland, specific reference was made to equal rights of religious associations, Article 25 of the Constitution.

⁶³ Act no. 40/1964, the Civil Code, as subsequently amended Article 2; Act no. 99/1963, the Civil Procedure Code, as subsequently amended.

⁶⁴ Article 76 provides that discrimination against private persons on the grounds of gender, race, ancestry, national origin or religion; violation of the freedom of conscience; any unlawful restriction of personal freedom; injury to body or health; contempt for or insult to the honour, integrity, or human dignity of private persons shall be deemed as violations of inherent rights.

⁶⁵ Section 2 of Act No 40/164 Coll. Civil Code as subsequently amended.

⁶⁶ Article 252 of the Criminal Code.

⁶⁷ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination, COM (1999) 564 final, 25 November 1999.

Generally speaking, age was notably less protected throughout the EU than the other protected grounds. Two studies regarding age discrimination in employment in Europe were carried out in the 1990s which showed that discrimination mostly appeared in five areas: premature loss of employment, recruitment, exclusion from programmes for the unemployed, removal from unemployment statistics and exclusion from training.⁶⁸ However, little protection was guaranteed, except in dismissal cases.

D. Disability

Traditionally, disability was covered by social security provisions and was frequently defined under national law. Specialised definitions existed in the vast majority of EU Member States and candidate countries such as Bulgaria, Cyprus, the Czech Republic, Hungary, Malta, Poland and Romania. However, medical definitions focusing on the level of impairment were predominantly favoured when most countries designed legal systems providing specific rights to persons with disabilities, especially in the field of employment. Such definitions were, however, largely inadequate to tackle discriminatory behaviour based on disability in the form of, for instance, obstacles created by the organisation of the workplace.

Definition of disability in Polish law prior to the adoption of Directive 2000/78/EC

In Poland, a definition of 'disability' was contained in Article 2(10) of the 1997 Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons. Under this act, disability constituted a permanent or temporary incapacity to fulfil social roles due to a permanent or long-term injury to the mind or body, especially one which caused an inability to work.

Articles 3 and 4 defined three degrees of disability: significant, moderate and mild. Including a person in the categories of significant or moderate disability did not preclude the possibility of his/her employment by an employer who did not meet the requirements of the 'protected employment' category, so long as the employer had adapted the position to the needs of the disabled person, and this had been positively confirmed by the National Labour Inspectorate.

Labour law in states such as Bulgaria, Hungary, Poland, Romania and Slovenia used to require general medical examinations. In some countries, this obligation was regarded as a positive measure, aiming at promoting health and safety in the workplace. Limited requirements for medical examinations existed in Estonia, Lithuania, Malta and Slovakia and specific requirements were imposed in the Czech Republic and Cyprus. A closer look at the candidate countries revealed that three approaches addressing

⁶⁸ H. Meenan, Age Discrimination in Europe: A late bloomer or wall-flower?, in *Ageism – towards a global view* International Federation on Ageing Conference, Copenhagen, 30 May - 2 June 2006.

discrimination were generally favoured: quota systems, specialised employment and reasonable accommodation, though with little evidence of practical enforcement.

E. Sexual orientation

Sexual orientation was a clear area of weakness as the issue was very little addressed by national anti-discrimination provisions. In some countries, labour laws or collective agreements covered sexual orientation as a protected ground in the workplace, for instance in Denmark, Finland, France, Ireland, the Netherlands and Sweden.⁶⁹ In countries where public perception of homosexuals or bisexuals was very negative, an open-ended list of grounds was the only way to ensure protection against discrimination on grounds of sexual orientation. In the majority of countries, such a list made it possible for national judges to provide a wide interpretation. Courts in Finland, the Netherlands and Spain interpreted their constitutional anti-discrimination provisions as to encompass sexual discrimination. In the absence of clear provisions, legal uncertainty remained.

F. Concepts of discrimination

The Racial Equality and Employment Equality Directives identify four forms of prohibited discrimination: direct, indirect, harassment and instructions to discriminate.

Some Member States and candidate countries were familiar with the concepts of direct and indirect discrimination but clear definitions were lacking (e.g. Austria, Belgium, Italy and Portugal) or required further specification, in particular regarding the justification test (e.g. France, Finland and Germany). In candidate countries, direct discrimination was frequently given a flexible interpretation by courts with possibilities to justify discrimination which ran counter to the spirit of the future Directives (e.g. Estonia, Hungary and Poland). Candidate countries such as the Czech Republic, Estonia, Lithuania, Malta and Poland lacked a definition of indirect discrimination. Bulgaria, Hungary, Latvia, Romania, Slovakia and Slovenia provided such a definition but only in the field of employment.

Section 13(2) of the Slovak Labour Code

'For the purpose of the principle of equal treatment, indirect discrimination is an apparently neutral instruction, decision, or practice which puts at a disadvantage a larger group of natural persons, unless such instruction, decision or practice is appropriate and necessary, and can be justified by objective circumstances.'

⁶⁹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination, COM (1999) 564 final, 25 November 1999.

The concept of unlawful harassment was used by very few national legal systems in the EU, although sexual harassment was more commonly addressed by national legislation. For instance, Sweden provided a definition in employment law⁷⁰ and imposed a duty on employers to investigate and take measures against harassment.⁷¹ In Finnish law, there was no explicit definition of harassment, but criminal law provisions could cover harassment, physical abuse or slander.⁷² Candidate countries commonly referred to sexual harassment and the concept was not applicable to the other grounds. 'Insulting or ridiculing' a person constituted a criminal misdemeanour in Slovak law⁷³ and this could be used as a means to challenge some forms of harassment.

Legislation in Ireland,⁷⁴ Romania,⁷⁵ and Slovakia⁷⁶ explicitly prohibited instructions to discriminate at that stage. In Austria,⁷⁷ Belgium⁷⁸ and Lithuania⁷⁹ only criminal law applied, therefore the provision on instructions to discriminate could not apply to other areas of law. Alternatively, instructions to discriminate could be punished by recourse to the laws forbidding incitement. For instance, public incitement to hatred on the grounds of sex, race or religion was a criminal offence in Lithuania.⁸⁰

G. Specialised bodies

Prior to 2000, some sort of specialised bodies were identifiable in several Member States such as Belgium,⁸¹ Finland,⁸² Ireland,⁸³ the Netherlands,⁸⁴ Sweden⁸⁵ and the UK.⁸⁶ At that time, none of the candidate countries had set up an authority that resembled

⁷⁰ § 4 of the 1999 Act on Measures against ethnic discrimination in working life (*Lagen (1999:130) om åtgärder mot etnisk diskriminering i arbetslivet*).

⁷¹ Article 13 of the 1999 Act on Measures against Ethnic Discrimination in Working Life.

⁷² Chapter 11, Section 8 of the Criminal Code: 'A person who spreads statements or other notices among the public in which a certain race or national, ethnic or religious group or a comparable group is threatened, slandered or insulted shall be sentenced for agitation against an ethnic group to a fine or to imprisonment for a maximum of two years.'

⁷³ Section 49, Misdemeanour Act, no. 372/1990.

⁷⁴ Sections 8(4) and 14 Employment Equality Act 1998, section 13 Equal Status Act 2000.

⁷⁵ Order 137.

⁷⁶ Article 198a of the Criminal Code (incitement to racial and ethnic hatred).

⁷⁷ §§ 12 and 13 of the Criminal Code (*Strafgesetzbuch*) and § 7 of the Administrative Criminal Code, (*Verwaltungsstrafgesetz*).

⁷⁸ Article 1, paragraph 1 of the Act of 30 July 1981.

⁷⁹ The Act of the Republic of Lithuania of 31 August 2000 on the Amendment of Article 72 of the Criminal Code and the Supplementation of the Code by Article 72(1) provides a definition of unlawful conduct comparable to 'giving instructions to discriminate'. In addition, Article 24 of the Criminal Code expands the notion of criminal offenders from executors to organisers, instigators and assistants.

⁸⁰ Article 72, Criminal Code.

⁸¹ The Centre for Equal Opportunities and Opposition to Racism.

⁸² The Chancellor of Justice of the Government and the Parliamentary Ombudsman.

⁸³ The Equality Authority.

⁸⁴ The Equal Treatment Commission.

⁸⁵ The Ethnic Discrimination Ombudsman and the Discrimination Board.

⁸⁶ The Commission for Racial Equality (GB) and the Northern Ireland Equality Commission (NI).

the body prescribed in the Racial Equality Directive. In Romania the National Council for Combating Discrimination, set up by Order 137/2000 (the anti-discrimination law) and established in 2001, was charged with sanctioning discriminatory conduct and preventing future discrimination but still lacked independence. According to Article 23, this was not an independent agency but a specialised body of the central public administration, subordinate to the Government. Its organisational structure and other responsibilities were regulated by governmental decisions. In the vast majority of countries, a number of bodies dealing with human rights complaints existed (e.g. Cyprus, Hungary, Latvia and Slovenia) but none showed the features imposed by the Racial Equality Directive.

The Centre for Equal Opportunities and Opposition to Racism in Belgium

The Centre was created by the Act of 15 February 1993 and is an independent body charged with promoting equal opportunities and combating all forms of discrimination on the grounds of race, colour, descent, origin or nationality. It is linked to the departmental offices of the Prime Minister, but enjoys legal status in its own right and exercises its activities in full independence. The functions of the Centre include receiving complaints from persons who have suffered discrimination on the grounds of race (...), initiating inquiries or studies into discrimination, publishing reports and putting forward recommendations to the public authorities and to private individuals and institutions on issues connected to discrimination. It is available to individuals who are victims of or witnesses to racist acts or discrimination. A team of experts provides information, collects complaints, analyses incidents of discrimination, advises of existing services, performs mediation and considers with the applicant the possible legal recourses on the basis of the Act of 30 July 1981 on the Prevention of certain acts inspired by racism or xenophobia. The Centre was entitled to bring legal actions in any dispute to which may be applied the Racism Act of 30 July 1981, or that of 13 April 1995 aimed at preventing the trafficking of human beings and child pornography. In 2003, the General Anti-discrimination Act reaffirmed the Centre's competence to deal with all the protect grounds protected at the federal level, except for language, and grants the Centre the power to file legal actions.

H. Assessment of the situation prior to the adoption of the Directives

In the vast majority of countries where the principles of equal treatment and protection against discrimination were guaranteed, effective implementation was still largely deficient, notably due to the lack of access to justice and effective remedies. This phenomenon was reinforced in the candidate countries where there was little experience of litigation on discrimination, and difficulties in assessing the effectiveness or potential of sanctions therefore arose. Lack of awareness with regard to discrimination-related concepts was perceptible at the national level, in particular among judges and members of the legal profession. Moreover, as anti-discrimination provisions were scattered throughout national legislation, the applicable sanctions depended on the specific law under which a legal action was being brought (e.g. in Bulgaria and Hungary). Difficulties relating to the burden of proof were

systematically reported, for instance in Belgium and France.⁸⁷ There was, however, no provision for a shift in the burden of proof in discrimination cases in any of the countries covered by this analysis, or the rules were only confined to the employment field (e.g. Hungary, Latvia, Slovakia and Slovenia).

In the mid-1990s, a wide consensus emerged on the need to address discrimination on grounds other than sex, protected under ex-Article 141 TCE. In 1997, the Amsterdam Treaty consequently introduced Article 13 TCE (now Article 19 TFEU) to fill the gap and to empower the European Community to adopt measures covering discrimination on grounds of racial and ethnic origin, religion or belief, age, disability and sexual orientation. The adoption of this Article reflected the 'need to develop a coherent and integrated approach towards the fight against discrimination',⁸⁸ with common concepts for all grounds. The following chapter details how the principle of non-discrimination enshrined in the Treaty is given concrete expression and analyses the state of implementation in all Member States of the European Union.

Article 19, Treaty on the Functioning of the European Union

'1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

⁸⁷ I. Chopin, J. Niessen (Eds.), *Racial, ethnic and religious discrimination – a comparative analysis of the national and European law*, August 2002.

⁸⁸ Green Paper – Equality and non-discrimination in an enlarged European Union presented by the European Commission, COM (2004) 379 final, 28 May 2004.



Chapter 3

Current state of play 10 years after the adoption of the Directives

Further to the introduction of ex-Article 13 TCE by the Amsterdam Treaty (now Article 19 TFEU), two ground-breaking EC directives banning discrimination on grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation were adopted in 2000. These directives presented profound challenges to the existing approaches to combating discrimination across Europe and aimed to ensure that all individuals living in the EU, regardless of their nationality, could benefit from effective legal protection against discrimination. All Member States were required to review their existing legislation and to make the necessary changes to comply with the requirements of the directives, and candidate countries were similarly required to do so in order to comply with EU law in force by their date of accession.

The Racial Equality Directive⁸⁹ requires Member States to prohibit certain forms of discrimination, namely direct and indirect discrimination, harassment and instruction to discriminate, on the grounds of racial or ethnic origin. It covers employment and occupation, as well as vocational training, education, social protection including social security, healthcare and access to goods and services, including housing. The Equality Employment Directive⁹⁰ limits the protection granted to the field of employment and occupation as well as vocational training, and prohibits direct and indirect discrimination as well as harassment and instructions to discrimination, on the grounds of religion or belief, age, sexual orientation and disability.

The European Union's commitment to the principle of non-discrimination was reaffirmed in the Charter of Fundamental Rights in December 2000 which states that 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.

All Member States have transposed the two Directives into their national law, but certain discrepancies still remain. Poland eventually transposed the Directives only in 2010, in particular giving effect to provisions on the scope of the Racial Equality Directive beyond employment (Article 3(1)(e)-(h)) and the creation of a specialised equality body.⁹¹ As far as candidate countries are concerned, Croatia has adopted an Anti-discrimination Act, in force since January 2009, but there are certain points which are not in compliance with the Directives. Exceptions to the prohibition of discrimination are too wide, unclear and open to interpretation. Moreover, the exception for employers with an ethos based on religion or belief is not limited to situations where a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.⁹² In the FYR of Macedonia, the Anti-discrimination Act entered in force on 1 January 2011, replacing various anti-discrimination provisions contained in the Labour and Criminal Codes. Although most of the recent Turkish legislative changes reflect an effort

⁸⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, pp. 22-26.

⁹⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 2 December 2000, pp. 16-22.

⁹¹ Several attempts to adopt a comprehensive Equal Treatment Act have been made since 2006.

⁹² The Croatian Government is planning to reform the Anti-discrimination Act, and an expert group has been established to draft amendments.

towards harmonisation, there are still major shortcomings. Age and sexual orientation are not explicitly mentioned at all, and the material scope of the Directives is not reflected. Discrimination is not defined, and not all forms of discrimination are prohibited. For example, indirect discrimination is explicitly referred to only with regard to discrimination based on gender or maternity, and harassment is neither prohibited explicitly nor defined in the Turkish legislation. The burden of proof shifts in limited situations. Finally, there is no specialised body. However, a preliminary draft for an Act on the Combating of Discrimination and Establishment of an Equality Council was tabled in March 2010 in order to address most of these shortcomings. In all candidate countries, greater efforts towards harmonisation should undeniably be made to bring the major existing discrepancies into line with EU standards as a prerequisite to possible future accession.

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 criminal codes and some administrative law;
- adoption of a much wider general act.

Under Article 258 TFEU (ex-Article 226 TEC), the European Commission can launch infringement proceedings against Member States which, by failing to transpose the Racial Equal Treatment Directive or the Employment Equal Treatment Directive, it considers to have failed to fulfil their Treaty obligations. It may initiate proceedings for non-communication of transposition or for non-conformity where the transposition is incomplete or incorrect. The Commission has embarked on a detailed check of the compliance of national law to this end and is currently still reviewing potential gaps in the correct transposition of these two directives.

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 Court of Justice of the European Union (CJEU) to have failed to fulfil its obligations by omitting the Åland Islands from its transposition of Directive 2000/43/EC. Since the end of the transposition period in 2003, the European Commission has sent a great number of reasoned opinions for failure to notify or for non-conformity. And, ten years after the adoption of the Directives, there are still some pending cases. On 20 November 2009 the Commission 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 also came under scrutiny, in particular with regard to the exception provided for ethos-based organisations in Article 4(2).⁹³ In two reasoned opinions sent in October 2009, the Commission required Germany to fully comply with Directives 2000/43/EC and 2000/78/EC.⁹⁴ In 2010, the European Commission pointed out that Poland had failed to transpose the Racial Equality Directive outside the field of employment as there were no specific national provisions prohibiting discrimination on the grounds of race or ethnic origin in relation to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services which were available to the public including housing, and membership of trade unions, employers' bodies and professional organisations. In addition, protection against victimisation was provided only in the field of employment.⁹⁵

This report looks in turn at the main substantive issues in both Directives: the grounds of discrimination, the definition of grounds and scope, exceptions to the principle of equal treatment and positive action, access to justice and effective enforcement and equal treatment bodies.

A. Which grounds are covered?

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 in the field of employment. Moreover, the material scope of the Racial Equality Directive has been enlarged to also cover social protection including social security, healthcare, education, goods and services including housing. 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

⁹³ In total eight cases of incorrect transposition remained open at the end of 2010.

⁹⁴ The European Commission closed infringement proceedings against Germany on 28 October 2010 following the proper implementation of both Directives.

⁹⁵ Procedures initiated against Poland for failure to transpose correctly and completely both Directives were closed in 2011 following the successful adoption of its new anti-discrimination law complying with EU law.

national law. This involves issues such as whether to provide a definition of each ground and how to address discrimination based on assumed characteristics. In addition, this 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 implementing legislation (including, for instance, France, Greece, Hungary, Poland, Romania, Slovenia, Croatia and the 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.

All countries have included the general principle of equal treatment or specific grounds of discrimination in their constitution (except the UK, which lacks a written constitution). As already mentioned, constitutional provisions are commonly 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 the FYR of Macedonia).

In the majority of countries, constitutional equality guarantees apply generally, thus theoretically covering the material scope of the Directives (see Chapter 3), at least in the public sector. However, it is highly unlikely that constitutional provisions alone are adequate to 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 discrimination legislation applies.

As already mentioned, 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) to further realise the equal treatment principles enshrined in their constitutions. 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 has also been discernible. Countries having recently opted for a single act, such as the UK, have taken the opportunity to clarify existing provisions and to fill the gaps and inconsistencies caused by a patchy legal framework. In the Netherlands, the government is currently working on a new General Equal Treatment Act in which four distinct laws (the General Equal Treatment Act, the Equal Treatment for Men and Women in Employment Act, the Disability Discrimination Act and the Age Discrimination Act) as well as several Civil Code provisions will be integrated into one single act, with no changes in scope or content foreseen.

Catherine Barnard, *The Equality Act 2010*⁹⁶

‘The Equality Act 2010, which completed its passage through the UK Parliament in the dying hours of the Labour Government, is a remarkable instrument. It confines to history over a hundred separate pieces of equality legislation and replaces them with one substantial Act of Parliament, which applies to England, Scotland and Wales. It comprises 218 sections and 28 Schedules covering discrimination not only in employment but also in respect of services, transport, and education. Already a number of secondary measures have been adopted to accompany the legislation, especially in the field of disability.

The Equality Act was the culmination of an extraordinarily ambitious project. It was not merely a codification and harmonisation exercise, bringing the different strands under one roof and applying (where possible) a single set of principles. (...) But it was also a transformative exercise, pushing at the frontiers as to what conduct was considered discriminatory. (...) But the Act has probably provided Great Britain with one of the most sophisticated pieces of anti-discrimination legislation in Europe and for this reason it certainly repays further study.’

A number of Member States such as Belgium, Bulgaria, Cyprus, Hungary, Poland, Romania, Spain, and Sweden chose not to restrict new anti-discrimination laws to the grounds outlined by the two Directives and have opted for a broader list of prohibited grounds. Age and sexual orientation are not explicitly mentioned in Turkish legislation, and whereas the new Anti-discrimination Act in the FYR of Macedonia covers extra grounds not provided for in the Directives, it does not include sexual orientation.

The table below shows what sort of grounds (in addition to the five mentioned in the two Directives) have been introduced at the national level in specific anti-discrimination legislation or any other kind of law granting protection against discrimination.

Table: Grounds protected on the national level in various anti-discrimination laws, whether at the federal or regional level

AUSTRIA	Gender, ethnic affiliation, race or ethnic origin, religion, belief, age, sexual orientation, disability, disability of a relative, sexual identity, gender, pregnancy, maternity
BELGIUM	Alleged race, colour, descent, ancestry, ethnic and national origin, nationality, age, sexual orientation, civil status, birth, wealth/income, religious or philosophical belief, actual or future state of health, disability, physical characteristics, genetic characteristics, political opinion, language, social origin, social position, trade union conviction, gender (including pregnancy, birth, maternity leave, and transgender), gender reassignment
BULGARIA	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 an international treaty that the Republic of Bulgaria is a party to

⁹⁶ European Gender Equality Law Review, Issue no 1/2011, p. 13.

CROATIA	Race or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, gender identity and expression, sexual orientation
CYPRUS	Race/ethnic origin, religion or belief, age, sexual orientation, disability
CZECH REPUBLIC	Sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, nationality, national origin, social origin, birth, language, health condition, property, marital and family status or family obligations, political or other views, membership of political parties and movements, trade unions, employers' organisations or other assemblies, colour, pregnancy and motherhood or breastfeeding, or any other status
DENMARK	Age, disability, ethnicity or ethnic origin, race, skin colour, belief and religion, sexual orientation, political opinion, national and social origin, gender
ESTONIA	Ethnic origin, race, colour, origin, religion or other beliefs, age, disability or sexual orientation, sex, language, duty to serve in defence forces, marital or family status, family-related duties, social status, representation of the interests of employees or membership of an organisation of employees, political opinion, financial or social status, genetic risks
FINLAND	Race, ethnic origin, religion or belief, age, disability, sexual orientation, nationality, language, health, opinion
FRANCE	Sex, pregnancy, origin, appearance of origin, race, ethnic and national origin, morals, sexual orientation, age, family situation, genetic characteristics, physical appearance, family name, health, disability, union activities, religion, political and religious convictions
FYR of MACEDONIA	Sex, race, colour, gender, membership of a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious belief, political or other beliefs, membership of a trade union, education, political affiliation, personal or social status, mental or physical impairment, disability, age, family or marital status, national or social origin, position of the family, property status, health condition, language, sexual orientation or other personal circumstances, any other ground prescribed by law or ratified international treaty
GERMANY	Sex, parentage, race, ethnic origin, language, homeland and origin, faith, religion or belief, religious or political opinions, disability, age, sexual identity
GREECE	Racial or ethnic origin, religion or belief, disability, age, sexual orientation
HUNGARY	Sex, racial affiliation, colour of skin, nationality, membership of 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, part-time nature of employment legal relationship or other legal relationship relating to employment or the fixed period thereof, membership of an interest representation organisations, other situation, attribute or condition of a person or group
IRELAND	Gender, age, race, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community
ITALY	Race and ethnic origin, colour, religion or belief, disability, age, sexual orientation, ancestry, national or ethnic origin, religious beliefs and practices, disability
LATVIA	Race, ethnicity/ethnic origin, skin colour, age, disability, health condition, religious, political or other conviction/opinions, national or social origin, gender, property, family status or marital status, sexual orientation, occupation, place of residence or other circumstances
LITHUANIA	Age, disability, sexual orientation, race, ethnicity, ethnic origin, religion, beliefs or convictions, language and social status
LUXEMBOURG	Race, ethnic origin, religion or belief, age, disability, sexual orientation
MALTA	Race, racial or ethnic origin, place of origin, political or other opinions, colour, creed or sex, marital status, pregnancy or potential pregnancy, sex, disability, religious conviction, membership of a trade union or in an employers' association, language, national or social origin, association with a national minority, property, birth or other status
NETHERLANDS	Race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (marital) status, disability and chronic disease, age
POLAND	Gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation, membership of a trade union, civil (marital) and family status

PORTUGAL	Race, colour, nationality, ethnic origin, religion, ancestry, sex, language, country of origin, political or ideological convictions, education, economic situation, social condition, sexual orientation, civil status, family situation, disability, genetic inheritance, pre-existing risk to health, reduced capacity to work, disability or chronic disease, membership of a trade union, age
ROMANIA	Race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, HIV positive status, membership of a disadvantaged group or any other criterion
SLOVAKIA	Sex, religion or belief, race, affiliation to a nationality or an ethnic group, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, lineage/gender or other status, unfavourable health condition, duties to a family, trade union involvement, membership of or involvement in a political party, a political movement or other association, other status
SLOVENIA	Gender, ethnicity, race or ethnic origin, religion or belief, disability, age, sexual orientation, national and social origin, skin colour, v, family status, membership of a trade union, financial situation, ethnic roots, language, political or other belief, social status, birth, education, social position or other personal circumstance
SPAIN	Race or ethnic origin, religion or belief, age, disability, sexual orientation, gender, marital status, origin, social status, political ideas, affiliation or non-affiliation to a union, official language of the state of Spain, family ties with other workers in a company, colour, descent, religious convictions and practices, ideology, membership of an ethnicity, race or nation
SWEDEN	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age
UNITED KINGDOM	Northern Ireland: Disability and dependant status, racial grounds, including grounds of colour, nationality (including citizenship), ethnic origins, national origins and membership of the Irish Traveller community, religion, political belief and belief, racial group, age, marital status, sexual orientation, gender
	Great Britain: Racial grounds, including grounds of colour, nationality (including citizenship), ethnic origins, national origins, gender, including gender reassignment, pregnancy and maternity, married/civilly partnered status, disability, religion/belief, sexual orientation, age
	United Kingdom: race and ethnic origin, religion or belief, age, disability, 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. Second, there are overlaps with other personal characteristics such as nationality, language or religion.

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 a 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, heated criticism 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 might fall within the scope of 'racial or ethnic origin'. Some national laws include, as a minimum, colour and national origin within legislation implementing the Racial Equality Directive. Some states, such as Hungary,⁹⁷ 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.

Lucy Vickers, *Religion and belief discrimination in employment*⁹⁸

'The blending of religion and racial identity may not be of particular importance where discrimination occurs in employment or occupation, as the protection will be similar under both Directives. However, where the scope of the Racial Equality is broader, in the areas of social security, education or health, then protection against discrimination will only be provided on grounds of race and ethnicity, and the pressure to broaden the definition of race and ethnicity to include some religious groups will continue. Unless the scope of the Employment Equality Directive is broadened to match that of the Racial Equality Directive, the potential for inconsistencies in protection available as between different religious groups will remain. In effect, a hierarchy is created, with those religious groups that can claim a separate ethnic identity being given greater protection against discrimination than those who remain only a religious group. Hierarchy as between member states could also be created if member states vary in the extent to which they recognise religious groups as ethnic groups. The creation of such hierarchies between different religious groups works against the aims of the Employment Equality Directive which is to put an end to discrimination between those of different religions.'

⁹⁷ 'Race' (*faj*) and 'colour' (*szín*) are mentioned by the Constitution, whereas the Equal Treatment Act uses 'colour of skin' (*bőrszín*), 'racial affiliation' (*faji hovatartozás*), 'membership of a national or ethnic minority' (*nemzeti vagy etnikai kisebbséghez való tartozás*) and 'nationality' (*nemzetiség*).

⁹⁸ Lucy Vickers, *Religion and Belief: Discrimination in Employment - the EU law*, Thematic report by the European network of Legal Experts in the Non-discrimination Field, 2007.

Nevertheless, it is undeniable that the concepts of ethnicity and religion are closely linked. The European Court of Human Rights (ECtHR) 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.⁹⁹

In the Netherlands, case law has recognised the possibility for discrimination against Jews,¹⁰⁰ and in certain circumstances Muslims,¹⁰¹ to be challenged as race discrimination. In the United Kingdom, discrimination against Sikhs¹⁰² or Jews¹⁰³ 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 social protection, education and goods and services including housing. Yet several states have not adopted adequate legislation on discrimination outside employment. Secondly, the Racial Equality Directive requires Member States to establish a body or bodies for the promotion of equal treatment. All Member States and candidate countries included in this review, except Turkey, have set up such a body. The Czech Republic and Spain only put in place their equality bodies for the first time during the course of 2009 and a new equality body was proposed in Spain in 2010. At last, the new 2010 anti-discrimination in Poland designates the existing Office of the Ombudsperson (Commissioner for Civil Rights Protection – *Rzecznik Praw Obywatelskich*) as the equality body. In the FYR of Macedonia, the new Anti-discrimination Act envisages the establishment of the Commission for Protection from Discrimination in 2011.¹⁰⁴

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), nor has it ever been defined at the international level.

⁹⁹ Para 55, *Timishev v Russia*, Applications 55762/00 and 55974/00, 13 December 2005.

¹⁰⁰ Opinion 1998/48, Equal Treatment Commission.

¹⁰¹ Opinion 1998/57, Equal Treatment Commission.

¹⁰² *Mandla v Dowell Lee* [1983] 2 AC 548.

¹⁰³ *Seide v Gillette Industries Ltd.* [1980] IRLR 427.

¹⁰⁴ The founding session of the Commission was held on 17 January 2011.

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, Germany and the Netherlands.¹⁰⁵

Explanatory Notes to the UK Equality Act 2010 on religion and belief

(paras 51-52) *'The protected characteristic of religion or religious or philosophical belief ... [has] a broad definition in line with the freedom of thought, conscience and religion guaranteed by Article 9 of the European Convention on Human Rights. The main limitation for the purposes of Article 9 is that the religion must have a clear structure and belief system. Denominations or sects within a religion can be considered to be a religion or belief, such as Protestants and Catholics within Christianity ... The Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism are all religions for the purposes of this provision...*

*The criteria for determining what is a 'philosophical belief' are that it must be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others. So, for example, any cult involved in illegal activities would not satisfy these criteria.'*¹⁰⁶

Most of the controversy around implementation of the provisions of the Employment Equality Directive on religion or belief centres 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 appear to go beyond the strict terms of the Directive (e.g. Hungary and Croatia) or which remain ambiguous (e.g. Greece, Ireland, Italy, the Netherlands, Romania and the UK). France, Portugal and Sweden did not adopt an 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 relating to 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.

¹⁰⁵ 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 of society. In addition to *levensovertuiging*, the Dutch General Equal Treatment Act (GETA) also covers *godsdienst* (religion).

¹⁰⁶ http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpgaen_20100015_en.pdf.

***Lautsi and others v. Italy* (no. 30814/06), ECtHR (Grand Chamber) Judgment of 18 March 2011**

In 2006, Mrs Lautsi and her two sons brought a complaint alleging a violation of the principle of secularism by the directors of the boys' school, who had decided to fix crucifixes onto classrooms walls. On 3 November 2009, a Chamber of the ECtHR ruled that the presence of crucifixes was in conflict with the principle of secularism and could be emotionally disturbing for pupils of non-Christian religions. According to the Chamber, negative freedom of religion entailed the absence of religious services and education and also religious practices and symbols expressing a belief, a religion or atheism.

At the request of Italy, the case was referred to the Grand Chamber ('the Court'). On 18 March 2011, it overruled the Chamber's judgment, stating that the presence of crucifixes in classrooms did not constitute a violation of the European Convention on Human Rights. The Court based its reasoning on the margin of appreciation given to each Contracting State to ensure the exercise of various religions, faiths and beliefs in compliance with the right to education enshrined in Article 2 of Protocol No. 1 and the principle of neutrality. Moreover, crucifixes being passive symbols, they neither have an influence on pupils nor indoctrinate them in the same way as active religious education or activities. The Court concluded by observing that parents retained their rights to enlighten and advise their children in accordance with their philosophical or religious convictions.

Specific provisions on religion or belief – ethos-based organisations

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.

Not all countries chose to include the Article 4(2) exception: such was the case of France, Portugal, Romania, and Sweden. The Romanian anti-discrimination law (Order 137/2000) 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. Turkey does not provide an exception for employers with an ethos based on religion or belief. 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 the FYR of Macedonia.

The 'sole fact provision' under Dutch law

In the Netherlands, the General Equal Treatment Act does not apply to the internal affairs of churches, of other religious communities, or of associations of a spiritual nature. This restriction complies with the Employment Equality Directive provided that it is limited to the appointment of religious staff for the purposes of teaching or practising religion. In addition, Article 5(2)(a) and (c) states that ethos-based private schools and other denominational organisations may discriminate where it is necessary in order to realise their religious or philosophical purposes or founding principles. Such requirements may, however, not lead to differential treatment based on the *sole fact* of political opinion, race, sex, nationality, sexual orientation or civil status. The sole fact provisions aims at eliminating the possibility that difference in treatment is exclusively made on the grounds of political opinion, race, sex, nationality, hetero- or homosexual orientation or civil status. Additional circumstances are necessary to lawfully make such a distinction but the law does not specify which circumstances could count as 'additional'.

In 2008, the European Commission initiated an infringement procedure against the Netherlands,¹⁰⁷ and asked the government to bring this exception into line with the wordings of the Directive as the current provision is insufficiently clear and open to interpretation. This infringement procedure is still pending.¹⁰⁸

There are concerns in several states that the exceptions based on Article 4(2) may be 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 defining 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 terms 'legitimate' or 'proportionate' as required by the Directive.

¹⁰⁷ Letter dated on 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement no. 2006/2444.

¹⁰⁸ See Letter of the Ministry of Interior and Kingdom Affairs dated 29.09.2009, *Tweede Kamer* 2009-2010, 28 481, no. 7 and *Tweede Kamer* 2009-2010, 22 112, no. 962.

D. Disability

On 23 December 2010, the EU ratified the UN Convention on the Rights of People with Disabilities, being the first international organisation to accede to an international treaty on human rights. This means that all legislation, policies and programmes at EU level must comply with the Convention's provisions on disability rights, within the limits of EU responsibilities. Countries that have ratified the Convention should take action in the following areas: access to education, employment, transport, infrastructure and buildings open to the public, and granting the right to vote, improving political participation and ensuring full legal capacity of all people with disabilities.

In 2006, the CJEU 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 ...

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.¹⁰⁹

Speech impediment constitutes disability according to the Cypriot equality body¹¹⁰

A successful applicant to the position of assistant clerk was dismissed a week after she started work at a hospital on the ground that she was not sufficiently efficient. Investigations showed that the hospital authorities believed that the complainant's speech impediment could cause communication difficulties in daily contact with the public. However, they claimed that efforts were made to relocate her to a post where she would not deal with the public.

The equality body¹¹¹ held that a speech impediment amounts to disability according to national legislation as well as to the CJEU ruling in the *Chacón Navas*¹¹² case, where disability was defined as a disadvantage owing to a physical, intellectual or psychological illness which restricts the participation of a person in professional life for a long period of time. In the light of these observations, the equality body concluded that the complainant's dismissal constituted discrimination on grounds of disability, as the hospital authorities failed to provide reasonable accommodation. As the plaintiff had remained unemployed in the meantime, the equality body invited both parties to a consultation prior to issuing final recommendations which suggested remedies to damage suffered.

¹⁰⁹ 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.

¹¹⁰ File No. A/Π 2898/2007, A.K.I. 10/2010 of 23 February 2010.

¹¹¹ File no. A/Π 2898/2007, A.K.I. 10/2010 of 23 February 2010.

¹¹² Case C-13/05, *Chacón Navas*, [2006] ECR I-6467.

The majority of national legislation contains many examples of definitions of disability (e.g. Austria, Belgium, Cyprus, the Czech Republic, Estonia, Germany, Lithuania, Luxembourg, Portugal, Slovakia, Spain, Sweden, and the 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 *Chacón Navas* ruling of the Court, except for some countries where discrepancies may exist, such as Cyprus, Greece, Poland, Slovakia and the United Kingdom.¹¹³ The new Anti-discrimination Act in the 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 *Chacón 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’¹¹⁴ – 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 CJEU case law as it requires three additional elements: the permanence of what is effectively the equivalent of a hindrance to participation, a threshold of 50% 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.¹¹⁵ However, mental and psychological impairments are not addressed by Lithuanian legislation. In addition, the Act on the Social Integration of the Disabled defines a person with a disability as a person who has been assigned a level of disability or a level of 55% or less of working capacity. Disabilities must thus be acknowledged by the competent authority. Countries including Estonia, Hungary and Malta go beyond the employment field by referring to everyday activities or all aspects of social life¹¹⁶ and, likewise, Sweden does not seem to restrict the scope of relevant impairment to professional activities only.

The term ‘handicap’ in national legislation

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*. Danish courts have also opted for an interpretation requiring ‘a physical, mental or intellectual disability which results in a need for compensation in order for that person to be able to function on an equal level to other citizens in a similar situation in life’.

In Romania, specialised legislation, distinct from anti-discrimination legislation, refers to ‘handicap’, and persons with disabilities had been defined until September 2010 as those ‘lacking abilities to normally carry out daily activities due to a physical, mental or sensorial impairment and requiring protective measures for rehabilitation,

¹¹³ The UK definition requires that an impairment has to have lasted for at least 12 months, or the period for which it is likely to last is at least 12 months or it is likely to last the rest of the person’s life. It is unclear whether this reading is incompatible with the *Chacón Navas* decision.

¹¹⁴ Integration of Persons with Disabilities Act, sections 1.1 and 1.2 Additional Provisions.

¹¹⁵ Social Integration of Disabled Persons Act, 1991, No. 36-969.

¹¹⁶ For Estonia, see Article 5 Equal Treatment Act. For Hungary, see Article 4 of the Rights of Persons with Disabilities Act.

integration and social inclusion.¹¹⁷This definition was amended in September 2010 by Emergency Order 84/2010 to 'persons whose social environment hinders completely or limits their access to equal opportunities in the life of society, requiring protective measure for supporting their integration and social inclusion, as the social environment is not adapted to their physical, sensorial, psychological, mental and/or associated impairments',¹¹⁸ which goes beyond the definition of disability used by in *Chacón Navas* as the emphasis is put on the duty to secure accessibility and on the intertwining of social and medical elements in disability.

The specific legislation on disability further maintains the definition of disability (*handicap*) in Article 5 (16), which was not amended following the September 2010 changes. Handicap is defined as:

- the generic term for impairments/deficiencies, limitations in activity and restrictions in participation defined according to the International Classification of Functioning, Disability and Health adopted by the World Health Organization, and which highlight the negative aspect of the interaction between the individual and the environment.¹¹⁹

The two definitions of 'disability' (*handicap*) and 'persons with disabilities' (*persoane cu handicap*) have a different approach to disability. The co-existence of two rather conflicting definitions in the same law could potentially cause difficulties in the enforcement of both disability and non-discrimination legislation.

The CJEU'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 Austria¹²⁰ and Germany¹²¹ impairments must be likely to last for more than six months in order to amount to disabilities, while in the United Kingdom¹²² the impairment should last for at least 12 months. In contrast, other states require the impairment to be indefinite in duration (Cyprus¹²³ and Sweden¹²⁴).

It is not yet clear whether the Court regards the formula provided in *Chacón 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

¹¹⁷ Article 2 of Romanian Act 448/2006 on the Protection and promotion of the rights of persons with a handicap (06.12.2006).

¹¹⁸ Romania/ Ordonanță de urgență nr.84 din 20 septembrie 2010 pentru modificarea și completarea Legii nr. 448/2006 privind protecția și promovarea drepturilor persoanelor cu handicap, Emergency Order 84/2010 on amending Act 448/2006 on the protection and promotion of the rights of persons with a handicap (20.09.2010).

¹¹⁹ Article 3 (16) of Romanian Act 448/2006 on the Protection and promotion of the rights of persons with a handicap (06.12.2006).

¹²⁰ Section 3, Disability Equality Act 2005.

¹²¹ Section 2, Social Code IX and Section 3 Disabled Equality Act.

¹²² Section 1(1), Disability Discrimination Act 1995.

¹²³ Act 127(I)/2000.

¹²⁴ Chapter 1, Section 5, paragraph 4, Discrimination Act (2008:567).

are anticipated in some national legislation. For instance, Irish legislation covers discrimination on grounds that exist at the present moment, grounds that previously existed, and grounds that may exist in the future.¹²⁵ Dutch law covers ‘an actual or assumed disability or chronic disease’,¹²⁶ 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’.¹²⁷ UK law also protects individuals with respect to past disabilities.

Specific provisions on disability – the reasonable accommodation duty

One of the most significant innovations within the Employment Equality Directive is the duty placed on employers 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’.¹²⁸ This provision has been implemented very unevenly across the states.

The following states have legal provisions that approximate to the reasonable accommodation duty found within the Directive: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia,¹²⁹ Spain, Sweden, the United Kingdom, Croatia and the FYR of Macedonia.¹³⁰ These vary considerably, from states which provide a basic duty with little elaboration on how this should be implemented (e.g. Lithuania) or how a disproportionate burden must be assessed (e.g. Latvia, Sweden, Croatia and the 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.

¹²⁵ Section 6(1)(a), Employment Equality Act 1998-2004.

¹²⁶ Article 1(b), Act of 3 April 2003 to establish the Act Equal Treatment on the Grounds of Disability or Chronic Disease, *Staatsblad* 2003, 206.

¹²⁷ 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 Acts, as amended.

¹²⁸ Article 5, Directive 2000/78.

¹²⁹ The 2010 Act on Equal Opportunities of People with Disabilities (*Zakon o izenačevanju možnosti invalidov*, Official Journal of the Republic of Slovenia, No. 94/2010) establishes the duty to provide reasonable accommodation in conformity with the Directive. The law uses the inaccurately translated term ‘appropriate accommodation’ instead of ‘reasonable accommodation’. The purpose of this act is to prevent and eliminate discrimination towards people with disabilities and to encourage equal opportunities for people with disabilities in all areas of life.

¹³⁰ Clear provisions regarding reasonable accommodation have been introduced with the entry into force of the new Anti-discrimination Act.

The concept of reasonable accommodation has not been included in national legislation in Italy, Poland,¹³¹ and Turkey.¹³² In Hungary, the duty of reasonable accommodation has not entirely been implemented. Concerns are particularly severe with regard to access to employment as Act XXCI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities does not seem to prescribe that reasonable effort should be made to accommodate the workplace to the special needs of these people. 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 law (Order 137/2000) 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 Order, establishes the duty to ensure reasonable accommodation in access to 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 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.

¹³¹ The new 2010 Equal Treatment Act eventually introduced the duty to provide reasonable accommodation. The Disabled Persons Act (amended by the Equal Treatment Act) provides in its new Article 23a (1-3) that:

- the employer is obliged to provide the necessary reasonable accommodation to the disabled employee during employment, the recruitment process and vocational or professional training, apprenticeship, and work experience;
- necessary reasonable accommodation means introducing, where needed in a particular case, changes and adjustments in line with the specific needs reported to employers, stemming from a person's disability, unless the introduction of such changes or adjustments would impose a disproportionate burden on the employer;
- the burden shall not be disproportionate when it is sufficiently remedied by public funds;
- failure to provide necessary reasonable accommodation constitutes an infringement to the principle of equal treatment in employment within the meaning of Art. 183a (2-5) of the Labour Code.

¹³² 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. Nevertheless, there is no explanation of the concept of reasonableness or guidance on how the test should be conducted.

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 the code of conduct on disability discrimination in the workplace issued by the Equality Body in 2010 explicitly provides that an employer's failure to adopt reasonable accommodation measures amounts to unlawful discrimination and is punishable with a fine or even imprisonment like all other forms of discrimination.¹³³ Irish case law holds that a failure to provide reasonable accommodation amounts to discrimination.¹³⁴ 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 also encompasses 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 the actions or omissions of an employer cannot at the same time also fall within definitions of the specific forms of discrimination 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. In the Czech Republic, there are two co-existing definitions of indirect discrimination which establish eligibility for reasonable accommodation. The first can be found in the Employment Act and applies to right to employment, recruitment, training, retraining and other areas covered by the law on employment. The second is provided in the Anti-discrimination Act and applies to all areas covered by anti-discrimination legislation (including access to employment). In practice, it is difficult to say which one of the two would prevail.

While the Directive requires the duty of reasonable accommodation to be put in place for persons with disabilities, in a few countries reasonable accommodation has been extended to other grounds of discrimination in the law. In practice, there are quite a few examples, notably from the private sector, whether people with a specific religion can benefit from reasonable accommodation such as not working on religious days or adapting working hours during Ramadan.

¹³³ Available (in Greek) at:

http://www.no-discrimination.ombudsman.gov.cy/sites/default/files/kodikas_gia_diakriseis_logo_anapirias_ergasia.pdf.

¹³⁴ *A Complainant v. Bus Éireann* DEC E2003-04.

Table: Reasonable accommodation extended in law to other grounds than disability

AUSTRIA	judicial interpretation required of the Viennese Anti-discrimination Act
BELGIUM	no
BULGARIA	for religion ¹³⁵
CROATIA	no
CYPRUS	no
CZECH REPUBLIC	no
DENMARK	no
ESTONIA	no ¹³⁶
FINLAND	no
FRANCE	no
FYR of MACEDONIA	for religion ¹³⁷
GERMANY	possibly religion ¹³⁸
GREECE	no
HUNGARY	no
IRELAND	no
ITALY	no
LATVIA	no
LITHUANIA	no
LUXEMBOURG	no
MALTA	no
NETHERLANDS	no
POLAND	no
PORTUGAL	no
ROMANIA	no
SLOVAKIA	no
SLOVENIA	no
SPAIN	for religion ¹³⁹
SWEDEN	no
UNITED KINGDOM	no

¹³⁵ Protection Against Discrimination Act, Article 13, for religion.

¹³⁶ According to Articles 10 (1)) and 10¹ (1) of the Act on Occupational Health and Safety, an employer shall create suitable working and rest conditions for disabled workers, pregnant women, women who are breastfeeding, and minors.

¹³⁷ Act on the Prevention of and Protection against Discrimination, Article 14, para.1, line 3, 4, 5.

¹³⁸ Depending on the judicial interpretation of the Basic Law (Article 4).

¹³⁹ Act 24/1992, of 10 November, adopting the cooperation agreement between the State and the Federation of Evangelical Religious Entities of Spain, Article 12.1; Act 25/1992, of 10 November, adopting the cooperation agreement between the State and the Jewish Communities of Spain, Article 12(1) and (2), Act 26/1992, of 10 November, adopting the cooperation agreement between the State and the Islamic Commission of Spain, Articles 12 (1) and (2).

Specific provisions on disability – 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.¹⁴⁰ In the 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 the special protection of people with disabilities. In Bulgaria, there are no exceptions for health and safety relating to any of the protected grounds, including disability, under the Protection against Discrimination Act; however, under the Healthy and Safe Working Conditions Act, employers have a duty to only assign to their employees tasks that are compatible with their capabilities¹⁴¹ in view of the specific dangers for employees with a reduced work capability,¹⁴² and a number of other laws and pieces of 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 Order 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 Order, could be applicable.

E. Sexual orientation

The introduction of legal protection against discrimination for the first time on the ground of sexual orientation has been challenging for a number of states as it has proved to be controversial. At present, very few countries have defined sexual orientation within anti-discrimination legislation. In Bulgaria, sexual orientation is defined under the Protection against Discrimination Act, section 1.9 Additional Provisions as ‘heterosexual, homosexual or bisexual 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’.¹⁴³ The 2006 German General Equal Treatment Act 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.¹⁴⁴ In France and the Netherlands, the concept of sexual orientation has not been interpreted in a way that covers transexuality and transvestism, in contrast with Denmark. Discrimination on these grounds is regarded as sex discrimination.

¹⁴⁰ Section 4(4) Equal Status Act 2000-2004.

¹⁴¹ Article 16 (1.2a).

¹⁴² Article 16 (1.3).

¹⁴³ Regulation 2(1), Employment Equality (Sexual Orientation) Regulations 2003, S.I. 1661.

¹⁴⁴ See Federal Constitutional Court (*Bundesverfassungsgericht*) of 6 December 2005; 1 BvL 3/03, paragraph 48 *et seq.*

Although explicitly mentioned in the Hungarian Equality Treatment Act of 2003, the provision prohibiting discrimination in the new Fundamental Law of Hungary does not list sexual orientation among the grounds protected from discrimination.¹⁴⁵ However, the level of protection is not expected to be affected when the new Constitution comes into effect on 1 January 2012 as the Constitutional Court and ordinary courts have acknowledged sexual orientation as one of the protected grounds. Anti-discrimination provisions in the FYR of Macedonia and Turkey do not mention sexual orientation as a protected ground.

The Macedonian specialised body (the Commission for Protection against Discrimination) finds an education textbook discriminatory on grounds of sexual orientation

A textbook used in third year secondary education was challenged before the Commission for Protection against Discrimination on the basis that it contained discriminatory content on grounds of sexual orientation.

The equality body observed that Article 3 of the Constitution presents an open-list of protected grounds, and although is not explicitly mentioned, there was no reason why it should not be included. The Commission subsequently established that the content constituted harassment creating a feeling of humiliation and harming the dignity of a group of individuals and recommended the revision of the textbook.

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 they stir up debate around reasonable accommodation beyond disability in the EU: some employers may be hostile to homosexuality because of their religious beliefs while others are looking to strike the right balance between the interests of employees holding religious convictions and the interests of lesbian, gay, bisexual and transsexual people.¹⁴⁶

Another key issue relates to partners' benefits (see the *Maruko* case¹⁴⁷) 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 or fear of victimisation may deter some individuals. Moreover, in some states the wider political climate remains unfriendly or openly hostile to equality for lesbian, gay and bisexual people (e.g. Poland, Lithuania and the FYR of Macedonia).

¹⁴⁵ Article XV of the Fundamental Law provides: 'Hungary provides the fundamental rights to everyone without any discrimination, namely discrimination based on race, colour, gender, disability, language, religion or other opinion, national or social origin, financial, birth-related or any other situation.'

¹⁴⁶ See Application numbers 48420/10 and 59842/10, *Lillian Ladele and Gary McFarlane against the United Kingdom*, ECtHR.

¹⁴⁷ Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 ECR I-1757.

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'.¹⁴⁸ Similarly, in Denmark legislation was adopted in 2006 which removes protection from persons under 18 if differential treatment is stipulated in a collective agreement.¹⁴⁹ 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.

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. Turkey has not yet incorporated age discrimination into its national legislation.

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. 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. Cyprus, Greece and Italy have passed anti-discrimination laws which more or less reproduce the Directives.

A contrasting response consisted of engaging in a more elaborate legislative debate at the national level as to how the age discrimination requirements of the Directive might be fully and immediately integrated within existing law and practice. The resulting legislative debate tended to be difficult and complex in some Member States, 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.

¹⁴⁸ Section 6(f)(3).

¹⁴⁹ Act No. 31/2006.

Specific provisions on age

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 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. 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*,¹⁵⁰ 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* case,¹⁵¹ might potentially greatly affect national implementation, particularly as the CJEU 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.

Mangold challenged by German Constitutional Court

The Federal Constitutional Court reviewed the CJEU's exercise of powers in the *Mangold* ruling,¹⁵² showing the fragile authority of EU law in Germany, in particular with regard to the general EU principle of age discrimination.

On 26 April 2006, the Federal German Labour Court (*Bundesarbeitsgericht*) found against a company which had concluded fixed-term employment contracts with workers who had reached the age of 52. By virtue of the principle of the primacy of EU legislation, the Court applied the *Mangold* ruling where the CJEU held that section 14.3 of the Part Time and Fixed Term Employment Act (*Teilzeit- und Befristungsgesetz*) violated EU law.¹⁵³ The case was brought to the attention of the Federal Constitutional Court, where the company sought to have the *Mangold* case declared *ultra vires*. The claimant alleged that the CJEU had exceeded the powers conferred by the Treaties by developing a new general EU principle of age discrimination as, in his view, there was no such principle in the EU legal order. He also claimed that the application of *Mangold* to his own case amounted to a violation of his fundamental rights of freedom of profession (Article 12 of the Basic Law) and general freedom of action (Article 2.1 of the Basic Law). In addition, he argued that the Federal Labour Court's failure to refer his case to the CJEU for a preliminary ruling violated his right to judicial protection enshrined in Article 101.1 of the Basic Law.

¹⁵⁰ Case C-144/04, *Mangold v. Helm*; [2005] ECR I-9981.

¹⁵¹ Case C-555/07, judgment of 19 January 2010 (not yet reported).

¹⁵² Decision Federal German Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 2661/06 of 6 July 2010.

¹⁵³ 7 AZR 500/04.

The Federal German Constitutional Court (*Bundesverfassungsgericht*) rejected the complainant's claim and ruled that even if it were assumed that there had been a breach of EU law, that violation would not be serious enough to justify the disregard of the ruling. Only an obvious violation of powers which would have the consequences of significantly reshaping the EU institutional structure at the expense of the Member States could allow the Court to review a judgment of the CJEU. With regard to Article 101.1, the Court held that there were insufficient reasons for the Federal Labour Court to request a preliminary reference from the CJEU.

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).

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.

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 and 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.¹⁵⁴ In Cyprus,

¹⁵⁴ Case 2003-12-01, decision of 18 December 2003.

a series of judicial decisions have recently sought to justify differences in retirement ages for different employees, introducing a rather wide spectrum of exceptions premised upon a doctrine that equality must be applied only to equal situations and that that 'different things... can only be dealt with differently'.

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 public-sector employees (65) can be subject to derogation. In Bulgaria, in some sectors, such as the professional army¹⁵⁵ and the police,¹⁵⁶ 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), Sweden (67), the United Kingdom (65), Croatia (65) and the FYR of Macedonia (64).¹⁵⁷ 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 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], 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, C-45/09, *Rosenblatt*.

¹⁵⁵ 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.

¹⁵⁶ Ministry of Interior Act, Article 245 (1). The limit is 60 years.

¹⁵⁷ The retirement age is 65 for men and 62 for women.

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 UK¹⁵⁸ and Turkey.

The Cypriot equality body finds discrimination on grounds of disability against a worker posted far from her place of residence¹⁵⁹

The mother of a ten-month-old child with a disability lodged a complaint to the equality body claiming that she was discriminated against when she was posted to teach in a school far from her place of residence. She had previously complained to the Commission for the Education Service, invoking a regulation which entitles the Commission to transfer teachers upon request for reasons of pregnancy or to take care of a child of less than 12 months of age. She claimed that her child's condition required regular therapy sessions, justifying her transfer. The Commission failed to provide an answer in response to both the mother and the equality body's requests.

The equality body recalled the *Coleman* case,¹⁶⁰ stating that the prohibition of discrimination on grounds of disability enshrined in the Employment Equality Directive 2000/78/EC and national transposition legislation¹⁶¹ is not restricted to workers with a disability but extends to workers who, although they do not suffer a disability themselves, are responsible for the care of a person with a disability. The equality body also referred to Article 3B(1) of the Act on Persons with Disabilities, which stipulates that nothing shall preclude more favourable treatment in employment even if at first sight this appears discriminatory towards other workers as the difference in treatment may aim to prevent or balance a disadvantage due to disability. It follows that more favourable treatment may be extended to the carers of persons with a disability without violating the principle of equality. As it appeared that the Commission had adopted the same attitude in similar cases involving pregnant women and the main carers of babies by not taking into account the specific nature of their situation, the equality body held that its practices

¹⁵⁸ 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.

¹⁵⁹ A.K.I. 82/2009, dated 25 June 2010, [http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/A85BC1134AC8CAA2C225775800374FBD/\\$file/AKI82.2009-25062010.doc?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/A85BC1134AC8CAA2C225775800374FBD/$file/AKI82.2009-25062010.doc?OpenElement).

¹⁶⁰ Case C-303/06, *S. Coleman v. Attridge Law and Steve Law*, [2008] ECR I-5603.

¹⁶¹ Act on Persons with Disabilities N. 127(I)/2000.

violated the principle that two unequal things must not be treated equally. Finally, the equality body declared its intention to issue a recommendation and hence invited the two parties to a consultation, in accordance with the procedure prescribed by law.

Ireland provides a rare example where legislation explicitly forbids discrimination where a ground is 'imputed' to exist and discrimination due to association.¹⁶² Croatia prohibits discrimination based on misconception¹⁶³ although there is no case law on discrimination based on a 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.¹⁶⁴ 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 Austrian Federal Disability Equality Act extends protection to relatives (parents, children, siblings or partners) caring for disabled persons and the same is stated in the Employment of People with Disabilities Act, which protects close relatives with caring responsibilities. 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'. Amendments to the law are due to enter in force in 2011 to clarify the possible interpretation of provisions of the Equal Treatment Act on the other grounds. 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.

¹⁶² Section 6(1)(b), Employment Equality Act 1998-2004.

¹⁶³ Article 1(3) of the Anti-discrimination Act.

¹⁶⁴ 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.



Chapter 4

Definitions and Scope

An overview of Member State and candidate country anti-discrimination legislation reveals considerable progress in this area since the adoption of the Directives. The great majority of states have introduced legislation that expressly forbids each of the 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 chapter 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 will be resolved through purposive judicial interpretation or whether there are substantive gaps in national implementation.

A. Direct discrimination

All the countries, except Turkey,¹⁶⁵ 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, in breach of the Directives), Finland, Germany, Greece, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, Poland (although the definition of direct discrimination given in the Labour Code is still erroneous with regard to the comparator), Portugal, Slovakia, Slovenia, Sweden, the United Kingdom, Croatia and the 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 Order provides a detailed definition, attempting to cover the whole range of actions and omissions leading to

¹⁶⁵ In fact, there is no definition of direct discrimination in Turkish law.

discrimination. The Order 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.'¹⁶⁶ 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.

Table: Prohibition of direct discrimination in national law

	Law	Article
AUSTRIA	Equal Treatment Act	§§ 19(1), 32(1)
BELGIUM	Racial Equality Federal Act	Art. 4, 7°
	General Antidiscrimination Federal	Art. 4, 7°
BULGARIA	Protection Against Discrimination Act	Art. 4(2)
CROATIA	Anti-discrimination Act	Art. 2/1
CYPRUS	Act on Equal Treatment in Employment and Occupation	Arts. 2, 6(1)(a)
	Act on Equal Treatment irrespective of Race or Ethnic Origin	Arts. 2, 5(2)(a)
	Act amending the Act on Persons with Disability	Arts. 2, 3(a)
CZECH REPUBLIC	Anti-discrimination Act	s. 2 para 3
	Employment Act	s. 4, para 5
DENMARK	Act on Prohibition against Differential Treatment in the Labour Market	s. 1(2)
	Ethnic Equal Treatment Act	s. 3(2)
ESTONIA	Equal Treatment Act	Art. 3
FINLAND	Non-Discrimination Act	s. 6(2)
FRANCE	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1
FYR of MACEDONIA	Act on Prevention and Protection against Discrimination	Art.6, para 1
GERMANY	General Law on Equal Treatment	Art. 3.1
GREECE	Anti-discrimination Act	Arts. 5 and 9
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 8
IRELAND	Employment Equality Act	s. 6
	Equal Status Act	s. 3

¹⁶⁶ Article 10, Act 324/2006 on the Amendment of Government Order 137/2000 on the Prevention and Punishment of All Forms of Discrimination, (20 July 2006).

	Law	Article
ITALY	Legislative Decree no. 215 of 2003 on the Implementation of Directive 43/2000	Art. 2
	Legislative Decree no. 216 of 2003 on the Implementation of Directive 78/2000	Art. 2
	Legislative Decree no. 286 of 1998 Consolidated text of provisions on the regulation of immigration and the status of foreign citizens	Art. 43
	Act on Measures for the judicial protection of persons with disability who are victims of discrimination	Art. 2
LATVIA	Labour Act	Art. 29(5)
LITHUANIA	Equal Treatment Act	Art. 2, para 7
LUXEMBOURG	Equal Treatment Act	Art. 1
MALTA	Equal Treatment in Employment Regulations	Art. 3(2)(a)
	Equal Treatment of Persons Order	Art. 2(2)(a)
NETHERLANDS	General Equal Treatment Act	Art. 1(a) and (b)
	Disability Discrimination Act	Art. 1(a) and (b)
	Age Discrimination Act	Art. 1(1)
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3
PORTUGAL	Principle of Equal Treatment Act	Art. 3(3)(a)
	Act on the Prohibition of discrimination based on disability and pre-existing risk to health	Art. 3(a)
ROMANIA	Order on the Prevention and Punishment of All Forms of Discrimination	Art. 2
SLOVAKIA	Anti-discrimination Act	s. 2a, para 2
SLOVENIA	Act Implementing the Principle of Equal Treatment	Art. 4(2)
	Employment Relationship Act	Art. 6(3)
	Vocational Rehabilitation and Employment of Disabled Persons Act	Art. 5
SPAIN	Act on Fiscal, Administrative and Social Measures	Art. 28.1.b
SWEDEN	Discrimination Act	Ch. 1, s. 4, para 1
UNITED KINGDOM	(GB) 2010 Equality Act	s. 13
	(NI) The Race Relations Order (RRO)	Art. 3(1)(a)
	(NI) Fair Employment and Treatment Order	Art. 3(2)(a)
	(NI) Equality Act (Sexual Orientation) Regulations 2006	Reg. 3

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, Spain, Sweden, the United Kingdom, Croatia and the 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 Directives.¹⁶⁷ 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. In Slovenia, the law requires individuals to be in an 'equal or similar situation and conditions', without further details. Slovenian law therefore seems more restrictive than the Directives.

The Directives envisage 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. 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.¹⁶⁸

Table: Prohibition of indirect discrimination in national law

	Law	Article
AUSTRIA	Equal Treatment Act	§§ 19(2), 32(2)
BELGIUM	Racial Equality Federal Act	Art. 4, 9°
	General Antidiscrimination Federal Act	Art. 4, 9°
BULGARIA	Protection Against Discrimination Act	Art. 4 (3)
CROATIA	Anti-discrimination Act	Art. 2/2
CYPRUS	Act on Equal Treatment in Employment and Occupation	Arts. 2, 6(1)(b)
	Equal Treatment irrespective of Race or Ethnic Origin Act	Arts. 2, 5(2)(b)
	Act amending the Act on Persons with Disability	Arts. 2, 3(a)
CZECH REPUBLIC	Anti-discrimination Act	s. 3, paras 1 and 2
	Employment Act	s. 4, para 6
DENMARK	Act on Prohibition of Differential Treatment in the Labour Market	s. 1(3)
	Ethnic Equal Treatment Act	s. 3(3)
ESTONIA	Equal Treatment Act	Art. 3
FINLAND	Non-Discrimination Act	s. 6(2)
FRANCE	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1
FYR of MACEDONIA	Act on the Prevention and Protection against Discrimination	Art. 6, para 2
GERMANY	General Equal Treatment Act	Art. 3.2

¹⁶⁷ 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 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.

¹⁶⁸ Section 19 of the Equality Act 2010.

GREECE	Anti-discrimination Act	Arts. 3(B) and 7(1)(B)
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 9
IRELAND	Employment Equality Act	ss. 10 and 22
	Equal Status Act	s. 3
ITALY	Legislative Decree no. 215 of 2003 on the Implementation of Directive 43/2000	Art. 2
	Legislative Decree no. 216 of 2003 on the Implementation of Directive 78/2000	Art. 2
	Legislative Decree no. 286 of 1998 Consolidated text of provisions on the regulation of immigration and the status of foreign citizens	Art. 43
	Act on Measures for the judicial protection of persons with disability victims of discriminations	Art. 2
LATVIA	Labour Act	Art. 29 (6)
LITHUANIA	Equal Treatment Act	Art. 2, para 4
LUXEMBOURG	Equal Treatment Act	Art. 1
MALTA	Equal Treatment in Employment Regulations	Art. 3(2)(b)
	Equal Treatment of Persons Order	Art. 2(2)(b)
NETHERLANDS	General Equal Treatment Act	Art. 1(c)
	Disability Discrimination Act	Art. 1(c)
	Age Discrimination Act	Art. 1(1)
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3
PORTUGAL	Principle of Equal Treatment Act	Art. 3(3)(b)
	Act on the Prohibition of discrimination based on disability and pre-existing risk to health	Art. 3(b)
ROMANIA	Order on the Prevention and Punishment of All Forms of Discrimination	Art. 2(3)
SLOVAKIA	Anti-discrimination Act	s. 2a, para 3
SLOVENIA	Act Implementing the Principle of Equal Treatment	Art. 4(3)
	Employment Relationship Act	Art. 6(3)
	Vocational Rehabilitation and Employment of Disabled Persons Act	Art. 5
SPAIN	Act on Fiscal, Administrative and Social Measures	Art. 28.1.c
SWEDEN	Discrimination Act	Ch. 1, s. 4 para 2
UNITED KINGDOM	(GB) 2010 Equality Act	s. 19
	(NI) Race Relations Order (RRO)	Art. 3(1)(b)

C. Harassment

The concept of harassment, in particular sexual harassment, was traditionally developed in the 1990s from EU gender equality legislation. Harassment in the Anti-discrimination Directives does not differ much from the baseline established, and is defined as unwanted conduct relating 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.¹⁶⁹ 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 the FYR of Macedonia. In Romania, harassment is defined in the 2000 Anti-discrimination Order, in the Act 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. They refer only to unwanted conduct related to any of the grounds with the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment and not to unwanted conduct relating to any of the grounds with the purpose or effect of violating the dignity of a person, etc. 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 the creation of an intimidating, unfriendly, shameful, humiliating, degrading or offensive environment and which has or may have the purpose or effect of violating 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. In Cyprus, the Code of Conduct on Disability Discrimination issued by the Equality Body in September 2010 explains the law and provides concrete examples regarding harassment in the workplace.

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 Equal Treatment Act 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.¹⁷⁰ 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.¹⁷¹ Ireland also prohibits harassment by an employer, a colleague, a client, customer or other business contact of the employer.¹⁷² Sweden is not so explicit regarding co-workers and third parties. In Belgium, further to the dismissal of a trade union representative charged with harassment in

¹⁶⁹ Article 2(3).

¹⁷⁰ Section 12.4 AGG.

¹⁷¹ Article 5(5) of the Labour Act.

¹⁷² Section 14A(1)(a), Employment Equality Act 1998-2007.

November 2010, the Belgian association of employers called for the development of a general code of practice on harassment with trade unions.

Harassment of a homosexual employee in the workplace recognised by the Dutch Equal Treatment Commission¹⁷³

A male employee of a firm selling kitchens encountered constant jokes regarding his sexual orientation from the assistant manager and fellow employees and decided to bring a complaint to the Equal Treatment Commission. He also mentioned that the assistant manager stroked his leg while he was standing next to the photocopying machine. The Equal Treatment Commission confirmed that anti-discrimination legislation also covers harassment, for which there is a shift of the burden of proof.¹⁷⁴ Although some facts put forward by the plaintiff were refuted, it was generally established that a disrespectful environment was created by certain gestures and behaviour, such as hands being waved in a camp manner during meetings, which affected his dignity. The Equal Treatment Commission concluded that the employer did not fulfil his duty to provide working conditions free of discrimination, in particular as he failed to protect the claimant against harassment and did not treat his complaints with sufficient seriousness. Instead, the employer chose not to renew the complainant’s temporary contract. That decision was also judged discriminatory as it seemed to be motivated by the fact that complaints were brought to the attention of the Equality Treatment Commission.

Table: Prohibition of harassment in national law

	Law	Article
AUSTRIA	Equal Treatment Act	§§ 21, 34
BELGIUM	Racial Equality Federal Act	Art. 4, 10°
	General Antidiscrimination Federal Act	Art. 4, 10°
BULGARIA	Protection Against Discrimination Act	Art. 5 in conjunction with § 1.1. Additional Provisions
CROATIA	Anti-discrimination Act	Art. 3/1
CYPRUS	Act on Equal Treatment in Employment and Occupation	Arts. 2, 6(1)(c)
	Act on Equal Treatment irrespective of Race or Ethnic Origin	Arts. 2, 5(2)(c)
	Act amending the Act on Persons with Disability	Arts. 2, 3(b)

¹⁷³ Equal Treatment Commission 6 September 2010; ETC Opinion 2010-135.

¹⁷⁴ ETC Opinion 2010-135 of 6 September 2010.

	Law	Article
CZECH REPUBLIC	Anti-discrimination Act	s. 4, paras 1 and 2
	Employment Act	s. 4, para 7
DENMARK	Act on Prohibition against Differential Treatment in the Labour Market	s. 1(4)
	Ethnic Equal Treatment Act	s. 3(4)
ESTONIA	Equal Treatment Act	Art. 3
FINLAND	Non-Discrimination Act	s. 6(2)3
FRANCE	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1
FYR of MACEDONIA	Act on Prevention and Protection against Discrimination	Art.7(1)
GERMANY	General Equal Treatment Act	Art. 3(3)
GREECE	Anti-discrimination Act	Art. 2
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 10(1)
IRELAND	Employment Equality Act	s. 14A
	Equal Status Act	s. 11
ITALY	Legislative Decree no. 215 of 2003 on the Implementation of Directive 43/2000	Art. 2
	Legislative Decree no. 216 of 2003 on the Implementation of Directive 78/2000	Art. 2
	Act on Measures for the judicial protection of persons with disability who are victims of discrimination	Art. 2
LATVIA	Labour Act	Art. 29(7)
LITHUANIA	Equal Treatment Act	Art. 2, para 5
LUXEMBOURG	Equal Treatment Act	Art. 1
MALTA	Equal Treatment in Employment Regulations	Art. 3(3)
	Equal Treatment of Persons Order	Art. 2(2)(c)
NETHERLANDS	General Equal Treatment Act	Art. 1 a
	Disability Discrimination Act	Art. 1 a
	Age Discrimination Act	Art. 2
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3
PORTUGAL	Labour Code	Art. 29(1)
ROMANIA	Order on the Prevention and Punishment of All Forms of Discrimination	Art. 2(5)
SLOVAKIA	Anti-discrimination Act	s. 2a, para 4
SLOVENIA	Act Implementing the Principle of Equal Treatment	Art.5
	Employment Relationship Act	Art. 6(a)
SPAIN	Act on Fiscal, Administrative and Social Measures	Art. 28.1.d
SWEDEN	Discrimination Act	Ch. 1, s. 4, para 3

	Law	Article
UNITED KINGDOM	(GB) 2010 Equality Act	s. 26
	(NI) The Race Relations Order (RRO)	Art. 4(a)
	(NI) Fair Employment and Treatment Order	Art. 3(a)
	(NI) Equality Act (Sexual Orientation) Regulations 2006	Art. 3
	(NI) Disability Discrimination Act	s. 3A
	(NI) Age Regulations	Art. 6

D. Instructions to discriminate

The Directives contain a provision stating that ‘an instruction to discriminate (...) shall be deemed to be discrimination.’¹⁷⁵ 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 an 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 could previously 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.¹⁷⁶ UK law does not expressly regulate instructions to discriminate, though less favourable treatment ‘because of’ a protected ground is regarded as including an instruction to discriminate on protected grounds.¹⁷⁷

¹⁷⁵ Article 2(4), Directives 2000/43 and 2000/78.

¹⁷⁶ Court of Cassation, Criminal Chamber, 7 June 2005, no. 04-87354.

¹⁷⁷ *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425.

Table: Prohibition of instructions to discriminate in national law

	Law	Article
AUSTRIA	Equal Treatment Act	§§ 19(3), 32(3)
BELGIUM	Racial Equality Federal Act	Art. 4, 12°
	General Antidiscrimination Federal Act	Art. 14
BULGARIA	Protection Against Discrimination Act	Art. 5 in conjunction with § 1.4. Additional Provisions
CROATIA	Anti-discrimination Act (judicial interpretation required) ¹⁷⁸	Art. 4/1
CYPRUS	Equal Treatment in Employment and Occupation Act	Arts. 2, 6(1)(d)
	Equal Treatment irrespective of Race or Ethnic Origin Act	Arts. 2, 5(2)(d)
	Act amending the Act on Persons with Disability	Art. 2, 3(a)
CZECH REPUBLIC	Anti-discrimination Act	s. 4, para 4
DENMARK	Act on Prohibition against Differential Treatment in the Labour Market	s.1(5)
	Ethnic Equal Treatment Act	s.3(5)
ESTONIA	Equal Treatment Act	Art. 3
FINLAND	Non-Discrimination Act	s. 6(2)4
FRANCE	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 1
FYR of MACEDONIA	Act on the Prevention of and Protection against Discrimination	Art. 9
GERMANY	General Equal Treatment Act	Art. 3.5
GREECE	Anti-discrimination Act	Art. 2
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 7(1)
IRELAND	Employment Equality Act	s. 2 (a)
	Equal Status Act	s. 2(1) and s. 2(a)
ITALY	Legislative Decree no. 215 of 2003 on the Implementation of Directive 43/2000	Art. 2
	Legislative Decree no. 216 of 2003 on the Implementation of Directive 78/2000	Art. 2
LATVIA	Labour Act	Art. 29(4)
LITHUANIA	Equal Treatment Act	Art. 2, para 84
LUXEMBOURG	Equal Treatment Act	Art. 1
MALTA	Equal Treatment in Employment Regulations	Art. 3(4)
NETHERLANDS	General Equal Treatment Act	Art. 1(a) and (b)
	Disability Discrimination Act	Art. 1 (a)
	Age Discrimination Act	Art. 1(2)
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 3.9

	Law	Article
PORTUGAL	Principle of Equal Treatment	Art. 3 (5)
	Act on the Prohibition of discrimination based on disability and pre-existing risk to health	Arts. 2, 3, 4(a) to (m), 5(1) (a) to (c)
ROMANIA	Order on the Prevention and Punishment of All Forms of Discrimination	Art. 2(2)
SLOVAKIA	Anti-discrimination Act	s. 2a, para 6
SLOVENIA	Act Implementing the Principle of Equal Treatment	Art. 4(4)
	Employment Relationship Act	Art. 6(3)
SPAIN	Act on Fiscal, Administrative and Social Measures	Art. 28.2
SWEDEN	Discrimination Act	Ch. 1, s. 4, para 5
UNITED KINGDOM	(GB) 2010 Equality Act	s. 111
	(NI) The Race Relations Order (RRO)	Art. 30
	(NI) Fair Employment and Treatment Order	Not expressly regulated but would amount to direct discrimination within Article 4
	(NI) Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006	Art. 21
	(NI) Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003	Not expressly regulated but would amount to direct discrimination within Art. 3
	(NI) Disability Discrimination Act	s. 16C (employment only)
	(NI) Employment Equality (Age) Regulations (Northern Ireland) 2006	Art. 5

E. 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 grounds included in the Directives is not conditional on nationality, citizenship or residence status.¹⁷⁹ Even so, some countries have included nationality in their list of protected grounds (e.g. Austria, Estonia, France, Hungary, the Netherlands and the UK).

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

¹⁷⁸ The law prohibits intentional encouragement to discriminate, but it does not specifically address instructions to discriminate.

¹⁷⁹ In France for example, the principle of equality is applicable to non-nationals unless the legislator can justify a difference in treatment on the basis of public interest, cf. Constitutional Council, 22 January 1990, 296 DC, R.F.D.C. No. 2 1990, obs. Favoreu.

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,¹⁸⁰ 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,¹⁸¹ the Netherlands¹⁸² and Sweden, anti-discrimination legislation is directed at employers, and usually the person who actually acted in a discriminatory way cannot be held personally liable. Due to the limits to the personal scope of the Equal Treatment Act in Hungary, the law does not provide for protection against harassment committed by colleagues. 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 subcontractors.¹⁸³ 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

¹⁸⁰ 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 seq*). However, this proposal has not been finally accepted.

¹⁸¹ 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.

¹⁸² 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.

¹⁸³ Article 617(2) of the Labour Code.

there is no contract or relationship of authority between the parties.¹⁸⁴ Pursuant to Croatian anti-discrimination law, employers and service providers cannot be held liable for actions of third parties but employers are obliged to ensure the dignity of their employees against the conduct of persons whom they regularly meet in connection with their work.¹⁸⁵ In the 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 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 usually not 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.

F. Material scope

Both the Racial Equality Directive and the Employment Equality Directive require discrimination to be forbidden in employment and vocational training. 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.

The Racial Equality Directive goes further and 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 material scope of the Directives is met in Austria, Bulgaria, Cyprus, the Czech Republic, 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

¹⁸⁴ 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, No. 3, p.19.

¹⁸⁵ Article 5(5) of the Labour Act.

the implementation of the material scope of the Directives.¹⁸⁶ In the Czech Republic the 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; healthcare; 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).

To fulfil the requirements of the Directives, national anti-discrimination law must apply to the public and private sectors, including public bodies. Not all states currently meet this requirement. In the 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. 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 of the Equal Treatment Act). 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.

Employment

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 only since 1 January 2008.

In Greece, Latvia,¹⁸⁷ Lithuania,¹⁸⁸ 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

¹⁸⁶ For instance, although the Region of Brussels-Capital filled the gap with regard to social housing in March 2009, discrepancies still persist as regards social advantages and access to goods and services in general, which are regional competences.

¹⁸⁷ Provisions dealing with access to economic activity and self-employment were adopted at first reading on 10 December 2009 in Parliament.

¹⁸⁸ Self-employment is not explicitly mentioned in the Equal Treatment Act, and legislation regulating particular professions such as attorney, notary, etc. does not provide anti-discrimination provisions. Further interpretation of the Equal Treatment Act by courts or the Equal Opportunities Ombudsman would be required.

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 Order does not expressly spell out 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 the FYR of Macedonia.

Social protection

Until very recently, Latvia, Lithuania and Poland had not transposed 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 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. In Lithuania, the Equal Treatment Act does not explicitly cover social security and healthcare but it does envisage a general duty to implement equal opportunities: 'State and local government institutions and agencies must within the scope of their competence ensure that in all the legal acts drafted and passed by them, equal rights and treatment are laid down without regard to gender, sexual orientation, age, disability, race, ethnicity, origin, religion, beliefs or convictions, language and social status'. This could be interpreted to encompass social security and healthcare as well, as these fields are not explicitly excluded either. The Ombudsman has given a divergent reading where social security and social protection do not fall under the scope of the Equal Treatment Act, and whereas healthcare does, since the wording of the Act regarding goods and services is broad enough to include healthcare services.¹⁸⁹ In Poland, the new Equal Treatment Act widens the material scope of anti-discrimination legislation on grounds of racial and ethnic origin and now fully covers fields beyond employment, including social protection and healthcare, education, and access to goods and services, including housing.

¹⁸⁹ Equal Opportunities Ombudsperson, Annual Report for 2010, available in Lithuanian at www.lygybe.lt.

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.

Social advantages

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 CJEU case law rendered in the context of Regulation 1612/68 on the free movement of workers.¹⁹⁰ 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, price concessions for public transport and cultural or other events. Advantages offered by private entities include, for example, concessionary prices for the cinema and theatre.

Education

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 the Roma. Another common issue that arises is the lack of data in many states on the socio-economic situation of people vulnerable to racial discrimination. This makes it difficult to identify the extent of disadvantage and whether any progress is being made in reducing inequalities.

Roma segregation in education provides a good example of the serious challenges faced by several states in terms of implementation and effective enforcement,¹⁹¹ including Bulgaria, the Czech Republic, Cyprus,¹⁹² Finland, Greece, Hungary, Poland, Slovakia and Croatia.

¹⁹⁰ See for example CJEU 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, No. 3, p. 15.

¹⁹¹ 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.

¹⁹² It should be noted that the total Roma population in Cyprus is relatively marginal compared to other countries such as Romania and Croatia.

There are Roma in all EU Member States 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 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.¹⁹³

Segregation of the 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 ‘Roma classes’ or ‘remedial classes’ which followed a special curriculum but the situation is gradually improving. In 2008, the Minister of Education decided to stop the creation of new Roma classes and to abolish the existing Romani classes within a period of two years (2009-2010).¹⁹⁴ This means that as of 2011, there will be no more Roma classes in Poland. 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 % of the schools monitored (90 schools), either at school or at classroom level.¹⁹⁵ 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 their social and linguistic environment. Although formulated neutrally, these measures have in practice been aimed most specifically at Roma children, and Roma children are also their almost exclusive beneficiaries. In Finland, the Roma are streamed into special education classes more often than other pupils. Notably, 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, Greece and Hungary. In Finland there has been one case where *de facto* segregation of immigrant children at school was successfully challenged.¹⁹⁶ 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. In court, the ECtHR found that there had

¹⁹³ See thematic report by Lilla Farkas (*op. cit.* at footnote 191).

¹⁹⁴ See minutes from the fourth 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.

¹⁹⁵ 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 nine counties (Alba, Botosani, Brasov, Dolj, Galati, Hunedoara, Iasi, Neamt and Salaj), as well as from Bucharest.

¹⁹⁶ In Finland, segregation did not aim at Roma children in particular.

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.¹⁹⁷

The Hungarian Supreme Court awards compensation to Roma segregated pupils¹⁹⁸

In 2006, the Debrecen Court of Appeal held, further to an *actio popularis* claim, that the Local Council of Miskolc in northern Hungary had violated the principle of equal treatment by financially and administratively merging seven schools without concurrently redrawing the catchment areas. Under Hungarian law, catchment areas are residential areas from which all pupils of a given school come. This policy resulted in discrimination on grounds of ethnic origin and the segregation of Roma children at school as it prevented them from enrolling at predominantly non-Roma schools. The situation remained unchanged, and in 2007 a new action was initiated by five Roma pupils. The plaintiffs claimed that the segregation violated their inherent personal rights protected by the Criminal Code and requested compensation for non-pecuniary damages. The case was brought to the attention of the Supreme Court after the lower courts rejected the claim on the basis that no non-material damages could be proven.

On 2 June 2010, the Supreme Court overruled the decisions of the lower courts, stating that segregation *de facto* always entails non-material damages and awarded HUF 100,000 (EUR 370) as compensation to each plaintiff.

In many states, including Belgium, Cyprus, Finland, Lithuania, 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%) did not attend either pre-school establishments or pre-school groups; and participation in after-school activities is uncommon among Roma. In the FYR of Macedonia, the Roma population has the lowest level of educational achievement with 39% of Roma not attending primary school and only 17.4% enrolled in secondary education.¹⁹⁹ In Poland the school attendance rate among the Roma increased to 84.3% in the school year 2005/2006 and 86.5% in the school year 2006/2007 compared to previous estimates of around 70%; however, it dropped to 82% in 2009/2010.

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 Kingdom²⁰⁰) in certain schools, resulting in so-called 'ghetto schools'. These schools follow the same curriculum but the quality of education and

¹⁹⁷ ECtHR, *Oršuš and Others v. Croatia* (no. 15766/03), Chamber Judgment of 16 March 2010.

¹⁹⁸ Decision no. Pfv.IV.20.510/2010/3.

¹⁹⁹ http://www.unicef.org/tfymacedonia/MK_SITAN_ENG.pdf.

²⁰⁰ Concerns persist as to the concentration of ethnic minority students in particular schools, which reflects the 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.

the physical condition 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.²⁰¹ 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.

Access to and supply of goods and services

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 have 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,²⁰² Luxembourg,²⁰³ Malta, Romania, Slovenia, Spain and Croatia, where legislation does not distinguish between goods and services available to the public and available privately, and 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 the FYR of Macedonia.²⁰⁴ A few legislatures have provided definitions to delineate the circumstances in which discrimination is prohibited. Swedish law prohibits discrimination in the supply of 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

²⁰¹ For a discussion of some of these measures, see the section in Chapter 4 on positive action.

²⁰² Note that religious communities or associations, as well as associations founded by these religious communities or their members, are not obliged to comply with the Equal Treatment Act while providing goods and services, when the purpose of this provision is of a religious character.

²⁰³ Although in general no difference is made between goods and services available to the public and those offered by private associations, there is a special provision 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 collective agreement 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.

²⁰⁴ The new Anti-discrimination Act (entered 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.

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* of the Non-Discrimination Act provide that the powers of the European Union and the basis of the Directives have to be taken into account when interpreting this provision. Legislation on issues 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 the Roma in the field of housing is a serious issue facing most states. Roma and Travellers usually live on the outskirts of cities, in settlements which do not provide a basic standard 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 the FYR of Macedonia. Unfortunately, little data is available at the national level regarding the Roma housing situation. In the recent years, many cases have been reported on forced expulsion (e.g. in Greece²⁰⁵) or in relation to camping and stopping sites for Travellers (e.g. in France or the UK).

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 for other grounds of discrimination as well, if not all grounds, and thus go beyond the requirements of the Directives.

The following illustrates areas in which countries exceed EU 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.²⁰⁶
- 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.²⁰⁷ 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.

²⁰⁵ Several complaints have been brought to the attention of the Ombudsman and the Council of Europe European Committee of Social Rights.

²⁰⁶ See recent amendments to the Anti-discrimination Act of the Province of Vienna in the Viennese Law Gazette no. 44/201, which entered into force in September 2010.

²⁰⁷ Protection against Discrimination Act, Article 6.

- 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'.²⁰⁸
- In France the general principle of equality in public services guarantees equal treatment in social protection and education for all grounds. In addition, 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.
- 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 healthcare is guaranteed equally to every person irrespective of sex, religion or belief, race, affiliation to a nationality or ethnic group, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, lineage/gender,²⁰⁹ trade union activities or other status.²¹⁰ 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 grounds listed in the Directives and other grounds of discrimination in the fields of social protection, social advantages, education and goods and services.
- 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.

²⁰⁸ 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.

²⁰⁹ The Slovak word '*rod*' can be translated as either lineage or gender.

²¹⁰ Section 2 paragraph 1 of the Anti-discrimination Act.

- 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 Order 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.



Chapter 5

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. 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. Romania²¹¹).

Justification of direct discrimination in Slovenia

The provision that permits indirect discrimination in Slovenia is quite confusing and allows for contradicting interpretations. Article 2a of the Act Implementing the Principle of Equal Treatment states that difference of treatment on the basis of certain personal circumstances is not excluded, provided that it is justified by a legitimate goal and if the means for achieving the goal are appropriate and necessary (§1). But §2 and §3 of Article 2a prohibit any discrimination, regardless of the provision of §1, except for specifically defined exceptions, related to genuine and determining occupational requirements in the area of employment; religion in religious organisations; age in recruitment, employment and vocational training; beneficial treatment of women during pregnancy and motherhood; availability of goods and services for people of one gender; in the area of insurance; or in other cases defined by laws adopted pursuant to European Union law. These provisions are hence quite confusing since §1 indicates that direct discrimination on grounds of racial or ethnic origin could be justified by reasons other than positive action and genuine and determining occupational requirement.

The Directives, however, permit a number of exceptions to the ban on discrimination. 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.

²¹¹ With regard to housing, access to services and goods justifications are allowed by the law (Article 10, Act 324/2006 on the amendment of Government Order 137/2000 regarding the prevention and the punishment of all forms of discrimination, 20 July 2006) if such a 'restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary'. The possibility of allowing justifications in cases of direct discrimination regarding housing and access to services and goods is therefore in breach of Directive 2000/43.

A. Genuine and determining occupational requirements

Article 4 Racial Equality Directive and Employment Equality Directive

'Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin 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.'

Most prominently, both Directives allow national legislation to provide an exception where the characteristic is a 'genuine and determining occupational requirement'. Pursuant to recital 18 of the Racial Equality Directive, in very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission. 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 the 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 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.²¹² 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.

²¹² Article 2(4)(b) General Equal Treatment Act, as inserted by the 2004 EC Implementation Act.

B. Armed forces and other specific occupations

Article 3 (4) Employment Equality Directive

'Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.'

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 the FYR of Macedonia. But in Slovenia, the Police Act states that employment in the police is not possible if an individual invokes conscientious objection in the armed forces, which might unjustifiably constitute exclusion on grounds of religion or belief. 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.²¹³

C. Nationality

Article 3(2) Racial Equality Directive and Employment Equality Directive

'This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.'

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.

²¹³ Section 37, Employment Equality Act 1998-2004.

D. 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.²¹⁴ 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*.²¹⁵ 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.²¹⁶

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 the FYR of Macedonia).

²¹⁴ BVerwG, 2 C 43.04, 26 January 2006.

²¹⁵ Case C-267/06, *Maruko*, [2008] ECR I-1757.

²¹⁶ Federal German Constitutional Court (*Bundesverfassungsgericht*), 7 July 2009, 1 BvR 1164/07.

E. 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

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

F. 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 of protecting the rights and interests of children, which must be justified by a legitimate aim, the protection of public morality and the favouring of marriage in line with the provisions of the Family Act.' In the FYR of Macedonia, the new Anti-discrimination Act provides three exceptions regarding measures aiming at stimulating employment, protecting the distinguishing characteristics of the 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.

G. Positive action

Article 5 of the Racial Equality Directive and Article 7(1) of the Employment Equality Directive

‘With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.’

The scope for positive action is often a matter clarified through case law. In Croatia, the Constitutional Act on the Rights of Ethnic Minorities²¹⁷ provides for positive action for proportionate representation of members of ethnic minorities in state administration, the judiciary and local authority bodies and administrations, and the Judiciary Act²¹⁸ 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 Court²¹⁹ held that such advantages constitute special positive measures intending to favour a certain group with the aim of eliminating factual inequality and differentiation of such 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)). The FYR of Macedonia has developed a set of positive actions, as a result of the armed conflict in 2001 and the signing of the Ohrid Framework Agreement (OFA). The OFA was signed, *inter alia*, with the aim of enhancing the situation of minority communities in the country, and of reflecting multi-ethnicity in the public sphere, including by adopting non-discrimination measures. This agreement was reflected in the Constitution via amendments,²²⁰ and numerous laws that relate to equality on grounds of ethnic origin were also changed. These changes regulate, *inter alia*, the use of language and the provision of ‘fair’ representation in public administration and public institutions.

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.²²¹ The Act requires authorities

²¹⁷ *Ustavni zakon o pravima nacionalnih manjina*, Official Gazette 155/02.

²¹⁸ Article 78(7) and (8), *Zakon o sudovima*, Official Gazette 150/2005, 16/2007 and 113/08.

²¹⁹ Constitutional Court decisions no. U-I-2767/2007, 31 March 2009 and no. U-I-402/2003 and U-I-2812/2007, 30 April 2008.

²²⁰ Constitution of the Republic of Macedonia. Official Gazette of the Republic of Macedonia. *Official Gazette of the Republic of Macedonia Website*. <<http://www.slvesnik.com.mk/WBStorage/Files/USTAV-eng.pdf>>. Accessed on: 07 March 2011. Amendments IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII.

²²¹ Article 11(1).

to take such measures as a priority for the benefit of victims of multiple discrimination.²²² In Finland, the Non-Discrimination Act compels all public authorities to foster equality, including by drawing up plans on ethnic equality. Swedish law obliges employers to take measures designed to ensure full equality with regard to ethnic background.

Positive obligation to pay due regard in the United Kingdom

The 2010 Equality Act includes detailed positive obligations for public authorities to pay 'due regard' to the need to 'eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the EqA]; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; [and] foster good relations between persons who share a relevant protected characteristic and persons who do not share it'. The 'relevant protected grounds' are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The new coalition Government has, however, decided not to implement the provisions in the Act to impose specific equality-related obligations on public authorities in relation to the exercise of their public procurement functions. Public authorities will be required to set specific, relevant and measurable equality outcome objectives in order to comply with the general duty. The current 'specific duties' which impose a variety of obligations regarding information gathering, consultation and impact assessment of policies are to be replaced, however, with specific duties which are likely to be significantly diluted.

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, for example, 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 a ten-year period until 2015.²²³

²²² Article 11(2).

²²³ <http://www.romadecade.org>.

Table: Main grounds and fields where positive action is used in practice

AUSTRIA	National minorities (use of language, etc.), people with disabilities (in the workplace)
BELGIUM	Quotas for persons with disabilities in public bodies
BULGARIA	Race, ethnicity and Roma (education, healthcare, housing and employment), disability (education, accessibility of architecture, infrastructure, information and communications, vocational training and employment, self-employment), age (social inclusion, education, healthcare)
CROATIA	Ethnicity (in the judiciary and state administration)
CYPRUS	Disability (employment)
CZECH REPUBLIC	Disability (mandatory quota system in employment for disabled workers)
DENMARK	Disability (employment)
ESTONIA	Disability (employment and education), ethnic minorities (education)
FINLAND	Positive duty to promote equality upon authorities
FRANCE	Disability (employment)
FYR of MACEDONIA	Ethnicity including Roma (employment and education), language (employment and education), age (social protection and housing)
GERMANY	Disability (social inclusion/integration including employment), older and foreign workers (integration)
GREECE	Disability (safety and health in the working environment, integration into occupation and employment)
HUNGARY	Disability (employment, education), age (employment), maternity (employment), ethnic origin/social status (education)
IRELAND	Disability (employment), Roma (employment, goods and services), Travellers (education, employment, health)
ITALY	Disability
LATVIA	Disability (employment)
LITHUANIA	Disability (education, employment, integration), Roma and ethnic minorities (integration)
LUXEMBOURG	-
MALTA	Disability (employment)
NETHERLANDS	Disability (integration, social policies), ethnic minorities (employment)
POLAND	Ethnic origin (education, employment, healthcare, living conditions), age (employment), disability (employment and education)
PORTUGAL	Disability (inclusion, employment and accessibility), race, ethnic origin or nationality (inclusion)
ROMANIA	Roma (attendance and access to higher education for students)
SLOVAKIA	Social and economic disadvantage/disadvantage resulting from disability and age (employment and occupation, social security and social advantages, healthcare, provision of goods and services including housing and education), disability (employment, education, social security), age (employment, social security), marital and family status, pregnancy, motherhood, early parenthood (employment)
SLOVENIA	Disability (employment), age (employment), Italian and Hungarian minorities (local self-government, representation in the National Assembly, special rights concerning language, culture, broadcasting), ethnicity including Roma (political representation, education)
SPAIN	Disability (employment), Roma (development plan)
SWEDEN	Not specified
UNITED KINGDOM	Race (education, training and welfare, under-representation in employment, membership among under-represented racial groups – GB and NI), age (employment – GB and NI), disability (employment, education, access to goods, facilities and services – GB), religion or belief (employment – GB and NI, access to goods and services – GB), sexual orientation



Chapter 6

Access to justice and effective enforcement

Access to justice and effective remedies are both critical to victims of discrimination, otherwise there is a risk that non-discrimination obligations imposed on Member States will remain unenforced.

A. Judicial and administrative procedures

Article 7(1) Racial Equality Directive and Article 9(1) Employment Equality Directive

'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 the FYR of Macedonia.²²⁴ 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.²²⁵ However, mediation remains optional in Romania. Some national proceedings are exclusively for private or public sector complaints, while others deal with 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 legally binding.

Legal actions in the private sector

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 to resolve employment disputes. The

²²⁴ Although there is no record that mediation has been used in discrimination cases.

²²⁵ Romanian Act 370/2009 amending Act 192/2006 on Mediation (26 November 2009).

responsibility for establishing 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 have 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 a number of Member States, specialised bodies may be entitled to examine complaints brought by victims of discrimination. Powers and outcomes greatly differ as in certain countries compensation or sanctions may be imposed whereas in some others, the specialised body may only issue non-binding recommendation.

Some countries propose conciliation, such as Latvia where the Ombudsman's Office examines and reviews complaints of human rights violations and attempts to resolve conflicts through conciliation, which, if unsuccessful, is followed by non-binding recommendations. Similarly, 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 cases 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 before the Chancellor of Justice is not compulsory. 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 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). 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 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.

Some countries provide the possibility to impose fines. For instance, in Bulgaria the Protection against Discrimination Commission can make a finding of discrimination and order preventative or remedial action; it can also impose financial sanctions, but it cannot award compensation to a victim. In addition, the procedure is universally applicable to both the public and private sectors. 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 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. 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.

In Romania, a victim of discrimination or any interested NGO 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 (the 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. In the FYR of Macedonia, the new Anti-discrimination Act provides for an administrative procedure before 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.²²⁶

There are special court procedures in a number of countries. Spain has an emergency procedure in the social (labour) 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.

²²⁶ However, the Act does not specify which authority.

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.²²⁷ The Equality Authority may provide assistance in the enforcement procedures.²²⁸ In Poland a 'compensation complaint' procedure has been operating under the Labour Code since 1 January 2004;²²⁹ 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 of the Civil Code (general compensation clause), though use of general remedies is not excluded.

Legal actions in the public sector

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 amicable 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.

Obstacles to effective access to justice

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 the criminal law procedures which traditionally have been used but which pose difficulties in terms of proof and the prerogative of the state prosecutor.

²²⁷ Section 91(2), Employment Equality Act 1998-2007.

²²⁸ Section 67(1)(b)(iii) Employment Equality Act 1998-2007.

²²⁹ Article 18 3d.

Anti-discrimination case law in Luxembourg

There is no case law based on the EC Directives and the Act of 28 November 2006. The Constitutional Court regularly issues rulings on the general principle of equality enshrined in Article 10*bis* of the Constitution, but without referring to any discrimination mechanisms and concepts. The judge generally verifies whether or not a specific rule is in line with the constitutional principle and whether differences in treatment are justified by objective disparities while being adequate and proportionate to the goal pursued by the law. Such trend is worrying as it reveals that the anti-discrimination legislation is hardly used in courts.

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 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 little effect. In Slovakia, the ceiling for entitlement to free legal aid is quite low and hence a relatively large number of people cannot afford legal services. In Croatia, procedures for free legal aid are extremely complicated, and the overall level of assistance and subsequently access to justice for vulnerable people and members of marginalised groups remain problematic.

Access to free legal aid granted further to request from the Danish Institute for Human Rights

For the first time, the Danish Institute for Human Rights has applied for free legal aid on behalf of a victim of discrimination. The case concerns a person with a non-Danish ethnic background who applied for the position of coordinator in a school. Although he was considered the most qualified applicant, he was informed that the school wanted someone with more professional experience, and consequently the vacancy was re-advertised with the new requirement added. He was, however, reassured that his profile still matched the position and that he would be called for an interview. As the job was then given to another candidate, the complainant claimed that he had been discriminated against on the grounds of ethnic origin as he was not given an interview at any stage. The Board of Equal Treatment held that insufficient evidence of discrimination was supplied by the plaintiff in accordance with EU law relating to the burden of proof and dismissed the case. In accordance with its remit, when the Danish Institute for Human Rights does not agree with the Board's decisions, it may request free legal aid so as to access the courts. In the present case, the Institute agreed to provide its assistance as it considered that the burden of

proof imposed on the complainant had been adequately fulfilled. The Institute subsequently applied to the State for free legal support in order to have the scope of the burden of proof tried in court. In July 2010, free legal aid was granted. Accordingly, the complainant can now choose a lawyer and have the case brought to court free of cost.

Another potential barrier is posed by 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) of the Racial Equality Directive, Article 9(3) of the 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 people. 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 termination 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.

Access to public buildings, including court buildings, in Austria

Federal Law Gazette I Nr. 111/2010, § 8/2, which entered into force on 1 January 2011, states that federal ministries, Presidents of the Constitutional Court, the Administrative High Court, the Court of Auditors, the National Council, the Federal Council and the National Ombudsman Institution must publish their schedule for improving access to their premises on their respective websites. According to the provision, indirect discrimination on the ground of

disability can be found only when the removal of physical obstacles becomes effective according to the timeframe set and in the absence of such schedule, from 31 December 2019 onwards.

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. 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 or Slovakia. 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.²³⁰ 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 Disability Act 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. In Slovenia, the 2010 Act on Equal Opportunities of People with Disabilities ultimately introduces the obligation to make courts accessible for people with disabilities and to make the court's writings accessible either in scripts or in any other way chosen by the individual concerned (such as Braille).

French State held strictly liable for failure to provide access to court buildings to disabled members of legal professions²³¹

Ms B., a wheelchair user, complained against the State for failure to provide adequate accommodation, claiming that she could not access some court buildings under the Bethune Bar's jurisdiction where she exercises her profession as a lawyer. In particular, she raised the fact that court personnel had to lift her up to access the court building or organise hearings in the parking lot.

In accordance with the Act on the Rights of Disabled Persons of 11 February 2005, the State adopted on 17 May 2006 a decree specifying that all public infrastructure must be accessible by 1 January 2015. Consequently, the trial and appeal courts ruled that since the deadline for the completion of accessibility works was not until 2015, the State could not be held liable for failure to provide adequate accommodation.

In appeal, the Council of State (supreme administrative court) reproached the lower courts for having focused on the deadline imposed by the decree without taking into account the specific obligation towards lawyers imposed on the State (as prescribed by the Employment Equality Directive). The lower courts should have verified whether

²³⁰ 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).

²³¹ Combined Court of the Council of State, 22 October 2010, Mme B., no. 301572.

de facto inequality could render the State strictly liable. The Council subsequently ruled that sufficient legislative efforts had been made and that the State could not be held liable on the ground of insufficient transposition of Directive 2000/78/EC. However, the State could be held strictly liable on the ground of *de facto* inequality in access to court buildings as Ms B. was an officer of the court (*auxiliaire de justice*). The facts showed that the situation exceeded the reasonable inconvenience that a disabled person would normally be obliged to bear and that the difficulties resulting from this situation impeded her professional practice. The Council awarded Ms B. EUR 20,000 as compensation for non-material damage.

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 these rights. There is a tendency for the media to report on high-profile cases involving racial or ethnic and religious discrimination rather than age or disability cases.

B. Legal standing and associations

Article 7(2) of the Racial Equality Directive and Article 9(2) of the Employment Equality Directive

'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, and therefore national legal orders present many different patterns that are difficult to contrast. Being able to 'support' a victim is more common than the power to engage in proceedings 'on behalf' of a victim.

Entities that may engage in procedures

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 the FYR of Macedonia, the Labour Act grants the right to engage in judicial or other proceedings only to 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 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 at issue 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 of taking into account their members' interests, depending on 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.²³² Furthermore, they can initiate proceedings themselves without an individual complainant where the rights of many parties are affected.²³³ 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 criminal, 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 Chancellor of Justice Act). 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

²³² 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.

²³³ Article 72(3), Protection against Discrimination Act.

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.

In Germany under the General Equal Treatment Act, 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.

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 of the 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.

To engage 'on behalf of'

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 before state institutions and courts on behalf of a victim (with their consent) 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, under the latest amendments to the Equal Treatment Act adopted 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. However, recent case law suggests that the rule is not effective in practice as associations do not have the right to act on behalf of a victim, unless they have a clear mandate (most probably written consent) or provided that their rights have been directly infringed.

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 mandate given by the victim. When the discrimination concerns a community or a group of people, the Romanian Anti-discrimination Order 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 labour and administrative proceedings. They can also act as *amicus curiae* and present their opinion to the court.²³⁴ 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. 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 Supreme Court.²³⁵ 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.

Collective redress

The European Commission has been assessing the need of a common EU approach to collective redress. In a working document published in 2011,²³⁶ it recognised that group action is necessary where the same breach affects a large number of persons, in particular when individual actions fail to reach effective redress, in terms of stopping unlawful conduct and securing adequate compensation. Collective redress may therefore constitute an efficient instrument for effective access to justice. Group action is not covered by the two Anti-discrimination Directives. Group action can be divided into collective lawsuits (identified claimants and multiple claims) and class action (claims on behalf of an undefined group of claimants). Collective redress is provided for under discrimination law in some countries; under general civil procedure in others (i.e. Belgium or the Netherlands); or in both. In many countries, there is no specific procedure for discrimination cases but consumer protection law envisages group action, which

²³⁴ Article 63, Code of Civil Procedure.

²³⁵ Supreme Court [2006] IESC 57.

²³⁶ Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress, 4 February 2011.

can be relevant in the field of access to goods and services (i.e. Belgium, France, Italy, Greece, Portugal or Sweden). In practice, application of these provisions is, however, subject to judicial interpretation.

Class actions are permitted under certain conditions in a few countries, such as Bulgaria, Cyprus, Denmark and Lithuania. According to a 15 October 2008 amendment to the Slovak Civil Procedure Code, the national equality body, as well as NGOs dealing with discrimination, can bring a class action. 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 entered into force in July 2010²³⁷ and in Italy, the Government included in the finance law a provision²³⁸ introducing class action to obtain financial compensation for wrongs perpetrated against groups of consumers.²³⁹

Collective redress with NGOs and trade unions having standing is not possible in Cyprus, the Czech Republic, Estonia, Finland, Croatia, Hungary, Ireland, Latvia, Malta, Romania, Slovakia, Poland, Slovenia, and the United Kingdom.

Legitimate interest

According to the Court of Justice, Member States are not precluded 'from laying down, in their national legislation, the right of associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant. It is, however, solely for the national court to assess whether national legislation allows such a possibility'.²⁴⁰ In practice, this gives considerable discretion to Member States in the criteria they set for determining which legal entities can have a legitimate interest and which cannot. Further administrative provisions or formal requirements often reduce the scope for organisations to act. 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,

²³⁷ 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). However, it is limited to consumer protection claims and torts (with the exception of protection of 'personal values/welfare'). Therefore it does not include, for instance, employment cases.

²³⁸ *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*.

²³⁹ After having been frozen for a while since its adoption in 2007, this legislation will enter into force, in a slightly modified form, on 1 January 2010.

²⁴⁰ Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, [2008] ECR I-5187.

NGO interventions are common practice before administrative courts provided that the purpose of the NGO corresponds to the subject matter of the case. However, the scope of the law is narrow and does not include employment cases for instance.

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, associations and bodies active in the fight against discrimination can engage in proceedings in cases of discrimination on the grounds of race and ethnicity 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.²⁴¹ 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 – has now been 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).

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 feel they have faced discrimination must only establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination.²⁴² The burden of

²⁴¹ 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* no. 9, on 12 January 2006.

²⁴² The shift of burden of proof was originally developed under gender legislation (see Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex).

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 (the supreme administrative court) held in 2009 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 appear to have failed to transpose the burden of proof provision in line with the Directives. In Latvia the shift of the burden of proof applies to employment only, natural persons who are economic operators and access to goods and services (Consumer Protection Act, Article 3(1)(5)). 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 discriminatory infringements are successfully established, it is for the respondent to prove that he or she did not discriminate.' In the 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. However, the Anti-discrimination Act places the burden on a great extent on the complainant, as he or she must submit 'facts and evidence from which the act or action of discrimination can be established',²⁴³ contrasting with the Directives, which merely require the establishment of the facts. Turkish law provides for a shift in a limited number of cases. Before the adoption of the new Equal Treatment Act in 2010, the burden of proof only shifted in employment cases in Poland. Article 14 of the Act introduced the shift of the burden of proof in all compensation proceedings dealing with the principle of equal treatment enshrined in the Act.

New provisions on burden of proof in Romania

The Romanian 2006 amendments to the Anti-discrimination Order introduced the concept of 'sharing the burden of proof' by which 'the person concerned has the obligation to prove the existence of facts which allow the pre

²⁴³ Act on the Prevention of and Protection against Discrimination [Закон за спречување и заштита од дискриминација], Official Gazette of the Republic of Macedonia, No.50/10. Articles 25 (para.2), 38.

sumption of the existence of direct or indirect discrimination, and the person against whom a complaint has been filed has the duty to prove that the facts do not amount to discrimination.²⁴⁴ The equality body's interpretation was not always in compliance with the Directives, and some courts interpreted the concept in a manner that placed an unreasonable burden on the victim. A draft proposal to amend the Anti-discrimination Order was submitted to the Senate. The Head of the Senate's Legal Committee put forward several amendments, including a new definition of the burden of proof, which were approved in a report by the Joint Legal and Human Rights Committees.

The new wording for the burden of proof reads as follows: 'the person concerned has the obligation to prove facts which allow the presumption of the existence of direct or indirect discrimination, and the person against whom a complaint has been filed *can invoke in his/her defence any means of evidence to prove* that the alleged facts do not amount to discrimination' [italics added].

In appearance the amended language does not significantly change the legal provision as it was already obvious from the current formulation that the defendant would supply the necessary evidence in any case. However, it is remarkable that the changes refer solely to the burden of proof before the national equality body and not before the courts. More importantly, the new wording maintains the duty of the plaintiff to provide evidence leading to a presumption of discrimination but wipes out the duty of the defendant and turns it into an option. The draft was adopted by the Senate in 2010 and sent to the Chamber of Deputies on 13 December 2010

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 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

²⁴⁴ Article 20 (6) of Governmental Order 137/2000.

and the employee's request for equal treatment. In Italy, a recent Act²⁴⁵ introduced amendments to the Anti-discrimination Decrees extending protection against victimisation to 'any other person' beyond the complainant. In both Croatia and the 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 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.²⁴⁶ Furthermore, protection against victimisation in the United Kingdom is retrospective only: the law does not require preventative measures as are implicitly required by the 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 person that faced discrimination or persons assisting the victim of discrimination from victimisation or adverse consequences of the complaint. In the event that an alleged offender does not obey the Advocate's order, 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 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

²⁴⁵ Legislative Decree of 8 April 2008, no. 59 (later converted into an ordinary law by the Act of 6 June 2008, no. 101, converting into an Act, with modifications, the 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 no. 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*).

²⁴⁶ 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.

distinguish, victimisation is prohibited not only in relation to complaints filed with the national 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.

Table: Victimisation in national law

AUSTRIA	Equal Treatment Act	§§ 27, 36
BELGIUM	Racial Equality Federal Act	Arts. 14 and 15
	General Antidiscrimination Federal Act	Arts. 16 and 17
BULGARIA	Protection Against Discrimination Act	Art. 5 and § 1.3-4 Additional Provisions
CROATIA	Anti-discrimination Act	Art. 7
CYPRUS	Equal Treatment in Employment and Occupation Act	Art. 10
	Act on Equal Treatment irrespective of Race or Ethnic Origin	Arts. 7 and 11
CZECH REPUBLIC	Anti-discrimination Act	s. 4, para 3
DENMARK	Act on Prohibition against Differential Treatment in the Labour Market	s. 7, subsection 2
	Ethnic Equal Treatment Act	s. 8
ESTONIA	Equal Treatment Act	Art. 3
FINLAND	Non-Discrimination Act	s. 8
FRANCE	Act on the Adaptation of National Law to Community Law in Matters of Discrimination	Art. 3
FYR of MACEDONIA	Act on the Prevention of and Protection against Discrimination	Art. 10
GERMANY	General Equal Treatment Act	Art. 16
GREECE	Anti-discrimination Act	Art. 15
HUNGARY	Act on Equal Treatment and the Promotion of Equal Opportunities	Art. 10, para 3
IRELAND	Employment Equality Act	ss. 14, 74(2), 98
	Equal Status Act	ss. 38A
ITALY	Legislative Decree no. 215 of 2003 on the Implementation of Directive 43/2000	Art. 4
	Legislative Decree no. 216 of 2003 on the Implementation of Directive 78/2000	Art. 4
LATVIA	Labour Act	Art. 9
LITHUANIA	Equal Treatment Act	Art. 7, para 8
LUXEMBOURG	Equal Treatment Act	Art. 4

MALTA	Employment and Industrial Relations Act	Art. 28
	Equal Treatment of Persons Order	Art. 7
NETHERLANDS	General Equal Treatment Act	Arts. 8(1) and 8(a)
	Disability Discrimination Act	Arts. 7(a) and 9
	Age Discrimination Act	Arts. 10 and 11
POLAND	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment	Art. 17
PORTUGAL	Labour Code	Art. 129 (1)(a)
ROMANIA	Order on the Prevention and Punishment of All Forms of Discrimination	Art. 2(7)
SLOVAKIA	Anti-discrimination Act	s. 2a, paras 8 and 10
SLOVENIA	Act Implementing the Principle of Equal Treatment	Art. 3 (2)
SPAIN	Royal Legal Decree 1/1995, 24 March, Workers' Statute	Art. 17.1
SWEDEN	Discrimination Act.	Ch. 2, ss. 18-19
UNITED KINGDOM	(GB) 2010 Equality Act	s. 27
	(NI) The Race Relations Order (RRO)	Art. 4
	(NI) Fair Employment and Treatment Order	Art. 3
	(NI) Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003	Art. 4
	(NI) Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006	Art. 4
	(NI) Disability Discrimination Act	s. 55
	(NI) Employment Equality (Age) Regulations (Northern Ireland) 2006	Art. 4

E. Sanctions and remedies²⁴⁷

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 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.

²⁴⁷ 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.

High level of compensation awarded by Irish Equality Officer²⁴⁸

A man of South African origin commenced employment on 18 July 2005 as a Residential Sales Representative entailing door-to-door (cold-calling) sales. He claimed that he was subjected to consistent verbal harassment on grounds of his race by a colleague and the Regional Sales Manager, and was denied promotion.

In relation to the issue of harassment, the Equality Officer was satisfied on the evidence that such incidents did take place and that the complainant brought these formally to the attention of the company. The company did investigate the alleged harassment, but the Equality Officer did not find its investigation objective and impartial but rather was of the view that it had set out to prove the complainant wrong. In relation to the promotion aspect, at the hearing, the Equality Officer asked for the profile of nationalities of field sales representative and of those promoted to Team Coach/Team Leader/Regional Sales Manager. Eighty-five to ninety percent of approximately 300 Field Sales Representatives were foreign nationals. There were 19 promotions to team leader since 2007, 16 of these were Irish, one was South African (white), one was Australian and one was British. It was significant that even though foreign nationals made up 85% to 90% of field sales representatives, only 16% of non-Irish nationals were promoted above this level. Regarding length of service before being promoted, the shortest length of service was 7.23 months and the longest was 54.6 months. The complainant was working there 48 months before he went on sick leave due to the effects of the harassment. The Equality Officer accepted evidence that employees on the complainant's team did not apply for promotions without the imprimatur of the Area Sales Manager, and that promotional vacancies were filled without the complainant being advised by this person of these vacancies. Therefore, the Equality Officer was satisfied that the complainant had established a *prima facie* case that he was not allowed access to promotion in the same way as Irish Nationals were and the respondent failed to rebut this.

The Equality Officer awarded EUR 5,000 for the effects of harassment and EUR 10,000 for the effects of discrimination regarding access to promotion.

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- 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, 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

²⁴⁸ DEC-E2011- 025.

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).

Travel agency found to discriminate against a deaf person in Belgium

A deaf man wished to book a package tour to Jordan but the travel agency refused unless he could guarantee the services of an independent personal assistant at his own expense. It was argued that his security could be jeopardised by alleged difficulties in adequately communicating with the locals. The Centre for Equal Opportunities and Opposition to Racism brought an action before the Commercial Court of Ghent claiming that less disproportionate measures, such as the use of a notepad or SMS to arrange group appointments, could sufficiently ensure the traveller's security. The Court endorsed the Centre's reasoning and sentenced the travel agency to a fine of EUR 650 for failure to provide reasonable accommodation. In addition, a conditional penalty of EUR 1,000 will apply for any new offence reported in the future and *per diem* if the offence continues. Finally, the travel agency had to advertise the judgment in its Ghent branch and on its own website, and to publish it in the media at its own expense.

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 penalties have been established in the employment field for all the grounds (Directive 2000/78) and for the ground of disability in all fields (Act 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 powers to impose financial sanctions between the equivalents of EUR 125 and EUR 1 250, amounts that would be dissuasive to the majority.²⁴⁹ These sanctions are administrative fines and are

²⁴⁹ Article 78-80 of the Protection against Discrimination Act.

not awarded to the victim as compensation but go to the state budget. The British Commission for Equality and Human Rights²⁵⁰ 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.

Lack of appropriate mechanisms to monitor compliance with decisions in Romania

Though Article 19 of Order 137/2000 (the Romanian anti-discrimination law) lists the monitoring of discrimination among the tasks of the National Council for Combating Discrimination, there is no mechanism which would permit adequate monitoring of compliance with the NCCD’s decisions. In practice, enforcement is only monitored if the member of the NCCD Steering Board who is responsible for the case in question takes an interest.

Interesting administrative remedies are found in Portugal and Hungary.

The following remedies are available in Portugal 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.

²⁵⁰ 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.

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

- oblige the perpetrator to discontinue the infringement 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 apology;
- oblige the perpetrator to restore the state preceding the infringement, and to eliminate or deprive of its infringing nature any consequence 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; or
- 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 perimeter of the same settlement.²⁵¹

For certain cases, the Court of Justice of the European Union'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 EUR 6,348. In Finland, the law specifies an upper limit of EUR 15,560;²⁵² 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 (EUR 465).²⁵³

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 the 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.

²⁵¹ Article 84, paragraph 14 of the Public Education Act.

²⁵² TyA 60/2007, section 1.

²⁵³ Article 24 of the Equal Opportunities (Persons with Disability) 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 LVL 5,000 (around EUR 8,000), or LVL 7,000 (around EUR 10,000) in cases of grave personal harm, and LVL 20,000 (around EUR 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 LVL 3,000 (around EUR 4,800) or LVL 5,000 (around EUR 8,000) in cases of grave moral harm and LVL 20,000 (around EUR 24,000) if harm has been caused to life or grave harm has been caused to health. It is unclear as yet whether the courts would award damages for both personal and moral harm in cases of discrimination. The definitions of personal 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 EUR 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 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.

The following examples illustrate sanctions in a number of Member States which can hardly be regarded as effective or dissuasive remedies. In France judges are still very conservative when calculating pecuniary loss, and amounts awarded remain rather low. In Sweden, damages for violations of non-discrimination legislation range between EUR 1,700 and EUR 11,000, depending on the 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 EUR 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 punished with non-pecuniary damages of around EUR 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 remedies and even whether they in actual fact make good the loss. Their dissuasiveness is also questionable, in particular with regard to the issue of whether such sums will deter larger employers. Spanish legislation provides criteria based on company turnover to determine the level of penalty in some cases. This approach presents an interesting option.



Chapter 7

The role of equality bodies compared

Article 13, Racial Equality Directive:

'1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,*
- conducting independent surveys concerning discrimination,*
- publishing independent reports and making recommendations on any issue relating to such discrimination.'*

All 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. 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. The Comprehensive Bill for Equal Treatment and Non-Discrimination tabled in 2010 creates the Authority for Equal Treatment and Non-discrimination which would respond to all requirements set out in the Directive if the law passes. As an independent body, it would be responsible for the tasks prescribed in EU law but also for mediation, investigation of discrimination cases, intervention in litigation, and training. The new 2010 anti-discrimination act in Poland established the existing Office of the Ombudsperson as the equality body. In Turkey²⁵⁴ there is no single specialised body 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.

²⁵⁴ The draft law tabled in March 2010 foresees the creation of an equality body.

Some Member States have set up completely new bodies such as France,²⁵⁵ Germany,²⁵⁶ Greece,²⁵⁷ Hungary,²⁵⁸ Italy,²⁵⁹ Romania,²⁶⁰ Slovenia,²⁶¹ Spain and Poland. 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, 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. A large number of states went further than the Directive's wording, either in terms of the grounds of discrimination that specialised bodies cover, or in terms of the powers that they have to combat discrimination. The Directive left Member States with a wide degree of discretion with regard to how to set up their specialised body, creating differentiated levels of protection throughout the EU. Although there are undeniably pros, such as strategic litigation and cost-effectiveness, multiple-ground bodies may face the challenge of implementing different standards of protection for different grounds of discrimination. Interpretations given by national courts of concepts may differ between the grounds protected, and specialised bodies may find it tricky to find the right balance between horizontal implementation of non-discrimination provisions and the particular features of specific grounds, with the danger of creating a hierarchy among them.

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. Member States ensure that 'associations, organisations or other legal entities' may engage in support of complainants in judicial or administrative proceedings, but such engagement is not required by the Directive. 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

²⁵⁵ High Authority against Discrimination and for Equality (HALDE). The HALDE has been incorporated into a new institution named the Defender of Rights, effective since 1 May 2011 (Act no 2011-333 of 29 March 2011 creating the Defender of Rights). The cut-off date of this comparative analysis being 1 January 2011, we refer to the HALDE throughout the text.

²⁵⁶ The Federal Anti-discrimination Agency.

²⁵⁷ 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.

²⁵⁸ Equal Treatment Authority.

²⁵⁹ National Office against Racial Discrimination.

²⁶⁰ National Council on Combating Discrimination (NCCD).

²⁶¹ Advocate of the Principle of Equality and Council of the Government for the Implementation of the Principle of Equal Treatment.

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.

Although the Directive does not require it, a number of specialised bodies – e.g. 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 decision (known as a ‘deliberation’) which may propose recommendations, suggest mediation or present observations to 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 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.

Equality body’s authority challenged

As the national specialised body, the Cypriot Ombudsman (Commissioner for Administration) 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 to obtain 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 CYP 350 (EUR 598) for discriminatory behaviour, treatment or practice; CYP 250 (EUR 427) for racial discrimination concerning the enjoyment of a right or freedom; CYP 350 (EUR 598) for non-compliance with the recommendation within the specified time limit; and CYP 50 (EUR 85.44) daily for continuing non-compliance after the deadline set by the equality body.²⁶² Generally speaking, the fines are very low and offer little deterrent to potential perpetrators, and they are hardly ever imposed by the equality body. In addition, no fines have ever been imposed so far.

The Attorney General, however, disputes the power of the equality body to make binding decisions on discrimination matters or to impose fines on public authorities and in certain cases even refuses to act upon the equality body’s recommendations to change the law when it is found discriminatory. According to the Attorney General, when a specific rule is deemed contrary to the *acquis* on non-discrimination, it continues to apply until amended by Parliament. In addition, there is no procedure in place for monitoring and reviewing laws that are discriminatory.

²⁶² The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Act No. 42(1)/ 2004 (19 March 2004), Sections 18, 26(1).

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

The Province of Vienna introduces conciliation procedure in discrimination cases

On 18 September 2010, the amendments to the Anti-discrimination Act adopted by the Province of Vienna entered into force, going beyond the legal framework set at the federal level.²⁶³

A conciliation procedure was established, under which attempts must be made to settle discrimination cases within the Office for Combating Discrimination (*Stelle zur Bekämpfung von Diskriminierungen*). If no agreement or settlement is reached after three months, the complaint will be brought to court. The conciliation procedure is free of cost for both parties.

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

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 cases.

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, who can either accept or reject it. 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,

²⁶³ Viennese Law Gazette No. 44/2010.

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.

In Slovakia, if a breach of the principle of equal treatment violates the 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. The latter can request that the entity breaching the principle of equal treatment refrain from such conduct and, where possible, rectify the illegal situation (the list of these two options is exhaustive).²⁶⁴

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 established in 2009 cast doubts on the Advocate's independence; the Authority's President in Hungary is appointed by the Prime Minister and his or her appointment may be withdrawn at any time without any justification; 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. It is not part of the Equality Ministry's hierarchical structure, and representatives of all ministries with responsibilities in the areas referred to in Article 3(1) of the Racial Equality Directive have a seat on it.²⁶⁵ Moreover, the word 'independent' is not included in the Act defining the Council's functions, although it does appear in a Royal Decree redefining these functions. This text is, however, purely rhetorical as the Council cannot *de jure* and *de facto* exercise its functions fully independently.

Independence in Estonia

The statutes of both the Commissioner for Gender Equality and Equal Treatment and the Chancellor of Justice are provided by laws. The Commissioner is appointed by the Minister of Social Affairs for five years, and the body is funded by the State budget. In terms of independence, both the Commissioner for Gender Equality and Equal Treatment and the Chancellor of Justice are under the obligation to refrain from holding any other state or local

²⁶⁴ Although this provision is very progressive, no entity entitled to file the *actio popularis* has done so as yet.

²⁶⁵ Royal Decree 1262/2007 (modified by Royal Decree 1044/2009) details the composition of the Council.

government office or public authority. They cannot become members of the management board, supervisory board or supervisory body of any commercial undertaking or engage into any enterprise, except for personal investments. They are permitted to engage in research or teaching provided that such activities do not hinder their functions as equality bodies. The Chancellor of Justice cannot participate in the activities of political parties.

Independence, but also effectiveness, is greatly affected by the recent budgetary cuts faced by many equality bodies due to the economic crisis (e.g. Ireland, Latvia and Romania). In Austria, persistent problems, continuously highlighted by international bodies such as ECRI, CERD, and the UPR, relate to the fact that the national equality body is severely under-equipped and understaffed. Such problems exist in Hungary, and the Authority has insufficient financial and human resources to carry out tasks (such as assistance to victims, *actio popularis* claims, conduct of independent surveys, etc.) other than its quasi-judicial functions.

Table: National specialised bodies

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations
AUSTRIA	Equal Treatment Commission (Act on the Equal Treatment Commission and the Office for Equal Treatment)	Gender, ethnic affiliation, religion, belief, age, sexual orientation (Act on the Equal Treatment Commission and the Office for Equal treatment)	No ²⁶⁶	No ²⁶⁷	Yes	Yes
BELGIUM	Centre for Equal Opportunities and Opposition to Racism for the Federal Level (Act establishing the Centre for Equal Opportunities and Opposition to Racism) ²⁶⁸	Alleged race, colour, descent, ethnic and national origin, nationality, age, sexual orientation, civil status, birth, wealth/income (<i>fortune</i> in French), religious or philosophical belief, actual or future health condition, disability, physical characteristic, political opinion, genetic characteristic and social origin (not formally trade union conviction). (Act establishing the Centre for Equal Opportunities and Opposition to Racism)	Yes	Yes	Yes	Yes
BULGARIA	Protection Against Discrimination Commission (Protection Against Discrimination Act)	Sex, national origin, 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 international treaty that the Republic of Bulgaria is a party to	Judicial interpretation required ²⁶⁹	Yes	Yes	Yes

²⁶⁶ This is provided by the national equality body.

²⁶⁷ This is provided by the national equality body.

²⁶⁸ The situation is still patchy regarding equality bodies at the regional/community level. The Centre for Equal Opportunities and Opposition to Racism will most probably be soon entrusted with the monitoring and implementation of some of the legislative instruments adopted by the Regions and the Communities. In order to empower the Centre for Equal Opportunities to play this role, a ‘protocol of collaboration’ (cooperation agreement) has to be concluded between the Federal Government and the Government of each Region and Community concerned. Two protocols of collaboration were signed in 2009, with the Walloon Region and the French-speaking Community. Such a Protocol is under discussion with the Region of Brussels-Capital and the French Community Commission (COCOF). There is presently no protocol with the Flemish Community/Region. Moreover, the German-speaking Community has not yet designated an equality body in relation to its anti-discrimination law but it has initiated some contact with the Centre.

²⁶⁹ Judicial interpretation is required of the Protection against Discrimination Act.

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations
CROATIA	People's Ombudsman (Anti-discrimination Act)	Racial or ethnic affiliation or colour, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, genetic heritage, gender identity and expression, sexual orientation	Yes	Yes	Yes	Yes
CYPRUS	Equality Authority and Anti-discrimination Authority (Act on the Combating of Racial and Other Forms of Discrimination (Commissioner))	Race/ethnic origin, religion or belief, age, sexual orientation, disability, colour, political or other beliefs, national origin ²⁷⁰	No ²⁷¹	Yes	Yes	Yes
CZECH REPUBLIC	Public Defender of Rights (Act on Public Defender of Rights)	Sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, 'nationality'	Yes	Yes	Yes	Yes
DENMARK	Danish Institute for Human Rights (Act on Ethnic Equal Treatment, entry into force: 1 July 2003)	No	Yes	Yes	Yes	Yes

²⁷⁰ And also all rights guaranteed in the ECHR and all its protocols, the International Convention for the Elimination of All forms of Discrimination, the Convention against Torture and Other Forms of Inhumane or Humiliating Treatment, the International Covenant on Civil and Political Rights and the Framework Convention on the Protection of National Minorities.

²⁷¹ In practice, the Equality Authority and the Anti-discrimination Authority do inform victims of their rights.

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations
ESTONIA	Commissioner for Gender Equality and Equal Treatment (Act on Equal Treatment)	Sex, ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation. Other grounds (with regard to official employment): level of language proficiency, duty to serve in defence forces, marital or family status, family-related duties, social status, representation of employees' interests or membership of an employees' organisation	Yes / judicial interpretation required regarding additional grounds	Yes / judicial interpretation required regarding additional grounds	Yes / judicial interpretation required regarding additional grounds	Yes
	Chancellor of Justice (Chancellor of Justice Act)	Not specified (public sector); sex, race, ethnic origin, colour, language, origin, religious, political or other belief, property or social status, age, disability, sexual orientation or other ground of discrimination provided for by the law (private sector)	No ²⁷²	No	No	Yes
FINLAND	Ombudsman for Minorities (Non-discrimination Act)	No	Yes	Yes	Yes	Yes
FRANCE	High Authority against Discrimination and for Equality (Act no. 2004-1486 creating the HALDE) ²⁷³	Equality and all grounds as covered by French law and international conventions, i.e. the Directive plus health condition, way of life, physical appearance, family name, nationality, trade union membership, sex, pregnancy, family situation, genetic characteristics, political opinions	Yes	Yes	Yes	Yes

²⁷² In practice, the Chancellor informs victims of their rights.

²⁷³ As already mentioned, the French High Authority was incorporated in 2010 into a new institution named the Defender of Rights, which will become effective in 2011 (Institutional Act (*loi organique*) no. 2011-333 of 29 March 2011 creating the Defender of Rights).

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations
FYR of MACEDONIA	Commission for Protection against Discrimination (Act on Prevention and Protection against Discrimination) ²⁷⁴	Sex, race, colour, gender, membership of a marginalised group, ethnic affiliation, language, citizenship, social origin, religion or religious belief, other beliefs, education, political affiliation, personal or social status, mental or physical impairment, age, family or marital status, property status, health condition, any other ground prescribed by law or ratified international treaty	Yes	Yes	Yes	Yes
GERMANY	Federal Anti-discrimination Agency (General Equal Treatment Act)	Race or ethnic origin, sex, religion or belief (<i>Weltanschauung</i>), disability, age, sexual identity	Yes	Yes	Yes	Yes
GREECE	Ombudsman, ²⁷⁵ Labour Inspectorate, ²⁷⁶ Equal Treatment Committee ²⁷⁷ (Anti-discrimination Act)	Racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation	No, none of the bodies	Only the Ombudsman	Only the Ombudsman	Yes, all three bodies
HUNGARY	Equal Treatment Authority (Equal Treatment Act)	Sex, racial affiliation, colour of skin, nationality, membership of 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, part-time nature of employment relationship or other legal relationship connected with labour, or the fixed period thereof, membership of an interest representation organisation, other situation, attribute or condition of a person or group	Yes ²⁷⁸	Yes	Yes	Yes

²⁷⁴ The Ombudsman also plays a role against discrimination on the grounds of sex, race, colour, national, ethnic, social, political, religious, cultural, language, property, social background, disability and origin.

²⁷⁵ The Ombudsman covers discrimination by public services.

²⁷⁶ The Labour Inspectorate covers discrimination by public services, in the field of employment and occupation.

²⁷⁷ The Equal Treatment Committee covers discrimination by no public services, in any field other than employment and occupation.

²⁷⁸ However, the Equal Treatment Authority focuses on its quasi-judicial function.

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations
IRELAND	Equality Authority Equality Tribunal (Equal Status Act)	Gender, age, race, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community	Yes	Yes	Yes	Yes
ITALY	National Office against Racial Discrimination (Legislative Decree no. 215 of 2003 on the Implementation of Directive 2000/43/EC)	No ²⁷⁹	Yes	Yes	Yes	No
LATVIA	Ombudsman (Ombudsman Act)	Grounds not specified, hence any ground	Yes	Yes	Yes	Yes
LITHUANIA	Equal Opportunities Ombuds-person (Act on Equal Opportunities of Men and Women and Equal Treatment Act)	Age, disability, sexual orientation, race, ethnicity, origin, religion, beliefs or convictions, language and social status	No	Yes	Yes	Yes
LUXEMBOURG	Centre for Equal Treatment (Act of 28.11.2006)	Race, ethnic origin, religion or belief, disability, age, gender, sexual orientation	Yes	Yes	Yes	Yes
MALTA	National Commission for the Promotion of Equality for Men and Women (Equality for Men and Women Act)	Gender, equal treatment irrespective of racial or ethnic origin	Yes	Yes	Yes	Yes
NETHERLANDS ²⁸⁰	Equal Treatment Commission (General Equal Treatment Act)	Race, religion & belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil status, disability and chronic disease, age, working time and type of labour contract	No	Yes	Yes	Yes
	the NGO 'Art.1' ²⁸¹	Race, religion & belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status, disability and chronic disease, age or any other ground	Yes	Yes	Yes	Yes

²⁷⁹ Although in some cases the Italian body also deals with nationality.

²⁸⁰ In the Netherlands, no specialised equality bodies are designated by the law. There are two bodies that count as such as they are officially recognised in e.g. parliamentary papers.

²⁸¹ See *Wet gemeentelijke antidiscriminatievoorziening*, *Staatsblad* 2009, 313.

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations
POLAND	Commissioner for Civil Rights Protection ('Ombud') (Act on the Commissioner for Civil Rights Protection)	The Act on the Commissioner for Civil Rights Protection does not mention any protected grounds	Yes ²⁸²	Yes	Yes	Yes
PORTUGAL	ACIDI (High Commissioner for Immigration and Intercultural Dialogue) (Decree-law 167/2007)	No	Yes	Yes	Yes	Yes
ROMANIA	The National Council on Combating Discrimination (Act 324/2006 on the amendment of Government Order (GO) 137/2000 on the Prevention and Punishment of All Forms of Discrimination)	Race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, HIV positive status, membership of a disadvantaged group or any other criterion	Yes	Yes	Yes	No ²⁸³
SLOVAKIA	Slovak National Centre for Human Rights (Act No. 308/1993 on the Establishment of the Slovak National Centre for Human Rights)	Sex, religion or belief, race, affiliation to a nationality or an ethnic group, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, lineage/gender or other status, unfavourable health condition, family duties, membership or involvement in a political party or a political movement, a trade union or another association	Yes	Yes	Yes	Yes
SLOVENIA	Advocate of the Principle of Equality (Act Implementing the Principle of Equal Treatment)	Gender, ethnicity, race or ethnic origin, religion or belief, disability, age, sexual orientation, or other personal circumstance	Judicial interpretation required	No	No	Yes

²⁸² Judicial interpretation is required as under the Polish Constitution and the new law, the competences of the Ombud are limited when it comes to conflicts between private parties.

²⁸³ Issuing recommendations is not specifically provided for in the law, but the national equality body does so in practice.

Country	Specialised body designated by law in compliance with Article 13	Does this body cover other grounds than race or ethnic origin as specified by Article 13? If so, which?	Provides independent assistance to victims	Provides independent surveys	Provides independent reports	Issues recommendations
SPAIN	Council for the Promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (Act 62/2003, of 30 December on Fiscal, Administrative and Social Measures)	No	No	No	No	No
SWEDEN	Equality Ombudsman (Discrimination Act and Equality Ombudsman Act)	Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, age	Yes	Yes	Yes	Yes
UNITED KINGDOM	Equality and Human Rights Commission	Race/ethnicity, sexual orientation, religion, belief, disability, age, sex, human rights	Yes	Yes	Yes	Yes
	Equality Commission for Northern Ireland (ECNI)	Race/ethnicity, sexual orientation, religion, belief, disability, age, sex, political opinion	Yes	Yes	Yes	Yes



Chapter 8

Implementation and compliance

A. Dissemination of information and social and civil dialogue

Article 10 Racial Equality Directive, Article 12 Employment Equality Directive

'Dissemination of information'

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.'

Article 11 Racial Equality Directive, Article 13 Employment Equality Directive

'Social dialogue'

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.

2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.'

Article 12 Racial Equality Directive, Article 14 Employment Equality Directive

'Dialogue with non-governmental organisations'

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.'

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, the 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 mechanisms for dialogue is not a high priority at the national level.

Dissemination of information and awareness-raising

Information dissemination activities include ministerial publications providing basic information on the principle of equal treatment, information campaigns through the media and the 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 have 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 (an NGO).

'Action plan for ethnic equal treatment and respect of individuals' in Denmark

In 2010, the Danish Government launched the 'Action plan for ethnic equal treatment and respect of individuals', which contains 21 initiatives to promote equal treatment. For instance, awareness campaigns and training specifically target club doormen to ensure that the prohibition of discrimination is understood and effective in nightlife. The plan also includes a research project aiming at developing more accurate methods to measure discrimination.

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,²⁸⁴ 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 is not provided in a manner that caters for disabled people's needs in some countries including Bulgaria, the Czech Republic, Hungary, Latvia, Portugal, Slovakia and, to some extent, Poland.²⁸⁵

²⁸⁴ 'STOP – Finland Forward without Discrimination', funded by the Community Action Programme to Combat Discrimination.

²⁸⁵ The website of the Ministry of the Interior and Administration was designed in a way that made it accessible to people with visual impairments using Intelligent Web Reader software.

The mandates of specialised bodies in most countries include awareness-raising activities, for instance in 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 shortcoming for example in Italy, where the National Office against Racial Discrimination has begun to disseminate information but no particular measures are planned for the other grounds.

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.²⁸⁶ 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.

A small number of Member States, including Malta, Poland and Portugal, have included in their legislation an obligation on employers to inform employees of discrimination laws. Malta goes further, specifying that 'any person or organisation to whom these regulations apply' 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.²⁸⁷ Implementation of the obligation on employers in Poland is monitored by the National Labour Inspectorate.

However, in the vast majority of countries, serious concerns around perception and awareness still persist and are particularly acute in Croatia, the FYR of Macedonia and Turkey. Individuals are often not informed of their rights to protection against discrimination and protection mechanisms. Reports from the FYR of Macedonia indicate that age is commonly not perceived as a ground of discrimination as people still believe discriminatory practices based on age to be acceptable, and public opinion is strongly homophobic.

Social and civil dialogue

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

²⁸⁶ The five grounds included in the two Anti-discrimination Directives and gender.

²⁸⁷ Regulation 12 of Legal Notice 461 of 2004.

principal trade unions. 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 operational 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.

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

- In Slovakia, cooperation between the Government and NGOs was shown in the process of amending the Anti-discrimination Act. An NGO representative was invited to become a member of the body commissioned 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.
- In Hungary, the legislative conceptual paper and draft law were sent to NGOs and posted on the Ministry of Justice's 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 provide their input regarding implementation of the Anti-discrimination Act in February 2010.
- In the UK, well over 10,000 copies of the draft text 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 in the United Kingdom during the first consultation in early 2000. Consultations on anti-discrimination legislation are now standard practice in the United Kingdom.
- In Spain, consultations with associations dealing with equal treatment were held in 2011 on the new comprehensive bill on equal treatment and non-discrimination, with the draft text being published on the website of the Ministry of Health, Social Policy and Equality. The bill was also discussed with organisations in meetings where the minister responsible for equality was present. This contrasts with the former approach where transposition had been severely criticised for being 'hidden', with a lack of consultation and parliamentary debate, an absence of public statements by the government and the bypassing of the Council of State (the highest government advisory body) and Economic and Social Council (an advisory body formed by the social partners).
- In the Netherlands, the new General Equal Treatment Act, incorporating four distinct equal treatment laws, was subject in 2010 to an online consultation and the Equal Treatment Commission was asked for its advice.

- A different problem emerged in Denmark and Finland: a 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.

Finland has 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 legislation. 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 is running 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 the 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 brings together 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 on equal opportunities, non-discrimination and universal accessibility. At local level in France, Commissions for the Promotion of Equality (COPEC) bring together all the interested parties in a given administrative area (*département*) under the authority of the *Préfet* (the local representative of the central government) to generate co-operation and dialogue. The Disability Act of 2005 created *Département*-level Commissions for the Rights and Autonomy of the Disabled, which are competent for all decisions relating to the support of disabled people. Their members are representatives of public authorities, NGOs, trade unions and social partners and at least 30 % are representatives of the disabled. 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.

As with the dissemination of information, 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, there is significant variation in their effectiveness in practice. The United Kingdom has a good record of governmental agencies and ministerial departments co-operating with non-governmental organisations.

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. Independent 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 (Act 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 set aside any unconstitutional provisions. However, proceedings before constitutional courts for this purpose can be lengthy, requiring the prior exhaustion 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 void laws that are in breach of the principle of equal treatment. 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 officials 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 Order as *lex specialis*. Following the decisions of the Romanian Constitutional Court which limited both the mandate of the NCCD²⁸⁸ and of the civil courts in relation to discrimination generated by legislative rules,²⁸⁹ only the Constitutional Court may tackle rules 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 normally 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.

In some jurisdictions, an entire agreement is invalidated if it includes a discriminatory clause. However, legislation which can annul individual 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 of the Labour Act), Poland (Article 9.2 of the Labour Code), and Estonia (Articles 16 and 125(1) of the Employment Contracts Act and Article 4(2) of the 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).

²⁸⁸ 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.

²⁸⁹ Romania / Curtea Constituțională / Decision 818 (3 July 2008) published in the Official Gazette 537 of 16 July 2008.

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 holds 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. The UK Equality Act 2010 contains specific provisions to this effect for each of the relevant grounds.



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 their own legislation for full compliance with the EU *acquis*, including the two landmark Directives. It is encouraging to note how much additional protection national law provides compared to EU law in certain instances and that the levelling up of protection across grounds has continued in a few countries. However, this sixth comparative overview²⁹⁰ has revealed that, although huge progress has been made and significant 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, especially 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. Unfortunately, in several countries public access to case law is not available or decisions are not published on courts' websites, which makes it difficult to monitor discrimination cases. On a positive note, there has been a large increase in the number of preliminary references lodged at the 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 the text of the Directives, and therefore also in many national provisions, judicial interpretation is more than welcome 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. Polls regularly show that the discrepancy between the levels of discrimination experienced and reported needs to be seriously addressed. Victims still have difficulty in recognising a discriminatory situation. Awareness is low not only among the public but also among the members of the legal professions, although for the latter change has slowly started thanks to training organised on the national level. Some countries have made some slight 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. In addition, most Member States have chosen not to fulfil their obligations to disseminate information regarding anti-discrimination legislation or to raise awareness in the public around it but have instead delegated these responsibilities to national specialised bodies without necessarily granting them the adequate resources.

The hope was expressed in the last five editions of this publication that the detail 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

²⁹⁰ Five previous issues of this publication compared the situation in the 27 Member States. They were completed in September 2005, November 2006, July 2007, November 2009 and November 2010.

machinery has 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 and failures in the provision of legal aid as well as barriers in the form of language, access for people with disabilities, and issues relating to legal standing or legitimate interest. The law remains complex and remedies often inadequate. Further work is needed to ensure the credibility and admissibility of methods of proof such as statistical evidence (which touches on the issue of data collection) and to a lesser extent situation testing. When a decision is rendered by courts or equality bodies, sanctions are not always observed by respondents, and recommendations are not always followed by public authorities.

Finally, the economic downturn has led to budget cuts that have greatly affected equality bodies and NGOs in many Member States. They have also impeded or brought to a standstill complementary policy measures adopted by the states.



Annex 1

Signature/ratification of international conventions

-: not signed, not ratified / : signed X: ratified	European Convention on Human Rights	Protocol 12, ECHR	Revised European Social Charter	Framework Convention on the Protection of National Minorities	International Covenant on Civil and Political Rights	International Convention on Economic, Social and Cultural Rights	Convention on the Elimination of All Forms of Racial Discrimination	Convention on the Elimination of Discrimination against Women	Convention on the Rights of the Child	ILO Convention No. 111 on Discrimination	Convention on the Rights of Persons with Disabilities
AUSTRIA	X	/	/	X	X	X	X	X	X	X	X
BELGIUM	X	/	X	/	X	X	X	X	X	X	X
BULGARIA	X	-	X	X	X	X	X	X	X	X	/
CROATIA	X	X	/	X	X	X	X	X	X	X	X
CYPRUS	X	X	X	X	X	X	X	X	X	X	X
CZECH REPUBLIC	X	/	/	X	X	X	X	X	X	X	X
DENMARK	X	-	/	X	X	X	X	X	X	X	X
ESTONIA	X	/	X	X	X	X	X	X	X	X	/
FINLAND	X	X	X	X	X	X	X	X	X	X	/
FRANCE	X	/	X	-	X	X	X	X	X	X	X
FYR of MACEDONIA	X	X	/	X	X	X	X	X	X	X	/
GERMANY	X	/	/	X	X	X	X	X	X	X	X
GREECE	X	/	/	/	X	X	X	X	X	X	/
HUNGARY	X	/	X	X	X	X	X	X	X	X	X
IRELAND	X	/	X	X	X	X	X	X	X	X	/
ITALY	X	/	X	X	X	X	X	X	X	X	X
LATVIA	X	X	X	X	X	X	X	X	X	X	X
LITHUANIA	X	-	X	X	X	X	X	X	X	X	X
LUXEMBOURG	X	X	/	/	X	X	X	X	X	X	/
MALTA	X	-	X	X	X	X	X	X	X	X	/
NETHERLANDS	X	X	X	X	X	X	X	X	X	X	/
POLAND	X	-	/	X	X	X	X	X	X	X	/
PORTUGAL	X	/	X	X	X	X	X	X	X	X	X
ROMANIA	X	X	X	X	X	X	X	X	X	X	X
SLOVAKIA	X	/	X	X	X	X	X	X	X	X	X
SLOVENIA	X	X	X	X	X	X	X	X	X	X	X
SPAIN	X	X	/	X	X	X	X	X	X	X	X
SWEDEN	X	/	X	X	X	X	X	X	X	X	X
UNITED KINGDOM	X	-	/	X	X	X	X	X	X	X	X
TURKEY	X	/	X	-	X	X	X	X	X	X	X



Annex 2

Main anti-discrimination legislation

The information in these tables is based on the updated executive summaries and country reports for the European Network of Legal Experts in the Non-discrimination Field that contain information valid as at 2010. This is a non-exhaustive list which contains only the main pieces of anti-discrimination legislation in each Member State, and it does not include references to other specific legislation. Inclusion of national legislation in the tables does not imply that it complies 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 last amended by Federal Law Gazette I 153/2009	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 109/2008	Disability
		Employment of People with Disabilities Act, Federal Law Gazette I 82/2005 as last amended by Federal Law Gazette I 111/2010	Disability
		Styrian Equal Treatment Act, Styrian Provincial as last amended by Law Gazette 66/2004	Gender, race or ethnic origin, religion or belief, disability, disability of a relative, age, sexual orientation
		Viennese Service Order, as last amended by Viennese Provincial Law Gazette 09/2006	Gender, race, ethnic origin, religion, belief, disability, age, sexual orientation
		Viennese Anti-discrimination Act, as last amended by Viennese Provincial Law Gazette 44/2010	Race, ethnic origin, religion, belief, age, sexual orientation
		Lower Austria Anti-discrimination Act, as last amended by the Lower Austrian Provincial Law Gazette 148/2009	
		Lower Austrian Equal Treatment Act, Lower Austrian Provincial Law Gazette 69/1997 as amended by 40/2005	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Carinthian Anti-discrimination Act, as last amended by the Carinthian Provincial Law Gazette 11/2010	Gender, ethnic affiliation, religion or belief, disability, age, sexual orientation
		Voralbergian Anti-discrimination Act as last amended by the Voralbergian Provincial Law Gazette 49/2008	Gender, ethnic affiliation, religion, belief, disability age, and sexual orientation
		Upper Austrian Anti-discrimination Act as last amended by the Upper Austrian Provincial Law Gazette 60/2010	Gender, ethnic affiliation, religion, belief, disability age, and sexual orientation
		Burgenland's Anti-discrimination Act, as last amended by the Burgenlandian Provincial Law Gazette 17/2010	All grounds of the two Directives
		Tyrolian Equal Treatment Act as last amended by the Tyrolian Provincial Law Gazette 39/2008	All grounds of the two Directives
		Tyrolian Anti-discrimination Act, Tyrolian Provincial Law Gazette 25/2005	All grounds of the two Directives
		Salzburg Equal Treatment Act, Provincial Law Gazette 31/2006	All grounds of the two Directives

	Constitutional provisions	Main Anti-discrimination Legislation	Grounds covered
BELGIUM	Articles 10 and 11 of the Constitution	Federal Act Criminalising Certain Acts inspired by Racism or Xenophobia of 30 July 1981, as last amended by Act of 10 May 2007	Race, colour, descent, ethnic and national origin
		General Anti-discrimination Act on Opposition to Certain Forms of Discrimination of 10 May 2007 as amended by the Federal Act on the Establishment of the Centre for Equal Opportunities and Opposition to Racism of 30 December 2009	All grounds of 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 Opposition to Certain Forms of Discrimination of 12 December 2008	All grounds of the two Directives and additional grounds
		Walloon Region: Decree on Opposition to Certain Forms of Discrimination, including between Women and Men, in the Economy, Employment and Vocational Training of 6 November 2008 as last amended in 2009	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: Order on Opposition to Discrimination and Equal Treatment in Employment of 4 September 2008	All grounds of the two Directives and additional grounds
		Region of Brussels-Capital: Order on the Promotion of Diversity and Opposition to Discrimination in the Civil Service of the Region of 4 September 2008	All grounds of the two Directives and additional grounds
		<i>Commission communautaire française (COCOF)</i> : Decree on the Opposition to certain forms of discrimination and on the implementation of equal treatment of 9 July 2010	All grounds of the two Directives and additional grounds
		<i>Commission communautaire française (COCOF)</i> : Decree on Equal Treatment between Persons in Vocational Training of 22 March 2007	All grounds of the two Directives (open list of suspect criteria)
BULGARIA	Article 6 (2) of the Constitution	Protection against Discrimination Act of 13 September 2003 as last amended in 2011	All grounds of the two Directives and additional grounds
CROATIA	Article 14 of the Constitution	Anti-discrimination Act	Race and ethnic origin
		Labour Code	No grounds mentioned

	Constitutional provisions	Main Anti-discrimination Legislation	Grounds covered
CYPRUS	Article 28 of the Constitution	Act on Opposition to Racial and Some Other Forms of Discrimination (Commissioner), Act 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)
		Equal Treatment Irrespective of Race or Ethnic Origin Act, Act 59(I)/2004 of 31 March 2004 as last amended in 2006	Racial and ethnic origin (transposing the Racial Equality Directive)
		Equal Treatment in Employment and Occupation Act, Act 58(1)/2004 of 31 March 2004 as last amended in 2009	Racial and ethnic origin religion or belief, age, sexual orientation (transposing the Employment Directive)
		Persons with Disabilities Act, Act 127(I)/2000 as amended by Act 57(I)/2004 of 31 March 2004 as last amended in 2007	Disability
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, Act 198/2009 of 17 June 2009	All grounds of the two Directives and sex
		Employment Act, Act 435/2004 of 13 May 2004	All grounds of the two Directives and additional grounds
		Pre-school, Basic, Secondary, Tertiary Professional and Other Education Act (the Education Act), Act 561/2004	Race, ethnic origin, religion or belief and additional grounds
DENMARK	None	Criminal Code, Act 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, Act 626 of 29 September 1987 as last amended in 1987	Race, skin colour, national or ethnic origin, religion/belief and sexual orientation
		Prohibition of Differential Treatment in the Labour Market Act, Act 31 of 12 January 2005, as last amended in 2008	Race, skin colour, national, social or ethnic origin, religion, belief, age, disability, sexual orientation and political opinion
		Ethnic Equal Treatment Act, Act 374 of 28 May 2003 as last amended in 2008	Race and ethnic origin
		Institute for International Studies and Human Rights Act, Act 411 of 6 June 2002	Race and ethnic origin
		Prohibition of Direct and Indirect Discrimination on the Grounds of Age and Disability Act, Act 1417 of 22 December 2004	Age and disability
		Equal Treatment Board Act, Act 387 of 27 May 2008	All grounds of the two Directives and additional grounds

	Constitutional provisions	Main Anti-discrimination Legislation	Grounds covered
ESTONIA	Article 12(1) Constitution	Chancellor of Justice Act of 25 February 1999 as last amended in 2005	All grounds of the two Directives and additional grounds
		Equal Treatment Act of 22 April 2004 as last amended in 2009	All grounds of the two Directives
		Criminal 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 last amended in 2009	All grounds of the two Directives and additional grounds
		Criminal Code	All grounds of 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 of the two Directives
FRANCE	Preamble to the Constitution, Article 1 of the Constitution	Act on the Opposition to Discrimination, Act 2001-1006 of 16 November 2001 All grounds in the two directives and additional grounds	All grounds of the two Directives and additional grounds All grounds in the two directives and additional grounds
		Social Modernisation Act, Act 2002-73 of 17 January 2002	All grounds of the two Directives and additional grounds
		Creation of a Specialised Body (HALDE) Act, Act 2004-1486 of 30 December 2004 as last amended in 2008	All grounds of the two Directives and additional grounds
		Institutional Act (<i>loi organique</i>) no. 2011-333 of 29 March 2011 creating the Defender of Rights	All grounds of the two Directives and additional grounds
		Social Cohesion Act, Act 2004-1370 of 20 December 2004	Race and religion
		Act enabling the Government to Adopt Emergency Measures for Employment by Governmental Decree, Act 2005-846 of 26 July 2005	Age
		Act on the Adaptation of National Law to Community Law in Matters of Discrimination, Act 2008-496 of 27 May 2008	All grounds of the two Directives
		Disability Act, Act 2005-102 of 11 February 2005	Disability

	Constitutional provisions	Main Anti-discrimination Legislation	Grounds covered
FYR of MACEDONIA	Article 9 of the Constitution (for nationals only)	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
		Act on the Ombudsman of 10 September 2003 as last amended in 2009	Sex, race, colour, national, ethnic, social, political, religious, cultural, language, property and social background, disability and origin
		Act on Employment of Disabled People of 02.06.2000 as last amended in 2009	Disability
		Labour Act of 8 July 2005 as last amended in 2010	Race, colour, sex, age, health condition, disability, religious, political or other belief, membership of a trade union, national or social origin, family status, property, sexual orientation or other personal circumstances
GERMANY	Article 3, German Basic Law	Act on the Promotion of Equality of the Disabled 27 April 2002	Disability
		Act Implementing European Directives Putting into Effect the Principle of Equal Treatment including the General Equal Treatment Act of 14 August 2006 as last amended in 2009	All grounds of the two Directives and additional grounds (belief not in civil law)
GREECE	Article 5.2 of the Constitution	Act against Discrimination on the Grounds of Racial or Ethnic Origin or Religion, as amended, Act 927/1979	Racial or ethnic origin and religion
		Act on the Implementation of the Principle of Equal Treatment regardless of Racial or Ethnic Origin, Religion or other Beliefs, Disability, Age or Sexual Orientation (General Framework), Act 3304/2005 of 27 January 2005	All grounds of the two Directives
HUNGARY	Article 70/A of the Constitution	Equal Treatment and Promotion of Equality of Opportunities Act, Act CXXV of 28 December 2003, as last amended in 2009	All grounds of 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 of the two Directives and additional grounds
		Act on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities, Act XXVI of 16 March 1998	Disability
IRELAND	Article 40.1 of the Constitution	Employment Equality Act 1998-2007 of 18 October 1999 as last amended in 2008	All grounds in the two Directives and additional grounds
		Equal Status Act 2000-2004 of 25 October 2000 as last amended in 2008	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 last amended in 2008	Racial and ethnic origin
		Decree on Internal Structures and Competences of the 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 last amended in 2008	Religion or belief, age, disability and sexual orientation
LATVIA	Article 91 of the Constitution	Labour Act of 20 June 2001, last amended in 2010	All grounds in the two Directives and 'any other circumstances'
		Consumer Protection Act of 18 March 1999, as last amended in 2011	Race, ethnic origin and gender
		Ombudsman Act of 6 April 2006 as last amended in 2011	Grounds not specified
		Prohibition of Discrimination against Natural Persons who are Economic Operators Act of 21 May 2009 as last amended in 2010	Race, ethnic origin and gender
LITHUANIA	Article 29 of the Constitution	Equal Treatment Act of 18 November 2003, as last amended in 2008	All grounds in the two Directives and additional grounds
LUXEMBOURG	Article 10 <i>bis</i> of the Constitution (for nationals only)	Criminal Code	All grounds in the two Directives
		General Anti-discrimination Act of 28 November 2006 as last amended in 2008	All grounds in the two Directives
		Public Sector Act of 29 November 2006	All grounds in the two Directives
		Disabled Persons Act of 12 September 2003	Disability
MALTA	Article 45 of the Constitution	Employment and Industrial Relations Act of 2 December 2002 as last amended in 2009	Marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership of a trade union or of 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
		Equal Treatment of Persons Order, Legal Notice 85 of 3 April 2007	Race and ethnic origin

	Constitutional provisions	Main Anti-discrimination Legislation	Grounds covered
NETHERLANDS	Article 1 of the Constitution	General Equal Treatment Act of 1994, as last amended in 2008	All grounds in the two Directives and additional grounds
		Equal Treatment in Employment on the Ground of Age Act of 17 December 2003 as last amended in 2004	Age
		Equal Treatment on the Grounds of Disability and Chronic Disease Act of 3 April 2003 as last amended in 2009	Disability and chronic disease
		Criminal Code	Race, religion or belief, heterosexual or homosexual orientation and disability
POLAND	Article 32 of the Constitution	Labour Code as last amended in 2010	All grounds in the two Directives and additional grounds
		Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment of 03 December 2010	Gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation
		Act on the Commissioner for Civil Rights Protection, as amended on 3 December 2010	Gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation
		Promotion of Employment and the Institutions of the Labour Market Act of 20 April 2004	All grounds in the two Directives and additional grounds
PORTUGAL	Article 13 of the Constitution	Racial and Ethnic Origin Discrimination Act, Act 18/2004 of 11 May 2004, as amended by Decree-law 86/2005	Race, and ethnic origin
		Labour Code Act, Act 35/2004 as last amended in 2009	All grounds in the two Directives and additional grounds
		Act 38/2004 on Prevention and the Rehabilitation and Participation of Disabled People of 18 August 2004	Disability
		Decree-law creating the High Commissioner for Immigration and Intercultural Dialogue 167/2007 of 3 May 2007	Race, ethnic origin and nationality
ROMANIA	Articles 4 and 16 of the Constitution	Government Order 137/2000 on the Prevention and Punishment of All Forms of Discrimination (the Anti-Discrimination Law), of 31 August 2000 as last amended in 2006	All grounds in the two Directives and additional grounds
SLOVAKIA	Article 12 of the Constitution	Act on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws, Act 365/2004 of 20 May 2004 as last amended in 2011	All grounds in the two Directives
		Slovak National Centre for Human Rights (Establishment) Act, Act 308/1993 as last amended in 2008	All grounds in the two Directives
		Labour Code No. 311/2001 of 2 July 2001 as last amended in 2011	Non exhaustive list
SLOVENIA	Article 14 of the Constitution	Principle of Equal Treatment (Implementation) Act of 22 April 2004, as last amended in 2007	All grounds in the two Directives and additional grounds
		Act on Equal Opportunities of People with Disabilities of 16 November 2010	Disability
		Employment Relations Act of 24 April 2002, as last amended in 2007	All grounds in the two Directives and additional grounds

	Constitutional provisions	Main Anti-discrimination Legislation	Grounds covered
SPAIN	Arts. 14 and 16 of the Constitution	Fiscal, Administrative and Social Measures Act, Act 62/2003, of 30 December 2003	All grounds in the two Directives
		Royal Legal Decree 5/2000, Act on Infractions and Sanctions in Social Matters of 4 August 2000 as last amended in 2011	All grounds in the two Directives and additional grounds
		Act 49/2007 on Offences and Sanctions in the Field of Equality for Disabled People of 26 December 2007	Disability
		Criminal Code as last amended in 2010	All grounds
SWEDEN	Chapter 1, Sec 2 and Chapter 2, Sec. 15 of the Constitution	Discrimination Act (2008:567) of 5 June 2008 as last amended in 2010	All grounds in the two Directives and sex and transgender identity or expression
		Criminal Code as last amended in 2010	Ethnicity, religion and other belief, sexual orientation
UNITED KINGDOM	No written constitution	Northern Ireland: Race Relations (NI) Order 1997, as last amended in 2003	Racial and ethnic origin, colour, nationality and national origin
		Northern Ireland: Disability Discrimination Act 1995, as amended in 2004	Disability
		Northern Ireland: Employment Equality (Sexual Orientation) Regulations (NI) 2003: The Civil Partnership Act 2004 as amended in 2005	Sexual orientation
		Northern Ireland: Fair Employment and Treatment (NI) Order 1998, last amended by Fair Employment Regulations in 2003.	Religious belief and political opinion
		UK: The Equality Act 2006	All grounds in the two Directives including sex
		NI: Employment Equality (Age) Regulations 2006	Age
		NI: Northern Ireland Act 1998	All grounds in the two Directives and political opinion, racial group, marital status, gender and dependent status
		NI Employment Equality (Sexual Orientation) 2003	Sexual orientation
		NI Equality Act (Sexual Orientation) 2006	Sexual orientation
		GB: Equality Act 2010	All grounds in the two Directives and nationality (including citizenship), national origins, gender, including gender reassignment, pregnancy and maternity, married/civilly partnered status

European Commission

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The Comparative Analysis provides a detailed comparison of the anti-discrimination legislation in the 27 EU Member States, Croatia, the Former Yugoslav Republic of Macedonia and Turkey, as comprehensively described in the country reports written by the European Network of Legal Experts in the Non-discrimination Field and summarised in this publication. The grounds of discrimination listed in the Directives 2000/43/EC and 2000/78/EC are considered individually and collectively, while the overall purpose of this document is to provide an overview of the national legal framework across the EU.

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